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Giorgio Gaja

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Edited By: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat

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- A. The Jurisdiction of the PCIJ in the Context of the Parties' Preference for Other Methods for the Settlement of Disputes 1-3
- B. The Relationship between Acceptance of the ICJ's Jurisdiction and Agreements Providing for the Settlement of Disputes by Other International Courts and Tribunals 4-13
 - I. Adoption of the ICJ Statute and Article 95 UN Charter 4-5
 - II. The Parties' Choice of an Arbitral or Judicial Body Other than the ICJ 6-8
 - III. The Parties' Agreement not to Resort to the ICJ over Certain Disputes 9-11
 - IV. Cases in which the ICJ's Jurisdiction Overlaps with that of Other Courts and Tribunals 12-13
- C. Issues of Judicial Propriety 14-18
- D. The Review by the ICJ of Final Arbitral Awards 19-22
- E. The Risk of Fragmentation of International Law because of the Proliferation of International Courts and Tribunals 23-25

Select Bibliography

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A. The Jurisdiction of the PCIJ in the Context of the Parties' Preference for Other Methods for the Settlement of Disputes

1 Article 14 of the Covenant of the League of Nations envisaged the 'establishment of a Permanent Court of International Justice' as a body 'competent to hear and determine any dispute of an international character which the parties thereto submit to it'. The Advisory Committee of Jurists that was entrusted by the Council of the League of Nations with elaborating a draft Statute of the PCIJ considered that States should accept the Court's jurisdiction in advance for categories of disputes and that thus the Court could examine the merits of a case also 'in the absence of a separate and special convention or special consent'.¹ While the attention of the Advisory Committee was centred on methods for attributing jurisdiction to the new Court, a provision was also drafted for the case that the

parties would prefer the dispute to be submitted to another 'jurisdiction'. The provision read as follows:

When a dispute has arisen between States, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next Articles.²

(p. 649) This provision elicited the following comment:

It may be that the parties in dispute have agreed to submit their differences to a particular forum. In such a case, that jurisdiction is to be resorted to. If, notwithstanding the previous agreement, the parties prefer the court, they may submit the case, and the court will assume jurisdiction, but it will be by virtue of the new, and in spite of the old agreement.³

2 The Statute as finally adopted did not include any reference to the parties' choice of a different method for settling disputes for which the PCIJ's jurisdiction was accepted. Conditions for the acceptance of the Court's jurisdiction were certainly not excluded. The existence and meaning of any such condition would have to be ascertained on the basis of the interpretation of the instrument governing the Court's jurisdiction. Thus, if the parties to a treaty accepted the Court's jurisdiction only on condition that diplomatic negotiations had not been successful, the Court would be required to define the precise meaning of that condition and to assess whether it had been fulfilled. This is what first occurred in the *Mavrommatis Palestine Concession* case. The applicant invoked a provision of the Palestine mandate that attributed jurisdiction to the Court over a dispute relating to the mandate only if it could not 'be settled by negotiation'.⁴ The PCIJ held:

The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiations should be brought before it. It recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations. Nevertheless, in applying this rule, the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation.⁵

A similar approach would have to be taken towards conditions for the acceptance of the PCIJ's jurisdiction in relation to other methods for the settlement of disputes. These methods could include arbitration. In instruments governing the Court's jurisdiction, this type of condition was rather frequent. For instance, several declarations made by States under the optional clause accepted the Court's jurisdiction only on condition that a treaty did not provide another method of pacific settlement for the dispute.⁶

3 The PCIJ's jurisdiction would then depend on the extent of the competence given by the parties to another court or tribunal. This would also occur when the parties intended to limit the Court's jurisdiction so that it would not overlap with the competence of another court or tribunal. With regard to that type of clause, the PCIJ held in the *Factory at Chorzów (Indemnity)* case that:

The Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.⁷

This statement, which did not constitute the only basis for the Court's assertion of its jurisdiction, is not entirely persuasive. In order to make sure that a judicial remedy is (p. 650) provided, the Court could impinge on the competence that the parties reserved to the other court or tribunal.⁸ In case of doubt concerning the scope of the parties' preferred remedy, a stay of the Court's proceedings would have been more appropriate.⁹

B. The Relationship between Acceptance of the ICJ's Jurisdiction and Agreements Providing for the Settlement of Disputes by Other International Courts and Tribunals

I. Adoption of the ICJ Statute and Article 95 UN Charter

4 The adoption of the ICJ Statute did not bring any change with regard to the relationship between acceptance of the Court's jurisdiction and the parties' choice of other methods for settling their disputes. There is no reference in the ICJ Statute to that eventuality. A reference to other methods is instead contained in Article 95 UN Charter, which reads as follows:

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Since this provision is simply a saving clause, it does not regulate the relationship between acceptance of the ICJ's jurisdiction and resort to settlement of disputes by another court or tribunal. Article 95 UN Charter neither subordinates the ICJ's jurisdiction to the competence of the other court or tribunal,¹⁰ nor does it establish a presumption that resort to the ICJ is considered to be the parties' preferred method.¹¹

5 Article 36, para. 3 UN Charter does say that 'legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court', but this is only a preference expressed by the Charter for the purpose of the peaceful settlement of disputes according to Chapter VI of the UN Charter. Even within this ambit, the provision does not impinge on the parties' freedom to choose the method that they deem more suitable for settling their dispute.¹²

II. The Parties' Choice of an Arbitral or Judicial Body Other than the ICJ

6 As with regard to the acceptance of the PCIJ's jurisdiction, the ICJ's jurisdiction is often made conditional on the fact that parties have not agreed to have recourse to some other method of peaceful settlement. Many declarations by States under the optional clause (p. 651) contain a statement to this effect.¹³ Resort to arbitration or other courts is certainly covered by the wording used. Some declarations specify that an exception to the acceptance of the ICJ's jurisdiction is only made when the settlement of the dispute has been entrusted to other tribunals.¹⁴

7 Subordination of the Court's jurisdiction to other methods of settlement may be more limited. For instance, it may be provided that the ICJ's jurisdiction exists unless an agreement to resort to another court or tribunal is reached by the parties within a certain

time-limit. For example, Article II of the Optional Protocol to the Vienna Convention of 18 April 1961 on Diplomatic Relations provides as follows:

The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.¹⁵

The relationship between various methods of settlement may instead be regulated to the effect that resort to the ICJ's jurisdiction in principle prevails over other methods. As an example of this approach one may quote Article 282 UNCLOS:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.¹⁶

Thus, should the States parties to a dispute relating to the interpretation or application of UNCLOS have accepted for a category of cases including that dispute the ICJ's jurisdiction, then this method would prevail, in the absence of a special agreement to the contrary, over any other method provided for in Section 2 of Part XV of the Convention.¹⁷ This applies also when the reservation to the relevant declarations under the optional clause—like Kenya's—excludes disputes with regard to which the parties agree to have recourse to 'some other method or methods of settlement'. In its judgment on preliminary objections in the case concerning *Maritime Delimitation in the Indian Ocean* the Court found that:

Article 282 should therefore be interpreted so that an agreement to the Court's jurisdiction through optional clause declarations falls within the scope of that Article and applies 'in lieu' of procedures (p. 652) provided for in Section 2 of Part XV, even when such declarations contain a reservation to the same effect as that of Kenya.¹⁸

8 The parties may also agree on a combination of methods for settling their disputes that would give the ICJ the limited role of providing an auxiliary function with regard to resort to other methods of settlement. For instance, the Court may be given only the task of ascertaining whether the parties are under an obligation to resort to arbitration. In the *Ambatielos* case the Court found that, in view of the parties' arbitration agreement, the merits of the dispute were outside the Court's jurisdiction and said:

The Court must refrain from pronouncing final judgment upon any question of fact or law falling within 'the merits of the difference' or 'the validity of the claim'. If the Court were to undertake to decide such questions, it would encroach upon the jurisdiction of the Commission of Arbitration.¹⁹

III. The Parties' Agreement not to Resort to the ICJ over Certain Disputes

9 One way of subordinating the ICJ's jurisdiction to other methods for the settlement of disputes that the parties may choose is to agree that, notwithstanding their general preference for a given method such as resort to the ICJ, a special method should instead apply to a certain category of disputes. The ICJ's jurisdiction would be accordingly restricted. By agreeing to resort exclusively to the special method, the parties implicitly

derogate from the ICJ's jurisdiction that they have more generally accepted, whether by an agreement or by declarations under the optional clause.²⁰

10 As an example of this type of choice one may take Article 55 (formerly Article 62) of the European Convention on Human Rights, which reads as follows:

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 purpose 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.²¹

While this provision only appears to state an obligation for each party not to resort to other methods of settlement that the parties may have agreed to, the implied meaning is that the parties replace one agreed method of settlement with another, which thus becomes exclusive. As was held by the European Commission of Human Rights in the case of *Cyprus v. Turkey*:

The principle stipulated in Article 62 [now Article 55] is the monopoly of the Convention institutions for deciding disputes arising out of the interpretation and application of the Convention. Only exceptionally is a departure from this principle permitted, subject to the existence of a 'special agreement' between the High Contracting Parties concerned.²²

(p. 653) **11** A similar example of a treaty provision which envisages an exclusive method for settling certain disputes is provided by Article 344 of the Treaty on the Functioning of the European Union (TFEU, formerly Article 292 of the Treaty Establishing the European Community), according to which:

Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.²³

Thus, should the ICJ be seised by a Member State of the European Union in breach of the exclusive competence attributed to the CJEU under the EU Treaties, the Court could find itself in a position analogous to that of the Arbitral Tribunal in the *Mox Plant Case* (Ireland v. United Kingdom). In view of the possibility that infringement proceedings would be commenced, as they later were, before the CJEU, the Arbitral Tribunal suspended its proceedings on the following grounds:

There is a real possibility that the European Court of Justice may be seised of the question whether the provisions of the Convention [UNCLOS] on which Ireland relies are matters in relation to which competence has been transferred to the European Community and, indeed, whether the exclusive jurisdiction of the European Court of Justice, with regard to Ireland and the United Kingdom as Member States of the European Community, extends to the interpretation and application of the Convention as such and in its entirety ... [T]he determination of the Tribunal's jurisdiction ... [is] crucially dependent upon the resolutions referred to above.²⁴

On an application by the Commission of the European Union, the CJEU found that 'the system for the resolution of disputes set out in the EC Treaty must in principle take precedence over that contained in Part XV of the Convention'²⁵ and that Ireland was precluded from 'initiating proceedings before the Arbitral Tribunal with a view to resolving

the dispute concerning the Mox plant'.²⁶ Following this judgment, Ireland withdrew its claim before the Arbitral Tribunal.²⁷

Should both parties to a dispute prefer to submit their dispute to the ICJ instead of the CJEU notwithstanding their commitments under the TFEU and conclude an agreement to this end, their agreement would restore the ICJ's jurisdiction. However, contrary to what occurs with regard to the provision of the European Convention on Human Rights quoted previously,²⁸ the parties' special agreement would be considered in breach of the TFEU.

(p. 654) IV. Cases in which the ICJ's Jurisdiction Overlaps with that of Other Courts and Tribunals

12 There are instances in which the ICJ's jurisdiction over a certain dispute overlaps with that of other international courts or tribunals. Jurisdictions may overlap because a dispute is covered by a plurality of instruments, which select different methods of settlement—one of which is judicial settlement by the ICJ—and do not make resort to one of these methods conditional on the fact that no alternative method has been agreed. Overlapping may also depend on the fact that a single instrument provides for different methods of settlement without establishing any priority. For instance, Article 287, para. 1 UNCLOS provides as follows:

When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.²⁹

13 Several States parties to the Convention have made declarations that refer to a plurality of methods, including resort to the ICJ, without indicating a preference for one or the other method.³⁰ As a result, a dispute between States that have made the same choice could be referred either to the ICJ or to the other chosen tribunal.

In all the cases in which the ICJ's jurisdiction overlaps with that of another court or tribunal, the parties to a dispute may select, through a special agreement, one particular method of settlement. If no special agreement is concluded and the relevant courts or tribunals may be seised by unilateral application, the court or tribunal to which one of the parties applies is certainly entitled to exercise jurisdiction. The same goes, however, for the other court or tribunal whose jurisdiction was also agreed, should it later be seised by one of the parties by unilateral application. This scenario presupposes that, under the applicable rules, application to one court or tribunal does not prevent resort to the other court or tribunal.

C. Issues of Judicial Propriety

14 The fact that another court or tribunal has concurring jurisdiction with the ICJ creates the risk of conflicting decisions over the same dispute, but does not per se affect the ICJ's (p. 655) exercise of its jurisdiction. However, the Court may consider whether, in order to avoid the exercise of overlapping jurisdictions, judicial propriety should not require the Court to refrain from examining the merits of the dispute. Similar issues of judicial

propriety could also be raised by the other court or tribunal, whose jurisdiction overlaps with that of the ICJ.

It would be difficult to find in the ICJ Statute an indication that the Court should not exercise its jurisdiction over a dispute for reasons of judicial propriety.³¹ However, one may consider that discretion in this regard is inherent in the powers conferred on a court. In any event, the ICJ has admitted, although with regard to an entirely different set of circumstances, that judicial propriety may prompt the Court to decline the exercise of its jurisdiction. In the *Northern Cameroons* case the Court said that:

even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so.³²

15 A first issue of propriety that may be raised in the case of overlapping jurisdictions is that of *forum non conveniens*.³³ This kind of issue could hardly come into consideration when both parties agree to select the ICJ for the settlement of their dispute. The same could be said when the Court is seised by unilateral application and the defendant State does not contest the exercise of jurisdiction on the part of the Court. It seems that, under these circumstances, the ICJ should abide by the parties' express or implied choice. Even if the other court or tribunal may appear to the ICJ as especially qualified to decide the dispute, there could be other elements that make settlement through an ICJ judgment preferable for the parties. Thus, for an issue of propriety to arise before the ICJ because of overlapping jurisdictions, it is necessary that the defendant State contests the ICJ's jurisdiction or at least argues that the dispute be referred to the other court or tribunal. Various elements would have to be weighed by the Court before reaching the conclusion that it would be appropriate to decline to exercise its jurisdiction. Some of the relevant elements that could militate against a refusal to exercise jurisdiction are as follows: the other court or tribunal may not have jurisdiction over the whole dispute; the settlement of the dispute could be delayed; deciding the dispute would require an examination of questions of international law that are not included among those for which the other court or tribunal is regarded as particularly qualified; the procedure before the other court or tribunal would not provide the same opportunities for defence.

(p. 656) **16** While a consideration of all the relevant elements is unlikely to lead the Court to the conclusion that it is *forum non conveniens*, a weightier issue of propriety would seem to arise when the dispute has been taken by one of the parties against the other party to another court or tribunal before the application is made to the ICJ. There is no judicial precedent of the ICJ in point, while the PCIJ considered a case in which the issue of *lis alibi pendens* was raised. In the *Certain German Interests* case the PCIJ examined this issue mainly in the relations between proceedings held in different States:

It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of *litispendance*, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country.³⁴

17 The PCIJ went on to discuss whether *lis alibi pendens* could play a role in the relations between the German-Polish Mixed Arbitral Tribunal and the PCIJ and answered in the negative, because ‘the essential elements which constitute *litispendance* are not present’: there was ‘no question of two identical actions’, the parties were ‘not the same’ and ‘the Mixed Arbitral Tribunal and the Permanent Court of International Justice [were] not courts of the same character’.³⁵ This passage appears to suggest that *lis alibi pendens* could on the contrary be invoked before the Court when the nature of the other court or tribunal before which proceedings are pending was regarded as similar to that of the PCIJ.³⁶

18 It would be difficult to draw from this judgment any precise conclusion about the relevance that *lis alibi pendens* may have before the ICJ.³⁷ However, the quoted passages confirm that an issue of judicial propriety may indeed exist in the case of *lis alibi pendens*. As generally occurs with this type of issue, it would be difficult to provide an analysis of all the relevant elements. Much would depend on the specific circumstances of the case.

D. The Review by the ICJ of Final Arbitral Awards

19 The ICJ may be given jurisdiction to review the results reached by the use of other methods of settlements, especially arbitral awards. A general proposal to give the PCIJ (p. 657) a power of reviewing arbitral awards was examined in 1929 by the Assembly of the League of Nations and subsequently by a Special Committee set up by the Council; however, the Assembly decided to postpone an examination of the matter and the proposal fell through.³⁸ The idea of enabling the Court to review arbitral awards was revived in 1958 by the International Law Commission in its ‘Model Rules on Arbitral Procedure’,³⁹ again to no effect. Thus, the ICJ’s jurisdiction in this regard depends on the construction of the parties’ arbitration agreement and of their instruments accepting the ICJ’s jurisdiction.

20 In the *ICAO Council* case, the ICJ found that there was ‘judicial recourse by way of appeal to the Court against decisions of the [ICAO] Council concerning interpretation and application’ of certain treaties.⁴⁰ In other instances the ICJ found that its jurisdiction was more limited.⁴¹ In the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906* an objection to the validity of an award had been made in response to an application to enforce the award. The Court noted:

The Award is not subject to appeal and ... the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce on whether the arbitrator’s decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect.⁴²

When a claim for the inexistence and nullity of an arbitral award was brought to the ICJ in the case concerning the *Arbitral Award of 31 July 1989*, the Court found that ‘Guinea-Bissau also took the position, which Senegal accepted, that these proceedings were not intended by way of appeal from the Award or as an application for revision of it’.⁴³

The Court did not rule out that its jurisdiction to review an award on the basis of declarations under the optional clause could have had a wider scope, even if the award had been defined in the arbitration agreement as ‘final and binding upon the two States’.⁴⁴

21 The principle of *res judicata*, to the extent that it exists in international law,⁴⁵ cannot prevent the parties from submitting their dispute to a new method of settlement. Should the parties have concluded a special agreement conferring on the Court jurisdiction to review an award, or should they otherwise agree for the Court to review the award, no issue (p. 658) of judicial propriety would seem to arise. Judicial propriety would, on the contrary, come into consideration when the Court’s jurisdiction or its exercise is contested. An

extensive review of an arbitral award on the part of the Court, even if it does not amount to a full re-examination of the merits of the dispute, would risk frustrating recourse to arbitration.

When the ICJ is given the power to review an arbitral award or the result of the resort to another method of settlement, Article 87 of the Rules applies. Paragraph 1 reads as follows:

When in accordance with a treaty or convention in force a contentious case is brought before the Court concerning a matter which has been the subject of proceedings before some other international body, the provisions of the Statute and the Rules governing contentious cases shall apply.

22 The reference to a treaty or convention in force, and not to declarations made under the optional clause, may find a reason in that the treaty or convention could establish a certain procedure which does not conform to that applicable to contentious cases according to the ICJ Statute and Rules, and that it is therefore necessary to clarify that only the latter procedure has to be followed. It would be difficult to infer from the reference to 'treaty or convention' in this article the conclusion that the review of an arbitral award would be admissible only if provided for by a treaty or convention.⁴⁶ In any event, as noted previously, the Court reviewed an arbitral award on the basis of an application made under the optional clause in the *Arbitral Award of 31 July 1989* case.⁴⁷

E. The Risk of Fragmentation of International Law because of the Proliferation of International Courts and Tribunals

23 States have increasingly chosen to diversify the methods of settlement of their disputes, in particular by establishing specialized bodies, some of them courts or tribunals, for disputes in certain matters or areas. Moreover, several international courts or tribunals have been created in order to take decisions that do not concern, or do not only concern, the settlement of disputes between States. Thus, provisions that concern the relationship between the ICJ and other courts and tribunals affect only to a limited extent the fragmentation of international law, which is linked to the existence of a plurality of judicial and arbitral bodies stating international law.

The fact that many of those bodies are entrusted with deciding cases related to specific fields does not substantially diminish the risk that decisions follow a variety of approaches with regard to questions on international law. It is in fact likely that these bodies will have to address incidentally questions relating to many aspects of international law. Some of the foremost divergences with regard to the jurisprudence of the ICJ were expressed by bodies that were not deciding disputes between States and were competent for questions of human rights law or international criminal law; moreover, divergences did not specifically concern questions pertaining to these areas of international law. It may be sufficient to refer to the judgment of the European Court of Human Rights in *Loizidou v. Turkey* (p. 659) (Preliminary Objections)⁴⁸ and to the judgment of the Appeals Chamber of the ICTY in *The Prosecutor v. Dusko Tadić*.⁴⁹

Given the large number of international courts and tribunals and the manifold questions of international law that are constantly raised before them, it would be 'cumbersome and unrealistic'⁵⁰ to try to ensure greater coherence in international law by establishing a system of preliminary references from those courts and tribunals to the ICJ, as was suggested by two successive Presidents of the Court.⁵¹ Moreover, it would be difficult to imagine that States would be willing to accept a revision of existing instruments that would give the ICJ the central role in defining questions of international law.

24 A remedy against part of the risks entailed by fragmentation appears to lie, more than in new institutional mechanisms, in the attitude that international judicial or arbitral bodies should take. First of all, courts and tribunals that have a special domain of competence should view questions within their respective domain in the larger context of overall international law. While they should not necessarily refrain from seeking innovative solutions,⁵² these courts and tribunals should acknowledge the ICJ's indispensable 'leading role in weaving together the strands of international law'.⁵³ On the other hand, the ICJ should pay great attention to the decisions of other courts and tribunals, especially when the Court deals with matters within their special field of competence. This awareness should include express discussion in the Court's judgments of decisions taken by other courts and tribunals.

25 This approach was taken by the ICJ in the *Bosnian Genocide* case. The Court declared that it attached 'the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it' and that it would take 'the fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute'.⁵⁴ However, the Court noted that '[t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it'.⁵⁵

In other decisions the Court emphasized the role that human rights treaty bodies play in the interpretation of the respective treaty. Thus the Court gave great significance to the views expressed by the Human Rights Committee on the interpretation of the International Covenant on Civil and Political Rights, first in its *Wall* advisory (p. 660) opinion,⁵⁶ and then in its judgment in the *Diallo* case.⁵⁷ In the latter judgment the Court stated:

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.⁵⁸

The same weight was given by the Court to the interpretation of the relevant provision of the African Charter on Human and Peoples' Rights made by the African Commission on Human and Peoples' Rights.⁵⁹

GIORGIO GAJA

Footnotes:

1 Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (1920), p. 98.

2 *Ibid.*, p. 159.

3 *Ibid.*, p. 98.

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

5 *Ibid.*, p. 15.

6 Cf. Hudson, PCIJ, pp. 682–703.

7 *Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series A, No. 9, pp. 4, 30. In its judgment on preliminary objections in the case concerning *Maritime Delimitation in the Indian Ocean* the ICJ stated that 'it [was] mindful . . . of the observation of the Permanent

Court of International Justice' quoted above in the text (see *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, ICJ Reports (2017), pp. 3, 50, para. 132).

8 The relevant provision of the bilateral treaty that conferred jurisdiction on the Court stated: 'Il n'est porté aucune atteinte à la compétence du Tribunal arbitral mixte germano-polonais résultant des dispositions du Traité de paix de Versailles' (*Factory at Chorzów (Indemnity)*, Jurisdiction, PCIJ, Series A, No 2, pp. 4, 12). This had been understood by the PCIJ as excluding the Court's jurisdiction over matters within the competence of the Mixed Arbitral Tribunal.

9 Thus also Lowe, *Australian YIL* (1999), p. 197; Finke (2004), p. 348. According to Kolb, *ICJ*, p. 1201, the proceedings before the Court may be suspended only if 'the two organs are already seised of the case' and the Court has been seised later.

10 Shany (2003), p. 196, observed that 'Article 95 and other Charter provisions do not have the effect of subjecting the jurisdiction of the Court to that of its competitors'.

11 Cf. Finke on Art. 95 UN Charter MN 2-7.

12 This freedom of choice has been asserted also in several declarations adopted by the General Assembly. Cf., among other instruments, GA Res. 2625 (XXV) (1970). Cf. also Giegerich on Art. 36 UN Charter MN 53.

13 Among the declarations reproduced at <<http://www.icj-cij.org>> those of the following States include a condition with regard to other methods of settlement of disputes: Australia, Austria, Barbados, Belgium, Botswana, Cambodia, Canada, Cote d'Ivoire, Djibouti, Estonia, Gambia, Germany, Honduras, Hungary, India, Italy, Japan, Kenya, Lesotho, Liberia, Lithuania, Luxembourg, Madagascar, Malawi, Malta, Marshall Islands, Mauritius, New Zealand, Nigeria, Pakistan, Peru, Philippines, Poland, Portugal, Republic of Guinea, Romania, Senegal, Slovakia, Spain, Sudan, Suriname, Swaziland, and the United Kingdom.

14 Cf. the declarations of Estonia, Liberia, and Pakistan. The declarations of Austria, Japan, Lesotho, Peru, and Romania refer to an agreement to resort to other means of settlement for a final and binding decision.

15 Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, 18 April 1961, 500 UNTS 241, Art. II. The same provision is contained in the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 24 April 1963, 596 UNTS 487, Art. II.

16 UNCLOS, 10 December 1982, 1833 UNTS 3, Art. 282.

17 Thus Treves, *NYU JIL & Pol.* (1998-1999), pp. 811-2; Boyle, 'Some Problems of Compulsory Jurisdiction before Specialised Tribunals: The Law of the Sea', in *Asserting Jurisdiction in International and European Legal Perspectives* (Capps *et al.*, eds., 2003), pp. 243-53, 244; Rao, 'Law of the Sea, Settlement of Disputes', *Max Planck EPIL*, MN 11; Tanaka, *The International Law of the Sea* (2nd edn., 2015), pp. 423-4.

18 *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, ICJ Reports (2017), pp. 3, 50, para. 130.

19 *Ambatielos*, Merits, ICJ Reports (1953), pp. 10, 16.

20 Starace, *La competenza della Corte internazionale di giustizia in materia contenziosa* (1970), p. 247, wrote of a negative rule ('norma negativa') concerning the Court's jurisdiction.

- 21** Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Art. 62.
- 22** *Cyprus v. Turkey*, Appl. No. 25781/94, 28 June 1996, ECHR, Series A, No. 86, pp. 104, 138. The defendant government's argument that a special agreement existed in this case was not submitted to the ECtHR. *Cf. Cyprus v. Turkey*, Appl. No. 25781/94, ECHR 2001-IV, pp. 1, 20.
- 23** Text reproduced in OJ 2016 C 202, pp. 47, 194.
- 24** *Mox Plant Case*, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, *ILM* 42 (2003), pp. 1187, 1190, paras. 21, 23. The view that Art. 292 of the EC Treaty (now Art. 344 TFEU) would not deprive the Arbitral Tribunal of its jurisdiction to decide on the division of competences between the EC and its Member States was expressed by Cazala, 'La contestation de la compétence exclusive de la Cour de Justice des Communautés européennes', *Revue trimestrielle de Droit européen* 40 (2004), pp. 505-32, 527.
- 25** *Commission v. Ireland*, Case C-459/03, (2006) ECR 4635, p. 4708, para. 126.
- 26** *Ibid.*, p. 4710, para. 133.
- 27** The proceedings were terminated by the Arbitral Tribunal with Order No. 6 of 6 June 2006. See *Mox Plant Case*, PCA Case No. 2002-01, Order No. 6, Termination of Proceedings, 6 June 2006.
- 28** *Cf. supra*, MN 10.
- 29** UNCLOS Art. 287.
- 30** *Cf.* declarations by Australia (of 22 March 2002), Belgium (of 13 November 1998), Ecuador (of 24 September 2012), Estonia (of 26 August 2005), Finland (of 21 June 1996), Italy (of 26 February 1997), Latvia (of 31 August 2005), Lithuania (of 12 November 2003), Mexico (of 6 January 2003), Oman (of 17 August 1989), and Spain (of 19 July 2002). Portugal declared (on 3 November 1997) that 'in the absence of non-judicial means for the settlement of disputes arising out of the application of this Convention, it will choose one of the following means for the settlement of disputes: (a) the International Tribunal for the Law of the Sea, established in pursuance of Annex VI, (b) the International Court of Justice, (c) an arbitral tribunal constituted in accordance with Annex VII, (d) a special arbitral tribunal, constituted in accordance with Annex VIII'. The same declaration was made by Timor-Leste (on 8 January 2013). The text of all these declarations is available at <<https://treaties.un.org>>.
- 31** Shaw, *Rosenne's Law and Practice*, vol. II, p. 554 argues that the use of the term 'matter' in Art. 36, para. 6 of the Statute 'carries an implication, common in fact to all superior courts, that the Court possesses an element of discretion whether to entertain a case'. However, since the provision in question deals with the case in which jurisdiction is contested, it is difficult to draw from this text any significant element with regard to the propriety in the exercise of jurisdiction that is conferred on the Court. *Cf.* generally as to Art. 36, para. 6, Tomuschat on Art. 36 MN 111-143.
- 32** *Northern Cameroons*, Preliminary Objections, ICJ Reports (1963), pp. 15, 37. The issue of propriety was considered in depth in Sir Gerald Fitzmaurice's Separate Opinion, *ibid.*, pp. 97, 100-7. An issue of propriety had also led the PCIJ to refrain from exercising part of its jurisdiction in the *Free Zones*, Judgment, PCIJ, Series A/B, No. 46, pp. 96, 161.
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33 The doctrine of *forum non conveniens* is mainly known to common law jurisdictions, *cf. e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Spiliada Maritime Corp. v. Cansulex Ltd* [1987] 1 AC 460.

34 *Certain German Interests*, Preliminary Objections, PCIJ, Series A, No. 6, pp. 4, 20 (emphasis in original).

35 *Ibid.*

36 In a comment on the above passages, Ténékidès, 'L'exception de litispendance devant les organismes internationaux', *RGDIP* 36 (1929), pp. 502-27, 523, stressed the importance of the requirement of judicial homogeneity. This author's conclusion (*ibid.*, p. 526) was that an international body should, as a matter of comity, decline to exercise jurisdiction if the case had already been brought before another body.

37 According to Shany (2003), p. 240, 'the case-law of the World Court neither supports nor repudiates the application of the *lis alibi pendens* rule in the relations between international courts and tribunals'. Lowe, *Australian YIL* (1999), pp. 202-3, draws 'from requirements of good order that are applicable to each and every judicial system' the conclusion that 'a tribunal may decline to exercise jurisdiction because it decides that the doctrine of *lis alibi pendens*, abuse of process, or *res judicata* is applicable'. The author's premise that each doctrine is 'common to all the major legal systems' would require some further analysis.

38 Rundstein, 'La Cour permanente de Justice internationale comme instance de recours', *Rec. des Cours* 43 (1933-I), pp. 5 *et seq.*, 33-4; Hudson, *PCIJ*, pp. 431-2.

39 *ILC Yearbook* (1958-II), pp. 82 *et seq.* While the arbitral award was said to 'constitute a definitive settlement of the dispute' (Art. 32), the grounds for reviewing the award (Art. 35) included 'failure to state the reasons', which could well open the way to an extensive review.

40 *ICAO Council*, Judgment, ICJ Reports (1972), pp. 46, 60, para. 26. See also in this regard the joint applications by several Arab States against Qatar concerning two decisions rendered by the ICAO Council, ICJ Press Releases No. 2018/32 of 5 July 2018 and No. 2018/33 of 5 July 2018.

41 Reisman, 'The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication', *Rec. des Cours* 258 (1996), pp. 9 *et seq.*, 389, noted a tendency by the Court 'toward appellate method'.

42 *Arbitral Award made by the King of Spain on 23 December 1906*, Judgment, ICJ Reports (1960), pp. 192, 214.

43 *Arbitral Award of 31 July 1989*, Judgment, ICJ Reports (1991), pp. 53, 62, para. 24.

44 *Ibid.*, p. 59, para. 14.

45 *Cf.* Brown on Art. 59.

46 Guyomar, *Commentaire*, p. 560, expressed the opinion that a review could not be held on the basis of *forum prorogatum*. She did not discuss the possibility of a review on an application under the optional clause. *Cf.* also Zimmermann/Thienel on Art. 60 MN 10-14.

47 *Supra*, MN 20.

48 *Loizidou v. Turkey*, Series A, No. 310, p. 24, para. 62.

49 *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeal Judgment, 15 July 1999, *ILM* 38 (1999), pp. 1518, 1536-46, paras. 88-145.

50 Thus, Higgins, *ICLQ* (2003), p. 20.

51 Reference is here made to President Schwebel's address to the General Assembly on 26 October 1999, *ICJ Yearbook* (1999–2000), pp. 282–8, and to President Guillaume's address to the Sixth Committee of the General Assembly on 27 October 2000, *ICJ Yearbook* (2000–2001), pp. 326–35. *Cf.* also Guillaume (2003), p. 27. For comments, *cf.* Treves, *Max Planck UNYB* (2000), *passim*; Finke (2004), pp. 360–3.

52 For the need for international law to develop through diverging opinions by different bodies, *cf.* Wolfrum, in Ando *et al.* (2002), p. 655.

53 Thus Charney, *Rec. des Cours* (1999), p. 362.

54 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 209, para. 403. In the judgment on the merits in the *Croatian Genocide* case, Judgment, ICJ Reports (2015), pp. 3, 62, para. 129, the Court noted that it would 'take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of ICTY, as it did in 2007, in examining the constituent elements of genocide in the present case'.

55 *Bosnian Genocide*, Judgment, ICJ Reports (2007), pp. 43, 209, para. 403.

56 *Wall*, Advisory Opinion, ICJ Reports (2004), pp. 136, 178–80, paras. 108–11.

57 *Diallo*, Merits, ICJ Reports (2010), pp. 639 *et seq.*

58 *Ibid.*, p. 664, para. 66.

59 *Ibid.*, p. 664, para. 67.
