Accordingly, Norway was entitled to invoke the French reservation to defeat the jurisdiction of the Court. However, much will depend upon the precise terms of the declarations. Declarations made under the optional clause in the Statute of the PCIJ and still in force are deemed to continue with respect to the ICJ,[169] but in the *Aerial Incident* case[170] between Israel and Bulgaria, the Court declared that this in fact only applied to states signing the ICJ Statute in 1945 and did not relate to states, like Bulgaria, which became a party to the Statute many years later as a result of admission to the United Nations.

The issue also arose in the jurisdictional phase of the *Nicaragua* case.[171] Nicaragua had declared that it would accept the compulsory jurisdiction of the Permanent Court in 1929 but had not ratified this. The US argued that accordingly Nicaragua never became a party to the Statute of the Permanent Court and could not therefore rely on article 36(5). The Court, in an interesting judgment, noted that the Nicaraguan declaration, unconditional and unlimited as to time, had 'a certain potential effect' and that the phrase in article 36(5) 'still in force' could be so interpreted as to cover declarations which had only potential and not binding effect. Ratification of the Statute of the ICJ in 1945 by Nicaragua had the effect, argued the Court, of transforming this potential commitment into an effective one.[172] Since this was so, Nicaragua could rely on the US declaration of 1946 accepting the Court's compulsory jurisdiction as the necessary reciprocal element.[173]

The reservations that have been made in declarations by states under the optional clause, restricting the jurisdiction of the ICJ, vary a great deal from state to state, and are usually an attempt to prevent the Court becoming involved in a dispute which is felt to concern vital interests. One condition made by a number of states, particularly the United States

1957, pp. 125, 145; 24 ILR, pp. 840, 845 and the *Interhandel* case, ICJ Reports, 1959, pp. 6, 23; 27 ILR, pp. 475, 487.

169 Article 36(5), Statute of the ICJ.

170 ICJ Reports, 1959, p. 127; 27 ILR, p. 557.

171 ICJ Reports, 1984, pp. 392, 403–12; 76 ILR, pp. 104, 114.

172 The Court also noted that since Court publications had placed Nicaragua on the list of states accepting the compulsory jurisdiction of the ICJ by virtue of article 36(5) and that no states had objected, one could conclude that the above interpretation had been confirmed, *ibid.* The Court also regarded the conduct of the parties as reflecting acquiescence in Nicaragua's obligations when article 36(5) was argued, ICJ Reports, 1984, pp. 411–15; 76 ILR, p. 122.

173 But see the Separate Opinions of Judges Mosler, ICJ Reports, 1984, pp. 461–3; Oda, *ibid.*, pp. 473–89; Ago, *ibid.*, pp. 517–27 and Jennings, *ibid.*, pp. 533–45, and the Dissenting Opinion of Judge Schwebel, *ibid.*, pp. 562–600; 76 ILR, pp. 172, 184, 228, 244 and 273.

of America, stipulates that matters within the domestic jurisdiction 'as determined by' that particular state are automatically excluded from the purview of the Court.[174] The validity of this type of reservation (known as the 'Connally amendment' from the American initiator of the relevant legislation) has been widely questioned,[175] particularly since it appears to contradict the power of the Court under article 36(6) to determine its own jurisdiction, and in reality it withdraws from the Court the jurisdiction conferred under the declaration itself. Indeed, it is a well-established principle of international law that the definition of domestic jurisdiction is an issue of international and not domestic law.[176]

Many reservations relate to requirements of time (*ratione temporis*),[177] according to which acceptances of jurisdiction are deemed to expire automatically after a certain period or within a particular time after notice of termination has been given to the UN Secretary-General. Some states exclude the jurisdiction of the ICJ with respect to disputes arising before or after a certain date in their declarations.[178] Reservations *ratione personae* may also be made, for example the UK reservation concerning disputes between member states of the British Commonwealth.[179] Reservations may also be made *ratione materiae*, excluding disputes where other means of dispute settlement have been agreed.[180] Other restrictive grounds exist.[181] However, once the Court is dealing with a dispute, any subsequent

[174] See Rosenne, *Law and Practice*, vol. II, pp. 748 ff.

[175] See e.g. L. Henkin, 'The Connally Reservation Revisited and, Hopefully, Contained', 65 AJIL, 1971, p. 374, and Preuss, 'The International Court of Justice, the Senate and Matters of Domestic Jurisdiction', 40 AJIL, 1946, p. 720. See also Judge Lauterpacht, *Norwegian Loans* case, ICJ Reports, 1957, pp. 9, 43–66; 24 ILR, pp. 782, 800; the *Interhandel* case, ICJ Reports, 1959, pp. 6, 77–8 and 93; 27 ILR, pp. 475, 524, 534, and A. D'Amato, 'Modifying US Acceptance of the Compulsory Jurisdiction of the World Court', 79 AJIL, 1985, p. 385.

[176] See above, chapter 12, p. 647.

[177] See Rosenne, *Law and Practice*, vol. II, pp. 751 ff., and Merrills, 'Revisited', pp. 213 ff.

[178] Rosenne, *Law and Practice*, vol. II, pp. 753 ff. The UK, for example, excluded disputes arising out of events occurring between 3 September 1939 and 2 September 1945 in its 1963 declaration, Cmnd 2248. This was altered in the 1969 declaration, which is expressed to apply only to disputes arising after 24 October 1945, Cmnd 3872.

[179] See Merrills, 'Revisited', pp. 219 ff.

[180] *Ibid.*, pp. 224 ff. See the *Nauru* case, ICJ Reports, 1992, pp. 240, 245–7; 97 ILR, pp. 1, 12–14. The Court emphasised that declarations made under article 36(2) related only to disputes between states and did not therefore cover disputes arising out of a trusteeship agreement between the Administering Authority and the indigenous population, *ibid.* See also the *Guinea-Bissau/Senegal* case, ICJ Reports, 1990, p. 64 and *ibid.*, 1991, p. 54; 92 ILR, pp. 1 and 30.

[181] See e.g. reservations relating to territorial matters, Merrills, 'Revisited', pp. 234 ff.

expiry or termination of a party's declaration will not modify the jurisdiction of the case.[182]

A state may withdraw or modify its declaration.[183] The US declaration of 1946 provided for termination after a six-month period of notice. What the Court in the jurisdictional phase of the *Nicaragua* case[184] had to decide was whether a modifying notification[185] expressly deemed to apply immediately could have effect over the original declaration. It decided that the six-month notice provision remained valid and could be invoked by Nicaragua against the US, since it was an undertaking that constituted an integral part of the instrument that contained it.

Article 36(2) declarations constitute unilateral acts and the Court will interpret them in order to establish whether or not mutual consent has been given to its jurisdiction and 'in a natural and reasonable way, having due regard to the intention of the state concerned at the time when it accepted the compulsory jurisdiction of the Court'.[186]

The Court has emphasised that there is a 'fundamental distinction between the existence of the Court's jurisdiction over a dispute, and the compatibility with international law of the particular acts which are the subject of the dispute'.[187] This is so even with regard to rights and obligations *erga omnes* or peremptory norms of general international law (*jus cogens*). The mere fact that a principle has this elevated character in the international legal system is not enough of itself to confer jurisdiction, for this is dependent upon the consent of the parties.[188] However, the Court has also emphasised that whether or not it finds that it has

[182] See e.g. the *Nottebohm* case, ICJ Reports, 1953, p. 111; 20 ILR, p. 567. See also Judge Shahabuddeen's Separate Opinion, the *Request for an Examination of the Situation in the Nuclear Tests Case*, ICJ Reports, 1995, pp. 288, 315.

[183] See e.g. Rosenne, *Law and Practice*, vol. II, pp. 783 ff. A state may waive its jurisdictional reservation, but this must be done unequivocally, *Application for Revision and Interpretation of the Judgment in the Tunisia/Libya Case*, ICJ Reports, 1985, pp. 192, 216; 81 ILR, pp. 419, 449, and the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 33; 76 ILR, pp. 349, 367.

[184] ICJ Reports, 1984, pp. 392, 415–21; 76 ILR, p. 126.

[185] Excluding disputes related to Central America for a two-year period. See e.g. A. Chayes, 'Nicaragua, the United States and the World Court', 85 *Columbia Law Review*, 1985, p. 1445; K. Highet, 'Litigation Implications of the US Withdrawal from the *Nicaragua* case', 79 AJIL, 1985, p. 992, and US Department of State Statement on the US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, 22 ILM, 1985, p. 246.

[186] *Spain* v. *Canada*, ICJ Reports, 1998, pp. 432, 454; 123 ILR, pp. 189, 214.

[187] *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, pp. 1307, 1351.

[188] *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports, 2006, pp. 6, 32 and 52. As to obligations *erga omnes* and *jus cogens*, see above, chapter 3, p. 123.

jurisdiction with regard to a particular dispute, the parties 'remain in all cases responsible for acts attributable to them that violate the rights of other states'.[189]

Once the Court has established jurisdiction, its treatment of the substance of the dispute will be framed by the terms of the jurisdiction it has found exists, for the Court as a matter of principle cannot deal with issues that lie outside of the consensual ambit it has determined subsists with regard to the dispute in question.[190] However, the Court has the competence to determine the meaning of its own jurisdiction and may interpret the terms of the relevant *compromis*, or treaty or declaration as it deems appropriate in the circumstances.[191] In the *Oil Platforms (Iran* v. *USA)* case, for example, the Court founded its jurisdiction upon article XXI(2) of the 1955 US–Iran Treaty of Amity, Economic Relations and Consular Rights concerning disputes as to the interpretation or application of that treaty. Article XX(1)d of that treaty provided that the treaty 'shall not preclude the application of measures . . . necessary to fulfill 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 Court noted, in what may be seen as an expansive approach, that 'the interpretation and application of that article will necessarily entail an assessment of the conditions of legitimate self-defence under international law' and further held that the question of the application of that article 'involves the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self-defence'.[192]

Sources of law, propriety and legal interest

In its deliberations, the Court will apply the rules of international law as laid down in article 38 (treaties, custom, general principles of law).[193]

[189] *Serbia and Montenegro* v. *UK*, ICJ Reports, 2004, pp. 1307, 1351.

[190] See e.g. the *Oil Platforms (Iran* v. *USA)* case, ICJ Reports, 2003, pp. 161, 183; 130 ILR, pp. 323, 342.

[191] See article 36(6) of the Statute and Rosenne, *Law and Practice*, vol. II, pp. 812 ff.

[192] ICJ Reports, 2003, pp. 161, 182–3. Note that at the preliminary objections to jurisdiction phase, the Court regarded that provision as 'confined to affording the Parties a possible defence on the merits to be used should the occasion arise', ICJ Reports, 1996, pp. 803, 811.

[193] See further above, chapter 3. Note that the Court may be specifically requested by the parties to consider particular factors. In the *Tunisia/Libya* case, ICJ Reports, 1982, pp. 18,

However, the Court may decide a case *ex aequo et bono*, i.e. on the basis of justice and equity untrammelled by technical legal rules where the parties agree.[194] This has not yet occurred, although it should not be confused with the ability of the ICJ to apply certain equitable considerations in a case within the framework of international law.[195] The question of gaps in international law in addressing a case arose in the Advisory Opinion concerning *The Legality of the Threat or Use of Nuclear Weapons*.[196] Although not a contentious case and therefore not as such binding, the fact that the Court was unable to give its view on a crucial issue in international law may have ramifications. The Court took the view that it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a state would be at stake'.[197] This appearance of a *non-liquet* is of some concern as a matter of principle, unconnected with the substance of the legal principle in question.[198]

Before dealing with the merits of a case, the Court may have to deal with preliminary objections as to its jurisdiction or as to the admissibility of the application.[199] Preliminary objections must be made within three months after the delivery of the Memorial of the applicant state.[200] The Court has emphasised that objections to jurisdiction require decision at the preliminary stage of the proceedings.[201] A decision on preliminary objections to jurisdiction cannot determine merits issues, even where dealt with in connection with preliminary objections. Such reference can only

21; 67 ILR, pp. 3, 14, the *compromis* specifically asked the Court to take into account 'the recent trends admitted at the Third Conference on the Law of the Sea'.

194 Article 38(2) of the Statute. See also A. Pellet, 'Article 38' in Zimmermann *et al.*, *Statute of the International Court*, p. 677 and see above, chapter 3, p. 105.

195 See e.g. above, chapter 11, p. 590.

196 ICJ Reports, 1966, p. 226; 110 ILR, 163.

197 ICJ Reports, 1966, pp. 226, 263 and 266. This is the subject of a strong rebuttal by Judge Higgins in her Dissenting Opinion, *ibid.*, pp. 583, 584 ff.

198 See above, chapter 3, p. 98.

199 'Or other objection', with regard to which a decision is requested before consideration of the merits: see article 79 of the Rules of Court 1978 and the previous sections of this chapter.

200 Prior to the amendment of article 79 adopted in December 2000, such objections could have been made within the time limit fixed for the delivery of the Counter-Memorial (usually six or nine months). See e.g. *Cameroon* v. *Nigeria (Preliminary Objections)*, ICJ Reports, 1998, p. 275. See also S. Rosenne, 'The International Court of Justice: Revision of Articles 79 and 80 of the Rules of Court', 14 *Leiden Journal of International Law*, 2001, p. 77.

201 The *Nicaragua* case, ICJ Reports, 1986, pp. 3, 30–1; 76 ILR, pp. 349, 364–5.

be provisional.[202] Where it has established its right to exercise jurisdiction, the Court may well decline to exercise that right on grounds of propriety. In the *Northern Cameroons* case,[203] the Court declared that:

> it may pronounce judgment only in connection with concrete cases where there exists, at the time of adjudication, an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.

Further, events subsequent to the filing of the application may render the application without object, so that the Court is not required to give a decision.[204]

In addition, and following the *South-West Africa* cases (Second Phase) in 1966,[205] it may be necessary for the Court to establish that the claimant state has a legal interest in the subject matter of the dispute. The fact that political considerations may have motivated the application is not relevant, so long as a legal dispute is in evidence. Similarly, the fact that a particular dispute has other important aspects is not of itself sufficient to render the application inadmissible.[206]

Evidence

Unlike domestic courts, the International Court is flexible with regard to the introduction of evidence.[207] Strict rules of admissibility common

[202] See the *South-West Africa* cases, ICJ Reports, 1966, pp. 3, 37; 37 ILR, pp. 243, 270. It is to be noted that admissibility issues may be discussed at the merits stage: see e.g. the *East Timor* case, ICJ Reports, 1995, p. 90; 105 ILR, p. 226. See also C. M. Chinkin, 'East Timor Moves into the World Court', 4 EJIL, 1993, p. 206.

[203] ICJ Reports, 1963, pp. 15, 33–4; 35 ILR, pp. 353, 369.

[204] See e.g. the *Armed Actions (Nicaragua* v. *Honduras)* case, ICJ Reports, 1988, pp. 69, 95; 84 ILR, p. 218; the *Nuclear Tests* case, ICJ Reports, 1974, pp. 253, 272; 57 ILR, p. 348; the *Lockerbie (Preliminary Objections)* case, ICJ Reports, 1998, pp. 9, 26; 117 ILR, pp. 1, 24; and *Democratic Republic of the Congo* v. *Belgium*, ICJ Reports, 2002, pp. 3, 14–15; 128 ILR, pp. 60, 69–70.

[205] ICJ Reports, 1966, p. 6; 37 ILR, p. 243.

[206] See above, p. 1065.

[207] See e.g. K. Highet, 'Evidence and Proof of Facts' in Damrosch, *International Court of Justice at a Crossroads*, pp. 355, 357, and C. F. Amerasinghe, 'Presumptions and Inferences in Evidence in International Litigation', 3 *The Law and Practice of International Courts and Tribunals*, 2004, p. 394. See also D. V. Sandifer, *Evidence before International Tribunals*, Charlottesville, 1975; S. Schwebel, *Justice in International Law*, Cambridge, 1994, p. 125; K. Highet, 'Evidence, the Court and the *Nicaragua* Case', 81 AJIL, 1987, p. 1;

in domestic legal systems do not exist here.[208] The Court has the competence *inter alia* to determine the existence of any fact which if established would constitute a breach of an international obligation.[209] It may make all arrangements with regard to the taking of evidence,[210] call upon the agents to produce any document or to supply any explanations as may be required,[211] or at any time establish an inquiry mechanism or obtain expert opinion.[212] The Court may indeed make on-site visits.[213] However, it has no power to compel production of evidence generally, nor may witnesses be subpoenaed, nor is there is any equivalent to proceedings for contempt of court.[214] The use of experts has been comparatively rare[215] as has been recourse to witnesses.[216] Agents are rarely asked to produce documents or supply explanations and there have been only two on-site visits to date.[217] This has meant that the Court has sought to evaluate claims primarily upon an assessment of the documentary evidence provided, utilising also legal techniques such as inferences and admissions against interest.[218]

The Court will make its own determination of the facts and then apply the relevant rules of international law to those facts it has found to exist and which are necessary in order to respond to the submissions of the

M. Kazazi, *Burden of Proof and Related Issues*, The Hague, 1996, and T. M. Franck, *Fairness in International Law and Institutions*, Oxford, 1995, pp. 335 ff.

208 President Schwebel in his address to the UN General Assembly on 27 October 1997 noted that the Court's 'attitude to evidence is demonstrably flexible': see www.icj-cij.org/icjwww/ipresscom/SPEECHES/Ga1997e.htm. See e.g. the introduction of illegally obtained evidence in the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 32–6; 16 AD, p. 155.

209 Article 36 of the Statute. 210 Article 48 of the Statute. 211 Article 49 of the Statute.

212 Article 50 of the Statute. By article 43(5), the Court may hear witnesses and experts, as well as agents, counsel and advocates.

213 Article 44(2) of the Statute and article 66 of the Rules of Court.

214 See K. Highet, 'Evidence, the Court and the *Nicaragua* Case', p. 10.

215 But see the *Corfu Channel* case, ICJ Reports, 1949, p. 4; 16 AD, p. 155.

216 But see *ibid*., and the *Tunisia/Libya* case, ICJ Reports, 1989, p. 18; 67 ILR, p. 4; the *Libya/Malta* case, ICJ Reports, 1985, p. 13; 81 ILR, p. 238, and the *Nicaragua* case, ICJ Reports, 1986, p. 14; 76 ILR, p. 349.

217 First, in the *Diversion of the River Meuse* case, PCIJ, Series A/B, No. 70, and secondly in the *Gabčíkovo–Nagymaros Project* case, ICJ Communiqué No. 97/3, 17 February 1997 and see ICJ Reports, 1997, pp. 7, 14; 116 ILR, p. 1.

218 See e.g. the *Iranian Hostages* case, ICJ Reports, 1980, pp. 3, 9; 61 ILR, pp. 530, 535. See also F. A. Mann, 'Foreign Investment in the International Court of Justice: The *ELSI* Case', 86 AJIL, 1992, pp. 92, 94–5, and the *El Salvador/Honduras* case, ICJ Reports, 1992, pp. 351, 574; 97 ILR, pp. 112, 490. Note in particular the *Nicaragua* case, ICJ Reports, 1986, p. 14; 76 ILR, p. 349. The difficulties of proving facts in this case were exacerbated by the absence of the respondent state during the proceedings on the merits.

parties, including defences and counter-claims. These findings of facts require an assessment of the evidence, which necessitates the Court deciding which of the material before it is relevant and of probative value with regard to the alleged facts. In so doing, the Court will make its own assessment of the weight, reliability and value of the evidence produced by the parties.[219] The Court has noted that it will treat with caution evidentiary materials specially prepared for the case in question[220] and also materials emanating from a single source, but would give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the state represented by the person making them.[221] Weight would also be given to evidence that has not been challenged by impartial persons for the correctness of what it contains and special attention given to evidence obtained by skilled judicial examination and cross-examination of persons directly involved.[222] However, the evidence of government and military figures of a state involved in litigation before the Court would be treated with 'great reserve'.[223] The Court has also noted that witness statements produced in the form of affidavits should be treated with caution and in assessing such affidavits, a number of factors would have to be taken into account, including whether they had been made by state officials or private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion with regard to certain events. Evidence which is contemporaneous with the period concerned may, however, be of special value. Further, a statement by a competent governmental official with regard to boundary lines is likely to have greater weight than sworn statements of a private person.[224]

[219] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 200.

[220] However, the Court has noted that affidavits prepared for litigation purposes may be received if they attest to personal knowledge of facts by a particular individual, *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 244.

[221] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 200 and 206. See also *Nicaragua* v. *USA*, ICJ Reports, 1986, pp. 14, 41; 76 ILR, p. 349.

[222] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 201. See also the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 213, where it was held that in principle the Court would accept as highly persuasive relevant findings of fact made by the International Criminal Tribunal for the Former Yugoslavia at trial, unless they had been upset on appeal. In addition, any evaluation by the Tribunal based on the facts was entitled to due weight. However, the procedural stages prior to a decision, which did not involve definitive rulings, should not be given weight, *ibid.*, paras. 216 ff.

[223] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 203.

[224] *Nicaragua* v. *Honduras*, ICJ Reports, 2007, para. 244.

The Court may also take judicial notice of facts which are public knowledge, primarily through media dissemination, provided that caution was shown and that the reports do not emanate from a single source.[225] In *Democratic Republic of the Congo* v. *Uganda*, the Court noted the particular importance of consistency and concordance in evaluating press information.[226]

The burden of proof lies upon the party seeking to assert a particular fact or facts,[227] although the Court has also stated that there was no burden of proof to be discharged in the matter of jurisdiction.[228] On the other hand, the burden of proof, and a relatively high one, lies upon the applicant state who wishes to intervene. Such state 'must demonstrate convincingly what it asserts, and thus . . . bear the burden of proof', although it need only show that its interest may be affected, not that it will or must be so affected. It must identify the interest of a legal nature in question and show how that interest may be affected.[229] The actual standard of proof required will vary with the character of the particular issue of fact.[230] In the *Genocide Convention (Bosnia* v. *Serbia)* case, the Court emphasised that it had long recognised that 'claims against a state involving charges of exceptional gravity must be proved by evidence that is fully conclusive'.

[225] See the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 41; 76 ILR, p. 349.

[226] ICJ Reports, 2005, pp. 168, 204. As to the value of maps as evidence, see *ibid.*, p. 206 and above, chapter 10, p. 519.

[227] See e.g. the *Nicaragua (Jurisdiction and Admissibility)* case, ICJ Reports, 1984, pp. 392, 437; 76 ILR, p. 1; the *Fisheries Jurisdiction (Spain* v. *Canada)* case, ICJ Reports, 1998, pp. 432, 450; the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 41; 134 ILR, pp. 120, 144, and the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, para. 204. Note also the view taken by the Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area in its Award of 14 February 1997. The Appendix to the Order lays down the Principles Applicable to the Admissibility of Evidence and notes *inter alia* that each party bears the burden of proving its own case and, in particular, facts alleged by it. The party having the burden of proof must not only bring evidence in support of its allegations, but must also convince the Tribunal of their truth. The Tribunal is not bound to adhere to strict judicial rules of evidence, the probative force of evidence being for the Tribunal to determine. Where proof of a fact presents extreme difficulty, the Tribunal may be satisfied with less conclusive, i.e. *prima facie*, evidence: see 36 ILM, 1997, pp. 396, 402–3.

[228] See the *Fisheries Jurisdiction (Spain* v. *Canada)* case, ICJ Reports, 1998, pp. 432, 450.

[229] *El Salvador/Honduras (Intervention)*, ICJ Reports, 1990, pp. 92, 117–18; 97 ILR, pp. 112, 238–9 and *Indonesia/Malaysia (Intervention)*, ICJ Reports, 2001, para. 29. As to third-party intervention, see below, p. 1097.

[230] Judge Higgins in her Separate Opinion in the *Oil Platforms (Iran* v. *USA)* case, ICJ Reports, 2003, pp. 161, 233; 130 ILR, pp. 323, 392, noted that 'the Court's prime objective appears to have been to retain a freedom in evaluating the evidence, relying on the facts and circumstances of each case'. See also Judge Shahabuddeen's Dissenting Opinion in the *Qatar* v. *Bahrain* case, ICJ Reports, 1995, pp. 6, 63; 102 ILR, pp. 1, 104.

The Court would need to 'be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III [of the Genocide Convention] have been committed, have been clearly established' and it has noted that the same standard of proof would apply to the proof of attribution for such acts.[231]

Evidence which has been illegally or improperly acquired may also be taken into account, although no doubt where this happens its probative value would be adjusted accordingly.[232] In the second provisional measures order in the *Application of the Genocide Convention (Bosnia* v. *Yugoslavia)* case, for example, the Court was prepared to admit a series of documents even though submitted on the eve of and during the oral hearings despite being 'difficult to reconcile with an orderly progress of the procedure before the Court, and with respect for the principle of equality of the parties'.[233] In dealing with questions of evidence, the Court proceeds upon the basis that its decision will be based upon the facts occurring up to the close of the oral proceedings on the merits of the case.[234]

In so far as the scope of the Court's decision is concerned, it was noted in the *Nicaragua* case that the Court 'is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it'.[235] In so doing, the Court will seek to ascertain 'the true subject of the dispute' taking into consideration the submissions, the applications, oral arguments and other documents placed before it.[236]

[231] ICJ Reports, 2007, para. 209. See also *Corfu Channel (United Kingdom* v. *Albania)*, ICJ Reports, 1949, p. 17. Judge Higgins in her Separate Opinion in the *Oil Platforms (Iran* v. *USA)* case, ICJ Reports, 2003, pp. 161, 234, noted that 'the graver the charge the more confidence there must be in the evidence relied on'.

[232] See e.g. the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 32–6; 16 AD, p. 155. See also H. Thirlway, 'Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication', 78 AJIL, 1984, p. 622, and G. Marston, 'Falsification of Documentary Evidence Before International Tribunals: An Aspect of the *Behring Sea* Arbitration, 1892–3', 71 BYIL, 2000, p. 357. See also the difficulties in the *Qatar* v. *Bahrain* case, International Court of Justice, Order of 17 February 1999.

[233] ICJ Reports, 1993, pp. 325, 336–7. Article 56 of the Rules provides that after the closure of written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party or, in the absence of consent, where the Court, after hearing the parties, authorises production where it is felt that the documents are necessary.

[234] The *Nicaragua* case, ICJ Reports, 1986, pp. 3, 39; 76 ILR, pp. 349, 373. Although note that in the *Lockerbie* case, ICJ Reports, 1992, pp. 3, 13; 94 ILR, pp. 478, 496, the Court referred in detail to Security Council resolution 748 (1992) adopted three days after the close of the oral hearings.

[235] ICJ Reports, 1986, pp. 3, 110; 76 ILR, pp. 349, 444.

[236] The *Nuclear Tests* case, ICJ Reports, 1974, pp. 466–7.

Provisional measures[237]

Under article 41 of the Statute, the Court has the power to indicate, if it considers that circumstances so require, any provisional (or interim) measures which ought to be taken to preserve the respective rights of either party. In deciding upon a request for provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, although it has held that it ought not to indicate such measures unless the provisions invoked by the applicant appear *prima facie* to afford a basis upon which the jurisdiction of the Court might be founded,[238] whether the request for the indication of provisional measures is made by the applicant or by the respondent in the proceedings on the merits.[239] In establishing the Court's *prima facie* jurisdiction to deal with the merits of the case, the question of the nature and extent of the rights for which

[237] See e.g. Rosenne, *Law and Practice*, vol. III, chapter 24, and Rosenne, *Provisional Measures in International Law: The International Court of Justice and the Tribunal for the Law of the Sea*, Oxford, 2005; K. Oellers-Frahm, 'Article 41' in Zimmermann *et al.*, *Statute of the International Court*, p. 923; S. Oda, 'Provisional Measures' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 541; B. Oxman, 'Jurisdiction and the Power to Indicate Provisional Measures' in Damrosch, *International Court of Justice at a Crossroads*, p. 323; C. Gray, *Judicial Remedies in International Law*, Oxford, 1987, pp. 69–74; Elias, *International Court*, chapter 3; J. G. Merrills, 'Interim Measures of Protection and the Substantive Jurisdiction of the International Court', 36 *Cambridge Law Journal*, 1977, p. 86, and Merrills, 'Reflections on the Incidental Jurisdiction of the International Court of Justice' in *Remedies in International Law* (eds. M. Evans and S. V. Konstanidis), Oxford, 1998, p. 51; L. Gross, 'The Case Concerning United States Diplomatic and Consular Staff in Tehran: Phase of Provisional Measures', 74 AJIL, 1980, p. 395, and M. Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction', 46 BYIL, 1972–3, p. 259. See also articles 73–8 of the Rules of Court 1978.

[238] See e.g. the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2003, pp. 77, 87; 134 ILR, pp. 104, 113; *Democratic Republic of the Congo* v. *Rwanda*, ICJ Reports, 2002, p. 241 and the two *Pulp Mills (Argentina* v. *Uruguay)* applications for provisional measures, ICJ Reports, 2006, pp. 113, 128–9 and ICJ Reports, 2007, para. 24. See also the request for the indication of provisional measures in the *Legality of the Use of Force (Yugoslavia* v. *Belgium)* case, ICJ Reports, 1999, pp. 124, 132; the *Arbitral Award of 31 July 1989 (Guinea-Bissau* v. *Senegal)* case, ICJ Reports, 1990, pp. 64, 68; 92 ILR, pp. 9, 13, the *Great Belt* case, ICJ Reports, 1991, pp. 12, 15; 94 ILR, pp. 446, 453, where jurisdiction was not at issue, and *Cameroon* v. *Nigeria*, ICJ Reports, 1996, pp. 13, 21, where it was. The Court in *Application of the Genocide Convention (Bosnia* v. *Yugoslavia)*, ICJ Reports, 1993, pp. 3, 12; 95 ILR, pp. 1, 27, declared that jurisdiction included both jurisdiction *ratione personae* and jurisdiction *ratione materiae*. Note that Jiménez de Aréchega, a former President of the Court, has written that 'interim measures will not be granted unless a majority of judges believes at the time that there will be jurisdiction over the merits', 'International Law in the Past Third of a Century', 159 HR, 1978 I, pp. 1, 161.

[239] The *Pulp Mills (Argentina* v. *Uruguay)* case, Provisional Measures, Order of 23 January 2007, ICJ Reports, 2007, para. 24.

protection is being sought in the request for the indication of provisional measures has no bearing, this being addressed once the Court's *prima facie* jurisdiction over the merits of the case has been established.[240]

The Court, when considering a request for the indication of provisional measures, 'must be concerned to preserve . . . the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent',[241] without being obliged at that stage of the proceedings to rule on those rights.[242] Thus, the purpose of exercising the power is to protect 'rights which are the subject of dispute in judicial proceedings'[243] and thus the measures must be such that once the dispute over those rights has been resolved by the Court's judgment on the merits, they would no longer be required.[244] These are awarded to assist the Court to ensure the integrity of the proceedings. Such interim measures were granted by the Court in the *Fisheries Jurisdiction* case,[245] to protect British fishing rights in Icelandic-claimed waters, and again in the *Nuclear Tests* case.[246] In the *Fisheries Jurisdiction* case, the Court emphasised that article 41 presupposes 'that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings'.[247] However, it was noted in the *Lockerbie* case[248] that the measures requested by Libya 'would be likely to impair the rights which appear *prima facie* to be enjoyed by the United Kingdom by virtue of Security Council resolution 748 (1992)'. The Court has also stated that its power to indicate provisional measures can

240 *Ibid.*, para. 25.

241 *Cameroon* v. *Nigeria*, Provisional Measures, Order of 15 March 1996, ICJ Reports, 1996 (I), p. 22, para. 35.

242 The *Avena (Mexico* v. *USA)* case, Provisional Measures, Order of 5 February 2003, ICJ Reports, 2003, pp. 77, 89; 134 ILR, pp. 104, 115.

243 The *Aegean Sea Continental Shelf* case, ICJ Reports, 1976, pp. 3, 9; 60 ILR, pp. 524, 530 and the *Iranian Hostages* case, ICJ Reports, 1979, pp. 7, 19; 61 ILR, pp. 513, 525. See also the *Arbitral Award of 31 July 1989* case, ICJ Reports, 1990, pp. 64, 69; 92 ILR, pp. 9, 14.

244 *Arbitral Award of 31 July 1989* case, ICJ Reports, 1990, p. 69; 92 ILR, pp. 9, 14.

245 ICJ Reports, 1972, p. 12; 55 ILR, p. 160. See also the *Anglo-Iranian Oil Co.* case, ICJ Reports, 1951, p. 89; 19 ILR, p. 501.

246 ICJ Reports, 1973, p. 99; 57 ILR, p. 360. They were also granted in the *Iranian Hostages* case, ICJ Reports, 1979, pp. 7, 19; 61 ILR, pp. 513, 525 and in the *Nicaragua* case, ICJ Reports, 1980, p. 169; 76 ILR, p. 35. See also the *Great Belt* case, ICJ Reports, 1991, p. 12; 94 ILR, p. 446, *Application of the Genocide Convention (Bosnia* v. *Yugoslavia)*, ICJ Reports, 1993, pp. 3 and 325; 95 ILR, p. 1, and the *Cameroon* v. *Nigeria* case, ICJ Reports, 1996, p. 13. See also the *LaGrand* case, ICJ Reports, 1999, p. 9; 118 ILR, p. 37.

247 ICJ Reports, 1972, pp. 12, 16, 30, 34; 55 ILR, pp. 160, 164; 56 ILR, pp. 76, 80. See also the *Iranian Hostages* case, ICJ Reports, 1979, pp. 7, 19; 61 ILR, p. 525, *Application of the Genocide Convention (Bosnia* v. *Yugoslavia)*, ICJ Reports, 1993, pp. 3, 19; 95 ILR, pp. 1, 34 and *Cameroon* v. *Nigeria*, ICJ Reports, 1996, pp. 13, 21–2.

248 ICJ Reports, 1992, pp. 3, 15; 95 ILR, pp. 478, 498.

be exercised only if there is an 'urgent necessity to prevent irreparable prejudice to such rights, before the Court has given its final decision'[249] and that 'the sound administration of justice requires that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time'.[250]

Provisional measures or recommendations or statements as to relevant international obligations may also be indicated or made by the Court, independently of requests by the parties, with a view to preventing 'the aggravation or extension of the dispute whenever it considers that circumstances so require'.[251] In *Cameroon* v. *Nigeria*, the Court referred explicitly not only to the rights of each party, but also by calling on the parties to observe an agreement reached for cessation of hostilities, to take all necessary steps to preserve relevant evidence in the disputed area and to co-operate with a proposed UN fact-finding mission.[252] The Court also took care to link with the rights of the parties that were being protected the danger to persons within the disputed area.[253]

The question of the legal effects of orders indicating provisional measures was discussed and decided by the Court for the first time in the *LaGrand* case. The Court addressed the issue in the light of the object and purpose of the Statute[254] which was to enable it to fulfil its functions and in particular to reach binding decisions. The Court declared that:

> The context in which article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court

[249] See e.g. the*Great Belt (Finland* v. *Denmark)* case, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, pp. 12, 17; *Republic of the Congo* v. *France*, Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, p. 107, para. 22 and the *Pulp Mills (Argentina* v. *Uruguay)* case, Provisional Measures, Order of 23 January 2007, ICJ Reports, 2007, para. 32. See also *Cameroon* v. *Nigeria*, ICJ Reports, 1996, pp. 13, 22 and the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2003, pp. 77, 90; 134 ILR, pp. 104, 116.

[250] The *LaGrand (Germany* v. *USA)* case, Provisional Measures, Order of 3 March 1999, ICJ Reports, 1999 (I), p. 14, para. 19; 118 ILR, p. 44.

[251] *Cameroon* v. *Nigeria*, ICJ Reports, 1996, pp. 13, 23. See also the *Burkina Faso/Mali* case, ICJ Reports, 1986, pp. 3, 9; 80 ILR, pp. 440, 456 and the *Pulp Mills (Argentina* v. *Uruguay)* case, Provisional Measures, Order of 23 January 2007, ICJ Reports, 2007, paras. 49 and 53.

[252] See the *dispositif*, ICJ Reports, 1996, pp. 13, 24–5.

[253] *Ibid*., p. 23. See also J. D'Aspremont, 'The Recommendations Made by the International Court of Justice', 56 ICLQ, 2007, p. 185. Note that the Court may make such recommendations even where it refuses to grant an order for provisional measures.

[254] Referring to article 33(4) of the Vienna Convention on the Law of Treaties, 1969, which the Court noted reflected customary law, ICJ Reports, 2001, pp. 466, 506.

> are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of article 41 when read in this context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the right of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under article 41 might not be binding would be contrary to the object and purpose of that article.[255]

This clear and unanimous decision that provisional measures orders are binding until judgment on the merits is likely to have a significant impact.[256]

Counter-claims[257]

Article 80 of the Rules of Court provides that the Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and 'is directly connected with the subject-matter of the claim of the other party'.[258] A counter-claim constitutes a separate claim, or 'autonomous legal act', while requiring to be linked to the principal claim.[259] It goes beyond a mere defence on the merits to the principal claim, but cannot be used as a means of referring to a court claims which exceed the limits of its jurisdiction as recognised by the parties.[260] The Rule does not define what is meant by direct connection and this is a matter for the discretion of the

[255] *Ibid*., pp. 502–3. The Court also referred to a related reason, the principle that parties to a case must abstain from any measure capable of exercising a prejudicial effect regarding the execution of the decision to be given and not to allow any step to be taken which might aggravate or extend the dispute, citing the *Electricity Company of Sofia and Bulgaria*, PCIJ, Series A/B, No. 79, p. 199, *ibid*., p. 503. The Court also noted that the preparatory work leading to the adoption of article 41 did not preclude the conclusion that orders under that article have binding force, *ibid*., pp. 503 ff.

[256] See *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 258 and the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, paras. 452 and 468.

[257] See e.g. Rosenne, *Law and Practice*, vol. III, p. 1232, and Rosenne, 'Counter-Claims in the International Court of Justice Revisited' in *Liber Amicorum Judge Ruda* (eds. C. A. Armas *et al.*), The Hague, 2000, p. 457.

[258] As revised in 2000. One major difference from the text of the previous Rule 80 is to emphasise the role of the Court. See Rosenne, 'Revision', p. 83. The Rule also provides that 'a counter-claim shall be made in the Counter-Memorial and shall appear as part of the submissions contained therein. The right of the other party to present its views in writing on the counter-claim, in an additional pleading, shall be preserved, irrespective of any decision of the Court, in accordance with Article 45, paragraph 2, of these Rules, concerning the filing of further written pleadings.'

[259] *Application of the Genocide Convention (Counter-Claims)*, ICJ Reports, 1997, pp. 243, 256.

[260] *Ibid*., p. 257.

Court, which has noted that 'the degree of connection between the claims must be assessed both in fact and in law'.[261] The direct connection of facts has been referred to in terms of 'facts of the same nature . . . [that] form part of the same factual complex'[262] while in the *Application of the Genocide Convention* case the direct connection of law appeared in that both parties sought the same legal aim, being the establishment of legal responsibility for violations of the Genocide Convention.[263] In the *Oil Platforms (Iran* v. *USA)* case, the Court held that it was open to the parties to challenge the admissibility of counter-claims in general at the merits stage of the proceedings, even though the counter-claims had previously been found admissible. That was because the earlier incidental proceedings were concerned only with the question of whether the requirements of article 80 of the Rules had been complied with, i.e. that the counter-claim is directly connected with the subject-matter of the principal claim. A more general challenge, going beyond the terms of article 80, was therefore possible at the merits stage.[264]

Third-party intervention[265]

There is no general right of intervention in cases before the Court by third parties as such, nor any procedure for joinder of new parties by the

[261] *Ibid*., p. 258. See also the *Oil Platforms (Iran* v. *USA) (Counter-Claims)*, case, ICJ Reports, 1998, pp. 190, 204–5. The Court has also noted that counter-claims do not have to rely on identical instruments to meet the 'connection' test of article 80: see *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 275.

[262] See *Application of the Genocide Convention (Counter-Claims)*, ICJ Reports, 1997, pp. 243, 258 and *Cameroon* v. *Nigeria*, International Court of Justice, Order of 30 June 1999. See also the *Oil Platforms (Iran* v. *USA) (Counter-Claims)* case, ICJ Reports, 1998, pp. 190, 205; *Democratic Republic of the Congo* v. *Uganda (Counter-Claims)*, Order of 29 November 2001, ICJ Reports, 2001, p. 664 and *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 259 ff.

[263] *Application of the Genocide Convention (Counter-Claims)*, ICJ Reports, 1997, pp. 243, 258. In *Cameroon* v. *Nigeria*, the 'same legal aim' was the establishment of legal responsibility for frontier incidents, International Court of Justice, Order of 30 June 1999. See also the *Oil Platforms (Iran* v. *USA) (Counter-Claims)* case, ICJ Reports, 1998, pp. 190, 205.

[264] ICJ Reports, 2003, pp. 161, 210. See also *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 261.

[265] See e.g. Rosenne, *Law and Practice*, vol. III, chapter 26, and Rosenne, *Intervention in the International Court of Justice*, Dordrecht, 1993; J. M. Ruda, 'Intervention Before the International Court of Justice' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 487; C. M. Chinkin, 'Third Party Intervention Before the International Court of Justice', 80 AJIL, 1986, p. 495; Elias, *International Court*, chapter 4, and P. Jessup, 'Intervention in the International Court', 75 AJIL, 1981, p. 903. See also articles 81–6 of the Rules of Court 1978.

Court itself, nor any power by which the Court can direct that third states be made a party to proceedings.[266] However, under article 62 of the Statute of the ICJ, any state which considers that it has an interest of a legal nature which may be affected by the decision in a case, may submit a request to be permitted to intervene,[267] while under article 63, where the construction of a convention to which states other than those concerned in the case are parties is in question,[268] the Registrar of the Court shall notify all such states forthwith. Every state so notified has the right to intervene in the proceedings.[269]

Essentially, the Court may permit an intervention by a third party even though it be opposed by one or both of the parties to the case. The purpose of such intervention is carefully circumscribed and closely defined in terms of the protection of a state's interest of a legal nature which may be affected by a decision in an existing case, and accordingly intervention cannot be used as a substitute for contentious proceedings, which are based upon consent. Thus the intervener does not as such become a party to the case.[270]

The Court appeared to have set a fairly high threshold of permitted intervention. In the *Nuclear Tests* case,[271] Fiji sought to intervene in the dispute between France on the one hand and New Zealand and Australia on the other, but the Court postponed consideration of this and, after its judgment that the issue was moot, it was clearly unnecessary to take any further steps regarding Fiji. Malta sought to intervene in the *Tunisia/Libya Continental Shelf* case[272] in the light of its shelf delimitation dispute with Libya in order to submit its views to the Court. The Court felt that the real purpose of Malta's intervention was unclear and

[266] See the *Libya/Malta* case, ICJ Reports, 1984, p. 25; 70 ILR, p. 527, and the *Nicaragua* case, ICJ Reports, 1984, p. 431; 76 ILR, p. 104.

[267] See C. Chinkin, 'Article 62' in Zimmermann *et al.*, *Statute of the International Court*, p. 1331. See also article 81 of the Rules of Court. It is for the Court itself to decide upon any request for permission to intervene: see the *Tunisia/Libya (Intervention)* case, ICJ Reports, 1981, pp. 3, 12; 62 ILR, p. 608.

[268] See here the *SS Wimbledon* case, PCIJ, Series A, No. 1 (1923); 2 AD, p. 4; the *Haya de la Torre* case, ICJ Reports, 1951, pp. 71, 76–7; 18 ILR, pp. 349, 356–7, and the *Nicaragua* case, ICJ Reports, 1984, pp. 215–16; 76 ILR, pp. 74–5. See also C. Chinkin, 'Article 63' in Zimmermann *et al.*, *Statute of the International Court*, p. 1369.

[269] See the *Wimbledon* case, PCIJ, Series A, No. 1 (1923), pp. 9–13, and the *Haya de la Torre* case, ICJ Reports, 1951, p. 71; 18 ILR, p. 349.

[270] *El Salvador/Honduras (Intervention)*, ICJ Reports, 1990, pp. 92, 134–5; 97 ILR, p. 112. See also E. Lauterpacht, *Aspects*, pp. 26 ff.

[271] ICJ Reports, 1974, p. 253; 57 ILR, p. 398.

[272] ICJ Reports, 1982, p. 18; 67 ILR, p. 4.

did not relate to any legal interest of its own directly in issue as between Tunisia and Libya in the proceedings or as between itself and either one of those countries.[273] While Malta did have an interest similar to other states in the area in the case in question, the Court said[274] that in order to intervene under article 62 it had to have an interest of a legal nature which might be affected by the Court's decision in the instant case.

However, the Court granted permission for the very first time in the history of both the ICJ and its predecessor to a third state intervening under article 62 of the Statute to Nicaragua in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*. The Court held unanimously that Nicaragua had demonstrated that it had an interest of a legal nature which might be affected by part[275] of the judgment of the Chamber on the merits of the case.[276] The intervening state does not need to demonstrate a basis of jurisdiction, since the competence of the Court is here not founded upon the consent of the parties as such but is rather derived from the consent given by the parties in becoming parties to the Court's Statute to the Court's exercise of its powers conferred by the Statute.[277] The purpose of intervention, it was emphasised, was to protect a state's 'interest of a legal nature' that might be affected by a decision in an existing case already established between other states, the parties to the case, and not to enable a third state to 'tack on a new case'.[278]

[273] ICJ Reports, 1981, pp. 3, 12; 62 ILR, pp. 612, 621.

[274] ICJ Reports, 1981, p. 19; 62 ILR, p. 628. The Court also refused Italy permission to intervene under article 62 in the *Libya/Malta* case: see ICJ Reports, 1984, p. 3; 70 ILR, p. 527. The Court also refused permission to El Salvador to intervene in the *Nicaragua* case under article 63: see ICJ Reports, 1984, p. 215; 76 ILR, p. 74, inasmuch as it related to the current phase of the proceedings. The Court here more controversially also refused to hold a hearing on the issue, *ibid.*, but see Separate Opinion of five of the judges, ICJ Reports, 1984, p. 219; 76 ILR, p. 78.

[275] I.e. concerning the legal regime of the waters within the Gulf of Fonseca only and not the other issues in dispute, such as maritime delimitations and delimitation of the land frontier between El Salvador and Honduras.

[276] ICJ Reports, 1990, p. 92; 97 ILR, p. 112.

[277] ICJ Reports, 1990, p. 133; 97 ILR, p. 254. The Court noted that 'the procedure of intervention is to ensure that a state with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party', ICJ Reports, 1990, p. 135, 97 ILR, p. 256. In the earlier cases it was not felt necessary to decide this issue: see e.g. the *Tunisia/Libya* case, ICJ Reports, 1981, pp. 3, 20; 62 ILR, pp. 612, 629, and the *Libya/Malta* case, ICJ Reports, 1984, pp. 3, 28; 70 ILR, pp. 527, 557.

[278] ICJ Reports, 1990, pp. 133–4.

The Court in *Cameroon* v. *Nigeria*, repeating the formulation adopted in *El Salvador/Honduras*,[279] stated that it followed from the juridical nature and purpose of intervention that the existence of a valid link of jurisdiction between the intended intervener and the parties was not a requirement for the success of the application. Indeed, 'the procedure of intervention is to ensure that a state with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party'.[280] A jurisdictional link between the intervening state and the parties to the case is, accordingly, only necessary where the former wishes actually to become a party to the case.[281]

In *Indonesia/Malaysia (Philippines Intervening)*, the Court addressed the meaning of 'interest of a legal nature' and concluded that it referred not only to the *dispositif*, or the operative paragraphs, of the judgment but also to the reasons constituting the necessary steps to it.[282] In deciding whether to permit an intervention, the Court had to decide in relation to all the circumstances of the case, whether the legal claims which the proposed intervening state has outlined might indeed be affected by the decision in the case between the parties. The state seeking to intervene had to 'demonstrate convincingly what it asserts'[283] and where the state relies on an interest of a legal nature other than in the subject matter of the case itself, it 'necessarily bears the burden of showing with a particular clarity the existence of the interest of a legal nature which it claims to have'.[284]

The Court in the merits stage of the *El Salvador/Honduras* case,[285] noting that Nicaragua as the intervening state could not thereby as such become a party to the proceedings, concluded that that state could not therefore

[279] *Ibid.*, p. 135. [280] ICJ Reports, 1999, pp. 1034–5.

[281] *El Salvador/Honduras (Intervention)*, ICJ Reports, 1990, pp. 92, 135; 97 ILR, p. 112.

[282] ICJ Reports, 2001, pp. 575, 596.

[283] *El Salvador/Honduras (Intervention)*, ICJ Reports, 1990, pp. 92, 117–18; 97 ILR, p. 112. And, on the basis of documentary evidence, see *Indonesia/Malaysia (Philippines Intervening)*, ICJ Reports, 2001, pp. 575, 603. As to the burden and scope of proof generally, see above, p. 1088.

[284] *Indonesia/Malaysia (Philippines Intervening)*, ICJ Reports, 2001, pp. 575, 598. The Court concluded that the Philippines had shown in the instruments it had invoked 'no legal interest on its part that might be affected by reasoning or interpretations of the Court in the main proceedings, either because they form no part of the arguments of Indonesia and Malaysia or because their respective reliance on them does not bear on the issue of retention of sovereignty by the Sultanate of Sulu as described by the Philippines in respect of its claim in North Borneo', *ibid.*, pp. 603–4.

[285] ICJ Reports, 1992, pp. 351, 609; 97 ILR, pp. 266, 525.

become bound by the judgment.[286] The intervener upon obtaining permission from the Court to intervene acquires the right to be heard, but not the obligation of being bound by the decision.[287] Since neither of the parties had given any indication of consent to Nicaragua being recognised to have any status which would enable it to rely on the judgment,[288] it followed that the decision of the Court could not bind Nicaragua and thus was not *res judicata* for it.[289]

Applications to intervene have to be filed 'as soon as possible, and not later than the closure of the written proceedings'.[290]

Remedies[291]

There has been relatively little analysis of the full range of the remedial powers of the Court.[292] In the main, an applicant state will seek a declaratory judgment that the respondent has breached international law. Such declarations may extend to provision for future conduct as well as characterisation of past conduct. Requests for declaratory judgments may also be coupled with a request for reparation for losses suffered as a consequence of the illegal activities or damages for injury of various kinds, including non-material damage.[293] Such requests for damages may include not only direct injury to the state in question but also with regard to its citizens or their property.[294] The Court may also interpret a relevant international

[286] This was partly because article 59 of the Statute of the Court refers to the binding effect of a judgment as between the parties only, ICJ Reports, 1992, p. 609; 97 ILR, p. 525.

[287] ICJ Reports, 1992, p. 610; 97 ILR, p. 526.

[288] Since the consent of the existing parties is required for an intervener to become itself a party to the case, *ibid*.

[289] *Ibid*.

[290] Rule 81(1). See also *Indonesia/Malaysia (Philippines Intervening)*, ICJ Reports, 2001, pp. 575, 584 ff.

[291] See also above, chapter 14, p. 800.

[292] But see e.g. Gray, *Judicial Remedies*, and I. Brownlie, 'Remedies in the International Court of Justice' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 557. Note that the Court has stated that 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: see the *LaGrand (Germany* v. *USA)* case, ICJ Reports, 2001, pp. 466, 485; 134 ILR, pp. 1, 24, and the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 33; 134 ILR, pp. 120, 136–7.

[293] See e.g. the *I'm Alone* case, 3 RIAA, 1935, p. 1609 and the *Rainbow Warrior* case, 74 ILR, pp. 241, 274 and 82 ILR, pp. 499, 575. See also *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 279.

[294] Note that the Bosnian application to the Court in the *Application of the Genocide Convention (Bosnia* v. *Yugoslavia)* case included a claim 'to pay Bosnia and Herzegovina, in

legal provision so that individual rights as well as state rights are recognised in a particular case, thus opening the door to a claim for damages on behalf of the former by the national state where there has been a breach of such rights.[295] Reparation may conceivably extend to full restitution, or *restitutio in integrum*.[296] The Court in the *Great Belt* case allowed for the possibility of an order for the modification or dismantling of disputed works.[297] The question of restitution also arose in the *Democratic Republic of the Congo* v. *Belgium* case, where the Court concluded that Belgium was under an obligation to cancel the arrest warrant concerned on the basis of the need for restitution.[298]

The issue of reparation was also raised in the *Gabčíkovo–Nagymaros Project* case,[299] where the Court concluded that both parties had committed internationally wrongful acts and that therefore both parties were entitled both to receive and to pay compensation. In the light of such 'intersecting wrongs', the Court declared that the issue of compensation could be satisfactorily resolved in the framework of an overall settlement by the mutual renunciation or cancellation of all financial claims and counter-claims.[300] The parties may also request the Court's assistance with regard to matters yet to be decided between the parties. Accordingly, in the *Gabčíkovo–Nagymaros Project* case, the Court, having reached its decision on the past conduct of the parties, proceeded in its judgment to exercise its prescriptive competence, that is 'to determine what the future conduct of the Parties should be'.[301]

its own right and as *parens patriae* for its citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court', ICJ Reports, 1993, pp. 3, 7; 95 ILR, p. 1.

[295] See the *LaGrand* case, ICJ Reports, 2001, pp. 466, 514 ff.; 134 ILR, pp. 1, 53, paras. 3 and 4 of the *dispositif* contained in paragraph 128 of the judgment.

[296] See the *Chorzów Factory* case, PCIJ, Series A, No. 13, and the *Iranian Hostages* case, ICJ Reports, 1980, p. 4; 61 ILR, p. 502, for possible authority for such a power. See also Gray, *Remedies*, pp. 95–6.

[297] ICJ Reports, 1991, pp. 12, 19; 94 ILR, p. 446.

[298] ICJ Reports, 2002, pp. 3, 31–2; 128 ILR, pp. 60, 87–8. But see the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, which expressed the view that 'As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased', *ibid.*, pp. 89–90. See also the Dissenting Opinion of Judge Van den Wyngaert, *ibid.*, p. 183.

[299] ICJ Reports, 1997, pp. 7, 81 ff.; 116 ILR, p. 1.

[300] *Ibid.*, pp. 7, 80–1

[301] *Ibid.*, pp. 75–6. The Court concluded that, 'It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses', *ibid.*, p. 78.

The Court may also refer to, and thus incorporate in its judgment, a statement of one of the parties, and in effect treat it as a binding unilateral statement. In the *LaGrand* case, the Court noted the 'substantial activities' that the US declared that it was carrying out in order to comply with the Convention in question and concluded that such behaviour 'expresses a commitment to follow through with the efforts in this regard' and must be regarded as meeting Germany's request for a general assurance of non-repetition.[302] In *Cameroon* v. *Nigeria*, the Court referred, both in the text of its judgment and in the *dispositif*, to a statement of the Cameroonian Agent as to the treatment of Nigerians living in his country and stated that it took note with satisfaction of the 'commitment thus undertaken'.[303]

The Court took a further step when, in the *LaGrand* case, it referred to the 'obligation . . . to review' of the US in cases of conviction and death sentence imposed upon a foreign national whose rights under the Vienna Convention on Consular Relations had not been respected,[304] while in operative paragraph (7) of the *dispositif*, the Court, by a majority of fourteen votes to one, concluded that in such situations, '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 violation of the rights set forth in that Convention'.[305]

Where the Court reserves the question of reparation to a later stage of proceedings, neither party may call in question such findings of the Court in the earlier judgment as have become *res judicata* and seek to re-litigate these findings. Where the parties seek to negotiate a resolution by direct negotiations, the Court has emphasised that such negotiations have to be

[302] ICJ Reports, 2001, pp. 466, 512–13 and 513–14; 134 ILR, pp. 1, 50–1 and 51–2. See also the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 69; 134 ILR, pp. 120, 172.

[303] ICJ Reports, 2002, pp. 303, 452 and 457, para. V(C) of the *dispositif.*

[304] ICJ Reports, 2001, pp. 466, 514; 134 ILR, pp. 1, 51–2. See also above, chapter 13, p. 773.

[305] ICJ Reports, 2001, pp. 466, 514 ff.; 134 ILR, pp. 1, 51 ff. But see R. Y. Jennings, 'The *LaGrand* Case', 1 *The Law and Practice of International Courts and Tribunals*, 2002, pp. 1, 40. See also the *Avena (Mexico* v. *USA)* case, ICJ Reports, 2004, pp. 12, 69–70, where the Court emphasised as an 'important point' that it had been addressing issues of principle with regard to the Vienna Convention on Consular Relations and that its comments with regard to Mexican nationals, the subject of the application, could not be taken to mean that the principles did not apply to all foreign nationals in the US in a similar position. The Court also concluded that it was for the United States to find an appropriate remedy with regard to the individuals in question having the nature of review and reconsideration according to the criteria indicated in the judgment, *ibid.*, p. 70. See as to the response of the US and relevant US case-law, above, chapter 4, p. 164, n. 178. See also the Request for the Interpretation of the *Avena* judgment, Provisional Measures, ICJ Reports, Order of 16 July 2008.

conducted in good faith and in order to find an agreed solution based on the findings of the judgment of the Court in question.[306]

Enforcement

Once given, the judgment of the Court under article 60 is final and without appeal. Although it has no binding force except between the parties and in respect of the particular case under article 59, such decisions are often very influential in the evolution of new rules of international law.[307] The Court itself is not concerned with compliance and takes the view that 'once the Court has found that a state has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it'.[308]

Under article 94 of the UN Charter, each member state undertakes to comply with the decision of the Court in any case to which it is a party and if this does not occur, the other party may have recourse to the Security Council which may make recommendations or take binding decisions. Examples of non-compliance would include Albania in the *Corfu Channel* case,[309] Iceland in the *Fisheries Jurisdiction* case[310] and Iran in the *Iranian Hostages* case.[311] However, since the 1990s the record of compliance has been generally good. For example, despite initial reservations, both Libya[312] and Nigeria[313] accepted the judgments of the Court in favour of their opponents in the litigation in question. The political costs of non-compliance have to be taken into account by potentially recalcitrant states.[314]

[306] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 257.

[307] See generally Shahabuddeen, *Precedent*.

[308] The *Nuclear Tests* case, ICJ Reports, 1974, p. 477.

[309] ICJ Reports, 1949, p. 4; 16 AD, p. 155.

[310] ICJ Reports, 1974, p. 3; 55 ILR, p. 238.

[311] ICJ Reports, 1980, p. 3; 61 ILR, p. 530. During the 1970s and part of the 1980s there was reluctance by some respondent states to appear before the Court at all: see e.g. the *Fisheries Jurisdiction* case, ICJ Reports, 1974, p. 3; 55 ILR, p. 238; the *Nuclear Tests* case, ICJ Reports, 1974, p. 253; 57 ILR, p. 350; the *Iranian Hostages* case, ICJ Reports, 1980, p. 3; 61 ILR, p. 530 and the *Nicaragua* case, ICJ Reports, 1986, p. 14. See also article 53 of the Statute and H. Thirlway, *Non-Appearance before the International Court of Justice*, Cambridge, 1985; G. G. Fitzmaurice, 'The Problem of the "Non-appearing" Defendant Government', 51 BYIL, 1980, p. 89, and J. Elkind, *Non-Appearance before the ICJ, Functional and Comparative Analysis*, Dordrecht, 1984.

[312] See the *Libya/ Chad* case, ICJ Reports, 1994, p. 40. See also above, chapter 18, p. 1011.

[313] *Cameroon* v. *Nigeria*, ICJ Reports, 2002, p. 303.

[314] See e.g. C. Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987', 98 AJIL, 2004, p. 434, and A. P. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', 18 EJIL, 2007, p. 815.

Application for interpretation of a judgment[315]

Article 60 of the Statute provides that, 'The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.' Rule 98(1) states that in the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation. The object of the request must be solely to obtain clarification of the meaning and the scope of what the Court has decided with binding force and not to obtain an answer to questions not so decided.[316] Accordingly, a request for interpretation must relate to the operative part of the judgment and not the reasons for the judgment, unless these are inseparable from the operative part.[317] The need to avoid impairing the finality, and delaying the implementation, of judgments means that the question of the admissibility of the request needs 'particular attention'.[318]

In addition, it is necessary that there should exist a dispute as to the meaning or scope of the judgment as to which see the Request for the Interpretation of the *Avena* judgment, Provisional Measures, order of 16 July 2008, paras. 44 ff.).

Application for revision of a judgment[319]

Under article 61 of the Statute, an application for revision of a judgment may only be made when based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision,

[315] See e.g. Rosenne, *Law and Practice*, vol. III, pp. 1616 ff., and Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards*, Leiden, 2007, and K. H. Kaikobad, *Interpretation and Revision of International Boundary Decisions*, Cambridge, 2007, part III. See also A. Zimmermann and T. Thienel, 'Article 60' in Zimmermann *et al.*, *Statute of the International Court*, p. 1275.

[316] See *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum* case, ICJ Reports, 1950, p. 402; 17 ILR, p. 339 and *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libya)*, ICJ Reports, 1985, pp. 191, 214–20; 81 ILR, pp. 420, 447.

[317] See *Request for Interpretation of the Judgment of 11 June 1998 (Cameroon* v. *Nigeria)*, ICJ Reports, 1999, pp. 31, 35.

[318] *Ibid.*, p. 36. The Court noted that, 'The language and structure of article 60 of the Statute reflect the primacy of the principle of *res judicata*. That principle must be maintained', *ibid*. As to *res judicata*, see above, p. 101.

[319] See e.g. Rosenne, *Law and Practice*, vol. III, pp. 1623 ff., and Rosenne, *Interpretation*, chapter 6, and Kaikobad, *Interpretation and Revision*, part IV. See also A. Zimmermann and R. Geiss, 'Article 61' in Zimmermann *et al.*, *Statute of the International Court*, p. 1299.

provided that such ignorance was not due to negligence. The application must be made within six months of the discovery of the new fact and within ten years of the date of the judgment. In the *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libya)*,[320] the Court decided that the 'new fact' in question, namely the text of a resolution of the Libyan Council of Ministers of 28 March 1968 setting out the western boundary of the Libyan oil concessions in the first sector of the delimitation, was a fact that could have been discovered through the application of normal diligence. If Tunisia was ignorant of the facts, it was due to its own negligence.[321] In addition, it could not be said that the new facts alleged were of such a nature as to be a decisive factor as required by article 61.[322] In the *Application for Revision of the Judgment of 11 July 1996 Concerning Application of the Genocide Convention (Preliminary Objections)*, the Court noted that the first stage of the procedure was to examine the question of admissibility of the request.[323] The Court emphasised that article 61 required that the application for revision be based upon the discovery of some fact which was unknown when the judgment was given. Thus the fact must have been in existence at the date of the judgment and discovered subsequently. A fact occurring several years after the judgment would not be regarded as 'new'.[324] Drawing legal consequences from post-judgment facts or reinterpreting a legal situation *ex post facto* would not fall within the terms of article 61. In the *Application for Revision of the Judgment of 11 September 1992 Concerning the El Salvador/Honduras (Nicaragua Intervening) Case*,[325] El Salvador sought revision of one sector of the land boundary between it and Honduras that had been determined by the Court in the earlier judgment. The Court detailed the requirements of article 61,[326]

320 ICJ Reports, 1985, pp. 191, 198–214; 81 ILR, p. 431.

321 ICJ Reports, 1985, pp. 206–7; 81 ILR, p. 439.

322 ICJ Reports, 1985, pp. 213–14; 81 ILR, p. 446.

323 ICJ Reports, 2003, pp. 7, 11. See also the *Application for Revision of the Judgment of 11 September 1992 Concerning the El Salvador/Honduras (Nicaragua Intervening) Case*, ICJ Reports, 2003, pp. 392, 398. The latter case is the first article 61 judgment by a chamber. See e.g. M. N. Shaw, 'Application for Revision of the Judgment of 11 September 1992', 54 ICLQ, 2005, p. 999.

324 ICJ Reports, 2003, pp. 7, 30.

325 ICJ Reports, 2003, pp. 392, 398–9.

326 The application should be based upon the 'discovery' of a 'fact'; the fact the discovery of which is relied on must be 'of such a nature as to be a decisive factor'; the fact should have been 'unknown' to the Court and to the party claiming revision when the judgment was given; ignorance of this fact must not be 'due to negligence'; and the application for revision must be 'made at latest within six months of the discovery of the new fact' and before ten years have elapsed from the date of the judgment.

and held that each of the conditions laid down in the provision had to be fulfilled, otherwise the application would be dismissed.[327]

Examination of a situation after the judgment

The Court may have the competence to re-examine a situation dealt with by a previous decision where the terms of that decision so provide. This is likely to be rare for it runs the risk of allowing the parties to re-litigate an issue already decided simply because some of the circumstances have changed. In the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v. *France) Case*,[328] the Court was asked to act in accordance with paragraph 63 of its 1974 decision in the light of further proposed French nuclear tests in the South Pacific. Paragraph 63 had noted that 'if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute'.[329] The 1974 judgment had concluded that there was no need for a decision on New Zealand's claims with regard to French nuclear testing as France had undertaken not to carry out any further atmospheric nuclear testing.

The Court implicitly accepted that 'a special procedure' in the sense of a re-examination of a situation in the light of changed circumstances could be established as a result of the terms of the original decision which did not amount to either an interpretation of the judgment under article 60 or a revision of the judgment under article 61.[330] Such a procedure would in fact have the aim not of seeking changes in the original judgment, but rather of preserving it intact faced with an apparent challenge to it by one of the parties at a later date. As Judge Weeramantry noted, '[t]he Court used its undoubted powers of regulating its own procedure to devise a procedure *sui generis*'.[331] However, in the instant case, the Court found that the basis of its 1974 judgment was a French undertaking not to conduct any further atmospheric nuclear tests and that therefore it was only a resumption of nuclear testing in the atmosphere that would affect the

[327] ICJ Reports, 2003, pp. 392, 399 and 404.

[328] ICJ Reports, 1995, p. 288; 106 ILR, p. 1.

[329] ICJ Reports, 1974, p. 477.

[330] *Ibid.*, pp. 303–4. Judge Weeramantry noted that the request for an examination of the situation was 'probably without precedent in the annals of the Court' and one that did not fit in with any of the standard applications recognised by the Rules of the Court for revision or interpretation of a judgment, *ibid.*, p. 320.

[331] *Ibid.*, p. 320.

basis of that judgment and that had not occurred.[332] Accordingly, New Zealand's request for an examination of the situation was rejected.

The advisory jurisdiction of the Court[333]

In addition to having the capacity to decide disputes between states, the ICJ may give advisory opinions. Article 65 of the Statute declares that 'the Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request', while article 96 of the Charter notes that as well as the General Assembly and Security Council, other organs of the UN and specialised agencies where so authorised by the Assembly may request such opinions on legal questions arising within the scope of their activities.[334]

Unlike contentious cases, the purpose of the Court's advisory jurisdiction is not to settle, at least directly or as such, inter-state disputes, but rather to 'offer legal advice to the organs and institutions requesting the opinion'.[335] Accordingly, the fact that the question put to the Court does not relate to a specific dispute does not affect the competence of the

[332] *Ibid.*, pp. 305–6. France was proposing to undertake a series of underground nuclear tests. This it eventually did.

[333] See e.g. Rosenne, *Law and Practice*, vol. III, chapter 30; D. Negulesco, 'L'Évolution de la Procedure des Avis Consultatif de la Cour Permanente de Justice Internationale', 57 HR, 1936, p. 1; K. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice*, Leiden, 1971; M. Pomerance, *The Advisory Jurisdiction of the International Court in the League and UN Eras*, Baltimore, 1973; D. Pratap, *The Advisory Jurisdiction of the International Court*, Oxford, 1972; D. Greig, 'The Advisory Jurisdiction of the International Court and the Settlement of Disputes Between States', 15 ICLQ, 1966, p. 325; R. Higgins, 'A Comment on the Current Health of Advisory Opinions' in Lowe and Fitzmaurice, *Fifty Years of the International Court of Justice*, p. 567; G. Abi-Saab, 'On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice' in *International Law, the International Court of Justice and Nuclear Weapons* (eds. L. Boisson de Chazournes and P. Sands), Cambridge, 1999, p. 36, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 907.

[334] See J. Frowein and K. Oellers-Frahm, 'Article 65' in Zimmermann *et al.*, *Statute of the International Court*, p. 1401, and K. Oellers-Frahm, 'Article 96 UN Charter', *ibid.*, p. 181. See further as to advisory opinions which are to be recognised as binding, below, chapter 23, p. 1304.

[335] The *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 236; 110 ILR, p. 163. In the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 162–3; 129 ILR, pp. 37, 80, the Court noted that 'advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action'. It was then for the requesting organ to draw conclusions from the Court's findings.

Court, nor does it matter that the question posed is abstract in nature.[336] Similarly, the fact that a legal question also has political aspects will not deprive the Court of its jurisdiction, nor of its function, which is to assess the legality of the possible conduct of states with regard to obligations imposed upon them by international law.[337] In addressing the question put to the Court by a political organ of the UN, the Court will not have regard to the origins or the political history of the request nor to the distribution of votes with regard to the relevant resolution. The fact that any answer given by the Court might become a factor in relation to the subject matter of the request in other fora is also irrelevant in determining the appropriate response of the Court to the request for the advisory opinion.[338] Further, the lack of clarity in the drafting of the question would not deprive the Court of jurisdiction. Such uncertainty could be clarified by the Court as a matter of interpretation. Indeed, the Court may 'broaden, interpret and even reformulate the questions put', seeing its role essentially as identifying the relevant principles and rules, interpreting them and applying them, 'thus offering a reply to the question posed based on law'.[339]

Originally, the Court took the broad view that it would not exercise its advisory jurisdiction in respect of a central issue in a dispute between the parties where one of these parties refused to take part in the proceedings.[340] However, the scope of this principle, which was intended to reflect the sovereignty and independence of states, has been reduced in a number of subsequent cases before the Court, so that the presumption is that the Court, subject to jurisdictional issues, would answer a request for an advisory opinion. In the *Interpretation of Peace Treaties* case,[341] for example, which concerned the interpretation of the 1947 peace agreements with

[336] The *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 236; 110 ILR, p. 163. See also the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 154; 129 ILR, p. 37.

[337] The *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 234 and the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 155 and 159–60.

[338] The *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 236.

[339] The *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 153–4 and 160. See also the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 234.

[340] See the *Eastern Carelia* case, PCIJ, Series B, No. 5, 1923; 2 AD, p. 394. Note that the Court dealt with the consent of an interested party as a matter not of the competence or jurisdiction of the Court, but of the judicial propriety of giving an opinion: see the *Western Sahara* case, ICJ Reports, 1975, p. 25 and the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 157–8.

[341] ICJ Reports, 1950, pp. 65, 71; 17 ILR, pp. 331, 335.

Bulgaria, Hungary and Romania, it was stressed that whereas the basis of the Court's jurisdiction in contentious proceedings rested upon the consent of the parties to the dispute, the same did not apply with respect to advisory opinions. Such opinions were not binding upon anyone and were given not to the particular states but to the organs which requested them. The Court declared that 'the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the organisation, and in principle should not be refused'. Similarly, the Court emphasised in the *Reservations to the Genocide Convention* case, that the object of advisory opinions was 'to guide the United Nations in respect of its own action'. Thus, the Court would lean towards exercising its jurisdiction, despite the objections of a concerned party, where it would be providing guidance for an international body with respect to the application of an international treaty. In fact, the Court has said that only 'compelling reasons' should lead the Court to refuse to give an opinion on grounds of propriety as distinct from grounds of lack of jurisdiction.[342]

In the *Western Sahara* case,[343] the ICJ gave an advisory opinion as regards the nature of the territory and the legal ties therewith of Morocco and Mauritania at the time of colonisation, notwithstanding the objections of Spain, the administering power. The Court distinguished the case from the *Eastern Carelia* dispute on a number of grounds, the most important being that the dispute in the *Western Sahara* case had arisen within the framework of the General Assembly's decolonisation proceedings and the object of the request for the advisory opinion (by the Assembly) was to obtain from the Court an opinion which would aid the Assembly in the decolonisation of the territory.[344] Accordingly, the matter fell within the *Peace Treaties/Reservations* cases category of opinions to guide the UN.[345] The Court noted that it was the fact that inadequate material was available

[342] See e.g. the *Legality of the Threat or Use of Nuclear Weapons* case, ICJ Reports, 1996, pp. 226, 235 and the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 156 and 164.

[343] ICJ Reports, 1975, p. 12; 59 ILR, p. 14.

[344] ICJ Reports, 1975, pp. 24–5; 59 ILR, p. 42. It was also noted that in the *Eastern Carelia* case, Russia had objected to the Court's jurisdiction and was neither a member of the League (at that time) nor a party to the Statute of the PCIJ, whereas in the *Western Sahara* case, Spain was a UN member and thus a party to the Statute of the ICJ. It had therefore given its consent in general to the exercise by the Court of its advisory jurisdiction. Further, Spain's objection was to the restriction of the reference to the Court to the historical aspects of the Sahara question, *ibid.*

[345] The Court emphasised that the central core of the issue was not a dispute between Spain and Morocco, but rather the nature of Moroccan (and Mauritanian) rights at the time of colonisation, ICJ Reports, 1975, p. 27; 59 ILR, p. 44.

for an opinion that impelled the PCIJ to refuse to consider the *Eastern Carelia* issue, notwithstanding that this arose because of a refusal of one of the parties to participate in the proceedings. In the *Western Sahara* case, an abundance of documentary material was available to the Court.[346] It is therefore evident that the general rule expressed in the *Eastern Carelia* case has been to a very large extent weakened.[347] However, it would not be correct to say that it has been entirely eroded. There may indeed be circumstances where the lack of consent of an interested party may render the giving of an advisory opinion incompatible with the judicial character of the Court.[348] Further, the need to have 'sufficient information and evidence' to enable the Court to reach a judicial conclusion still remains.[349] However, the primary criterion appears to be whether the request for an advisory opinion is made with the aim of obtaining assistance in the proper exercise of the functions of the requesting organ. This poses the question as to the proper exercise of functions.[350]

In examining the question posed by the requesting organ, the Court will operate on the same basis as in contentious cases with regard to the nature of evidence, as well as the burden and standard of proof,[351] regard being had to the different purposes of contentious and advisory proceedings. In addition, the Court has a certain latitude in advisory proceedings as distinct from contentious proceedings, since it is not as such determining the rights and duties of the parties to the case but providing advice to the requesting organ as to the legal issues comprised in the question asked. That would seem to import a responsibility to provide 'a balanced opinion', taking account of the relevant context, particularly

[346] ICJ Reports, 1975, pp. 28–9; 59 ILR, p. 45. See also the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 161–2, where the Court noted the detailed information available to it from UN and other sources.

[347] See also the *Difference Relating to Immunity from Legal Process* case, ICJ Reports, 1999, pp. 62, 78–9; 121 ILR, p. 405 and the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 156–7, where the Court concluded that it had a duty to satisfy itself each time it was asked to give an advisory opinion as to the propriety of the exercise of its judicial function, by reference to the criterion of 'compelling reasons', *ibid.*, p. 157.

[348] See the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 25. See also e.g. the Separate Opinion of Judge Higgins in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 209–10.

[349] See the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 28–9.

[350] *Ibid.*, p. 210.

[351] See above, p. 1088. Note that in her Separate Opinion in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 211, 213 and 214, Judge Higgins declared *inter alia* that she found the history of the Arab–Israeli dispute as recounted by the Court 'neither balanced nor satisfactory'. See also the Separate Opinion of Judge Kooijmans, *ibid.*, p. 220.

where a dispute between states is apparent in the situation in the sense of referring to all relevant legal issues.[352]

With regard to the jurisdiction of the Court to given an opinion, article 96(2) of the Charter provides that, in addition to the Security Council and the General Assembly:

> [o]ther organs of the United Nations and specialised agencies which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

The Court in the request for an advisory opinion by the World Health Organisation on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[353] found that three conditions were required in order to found the jurisdiction of the Court in such circumstances: first, that the specialised agency in question must be duly authorised by the General Assembly to request opinions from the Court; secondly, that the opinion requested was on a legal question, and thirdly, that the question must be one arising within the scope of activities of the requesting agency.[354] The Court examined the functions of the WHO in the light of its Constitution[355] and subsequent practice, and concluded that the organisation was authorised to deal with the effects on health of the use of nuclear weapons and of other hazardous activities and to take preventive measures with the aim of protecting the health of populations in the event of such weapons being used or such activities engaged in. However, the question put to the Court, it was emphasised, concerned not the effects of the use of nuclear weapons on health, but the legality of the use of such weapons in view of their health and environmental effects. Accordingly, the Court held that the question posed in the request for the advisory opinion did not arise within the scope of activities of the organisation as defined in its Constitution.[356]

[352] ICJ Reports, 2004, p. 136. See also the Separate Opinion of Judge Kooijmans, *ibid.*, p. 223 and the Separate Opinion of Judge Owada, *ibid.*, pp. 267 ff. See generally *Agora*, 99 AJIL, 2005, p. 1.

[353] ICJ Reports, 1996, p. 66.

[354] *Ibid.*, pp. 71–2. See also the *Application for Review of Judgment No. 273* (*Mortished*) case, ICJ Reports, 1982, pp. 325, 333–4; 69 ILR, pp. 330, 344–5.

[355] See article 2(a) to (v) of the WHO Constitution adopted on 22 July 1946 and amended in 1960, 1975, 1977, 1984 and 1994.

[356] ICJ Reports, 1996, pp. 66, 75 ff.; 110 ILR, p. 1.

The advisory opinion in the *Difference Relating to Immunity from Legal Process* case was the first time the Court had received a request under article VIII, section 30, of the General Convention on the Privileges and Immunities of the UN, 1946, which allowed for recourse to the Court for an advisory opinion where a difference has arisen between the UN and a member state. The particular interest in this provision is that it stipulates that the opinion given by the Court 'shall be accepted as decisive by the parties'. The importance of advisory opinions delivered by the Court is therefore not to be underestimated.[357]

The role of the Court

There are a variety of other issues currently facing the Court. As far as access to it is concerned, it has, for example, been suggested that the power to request advisory opinions should be given to the UN Secretary-General[358] and to states and national courts,[359] while the possibility of permitting international organisations to become parties to contentious proceedings has been raised.[360] Perhaps more centrally, the issue of the relationship between the Court and the political organs of the UN, particularly the Security Council, has been raised anew as a consequence of the revitalisation of the latter in recent years and its increasing activity.[361] The Court possesses no express power of judicial review of UN activities, although it is the principal judicial organ of the organisation and has in that capacity dealt on a number of occasions with the meaning of UN

[357] Among other influential Advisory Opinions delivered by the Court are the *Reparations* case, ICJ Reports, 1949, p. 174; 16 AD, p. 318; the *Admissions* case, ICJ Reports, 1948, p. 57; 15 AD, p. 333, and the *Certain Expenses* case, ICJ Reports, 1962, p. 151; 34 ILR, p. 281. See also the *WHO–Egypt* case, ICJ Reports, 1980, p. 73; 62 ILR, p. 451; the *Administrative Tribunal* cases, ICJ Reports, 1973, p. 166; 54 ILR, p. 381; ICJ Reports, 1982, p. 325; 69 ILR, p. 330; ICJ Reports, 1987, p. 18; 83 ILR, p. 296 and the *Applicability of the Obligation to Arbitrate* case, ICJ Reports, 1988, p. 12; 82 ILR, p. 225.

[358] See e.g. Higgins, 'Current Health', p. 569, and S. Schwebel, 'Authorising the Secretary-General of the United Nations to Request Advisory Opinions', 78 AJIL, 1984, p. 4. See also UN Secretary-General, *Agenda for Peace*, New York, 1992, A/47/277, para. 38.

[359] See e.g. S. Schwebel, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts', 28 Va. JIL, 1988, p. 495, and S. Rosenne, 'Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply', 29 Va. JIL, 1989, p. 40.

[360] See e.g. D. Bowett *et al.*, *The International Court of Justice: Process, Practice and Procedures*, London, 1997.

[361] See e.g. M. Bedjaoui, *The New World Order and the Security Council*, Dordrecht, 1994. See also below, chapter 22, p. 1268.

resolutions and organs.[362] In the *Lockerbie* case,[363] the Court was faced with a new issue, that of examining the relative status of treaty obligations and binding decisions adopted by the Security Council. In its decision on provisional measures, the Court accepted that by virtue of article 103 of the UN Charter obligations under the Charter (including decisions of the Security Council imposing sanctions) prevailed over obligations contained in other international agreements.[364]

The decisions and advisory opinions of the ICJ (and PCIJ before it) have played a vital part in the evolution of international law.[365] Further, the increasing number of applications in recent years have emphasised that the Court is now playing a more central role within the international legal system than thought possible two decades ago.[366] Of course, many of the most serious of international conflicts may never come before the Court, due to a large extent to the unwillingness of states to place their vital interests in the hands of binding third-party decision-making, while the growth of other means of regional and global resolution of disputes cannot be ignored.

[362] See e.g. the *Reparation* case, ICJ Reports, 1949, p. 174; 16 AD, p. 318, concerning the legal personality of the UN, the *Certain Expenses* case, ICJ Reports, 1962, p. 151; 34 ILR, p. 281, by virtue of which the UN was able to take action which did not amount to enforcement action outside of the framework of the Security Council, thus enabling the creation of peacekeeping missions, and the *Namibia* case, ICJ Reports, 1971, p. 56; 94 ILR, p. 2, recognising the succession of the UN to the League of Nations with regard to mandated territories and enshrining the principle of self-determination within international law. See also the *East Timor* case, ICJ Reports, 1995, pp. 90, 103–4; 105 ILR, p. 226.

[363] ICJ Reports, 1992, p. 3; 94 ILR, p. 478.

[364] ICJ Reports, 1992, p. 15; 94 ILR, p. 498.

[365] Indeed the importance of the pleadings in the evolution of international law has been noted: see e.g. P. Sands, 'Pleadings and the Pursuit of International Law' in *Legal Visions of the 21st Century* (eds. A. Anghie and G. Sturges), The Hague, 1998, while dissenting opinions may also be significant: see e.g. the Dissenting Opinion of Judge Franck in the *Indonesia/Malaysia* case, ICJ Reports, 2002, p. 3. See also, as to the international bar, Shaw, 'A Practical Look at the International Court of Justice' in Evans, *Remedies*, pp. 11, 12 ff.; A. Watts, 'Enhancing the Effectiveness of Procedures of International Dispute Settlement', 5 *Max Planck Yearbook of United Nations Law*, 2001, pp. 21, 24 ff., and the Declaration of Judge Ad Hoc Cot in the '*Grand Prince*' case, International Tribunal for the Law of the Sea, 2001, p. 3; 125 ILR, p. 272.

[366] See e.g. K. Highet, 'The Peace Palace Hots Up: The World Court in Business Again?', 85 AJIL, 1991, p. 646. See also e.g. A. Pellet, 'Strengthening the Role of the International Court of Justice as the Principal Judicial Organ of the United Nations', 3 *The Law and Practice of International Courts and Tribunals*, 2004, p. 159; P. Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy', 56 ICLQ, 2007, p. 741, and R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench', 55 ICLQ, 2006, p. 791.

Proliferation of courts and tribunals

The proliferation of judicial organs on the international and regional level has been one characteristic of recent decades.[367] It has reflected the increasing scope and utilisation of international law on the one hand and an increasing sense of the value of resolving disputes by impartial third-party mechanisms on the other. It is now possible to identify an accepted international practice of turning to such mechanisms as a reasonably effective way of settling differences in a manner that is reflective of the rule of law and the growth of international co-operation. The importance of this practice to the evolution of international law is self-evident, as the development of legal rules and the creation of legal institutions with accompanying compulsory adjudication go hand in hand.

The European Court of Justice, the European Court of Human Rights, the new African Court of Human Rights and the Inter-American Court of Human Rights have been joined by the two Tribunals examining war crimes in Bosnia and Rwanda and by the new International Criminal Court.[368] In addition, the International Tribunal for the Law of the Sea is in operation[369] and a variety of other relevant mechanisms have arisen, ranging from the World Trade Organisation's Dispute Settlement provisions creating an Appellate Body[370] to administrative tribunals and economic courts.[371] Again, the work of arbitration tribunals, whether established to hear one case or a series of similar cases, is of direct relevance.

It is unclear how this may impinge upon the work of the International Court in the long run. Some take the view that proliferation will lead to inconsistency and confusion, others that it underlines the vigour and

[367] See e.g. S. Rosenne, 'The Perplexities of Modern International Law', 291 HR, 2002, pp. 13, 125; J. I. Charney, 'The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea', 90 AJIL, 1996, p. 69, and Charney, 'The Multiplicity of International Tribunals and Universality of International Law', 271 HR, 1998, p. 101; Oda, 'The International Court of Justice from the Bench', 244 HR, 1993 VII, pp. 9, 139 ff.

[368] See further above, chapters 6, 7 and 8. See also with regard to the fragmentation of international law generally, above, chapter 2, p. 65.

[369] See above, chapter 11, p. 638.

[370] See above, chapter 18, p. 1036.

[371] See e.g. the Court of Justice of the European Communities, the Economic Court of the Commonwealth of Independent States, the Court of Justice of the Common Market of Eastern and Southern Africa, and the Court of Justice of the African Union: see Y. Shany, The *Competing Jurisdictions of International Courts and Tribunals*, Oxford, 2003, p. 5. See further as to economic courts and tribunals, above, chapter 18, p. 1034, and as to non-compliance mechanisms in the field of environmental law, above, chapter 15.

relevance of international law in an era of globalisation.[372] Evidence to date suggests the latter rather than the former. Inconsistency may sometimes flow from the subject matter of the dispute or the different functions of the courts in question, but it is not necessarily fatal to the development of international law. Of particular note, and only partly because it is somewhat exceptional, has been the difference of view between the International Court on the one hand and the International Criminal Tribunal for the Former Yugoslavia and the European Court of Human Rights on the other as to the test of control for the responsibility of a state with regard to the activities of non-state organs over which influence is exercised.[373] The courts and tribunals are now regularly referring to each other's decisions,[374] and some issues of international law, such as treaty interpretation principles, are regularly discussed in a range of courts and tribunals.[375] It is also true that the same situation may arise before two or more dispute settlement mechanisms.[376]

[372] See e.g. G. Guillaume, 'The Future of International Judicial Institutions', 44 ICLQ, 1995, p. 848; S. Rosenne, 'Establishing the International Tribunal for the Law of the Sea', 89 AJIL, 1995, p. 806; T. Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?', 14 *Leiden Journal of International Law*, 2001, p. 267; R. Higgins, 'The ICJ, ECJ, and the Integrity of International Law', 52 ICLQ, 2003, pp. 1, 12 ff., and Higgins, 'A Babel of Judicial Voices?'; Shany, *Competing Jurisdictions*; F. K. Tiba, 'What Caused the Multiplicity of International Courts and Tribunals?', 10 *Gonzaga Journal of International Law*, 2006, p. 202; B. Kingsbury, 'Is the Proliferation of International Courts and Tribunals a Systemic Problem?', 31 *New York University Journal of International Law and Politics*, 1999, p. 679; P. M. Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the ICJ', 31 *New York University Journal of International Law and Politics*, 1999, p. 791, and J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', 271 HR, 1998, p. 101. See also the speeches on proliferation, of ICJ Presidents Schwebel (1999), www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1; Guillaume (2001), www.icj-cij.org/court/index.php?pr=82&pt=3&p1=1&p2=3&p3=1; and Higgins (2007), www.icj-cij.org/presscom/files/7/14097pdf.

[373] See above, chapter 14, p. 789.

[374] See e.g. the reference to the International Court's judgment in *Democratic Republic of the Congo* v. *Uganda* in the International Criminal Court's confirmation of charges in the *Thomas Lubanga Dyilo* case, ICC-01/04-01/06, 29 January 2007, paras. 212 ff., and the reference in *Nicaragua* v. *Honduras*, ICJ Reports, 2007, paras. 68 ff., to a decision of the Central American Court of Justice. See also the discussion by the International Court of judgments of the International Criminal Tribunal for the Former Yugoslavia, the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, e.g. at paras. 195 ff. The European and Inter-American Courts of Human Rights have long referred to each other's judgments: see generally above, chapter 7.

[375] See generally above, chapter 16.

[376] E.g. the *Mox* case: see Shany, *Competing Jurisdictions*, p. 9, and see above, chapter 11, p. 643.

Of course, many of the other tribunals concern disputes between individuals and states rather than inter-state disputes and those in specialist areas, such as human rights, investment problems or employment issues. The International Tribunal for the Law of the Sea is beginning to deal with questions that have been before the International Court, such as jurisdiction and nationality and provisional measures issues, but it is also concerned with specific and limited matters, particularly the prompt release of arrested foreign vessels, and non-state parties may become parties to cases before it.[377] Nevertheless, all of these courts and tribunals and other organs relate in some way to international law and thus may contribute to its development and increasing scope. Together with a realisation of this increasing spread of institutions must come a developing sense of interest in and knowledge of the work of such courts and tribunals. The special position of the International Court as the principal judicial organ of the UN and as the pre-eminent inter-state forum has led some to suggest a referral or consultative role for it, enabling it to advise other courts and tribunals. While it is difficult to see this as a realistic or practical project, increasing co-operation between the International Court and other judicial bodies is taking place and all the relevant courts and tribunals are well aware of each other's work.[378]

Suggestions for further reading

D. Bowett *et al.*, *The International Court of Justice: Process, Practice and Procedures*, London, 1997

R. Y. Jennings, 'The Role of the International Court of Justice', 68 BYIL, 1997, p. 1

J. G. Merrills, *International Dispute Settlement*, 4th edn, Cambridge, 2005

S. Rosenne, *The Law and Practice of the International Court, 1920–2005*, 4th edn, Leiden, 4 vols., 2006

[377] See generally above, chapter 11.

[378] See the speech by President Higgins to the Legal Advisers of the Ministries of Foreign Affairs, 29 October 2007, www.icj-cij.org/pressscom/files/7/14097.pdf.

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International law and the use of force by states

The rules governing resort to force form a central element within international law, and together with other principles such as territorial sovereignty and the independence and equality of states provide the framework for international order.[1] While domestic systems have, on the whole, managed to prescribe a virtual monopoly on the use of force for the governmental institutions, reinforcing the hierarchical structure of authority and control, international law is in a different situation. It must seek to minimise and regulate the resort to force by states, without itself being able to enforce its will. Reliance has to be placed on consent, consensus, reciprocity and good faith. The role and manifestation of force in the world community is, of course, dependent upon political and other non-legal factors as well as upon the current state of the law, but the law must seek to provide mechanisms to restrain and punish the resort to violence.

[1] See e.g. Y. Dinstein, *War, Aggression and Self-Defence*, 4th edn, Cambridge, 2005; C. Gray, *International Law and the Use of Force*, 2nd edn, Oxford, 2004; S. Neff, *War and the Law of Nations: A General History*, Cambridge, 2005; O. Corten, *Le Droit Contre La Guerre*, Paris, 2008; M. Byers, *War Law*, London, 2005; D. Kennedy, *Of Law and War*, Princeton, 2006; T. M. Franck, *Recourse to Force*, Cambridge, 2002; D. W. Bowett, *Self-Defence in International Law*, Manchester, 1958; I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963; J. Stone, *Aggression and World Order*, Berkeley, 1958; J. Stone, *Legal Controls of International Conflict*, 2nd edn, Berkeley, 1959, and Stone, *Conflict Through Consensus*, Berkeley, 1977; M. S. McDougal and F. Feliciano, *Law and Minimum World Public Order*, New Haven, 1961, and McDougal and Feliciano, *The International Law of War*, New Haven, 1994; H. Waldock, 'The Regulation of the Use of Force by Individual States in International Law', 81 HR, 1982, p. 415; J. Murphy, *The United Nations and the Control of International Violence*, Totowa, 1982; R. A. Falk, *Legal Order in a Violent World*, Princeton, 1968; A. Cassese, *Violence and Law in the Modern Age*, Cambridge, 1988; *Law and Force in the New International Order* (eds. L. Damrosch and D. J. Scheffer), Boulder, 1991, and Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 933.

Law and force from the 'just war' to the United Nations[2]

The doctrine of the just war arose as a consequence of the Christianisation of the Roman Empire and the ensuing abandonment by Christians of pacificism. Force could be used provided it complied with the divine will. The concept of the just war embodied elements of Greek and Roman philosophy and was employed as the ultimate sanction for the maintenance of an ordered society. St Augustine (354–430)[3] defined the just war in terms of avenging of injuries suffered where the guilty party has refused to make amends. War was to be embarked upon to punish wrongs and restore the peaceful status quo but no further. Aggression was unjust and the recourse to violence had to be strictly controlled. St Thomas Aquinas[4] in the thirteenth century took the definition of the just war a stage further by declaring that it was the subjective guilt of the wrongdoer that had to be punished rather than the objectively wrong activity. He wrote that war could be justified provided it was waged by the sovereign authority, it was accompanied by a just cause (i.e. the punishment of wrongdoers) and it was supported by the right intentions on the part of the belligerents.

With the rise of the European nation-states, the doctrine began to change.[5] It became linked with the sovereignty of states and faced the paradox of wars between Christian states, each side being convinced of the justice of its cause. This situation tended to modify the approach to the just war. The requirement that serious attempts at a peaceful resolution of the dispute were necessary before turning to force began to appear. This reflected the new state of international affairs, since there now existed a series of independent states, uneasily co-existing in Europe in a primitive balance of power system. The use of force against other states, far from

[2] See e.g. L. C. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000; G. Best, *War and Law Since 1945*, Oxford, 1994; S. Bailey, *Prohibitions and Restraints in War*, Oxford, 1972; M. Walzer, *Just and Unjust Wars*, 2nd edn, New York, 1977, and T. M. Franck, *Fairness in International Law and Institutions*, Oxford, 1995, chapter 8. See also Brownlie, *Use of Force*, pp. 5 ff.; Dinstein, *War*, chapter 3, and C. Greenwood, 'The Concept of War in Modern International Law', 36 ICLQ, 1987, p. 283.

[3] See J. Eppstein, *The Catholic Tradition of the Law of Nations*, 1935, pp. 65 ff.; Bailey, *Prohibitions*, pp. 6–9, and Brownlie, *Use of Force*, p. 5.

[4] *Summa Theologica*, II, ii, 40. See Bailey, *Prohibitions*, p. 9. See also Von Elbe, 'The Evolution of the Concept of the Just War in International Law', 33 AJIL, 1939, p. 669, and C. Parry, 'The Function of Law in the International Community' in *Manual of Public International Law* (ed. M. Sørensen), London, 1968, pp. 1, 27.

[5] Brownlie, *Use of Force*, pp. 7 ff.

strengthening the order, posed serious challenges to it and threatened to undermine it. Thus the emphasis in legal doctrine moved from the application of force to suppress wrongdoers to a concern (if hardly apparent at times) to maintain the order by peaceful means. The great Spanish writer of the sixteenth century, Vitoria,[6] emphasised that 'not every kind and degree of wrong can suffice for commencing war', while Suarez[7] noted that states were obliged to call the attention of the opposing side to the existence of a just cause and request reparation before action was taken. The just war was also implied in immunity of innocent persons from direct attack and the proportionate use of force to overcome the opposition.[8]

Gradually it began to be accepted that a certain degree of right might exist on both sides, although the situation was confused by references to subjective and objective justice. Ultimately, the legality of the recourse to war was seen to depend upon the formal processes of law. This approach presaged the rise of positivism with its concentration upon the sovereign state, which could only be bound by what it had consented to. Grotius,[9] in his systematising fashion, tried to exclude ideological considerations as the basis of a just war, in the light of the destructive seventeenth-century religious conflicts, and attempted to redefine the just war in terms of self-defence, the protection of property and the punishment for wrongs suffered by the citizens of the particular state.

But with positivism and the definitive establishment of the European balance of power system after the Peace of Westphalia, 1648, the concept of the just war disappeared from international law as such.[10] States were sovereign and equal, and therefore no one state could presume to judge whether another's cause was just or not. States were bound to honour agreements and respect the independence and integrity of other countries, and had to try and resolve differences by peaceful methods.

But where war did occur, it entailed a series of legal consequences. The laws of neutrality and war began to operate as between the parties and third states and a variety of legal situations at once arose. The fact that the war may have been regarded as unjust by any ethical standards

[6] *De Indis et de Jure Belli Relectiones*, ss. 14, 20–3, 29 and 60, cited in Bailey, *Prohibitions*, p. 11.

[7] See *ibid.*, pp. 11–12. Suarez felt that the only just cause was a grave injustice that could not be avenged or repaired in any other way, *ibid.*

[8] *Ibid.*, pp. 12–15.

[9] *Ibid.*, chapter 2, and Brownlie, *Use of Force*, p. 13. See *De Jure Belli ac Pacis*, 1625.

[10] See e.g. Brownlie, *Use of Force*, pp. 14 ff. See also L. Gross, 'The Peace of Westphalia, 1648–1948', 42 AJIL, 1948, p. 20.

did not in any way affect the legality of force as an instrument of the sovereign state nor alter in any way the various rules of war and neutrality that sprang into operation once the war commenced. Whether the cause was just or not became irrelevant in any legal way to the international community (though, of course, important in political terms) and the basic issue revolved around whether in fact a state of war existed.[11] The doctrine of the just war arose with the increasing power of Christianity and declined with the outbreak of the inter-Christian religious wars and the establishment of an order of secular sovereign states. Although war became a legal state of affairs which permitted force to be used and in which a series of regulatory conditions were recognised, there existed various other methods of employing force that fell short of war with all the legal consequences as regards neutrals and conduct that that entailed. Reprisals and pacific blockades[12] were examples of the use of force as 'hostile measures short of war'.

These activities were undertaken in order to assert or enforce rights or to punish wrongdoers. There were many instances in the nineteenth century in particular of force being used in this manner against the weaker states of Latin America and Asia.[13] There did exist limitations under international law of the right to resort to such measures but they are probably best understood in the context of the balance of power mechanism of international relations that to a large extent did help minimise the resort to force in the nineteenth century, or at least restrict its application.

The First World War marked the end of the balance of power system and raised anew the question of unjust war. It also resulted in efforts to rebuild international affairs upon the basis of a general international institution which would oversee the conduct of the world community to ensure that aggression could not happen again. The creation of the League of Nations reflected a completely different attitude to the problems of force in the international order.[14]

The Covenant of the League declared that members should submit disputes likely to lead to a rupture to arbitration or judicial settlement or inquiry by the Council of the League. In no circumstances were members to resort to war until three months after the arbitral award or judicial decision or report by the Council. This was intended to provide a

[11] Brownlie, *Use of Force*, pp. 26–8. [12] *Ibid.* [13] *Ibid.*, pp. 28 ff.

[14] *Ibid.*, chapter 3. But note Hague Convention II of 1907, which provided that the parties would not have recourse to armed forces for the recovery of contract debts claimed from the government of one country by the government of another as being due to its nationals.

cooling-off period for passions to subside and reflected the view that such a delay might well have broken the seemingly irreversible chain of tragedy that linked the assassination of the Austrian Archduke in Sarajevo with the outbreak of general war in Europe. League members agreed not to go to war with members complying with such an arbitral award or judicial decision or unanimous report by the Council.[15]

The League system did not, it should be noted, prohibit war or the use of force, but it did set up a procedure designed to restrict it to tolerable levels. It was a constant challenge of the inter-war years to close the gaps in the Covenant in an effort to achieve the total prohibition of war in international law and this resulted ultimately in the signing in 1928 of the General Treaty for the Renunciation of War (the Kellogg–Briand Pact).[16] The parties to this treaty condemned recourse to war and agreed to renounce it as an instrument of national policy in their relations with one another.[17]

In view of the fact that this treaty has never been terminated and in the light of its widespread acceptance,[18] it is clear that prohibition of the resort to war is now a valid principle of international law. It is no longer possible to set up the legal relationship of war in international society. Thus, for example, it is unnecessary to declare war in order to engage legitimately in armed conflict.[19]

However, the prohibition on the resort to war does not mean that the use of force in all circumstances is illegal. Reservations to the treaty by some states made it apparent that the right to resort to force in self-defence was still a recognised principle in international law.[20] Whether in fact measures short of war such as reprisals were also prohibited or were left untouched by the treaty's ban on war was unclear and subject to conflicting interpretations.[21]

[15] Brownlie, *Use of Force*, chapter 4. See especially articles 10–16 of the Covenant.

[16] See e.g. Dinstein, *War*, chapter 4; A. K. Skubiszewski, 'The Use of Force by States' in Sørensen, *Manual of Public International Law*, pp. 739, 742–4, and Brownlie, *Use of Force*, pp. 74–92.

[17] Article I.

[18] It came into force on 24 July 1929 and is still in effect. Many inter-war treaties reaffirmed the obligations imposed by the Pact: see e.g. Brownlie, *Use of Force*, pp. 75–6.

[19] See e.g. *Yossi Beilin* v. *The Prime Minister of Israel* HCJ 6204/06, 2006. See also C. Greenwood, 'Scope of Application of Humanitarian Law' in *Handbook of Humanitarian Law in Armed Conflicts* (ed. D. Fleck), Oxford, 1999, p. 43, and I. Detter, *The Law of War*, 2nd edn, Cambridge, 2004, pp. 9 ff.

[20] See e.g. Cmd 3153, p. 10.

[21] See Brownlie, *Use of Force*, p. 87. Cf. Bowett, *Self-Defence*, p. 136.

The UN Charter[22]

Article 2(4) of the Charter declares that:

> [a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

This provision is regarded now as a principle of customary international law and as such is binding upon all states in the world community.[23] The reference to 'force' rather than war is beneficial and thus covers situations in which violence is employed which fall short of the technical requirements of the state of war.

Article 2(4) was elaborated as a principle of international law in the 1970 Declaration on Principles of International Law and analysed systematically. First, wars of aggression constitute a crime against peace for which there is responsibility under international law. Secondly, states must not threaten or use force to violate existing international frontiers (including demarcation or armistice lines) or to solve international disputes. Thirdly, states are under a duty to refrain from acts of reprisal involving the use of force. Fourthly, states must not use force to deprive peoples of their right to self-determination and independence. And fifthly, states must refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another state and must not encourage the formation of armed bands for incursion into another state's territory. Many of these items are crucial, but ambiguous. Although the Declaration is not of itself a binding legal document, it is important as an interpretation of the relevant Charter provisions.[24] Important exceptions to article 2(4) exist in relation to collective measures taken by the United

[22] See J. P. Cot, A. Pellet and M. Forteau, *La Charte des Nations Unies: Commentaire Article par Article*, 3rd edn, Paris, 2005, and *The Charter of the United Nations* (ed. B. Simma), 2nd edn, Oxford, 2002.

[23] See e.g. Skubiszewski, 'Use of Force', p. 745, and L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, p. 893. See also the *Third US Restatement of Foreign Relations Law*, St Paul, 1987, p. 27; Cot *et al.*, *Charte*, p. 437 (N. Schrijver), and Simma, *Charter*, p. 112.

[24] See e.g. G. Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of Sources of International Law*, Alphen aan den Rijn, 1979, and R. Rosenstock, 'The Declaration on Principles of International Law Concerning Friendly Relations', 65 AJIL, 1971, p. 713. See also General Assembly resolution 42/22, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 1987.

Nations[25] and with regard to the right of self-defence.[26] Whether such an exception exists with regard to humanitarian intervention is the subject of some controversy.[27]

Article 2(6) of the Charter provides that the UN 'shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security'. In fact, many of the resolutions adopted by the UN are addressed simply to 'all states'. In particular, for example, Security Council resolution 757 (1992) adopted under Chapter VII of the Charter, and therefore binding upon all member states, imposed comprehensive sanctions upon the Federal Republic of Yugoslavia (Serbia and Montenegro). However, the invocation in that decision was to 'all states' and not to 'member states'.

'Force'

One point that was considered in the past[28] and is now being reconsidered is whether the term 'force' in article 2(4) includes not only armed force[29] but, for example, economic force.[30] Does the imposition of boycotts or embargoes against particular states or groups of states come within article 2(4), so rendering them illegal?[31] Although that provision is not modified in any way, the preamble to the Charter does refer to the need to ensure that 'armed force' should not be used except in the common interest, while article 51, dealing with the right to self-defence, specifically refers to armed force, although that is not of itself conclusive as to the permissibility of other forms of coercion.

The 1970 Declaration on Principles of International Law recalled the 'duty of states to refrain . . . from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any state' and the International Covenants on Human Rights

[25] See below, chapter 22, p. 1235. [26] See below, p. 1131. [27] See below, p. 1155.

[28] An attempt by Brazil to prohibit 'economic measures' in article 2(4) itself was rejected, 6 UNCIO, Documents, p. 335. See also L. M. Goodrich, E. Hambro and A. P. Simons, *Charter of the United Nations*, 3rd edn, New York, 1969, p. 49.

[29] See e.g. the mining of Nicaraguan harbours by the US, the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 128; 76 ILR, p. 349.

[30] See Simma, *Charter*, p. 118.

[31] See e.g. *Economic Coercion and the New International Economic Order* (ed. R. B. Lillich), Charlottesville, 1976, and *The Arab Oil Weapon* (eds. J. Paust and A. Blaustein), Dobbs Ferry, 1977.

adopted in 1966 emphasised the right of all peoples freely to pursue their economic, social and cultural development. This approach was underlined in the Charter of Economic Rights and Duties of States, approved by the General Assembly in 1974, which particularly specified that 'no state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights'. The question of the legality of the open use of economic pressures to induce a change of policy by states was examined with renewed interest in the light of the Arab oil weapon used in 1973–4 against states deemed favourable to Israel.[32] It does seem that there is at least a case to be made out in support of the view that such actions are contrary to the United Nations Charter, as interpreted in numerous resolutions and declarations. But whether such action constitutes a violation of article 2(4) is dubious.[33]

It is to be noted that article 2(4) covers threats of force as well as use of force.[34] This issue was addressed by the International Court in its Advisory Opinion to the General Assembly on the *Legality of the Threat or Use of Nuclear Weapons*. The Court stated that a 'signalled intention to use force if certain events occur' could constitute a threat under article 2(4) where the envisaged use of force would itself be unlawful. Examples given included threats to secure territory from another state or causing it to 'follow or not follow certain political or economic paths'.[35] The Court appeared to accept that the mere possession of nuclear weapons did not of itself constitute a threat. However, noting that the policy of nuclear deterrence functioned on the basis of the credibility of the possibility of resorting to those weapons in certain circumstances, it was stated that whether this amounted to a threat would depend upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a state or against the purposes of the UN. If

[32] Paust and Blaustein, *Arab Oil Weapon*. [33] See e.g. Dinstein, *War*, p. 86.

[34] Brownlie, *Use of Force*, p. 364, notes that a threat of force consists 'in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government'. See also N. Stürchler, *The Threat of Force in International Law*, Cambridge, 2007; M. Roscini, 'Threats of Armed Force and Contemporary International Law', 54 NILR, 2007, p. 229; R. Sadurska, 'Threats of Force', 82 AJIL, 1988, p. 239, and N. White and R. Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?', 29 *California Western International Law Journal*, 1999, p. 243.

[35] This was cited with approval by the arbitral tribunal in *Guyana* v. *Suriname*, award of 17 September 2007, paras. 439 and 445, where an order by Surinamese naval vessels to an oil rig to leave the area within twelve hours or face the consequences was deemed to constitute such a threat.

the projected use of the weapons was intended as a means of defence and there would be a consequential and necessary breach of the principles of necessity and proportionality, this would suggest that a threat contrary to article 2(4) existed.[36] One key point here would be the definition of proportionality, in particular would it relate to the damage that might be caused or rather to the scope of the threat to which the response in self-defence is proposed? If the latter is the case, and logic suggests this, then the threat to use nuclear weapons in response to the prior use of nuclear or possibly chemical or bacteriological weapons becomes less problematic.[37]

The provisions governing the resort to force internationally do not affect the right of a state to take measures to maintain order within its jurisdiction. Accordingly, such a state may forcibly quell riots, suppress insurrections and punish rebels without contravening article 2(4). In the event of injury to alien persons or property, the state may be required to make reparation to the state of the alien concerned,[38] but apart from this the prohibition on force in international law is not in general applicable within domestic jurisdictions.[39] Accordingly, international law posits a general prohibition on the use of force. In order for force to be legitimate, it must fall within one of the accepted exceptions. These are essentially the right to self-defence[40] and enforcement action mandated by the United Nations Security Council.[41] Whether force may also be used in cases of extreme humanitarian need is discussed below.[42]

'Against the territorial integrity or political independence of any state'

Article 2(4) of the Charter prohibits the use of force 'against the territorial integrity or political independence of any state, or in any other manner

[36] ICJ Reports, 1996, pp. 226, 246–7; 110 ILR, p. 163.

[37] Note that article 2(b) of the Draft Articles on the Effects of Armed Conflicts on Treaties defines 'armed conflict' as 'a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between State parties to the armed conflict and third States, regardless of a formal declaration of war or other declaration by any or all of the parties to the armed conflict': see I. Brownlie's Third Report on the Effects of Armed Conflicts on Treaties, A/CN.4/578, 2007, p. 5.

[38] See above, chapter 14, p. 823.

[39] But see below, p. 1148, regarding self-determination, and p. 1148, regarding civil wars, and see with regard to non-international armed conflicts, below, chapter 21, p. 1194.

[40] See below, p. 1131. [41] See below, chapter 22, p. 1251. [42] Below, p. 1155.

inconsistent with the purposes of the United Nations'.[43] There is a debate as to whether these words should be interpreted restrictively,[44] so as to permit force that would not contravene the clause, or as reinforcing the primary prohibition,[45] but the weight of opinion probably suggests the latter position. The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States[46] emphasised that:

> [n]o state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.

This was reaffirmed in the 1970 Declaration on Principles in International Law,[47] with the proviso that not only were such manifestations condemned, but they were held to be in violation of international law. The International Court of Justice in the *Corfu Channel* case[48] declared specifically, in response to a British claim to be acting in accordance with a right of intervention in minesweeping the channel to secure evidence for judicial proceedings, that:

> the alleged right of intervention [was] the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot . . . find a place in international law.

The Court noted that to allow such a right in the present case as a derogation from Albania's territorial sovereignty would be even less admissible:

> for, from the nature of things it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself.

[43] The International Court has described the prohibition against the use of force as a 'cornerstone of the United Nations Charter', *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 223.

[44] See e.g. Bowett, *Self-Defence*, p. 152.

[45] See Brownlie, *Use of Force*, p. 268. See also Skubiszewski, 'Use of Force', pp. 745–6.

[46] General Assembly resolution 2131 (XX).

[47] General Assembly resolution 2625 (XXV).

[48] ICJ Reports, 1949, pp. 4, 35; 16 AD, pp. 155, 167. See also Brownlie, *Use of Force*, pp. 283–9, and H. Lauterpacht, *The Development of International Law by the International Court*, London, 1958, p. 90.

The essence of international relations, concluded the Court, lay in the respect by independent states of each other's territorial sovereignty.[49] In addition, the Eritrea–Ethiopia Claims Commission took the position that recourse to force would violate international law even where some of the territory concerned was territory to which the state resorting to force had a valid claim. It noted that 'border disputes between states are so frequent that any exception to the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law'.[50]

Categories of force

Various measures of self-help ranging from economic retaliation to the use of violence pursuant to the right of self-defence have historically been used. Since the establishment of the Charter regime there are basically three categories of compulsion open to states under international law. These are retorsion, reprisal and self-defence.[51]

Retorsion[52]

Retorsion is the adoption by one state of an unfriendly and harmful act, which is nevertheless lawful, as a method of retaliation against the injurious legal activities of another state. Examples include the severance of diplomatic relations and the expulsion or restrictive control of aliens, as well as various economic and travel restrictions. Retorsion is a legitimate method of showing displeasure in a way that hurts the other state while remaining within the bounds of legality. The Hickenlooper Amendments to the American Foreign Assistance Act are often quoted as an instance of

[49] See the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 109–10; 76 ILR, pp. 349, 443–4, and see further below, p. 1131.

[50] Partial Award, *Jus Ad Bellum*, Ethiopia's Claims 1–8, 2005, para. 10: see 45 ILM, 2006, pp. 430, 433. This statement was cited by the arbitral tribunal in *Guyana* v. *Suriname*, award of 17 September 2007, para. 423. See also C. Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?', 17 EJIL, 2006, p. 699.

[51] As to the use of force by the UN, see below, chapter 22, p. 1251.

[52] See e.g. Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 957; Skubiszewski, 'Use of Force', p. 753, and G. von Glahn, *Law Among Nations*, 7th edn, Boston, 1996, pp. 533 ff.

retorsion since they required the United States President to suspend foreign aid to any country nationalising American property without proper compensation. This procedure was applied only once, as against Ceylon (now Sri Lanka) in 1963, and has now been effectively repealed by the American Foreign Assistance Act of 1973.[53] Retorsion would also appear to cover the instance of a lawful act committed in retaliation to a prior unlawful activity.[54]

Reprisals[55]

Reprisals are acts which are in themselves illegal and have been adopted by one state in retaliation for the commission of an earlier illegal act by another state. They are thus distinguishable from acts of retorsion, which are in themselves lawful acts. The classic case dealing with the law of reprisals is the *Naulilaa* dispute[56] between Portugal and Germany in 1928. This concerned a German military raid on the colony of Angola, which destroyed property, in retaliation for the mistaken killing of three Germans lawfully in the Portuguese territory.

The tribunal, in discussing the Portuguese claim for compensation, emphasised that before reprisals could be undertaken, there had to be sufficient justification in the form of a previous act contrary to international law. If that was established, reprisals had to be preceded by an unsatisfied demand for reparation and accompanied by a sense of proportion between the offence and the reprisal. In fact, the German claim that it had acted lawfully was rejected on all three grounds. Those general rules are still applicable but have now to be interpreted in the light of the prohibition on the use of force posited by article 2(4) of the United Nations Charter. Thus, reprisals short of force (now usually termed countermeasures)[57] may still be undertaken legitimately, while reprisals involving armed force may be lawful where resorted to in conformity with the right

[53] See e.g. R. B. Lillich, 'Requiem for Hickenlooper', 69 AJIL, 1975, p. 97, and C. F. Amerasinghe, 'The Ceylon Oil Expropriations', 58 AJIL, 1964, p. 445.

[54] See also, with regard to countermeasures, above, chapter 14, p. 794.

[55] See e.g. Skubiszewski, 'Use of Force', pp. 753–5; Brownlie, *Use of Force*, pp. 219–23 and 281–2; D. W. Bowett, 'Reprisals Including Recourse to Armed Force', 66 AJIL, 1972, p. 1, and R. W. Tucker, 'Reprisals and Self-Defence: The Customary Law', 66 AJIL, 1972, p. 581.

[56] 2 RIAA, p. 1011 (1928); 4 AD, p. 526. See also G. Hackworth, *Digest of International Law*, Washington, 1943, vol. VI, p. 154.

[57] See above, chapter 14, p. 794.

of self-defence.[58] Reprisals as such undertaken during peacetime are thus unlawful, unless they fall within the framework of the principle of self-defence.[59] Sometimes regarded as an aspect of reprisal is the institution of pacific blockade.[60] This developed during the nineteenth century and was extensively used as a forceful application of pressure against weaker states. In the absence of war or armed hostilities, the vessels of third states were probably exempt from such blockade, although this was disputed by some writers.

Pacific blockades may be instituted by the United Nations Security Council,[61] but cannot now be resorted to by states since the coming into force of the Charter of the United Nations. The legality of the so-called 'quarantine' imposed by the United States upon Cuba in October 1962 to prevent certain weapons reaching the island appears questionable and should not be relied upon as an extension of the doctrine of pacific blockades.[62]

[58] See Dinstein, *War*, p. 222. But see Bowett, 'Reprisals'. See also SCOR, 19th Year, 111th meeting, 8 April 1964, in which the Security Council condemned reprisals as contrary to the UN Charter and deplored the UK bombing of Fort Harib, and R. B. Lillich, 'Forcible Self-Help under International Law', 62 *US Naval War College International Law Studies*, 1980, p. 129. Note that the US State Department has declared that, 'it is clear that the United States has taken the categorical position that reprisals involving the use of force are illegal under international law', 'Memorandum on US Practice with Respect to Reprisals', 73 AJIL, 1979, p. 489. As for episodes that appear to be on the borderline between self-defence and reprisals, see e.g. R. A. Falk, 'The Beirut Raid and the International Law of Retaliation', 63 AJIL, 1969, p. 415, and Y. Blum, 'The Beirut Raid and the International Double Standard', 64 AJIL, 1970, p. 73.

[59] The International Court declared in the *Legality of the Threat or Use of Nuclear Weapons* that, 'armed reprisals in time of peace . . . are considered to be unlawful . . . any right to [belligerent] reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality', ICJ Reports, 1996, pp. 226, 246; 110 ILR, p. 163. Note that reprisals taking place within an armed conflict (belligerent reprisals) are permitted in response to prior violation of the laws of armed conflict by the opposing side: see Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2004, pp. 220 ff., and C. Greenwood, 'The Twilight of the Law of Belligerent Reprisals', 20 Netherlands YIL, 1989, pp. 35, 38.

[60] See e.g. Skubiszewski, 'Use of Force', pp. 755–7, and Brownlie, *Use of Force*, pp. 223–4.

[61] See below, chapter 22, p. 1241.

[62] See e.g. Q. Wright, 'The Cuban Quarantine', 57 AJIL, 1963, p. 546, and M. S. McDougal, 'The Soviet–Cuban Quarantine and Self-Defence', *ibid.*, p. 597. See also A. Chayes, *The Cuban Missile Crisis*, Oxford, 1974. But note the rather different declaration by the UK of a Total Exclusion Zone during the Falklands conflict, above, chapter 11, p. 584, note 139.

The right of self-defence[63]

The traditional definition of the right of self-defence in customary international law arose out of the *Caroline* case.[64] This dispute revolved around an incident in 1837 in which British subjects seized and destroyed a vessel in an American port. This had taken place because the *Caroline* had been supplying groups of American nationals, who had been conducting raids into Canadian territory. In the correspondence with the British authorities which followed the incident, the US Secretary of State laid down the essentials of self-defence. There had to exist 'a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation'. Not only were such conditions necessary before self-defence became legitimate, but the action taken in pursuance of it must not be unreasonable or excessive, 'since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it'. These principles were accepted by the British government at that time and are accepted as part of customary international law.[65]

Article 51 of the Charter provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported

[63] See Bowett, *Self-Defence*, and Brownlie, *Use of Force*, chapter 13. See also I. Brownlie, 'The Use of Force in Self-Defence', 37 BYIL, 1961, p. 183; Dinstein, *War*, chapters 7 and 8; Gray, *Use of Force*, chapter 4; Franck, *Recourse*, chapters 3–7; S. Alexandrov, *Self-defence against the Use of Force in International Law*, The Hague, 1996; J. Delivanis, *La Légitime Défense en Droit International*, Paris, 1971; Byers, *War Law*, Part Two; S. Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law', 136 HR, 1972, p. 411; O. Schachter, 'The Right of States to Use Armed Force', 82 *Michigan Law Review*, 1984, p. 1620, Schachter, 'Self-Defence and the Rule of Law', 83 AJIL, 1989, p. 259, and Schachter, *International Law in Theory and Practice*, Dordrecht, 1991, chapter 8; N. Ochoa-Ruiz and E. Salamanca-Aguado, 'Exploring the Limits of International Law relating to the Use of Force in Self-defence', 16 EJIL, 2005, p. 499; Cot *et al.*, *Charte*, p. 506 (A. Cassese); Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 941, and Simma, *Charter*, p. 788.

[64] 29 BFSP, p. 1137 and 30 BFSP, p. 195. See also R. Y. Jennings, 'The Caroline and McLeod Cases', 32 AJIL, 1938, p. 82.

[65] See e.g. the Legal Adviser to the US Department of State, who noted that 'the exercise of the inherent right of self-defence depends upon a prior delict, an illegal act that presents an immediate, overwhelming danger to an actual and essential right of the state. When these conditions are present, the means used must then be proportionate to the gravity of the threat or danger', DUSPIL, 1975, p. 17.

> to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

There has been extensive controversy as to the precise extent of the right of self-defence[66] in the light of article 51, with some writers arguing that article 51 in conjunction with article 2(4) was exhaustive[67] and others maintaining that the opening phrase in article 51 specifying that 'nothing in the present Charter shall impair the inherent right of . . . self-defence' meant that there existed in customary international law a right of self-defence over and above the specific provisions of article 51, which referred only to the situation where an armed attack had occurred.[68]

The International Court of Justice in the *Nicaragua* case,[69] however, clearly established that the right of self-defence existed as an inherent right under customary international law as well as under the UN Charter. It was stressed that:

> Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter . . . It cannot, therefore, be held that article 51 is a provision which 'subsumes and supervenes' customary international law.

Accordingly, customary law continued to exist alongside treaty law (i.e. the UN Charter) in this field. There was not an exact overlap and the rules did not have the same content. The Court also discussed the notion of an 'armed attack' and noted that this included not only action by regular

[66] Note that article 21 of the International Law Commission's Articles on State Responsibility, 2001, provides that, 'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.'

[67] See e.g. Brownlie, *Use of Force*, pp. 112–13 and 264 ff., and E. Jiménez de Aréchaga, 'International Law in the Past Third of the Century', 159 HR, 1978, pp. 1, 87–98. See also Skubiszewski, 'Use of Force', pp. 765–8, and H. Kelsen, *The Law of the United Nations*, London, 1950, p. 914.

[68] See e.g. Bowett, *Self Defence*, pp. 185–6; Stone, *Aggression and World Order*, pp. 43, 95–6. See also H. Waldock, 'General Course on Public International Law', 166 HR, 1980, pp. 6, 231–7; Simma, *Charter*, pp. 790 ff.; Gray, *Use of Force*, pp. 98 ff.; J. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, pp. 417–18, and D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. I, p. 317. See also e.g. 6 UNCIO, Documents, where it is noted that 'the use of arms in legitimate self-defence remains admitted and unimpaired'.

[69] ICJ Reports, 1986, pp. 14, 94; 76 ILR, pp. 349, 428.