

THE DEVELOPMENT OF RULES OF PROCEDURE BY THE WORLD COURT THROUGH ITS RULE MAKING, PRACTICE AND DECISIONS

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Courts and tribunals follow procedures in reaching their decisions. Those procedures should provide the parties, appearing before an independent, impartial and qualified body, with a full and equal opportunity to present their cases and to challenge those presented against them. The process should also provide the body with sufficient material for it to resolve the dispute. The procedural rules may be established by those who set up the court or tribunal, including treaty makers and legislatures, or by the body itself through the exercise of its general rule making power and its rulings and practice in particular cases. This article considers the work of the Permanent Court of International Justice and its successor, the International Court of Justice, over almost the last 100 years in developing their procedures. A striking feature of the history is that the Statutes of the two Courts have remained essentially unchanged and that it is the Courts themselves that have developed the procedures which they and the parties are to follow. Along with the development of the law and practice of evidence in the two Courts, the history contributes an answer in one area to recurring questions about the best means of clarifying and making law.

I INTRODUCTION

Over the past 200 years, states in their treaty making and practice, international arbitrators and judges in their rule making, practice and rulings, advisory bodies and scholars have contributed to the development of international rules and principles of procedure. The first steps related to arbitration and, over the last century, they have extended to adjudication. This article emphasises contributions to that process of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). What do those contributions show? Evolution? Definitely. Dynamic? Hardly. But

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principled? Yes, even if constrained by the principle that states must consent to binding third party processes for the settlement of their disputes. But constrained not hog-tied.

II "THE GOOD ADMINISTRATION OF JUSTICE"

The Court has frequently referred to "the principle of the good administration of justice".¹ In a pure form that principle may be seen as having three components:²

1. an independent and impartial court or tribunal;
2. following a procedure which: (a) gives the parties before it a full and equal opportunity to present their cases and to challenge those presented against them; and (b) provides the court or tribunal with sufficient material on which to decide the case; and
3. deciding the dispute between the parties in a reasoned decision according to its findings on the facts and the governing law.

"In a pure form" because for instance:

1. the court or tribunal might be appointed in whole or in part by the parties, raising questions about its independence or impartiality;
2. it might not have access to all the possibly relevant evidence; and
3. it might have the option not to give reasons, it might advise rather than decide and it might be directed to decide on an equitable or principled basis and not on the basis of law.

This article keeps nearer to the pure end of the spectrum, but I do recognise that states, internationally, as nationally, have been and continue to be slow to relinquish the privileges and immunities they have long enjoyed in the courts and tribunals they create nationally, bilaterally and multilaterally. At the national level, consider the gradual enactment over the last century or so in the common law world of state liability legislation and court decisions both of which have cut back on

1 See for example *Judgments of the Administrative Tribunal of the ILO upon Complaints made against the UNESCO (Advisory Opinion)* [1956] ICJ Rep 76 at 86: "The principle of equality of the parties follows from the requirements of good administration of justice"; *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Preliminary Objection)* [1964] ICJ Rep 5 at 43 (relating to preliminary objections and citing a PCIJ case using the expression in relation to the joinder of cases); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 at [31] and [59]: "the sound administration of justice" (in the French text that expression appeared as "bonne administration" as in the two preceding cases – in relation to the absent respondent); and *Territorial and Maritime Dispute (Nicaragua v Colombia) (Preliminary Objection)* [2007] ICJ Rep 832 at [50]–[52] and see also page 889 at [8], and page 921, at [1] (in relation to deciding at an early stage that a matter is no longer a live one); and *Judgment No 2867 of the Administrative Tribunal of International Labour Organisation upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ Rep 10 at [35] (again the principle of equality before the Court with references to the UNESCO case and three others). The Court has also referred to the sound (again *bonne*) administration of justice in two of its practice directions issued in 2002.

2 See for example Lon L Fuller "The Forms and Limits of Adjudication" (1978) 92 Harv L Rev 353.

those privileges or immunities but not completely.³ And, internationally, major states have failed to accept the jurisdiction of, or, if they had, to appear before, international courts and tribunals and have acted to narrow or even to withdraw their acceptances of jurisdiction.⁴ The careful development and application of good, well respected principles and rules of procedure and evidence may help prevent those actions and reactions and promote wider acceptance of jurisdiction and use of the Court. In the case of the ICJ that expectation may be seen in the debates in recent years which follow the presentation to the General Assembly of the annual report of the Court by its President. The contrast with the debates in the late 1960s and early 1970s is stark.⁵

III THE DRAFTING OF THE PROCEDURAL RULES IN THE STATUTE, 1920 AND 1929 (AND 1945)

I begin in 1919 with the adoption of the Covenant of the League of Nations, included as Part I of the Peace Treaties adopted in 1919 and 1920, following the Great War. Articles 12 and 13 provided for the possibility of arbitration or judicial settlement, in the latter case by the PCIJ, which was to be established in accordance with Article 14, or to a tribunal established by the parties to the dispute or stipulated in any convention existing between them. Article 14 was in the following brief terms:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

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- 3 See for example Peter W Hogg, Patrick J Monahan and Wade K Wright *Liability of the Crown* (4th ed, Carswell, Toronto, 2011); *Corbett v Social Security Commission* [1962] NZLR 878 (CA); Robert E Keeton *Venturing to do Justice* (Harvard University Press, Cambridge (Mass), 1969) at 4 and the cases listed at 169–170; and Interpretation Act 1999, s 27.
- 4 In respect of the ICJ, consider the facts that the Russian Federation (like the USSR before it) has never deposited a declaration accepting the jurisdiction of the Court, the Peoples' Republic of China declared in 1972 that the declaration made earlier by the Republic of China was not valid, the withdrawal by France and the United States of their acceptances following decisions which went against them, the narrowing of acceptances by Japan and the United Kingdom, the earlier non-appearance of France and the United States in cases brought against them and the non-appearance of the Russian Federation and China before tribunals established under the United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS]. See more generally Benedict Kingsbury in James Crawford and Martti Koskeniemi (eds) *Cambridge Companion to International Law* (Cambridge University Press, Cambridge (Mass), 2012) ch 9.
- 5 See for example 34th and 35th Plenary meetings GA/11965 (26 October 2017). For initial caution about the presentation by the Court of an annual report, see Salo Engel "Notes: Annual Reports of the International Court of Justice to the General Assembly" (1970) 44 BYIL 193.

The Council of the League established an Advisory Committee of Jurists which met from 16 June to 24 July 1920 when it submitted a draft Statute and Report to the Council.⁶ The draft was reviewed by the Council and the Assembly. The latter adopted the Statute on 13 December 1920 and submitted it to states for acceptance. The Committee had 10 members, six of them continental Europeans, a Japanese, a Brazilian, an American and an Englishman. The Secretariat consisted of Dionisio Anzilotti, then a senior member of the Legal Secretariat of the League but soon to be a judge of the Court for the whole of its existence, and Ake Hammarskjöld, a brilliant young Swedish lawyer, who served as Registrar from 1922 when the Court was established until 1936 when he was elected to the Court, where, sadly, he served for less than one year before his death.⁷

The Committee had 15 documents before it when it met – a lengthy memorandum from the Secretariat,⁸ the Convention establishing the Central American Court of Justice and drafts from states and groups of states and from non-state sources.⁹ The Secretariat memorandum (prepared by Hammarskjöld) which draws on those and other sources considers, along with substantive matters, procedural issues including the Court's rule making powers, the written and oral phases, agents and counsel, public and private hearings, evidence, reasons and dissent. Also to be drawn on was the thinking, practice and treaty making of the preceding decades, including in the *Institut de Droit International* in 1874 and 1875¹⁰ and at the 1899 and 1907 Hague Peace Conferences.¹¹ Of the proposals relating to procedure submitted by states those which received most attention were those of the Netherlands and of the Five Neutral Powers (Denmark, Netherlands, Norway, Sweden and Switzerland). That detail had a major influence on the drafting of the 26 articles of Chapter III, headed Procedure, of the draft Statute.¹²

6 See Advisory Committee of Jurists "Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice" (1920) [ACJ Documents]; Committee of Jurists on the Statute of the Permanent Court of International Justice "Minutes" (1920) [ACJ Minutes]; and League of Nations "Documents concerning action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court of International Justice" (1921) [LNPCIJ]. For a valuable commentary see O Spiermann "Who attempts to do too much does nothing well: The 1920 Advisory Committee" (2002) 73 BYIL 87.

7 See for example José María Ruda "The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice" (1992) 3 EJIL 100 on the opinions of Anzilotti; and Manley O Hudson (1937) "Current Notes: Åke Hammarskjöld" 31 AJIL 703 on the genius of Hammarskjöld.

8 ACJ Documents, above n 6, at 7–11.

9 At 121–373.

10 *Annuaire de l'Institut de Droit International* (1877) vol 1.

11 See the many volumes published by the Carnegie Foundation and prepared by James Brown Scott (1920–).

12 See for example ACJ Minutes, above n 6, at 338–341, 347–350, 567–571, 587–594, 608–609, 637–644 and 732–746.

The conferral by the second sentence of Article 14 of the Covenant of advisory jurisdiction on the Court plainly puzzled the Secretariat and indeed the Committee. The Secretariat memorandum made two brief references to it:¹³

The Covenant provides another activity for the Court than the settlement of disputes. Article 14 says: "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or Assembly." As this may take the Court outside the area of strictly justiciable questions, it may have importance in connection with the question whether membership of the Court shall be confined to professional lawyers and jurists.

...

The Committee of Jurists may perhaps desire to make suggestions as to the constitution of the Court when acting under Article XIV of the Covenant as an advisory body on a reference from the Council or Assembly of the League.

The *procès-verbaux* of the Committee similarly contain almost no reference to the advisory jurisdiction. At its 28th meeting on the evening of 20 July the Committee, only four days before it completed its work, had this draft in front of it:¹⁴

The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special Commission of from three to five members.

When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision.

The report of the Committee to the Council explained the distinction it had made on the basis that an opinion given *in abstracto* is simply advisory and the Court would not be bound by it should the question come before it in a concrete case.¹⁵ Elihu Root, the American member of the Committee, had earlier said that he was opposed:¹⁶

... to the Court's having the right to give an advisory opinion with reference to an existing dispute. In his opinion this was a violation of all juridical principles.

13 ACJ Documents, above n 6, 31 and 111.

14 ACJ Minutes, above n 6, at 605.

15 At 730–732.

16 At 584.

He was, however, convinced by the reply of the Rapporteur who:¹⁷

... called his attention to the provisions of Article 13 of the Covenant and to the right of the Council to send to the Court any case which had been submitted to it but which ought to have been settled by judicial means; in such circumstances the Court must adopt a procedure similar to that of an actual trial.

The subcommittee of the League Assembly to which the draft Statute was referred considered that in every case the same quorum of judges as that required for the decision of disputes should sit. The distinction in the draft was lacking in clarity and was likely to give rise to practical difficulties. Further, the draft entered into details which concerned rather the Court's rules of procedure. The subcommittee accordingly recommended that the provision be deleted. That was done, with the consequence that the Statute contained no provisions at all, including procedural rules, relating to advisory cases. The French member of the subcommittee also made the point that Article 14 of the Covenant did not allow the Court to refuse to give an opinion (a reading no doubt based on the French text of Article 14: "Elle donnera aussi des avis consultatifs").¹⁸

The Council and Assembly made changes to the Committee's draft of Part III, headed Procedure: they added English to the official languages of the Court, they provided for dissenting opinions, they provided for intervention by states which considered that they had an interest of a legal nature which might be affected by a decision in the case and, as a consequence, they added what became Article 59, on *res judicata*, and which, contrary to a frequently expressed view, has nothing to do with *stare decisis*, whatever that might mean in the current context.¹⁹ On the substance, the principal change they made was to remove compulsory jurisdiction from the draft and to prepare the Optional Protocol enabling states unilaterally to accept the jurisdiction of the Court.²⁰

In all other respects the provisions on Procedure in Part III of the Statutes of both Courts have remained, in substance, unchanged. Both Statutes also included in Part I, headed The Organisation of the Court, a provision authorising the Court to make rules (Article 30). Since 2001, the Court has also issued Practice Directions and since 1931 it has had on its books a Resolution, amended from time to time, concerning the Internal Judicial Practice of the Court, a resolution which applies equally to contentious and advisory cases.²¹

The Protocol amending the Statute adopted in 1929 added Part IV to the Statute on advisory proceedings. Most of those provisions were taken from the Rules adopted by the Court in the course

17 At 585.

18 LNPCIJ, above n 6, at 211. See also at 146 and 151.

19 At 50: "No possible disadvantage could ensue from stating directly what article [63 on Intervention] indirectly admits". See also at 60 and 221.

20 At 46–47.

21 *Acts and Documents concerning the organisation of the Court* (2007) at 174.

of the 1920s, Rules which built on the Court's practice over the decade. The Protocol did not come into force until 1936 after which the PCIJ gave no opinions. Those provisions were carried over, without significant change, into the ICJ Statute.

The 1920 draft Statute was the subject of a careful report and commentary by James Brown Scott, completed on 11 September 1920, that is between the Committee adopting its text in July and the Council and Assembly amending the draft and adopting the Statute in December.²² He had been a Technical Delegate of the United States to the 1907 Hague Conference and the 1919 Paris Peace Conference and in 1920 was the adviser to Elihu Root, the United States member of the Advisory Committee. He attended the meetings and at times participated in them. Root and Scott had prepared a scheme for the Committee, dealing among other things with procedure, and Scott was plainly very familiar with the various texts to be considered.²³ His report provides a fuller account of some of the speeches made in the Committee than do the *Procès-Verbaux* and valuable commentary on the articles of the draft. On the provisions for advisory opinions, for instance, he mentions relevant American state court experience which drew on English practice, as opposed to the refusal of the United States Supreme Court to give advisory opinions.²⁴ Scott's commentary on the part of the Statute on Procedure draws attention to earlier treaty provisions, for instance, in respect of provisional measures, the written and oral phases, the making of orders for the conduct of the case, the hearing of evidence, the calling upon the parties for documents and explanations, questions from the bench, non-appearance of a party (citing the failure of New York to participate in a case brought by New Jersey), finality, interpretation, revision and intervention by parties to the treaty in issue.

IV THE RULES OF COURT

The PCIJ adopted its original Rules, under Article 30 of its Statute, in 1922. It adopted new versions in 1926 (with a single amendment in 1927), 1931 and 1936 (the last after the 1929 amendments to its Statute came into force). In 1946, the ICJ adopted essentially the 1936 Rules and

22 James Brown Scott *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary* (Washington DC, 1920).

23 At 177–218. See also at 218–223.

24 Scott, above n 22, at 111–112. See the vigorous exchange about advisory opinions between Professor Manley O Hudson (later PCIJ Judge) and Professor Felix Frankfurter (later United States Supreme Court Justice): Manley O Hudson "Advisory Opinions of National and International Courts" (1924) 37 Harv L Rev 970; and Felix Frankfurter "Notes on Advisory Opinions" (1924) 37 Harv L Rev 1002.

revised its Rules in 1972 and 1978.²⁵ A PCIJ publication, *Ten Years of International Jurisdiction* (1922–1932), says this of the 1926 Rules:²⁶

Except for certain innovations, it may be said that the changes made in the Rules were, for the most part, a codification of the practice which the Court had developed during the first four years of its existence in order to supplement and perfect its Rules. Furthermore, the revision of 1926 showed a tendency, already recognized in practice, to assimilate the rules followed in advisory cases more and more to those applied in contentious cases. The same tendency again showed itself, still more markedly, when, in the following year, the Court decided to make a further amendment [allowing a State which has no national upon the Bench the right to appoint a national judge in advisory proceedings when the question concerns an existing dispute].

V *PROVISIONAL MEASURES AND INHERENT JURISDICTION*

I have recently given some attention to provisional measures, non-appearance, intervention, seeking evidence and the giving of reasons and dissents.²⁷ I add further comment on provisional measures and address aspects of the advisory jurisdiction. I give some emphasis to the Court's exercise of its inherent jurisdiction and its exercise of powers which have no explicit base in the Statute or even in its Rules.

The provision of the Statutes relating to provisional measures has remained in the same form since 1922. Some changes have been made to the relevant Rules²⁸ and the practice and rulings of the Courts have developed the law further.²⁹

The Rules relating to provisional measures (or interim protection in the English text until 1978, except for the heading) have evolved from a minimal provision in 1922, a slightly more elaborate provision in 1931, a fuller statement in 1936/1946 which drew on the limited experience to date, a new version in 1972 and a reorganised set of provisions in 1978.³⁰

25 See Rosenne *Documents on the International Court of Justice* (2nd ed, Oceana Publications, Alphen aan der Rijn, 1979).

26 PCIJ *Ten Years of International Jurisdiction (1922–1932)* (AW Sijthoff's Publishing, Leiden, 1933) at 17–18 and 7, n 1.

27 A Sarvarian and others (eds) *Procedural Fairness in International Courts and Tribunals* (British Institute of International and Comparative Law, London, 2015) at ch 2.

28 See Rosenne, above n 25.

29 See *Annuaire de l'Institut de Droit International Session de Hyderabad* (2016) vol 77-1 at 265 and for the resolution as adopted (2017) vol 78 at 129; and the excellent report by Lawrence Collins on which it is based. See also Lawrence Collins "Provisional and Protective Measures in International Litigation" (1992) 234 *Recueil des Cours de l'Académie de Droit International* 214.

30 Rosenne, above n 25, at 170–173 and 250–253.

The first order was made by the President of the PCIJ in terms of a power which the minimal Rules stated – a power which continues, if in a different form, to this day and which the President has exercised from time to time before the Court as a whole has an opportunity to deal with the request.³¹ This power may be seen as inherent; a position supported by the passage from the order made in 1939 quoted later in this paragraph. The President, following an agreement between the parties, revoked the particular order just five weeks later. The only other order was made by the Court, right at the end of its working life, in December 1939.³² The Order quotes the relevant provisions of the Statute and the Rules and continues with this passage:³³

... the above quoted provision of the Statute applies the *principle universally accepted by international tribunals* and likewise laid down in many conventions to which Bulgaria has been a party – to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute ...

It made this Order:³⁴

... that pending the final judgment of the Court in the suit submitted by the Belgian Application on January 26th, 1938, the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court.

One of the provisions which the Court may have had in mind was Article 33 of the General Act for the Pacific Settlement of International Disputes 1928 which, to anticipate a point resolved by the Court only decades later, provided that provisional measures were binding.³⁵ New Zealand tried to rely on that provision in 1973 in the *Nuclear Tests Cases*, a position undermined by an Australian concession in its answer to a question from the Bench.³⁶

31 *Denunciation of the Treaty of November 2nd, 1865, Between China and Belgium (Order Made on January 8th, 1927)* (1927) PCIJ (series A) No 8 at 6.

32 *Electricity Company of Sofia and Bulgaria* (1939) PCIJ (series A/B) No 79 at 194.

33 At 199 (emphasis added).

34 At 199.

35 General Act for the Pacific Settlement of International Disputes 93 LNTS 344 (signed 26 September 1928, entered into force 16 August 1929).

36 *Nuclear Tests Cases* ICJ Pleadings, vol I at 229–231 and vol II at 122–124 and 130 (the last about 30 minutes before the Australian concession). See *Nuclear Tests Case (Australia v France) (Interim Protection)* [1973] ICJ Rep 99 102–103; and *Nuclear Tests Case (New Zealand v France) (Interim Protection)* [1973] ICJ Rep 135 at 138–139. For a valuable comment on that phase of the case see Stephen Kós "Interim relief in the International Court: New Zealand and the Nuclear Test cases" (1984) 14 VUWLR 357.

That non-aggravation measure has been an almost constant feature when the Court has made orders for provisional measures, although no provision such as that of 1928 (repeated in the 1949 Revised Act)³⁷ has been included in the Statute or the Rules. That has been so even when the parties have not sought it; since 1936 the Rules have made it explicit that the Court may indicate measures other than those proposed in the request. The exercise of that power appeared for example in the *Nuclear Tests* orders in 1973. New Zealand, consistently with the relief sought in its application, asked the Court in its request for a measure "that France refrain from conducting any further nuclear tests that give rise to radioactive fallout while the Court is seized of the case".³⁸ By contrast Australia, again consistently with its application, sought a measure "that the French Government should desist from any further *atmospheric tests* pending the judgment of the Court in this case".³⁹

The Orders in the two cases begin with the non-aggravation language and continue:⁴⁰

In particular, the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on [Australian territory] [the territory of New Zealand, the Cook Islands, Niue or the Tokelau Islands].

The wording of the orders is narrower in geographic terms, as perhaps was to be expected, but wider in terms of the activity than the Australian request. It reflects the fact that, as the Registrar of the day remarked, and as the New Zealand team thought (and again in 1995), this case was not limited to *atmospheric* nuclear testing. The absence of that adjective in the title of the cases supports that reading. But the Court in 1974 did impose that limit in paragraphs added to and amendments made in the New Zealand judgment, apparently late in the process of its preparation.⁴¹

37 Revised General Act for the Pacific Settlement of International Disputes 71 UNTS 101 (adopted 28 April 1949, entered into force 20 September 1950), art 33.

38 *Nuclear Tests Cases* Hearings, vol II at 59 (emphasis added).

39 *Nuclear Tests Cases* Hearings, vol I at 57 (emphasis added).

40 *Nuclear Tests Case (Australia v France) (Interim Protection)*, above n 36, at 106; and *Nuclear Tests Case (New Zealand v France) (Interim Protection)*, above n 36, at 143.

41 See *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253; and *Nuclear Tests Case (New Zealand v France)* [1974] ICJ Rep 457. The first 24 paragraphs of the two judgments are essentially the same, including [23] about inherent jurisdiction set out in the next paragraph of this article and [16] which says that both States are challenging the legality of "atmospheric nuclear tests"; the next four paragraphs cover exchanges between each applicant and the respondent in similar terms; [29] of the New Zealand judgment has no counterpart in the Australia judgment and addresses the wider statement of the relief New Zealand sought; [29] (Australia) and [30] (New Zealand) are essentially the same; [30] and [31] have some differences; [31] and [32], and [32] and [33] refer to different diplomatic exchanges; [33] and [34] about the Court's use of statements made after the hearings and natural justice are the same; [34]–[41] and [35]–[44] traverse those statements with the New Zealand discussion being more extensive because New Zealand engaged more fully with France – see also the strange para [35] in the Australian judgment, based on evidence presented and arguments made by New Zealand; [42]–[46] and [45]–[49] about the law of unilateral declarations are the same; [47]–[54] and [50]–[57] cover similar ground but with details differing; [55]–[61] and [58]–[64] about the consequences of the

The 1974 judgments were also notable for their broad statements about inherent jurisdiction to which the Court related its examination of a question "which may not be strictly capable of classification as matters of jurisdiction or admissibility [the only matters on which the parties had been directed by the Court to make their submissions] but are of such a nature as to require examination in priority to those matters". The question here was whether there were still live disputes between the applicants and the respondent or, in other words, whether the cases were moot, at least for the time being. The statements were in these terms:⁴²

In this connection, it should be emphasized that the Court possess an inherent jurisdiction enabling it to take such action as may be required, on one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*The Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15 at 29). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

The power to grant provisional measures appears to fall within the first action contemplated, for the purpose of avoiding the frustrating of any future ruling. On that basis, Article 41 of the Statute was declaratory rather than constitutive, a position which, as indicated in 1939, supports the binding force of provisional measures, as the Court ruled in 2001 in the *La Grand* case.⁴³

The Court found yet another preliminary issue in 1995 in addressing New Zealand's attempt to revive its *Nuclear Tests* case. With its substantive application New Zealand had sought provisional measures but the rule requiring priority of such requests was not applied. Rather the Court asked the parties to address the question whether the New Zealand requests fell within a paragraph of the 1974 judgment permitting an application for an "examination of the situation" because the basis of the judgment had been affected.⁴⁴ The Court, first, ruled that the request, even if it is disputed *in limine*, must be entered in the General List of the Court for the purpose of the Court determining whether the conditions for the examination were satisfied but, second, that the conditions had not been satisfied.

Court's mootness finding are common. See in terms of the preparation of the texts of the judgments the comment, in identical terms, of President Lachs: ICJ Pleadings, vol 1 at 529 and vol 2 at 292–293.

42 *Nuclear Tests Case (New Zealand v France)*, above n 41, at [23].

43 *La Grand (Germany v United States of America)* [2001] ICJ Rep 466 at 501–506.

44 See *Nuclear Tests Case (New Zealand v France)*, above n 41, at [63].

The consequences were that the request was removed from the General List (22 paragraphs after it had been entered – a busy Registrar!) and the various requests were dismissed.⁴⁵

The *Nuclear Tests* cases are also notable for a request made by the French Government back in 1973, just one week after the filing of the applications, that the Court order that "cette affaire soit rayée de son rôle" (that the case be removed from the list).⁴⁶ The Court rejected the request. Similar requests have been made since, by Turkey in the Aegean Sea case (unsuccessfully), Spain in the NATO case (successfully) and Thailand in 2011 in the *Preah Vihear* case (unsuccessfully).⁴⁷ The NATO case against the United States was also removed from the list although the United States had not formally sought that action. Those actions too may be seen as the exercise of an inherent power.

Before the rule change introducing forum prorogatum (Article 38(5)) and providing for entry of an application into the General List only when the consent of the respondent to jurisdiction in the case had been received, the Court had routinely made orders removing cases – several in the 1950s – from the General List where jurisdiction was clearly not available.⁴⁸ The exercise of that power may be seen as flowing directly from the principle of the necessity of consent to jurisdiction, as confirmed by Article 36 of the Statute, or as inherent. For the practitioner, the judge, nothing may appear to turn on the source. The power is in fact available.

I return to the power to grant provisional measures and to one further aspect of the law and practice which the Court has developed, again with no change being made to its Statute. It has made that development through its rule making, a practice direction and its rulings. I put to one side the issues whether both parties can seek the measures (they can), the requirement of a prima facie showing of jurisdiction (now well established), risk of irreparable harm and urgency, the frequent statement that the Court will keep the matter under review, the common requirement of reporting on compliance, the modification of orders and the binding force of the orders. Rather I address the requirement for the grant of provisional measures, stated in express terms as recently as 2009, that the rights asserted

45 *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* [1995] ICJ Rep 288 at [44] and [66].

46 *Nuclear Tests Cases* ICJ Pleadings, vol II at 348.

47 *Aegean Sea Continental Shelf Case (Greece v Turkey)* [1978] ICJ Rep 3; *Case Concerning Legality of Use of Force (Yugoslavia v Spain) (Request for Provisional Measures)* [1999] ICJ Rep 761; and *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand) (Cambodia v Thailand) (Provisional Measures)* [2011] ICJ Rep 537.

48 See *Treatment in Hungary of aircraft of United States of America (United States v Hungary)* [1954] ICJ Rep 99 at 103; *Aerial incident of March 10th, 1953 (United States of America v Czechoslovakia) (Order)* [1956] ICJ Rep 6 at 9, 12 and 15; and *Aerial Incident of September 4th, 1954 (United States of America v Soviet Union)* [1958] ICJ Rep 158.

by the parties are "at least plausible".⁴⁹ In the case in which that was first stated the Court said that the rights asserted by the applicant, being grounded in a possible interpretation of the relevant convention, appeared to be plausible; the rights moreover were those which would be likely to be affected in a possible event and might be adjudged to belong to the applicant on the merits. The French text of the Order, which is the authoritative one, also uses the word "plausible".⁵⁰

That requirement has become a constant in later orders given in 2011, 2013, 2015, 2016, 2017 and 2018. Making that requirement express has given rise to comment, some negative in part from within the Court. For me that criticism is surprising. The New Zealand team as long ago as 1973 and again in 1995 had no doubt that it had to have a prima facie case on the merits in support of the relief sought – that nuclear tests that give rise to radioactive fallout constituted a violation of New Zealand's rights under international law. The request for provisional measures discussed the law and the facts at some length. The 1973 team in The Hague included the head of the New Zealand National Radiation Laboratory. The Court was provided with copies of the Laboratory's reports, and its oral submissions addressed the merits in some detail, including possible dangers to health, the contamination of the air and the waters from which food supplies were drawn, the safety standards set by the International Commission for Radiological Protection, principles which had been adopted by several other international organisations and matters relating to the developing law, as seen in the Partial Test Ban Treaty (the language of which New Zealand employed in the relief it sought), General Assembly resolutions, the Stockholm Declaration of 1972, and principles such as the following:⁵¹

No artificial radiation should be generated without countervailing and compensating benefit to mankind.

I also note that dissenting judges did enter into the merits of the two cases to some extent.⁵²

49 *Obligation to Prosecute or Extradite (Belgium v Senegal) (Provisional Measures)* [2009] ICJ Rep 139 at [56]–[57].

50 At [56]–[57].

51 ICJ Pleadings vol II at 114 (Allan Martyn Finlay, Attorney-General).

52 *Nuclear Tests Case (New Zealand v France) (Interim Protection)*, above n 36, at 161–164 (which quotes on the merits from a recent publication of the New Zealand Institute of International Affairs "of which, Mr Allan Martyn Finlay Attorney-General of New Zealand and counsel for his county in this case, is the Vice-President"; in fact Dr Finlay was one of several honorary Vice Presidents and another two of the New Zealand team were President and Director of the Institute). See also the Institut de Droit International Resolution on Provisional Measures, above n 29.

VI THE ADVISORY JURISDICTION OF THE COURT

I have addressed major aspects of the evolving procedure applied in advisory cases over the first 74 years of its existence.⁵³ Over the last 23 years the Court has dealt with only six requests, with one pending. I consider three aspects of the procedure followed in those cases:

- (1) participation of interested parties;
- (2) the application of the principle of equality; and
- (3) the redrafting of the questions submitted.

The pending case will raise the significance of the lack of consent to the request by one (or even two) of the States involved in the case. At this stage, I have nothing to add to what I have earlier said about that.⁵⁴

The 1920 comment by Elihu Root about the advisory jurisdiction of the PCIJ was paralleled by the first American judge on the Court, John Bassett Moore, who said in 1922 that it was "obviously not a judicial function".⁵⁵ The PCIJ's advisory jurisdiction continued to be an issue throughout the later negotiations of a protocol for the accession of the United States in the Statute of the PCIJ. More relevant in terms of giving a practical response to the Root/Moore positions is the extensive assimilation by the Court of the advisory jurisdiction with the contentious, emphasised by the Registry in its 1933 pamphlet quoted earlier and confirmed by Article 68 of the Statute added in 1936. By the time of that publication the PCIJ had replied to 22 of the 27 requests submitted to it. It gave none after 1935.

In all but one of the six advisory cases since 1996 the issue of participation has arisen. While the sixth, the *Cumuraswamy* case, could have been seen as raising a question about the participation of the Special Rapporteur whose immunity from legal suit had been rejected by the Malaysian courts and government, his case was in effect taken up by the UN Secretariat.⁵⁶ In this case the UN Legal counsel played a major role, first, in the written pleadings filed by the Secretariat, and second, orally including by way of a reply to the arguments made by Malaysia in a case in which the dispute was

53 KJ Keith *The Extent of the Advisory Jurisdiction of the International Court of Justice* (AW Sijthoff's Publishing, Leiden, 1971); and KJ Keith "The Advisory Jurisdiction of the International Court of Justice: Some comparative reflections" (1996) 16 AYBIL 39.

54 Keith *The Extent of the Advisory Jurisdiction of the International Court of Justice*, above n 53, 45 at 89–124; and Keith "The Advisory Jurisdiction of the International Court of Justice", above n 53, at 43–47.

55 John Bassett Moore "The Organisation of the Permanent Court of International Justice" (1922) 22 Colum L Rev 497 at 507. See also the doubts expressed as late as 1944 in the *Report of the Informal Inter Allied Committee on the Future of the Permanent Court of International Justice* (1944) Cmd 6531, reprinted in (1945) 39 AJIL Sup 1, at [65]–[66], but compare [64]–[75] and [142]–[145].

56 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* [1999] ICJ Rep 62.

essentially between the UN and that country.⁵⁷ That role also appears in earlier cases in which the advisory jurisdiction has been used in cases involving the UN (and its Rapporteur) as a disputing party, given that in contentious cases only states can be parties.⁵⁸ By contrast the UN Secretariat took no part at all in the *Nuclear Weapons*, *Wall* and *Kosovo* cases,⁵⁹ other than meeting its statutory obligation to provide relevant information under Article 65(2), nor in essence did the World Health Organization in respect of the request in the *Nuclear Weapons* case made by its Assembly.

The requests in the two *Nuclear Weapons* cases, understandably, given the extensive civil society support for the requests and their close interest in the substance, led to many non-governmental organisations (NGOs) wishing to make submissions. They were however rebuffed in a ruling which appears to contradict that in the initial *South West Africa* case (1950) when the International League for the Rights of Man was informed that it could make submissions.⁶⁰ The basis of the *Nuclear Weapons* rulings is not clear since the relevant correspondence has not yet been published and the once informative ch 6 of the Court's Yearbook no longer has that quality. The case does however appear to have helped generate the arguments for the new Practice Direction XII about NGO submissions – a direction which may raise natural justice issues.⁶¹ The ruling is also inconsistent with actions in two later cases, relating to Palestine and Kosovo, discussed below.

To repeat a point I have made in earlier writings, the transfer of Rules relating to advisory procedures into the Statute may, on one reading, have limited the Court's capacity to allow participation on a principled basis. In this case as in others, Robert Browning is right: "less is more".⁶²

A Equality of the Parties

In a number of advisory cases the achieving of equality for the disputing parties has presented the Court with challenges, particularly requests for the review of the judgments and awards of the UN Administrative Tribunal (UNAT) and the International Labour Organization Administrative Tribunal (ILOAT). Those challenges, it is pleasing to note, no longer face the Court since the relevant

57 *Immunity from Legal Process of Special Rapporteur*, Written Statement and written comments of UNSG and CR 98/15, 10-44 and CR 98/17, 8-30.

58 See the 1988 and 1989 requests.

59 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403.

60 *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128; and Pleadings 324 and 327.

61 For some background see Rosalyn Higgins and others *Oppenheim's International Law: United Nations* (Oxford University Press, Oxford, 2017) vol II at 1175–1176.

62 Robert Browning *Andrea del Sarto* (1855), a poem about a renaissance artist.

provisions of the Statutes of the two Tribunals have been revoked. Three points, among others, may be drawn from the cases and the subsequent amendments to the Tribunal Statutes.

The first has been the actions taken by the Court to ensure, so far as it can, the equality of the parties – the former employee and the employing agency – in the proceedings before the Court. As the Court has read the Statute, with the provisions added in 1936, the particular individual who was one of the real disputants had no right to make submissions at the written stage or to appear. The UNAT Statute required the Secretariat to forward the written submissions of the individual to the Court on an equal footing with its own submissions and that process was established for ILOAT challenges by the directions of the Court in the first case, involving UN Educational, Scientific and Cultural Organization employees, and by Court Order in the last when the International Fund for Agricultural Development sought review.⁶³ In the latter case the Court also confirmed that no hearing would be held. In that case it emphasised that it had a discretion whether to give an advisory opinion.⁶⁴

In exercising that discretion, the Court has to have regard to its character, both as a principal organ of the United Nations and as a judicial body. The court early declared that the exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, in principle, a request should not be refused (*Interpretation of Peace Treaties with Bulgaria Hungary and Romania (First Phase, Advisory Opinion)* [1950] ICJ Rep 65 at 71). That indication of a strong inclination to reply is also reflected in the Court's later statement, in the only other challenge to a decision of the ILOAT brought to it, that "compelling reasons" would be required to justify a refusal (*Advisory Opinion* [1956] ICJ Rep 77 at 86).

[34] The Court and its predecessor have emphasized that, in their advisory jurisdiction, they must maintain their integrity as judicial bodies. The Permanent Court of International Justice as long ago as 1923, in recognizing that it had discretion to refuse a request, made an important statement of principle:

The Court, being a Court of Justice, cannot even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court." (*Status of Eastern Carelia (Advisory Opinion)* (1923) PCIJ series B No 5 at 29; for the most recent statement on this matter see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 at 415–416, [29], and the authorities referred to there.)

It then recalled the concern expressed in the four earlier tribunal review cases:⁶⁵

63 *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* [2010] ICJ Rep 298.

64 *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ Rep 10 at 25.

65 At 25–26.

Concerns have been raised about a central aspect of the good administration of justice: the principle of equality before the Court of the organization on the one hand and the official on the other.

[36] Two issues arising from Article XII of the Tribunal's Statute and its Annex providing for review of the ILOAT judgments were addressed by the Court in its 1956 Advisory Opinion: inequality of access to the Court and inequalities in the proceedings before the Court. With regard to the first point, it is only the employing agencies which have access to the Court. By contrast, the provisions for the review by the Court of judgments of the UNAT, in force from 1955 to 1995, gave officials, along with the employer and member States of the United Nations, access to the process which could lead to a request to the Court for review. When that review procedure was being established, the Secretary-General [a younger brother of the first Registrar of the PCIJ] identified as a fundamental principle that the staff member should have the right to initiate the review and to participate in it. Further, any review procedure should enable the staff member to participate on an equitable bases in such procedure, which should ensure substantial equality (UN doc A/2902 (10 June 1955) at [13] and [17]).

But, as the Court recognised, it could do nothing about that inequality of access in the ILOAT case. It was however able to take steps to reduce the inequality in the proceedings before it and decided to exercise its discretion to address the merits of the request. It did that and on the substance of the challenge found in favour of the former employee.

The second matter, concerning the review of the tribunal decisions, relates to the actions taken in the one case by the UN General Assembly in 1995 and 2008 and in the other by the International Labour Conference in 2016. The General Assembly first abolished the power to seek review since it had not proved to be a constructive or useful element in the adjudication of staff disputes.⁶⁶ It was 14 years before it established an appellate system, which is now itself the subject of review.⁶⁷ The repeal of the relevant provisions of the Statute of the ILOAT was achieved over a shorter period. The consultations with the organisations which had recognised the jurisdiction of the Tribunal revealed by June 2016 almost unanimous support for the repeal. According to the Legal Adviser to the International Labour Organization (ILO), the review procedure was an unfortunate one which clearly no longer had a place in the Statute. The General Conference of the ILO in the preamble to the resolution making the amendments to the Statute stated that repeal was needed "to ensure equality of access to justice for employing institutions and officials alike".⁶⁸ The paper before the Governing Body of the ILO stated that:⁶⁹

66 *Review of the procedure provided for under article 11 of the statute of the Administrative Tribunal of the United Nations* GA Res 50/54 (1995).

67 See for example *Administration of justice at the United Nations* GA Res 72/256 (2017).

68 *105th Session of the International Labour Conference* (GEN 2016/40, 20 May–20 June 2016).

69 *Decision on the twelfth item on the agenda: Matters relating to the Administrative Tribunal of the ILO* (326/PFA/12/1, 16 March 2016) at [3]. See also the ILOAT Judgment No 3003 (2011).

... it is generally recognised today that [the provisions of the Statute about ICJ review] failed to meet the overriding principles of equality of access to courts and tribunals. The proviso has been vividly criticised by the International Court of Justice as anachronistic.

(The Court had traced the development of the principle of access to courts and tribunals since 1946 when the Statute of the League of Nations Administrative Tribunal was adapted. It did that by contrasting General Comments of 1984 and 2007 made by the Human Rights Committee on the right to equality before Courts and Tribunals under the International Covenant on Civil and Political Rights;⁷⁰ those provisions relate in their own terms, of course, to national and not international institutions.) The Governing Board noted that all member organisations and staff associations which had commented expressed unqualified support for the proposed deletion.⁷¹

The Governing Board paper makes my third point, this one about inherent powers. The ILO Tribunal had accepted that the final and binding nature of judgments did not impede the exercise of a limited power of review in exceptional circumstances and on strictly limited grounds. The paper proposed and the Conference accepted the formalisation of the Tribunal's practice by adding a sentence to the provision which states that the judgment is final and binding: "The Tribunal shall nevertheless consider applications for interpretation, execution or review of a judgment."⁷²

B The Rewriting of the Questions

In 1956 Judge Hersch Lauterpacht declared that: "It is a matter of common experience that a mere affirmation or a mere denial of a question does not necessarily result in a close approximation to proof."⁷³

Similar comments may be found in many cases, for instance in a decision of the Privy Council on an appeal in an advisory jurisdiction case from Canada⁷⁴ and in a decision of the New Zealand Court of Appeal in a declaratory judgments case.⁷⁵

70 UN Human Rights Committee *CCPR General Comment No 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (13 April 1984); UN Human Rights Committee *General Comment No 32: Article 14 – Right to equality before courts and tribunals and to fair trial* UN Doc CCPR/C/GC/32 (23 August 2007); and International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976).

71 *Decision on the twelfth item on the agenda*, above n 69, at [4].

72 Article VI(I) of the amended Statute.

73 *South West Africa (Hearings) (Advisory Opinion)* [1956] ICJ Rep 13 at 37.

74 *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 (PC) at 162.

75 *Gazley v Attorney-General* (1996) 10 PRNZ 47 (CA) at 54–55.

The Court has answered none of the six requests answered by it since 1996 in the precise terms put to it. (In the *World Health Assembly Nuclear Weapons* case it refused to answer the question on the basis that the Assembly has no power to make the particular request: it did not relate to a question which arose within the scope of the activities of the WHO.)⁷⁶ I do not at this stage track through them. Instead I mention a request for an advisory opinion which was *not* made.

Disputes arose within the ILO about the interpretation of Convention No 87 on Freedom of Association and the Right to Organise in relation to the right to strike.⁷⁷ The disputes were affecting the smooth running of the ILO's supervisory system. Discussions within the ILO between 2014 and 2015 raised the possibility of a request for an advisory opinion, which would have been the first from the ILO since 1932. The Governing Body decided not to make a request, given the broad agreements reached during tripartite meetings. All accepted that the right to strike is linked to freedom of association, that freedom of association cannot be fully realised if the right to strike is not guaranteed, but that that right is not absolute.⁷⁸ That final phrase indicates a major problem which would have faced the relevant ILO body in stating the question and the Court in answering it. The assembled information on national law and practice showed many variations in national law and practice in the prohibitions and the limits on, and the procedures surrounding, the right to strike. The answer would very likely be, *yes*, freedom of association in the Convention does involve a right to strike (that was not in dispute), but that right is not absolute. Would such an answer really help the expert monitoring bodies which have over nine decades of experience in examining varying and evolving national laws and practices against ILO conventions?

A second issue would have concerned participation. Could interested employer and worker organisations be invited to submit written and oral agreements, or to take that action as they had in a number of cases in the 1920s and 1930s before the amendments were made to the Statute of the PCIJ?⁷⁹ Under Article 66 "international organisations" likely to be able to furnish information on the question submitted may have the opportunity to make written and oral submissions. In principle, the international employer and worker organisations should have been permitted to participate, as in those

76 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, above n 59.

77 Freedom of Association and Protection of the Right to Organise Convention 68 UNTS 17 (adopted 7 July 1947, entered into force 4 July 1950).

78 *The Standards Initiative* (GB.323/INS/5/, 13 March 2015), Appendix 1 (TMF APROC/2015/3).

79 See the following five advisory opinions: *Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference (Advisory Opinion)* (1922) PCIJ (series B) No 1; *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)* (1922) PCIJ (series B) No 2; *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production (Advisory Opinion)* (1922) PCIJ (series B) No 3; *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer (Advisory Opinion)* (1926) PCIJ (series B) No 13; and *Interpretation of the Convention of 1919 concerning Employment of Women during the Night (Advisory Opinion)* PCIJ (series A/B) No 50.

earlier cases. They would have been affected in major ways by any ruling. As appears from the 2014–2015 and many earlier exchanges, their participation in the ILO processes since 1920 in terms of the principles underlying the ILO constitution demonstrates that beyond any doubt. Their contributions would also have been important, even necessary, for the Court to be fully informed. Any literal argument, perhaps reflected by the rulings in the *Nuclear Weapons* cases and earlier in the *UNAT* case,⁸⁰ that international NGOs do not fall within the category of "international organisations" would be met by the contrasting use of "public international organisation" in paras (2) and (3) of Article 34 of the Statute, by the principle just mentioned and by the practice in the *Wall* and *Kosovo* cases.

In the former, the Court decided that Palestine was to be invited to participate, taking into account that the General Assembly has granted it a special Status of Observer and that it cosponsored the draft resolution requesting the opinion;⁸¹ in the latter the Court, taking account of the fact that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was the subject of the question submitted to the Court, the authors of the declaration were considered to be likely to be able to furnish information on the question, invited them to participate.⁸² Neither of those invitations fits within the terms of Article 66 of the Statute. Further, those receiving the invitations were not "States entitled to appear before the Court". The Court did not have available to it the opportunity of making the invitations by way of arts 63 (on intervention) and 68 (on assimilation) as it did in the request concerning the interpretation of the 1947 Treaties of Peace with Bulgaria, Hungary and Romania⁸³ – those being States which at that time (1949–1951) were not entitled to appear before the Court. (The United States appeared not to have recognised that fact when in that early period it brought a unilateral proceeding against Hungary.)⁸⁴ Is the Court to be seen, in those cases, as exercising its statutory power to make orders for the conduct of the case (Article 48 by way of Article 68) or its inherent power as a Court in pursuit of the principle of the good administration of justice and in particular the equality of parties before the Court?

80 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47; and Pleadings 394–395 and 397.

81 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for Advisory Opinion)* [2003] ICJ Rep 428 at 429, [2] and [4] of the Order.

82 *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)* [2008] ICJ Rep 409 at 410, [4] of the Order; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, above n 59, at 408–410; and *Sixteenth Report of the Permanent Court of International Justice PCIJ* (series E) No 16 at 93–95, 108–109 and 128.

83 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Request for Advisory Opinion)* [1949] ICJ Rep 229; and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Order)* [1950] ICJ Rep 121.

84 See *Treatment in Hungary of Aircraft and Crew of United States of America (United States v Hungary)* [1954] ICJ Rep 99.

* * *

I have not, as I had originally planned, addressed the development by the two Courts of the law and practice of evidence. Among several reasons for not doing that is the existence of valuable recent surveys, one by an academic and another by an experienced ICJ Judge and his clerk.⁸⁵ Rather I conclude by questioning the 2017 decision of the International Law Commission to include "evidence before international courts and tribunals" in its long term programme of work.⁸⁶

The syllabus⁸⁷ on the basis of which this decision was made justifies the Commission's proposed role on what appears to me to be a confused basis. The existing law and practice is said to be developed, but then it is said there is a void to be filled and an absence of rules.⁸⁸ As the sources I have just mentioned and many others plainly demonstrate, the former is the case for the ICJ although the process will undoubtedly continue. It is then said that there is uncertainty and inconsistency in the rules, but no example is given.⁸⁹ Further, "if the issue of evidence ... is left unattended [it is not said by whom], it would result into contradictory practices developing due to multiplicity of courts and tribunals and technical complexities"⁹⁰ – but again no example is given.

The author does not appear to have given sufficient attention to what international courts and tribunals and in particular the ICJ have achieved and continue to achieve. Some evidence of that failure appears from the appended list of ICJ decisions: it does not for instance include *Oil Platforms*, the merits judgments in the two Balkans genocide cases and the *Pulp Mills* case, and the *Whaling* case;⁹¹ it also appears from the lack of any reference to changes in the Rules of Court, and the Practice Directions, let alone the law and practice of the Court. Finally, the author has not considered whether it would not be better for the various courts and tribunals which in many cases *do* take account of the

85 Markus Benzing "Evidentiary Issues" in Andreas Zimmerman and others (eds) *The Statute of the International Court of Justice: A commentary* (2nd ed, Oxford University Press, Oxford, 2012) 1234; and Tomka and Proulx, above n *. See also Chester Brown *A Common Law of International Adjudication* (Oxford University Press, Oxford, 2007) at ch 3.

86 *Report of the International Law Commission* UN Doc A/72/10 (2017).

87 At 242–245.

88 At [6] and [7].

89 At [7].

90 At [9].

91 *Oil Platforms (Iran v United States of America) (Merits)* [2003] ICJ Rep 161; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* [1996] ICJ Rep 595; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 47; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 18; and *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* [2014] ICJ Rep 228.

practice of other courts and tribunals to be left to clarify and develop the law.⁹² A principal responsibility of a law reform agency is to assess the best way in which a particular area of the law is to be clarified, codified or progressively developed. That assessment requires a consideration of the body or bodies which might undertake the task, the procedures they follow, the material on which they draw, the principles and policies they apply and the form of the product, and in particular whether it may be better to leave the area to developing practice.⁹³

92 The paper also has serious flaws: for example the Fitzmaurice quote at [3] is not accurate and it is taken out of context; the passage at [2], n 3 is not from the Corfu Channel case; the quote at [5] dates from 2006 – a later similar passage would be more persuasive; the first and second references at [10], n 10 do not support the text; the Institut de Droit International did not adopt a resolution in 2003 (at [10]); as the *Annuaire* makes clear the relevant commission was unable to agree on a text.

93 For the ILC see the *Survey of International Law* [1971] vol II, pt 2 YILC 1 at 9; and more generally KJ Keith "Making Law – Who, How and What?" in Matthew Dyson and others (eds) *Fifty Years of the Law Commission: the dynamics of law reform* (Hart Publishing, Oxford, 2016) ch 39.