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An Arbitral Tribunal or a Judicial Body?

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To Raffaele

Preface

The International Court of Justice is the principal judicial organ of the United Nations, and epitomises the very notion of international judicial institution. Yet, the consensual basis of its contentious jurisdiction makes it more similar to an arbitral tribunal than any other international court. The aim of this book is to assess if, and how, the properly judicial features of the Court—its permanent character, the public nature of its proceedings, the non-derogable nature of its Statute, the possibility for third States to intervene in proceedings—and its organic link to the United Nations have led it to depart from principles established in international arbitration and if, in the light of this, its role in the settlement of inter-State disputes can be distinguished from that of traditional, non-institutionalised arbitral tribunals. This issue is by no means new: it was debated at length when the Permanent Court of International Justice was established, and again when the International Court of Justice replaced it. However, a reappraisal seems warranted as the centennial of the adoption of the Statute of the Permanent Court of International Justice approaches. The framework in which the International Court of Justice is now operating is very different from that which existed when the Permanent Court began its activities in the 1920s. The growing readiness of States to submit to adjudication disputes involving other States or non-State actors and the ensuing proliferation of institutionalised international tribunals seem to have influenced the Court's reading of its own role—although possibly not to the full extent allowed for by the letter of the Statute. Moreover, in its recent practice the Court has taken a number of steps aimed at fostering international peace and security that mark its distance from international arbitration. Whether these developments are all desirable per se, and whether they are sufficient to distinguish the contentious jurisdiction of the Court from the arbitral model—as was the intention of the drafters of the Permanent Court's Statute—is open to question. Hopefully, this work will provide some useful elements for this discussion.

I am grateful to Professor (now Judge) Giorgio Gaja, for his many insightful comments over the years, including those on an earlier draft of this book. I am also indebted to Professor Francesco Salerno, for always finding the time to discuss my

work and for the support he has given me in many other ways. All remaining shortcomings are, of course, only mine.

The book is updated as of 31 December 2013. Unreported judgments and documents of the ICJ are available on the Court's website, www.icj-cij.org.

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Abbreviations

Ann fr dr int	Annuaire français de droit international
Am J Int Law	American Journal of International Law
Am Soc Int Law	American Society of International Law
BIICL	British Institute of International and Comparative Law
Br Year B Int Law	British Year Book of International Law
CACJ	Central American Court of Justice
Collected Courses	Hague Academy of International Law, Collected Courses
CTS	Consolidated Treaty Series
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
Eur J Int Law	European Journal of International Law
Hum Rights Law Rev	Human Rights Law Review
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILC	International Law Commission
ILC Model Rules	International Law Commission, Model Rules on Arbitral Procedure
ILO	International Labour Organization
ILR	International Law Reports
Int Comp Law Q	International and Comparative Law Quarterly
Inter-State Optional Rules	Permanent Court of Arbitration, Optional Rules for Arbitrating Disputes Between Two States
IOS Optional Rules	Permanent Court of Arbitration, Optional Rules for Arbitration Involving International Organizations and States
ITLOS	International Tribunal for the Law of the Sea

Law Pract Int Courts Tribunals	The Law and Practice of International Courts and Tribunals
Leiden J Int Law	Leiden Journal of International Law
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Rev gén dr int pub	Revue générale de droit international public
RIAA	United Nations Reports of International Arbitral Awards
Riv dir int	Rivista di diritto internazionale
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
Zeitschrift	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

Contents

Chapter 1
Introduction

1.1 The Research Topic

'This Permanent Court will not be (...) a Court of Arbitration, but a Court of Justice'.[1] With these words Louis Bourgeois marked the beginning of the process that eventually gave birth to the Permanent Court of International Justice (PCIJ). Despite these intentions, the Committee's proposal to endow the PCIJ with compulsory jurisdiction over inter-State disputes[2] was not accepted. Thus, the most significant differences between the PCIJ and its main predecessor, the Permanent Court of Arbitration (PCA), regarded the permanent nature of the new Court, with only very limited options left to the parties as to the choice of the Bench, the public nature of proceedings and the fact that procedural aspects were to be regulated once and for all by the Statute, as supplemented by the Rules of Court.

The situation did not change significantly when the International Court of Justice (ICJ) replaced the PCIJ. Indeed, the ICJ is defined as the 'principal judicial organ' of the United Nations by Article 92 of the UN Charter and by Article 1 of its Statute. This distinguishes the ICJ from the PCIJ, which had no formal relationship with the League of Nations and viewed itself as an 'organ of international law'[3]—although it was described at times as an organ of the League of Nations (also by its first President, Loder[4]) and was formally dissolved by the Assembly of that organisation.[5]

[1] PCIJ, Advisory Committee of Jurists, *procés verbal* of the first meeting, Annex No. 2 (1920), *Procés Verbaux of the Meetings of the Committee*. van Langenhuysen Brothers, The Hague, p. 8. Bourgeois was delegate of the Council of the League of Nations to the Advisory Committee of Jurists.

[2] See Article 33 of the Draft-Scheme adopted by the Committee at its 32nd meeting, *ibid*., p. 679.

[3] *Certain German Interests in Polish Upper Silesia*, judgment of 25 May 1926, *Series A*, No. 7, p. 19. See also ICJ, *Corfu Channel* (*United Kingdom* v. *Albania*), judgment of 9 April 1948, *ICJ Reports 1948*, p. 4 at 35.

[4] See Hudson (1943), p. 112. For a different view, Fachiri (1932), p. 330.

[5] Resolution of 18 April 1946, reproduced in (1946/1947) *ICJ Yearbook*, pp 28–29, fn. 2.

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Also thanks to its organic link to the United Nations—which does not limit the independence of the ICJ as a jurisdictional organ[6]—the Court plays a particularly prominent role among international judicial institutions and has been described as providing the 'type' of the 'juridictions proprement dites, c'est-à-dire institutionnelles et à tendances obligatoires, qui, elles, sont conçues implicitement comme des organes de la société internationale globale', as opposed to arbitration that, 'au contraire, demeure encore ce qu'il était dans la procédure romaine primitive: un succédané de la lutte de forces entre les plaideurs'.[7] Yet, the ICJ's contentious jurisdiction is still 'primitive',[8] in that it is based on the consent of the parties to the case. Consent may be expressed in various forms, which can also be used to refer disputes to arbitration: *i.e. compromis*, compromissory clauses and treaties submitting a specific category of disputes to adjudication. Although the attribution of jurisdiction through unilateral declarations, as set forth by Article 36(2) of the Statute, is peculiar to the ICJ (and to the PCIJ before it), these unilateral declarations give, in fact, rise to agreements, and are yet another expression of the consensual principle.[9] The same applies to the so-called *forum prorogatum*[10] (which also has some parallels in the framework of arbitral proceedings[11]). For these reasons, among others, Gaetano Arangio-Ruiz stressed the difficulty of distinguishing between arbitration and 'at least some forms' of ICJ proceedings.[12] More recently, Antonio Cassese suggested that 'the essential recipe for reviving the Court and bringing it into the twenty-first century is to turn it from a substantially *arbitral* court, a late nineteenth-century behemoth oriented to unrestricted respect for outmoded conceptions of state

[6] Jennings, Higgins (2012), pp. 4–5. Cf. also Arangio-Ruiz (1962), p. 1048; Gowlland-Debbas (2012), p. 232.

[7] Scelle, 'Rapport sur la procédure arbitrale', doc. A/CN.4/18, (1950) *ILC Yearbook*, vol. II, p. 114 at 138, para. 80.

[8] Jenks (1964), p. 121.

[9] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), *Jurisdiction and Admissibility*, judgment of 26 November 1984, *ICJ Reports 1984*, p. 392 at 418, para. 60; *Fisheries Jurisdiction* (*Spain* v. *Canada*), judgment of 4 December 1998, *ICJ Reports 1998*, p. 432 at 453, para. 46. This assumption was never cast in doubt in the debate concerning the legal nature of the mechanism set forth by Article 36(2), on which see only Starace (1970), pp. 153ff.

[10] See *Corfu Channel Case. Judgment on Preliminary Objection* (*United Kingdom* v. *Albania*), 25 March 1948, *ICJ Reports 1948*, p. 15 at 26; *Certain Criminal Proceedings in France* (*Republic of Congo* v. *France*), struck out of the list by order of 16 November 2010, *ICJ Reports 2010*, p. 635; *Questions of Mutual Assistance* (*Dijbuti* v. *France*), judgment of 4 June 2008, *ICJ. Reports 2008*, p. 177 at 206; and Article 38(5) of the Rules of Court.

[11] Santulli (2005), p. 145.

[12] Arangio-Ruiz (1958), p. 975. A unitary vision of inter-State arbitration and adjudication is purported also by Morelli (1937), pp. 311ff.; and, implicitly, by Carlston (1946); Cavaré (1956), p. 496; Santulli (2005), p. 4.

sovereignty, into a proper *court of law*, with all the attributes and trappings of a modern judicial institution'.[13] The late Judge Cassese proposed a number of changes to the Statute and to the Rules of Court to reach this end. The aim of this book is rather to assess *de lege lata* if, and to what extent, the contention that the ICJ is arbitral in nature is well founded. While the Court's[14] approach to its dispute-settlement function has shifted over time,[15] the main focus here is on the current phase of its jurisprudence, with some forward-looking suggestions that could be implemented without amending the Statute.

There is no attempt to define, in general terms, what an international judicial body is, or should be[16]—although, of course, the assessment of the Court's 'true nature' also depends on the theoretical approach used to address this issue. Even without considering the definition in the UN Charter and in the Statute, it seems natural to qualify the Court as a judicial body if the emphasis is placed on its permanent institutional structure, on the public nature of proceedings and on the predetermination of rules of procedure. A different conclusion is often reached by authors who look rather at the consensual basis of the Court's jurisdiction and at its contentious function.[17] My analysis adopts the latter perspective, focusing on the way the ICJ—and the PCIJ before it—has performed its role in the settlement of international disputes. More specifically, I tried to ascertain whether, and how, the Court has set aside or re-interpreted principles established in international arbitration in consideration of its judicial function. This, in turn, might help shedding some light on the Court's understanding of this concept: as was noted, reference to the Court's judicial function is a sort of *Leitmotif* in its activities,[18] but usually without any comprehensive elaboration of this notion.[19]

[13] Cassese (2012), p. 241.

[14] In this and other contexts hereinafter, the term 'Court' encompasses both the PCIJ and the ICJ, relying on the generally accepted assumption that there is continuity between these two judicial institutions: see only Rosenne (2006), pp. 73ff. This continuity is not, of course, to be taken for granted in all respects: cf. Bedjaoui (1997), pp. xxi–xxiii.

[15] On the different phases of the Court's jurisprudence see only Abi-Saab (1987), pp. 258ff.; Dupuy (2002); Kolb (2013), pp. 1144ff.

[16] For a discussion of the notion of 'international judicial body' see Cavaré (1956); Ascensio (2003); Santulli (2000); Kolb (2013), pp. 69ff.

[17] See above, note 12, and below, Sect. 1.2.

[18] Wittich (2008), p. 981.

[19] This seems typical of international jurisdiction. As was aptly noted, moreover, specifically in international law it is difficult to provide a general definition of this concept, since judicial functions are "tailored to meet the specific needs of the relevant court or tribunal": Wittich (2008), p. 987.

The Court's advisory competence is also part of that judicial function,[20] and is probably the area where its role as an UN organ emerges more clearly.[21] However, precisely because this competence is not directly based on the consent of the parties to the proceedings, it will be taken into account only insofar as it is relevant to the main research topic.

When comparing the Court's contentious jurisdiction to arbitration, one should keep in mind that arbitration is an inherently flexible tool that can take very different forms, including highly institutionalised ones. Examples such as the one of the Iran–United States Claims Tribunal show that it may be difficult at times to assess the nature of a given mechanism of dispute settlement.[22] In taking into account this rather complex context, the Court's role is discussed and compared to the 'classical' model that Bourgeois had in mind when making the statement quoted above: namely, a model where the arbitral tribunal is freely chosen by two States and called to decide on a specific international dispute, outside any institutional framework that goes beyond the very loose one of the PCA. This model has not lost its relevance in contemporary international society; rather, it goes hand in hand with the practice of establishing 'institutionalised' forms of arbitration and the proliferation of international judicial bodies. This more general trend in international society—whereby States are increasingly ready to submit disputes to adjudication or arbitration even when they involve non-State actors—has influenced purely bilateral, inter-State arbitration and contributed to its 'jurisdictionalisation'.[23] As we shall see, modern inter-State arbitration has generally lost the conciliatory features that often characterised it in the nineteenth century and early twentieth century and is fully involved in a 'dialogue' with judicial bodies, as regards the assessment not only of substantive rules of international law but also of principles of procedure. A factor of some relevance, in this regard, is that present and past ICJ judges are often appointed as arbitrators in inter-State disputes:[24] their experience as adjudicators enhances the authority of arbitral tribunals and most

[20] *Admission of a State to the United Nations* (*Charter*, *Art. 4*), advisory opinion of 28 May 1948, *ICJ Reports 1948*, p. 57 at 61; *Case Concerning the Northern Cameroons* (*Cameroon* v. *United Kingdom*), judgment of 2 December 1963, *ICJ Reports 1963*, p. 15 at 30. On the assimilation of the Court's advisory and judicial functions see *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, advisory opinion of 23 October 1956, dissenting opinion of Judge Winiarski, *ICJ Reports 1956*, p. 104. at 105. On the relationship between the two functions in the framework of the ICJ, as compared to the PCIJ, cf. also the individual opinions of Judge Azevedo in *Admission of a State to the United Nations*, *ICJ Reports 1948*, p. 72, par. I, and in *Interpretation of Peace Treaties*, advisory opinion of 30 March 1950, *ICJ Reports 1950*, p. 79. See also Hudson (1943), p. 511; Abi-Saab (1999), p. 41; Cot (2012) pp. 1670ff.

[21] Cf. Gross (1967), p. 320.

[22] See Caron (1990); Kolb (2013), p. 45.

[23] Abi-Saab (1987), p. 245.

[24] On this extra-judicial function performed by the Court's judges see below, Sect. 11.4. Also ITLOS judges are often appointed as arbitrators, especially in proceedings initiated under Annex VII UNCLOS.

probably influences the approach those tribunals take to the management of proceedings and to the settlement of the dispute.[25]

In analysing the developments of inter-State arbitration, authoritative model rules such as those included in the 1899 and 1907 Hague Conventions on the Peaceful Settlement of International Disputes,[26] the ILC Model Rules on Arbitral Procedure[27] and the PCA Rules of Procedure (specifically, the Optional Rules for Arbitrating Disputes between Two States[28] and the Arbitration Rules 2012[29]) will often be referred to as exemplifying the usually accepted practice concerning inter-State arbitration in a given historical phase.

1.2 Some Preliminary Remarks

As a premise, it should be recalled that the principle of the free choice of means of settlement of international disputes is deeply entrenched in international law, and consent underlies the activities of most international judicial bodies, not only the ICJ. International tribunals are usually instituted by treaty—either as part of a broader institutional framework (as is the case with the ICJ) or as independent international organisations (such as the International Criminal Court).

There are some exceptions in this regard: for instance, the International Criminal Tribunals for the Former Yugoslavia and Rwanda were established by resolutions of the UN Security Council. Even in this case, however, an admittedly more remote consensual basis could be found in the UN Charter itself—in Article 41 thereof, to

[25] The Ethiopia–Eritrea Claims Commission was composed mainly of individuals with experience in international commercial arbitration and this probably had an influence on their handling of claims: see Gray (2006), p. 707; De Guttry et al. (2009) (cf. especially the contributions of Ponti, p. 269, and Sommario).

[26] Respectively CTS 187:410 and CTS 205:533.

[27] (1958) *Yearbook of the International Law Commission*, vol. II, pp. 83ff.

[28] Effective since 20 October 1992 (hereinafter, the Inter-State Optional Rules). As the introduction to this text recalls, the Inter-State Optional Rules are based on the UNCITRAL Rules 1976, while taking into account the public international law character of inter-State disputes and diplomatic practice relating to such disputes. The same applies to the PCA Optional Rules for Arbitration Involving International Organisations and States, effective since July 1, 1996 (hereinafter, IOS Optional Rules). This is why no specific reference is made here to the UNCITRAL Rules. The texts of the PCA Rules are available on the Permanent Court's website, www.pca-cpa.org, last visited 20 December 2013.

[29] These Rules, effective since 17 December 2012, are for use in arbitrating disputes involving at least one State, State-controlled entity, or intergovernmental organisation. They do not replace previously adopted PCA Rules, which remain a valid and available alternative; they do, however, constitute a consolidation of previously existing sets of rules 'in light of the 2010 revisions to the UNCITRAL Rules and the PCA's experience with its existing procedural rules and the UNCITRAL Rules 1976' (see PCA, *Annual Report 2012*, p. 19).

be precise.[30] Yet, the Security Council's powers under Chapter VII are not without limitations: it is doubtful that the Council may directly decide on the rights and obligations of States when acting on that basis, or that it may establish subsidiary bodies entrusted with such tasks.[31]

To return to the more usual context of judicial bodies established through international agreements, even if the jurisdiction of these tribunals is compulsory under the relevant instruments individual contracting parties may be entitled to withdraw from such instruments. This was the case, for instance, when Trinidad and Tobago or Venezuela denounced the American Convention on Human Rights.[32] Moreover, a decision by the contracting parties jointly to reform or dismantle the relevant tribunal cannot be ruled out and this can happen not only to take into account major changes within the international society, as was the case with the abolition of the PCIJ:[33] for instance, the Summit of the Heads of State and Government of the Southern African Development Community virtually abolished that Organisation's Tribunal out of discomfort with some of its judgments.[34]

Nonetheless, the role of consent is not as prominent in other international judicial institutions as it is in the context of the ICJ. Several international tribunals now have compulsory jurisdiction over classes of disputes involving States without any need for the parties to the instituting treaty to specifically express their consent in this regard. For instance, the jurisdiction of the Court of Justice of the European Union usually finds its sole basis in the founding treaties, with the exception of what is now Article 273 TFUE.[35] Other international courts' contentious jurisdiction is in whole or in part conditional upon the parties' specific consent: examples include the ITLOS, the European Court of Human Rights before the entry into force of Protocol 11, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights (as regards its competence to hear applications submitted by individuals or non-governmental organisations[36]). However, in those cases the tribunal's competence is accepted once and for all and thus for a potentially indefinite number of disputes. The possibility to withdraw the acceptance of

[30] This is the stance taken by the ICTY Appeals Chamber in *Prosecutor* v. *Dusko Tadic*, decision on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, *ICTY Judicial Reports* 1995–1995, p. 353 at 389, paras 34ff. For a critical view see Arangio-Ruiz (1996). Cf. however Dupuy (2002), pp. 330ff.

[31] See only Arangio-Ruiz (1996), pp. 34ff. De Wet (2004), pp. 362ff.; Krisch (2012), p. 1323.

[32] On 26 May 1998 and on 1 September 2012, respectively.

[33] See Dubisson (1964), p. 13.

[34] On the Summit's Decision of 17 August 2012 see http://www.sadc.int/about-sadc/sadc-institutions/tribun/, accessed 10 October 2013. See further Cowell (2013), p. 153.

[35] This provision states: 'The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties'.

[36] See Articles 5(3) and 34(6) of the Protocol establishing the African Court, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

jurisdiction is often limited and there is usually no opportunity for 'cherry picking', or rather, deciding whether to submit specific disputes to adjudication or not.

The ICJ's situation is different: the submission of cases by special agreement is still frequent, although not as much as it used to be.[37] Many unilateral applications are submitted by relying on compromissory clauses; respondent States who are not satisfied with the outcome of specific proceedings may react by withdrawing from the relevant treaty instruments, as was the case in the denunciation by the United States of the Optional Protocol to the Vienna Convention on Consular Relations on 7 March 2005,[38] or by Colombia of the Pact of Bogotà on 27 November 2012.[39] Also unilateral declarations made under Article 36(2) of the Statute are often limited in scope, and may be withdrawn or modified over time so as to avoid the risk of particularly sensitive disputes being submitted unilaterally to the Court by the other party (or parties). Examples include the replacement of the declarations under Article 36(2) made by Canada on 10 May 1994—so as to exclude disputes concerning measures of conservation and management of fish stocks[40]—and by Australia on 22 March 2002—excluding disputes relating to the delimitation of maritime zones.[41] Finally, the prevailing view is that Article 36(3) of the Charter does not provide a legal basis for the seisin of the Court without both parties' consent,[42] although the ICJ reserved the issue in *Corfu Channel Case*.[43] While the Council might be entitled to enjoin the parties to a dispute to submit it to the ICJ under Chapter VII of the Charter, this has never happened so far.[44]

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[37] At the moment when this book goes in press, no case on the docket was initiated by special agreement. See, by contrast, Higgins (1991), pp. 244ff.

[38] The withdrawal was decided after the ICJ judgments in *LaGrand* (*Germany* v. *United States*) and *Avena and other Mexican Nationals* (*Mexico* v. *United States*). See Quigley (2009).

[39] See www.oas.org/juridico/english/sigs/a-42.html#Colombia, visited on 10 October 2013. The denunciation followed the ICJ judgment of 19 November 2012 in the case of the *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), *ICJ Reports 2012*, p. 624. The day before the denunciation became effective, on 26 November 2013, Nicaragua submitted a new case to the ICJ challenging the refusal by Colombia to execute the judgment (see Press Release No. 2013/36 of 27 November 2013).

[40] *ICJ Yearbook*, 1994–1995, p. 89. This limitation was critical in excluding the Court's jurisdiction over the *Fisheries Jurisdiction* (*Spain* v. *Canada*) case: see the judgment of 4 December 1998, *ICJ Reports 1998*, p. 432.

[41] *ICJ Yearbook*, 2001–2002, p. 125. The new clause is subject to further limitations; for instance, it does not apply 'where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court'. It was specifically intended to avoid the possibility of an unilateral application by Timor-Leste seeking the delimitation of the maritime areas between the two countries: see Triggs and Bialek (2002).

[42] Giegerich (2012), p. 154.

[43] *Judgment on Preliminary Objection*, *ICJ Reports 1948*, p. 26. See the joint separate opinion of Judges Basdevant, Alvarez, Winiarski, Zoričič, De Visscher, Badawi Pacha and Krylov, *ibid*., pp. 31–32, and the dissenting opinion of Judge *ad hoc* Daxner, *ibid*., pp. 33ff.

[44] Kolb (2013), p. 393.

With this in mind, it is difficult to disagree with the stance that, specifically for the ICJ, the principle of consent is a sort of 'judicial dogma'.[45] Moreover, the arbitral basis of the Court's jurisdictional competence is reflected in the 'transactional' character of some of its pronouncements[46] and in various rules governing contentious proceedings. Two obvious examples of this regard the possibility for the parties to appoint judges *ad hoc* under Article 31 of the Statute and for them to request that particular disputes be submitted to a Chamber under Article 26 thereof.

Other aspects of the relevant legal framework and of the Court's practice point in the opposite direction: for instance, its judicial role was clearly enhanced when the Rules of Court established the possibility of hearing counter-claims and joining proceedings, which has no basis in the Statute; or when, in *LaGrand*, the Court held that provisional measures adopted under Article 41 of the Statute are binding upon the Parties.[47]

The question of which of these aspects prevails over the other can be discussed at length; the fact is, however, that the Court clearly perceives itself as a *judicial* body. It has stated as much on a number of occasions, and not simply in terms of a reminder of Article 92 of the UN Charter (this being—interestingly—a provision that is more often mentioned in the exercise of the ICJ's advisory function than in the framework of contentious proceedings[48]). One of the clearest stances to this effect can be found in *Northern Cameroons*:

> There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.[49]

Specific consequences have derived from this assumption, as the Court deemed it impossible to decide on the merits a dispute that had become moot.[50] In other

[45] Kolb (2013), p. 373.

[46] See the critical remarks of Judge Simma in *Application of the Interim Accord of 13 September 1995* (*The Former Yugoslav Republic of Macedonia* v. *Greece*), judgment of 5 December 2011, separate opinion, *ICJ Reports 2011*, p. 695 at 697, para. 6. Cf. also Abi-Saab (1996), pp. 11ff.

[47] *LaGrand* (*Germany* v. *United States*), judgment of 27 June 2001, *ICJ Reports 2001*, p. 466 at 516. See Oellers-Frahm (2012), pp. 390, 407–408. Cf. Le Floch (2008), pp. 431ff., generally on the attitude of international judicial bodies.

[48] Cf. for instance *Interpretation of Peace Treaties*, *ICJ Reports 1950*, p. 65 at 71; *Certain Expenses of the United Nations*, advisory opinion of 20 July 1962, *ICJ Reports 1962*, p. 151 at 155; *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, in *ICJ Reports 1996*, p. 226 at 235, para. 14; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, *ICJ Reports 2010*, p. 403 at 416, para. 29, and p. 417, para. 33. See however *Nottebohm* (*Lichtenstein* v. *Guatemala*), *Preliminary Objection*, judgment of 18 November 1953, *ICJ Reports 1953*, p. 111 at 119.

[49] *Northern Cameroons*, *ICJ Reports 1963*, p. 29.

[50] *Northern Cameroons*, *ICJ Reports 1963*, p. 38; *Nuclear Tests* (*Jurisdiction*) (*Australia* v. *France*) and (*New Zealand* v. *France*) judgments of 20 December 1974, *ICJ Reports 1974*,

instances, the Court has considered that 'discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function'.[51] A recent example of the same approach can be taken from the *Burkina Faso/Niger* case: although it is possible both for the Court[52] and for international arbitral tribunals[53] to issue 'judgments by consent' whenever the parties agree *pendente lite* on a settlement of the dispute, the ICJ has refused to place on record, in the operative part of the judgment, the existence of a similar agreement concerning part of a dispute that was submitted to the Court *later*, since 'such a pronouncement would lie outside its judicial function, which is to decide disputes'.[54]

If the essence of the Court's judicial function lies in deciding specific international disputes, a more radical question arises as to whether, in the absence of any form of compulsory jurisdiction, other structural elements allow to qualify the ICJ as a properly judicial, rather than an arbitral, body.[55] This is the issue that we seek to address.

As we shall see, many elements of the Court's practice that enhance its judicial function regard issues of procedure,[56] an area where its case law is at times influenced by the practice of other international tribunals, notably the ITLOS,[57] in the context of which, however, arbitral features are not as prominent. Moreover, the idea that arbitral bodies too exercise a jurisdictional function, as had already been advocated

respectively p. 253 at 271, para. 56, and p. 457 at 476, para. 58. When not otherwise specified, reference will be made hereinafter to the case concerning Australia.

[51] *Kosovo* advisory opinion, *ICJ Reports 2010*, p. 416, para. 29. See already the advisory opinions on *Status of Eastern Carelia*, 23 July 1923, PCIJ, *Series B*, No. 5, p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, 12 July 1973, *ICJ Reports 1973*, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, 20 July 1982, *ICJ Reports 1982*, p. 325 at 334, para. 22; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, *ICJ Reports 2004* (I), pp. 156–157, paras. 44–45.

[52] See PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex*, order of 6 December 1930, *Series A*, No. 24, at 14: 'there seems nothing to prevent the Court from embodying in its judgment an agreement previously concluded between the Parties; (. . .) a "judgment by consent", though not expressly provided for by the Statute, is in accordance with the spirit of that instrument'. The same principle is reflected in Article 88(2) of the Rules of Court. See on the issue Giardina (1975) and Salerno (2013), p. 525ff.

[53] See Article 23 of the ILC Model rules on arbitral procedure, in *Yearbook of the International Law Commission*, II (1958), 854; Article 34 of the PCA Inter-State Optional Rules and the corresponding provision of the IOS Optional Rules; Article 36 of the PCA Arbitration Rules 2012. Cf. also, recently, the award on agreed terms issued on 1 September 2005 in the dispute concerning the *Land Reclamation by Singapore in and around the Straits of Johor* (*Singapore* v. *Malaysia*), RIAA 27, pp. 133–145.

[54] *Frontier Dispute* (*Burkina Faso/Niger*), judgment of 16 April 2013, para. 53.

[55] See above, Sect. 1.1.

[56] See below, especially Part I.

[57] See only, with reference to the binding character of provisional measures, Brown (2007), pp. 146–147.

in the 1899 Hague Peace Conference,[58] is reflected in arbitral practice concerning procedural matters: arbitral bodies have held, for example, to be subject to the 'rules applying to, and practice of, inter-State tribunals' as regards qualification and challenge of arbitrators;[59] they also consider to have inherent jurisdiction to stay proceedings[60] and to revise their own judgments,[61] even when this is not expressly set forth in the relevant legal rules. Thus, the emerging 'common law of international adjudication' fully encompasses the practice of arbitral bodies.[62] Nor is there any significant difference as regards the substantive parameters referred to in the settlement of disputes: both international arbitral tribunals and the ICJ usually adjudicate disputes according to international law, although it is open to the parties to ask that their case be settled *ex aequo ex bono*.[63] Article 38(2) of the ICJ Statute has never been invoked so far; and although arbitration has often been blurred by conciliation in the past, this does not usually occur nowadays. The arbitration currently pending between the Republic of Croatia and the Republic of Slovenia concerning their land and maritime boundary is a rare contemporary case where the Arbitral Tribunal is required to decide part of a dispute by applying 'international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances'.[64]

1.3 The Thesis

Notwithstanding the many similarities mentioned above, the permanent character of the ICJ, the public nature of proceedings and its link to the United Nations Organization do influence the Court's perception of its own role. The situations

[58] See the speech of Descamps at the fourth meeting of the Third Commission, 7th July 1899, in *Conférence internationale de la paix*, *La Haye 18 mai–29 July 1899* (Nijhoff, La Haye, 1907), pp. 10–11. Cf. further above, Sect. 1.1.

[59] *Mauritius* v. *United Kingdom*, reasoned decision on challenge of 30 November 2011, (2012) ILM 51, pp. 350ff, para. 168. Admittedly, this stance may be influenced by the fact that UNCLOS sets forth a 'comprehensive dispute settlement framework' (*ibid.*), of which Arbitration under Annex VII is only one element.

[60] *Mox Plant* (*Ireland* v. *United Kingdom*), Order No. 3, 24 June 2003, www.pca-cpa.org accessed 20 October 2013.

[61] *Trail Smelter* (*United States of America/Canada*), final award of 11 March 1941, RIAA 3, p. 1938 at 1954.

[62] Brown (2007), pp. 4–5.

[63] See Jennings (2002), p. 894.

[64] See the PCA press release of 13 April 2012, available online at www.pca-cpa.org. Another singular example is the case concerning the *Arbitration for the Brčko Area* (*The Federation of Bosnia and Herzegovina* v. *The Republika Srpska*), that concerned non-State entities but was established under the Dayton Agreements: see the awards of 15 February 1997, (1997) ILM 36, p. 428; 15 March 1998, available at www.ohr.int, last accessed 15 Nov 2013; 5 March 1999, (1999) ILM 38, p. 536.