

100 YEARS OF INTERNATIONAL ARBITRATION AND ADJUDICATION

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On 28 August 1913, the Peace Palace in The Hague was opened in the presence of Queen Wilhelmina. Andrew Carnegie, the Scottish American philanthropist who provided the major funding for the building, recorded in his diary that evening that

[n]othing he [man] has yet accomplished equals the substitution for war, of judicial decisions founded upon International Law, which is slowly, yet surely, to become the corner stone, so long rejected by the builders, of the grand edifice of Civilization.¹

The Peace Palace was built to house the Permanent Court of Arbitration ('PCA'), which was established by the *Hague Conventions for the Pacific Settlement of International Disputes*.² It was said of that body that it 'is not permanent because it is not composed of permanent judges; it is not accessible because it has to be constituted for each case; it is not a court because it is not composed of judges'.³ Neither did it arbitrate. Rather it was a secretariat with a list of possible arbitrators if states in dispute were willing to agree to use its

* Judge, International Court of Justice. Based on addresses given in Wellington on 27 August 2013 and as the Seabrook Chamber Lecture in Melbourne on 4 September 2013 to mark the centennial of the opening of the Peace Palace in The Hague. In delivering the lecture in Melbourne, I recalled my long and valuable connection from the 1960s to members of the Law Faculty in Melbourne, including Sir David Derham, Dr Peter Brett, Sir Zelman Cowen and Sir Kenneth Bailey, who had been Dean in the 1930s. I also mentioned the excellent conference at the University held in the lead up to the 1999 Conference in The Hague, marking the centennial of the 1899 Conference, organised by Sir Ninian Stephen, Professor Michael Crommelin and Professor Tim McCormack, all of whom attended the 2013 address. See Timothy L H McCormack, Michael Tilbury and Gillian D Triggs (eds) *A Century of War and Peace: Asia Pacific Perspectives on the Centenary of the 1899 Hague Conference* (Kluwer Law International, 2001) 269. Many thanks to Amelia Keene for research assistance and to Dr Liesbeth Lijnzaad for comment.

¹ Andrew Carnegie, quoted in Arthur Eyffinger, *The Peace Palace: Residence for Justice — Domicile of Learning* (Carnegie Foundation, 1988) 110.

² *Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899 (entered into force 4 September 1900); *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907 (entered into force 26 January 1910) ('*Hague I*').

³ James Brown Scott, 'Address to the Ninth Meeting' (Speech delivered at the Second International Peace Conference, The Hague, 1 August 1907) in James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts* (Oxford University Press, 1921) vol 2, 319. F F de Martens also delivered a speech at the same conference in which he said that '[t]he Court of 1899 is but an idea which occasionally assumes shape and then again disappears': at 327.

services⁴ — as, in fact, 15 countries did in 17 cases during the PCA's first decade.⁵

In 1919–20 the Netherlands, which had been neutral through the Great War, succeeded in having the Permanent Court of International Justice ('PCIJ') set up under art 14 of the *Covenant of the League of Nations* ('Covenant'),⁶ housed in the Palace. Finally, a permanent court, with resident judges from Europe, the Americas, China and Japan and with a steady flow of cases, primarily from Europe, came into existence. That Court operated until the outbreak of the Second World War. Since 1946, the International Court of Justice ('ICJ' or 'the Court'), as the principal judicial organ of the United Nations, has occupied the Peace Palace along with a now very busy PCA, which has 88 pending cases as at March 2014. That body had almost disappeared from sight from the 1920s to the 1980s.⁷

So far I have mentioned only arbitration and adjudication, but that is to give an incomplete picture even as at 1899 and 1907. The 1907 *Convention for the Pacific Settlement of International Disputes* ('Hague I'), under which the PCA was established, provided for a raft of means of peaceful settlement: good offices, mediation and international commissions of inquiry, as well as arbitration generally, arbitration by the PCA and summary arbitration.⁸ That list can be extended by including negotiation, conciliation (if it differs from mediation) and, of course, adjudication. The longer list is important to remind us that only a small proportion of disputes are resolved by arbitration or adjudication. The other means, particularly negotiation, are much more common. And we should not forget agreeing to disagree (which might be implicit) or formally agreeing not to resolve the dispute (as with territorial claims in Antarctica).⁹

⁴ Tobias Asser stated that '[i]nstead of a permanent court, the Convention of 1899 gave but the phantom of a court, an impalpable specter, or to be more precise yet, it gave us a recorder with a list': Tobias Asser, 'Address to the Fifth Meeting' (Speech delivered at the Second International Peace Conference, The Hague, 16 July 1907) in James Brown Scott (ed), *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts* (Oxford University Press, 1921) vol 2, 234.

⁵ In the first 100 years of its existence, the Permanent Court of Arbitration ('PCA') decided 35 disputes, nearly half of them before the Permanent Court of International Justice ('PCIJ') was constituted in 1922: see P Hamilton et al (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution — Summaries of Awards, Settlement Agreements and Reports* (Kluwer Law International, 1999). See also the annual reports of the PCA: Permanent Court of Arbitration, *Annual Reports* (2009) <http://www.pca-cpa.org/showpage.asp?pag_id=1069> ('PCA Annual Reports').

⁶ *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919 (entered into force 10 January 1920) pt I ('*The Covenant of the League of Nations*') ('Covenant').

⁷ Hamilton, above n 5; *PCA Annual Reports*, above n 5. The PCA is not even mentioned in a 1990s article on inter-state arbitration: Christine Gray and Benedict Kingsbury, 'Developments in Dispute Settlement: Inter-State Arbitration Since 1945' (1993) 63 *British Yearbook of International Law* 97. The decisions and awards of the PCA are available on its website subject to confidentiality requirements. For the Australian involvement with the PCA, see Kenneth Keith, 'Member of the Permanent Court of Arbitration' in Timothy L H McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 155.

⁸ *Hague I* arts 2, 3, 8, 9.

⁹ For more on this topic, see Cristina Hoss and Jason Morgan-Foster, 'The Rainbow Warrior' (April 2010) *Max Planck Encyclopaedia of Public International Law*.

The 1899 and 1907 Conferences provide other important reminders against too narrow a focus simply on arbitration or on methods of peaceful settlement. The 1899 Conference was called at the urging of the Tsar of Russia who was worried, for good reason, at the rapid growth of the arms race, especially in Europe.¹⁰ He was seeking agreement on controls on armaments spending.¹¹ That request led to no more than a mildly worded resolution, but the 1899 Conference, along with that of 1907, also adopted another 12 conventions setting out substantive law, notably the *Hague Convention respecting the Laws and Customs on War*,¹² some provisions of which are still considered to be in force as part of customary international law.¹³ One important provision which is of continuing effect is the Martens clause,¹⁴ which facilitated the filling of gaps in the written law. It declared that populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience. The 1977 version requires protection, beyond the law in force, by the principles of humanity and the dictates of the public conscience.¹⁵ This is one example, among many to be found in national and international law, of a general principle underlying or supplementing the particular rules.

The point had been taken some decades earlier as major arbitrations began, notably *The Alabama* in 1870,¹⁶ *The Bering Sea* in 1893¹⁷ and *British Guiana* in 1897,¹⁸ that the law had to be systematically codified and developed if arbitration according to law was to become accepted. It was not only governments that had taken that point. In 1873 the *Institut de Droit International* ('IDI') and the International Law Association were established, their members being of the opinion that the codification and development of international law

¹⁰ Johan Joor, 'Prologue: The Hague Peace Conference of 1899' in Johan Joor and Heikelina Verrijn Stuart (eds), *The Building of Peace: A Hundred Years of Work on Peace through Law — The Peace Palace 1913 – 2013* (Carnegie Foundation, 2013) 19–23; T D Gill, 'Het Haags Landoorlogsreglement van 1907 na 100 jaar [The Hague Regulations on Land Warfare of 1907 after 100 Years]' in J G Lammers et al (eds), *Oude verdragen in een nieuwe tijd: honderd jaar Haagse Vredesconferentie van 1907 [Commemorating the Centenary of the 1907 Second Hague Peace Conference]* (TMC Asser Press, 2007) 71.

¹¹ Circular Note from Count Mouravieff, Russian Minister for Foreign Affairs, to Diplomatic Representatives, 24 August 1898 in Shabtai Rosenne (ed), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents* (TMC Asser Press, 2001) 23, 23–4.

¹² *Convention (IV) respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907 (entered into force 26 January 1910) ('Hague IV').

¹³ See, eg, 'International Military Tribunal (Nuremberg), Judgment and Sentences' reproduced in 'Judicial Decisions' (1947) 41 *American Journal of International Law* 172, 219; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226 ('Nuclear Weapons'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 ('Wall Opinion').

¹⁴ *Hague IV* Preamble.

¹⁵ *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) Preamble.

¹⁶ *Alabama Claims (United States of America v Great Britain) (Award)* (1871) 29 RIAA 125.

¹⁷ *Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals (United States v United Kingdom) (Award)* (1893) 28 RIAA 263.

¹⁸ *Boundary between the Colony of British Guiana and the United States of Venezuela (United Kingdom v Venezuela) (Award)* (1899) 28 RIAA 331.

were too important to be left to governments. That was a time when a great number of non-governmental organisations ('NGOs') were being created, one notable instance being the beginnings of the international Red Cross movement, though the International Committee of the Red Cross ('ICRC'), which in its initial form began 150 years ago, I should be careful to say, is not an NGO.¹⁹ So the first Geneva 'Red Cross Convention' was adopted in 1864.²⁰ Other more functional regimes were being established by governments at that time or even earlier, as with the Central Commission for Navigation on the Rhine (1831) and the Danube Commission (1856), the beginnings of the International Telecommunications Union (1865) along with the *Convention for the Protection of Submarine Telegraph Cables* (1884),²¹ the Universal Postal Union (1874) and the various unions for the protection of intellectual property beginning in 1883 and, since 1970, consolidated in the World Intellectual Property Organization.

Another practical matter, increasingly requiring international regulation, was international commerce²² (at least to the extent that it was not governed by the customs of trade, as much of it had been for centuries).²³ In 1893 what is now the Hague Conference on Private International Law was formed on the initiative largely of Tobias Asser, a Dutch practitioner and professor. The Conference adopted conventions on, for instance, international aspects of civil procedure and family law.²⁴ For that work and his work at the Peace Conferences of 1899 and 1907, Asser was awarded the Nobel Peace Prize.²⁵ He was also a foundation member of the IDI and an international arbitrator in the first PCA arbitration.²⁶ He died just one month before the opening of the Peace Palace.

So far I have mentioned peaceful means for the settlement of international disputes and processes for the clarification and development of international law, both private and public. A third element associated with the Peace Palace and The Hague is the Hague Academy on International Law, a gathering of leading

¹⁹ See Simeon E Baldwin, 'The International Congresses and Conferences of the Last Century as Forces Working towards the Solidarity of the World' (1907) 1 *American Journal of International Law* 565; Simeon E Baldwin, 'The International Congresses and Conferences of the Last Century as Forces Working towards the Solidarity of the World' (Appendix) (1907) 1 *American Journal of International Law* 808.

²⁰ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('Geneva I'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively 'Geneva Conventions').

²¹ *Convention for the Protection of Submarine Telegraph Cables*, opened for signature 14 March 1884 (entered into force 1 May 1888).

²² See, eg, International Chamber of Commerce, *Incoterms 2010: ICC Rules for the Use of Domestic and International Trade Terms* (ICC Services, 2010).

²³ See Johannes Nider, *On the Contracts of Merchants* (Charles H Reeves trans, Ronald B Shuman (ed), University of Oklahoma Press, 1966) [trans of: *De Contractibus Mercatorum* (first published 1468)].

²⁴ See Arthur Eyffinger, *T M C Asser (1838–1913): Founder of the Hague Tradition — Dreaming the Ideal, Living the Attainable* (TMC Asser Press, 2011) 35–45.

²⁵ See *ibid* 84–9.

²⁶ *Pious Fund (United States of America v Mexico)* (1902) 9 RIAA 1.

scholars and senior students which began in 1923 and meets every summer at the Peace Palace as well as elsewhere. Asser gave half of his Nobel Prize money to assist the establishment of the proposed Academy.

I will now focus on arbitration and adjudication but, from time to time, will return to the other methods of peaceful settlement and to methods of lawmaking. I trust that the need for excellent teaching will not need further mention. The Hague stool cannot stand unless it has three legs.

The PCIJ was established in 1922. It was established as part of the system of the League of Nations ('the League'), although not as an organ of the League, by contrast with the status of the ICJ. Australia and New Zealand participated in the Conference at Versailles in 1919, which prepared the major peace treaty with Germany. Part I of that treaty, similar to the other peace treaties of that time, was the *Covenant*, art 14 of which provided for the establishment of the PCIJ. Australia and New Zealand were not at all enthusiastic participants, especially by comparison with their participation at the 1945 San Francisco Conference which adopted the *Charter of the United Nations* ('UN Charter'), an integral part of which was the *Statute of the International Court of Justice* ('ICJ Statute').

New Zealand had real concerns about the impact the *Covenant's* provisions, powers and procedures would have on naval power. At Versailles in 1919, William Ferguson Massey had declared that while others might trust the League, New Zealand trusted the Royal Navy.²⁷ At that Conference, he expressed sharply different views from those of Woodrow Wilson about the lessons of history. While Massey would not speak against the League, the attempts of the Congress of Vienna to frame universal peace had failed. For President Wilson that was no precedent. That Congress, he said, was designed to extend monarchical and arbitrary government.²⁸

Another concern at Versailles was about a Japanese proposal for a racial equality clause to be included in the *Covenant*, a matter of great symbolic importance for that ally.²⁹ Baron Makino Nobuaki made the case in this way at Versailles:

He wished to add an amendment to the clause providing for religious liberty, to the effect that all the members of the League would agree to treat each other's citizens equally without any discrimination. He recognized that racial prejudice ran deep, but the important thing was to get the principle accepted and then let individual nations work out their own policies. The League, he went on, would be a great family of nations. They were all going to look out for each other. It was surely unreasonable to ask nationals of one country to make sacrifices, perhaps even give up their lives, for people who did not treat them as equals. In the Great War different races had fought side by side: 'A common bond of sympathy and gratitude has been established to an extent never before experienced.'³⁰

²⁷ Barbara H Wall, *William Ferguson Massey and the Paris Peace Conference, 1919* (Masters Thesis, Victoria University of Wellington, 1946).

²⁸ United States Department of State, *Papers relating to the Foreign Relations of the United States: The Paris Peace Conference 1919* (United States Government Printing Office, 1943) vol III, 751–3.

²⁹ M P Lissington, *New Zealand and Japan 1900–1941* (New Zealand Government Printer, 1972) 36–7.

³⁰ Margaret MacMillan, *Peacemakers: The Paris Conference of 1919 and Its Attempt to End War* (John Murray Publishers, 2001) 327 (citations omitted).

The loudest opposition, comments Margaret MacMillan in her excellent account of the 1919 Conference,

came from the British Empire delegation ... Like many of his compatriots, Hughes [the Australian Prime Minister] firmly believed that the clause was the first breach in the dike protecting Australia. 'No Govt could live for a day in Australia if it tampered with a White Australia', wrote one of his subordinates from Paris ... Massey of New Zealand followed in Hughes' wake. This put the British in an awkward position. They wanted very much to maintain the alliance with Japan, but, yet again, they had to pay attention to their dominions.³¹

The Japanese amendment received majority support, but

Wilson, with the dexterity he had no doubt learned as a university president, announced that because there were strong objections to the amendment it could not carry. The Japanese chose not to challenge this dubious ruling and so the racial equality clause did not become part of the [*Covenant*]. The Japanese press was bitterly critical of the so-called 'civilized world'. Liberal, internationally minded Japanese were dismayed. They had played the game, they had shown themselves ready to participate in the international community, and yet they were still treated as inferiors. If nations were denied just and equal treatment, Makino warned a plenary session of the Peace Conference on 28 April, they might well lose faith in the principles that guided the League: 'Such a frame of mind, I am afraid, would be most detrimental to that harmony and co-operation, upon which foundation alone can the League now contemplated be securely built.' He was right. The failure to get the racial equality clause was to be an important factor in the inter-war years in turning Japan away from co-operation with the West and towards more aggressively nationalistic policies.³²

Similar issues arose as both the League and the PCIJ were getting underway. In March 1924, Massey was still pursuing the theme of imperial defence when he expressed extreme regret to Ramsay MacDonald, Prime Minister of the recently elected UK Labour Government, at its decision not to develop a base at Singapore:

You say that 'your Government stands for international cooperation through a strengthened and enlarged League of Nations.' In reply to that I must say that if the defence of the Empire is to depend on the League of Nations only, then it may turn out to have been a pity that the League was ever brought into being.³³

In December 1924, the newly elected Baldwin Government in London called for an Imperial Conference in early March 1925 to consider the proposed *Geneva Protocol for the Pacific Settlement of International Disputes* ('*Geneva Protocol*'),³⁴ in the preparation of which the Ramsay MacDonald Government had had a major hand. The British Prime Minister said that his Government was 'greatly impressed' with the 'momentous character of [the] question both in its

³¹ Ibid 328 (citations omitted).

³² Ibid 329–30 (citations omitted).

³³ William Ferguson Massey quoted in F L W Wood, *The New Zealand People at War: Political and External Affairs* (War History Branch, New Zealand Department of Internal Affairs, 1958) 15; Lissington, above n 29, 65.

³⁴ *Protocol for the Pacific Settlement of International Disputes*, signed 2 October 1924, [1924] *League of Nations Official Journal*, Special Supp 23, 498 ('*Geneva Protocol*').

scope and its consequences'.³⁵ He instanced issues of 'highest importance'³⁶ — compulsory arbitration even of vital interests, imposition of sanctions of a most drastic character, the security of the Empire and future relations with the countries of Europe and the US. The replies showed great difficulties with the date of the proposed Conference — which was abandoned — and even more with the substance. The first of New Zealand's four 'principal objections' was about the provisions of the *Geneva Protocol* which bound the signatory states to accept the jurisdiction of the PCIJ in all matters.³⁷ The PCIJ, in particular when war was threatened, had express jurisdiction to determine whether a matter fell within domestic jurisdiction. The reply then turned directly to New Zealand's immigration laws: '[They] are framed to preserve, as far as possible, British nationality in New Zealand. No foreigner may come to New Zealand to reside without having first made written application from his country of origin'.³⁸

New Zealand was even more concerned with the admission of the Court as the deciding factor in Great Britain's belligerent rights at sea. The rights of His Majesty's ships against neutrals in wartime was the subject of dispute between English Courts and foreign jurists; 'the effect of adhesion to the [*Geneva Protocol*] would be definitely to accept a foregone conclusion against the exercise of privileges in war which are exercised in the defence of the Empire'.³⁹ The British Government, in the face of such objections, did not take the matter of the 1924 *Geneva Protocol* any further.

One of the major disputes during the negotiation of the *Statute of the Permanent Court of Justice* in 1920 and again in 1945, when the ICJ was being established, was whether it should have compulsory jurisdiction over the states parties to a legal dispute or whether the established principle that states were free to consent or not to third party binding procedures would continue to prevail. On both occasions the established principle was maintained. New Zealand supported that position in the 1920s and only reluctantly accepted the jurisdiction of the PCIJ in 1929. For instance, in 1924, the New Zealand Government sent a dispatch to the Government in London declaring that

[w]hatever the jurists at Geneva may think, the law advisers of the Crown in New Zealand believe that there is grave danger that the International Court of Justice at the Hague, consisting mainly of foreigners, might hold that the New Zealand law is contrary to the comity of Nations, ... that the right of foreigners to reside in New Zealand was not a matter exclusively within the domestic jurisdiction of

³⁵ Secretary of State for the Colonies, 'Telegram' [1925] I A-B Appendix to the Journals of the House of Representatives (NZ) A-5c, 1.

³⁶ *Ibid.*

³⁷ New Zealand 'Memorandum on the Protocol for Pacific Settlement of International Disputes' [1925] I A-B Appendix to the Journals of the House of Representatives (NZ) A-5c, 6.

³⁸ *Ibid.*

³⁹ *Ibid.*

New Zealand, and ... that as a matter of international law we must admit them or reduce the restrictions on their admission.⁴⁰

In the debates in the 1920s within the Empire, we see two concerns. The first was about the substance of the law. Hence Australian Attorney-General John Latham, in debating the report of the Australian delegation to the 1927 Assembly of the League, expressed the Australian Government's concern about the vagueness of international law, which introduced a 'considerable element of uncertainty' about the likely decisions of the PCIJ.⁴¹

The second concern was about the composition of the tribunal or the Court — hence New Zealand's concern about the PCIJ consisting 'mainly of foreigners'.⁴² The British Foreign Office Under Secretary Sir Eyre Crowe expressed his concern in 1924 that 'the most learned and acute foreign jurists are absolutely incapable of grasping the fundamental ideas underlying the principles of law on which the edifice of justice is built up in England and in America'.⁴³ A British Minister referred to Britain's reluctance to be a party to international adjudication or arbitration unless it was involved in the appointment of at least half of the arbitrators.⁴⁴ This was a reference to the already extensive experience of several countries in setting up particular panels and an attitude to be seen to this day in the establishment of chambers at the ICJ, as well as with the setting up of arbitral tribunals. This position was based on the advice of the four Foreign Office legal advisers, principally Cecil Hurst, who was to become a PCIJ judge in 1929.⁴⁵

British opposition to the optional clause changed only after a Labour Government came to power in 1929. New Zealand and Australia then reluctantly accepted the jurisdiction of the PCIJ. But neither country ever nominated any judge for election to the bench, nor appeared before it. Their acceptances, like those of the UK, Canada, South Africa and India — but not of the Irish Free State — excluded matters within 'domestic jurisdiction' and actions being taken or considered within the Council of the League, to address their two concerns about the substance of the law.⁴⁶ At that time, Britain and the US were negotiating the terms of an Arbitration Treaty which was also intended to address

⁴⁰ Ibid. Hersch Lauterpacht, in discussing in 1930 the British Reservations to the Optional Clause in its declaration deposited in 1929 (included also in the declarations of the Dominions), declared that it would be difficult for Great Britain to argue, should an occasion arise for such an argument as that made by New Zealand, that the reservation (about domestic jurisdiction) 'was inserted as a concession to an obviously provincial and uninstructed view on the character of the Permanent Court and the nature of international law administered by it': H Lauterpacht, 'The British Reservations to the Optional Clause' (1930) 10 *Economica* 137.

⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 April 1928, 4408 (John Latham).

⁴² Lauterpacht, above n 40, 150.

⁴³ Eyre Crowe quoted in Lorna Lloyd, *Peace through Law: Britain and the International Court of Justice in the 1920s* (Royal Historical Society, 1997) 48–9.

⁴⁴ Ibid 168.

⁴⁵ See also the lukewarm statements at the 1926 Imperial Conference: 'Imperial Conference, 1926: Summary of Proceedings' [1927] I A-B Appendix to the Journals of the House of Representatives (NZ) A-6.

⁴⁶ Originally up to nine reservations were proposed, but after the Labour Party took power in Britain this was whittled down to two. See again the account in: Lloyd, above n 43, 191–6, 205–6.

the belligerent maritime rights issue which had caused difficulty in the Great War.⁴⁷

For New Zealand, the election of the Labour Government in 1935 brought a fundamental change in attitude, a change which continued in 1945. By 1935, the collective security system which some had hoped would be created by the *Covenant* was being fronted, notably in Abyssinia, Spain and China. On 16 July 1936, Michael Joseph Savage, the first Labour Prime Minister of New Zealand, responded to the invitation of an Assembly of the League transmitted only nine days earlier to member states to make proposals to improve the application of the principles of the *Covenant*. One of the principles identified in the request was that territorial questions were not to be settled by force.⁴⁸ New Zealand's reply, the only one submitted by a member of the British Empire, emphasised the failure to implement the existing provisions of the *Covenant*; they had never been fully applied.⁴⁹ The *Covenant* could nevertheless be strengthened. The Government was prepared to agree in principle to provisions of the 1924 *Geneva Protocol* — so vigorously rejected by the Massey Government. It made proposals for the strengthening of the sanctions regime and for an international force. It called for greater public involvement through plebiscites and short-wave broadcasting of League debates. And it recognised the need to address economic matters, mentioning the peace treaties of the Great War.⁵⁰ Consistently with that position, the report of the New Zealand delegates, one of whom was G R Laking, on the final session of the Assembly of the League of Nations in April 1946 concluded with these words:

It may be, as some maintain, that the provisions of the *Covenant* were inadequate to enforce peace; but it is certainly true to say that the *Covenant* was never given a fair trial, for when the time came to apply its provisions, most members of the League — and among them the most powerful — hesitated; and hesitation played into the hands of aggression.⁵¹

In San Francisco, New Zealand sought a strong international organisation, a positive obligation to support victims of aggression, a limit on the veto power and a requirement that UN organs act according to principle.⁵²

Australia was also more willing to take a strong stand.⁵³ Both countries' delegations arrived armed with the 'Wellington Resolutions', which called for

⁴⁷ Lloyd, above n 43, 130–53.

⁴⁸ Gerald Chaudron, *New Zealand and the League of Nations* (PhD Thesis, University of Canterbury, 1989) 333.

⁴⁹ *Ibid.*

⁵⁰ Memorandum from M J Savage, Prime Minister of New Zealand, to Secretary-General of the League of Nations, 16 July 1936 in 'Reform of the League of Nations: Copies of Communications between the Secretary-General of the League of Nations and His Majesty's Government in New Zealand' [1936] I A-B Appendix to the Journals of the House of Representatives (NZ) A-5a, 2 See also Wood, above n 33, ch 5.

⁵¹ New Zealand, 'The League of Nations: Report of the New Zealand Delegates on the Adjourned 20th Session and the 21st (Final) Session of the Assembly of the League of Nations Held at Geneva 8–18 April 1946' [1946] I A-B Appendix to the Journals of the House of Representatives (NZ) A-5, 12

⁵² Wood, above n 33, 2, 374, 376, 380. See Peter Fraser, 'United Nations Conference on International Organization: Report on the Conference held at San Francisco 25 April – 26 June 1945 by the Rt Hon Peter Fraser, Chairman of the New Zealand Delegation' [1945] I AD Appendix to the Journal of the House of Representatives (NZ) A-2, 9–10.

‘the maximum employment of the International Court of Justice for the ascertainment of facts which may be in dispute’.⁵⁴ They pushed for the new court to possess some compulsory jurisdiction. But the US and the Union of Soviet Socialist Republics (‘USSR’) were opposed and to press the proposal, which had majority support, might have jeopardised the adoption of the *ICJ Statute* and indeed of the *UN Charter* itself.

Nevertheless, some progress was made. Australia and Cuba sponsored a proposal for an express requirement in the *UN Charter* for states to carry out decisions of the Court in cases in which they were parties — now art 94(1) of the *UN Charter* — a success that James Crawford describes as ‘probably Australia’s main contribution to the system of international justice as it currently stands’.⁵⁵ But compulsory jurisdiction was not to be.

In 1971, when the UN General Assembly (‘UNGA’) engaged in a review of the role of the ICJ, New Zealand stated that ‘it attaches considerable importance to third party settlement as a means of resolving disputes and, in particular, has always strongly supported the Court and the role of judicial settlement’.⁵⁶ It recalled that it had declared its acceptance of the jurisdiction of the PCIJ initially in 1929 and in accordance with art 36(2) of the *ICJ Statute*. It had also accepted the jurisdiction under special provisions in a number of treaties.⁵⁷

Australia has been party to five contentious cases. It has appeared twice as an applicant, in the *Nuclear Tests* case brought against France in 1973⁵⁸ and against Japan in the *Whaling* case in 2010.⁵⁹ It has also been respondent three times: in the case brought by Nauru in 1989,⁶⁰ in the *East Timor* case brought by Portugal in 1991⁶¹ and in the proceedings brought by Timor-Leste in late 2013.⁶²

New Zealand has been party to one case as an applicant — the *Nuclear Tests* case brought at the same time as the Australian case⁶³ — and in 1995 made an

⁵³ For a fuller exposition of Australia’s role in San Francisco, see James Crawford, ‘“Dreamers of the Day”: Australia and the International Court of Justice’ (2013) 14 *Melbourne Journal of International Law* 520; W J Hudson, *Australia and the New World Order: Evatt at San Francisco, 1945* (Australian National University, 1993).

⁵⁴ Australia and New Zealand, ‘Text of Conclusions Reached at the Australia–New Zealand Conference, Wellington, November 1944’ in New Zealand Ministry of Foreign Affairs (ed) *New Zealand Policy Statements and Documents 1943–1957* (New Zealand Government Printer, 1972) 80–1. For a discussion of the conclusions reached at the Wellington Conference, see Paul Hasluck, *Diplomatic Witness: Australian Foreign Affairs 1941–1947* (Melbourne University Press, 1980) 150.

⁵⁵ Crawford, above n 53, 525.

⁵⁶ *Review of the Role of the International Court of Justice — Report of the Secretary General — Addendum*, UN GAOR, 26th sess, Agenda Item 90, UN Doc A/8382/Add.4 (12 November 1971) 2.

⁵⁷ *Ibid.*

⁵⁸ *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253 (‘*Nuclear Tests 1*’).

⁵⁹ *Whaling in the Antarctic (Australia v Japan) (Judgment)* (International Court of Justice, General List No 148, 31 March 2014) (‘*Whaling*’).

⁶⁰ *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240.

⁶¹ *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90.

⁶² *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* (International Court of Justice, General List No 156, 3 March 2014).

⁶³ *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457 (‘*Nuclear Tests 2*’).

application in terms of the judgment of 1974 in that case, again against France.⁶⁴ Australia, along with several Pacific states, applied to intervene in that matter under art 62 of the *ICJ Statute* but the applications were dismissed, as the Court found that New Zealand did not have a proper basis for its case.⁶⁵ New Zealand was successful in its application to intervene in the *Whaling* case.⁶⁶

Both Australia and New Zealand have made submissions in advisory proceedings: Australia in the *Admission*,⁶⁷ *Expenses*,⁶⁸ *Nuclear Weapons*⁶⁹ and *Wall Opinion*⁷⁰ cases, both written and oral in the third and fourth cases; and New Zealand in the *Nuclear Weapons* cases,⁷¹ both written and oral.

Australia and New Zealand's most recent declarations of acceptance of jurisdiction, like those of many of the other 69 states which have taken that action, have a number of reservations. I mention two for each. Australia's declaration was made in 2002 and excludes certain disputes relating to the delimitation of maritime areas, a reservation in issue in the *Whaling* case.⁷² Similarly, New Zealand deposited a new declaration in 1977, when the major *United Nations Convention on the Law of the Sea*⁷³ was still being negotiated, excluding disputes arising out of or concerning the jurisdiction over rights claimed or exercised by New Zealand in respect of the exploration, exploitation or management of the living resources in the maritime zone beyond the territorial sea out to 200 miles. In 1977, the New Zealand Parliament had established an exclusive economic zone of that width. New Zealand reserved its right to amend the declaration in light of the results of the Conference on the Law of the Sea ('CLS'). Those two reservations — and comparable ones made by other states — indicate caution about the law of the sea, another instance of the concern demonstrated about the current state of the law that might be applied; recall the immigration and belligerent maritime rights issues debated in the inter-war period.

The second pair of reservations is related. They exclude disputes in regard to which the parties agree to some other method of peaceful settlement, several of which are to be found in treaties relating to the law of the sea, such as those in

⁶⁴ *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Order)* [1995] ICJ Rep 288.

⁶⁵ *Ibid.*

⁶⁶ *Whaling (Order on Declaration of Intervention of New Zealand)* (International Court of Justice, General List No 148, 6 February 2013).

⁶⁷ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57.

⁶⁸ *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep 151.

⁶⁹ *Nuclear Weapons* [1996] ICJ Rep 66.

⁷⁰ *Wall Opinion* [2004] ICJ Rep 136.

⁷¹ *Nuclear Weapons* [1996] ICJ Rep 66.

⁷² For details on the history of Australia's reservations, see Henry Burmester, 'Australia and the International Court of Justice' (1996) 17 *Australian Yearbook of International Law* 19; Crawford, above n 53, 538–9.

⁷³ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994).

issue in the *Southern Blue Fin Tuna* case⁷⁴ — between Australia and New Zealand on the one side and Japan on the other — and the *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean* ('*Fishery Resources Convention*').⁷⁵

I now return to the work of the ICJ. Between 1947 and 1962 it was busy and gave major decisions relating to the law of the sea, the law of treaties, the law of the UN and the status of South West Africa. But then came the disaster of the *South West Africa* cases in 1966⁷⁶ and, for some, the disappointment of the *Barcelona Traction* case in 1970,⁷⁷ while others took a very positive view of the obiter dicta relating to obligations *erga omnes*.⁷⁸ By the time the UNGA came to address the role of the Court at the end of 1970,⁷⁹ not a single contentious case was on its agenda and there was only one request for an advisory opinion. Those who proposed that item saw the lack of business before the Court as being commensurate neither with the distinction of the judges nor with the needs of the international community. That situation meant that a review of the Court was 'urgently needed'.⁸⁰ That led to the New Zealand response of 1971, to which it was useful to refer in the course of the *Nuclear Tests* case just a year or two later.⁸¹

The review appears to have had few consequences, although it may have helped prompt the Court's review of its *Rules of Court*,⁸² which among other things led to an enhanced role for chambers of the Court. This development was welcomed by the UNGA and brought some increase in business in later

⁷⁴ *Southern Bluefin Tuna (New Zealand v Japan) (Provisional Measures)* (1999) 38 ILM 1624; *Southern Bluefin Tuna (Australia v Japan) (Jurisdiction and Admissibility)* (2000) 39 ILM 1359.

⁷⁵ *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean*, opened for signature 1 February 2010, [2012] ATS 28 (entered into force 24 August 2012).

⁷⁶ *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319; *South West Africa (Ethiopia v South Africa) (Judgment)* [1966] ICJ Rep 6. See the comment by the eminent Soviet international lawyer, Grigory Tunkin, about the early departure from a meeting of the *Institut du Droit International* of members of the ICJ sometime after that judgment: 'I do not know where the judges hurry to since they all have nothing to do now': G I Tunkin, *The Tunkin Diary and Lectures: The Diary and Collected Lectures of G I Tunkin at the Hague Academy of International Law* (William E Butler and Vladimir G Tunkin trans and eds, Eleven International, 2012) 40–1.

⁷⁷ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3.

⁷⁸ The negative view is based on the delays in the case (in major part attributable to the parties) and on the fact that, after extensive pleadings on the merits and three months of oral argument, the case failed for lack of standing.

⁷⁹ *Review of the Role of the International Court of Justice*, GA Res 3232 (XXIX), UN GAOR, 29th sess, 2280th plen mtg, UN Doc A/RES/3232(XXIX) (12 November 1974) ('*Review of the Role of the ICJ*').

⁸⁰ Letter from Argentina et al to UN General Assembly, 14 August 1970, cited in *Report of the International Court of Justice: 1 August 1970 – 31 July 1971*, UN GAOR, 26th sess, Supp No 5, UN Doc A/8405 (1 August 1971) 3 [27]. The outcome of the review was a General Assembly resolution on the review of the role of the International Court of Justice: *ibid*.

⁸¹ *Nuclear Tests 2* [1974] ICJ Rep 457; 'Oral Arguments on Jurisdiction and Admissibility', *Nuclear Tests (New Zealand v France)* [1974] II ICJ Pleadings 247, 255 (Martyn Finlay QC), quoting *Review of the Role of the International Court of Justice — Report of the Secretary General — Addendum*, UN GAOR, 26th sess, Agenda Item 90, UN Doc A/8382/Add.4 (12 November 1971) 2.

⁸² International Court of Justice, *Rules of Court* (adopted 14 April 1978) ('*Rules*').

decades.⁸³ The chambers procedure brings the Court closer to the process of arbitration, although institutional and other differences remain.⁸⁴

In the 1970s and 1980s the Court faced six very difficult cases: the two *Icelandic Fisheries* cases⁸⁵ brought by Germany and the UK; the two French *Nuclear Tests* cases⁸⁶ brought by Australia and New Zealand; the *Tehran Hostages* case⁸⁷ brought by the US against Iran; and the *Military and Paramilitary Activities in and against Nicaragua* case⁸⁸ brought by that country against the US. Much can be and has been said about these cases. I make three points about them, points which have a wider significance.

The first is related to the reservations included in acceptances of jurisdiction concerning the law of the sea. The *Icelandic Fisheries* cases concerned the Icelandic claim to a 50 mile exclusive fishing zone. The Court would have understood that that law was definitely on the move as it dealt with the case, as indeed Libya and Tunisia recognised when, in 1978, their agreement submitting their maritime boundary dispute to the Court asked it to take account of the ‘new accepted trends’ in the CLS.⁸⁹ The Court would also have appreciated that various proposals before the CLS for new institutions were designed to reduce its role in deciding disputes about the law of the sea. The shadow cast by the 1966 *South West Africa* cases⁹⁰ was a long one.

The second point is that two major supporters and users of the Court, France and the US, withdrew their general acceptances of jurisdiction in response to the decisions in the *Nuclear Testing*⁹¹ and *Nicaragua* cases⁹² — although both have subsequently agreed to jurisdiction in particular cases. In taking that action they expressed strong displeasure about the decisions of the ICJ. In the words of a senior French official, France could no longer have confidence in the present day Court: ‘The Government of France has then finally resolved to modify its

⁸³ One issue is the extent to which the chambers procedure allows the parties to choose their own arbitrators. Article 17(2) of the Court’s *Rules* states that the ‘President shall ascertain [the parties’] views regarding the composition of the Chamber’: *ibid.* Yet in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, the parties made clear they would only proceed on the basis that they could choose the chamber: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Judgment)* [1984] ICJ Rep 246. See also Shigeru Oda, ‘Further Thoughts on the Chambers Procedure of the International Court of Justice’ (1988) 82 *American Journal of International Law* 556; Stephen M Schwebel, ‘Ad Hoc Chambers of the International Court of Justice’ (1987) 81 *American Journal of International Law* 831. There are currently no cases before the ICJ involving a chamber of the Court, the last being in 2005.

⁸⁴ Gray and Kingsbury, above n 7.

⁸⁵ *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3 (‘*Fisheries Jurisdiction*’); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland) (Merits)* [1974] ICJ Rep 175.

⁸⁶ *Nuclear Tests 1* [1974] ICJ Rep 253; *Nuclear Tests 2* [1974] ICJ Rep 457.

⁸⁷ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Judgment)* [1980] ICJ Rep 3 (‘*Tehran Hostages*’).

⁸⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 (‘*Nicaragua*’).

⁸⁹ ‘Special Agreement between the Republic of Tunisia and the Socialist People’s Libyan Arab Jamahiriya’, *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* [1978] I ICJ Pleadings 21, art 1.

⁹⁰ *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319; *South West Africa (Ethiopia v South Africa) (Judgment)* [1966] ICJ Rep 6.

⁹¹ *Nuclear Tests 1* [1974] ICJ Rep 253; *Nuclear Tests 2* [1974] ICJ Rep 457.

⁹² *Nicaragua* [1986] ICJ Rep 14.

relations with the Court; but it is the Court that had already changed'.⁹³ France did not attend the hearings in 1973 and 1974. The US, in announcing that it would not participate further in the *Nicaragua* case, declared that the objectives of the ICJ were being subverted by the efforts of Nicaragua and its Cuban and Soviet sponsors to use the Court as a political weapon. It spoke of the result-oriented illogic of the Court's majority.⁹⁴

The third is that each of these cases has to be seen in a much broader context, including the complicated relations from the early 1950s between Iran and the US, the attitude of Australia and New Zealand (especially the latter) to nuclear weapons and France's insistence on developing its *force de frappe*. France would not allow its fundamental security and independence to be called into question.⁹⁵ Additionally, the US declared that the inherently political problem of the conflict in Central America was not appropriate for judicial determination. It would be solved only by political and diplomatic means — not through a judicial tribunal.⁹⁶

Iceland and Iran also refused to participate in proceedings brought against them.⁹⁷ France did participate in the proceedings brought in 1995 by New Zealand, while denying that there was a true case before the Court and without appointing an agent.⁹⁸ That practice of non-appearance has recently reappeared in law of the sea cases brought against the People's Republic of China by the Philippines⁹⁹ and against the Russian Federation by the Netherlands.¹⁰⁰ Compare

⁹³ Guy Lacharrière, 'Commentaires sur la Position Juridique de la France à l'égard de la Licéité de ses Expériences Nucléaires [Comments on the Legal Position of France with regard to the Legality of its Nuclear Experiments]' (1973) 19 *Annuaire Français de Droit International* 235, 251. At the time of the statement de Lacharrière was *Directeur des Affaires Juridiques de l'Administration du Ministère des Affaires Etrangères* [Director of Legal Affairs in the Administration of the Ministry of Foreign Affairs], but subsequently became a Judge of the International Court of Justice. See K J Keith, 'The Nuclear Tests Cases after Ten Years' (1984) 14 *Victoria University of Wellington Law Review* 345, 346 n 2.

⁹⁴ Telegram from David R Robinson, US Department of State Legal Adviser, to Santiago Torres Bernárdez, Registrar of the International Court of Justice, 18 January 1985 in Marian Nash Leich, 'Contemporary Practice of the United States relating to International Law' (1985) 79 *American Journal of International Law* 431, 438–41.

⁹⁵ Keith, 'Nuclear Tests Cases', above n 93, 349.

⁹⁶ Letter from David R Robinson, US Department of State Legal Adviser, to Editor in Chief, American Society of International Law, 1 March 1985 in 'Correspondence' (1985) 79 *American Journal of International Law* 423.

⁹⁷ *Fisheries Jurisdiction* [1974] ICJ Rep 3; *Tehran Hostages* [1980] ICJ Rep 3.

⁹⁸ See, eg, 'Verbatim Record', *Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's 1974 Judgment in the Case concerning Nuclear Tests (New Zealand v France) Case*, International Court of Justice, CR 95/19, 11 September 1995 (recording that France was represented by a team including Mr Marc Perrin de Brichambaut as Director of Legal Affairs at the French Ministry of Foreign Affairs, but not recording an agent). See also 'Aide-Mémoire pour la Cour internationale de Justice [Memorandum for the International Court of Justice]', *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 (Written Proceedings)* (6 September 1995).

⁹⁹ *The Republic of the Philippines v The People's Republic of China*, filed with the PCA, 22 January 2013. China presented a note verbale on 1 August 2013 reiterating 'its position that it does not accept the arbitration initiated by the Philippines': Permanent Court of Arbitration, 'Arbitration between The Republic of the Philippines and The People's Republic of China: Arbitral Tribunal establishes Rules of Procedure and Initial Timetable' (Press Release, PCA 101203, 27 August 2013).

this with the procedural order made on 9 December 2013 by the ICJ in the *Continental Shelf* case¹⁰¹ — brought in September 2013 by Nicaragua against Colombia — following a meeting of the agents of the two parties with the President of the Court. Colombia had given notice of withdrawal from the *Pact of Bogota*,¹⁰² which gave jurisdiction to the Court following its November 2012 judgment between Colombia and Nicaragua.¹⁰³

I must emphasise, on the other side, that the business before the ICJ was increasing from the late 1980s, marked by the ending of the Cold War, into the 1990s and to the present day. The increase includes cases from all areas of the world and a wide range of subject matters.

By the 1990s, much other international court and tribunal activity was developing. That occurred to such an extent that some scholars and practitioners began to be concerned, wrongly in my opinion, with the ‘fragmentation’ of international law resulting from what they saw, in a negative sense, as the ‘proliferation’ of international courts and tribunals.¹⁰⁴ These included the International Tribunal for the Law of the Sea, regional human rights courts, notably in Europe, UN human rights treaty bodies, investment tribunals and regional economic and free trade courts and tribunals. There were also ad hoc tribunals dealing, for instance, with territorial disputes, maritime delimitation, the unlawful use of armed force, breaches of international humanitarian law, customs unions, the uses of rivers and breaches of treaties more generally. They all became more prominent, as did the work of the ad hoc international criminal tribunals.

From all that activity I mention three tribunals. First, the Iran–United States Claims Tribunal, set up as part of the settlement of the Tehran hostages crisis, has decided 4700 claims in favour of US nationals, amounting to US\$2.5 billion. It continues to this day with a handful of inter-state cases mainly brought by Iran against the US. Second, the Eritrea–Ethiopia Claims Commission rendered major awards between 2003 and 2009 relating to claims by those two states of breaches by the other of the customary international law codified by the *Geneva*

¹⁰⁰ *Arctic Sunrise (Netherlands v Russia) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 22, 22 November 2013).

¹⁰¹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia) (Order on Fixing of Time-Limits)* (International Court of Justice, General List No 154, 9 December 2013).

¹⁰² *American Treaty on Pacific Settlement (Pact of Bogota)* opened for signature 30 April 1948, 30 UNTS 84 (entered into force 6 May 1949).

¹⁰³ *Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment)* [2012] ICJ Rep 624. For a review of earlier practice by a French scholar, see Geneviève Guyomar, *Le Défaut des Parties a un différend devant les juridictions internationales* [The Failure of the Parties to a Dispute in International Courts] (Librairie Générale de Droit et de Jurisprudence, 1960).

¹⁰⁴ See, eg, Judge Gilbert Guillaume, ‘The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order’ (Speech delivered at the Sixth Committee of the General Assembly of the United Nations, 27 October 2000); Judge Gilbert Guillaume, ‘Advantages and Risks of Proliferation: A Blueprint for Action’ (2004) 2 *Journal of International Criminal Justice* 300. See also Rosalyn Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55 *International and Comparative Law Quarterly* 791; Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press, 2013). Cf Jonathan I Charney, ‘Is International Law Threatened by Multiple International Tribunals?’ (1998) 271 *Recueil des Cours* 101.

*Conventions*¹⁰⁵ and other relevant rules of law in their war. Third, the system for dispute settlement set up within the World Trade Organization in 1994 has dealt, or is now dealing, with over 400 cases relating to 100 states and other entities, many of which have never had experience with international litigation.

From this mass of material, I should try to draw some lessons which might indicate ways forward. I am however very aware of the dangers of prediction. Who would have predicted, for instance, that a Court which a century ago had jurisdiction over a quarter of the world population, but now has jurisdiction over barely one-thousandth, still has about the same number of hearing days and delivers the same number of judgments as it did then?¹⁰⁶

Notwithstanding that caution about numbers, my first point is about numbers and the wide range of the business these days of the ICJ. In the last decade the Court has given about 50 substantive decisions — some minor, many not. That is a big increase on earlier decades. The cases now come from all areas of the world, with France, the Russian Federation and the US appearing as parties in recent years and the People's Republic of China making submissions, both oral and written, along with the other four permanent members of the UN Security Council in the advisory case relating to Kosovo¹⁰⁷ — a first. The cases concern wide areas of law — territorial disputes, many law of the sea matters (notwithstanding the concerns of the 1970s and 1980s and the creation of a specialised tribunal), war (providing a gloss on the US position of the 1980s), human rights, diplomatic protection, treaty breaches, environmental issues, jurisdictional immunities, international criminal law issues and related evidentiary, procedural and jurisdictional issues. We are now a long way from a New York Times editorial of early 1970 which referred to the head of the American Bar Association's 1959 description of the Court as 'a forgotten forum where judges are paid \$20,000 each per year to waste their time waiting to decide cases that are never filed'.¹⁰⁸ Things were no better in the late 1970s: the Judge who was President from 1976–79, Judge Eduardo Jiménez de Aréchaga, signed only one judgment and that was one finding that the Court had no jurisdiction.¹⁰⁹ He was busier after he retired from the Court, chairing a tribunal

¹⁰⁵ For matters occurring before 14 August 2000, the Commission applied customary international law as exemplified by the *Geneva Conventions*, as it found Eritrea had not automatically succeeded to the *Geneva Conventions: Prisoners of War: Ethiopia's Claim 4 (Ethiopia v Eritrea) (Partial Award)* (2003) 42 ILM 1056, 1062 [32].

¹⁰⁶ Kenneth Keith, 'The Interplay with the Judicial Committee of the Privy Council' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876–2009* (Oxford University Press, 2009) 315, 337–8.

¹⁰⁷ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403.

¹⁰⁸ Editorial, 'A Forgotten Forum', *The New York Times* (New York), 13 March 1970, 38.

¹⁰⁹ *Aegean Sea Continental Shelf (Greece v Turkey) (Judgment)* [1978] ICJ Rep 3. The week of 9 December 2013 in the Peace Palace provides a very marked contrast; the ICJ made three decisions (and a new case was filed in the following week) and three inter-state arbitrations, administered by the PCA, were meeting.

deciding a maritime dispute between Canada and France¹¹⁰ and another relating to the *Rainbow Warrior* case.¹¹¹

The second lesson concerns the fears about ‘proliferation’ and ‘fragmentation’, fears I do not share. My first comment relates to the existence of court systems and indeed legislatures and executives in the 190 or more countries which make up the international state system. Consider, for instance, the many national court decisions from 18 jurisdictions and 11 pieces of legislation discussed in the recent *Jurisdictional Immunities* case between Germany and Italy.¹¹² Many parts of customary international law are to be discovered in such national practice, some of which inevitably will be inconsistent, as in that case. With the amazing developments in information technology, that practice is now more accessible. A related comment is that most international law, most of the time, is applied through national institutions — consider all the movements of people, trade, finance, aircraft and ships across borders at every moment of every day. That fact is reflected by the requirement that in many circumstances, an individual complaining of a breach of international law must exhaust national remedies before any international remedies available to that person or their state can be invoked.

Another fact meeting the fragmentation concern is the record of the work of the array of international courts and tribunals. Careful studies have shown that there are very few inconsistencies — certainly nothing to rank with the differences which might be found, for instance, between the different circuits of the Courts of Appeals in the US.¹¹³ Again, the revolution in information technology, together with the skill and knowledge of counsel, means that judges in the Peace Palace and other international tribunals are not likely to be ignorant of relevant decisions.

Those facilities accorded by information technology, the submissions of counsel and the related role of the scholarly community are also relevant to a third lesson — the borrowing by international courts and tribunals not just of substantive law, but also of procedural and evidentiary rules and practices, from national or international courts. To take two examples, courts may often face arguments that evidence should not be admitted because of claims of military

¹¹⁰ *Delimitation of Maritime Areas between Canada and the French Republic (Canada v France) (Decision)* (1992) 21 RIAA 265.

¹¹¹ *Difference between New Zealand and France concerning the Interpretation or Application of Two Agreements, Concluded on 9 July 1986 between the Two States and Which Related to the Problems Arising from the Rainbow Warrior Affair (New Zealand v France) (Decision)* (1990) 20 RIAA 217.

¹¹² *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* [2012] ICJ Rep 99.

¹¹³ See, eg, Charney, above n 104. In 2008, I provided a very brief, selective update: K J Keith, ‘The International Court of Justice: *Primus Inter Pares?*’ (2008) 5 *International Organizations Law Review* 7. For a more recent, excellent study, see Webb, above n 104

secrecy,¹¹⁴ ICRC confidentiality¹¹⁵ or about the way in which difficult technical and scientific matters can be introduced into the particular judicial proceeding.¹¹⁶

Fourthly, I return to the choice between the various methods of peaceful settlement — the choices to be made by those constructing those methods in the first place and then the choices made between them by the states and others who may decide to use one or other of them. I recall some wise words from one of the great legal thinkers of recent decades, Lon Fuller:

Anyone who discharges a judicial function works within a particular institutional framework. That framework is like a specialized tool; the very qualities which make it apt and efficient for one purpose make it useless for another. A sledge-hammer is a fine thing for driving stakes. It is a cumbersome device for cracking nuts, though it can be used for that purpose in a pinch. It is hopeless as a substitute for a can-opener. So it is with adjudication. Some social tasks confront it with an opportunity to display its fullest powers. For others it can be at best a *pis aller*. For still others it is completely useless.¹¹⁷

This can be tested by many cases, such as the various phases of the Rainbow Warrior affair.¹¹⁸ I take a recent example — the panel appointed under the *Fishery Resources Convention* — to decide on a challenge made by the Russian Federation to a determination made by the Commission set up under that convention relating to the quota of jack mackerel which can be taken by the various states involved.¹¹⁹ The panel consisted of two fisheries experts, one appointed by each side, with an international lawyer as chair. It had to decide within a very short time frame, with the hearing on a Monday and a reasoned decision on the Friday, as indeed it did. The decision could not wait for another

¹¹⁴ *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4, 32 (the United Kingdom declining to produce certain documents requested by the ICJ on the grounds of ‘naval secrecy’); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 128–9 [204]–[205] (‘*Genocide*’) (the Respondent refusing to provide full texts of some documents based on alleged military secrets). See Kenneth J Keith, “Naval Secrets”, Public Interest Immunity and Open Justice’ in Karine Bannelier, Theodore Christakis and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the Corfu Channel Case* (Routledge, 2012) 124.

¹¹⁵ See, eg, *Prosecutor v Simić (Decision on the Prosecution Motion under Rule 73 for a Ruling concerning the Testimony of a Witness)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-9-PT, 27 July 1999) (holding that International Committee of the Red Cross witnesses could not be called to give testimony and recognising the countries’ right of confidentiality).

¹¹⁶ See, eg, Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WTO Docs WT/DS26/AB/R and WT/DS48/AB/R, AB-1997-4 (16 January 1998).

¹¹⁷ Lon L Fuller, ‘Adjudication and the Rule of Law’ (1960) 54 *Proceedings of the American Society of International Law* 1, 1.

¹¹⁸ For a recent account, see Geoffrey Palmer, ‘Perspectives on International Dispute Settlement from a Participant’ (2012) 43 *Victoria University of Wellington Law Review* 39.

¹¹⁹ Review Panel established under the *Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, The Objection by the Russian Federation to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation* (Findings and Recommendations, 5 July 2013) <http://www.pc-a-cpa.org/showpage.asp?pag_id=1520>. The Russian Federation accepted the recommendations of the Panel: South Pacific Regional Fisheries Management Organisation, *Current News* (7 August 2013) <<http://www.southpacificrfmo.org/russian-federation-n-accepts-recommendations/>>.

fishing season. That tribunal, a special one designed for a particular purpose, is to be seen as a very clever can-opener, assisted by the expertise of the PCA. The tribunal is also to be seen, to recall another wise admonition from Lon Fuller, in the wider management system provided by the Commission established under the *Fishery Resources Convention*.¹²⁰

A fifth reflection is about the inequality of access to and applicability of some of the new regimes. Consider the International Criminal Court and tribunals or the *ICJ Statute* itself. Notwithstanding all the emphasis on the sovereign equality of states, some states and the nationals of some states are certainly more equal than others.¹²¹

For my sixth reflection, I return to the matter of updating the law. As I trust I have made clear, the perceptions of many states of the unsatisfactory state of the law in a substantive sense or its uncertainty has been one reason for their reluctance to accept the Court's jurisdiction on a broad basis. But that cannot justify their reluctance or refusal to agree to its jurisdiction when they have participated in the stating and updating of the law in a treaty text negotiated at length and to which they are willing to become party. It is striking that, beginning in 1989, the USSR and other Eastern European states withdrew their reservations to provisions in six multilateral human rights treaties which gave the Court jurisdiction over disputes arising under them and new treaties were signed without any such reservations.¹²² Clarification of the law was one of the reasons for such a change in attitude given by Vladimir Tunkin, an eminent Soviet international lawyer and long-time Chief of the Treaty and Legal Department of the Ministry of Foreign Affairs in the USSR:

In the past there were weighty reasons for some States to be cautious about accepting the compulsory jurisdiction of the Court. ... Now the situation is different. The composition of the Court has changed. Western judges do not have a majority in the Court anymore and it is also of importance that they are modern international lawyers. The number of uncertainties in international law has greatly diminished. And it is probably most important that, since 1985, the international climate has radically changed for the better.¹²³

It is a long while since the organised international law community has examined in a broad way the overall structure and systems of lawmaking and

¹²⁰ See Lon L Fuller, 'Irrigation and Tyranny' (1965) 17 *Stanford Law Review* 1021, 1042.

¹²¹ For just three instances, see *Provisional Verbatim Record of the Two Thousand Seven Hundred and Fourth Meeting*, UN SCOR, 2704th mtg, UN Doc S/PV.2704 (31 July 1986) (United Kingdom abstaining, United States vetoing, so the resolution was not passed). For UN Security Council resolutions referring matters to the International Criminal Court, see SC Res 1593, UN SCOR, 5158th mtg, UN Doc S/RES/1593 (31 March 2005); SC Res 1970, UN SCOR, 6491st mtg, UN Doc S/RES/1970 (26 February 2011). See also Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 203.

¹²² For an account of the background, see Theodor Schweisfurth, 'The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions' (1991) 2 *European Journal of International Law* 110. Georgia invoked one of those provisions in proceedings brought against the Russian Federation following their war in 2008: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections)* [2011] ICJ Rep 70, 99 [61].

¹²³ Tunkin, above n 76, 506.

implementation of the law. The remit of the International Law Commission is wide enough for it to initiate such an examination, an examination which could be supported by the work of the two learned societies founded in 1873. Those examinations might also include the methods for resolution of disputes as a whole, a matter not addressed at the universal intergovernmental level for over three decades.

My final point is about the limits of the law and legal process. I fear that lawyers and especially judges — or some of them — have far too grand a view of what the law and lawyers can alone achieve. I recall the dreadful evidence given in the genocide case between Bosnia and Serbia,¹²⁴ the first case on which I sat in The Hague. Additionally, lawyers should address the critically important targets in the Millennium Development Goals and the document which will replace them. The role of the law and the lawyer must be relatively modest in those huge, challenging areas. But it is interesting to notice one important feature for lawyers of those undertakings in respect of health, education, environment, economic development and many related matters. They increasingly emphasise the rule of law and good governance in seeking those goals. That essential connection was demonstrated in September 2012 when, with heads of international courts and tribunals, Helen Clark, as Administrator of the United Nations Development Programme, was one of those who spoke at the UNGA meeting which adopted a declaration on the rule of law.¹²⁵

¹²⁴ *Genocide* [2007] ICJ Rep 43.

¹²⁵ Helen Clark, United Nations Developmental Programme Administrator, 'Check Against Delivery' (Speech delivered at the 67th Session of the UN General Assembly 2012, New York, 24 September 2012) <<http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/09/24/helen-clark-67th-session-of-the-un-general-assembly/>>; *Declaration of the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res 67/1, UN GAOR, 67th sess, 3rd plen mtg, Agenda Item 83, Supp No 49, UN Doc A/RES/67/1 (30 November 2012).