

CORRESPONDENCE

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TO THE EDITOR IN CHIEF:

I was pleased to note that an opinion as highly regarded as that of Professor Highet was the first to be voiced in bringing to light the *momentum* that the International Court of Justice is currently undergoing (*The Peace Palace Heats Up: The World Court in Business Again?*, 85 AJIL 646 (1991)). As he rightly pointed out, this situation has no precedent in the seventy years of existence of the judicial organ. By way of contributing to a better understanding of the issues involved, this letter merely stresses certain details of recent developments in the Court's activities that were not touched upon by Professor Highet and that may have bearing on a wider consideration of the subject.

To begin with a question of vital importance for international adjudication, namely jurisdiction, it is worth noting that, aside from the fact that most of the cases currently before the Court were submitted by unilateral application, there is another element that is no less important: in most of these cases, the respondent state consented to litigation and has gone ahead with the proceedings without resorting to the usual tactic of challenging the Court's jurisdiction by entering preliminary objections. Indeed, in only three of the eight cases instituted by application has it been necessary to open a preliminary procedure on admissibility and jurisdiction.¹ In the same number of cases, the respondent state simply agreed to plead on the merits, which permits greater dispatch in the handling of the proceedings.² In the two remaining cases, no preliminary objections have been filed to date.³

Moreover, if we consider the title of jurisdiction invoked by the applicant in each of these cases, it will be noted that in almost all of them it consists of a set of declarations of acceptance of the Court's jurisdiction under the optional clause.⁴ It might be thought, then, that we are witnessing not only a reassessment of the role of the Court on a general level, but also a rebirth of the optional clause, perhaps revealing that it continues to be one of the fundamental pillars of the machinery of judicial settlement as embodied in the Charter of the United Nations. This phenomenon may even be considered the genesis of what could be called a "culture of litigation" at the international level, that is, the situation that would arise if a significant number of states would become accustomed to resorting to international adjudication and would abandon the widespread notion—and, we may add, erroneous belief—that appearing before the highest tribunal of the world, as either plaintiff or respondent, is or must be considered as an event reflecting hostility or animosity, or merely as an inconvenience. Only a consistent pattern of such conduct by states would give real content to the rhetoric ex-

¹ *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, and *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*.

² *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.)*, and *Passage through the Great Belt (Fin. v. Den.)*.

³ *East Timor (Port. v. Austl.)* and *Maritime Boundary (Guinea-Bissau v. Sen.)*.

⁴ The exceptions are *Aerial Incident* and *Maritime Delimitation and Territorial Questions*, in both of which the applicant invoked Article 36, paragraph 1 of the Statute, in different contexts.

pressed to this effect at the multilateral level.⁵ If my understanding of Professor Highet's Comment is accurate, the events surrounding the work of the World Court that are now taking place should be understood as indicating that we are likely witnessing the inception of this kind of conduct.

Also with regard to jurisdiction, it is worth stressing an aspect of the complex case between El Salvador and Honduras currently being dealt with by a chamber of the Court. As was mentioned in the Comment, this case represents the first time in the history of the Court that a third state's request for permission to intervene under Article 62 of the Statute has been granted. Furthermore, if the decision of the ad hoc Chamber by virtue of which Nicaragua was admitted to intervene will be considered a landmark in the jurisprudence of the World Court in procedural matters, it will be largely because the Chamber was called upon to determine definitively the controversial issue of whether a jurisdictional link between the state requesting permission to intervene and the parties to the case was a sine qua non for the admission of the intervention. This issue had arisen before the Court on previous occasions, but it had always managed to avoid confronting the problem. Moreover, as it was, and still is, a highly controversial matter at the scholarly level, one can only expect that discussion of the issue will be heightened by the fact that it was resolved by a chamber of five judges, only two of whom are currently members of the Court, and not by the full Court itself.⁶ The Chamber unanimously gave a negative answer to the question, establishing what a commentator in the *Journal* has termed "a new starting point" for the Court as regards future applications to intervene under Article 62.⁷

There is yet another consideration concerning jurisdiction that deserves mention, and it is linked to a case still appearing on the Court's General List. This is *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, which, as is rightly pointed out by Professor Highet, may be discontinued at any moment.⁸ The aspect worth highlighting is that the Court's Judgment of December 20, 1988, in the jurisdiction and admissibility phase of this case, may have profound implications for the member states of the inter-American system regarding the fate of the American Treaty on Pacific Settlement, or "Pact of Bogotá," of April 30, 1948. In this decision the Court had an opportunity to clarify certain fundamental aspects of the pact, in particular those which refer to judicial recourse as a means of settlement of disputes between American states. While not all the current members of the Organization of American States are parties to the pact, at this very moment a reform of the entire regional system of peaceful settlement is taking place under the heading "Study of the New American Treaty of Peaceful Settlement," a process that in all probability will have to take into account the Court's recent construction of some of the pact's provisions.⁹

There is an interesting development in the recent work of the Court concerning the law of the sea, particularly the rules governing the delimitation of maritime boundaries. Professor Highet draws a suggestive analogy (*id.* at 652) among the

⁵ See, in particular, GA Res. 3232 (XXIX) (Nov. 12, 1974) (operative para. 6); and Manila Declaration on the Peaceful Settlement of International Disputes, GA Res. 37/10 (Nov. 15, 1982) (operative sec. II, para. 5).

⁶ On this aspect, see Seifi, *Nicaragua Granted Permission to Intervene in the (El Salvador/Honduras) Land, Island and Maritime Frontier Case*, 6 INT'L J. ESTUARINE & COASTAL L. 253 (1991); Quintana, *The Intervention by Nicaragua in the Case Between El Salvador and Honduras Before an ad hoc Chamber of the I.C.J.*, 38 NETH. INT'L L. REV. 199 (1991); and E. LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 26-30 (1991). See also *infra* notes 7 and 15.

⁷ Ratner, case note on Judgment of Sept. 13, 1990, 85 AJIL 680, 685 (1991).

⁸ *Border and Transborder Armed Actions (Nicar. v. Hond.)*, Jurisdiction and Admissibility, 1988 ICJ REP. 69 (Judgment of Dec. 20) (discontinued and removed from Court's list, Order of May 27, 1992).

⁹ On this aspect, see, in general, the present author's *The Latin American Contribution to International Adjudication: The Case of the I.C.J.*, 39 NETH. INT'L L. REV. 127, 145-51 (1992).

three pending cases that refer exclusively to maritime delimitation.¹⁰ He points out rightly that in *Maritime Delimitation in the Jan Mayen Area*, Denmark relied on the optional clause to ask the Court to draw a single line delimiting both the continental shelf and the fishery zone. The nature of the delimitation requested of the Court in this case poses a fascinating problem technically known as the "single maritime boundary," which constitutes one of the newest aspects of the law on the delimitation of maritime spaces.¹¹ In addition, the other two pending cases concerning delimitation are largely based on the same notion. Indeed, in the *Maritime Boundary (Guinea-Bissau v. Senegal)* case, if the dispute reaches the merits phase, the Court not only will have to determine a boundary for the exclusive economic zone for the first time, but also will have to decide whether this line must follow the existing boundary line for the territorial sea and the continental shelf, or whether, on the contrary, it may follow a different course. Senegal, it may be recalled, has already raised the issue, both in the proceedings before the arbitral tribunal that dealt with the original case in 1989, and in the litigation before the Court on the existence and validity of that tribunal's award.¹² Similarly, in *Maritime Delimitation and Territorial Questions (Qatar v. Bahrain)*, one of the submissions in the Application by Qatar invites the Court "to draw in accordance with international law a single maritime boundary between the maritime areas of sea-bed, subsoil and superjacent waters appertaining respectively to the State of Qatar and the State of Bahrain."¹³

Therefore, it seems very likely that in any one of these three cases, the Court will have to clarify the obscurities that still surround the concept of the "single maritime boundary." This time the Court will probably find it difficult to ignore the legal implications of the problem, as has been done both by itself and by other organs of international adjudication in the past.¹⁴

In closing, we refer to recent occasions on which the Court has had the opportunity to consider questions related to the litigation procedure before it, a subject of obvious appeal to all those who follow the Court's work. Two of these developments bring us back to the case between El Salvador and Honduras and to the

¹⁰ The case between El Salvador and Honduras could also be said to refer to the delimitation of maritime spaces, but more indirectly. As for the *East Timor* case, although it does not involve maritime delimitation, it does derive from the operation of a delimitation between two states.

¹¹ On this aspect, see especially D. J. ATTARD, *THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW* 139, 145, 212 (1987); Kwiatkowska, *Equitable Maritime Boundary Delimitation—A Legal Perspective*, 3 INT'L J. ESTUARINE & COASTAL L. 287, 298 (1988); Oda, *Delimitation of a Single Maritime Boundary—The Contribution of Equidistance to Geographical Equity in the Interrelated Domains of the Continental Shelf and the Exclusive Economic Zone*, in 2 INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO 349 (1987); F. ORREGO VICUÑA, *THE EXCLUSIVE ECONOMIC ZONE—REGIME AND NATURE UNDER INTERNATIONAL LAW* 195 (1989); Peters & Tanja, *Lateral Delimitation of Continental Shelf and Exclusive Economic Zone*, 86 DIRITTO MARITTIMO 463 (1984); Reuter, *Une Ligne unique de délimitation des espaces maritimes?*, in MÉLANGES GEORGES PERRIN 251 (1984); P. WEIL, *THE LAW OF MARITIME DELIMITATION—REFLECTIONS* 115 (1989).

¹² See, e.g., the Counter-Memorial of Senegal before the arbitral tribunal, para. 377 n.534, at 316 (1987); or the same country's Counter-Memorial before the ICJ, para. 93, at 43, and paras. 110, 113, at 50–52 (1990).

¹³ Application Instituting Proceedings, at 18 (filed July 8, 1991) (emphasis added).

¹⁴ The problem of the single maritime boundary has arisen with different degrees of intensity in at least three major cases of delimitation submitted to third-party settlement procedures, always on a consensual basis: Conciliation on the Continental Shelf Area between Iceland and Jan Mayen (1981), *reprinted in* 20 ILM 797 (1981); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12); and Maritime Boundary between Guinea and Guinea-Bissau (arbitral award of Feb. 14, 1985), *reprinted in* 25 ILM 251 (1986).

Another arbitral tribunal has been asked to draw a single line delimiting maritime spaces of a different nature. Delimitation of Maritime Areas between France and Canada, Special Agreement (Mar. 30, 1989), *reprinted in* 29 ILM 1 (1990).

intervention by Nicaragua. The request for permission to intervene by the Nicaraguan Government was included in an application filed in the registry on November 17, 1989. Two features of this Application deserve attention: first, it was addressed to the full Court and not to the Chamber that has dealt with the case from the outset; and second, it contained two additional requests, one aimed at changing the composition of the Chamber and reordering the written procedure, and the other at altering the mandate of the Chamber. As is apparent, these additional petitions were to some extent extraneous to a request for permission to intervene submitted pursuant to Article 81 of the Rules of Court. Nonetheless, this case had the peculiarity of not having been brought before the full Court but before a chamber whose composition was decided without the participation of the state seeking to intervene. In any case, both requests were entirely contingent upon the result of the previous decision on the acceptance or rejection of the intervention. This argument, coupled with the finding that the decision on the acceptance of the intervention could only be taken by the body invested with the power to deal with the merits of the case, enabled the Court to defer any decision on Nicaragua's additional requests, at least until the Chamber decided on the intervention itself.¹⁵ Yet one could say that the Chamber itself was responsible for depriving the two additional requests of any meaning. Indeed, while by virtue of its Judgment of September 13, 1990, that country was granted permission to intervene, the Chamber took care to fix narrow limitations on the actual scope of the intervention. The first and foremost of these limitations derives from the Chamber's careful specification that the intervening state does not become a state party to the case and does not acquire the rights or assume the obligations inherent in this condition.¹⁶ In conclusion, in dealing with this case, the Court availed itself of the opportunity both to recognize that chambers of the type embodied in Article 26, paragraph 2 of the Statute have broad competence in incidental matters, and to fix the procedural conditions for the exercise of one of the incidental proceedings par excellence, namely intervention, whether it takes place before the full Court or before one of those chambers.

A different problem, although closely related, is that of the actual exercise of the right to intervene by the states involved. As an intervening state, Nicaragua certainly did not submit to the limitations imposed upon it by the Chamber, and it proceeded to "make excursions into other aspects of the case," to use the words of the Judgment itself.¹⁷ In particular, both in the written statement filed in accordance with an Order issued by the President of the Chamber on September 14, 1990, and in the intervention by its Agent during the oral proceedings, Nicaragua put forward arguments related to certain aspects of the case on which it *was not granted permission to intervene*, such as the delimitation of the waters within the Gulf of Fonseca, the situation of the waters outside the gulf and the possible delimitation of the waters outside the gulf.¹⁸ This naturally caused some reaction by the principal parties to the case—not, however, of major proportions¹⁹—but the President of the Chamber abstained from taking any action on the issue. As a result, we must wait for the judgment on the merits to see how this body reacts to the attitude of the intervening state.

¹⁵ Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application to Intervene, 1990 ICJ REP. 3 (Order of Feb. 28). See the thorough discussion of this subject in E. LAUTERPACHT, *supra* note 6, at 87–93.

¹⁶ Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application to Intervene, 1990 ICJ REP. 92 (Judgment of Sept. 13).

¹⁷ *Id.* at 116, para. 58.

¹⁸ Written Statement of the Republic of Nicaragua, at 12–14, 20–23 (Dec. 14, 1990).

¹⁹ Observations of the Government of El Salvador on the Written Statement of Nicaragua (Mar. 14, 1991); and Observations of the Republic of Honduras on the Written Statement of the Republic of Nicaragua, at 1–9 (Mar. 14, 1991).

Finally, another interesting procedural development concerns preliminary objections. In the *Aerial Incident (Iran v. U.S.)* case, an unusual situation arose in which the respondent state, having decided to enter preliminary objections on jurisdiction and admissibility, declared itself willing to formulate these *before* the memorial was filed by the plaintiff. This procedure was opposed by the applicant state, which gave room for interlocutory proceedings at the end of which the Court issued an order designed to settle the matter. Interpreting Article 79 of the Rules, the Court concluded that, while the respondent has the right to know the contents and scope of the applicant's claim, as it appears in the memorial, prior to presenting its preliminary objections, it is entitled to waive this right and formulate those objections only on the basis of the application.²⁰ In the event, the United States simply ignored the time limit for the filing of the memorial, waited for Iran to do so, and then presented its preliminary objections. However, a precedent was set and the Order in question fixed, not without controversy, an aspect of the practice of litigation before the Court that had not been clear before.

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THE FRANCIS DEÁK PRIZE

The AJIL Board of Editors announces with great pleasure the award of the Deák Prize to three scholars working in Australia, Drs. Hilary Charlesworth, Christine Chinkin and Shelley Wright. Their winning article, *Feminist Approaches to International Law*, appeared in the October 1991 issue at page 613.

As our long-time readers know, the Deák Prize, which is awarded annually, honors the memory of Francis Deák and recognizes outstanding scholarship by our younger authors. The Board of Editors takes this opportunity to congratulate Drs. Charlesworth, Chinkin and Wright and to thank Mr. Philip F. Cohen, President of the Institute for Continuing Education in Law and Librarianship, whose generous support makes it possible to present an award to the recipients of the prize.

²⁰ *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, 1989 ICJ REP. 132 (Order of Dec. 13). The problem is examined in detail in the separate opinions of Judges Schwebel and Shahabuddeen, *id.* at 136 and 145, respectively.