

# The Role of the International Court of Justice in the Development of Private International Law

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## **Chapter I The Role of the Court – Introductory remarks**

### **1. The interaction between public and private international law**

In our interrelated world, the traditional divide between public international law as relating to the rights and obligations of States, operating at the international level, and private international law as concerned with international private transactions and relationships, belonging to the national domain, is becoming increasingly questionable<sup>1</sup>.

Next to States, traditionally the sole actors on the international scene, international organisations, NGO's, corporations, and individual human beings have made their appearance. Many environmental, financial, economic and other issues that used to be of a local character have become transnational in nature. Disputes with cross-border aspects may involve a mix of public and private interests, implicate both governments and private actors, and may be brought before national courts as well as international courts. Where private international law is the subject-matter of an international treaty or convention, national authorities and courts may be faced with questions relating to both private and public international law. In short, we are witnessing a confluence of public and private international law.<sup>2</sup>

The Peace Palace, the centennial of which we are celebrating this year, is, more than it is sometimes realised, situated at the confluence of public and private international law. It was built to house an arbitral court and an outstanding library. The *Permanent Court of Arbitration* (PCA) has developed into an arbitral institution “*at the juncture between public and private international law to meet the rapidly evolving dispute resolution needs of the international community. Today the PCA provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties.*”<sup>3</sup> The *Peace Palace Library* is specialised in both public and private international law, as well as in foreign national law. It serves also the *Hague Academy of International Law*, the teaching of which includes both public and private international law. The Final Acts of the *Hague Conventions on private international law* drawn up by the *Hague Conference on Private International Law* have been signed in the Great Hall of Justice of the Peace Palace since 1951, and the negotiations on these Conventions, their periodic review, and the meetings on the programme of the Conference all take place in the Academy Building on the grounds of the Peace Palace.

The principal occupant of the Peace Palace is, of course, the International Court of Justice (ICJ). The ICJ, like its predecessor, the Permanent Court of International Justice (PCIJ), apart from its advisory capacity, settles disputes between States, and is best known for its judgments on matters that engage States in their mutual relations, such as disputes on land and maritime boundaries, territorial sovereignty, the non-use of force, and non-interference in the internal affairs of States. But very often, private individuals or companies are at the origin of the disputes brought before the Court. This may lead the Court to examine issues relevant to private international law, or even issues of private international law. Here, again, we see a confluence of public and private international law.

### **2. Private international law – the perspective of this *Preadvies***

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<sup>1</sup> Cf. Th. M de Boer, “Living apart together: the relationship between public and private international law”, *Netherlands International Law Review* (2010) 183-207. See also D. Fernández Arroyo & C. Lima Marques (eds.) *Private International Law and Public International Law: A Necessary Meeting* (2010); C.G. Weeramantry, *Universalising International Law*, Nijhoff, 2003, Chapter 6, Private international Law and Public International Law: The Increasing Linkage (2003).

<sup>2</sup> Cf. A. Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private law* (2009).

<sup>3</sup> See PCA website: [http://www.pca-cpa.org/showpage.asp?pag\\_id=1027](http://www.pca-cpa.org/showpage.asp?pag_id=1027)

In this *Preadvies* we will discuss some aspects of the contribution which the World Court has made to the development of private international law. We will also attempt to offer some thoughts on its potential future role in this regard. In doing so, we are aware that the (potential) role of the Court may appear in a different light depending on the view one has on what constitutes private international law, and on how it interacts with public international law.

First, there are differing conceptions of private international law.<sup>4</sup> In the German approach private international law essentially covers choice of law, the question which substantive law applies in a given situation. In this narrow conception of private international law, the question of which court or authority has jurisdiction to deal with a civil or commercial issue, and the question of recognition and enforcement of foreign decisions is left to the discipline of civil procedure. In a broad sense – the French and Belgian approach –, private international law includes not only these three issues, but also the law of nationality and of the status of foreigners. There is much to be said for this approach because these issues are often interrelated.<sup>5</sup> Stéphanie De Dycker has discussed our topic from this perspective elsewhere.<sup>6</sup> In this *Preadvies*, however, we will follow the mainstream view of private international law, which covers the issues of (1) which authority or court has jurisdiction, (2) what law will be applied, and (3) whether foreign decisions will be recognised and enforced, to which may be added (4) issues relating to cross-border judicial and administrative cooperation.<sup>7</sup>

Second, one's perspective on the interaction between public international law and private international law, in particular the (potential) impact of the former on the latter, may also vary according to the type of national legal order which serves as one's frame of reference. This is, for our topic, especially relevant with regard to private international law embodied in international treaties, or conventions, the number and impact of which continue to grow. These treaties are generally cast in language that lends itself to being immediately applied within the national legal order: they are in this sense "self-executing". In "monist" systems, such as the Netherlands, this will mean that, in principle, the convention can and will be so applied, including by authorities and courts, without any intervening national law. In "dualist" systems, such as the United Kingdom, however, the convention will have no effect within the internal legal order unless a national legislative measure gives it such effect. Whereas, e.g., in the Netherlands a multitude of conventions on private international law are directly applied by the courts, and are known by and pleaded by the parties before them, in, e.g., the United Kingdom such a convention manifests itself only indirectly, sometimes even incompletely, or intertwined with provisions of a national origin.<sup>8</sup> The "distance" between the convention and the international legal order with its institutions including the ICJ on the one hand, and national law and the national legal order on the other, may therefore, appear as greater in the UK than in the Netherlands.<sup>9</sup> As a result, the question of the (potential) role of the ICJ in respect of the interpretation and application of private international law conventions may, from the perspective of different legal systems, appear in a different light.

### 3. The ICJ – jurisdictional and procedural aspects

The ICJ is, of course, the principal judicial organ of the United Nations. It is the legal successor to the PCIJ, whose jurisprudence "*remains pertinent and compelling to this day*".<sup>10</sup> Like its predecessor, the ICJ has a dual role: to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions submitted to it by the UN General Assembly and the Security Council and other duly authorised organs and agencies.

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<sup>4</sup> We will not consider here unified *substantive* law, such as the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April 1980 (S. Treaty Document Number 98-9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3).

<sup>5</sup> Cf. H. van Loon «Vers un nouveau modèle de gouvernance multilatérale de la migration internationale, Réflexions à partir de certaines techniques de coopération développées au sein de la Conférence de La Haye», in *Vers de nouveaux équilibres entre ordres juridiques, Mélanges H. Gaudemet-Tallon*, (2008) 419-434, (at 434).

<sup>6</sup> S. De Dycker, "Private International Law Disputes before the International Court of Justice", in *Journal of International Dispute Resolution*, Vol. 1, No.2 (2010) 475-498.

<sup>7</sup> This includes cooperation in matters such as the simplification of formalities regarding the production of documents abroad (Apostille), the service of documents and the taking of evidence abroad, and facilitating the access to foreign law.

<sup>8</sup> See F.G. Jacobs & S. Roberts, eds., *The Effect of Treaties in Domestic Law* (1987), in particular Chapter 11 (Van Loon), "The Hague Conventions on Private international law", with further details and illustrations.

<sup>9</sup> We are referring here, of course, to international conventions; the situation is quite different in respect of legislation enacted by the European Union, which does have direct effect within the national legal order also of the "dualist" EU States.

<sup>10</sup> R. Higgins, "The ICJ, the ECJ, and the integrity of international law", *52 ICLQ* (2003), 1-2 (at 3).

For our purposes, the advisory opinions given so far by the Court may be left aside.<sup>11</sup> However, as we will see in Chapter III, this function of the court would expand if the idea of preliminary rulings of the ICJ at the request of national (or even regional courts) were to become a reality. This Chapter and Chapter II will focus on the Court's principal function, i.e. settling inter-State disputes in accordance with international law. The exercise by the Court of its jurisdiction in inter-State disputes depends upon (1) the existence of a dispute and (2) the consent of the States parties to submit that dispute to the Court.

### 3.1. Existence of a dispute

What constitutes a dispute? And on what basis can the Parties submit an issue of private international law to the ICJ? In the *Mavrommatis* Case (Preliminary Objection) the PCIJ stated that “a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons”<sup>12</sup>. It added that “[t]he question (...) whether the (...) dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from [the] standpoint [of the Court].”<sup>13</sup> Nevertheless, in order to qualify as a ‘legal dispute’ in terms of Article 36(2) of the Statute, the dispute must be “capable of being settled by the application of principles and rules of international law”<sup>14</sup>. As the next Chapter will illustrate, disputes on – or relevant to – private international law brought before the World Court generally concern the interpretation or application of an international treaty or a question of international law. But even where national law is at the centre of an inter-State dispute, it may still qualify as a “fact, which if established would constitute a breach of an international obligation”<sup>15</sup>. The form and substance of the dispute may vary widely: only “the essence of the dispute must still be governed by rules of international law”<sup>16</sup>. As long as this is the case, there is no *a priori* obstacle for States to bring a dispute on any matter of private international law before the Court.

### 3.2. Consent of the States Parties to submit the dispute to the ICJ

Consent of the States Parties to submit to the jurisdiction of the Court is essential, and disputes on the meaning and scope of any consent given in advance are common before the Court. This applies also to the cases discussed in the next Chapters. Except where they cast light on our topic, however, these jurisdictional controversies will be left aside.

Under the Statute, a State may give its consent in either of two ways<sup>17</sup>:

First, under Article 36 (1) of the Statute, the jurisdiction of the Court comprises “all cases which the parties refer to it (...)”. The mandate that may be given to the Court in an international treaty<sup>18</sup> or by way of special agreement<sup>19</sup> is therefore unlimited.

Second, under article 36(2) of the Statute, States may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction

<sup>11</sup> Some advisory opinions may nevertheless have a certain bearing on questions relevant to private international law (e.g., the advisory opinion of the PCIJ in *Nationality Decrees Issued in Tunis and Morocco* (*Nationality Decrees Issued in Tunis and Morocco, advisory opinion, 7 February 1923, P.C.I.J., Series B, No. 4*) according to which questions of nationality are in principle matters of national law, but the right of a State to use its discretion may be restricted by international law, cf. the *Nottebohm* case, *infra* Chapter II 2.1.1.

<sup>12</sup> *Mavrommatis Palestine Concessions case, P.C.I.J., Series A, No. 2*, p. 11.

<sup>13</sup> *Mavrommatis Palestine Concessions case, P.C.I.J., Series A, No. 2*, p. 11.

<sup>14</sup> *Border and Transborder Armed Actions, (Nicaragua/Honduras), Jurisdiction and Admissibility, ICJ Reports, 1988*, pp.69, 91, para. 52.

<sup>15</sup> As was stated by the PCIJ, “it would be scarcely accurate to say that only questions of international law may form the subject of a decision of the Court. It should be recalled in this respect that paragraph 2 of Article 36 of the Statute provides that States may recognize as compulsory the jurisdiction of the Court in legal disputes concerning “the existence of any fact which, if established, would constitute a breach of an international obligation”” (PCIJ, *Case concerning the payment of various Serbian loans issued in France*, Series A, No. 20, Judgment of 12 July 1929, p. 19), *infra* 1.1. For a critical comment, see F. Rigaux, *Droit public et droit privé dans les relations internationales* (1977), p.154.

<sup>16</sup> Tomuschat, C. *Commentary on article 36 of the Statute of the International Court of Justice*, in: Zimmermann, A., Tomuschat, C., Oellers – Frahm, K., *The Statute of the International Court of Justice. A Commentary*, Oxford University Press, Oxford (2012) 658, para. 36.

<sup>17</sup> *Forum prorogatum* is not considered here.

<sup>18</sup> See e.g. among the cases below (Chapter II 2.2.) *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, in which jurisdiction was founded on the *European Convention of 29 April 1957 for the peaceful settlement of disputes*

<sup>19</sup> See for instance, among the cases below (Chapter II, 1.1.): PCIJ, *Case concerning the payment of various Serbian loans issued in France, Case concerning the payment in gold of Brazilian federal loans contracted in France*.

of the Court in all legal disputes concerning one or several of the categories detailed in the list included in the second paragraph of Article 36.<sup>20</sup> Many of the cases discussed in the next Chapters were brought to the Court on the basis of mutual declarations of this kind sometimes in combination with a jurisdictional basis in Art 36 (1).<sup>21</sup> In general, a State brings a dispute before the ICJ, typically, when it considers that it has been *directly* affected by an internationally wrongful act committed by another State. However, in some cases, the Applicant State will bring the case against the other State through the channel of *diplomatic protection*, i.e., asserting a violation of international law *in respect of one of its nationals* and requesting reparation of the injury suffered by its national. The next Chapters will give examples of both. The first case may arise in particular where the Applicant State claims a violation of treaty obligations owed to it by the Respondent State. In the second case, the Applicant State must demonstrate in particular that local remedies have been exhausted before bringing the case before the ICJ. That this condition has not been fulfilled is almost a standard objection by the Respondent State, and it complicates many proceedings. Applicant States will therefore, where possible, tend to present the dispute as one that also affects them directly.<sup>22</sup>

### 3.3. Applicable law

According to Article 38 of the Statute,<sup>23</sup> the Court “decides in accordance with international law”. That law is known to the Court (*ius curia novit*). It is not a matter of proof by the parties, and the Court freely determines what the law is.<sup>24</sup> Besides, it is generally accepted that the list of legal sources provided in Article 38 (1) is not exhaustive. Therefore, the fact that possible international sources such as *lex mercatoria* or trade usages are not mentioned is not in and by itself a reason why the Court could not apply these sources.<sup>25</sup> In theory, Article 38 excludes national law. In the words of the PCIJ, “*municipal laws are merely facts (...)*.”<sup>26</sup> One of the consequences is that the Court should not develop arguments based on national law *proprio motu*. In reality, as the next Chapter will show, national law is very much present in the case law of the Court. As was pointed out elsewhere<sup>27</sup>, national law may serve different functions, including that of verifying compliance by

<sup>20</sup> Article 36(2) of the Statute provides: “States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

1. the interpretation of a treaty;
2. any question of international law;
3. the existence of any fact which, if established, would constitute a breach of an international obligation
4. the nature or extent of the reparation to be made for the breach of an international obligation.”

<sup>21</sup> See, e.g., *Case concerning the application of the Convention dated 12 June 1902 governing the guardianship of infants, infra*, Chapter II 1.2.1; *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, *infra*, Chapter II 1.2.2..

<sup>22</sup> See: *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, (*infra* Chapter II 1.2.2.). Belgium argued that diplomatic protection was not at stake since, in particular, in that case, the rights of private persons and rights of the State concerned were interdependent and that, as a consequence, Belgium had validly brought the case before the Court on its own motion. In doing so, Belgium referred to the *Avena* case (*Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Judgment*, I. C. J. Reports 2004, p. 12), where the ICJ authorized Mexico to bring the case regarding the alleged violation of specific rights of Mexican prisoners in the United States on its own motion (and thus not through diplomatic protection) since Mexico had suffered injury directly as a consequence of the violation of Article 36 of the Vienna Convention on consular relations. Switzerland criticized Belgium’s approach: in its view, Belgium acted in its capacity of investor in the former Belgian airline company (i.e. *jure gestionis*) and, as a consequence, it had to exhaust local remedies before being able to validly bring the dispute before the Court – which it did not do. As the case was removed from the list, the question remains open.

<sup>23</sup> Article 38 of the Statute of the Court provides:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”

<sup>24</sup> See for instance: *Case concerning the application of the Convention dated 12 June 1902 governing the guardianship of infants, infra*, Chapter II 1.2.1.

<sup>25</sup> A. Pellet, *Commentary on article 38 of the Statute of the International court of Justice*, in: A. Zimmermann, C. Tomuschat, K. Oellers – Frahm, *The Statute of the International Court of Justice. A Commentary*, Oxford University Press, Oxford (2012) 762, para. 87 ss; also, on this point: De Dycker, (*op cit*) 484.

<sup>26</sup> *Certain German Interests in Polish Upper Silesia (merits)*, P.C.I.J., Series A, No.7, 19.

<sup>27</sup> See, in particular, on this point: De Dycker, (*op cit.*), in particular at 488 et seq.

States of their international obligations<sup>28</sup> or of filling lacunae in existing international law<sup>29</sup>. This role national law plays in the Court's construction of the law deserves particular attention, because it demonstrates that international law and national law do not operate in isolation in the Court's jurisprudence, but interact in manifold ways.<sup>30</sup>

In the next Chapter we will discuss a selection of judgments in contentious cases, in which the Court either dealt directly with an issue of private international law, or handled an issue that, while it does not directly concern private international law as understood in this *Preadvies*, is nonetheless relevant to its development.

## ***Chapter II Judgments of the Court on issues of private international law or relevant to the development of private international law***

Over the years, the ICJ and its predecessor, the PCIJ, have had a few occasions to deal directly with issues of choice of law and of jurisdiction of national courts in civil matters. More frequently, the Court has dealt with issues that are indirectly relevant to the development of private international law.

### **1. Case law directly dealing with issues of private international law**

#### **1.1. Choice of law – Serbian and Brazilian Loans**

In the *Case concerning the payment of various Serbian loans issued in France*,<sup>31</sup> the PCIJ was seized of a dispute between the Government of what was then the Kingdom of the Serbs, Croats and Slovenes on the one hand, and the French Government on the other, regarding the question whether the payment of the Serbian loans to French bondholders issued before the First World War should be effected in francs at gold value or in francs at their depreciated current value. A similar question was brought to the Court in the *Case concerning the payment in gold of Brazilian federal loans contracted in France*,<sup>32</sup> which opposed Brazil and France. Both cases turned on a question of choice of law (applicable law): which law applied to the loan contracts, and, more particularly, to the currency in which payment was to be made? They were decided on the same date on similar grounds, which the Court developed in particular in the Serbian loan case.

In answering the question posed to it, the Permanent Court first formulated the following three principles:

- (1) *Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.*
- (2) *The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the doctrine of the conflict of laws.*
- (3) *The rules thereof may be common to several States and may even be established by international conventions or customs, and in the latter case may possess the character of true international law governing the relations between States. But apart from this, it has to be considered that these rules form part of municipal law.*<sup>33</sup>

The Court then applied these principles in order to determine the applicable law. In light of the third principle, one might have expected the Court, as a first step, to identify the “municipal law” whose conflict rules would designate the applicable law. But then, to which conflict of law system should the Court turn: Serbian or French, Brazilian or French? Not surprisingly, the Court took a different approach. Boldly, it determined *itself* the applicable law:

*The Court, which has before it a dispute involving the question as to the law which governs the contractual obligations at issue, can determine what this law is only by reference to the actual nature of these obligations*

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<sup>28</sup> See for instance: *Case concerning the application of the Convention dated 12 June 1902 governing the guardianship of infants*, *infra* Chapter II 1.2.1.

<sup>29</sup> See *Case concerning the Barcelona Traction, Light and Power Company, Limited*, judgment *infra* Chapter II 2.1.2.

<sup>30</sup> The excerpts in the next Chapter can only give an incomplete picture of this osmosis in the Court's approach.

<sup>31</sup> PCIJ, *Case concerning the payment of various Serbian loans issued in France*, judgment of 12 July 1929, series A, No. 20, p.41.

<sup>32</sup> PCIJ, *case concerning the payment in gold of Brazilian federal loans contracted in France*, judgment of 12 July 1929, series A, No. 21, p.93.

<sup>33</sup> PCIJ, *Case concerning the payment of various Serbian loans issued in France*, judgment of 12 July 1929, series A, No. 20, p.41.

and to the circumstances attendant upon their creation, though it may also take into account the expressed or presumed intention of the Parties. Moreover, this would seem to be in accord with the practice of municipal courts in the absence of municipal law concerning the settlement of conflicts of law.<sup>34</sup>

The last sentence illustrates the point made above<sup>35</sup> on the role national law may play in the construction of the applicable law, in this case as in others, significantly, the *common* practice of different national courts. The Court then went on to identify as relevant factors:

- (1) *the actual nature of these obligations and the circumstances attendant upon their creation, taking into account,*
- (2) *the expressed or presumed intention of the Parties,*
- (3) *these principles may, however, in a particular territory be trumped by a municipal law of this territory – that it to say, by legislation enacting a public policy the application of which is unavoidable even though the contract has been concluded under the auspices of a foreign law,*
- (4) *it being understood, moreover, that it is quite possible that the same law may not govern all aspects of the obligation. The distinction which seems indicated for the purposes of this case is more particularly that between the substance of the debt and certain methods for the payment thereof.*

Applying these factors to the case before it, the Court examined the terms of the loan contract in detail:

*The bonds are bearer bonds signed at Belgrade by the representatives of the Serbian Government. It follows from the very nature of bearer bonds that, in respect of all holders, the substance of the debt is necessarily the same and that the identity of the holder and the place where he obtained it are without relevancy. Only the individuality of the borrower is fixed: in this case it is a sovereign State, which cannot be presumed to have made the substance of its debt and the validity of the obligations accepted by it in respect thereof, subject to any law other than its own.*<sup>36</sup>

The Court then went on to examine whether, nevertheless, Serbia had, as it claimed, intended, in a manner binding on the bondholders, that the loans “*should be, either generally speaking, or in certain respects, subject to French law*”, but concluded that this was not the case.

Having applied the first and second factors above, how did the Court apply the third and fourth of its principles? The Court may have played with the thought of setting aside Serbian law by applying French “*legislation enacting a public policy*” to the currency issue. But, avoiding the tricky challenge of appreciating and applying French public policy, it chose a different method, skipped the third, and resorted to the fourth principle, applying the technique of *dépeçage*:

*But (...) the fact that the obligations entered into do not provide for voluntary subjection to French law as regards the substance of the debt, does not prevent the currency in which payment must or may be made in France from being governed by French law. It is indeed a generally accepted principle, that a State is entitled to regulate its own currency. The application of the laws of such State involve no difficulty as long as it does not affect the substance of the debt to be paid and does not conflict with the law governing such debt.*<sup>37</sup>

As opposed to “*the substance of the debt*”, governed by Serbian law, French law thus applied to the currency in which payment was to be made. And that, of course, was the point on which the case turned: the (French) creditors could validly claim payment in the gold value stipulated for.

### ***Significance for the development of private international law***

The two judgments of the PCIJ were, at the time, welcomed by the leading *doctrine* not only because of their outcome but also because of their important clarification of several of choice of law issues. One of the interesting features of these judgments remains the PCIJ’s characterisation of the *nature* of private international law. While the Court recognised that, in principle, choice of law rules “*form part of municipal law*”, it did not stop there. Choice of law rules may be elevated to the international level “*by international conventions or customs, and in*

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<sup>34</sup> *Ibidem.*

<sup>35</sup> Chapter I 3.3.

<sup>36</sup> PCIJ, *Case concerning the payment of various Serbian loans issued in France, judgment of 12 July 1929, series A, No. 20, p.42.*

<sup>37</sup> PCIJ, *Case concerning the payment of various Serbian loans issued in France, judgment of 12 July 1929, series A, No. 20, p.44.*

*the latter case may possess the character of true international law governing the relations between States*”.<sup>38</sup> In light of the debate at the time, which is still on-going, on whether private international law belongs to national or international law, this is certainly a modern, forward looking, and dynamic characterisation of the nature of private international law.

As we have seen, the Court was clearly unwilling to base its principles for the determination of the applicable law on the choice of law rules of one (or both) of the States involved in each case. Instead, it formulated a set of principles, not by inventing them but by attempting to base them on a *comparison* of the practice of municipal courts in determining the applicable law to contractual obligations. In fact, the Court formulates a set of *international customary principles* to determine the law applicable to contractual obligations.

This applicable law is to be found “*by reference to the actual nature of [the contractual] obligations and to the circumstances attendant upon their creation, though [the Court] may also take into account the expressed or presumed intention of the Parties*”.<sup>39</sup> The Court recognised the role of party autonomy. This is still worth noting, because the principle of the parties’ freedom to choose the applicable law, although applied in most of the world, is still unknown, excluded or restricted in several legal systems, in particular in Latin America and the Middle East. This explains why the Hague Conference on Private International Law is currently working on “Principles of Choice of Law in International Contracts”.<sup>40</sup>

The Court did not, however, define the conditions or limits of party autonomy with any precision, except that it made clear that public policy<sup>41</sup> – if not *règles d’application immédiate*<sup>42</sup> – for which it provides some further clarifications<sup>43</sup> may set aside the otherwise applicable law. This lack of precision is not so surprising, as, here again, the issue was heavily debated at the time and the discussion is on-going.<sup>44</sup>

In any event, as we have seen, the Court chose not to set aside the Serbian law applicable to the substance of the debt applying public policy or *règles d’application immédiate*, but, using the technique of *dépeçage*, to apply French law to the question of currency. This is all the more interesting in light of the question whether under the current Rome I regulation *dépeçage* (by the court) for the *objectively* applicable law in contrast to *dépeçage* by choice of law by the parties remains possible.<sup>45</sup> Before concluding from the silence of Article 4 (1), that Rome I excludes such *dépeçage*, and that “[i]here appear to be no forceful reasons in favour of a judge-made *dépeçage*”, it might be useful to remember the Serbian and Brazilian loan cases.<sup>46</sup>

Finally, the way in which the Court interpreted the applicable French law, i.e. not just by reference to statutes, but, much like a municipal court would have done, by reference to their interpretation and application by the French courts provides another illustration of the role of national law, as a living law, in the Court’s jurisprudence.<sup>47</sup>

## 1.2. Jurisdiction of the courts

### 1.2.1 The Boll case

In the case concerning *the application of the Convention of 12 June 1902 governing the guardianship of infants*

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<sup>38</sup> Cf J.-P. Niboyet in his annotation of the judgments (in *Revue de droit international privé*, 1929, 427 (at 481)) : « (...) *plus se développeront les sources internationales, plus [le droit international privé] deviendra international. [La Cour] a ainsi nettement marqué les limites du présent et l’avenir*».

<sup>39</sup> PCIJ, *Case concerning the payment of various Serbian loans issued in France, judgment of 12 July 1929, series A, No. 20*, p.41.

<sup>40</sup> See [http://www.hcch.net/index\\_en.php?act=text.display&tid=49](http://www.hcch.net/index_en.php?act=text.display&tid=49)

<sup>41</sup> Niboyet (*op. cit.*), p. 488-489.

<sup>42</sup> Rigaux (*op. cit.*), p. 141.

<sup>43</sup> PCIJ, *Case concerning the payment of various Serbian loans issued in France, judgment of 12 July 1929, series A, No. 20*, p.46; PCIJ, *case concerning the payment in gold of Brazilian federal loans contracted in France, judgment of 12 July 1929, series A, No. 21*, p.125.

<sup>44</sup> Cf also draft Principles of Choice of Law in International Contracts (*op.cit.*), Art 11.

<sup>45</sup> Cf e.g., F. Ferrari & S. Leible, eds., *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, p. 31

<sup>46</sup> Article 9 (3) Rome I providing that “*Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful*”, because of its discretionary nature, does not seem to provide a full substitute for *dépeçage*.

<sup>47</sup> Niboyet (*op. cit.*) 484-487.

(the “1902 Convention”),<sup>48</sup> opposing the Netherlands to Sweden, the International Court of Justice had to decide whether Sweden had violated its obligations under the 1902 Hague Convention. Contrary to the Serbian and Brazilian loan cases, the issue here concerned the interpretation and application of a multilateral treaty, not the application of an international custom or principle of law. A further difference with the Serbian and Brazilian cases was that the case centred on a jurisdictional issue, a conflict of authorities.

The child at the centre of the case, Marie Elisabeth Boll, 13 years old at the time of the judgment, was, as a daughter of a Dutch sea captain, a citizen of the Netherlands but permanently resident with her mother in Sweden. When her mother died in 1953, her father became her guardian by operation of Dutch law, as it then stood. In accordance with the 1902 Convention, which provides that guardianship is regulated by the law of the nationality of the infant, the guardianship regarding Elisabeth Boll was thus established in the Netherlands, and registered by the Swedish authorities.

The controversy began when in 1954 by decision of the Swedish administrative authorities the child was placed under the regime of protective upbringing (*skyddsuppfostran*) in accordance with the Swedish law for the protection of children and young persons. Appeals lodged by the father, and subsequently by the Dutch guardian appointed in his place, up to the Swedish Supreme Administrative Court, failed. The Netherlands contended before the International Court of Justice that by adopting the measures of protective upbringing, which in the Dutch view amounted to “*rival guardianship*” that “*completely (...) frustrated*” the guardianship established in conformity with the 1902 Convention, Sweden had violated the Convention.

In its judgment of 1958, the Court proceeded on the basis of distinguishing between the purpose and scope of the Convention, which dealt with guardianship, and of the Swedish law of protective upbringing and the decisions based on the latter. The Court admitted that in dismissing the guardian’s request to terminate the protective upbringing, the Swedish Supreme Administrative Court “*placed an obstacle in the way of the full exercise of the right to custody belonging to the guardian. Does this constitute a failure to observe the 1902 Convention, Article 6 of which provides that “the administration of a guardianship extends to the person... of the infant”*”<sup>49</sup>? The Court then observed that the Convention was intended

*to put an end to the divergences of view as to whether preference ought to be given (...) to the national law of the infant, to that of his place of residence, etc., but it was not intended to lay down, in the domain of guardianship, and particularly of the right to custody, any immunity of an infant or of a guardian with respect to the whole body of local law (...).*

Therefore,

*the 1902 Convention was not intended to decide upon anything other than guardianship, the true purpose of which is to make provision for the protection of the infant; it was not intended to regulate or to restrict the scope of laws designed to meet preoccupations of a general character.*<sup>50</sup>

Protective upbringing is such a law; it is not a law on guardianship, it is rather:

*applicable whether the infant be within the puissance paternelle of the parents or under guardianship. Protective upbringing (...) is superimposed, when that is necessary, on either, without bringing either to an end but paralyzing their effects to the extent that they are in conflict with the requirements of protective upbringing (...) Protective upbringing contributes to the protection of the child, but at the same time, and above all, it is designed to protect society against dangers resulting from improper upbringing, inadequate hygiene, or moral corruption of young people.*

*The 1902 Convention is (...) not concerned with the determination of the domain of application of such a law.*<sup>51</sup>

By making this fundamental distinction between scope and purpose of the 1902 Convention on one hand and of the Swedish law on the other, the Court could have disposed of the case: the Convention simply does not apply to the measure of upbringing even though it may to some extent be “paralyzed” by that measure. Indeed, the Court, distancing itself from the theses of the Parties, felt no need to deal with Sweden’s argument, contested by

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<sup>48</sup> *Case concerning the application of the Convention dated 12 June 1902 governing the guardianship of infants, (Netherlands v. Sweden), I.C.J. Reports, 1958, p.55.*

<sup>49</sup> *Ibidem*, p. 66-67.

<sup>50</sup> *Ibidem*, p. 67.

<sup>51</sup> *Ibidem*, p. 67-69.

the Netherlands,<sup>52</sup> that, although the 1902 Convention did not contain an explicit provision reserving *ordre public*, this was implied, and that for that reason the *skyddsufffostran* measure was justified as an intervention made necessary by public policy. But the Court went on, and in an apparent attempt to strengthen its reasoning, pointed out that the upbringing measure was taken by an *administrative* organ, whose powers are different from those of courts, and can have only territorial effect:

*Such an organ can act only in accordance with its own law: it is inconceivable that the Swedish Child Welfare Board should apply Dutch law to a Dutch infant living in Sweden and equally inconceivable that the competent Dutch organ should apply Dutch law to such an infant living abroad.*<sup>53</sup>

A law on the protection of children and young persons “cannot have any extraterritorial aspiration, for that would exceed its social purpose as well as the means of which it disposes.”<sup>54</sup> As a result, there can never be a positive conflict of such laws, which are strictly territorial in their application.

All in all, the Court concluded, by 12 votes to 4, “that, in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention (...) does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of 1924.”<sup>55</sup> Therefore, Sweden could not be considered to have failed to observe its obligations under the Convention.

In his dissenting opinion the ad hoc Judge chosen by the Netherlands, Johannes Offerhaus, criticised the reasoning of the Court mainly for two reasons. First, the distinction made between the purpose of the Convention and the Swedish law was unfounded: the Swedish law and the Dutch law applicable under the 1902 Convention served the same purpose, and both were directed towards the protection of the child. The Swedish authorities should have contacted the Dutch authorities who could then have taken exactly the same measures of protection under Dutch law. Second, the distinction made between protection measures taken by administrative authorities as opposed to judicial authorities was not decisive: the Netherlands and Sweden, having similar laws on the protection of children, with those laws applied by courts in the former country and by administrative organs in the latter.

Offerhaus received strong support from Sir Hersch Lauterpacht in his individual opinion. He argued that:

*both the laws relating to guardianship and those relating to protective upbringing are laws intended primarily for the protection of children and their interests. At the same time, the protection of children – through guardianship or protective upbringing – is pre-eminently in the interests of society (...) All social laws are, in the last resort, laws for the protection of individuals; all laws for the protection of individuals are, in a true sense, social laws. There is an element of unreality in making these two aspects of the purpose of the State the starting-point for drawing legal consequences of practical import.*<sup>56</sup>

In contrast to Offerhaus, however, Lauterpacht concurred with the outcome of the judgment. But, in his view, the Court should have relied on the principle of international *ordre public* (public policy) to justify the application of the Swedish protective measure. Where Offerhaus had pointed out that the drafters of the 1902 Convention had deliberately rejected the general formula of *ordre public*, Lauterpacht considered that the protection of children is an “*obvious particle of [the] hard core [of ordre public]*”. Furthermore, *ordre public* “*must be regarded as a general principle of law in the field of private international law. If that is so, then it may not improperly be considered to be general principle of law in the sense of Article 38 of the Statute of the Court.*” And, as such, its content must be determined, “*by reference to the practice and experience of the municipal law of civilised nations in that field*”, notwithstanding the fact that the Convention is “*silent*” on the matter. His conclusion, therefore, was that Sweden, applying the protective measure of upbringing was covered by “*ordre public*” and had not violated the 1902 Convention.<sup>57</sup>

### **Significance for the development of PIL**

As we saw, in *Serbian and Brazilian Loans* the Court had noted that the rules of private international law “*may even be established by international conventions (...), and in the latter case may possess the character of true*

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<sup>52</sup> Cf. *supra*, Chapter I 3.3.

<sup>53</sup> *Ibidem*, p. 70.

<sup>54</sup> *Ibidem*, p. 71.

<sup>55</sup> *Ibidem*, p. 71.

<sup>56</sup> *Separate opinion of Judge Sir Hersch Lauterpacht, I.C.J. Reports, 1958, p. 85.*

<sup>57</sup> *Separate opinion of Judge Sir Hersch Lauterpacht, I.C.J. Reports, 1958, p. 92-94.*

*international law governing the relations between States*". This was exactly the case in *Boll*, and this enabled the Court to further develop its understanding of private international law in the context of an international treaty, with a focus this time, not on the applicable law, but on the jurisdiction of national authorities. In *Serbian and Brazilian Loans* the Court, faced with a choice between two potentially applicable laws, had cut the issue in two parts, and attributed each part to a different law. In *Boll*, the technique applied is not identical yet comparable: the Convention has its proper domain and purpose, and so has the Swedish law on protective upbringing, and therefore there is no conflict.

The reasoning, as Offerhaus and Lauterpacht pointed out, is not flawless. The *a priori* classification based on the distinction between "private" guardianship and "public" upbringing measures, the theory of the different powers of courts and of administrative organs, and the thought that foreign public law can never be applied by the forum, are all questionable. Like Lauterpacht, Sauveplanne in his comment notes, "[m]any laws serve both an individual and a social purpose and can be classified equally validly as either personal or territorial. This holds true for (...) the *Boll* case".<sup>58</sup> As Offerhaus had pointed out, "[t]he designation as an administrative or a judicial organ is often accidental or secondary".<sup>59</sup> And it is now well accepted that "the so-called principle of the inapplicability *a priori* of foreign public law, like that of its absolute territoriality is based on no cogent or practical reason (...)".<sup>60</sup>

In *Serbian and Brazilian Loans* the Court had signalled the role of public policy, but eschewed its application. In *Boll*, again, it avoided resorting to what is primarily a standard related to each separate legal order. Batiffol and Francescakis see in the judgment the reflection, if not application, of the theory of *règles d'application immédiate*, of mandatory rules that are so important in the view of a given legal order that they must be applied irrespective of the applicable rules of private international law.<sup>61</sup> The idea is certainly there, but the Court, using the comparative method as it did in *Serbian and Brazilian Loans*, did not rely solely on the Swedish standards for the protection of children. It found that they were common to other countries as well:

*The social problem of (...) children whose health, mental state or moral development is threatened, in short, of those ill-adapted to social life, has often arisen; laws such as the Swedish Law now in question were enacted in several countries to meet the problem. The Court could not readily subscribe to any construction which would make the 1902 Convention an obstacle on this point to social progress.*<sup>62</sup>

This is where the Court "a eu directement en vue l'aspect concret des problèmes humains que cette affaire a mis en cause"<sup>63</sup>, which is a prelude to the application of human rights standards of a truly international character<sup>64</sup>, and where the *Boll* case has given a real impulse to the development of private international law. The Dutch had pleaded the case on principle, and had not really made a strong case to argue that the Swedish authorities had not acted in the child's interests, and that the child's needs would have been better met by intervention by the remote Dutch authorities. The decision in *Boll* was clearly inspired by the notion that the Swedish authorities, being close to the child and therefore naturally in a better position than the Dutch authorities to appreciate the child's needs, to take adequate measures and to ensure continuity in her upbringing, should have competence to act more generally to ensure her welfare, not just to respond to a case of urgency<sup>65</sup>.

The Court's decision had an immediate impact on the revision of the 1902 Convention which resulted in the *Hague Convention of 5 October 1961 on the Protection of Minors*. The 1961 Convention succeeded in surmounting the classification difficulties of the *Boll* approach. It governs measures of protection of minors in general, not just guardianship, whether private or public. Still, while avoiding the classification challenges and presenting a number of other important innovations, the 1961 Convention introduced a new problem. Although the authorities of the child's habitual residence were given primary responsibility to take measures of protection

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<sup>58</sup> J.G. Sauveplanne, *Developments in private international law: a retrospective look at the Boll case*, in: *Realism in Law-making, essays in honour of Willem Riphagen*, 1986, p.185.

<sup>59</sup> *Dissenting opinion of Judge ad hoc Offerhaus*, *I.C.J. Reports*, 1958, p. 155.

<sup>60</sup> Resolution on The Application of Foreign Public Law, *Institut de Droit International*, Session of Wiesbaden, 1975.

<sup>61</sup> Cf. A.V.M. Struycken, *Coordination and Cooperation in Respectful Disagreement*, *General Course on PIL, Recueil des Cours*, Vol 311(2004), p. 401-405, p. 423.

<sup>62</sup> *Case concerning the application of the Convention dated 12 June 1902 governing the guardianship of infants, (Netherlands vs. Sweden)*, *I.C.J. Reports*, 1958, p.71.

<sup>63</sup> H. Batiffol, Ph. Francescakis, « L'arrêt Boll et la Cour internationale de justice et sa contribution à la théorie du droit international privé », *Revue critique de droit international privé*, 1959, p. 255, at. p. 276.

<sup>64</sup> See Sauveplanne (*op cit*), at p.188.

<sup>65</sup> The 1902 Convention provided for the competence of the local authorities in matters of urgency in its Article 7. Offerhaus, in his dissent, had admitted that the initial measures of the Swedish authorities were justified under this provision, but had contested the justification of the subsequent more lasting measures, which could not be qualified as urgent.

of the child on their territory, applying their own law, those of the child's nationality were also given a grip on the situation and could even override the measures taken by the local authorities, except in cases of urgency (Art 9) or serious danger (Art 8). For many States involved in the negotiations on the 1961 Convention, nationality as a connecting factor was still very important and bound up with sovereignty concerns.<sup>66</sup>

Therefore, one could say that the 1961 Convention went only half way in drawing the consequences from the message underlying *Boll*. And, as subsequent practice showed, this hybrid system did not really function satisfactorily. It was one of the main reasons that the Hague Conference decided in 1993 to revise the 1961 Convention. The revision led to the *Hague Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996*. The 1996 Convention, finally, establishes preeminent jurisdiction for the authorities of the habitual residence of the child. The national authorities, if they are better placed to protect the child may, by way of exception, be requested to assume jurisdiction (Art 8); such a request may also emanate from the latter (Art 9). But the courts of the habitual residence remain preeminent, as being in principle best placed to act in the child's best interests. This is very much in the spirit of *Boll*.<sup>67</sup>

### **1.2.2. Interpretation and application of the Lugano Convention on Jurisdiction and the enforcement of judgments in civil and commercial matters**

More recently, in December 2009, the International Court of Justice was seized by Belgium in its dispute with Switzerland on the interpretation and application of the *Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, the "Lugano Convention", in its original version of 16 September 1988, "as well as the application of the rules of general international law governing the exercise of State authority, in particular in judicial matters".<sup>68</sup>

The dispute concerned the decision by the Swiss authorities not to recognize a judgment of the Belgian courts and not to stay proceedings which were later instituted in Switzerland in the same matter. It arose out of the pursuit of parallel judicial proceedings in Belgium and Switzerland concerning a conflict between the Swiss and Belgian shareholders in the Sabena Belgian national airline, which had gone bankrupt.

The Belgian shareholders, believing that the Swiss companies had breached their contractual and non-contractual obligations, sued the latter before the Belgian courts, which found that they had jurisdiction on the basis of Articles 17 and 5 (3) of the Lugano Convention. While the Belgian proceedings were still pending, with the Swiss shareholders represented at the Belgian court, the Swiss companies filed for a debt restructuring moratorium in the Swiss courts. The Belgian shareholders declared their claims against the Swiss companies, which they had brought before the Belgian courts, in these Swiss proceedings, but saw all their claims rejected by the Swiss liquidators. They then sought a stay of the proceedings in Switzerland, pending the outcome of the Belgian proceedings, on the basis of Article 21 of the Lugano Convention.<sup>69</sup> The Swiss courts refused to recognize the future Belgian judgments on the civil liability of the Swiss shareholders as falling outside the scope of application of the Lugano Convention, and, as a consequence, refused to stay the Swiss proceedings both on the basis of the Convention, and on the basis of Swiss municipal law (the latter point led Belgium to its complaint about the violation of "the rules of general international law governing the exercise of State authority, in particular in judicial matters.")

#### ***Significance for the development of PIL***

Unfortunately for us interested lawyers, the case was discontinued upon Belgium's request "in concert with the Commission of the European Union", following a clarification provided by Switzerland in its memorandum on preliminary objections that the Swiss Federal Court's reference to the "non-recognisability" of future Belgian judgments was not binding, and that there was, in fact, "nothing to prevent such a judgment, once handed down, from being recognized in Switzerland in accordance with the applicable treaty provision". As a result, the case

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<sup>66</sup> This was an important reason why the 1961 Convention did not manage to deal with the issue of international abduction of children, as States were reluctant to accept returning wrongfully removed children if they had their nationality. This led the Conference to engage subsequently in extensive work that resulted in the 1980 Hague Child Abduction Convention.

<sup>67</sup> It is interesting to note that both Sweden, which had denounced the 1902 Convention the day following the judgment in *Boll* (!) and never joined the 1961 Convention, and the Netherlands, are now both bound by the 1996 Convention.

<sup>68</sup> *Jurisdiction and enforcement of judgments in civil and commercial matters, (Belgium v. Switzerland), Application, 21 December 2009.*

<sup>69</sup> *Jurisdiction and enforcement of judgments in civil and commercial matters, (Belgium v. Switzerland), Memorial by Belgium, p. 4-24; Preliminary Objections by Switzerland, p. 8-12.*

was removed from the Court's list in April 2011.

We will not know what the Court, assuming it had declared itself competent in the matter, would have decided on the substance of the Belgian claim. But the fact that the case was brought before the ICJ is significant, because it shows that the Court remains the ultimate international judicial forum before which not only disputes on pure inter-State matters but, like in the *Boll* case, also questions of interpretation and application of conventions on private international law may be brought. The question also remains whether the Court would have declared itself competent to deal with the matter, in the light of the preliminary objections raised by Switzerland. We will come back to this question in Chapter III.3.

## 2. Case-law relevant to the development of private international law

In this section we will discuss a selection of judgments of the World Court that have a bearing on private international law, in the field of nationality, immunity and human rights. Of course, one could think of other examples of cases, such as the *Chorzow* case on expropriation,<sup>70</sup> which may have a bearing on private international law.

### 2.1. Nationality

Nationality – the determination whether a physical or legal person is a State's national – is primarily a matter of domestic legislation for each State.<sup>71</sup> It is a matter of public law, and, at least in the conception followed in this *Preadvies*, not a matter of private international law but serves as a *datum* for it. In many systems of private international law nationality operates as a relevant, indeed in some systems prominent, connecting factor to determine the jurisdiction of courts and the applicability of laws.<sup>72</sup>

While the grant of nationality is within the jurisdiction of each State, its effects on the international plane are also governed by principles of international law, and the ICJ has been called upon to rule on the effects of nationality notably in two important cases, one relating to physical, and the other to legal persons.

#### 2.1.1. Nottebohm

In the *Nottebohm* case<sup>73</sup>, the question was whether Liechtenstein could validly exercise diplomatic protection on behalf of one of its citizens, Mr. Nottebohm. Nottebohm was a German national by birth, who had left Germany for Guatemala in 1905. He took up residence in Guatemala and made it the centre of his business activities. In 1939 he travelled to Germany and, just after the Second World War began, went to Liechtenstein where he promptly obtained the nationality of Liechtenstein by naturalization, as a result of which he lost his German nationality under German rules on the acquisition and loss of nationality. He then returned to Guatemala where his change of nationality was registered in the register of aliens. As a result of war measures he was arrested in 1943, transported to the USA, and interned there for two years, but when he tried to return to Guatemala, was refused admission. He then left for Liechtenstein. Subsequently, his properties in Guatemala were confiscated. Espousing his case, Liechtenstein instituted proceedings against Guatemala before the ICJ.

In its judgment on the merits of 6 April 1955<sup>74</sup>, the Court did not question the validity of Nottebohm's naturalisation according to the law of Liechtenstein. The real issue was not one pertaining to the legal system of Liechtenstein, as the exercise of protection of a national was to place oneself on the plane of international law, and the Court noted rather that it:

*must ascertain whether (...) the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.*<sup>75</sup>

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<sup>70</sup> PCIJ, *Case concerning the factory at Chorzow (merits)*, judgment of 13 September 1928, Series A, No. 17.

<sup>71</sup> See already *Nationality decrees issued in Tunis and Morocco (advisory opinion)*, Series B, No. 4 (*op cit*).

<sup>72</sup> See, e.g., F. de Souza del'Olmo, "La nacionalidad como punto de encuentro entre el derecho internacional privado y el derecho público", in *Private International Law and Public International Law (op cit)*, pp.127-161.

<sup>73</sup> *Nottebohm case (second phase)*, I.C.J. Reports, 1955, 4.

<sup>74</sup> Also: *Nottebohm (preliminary objections)*, I.C.J. Reports, 1953, p. 111.

<sup>75</sup> *Nottebohm case (second phase)*, I.C.J. Reports, 1955, p. 24.

Analysing the essential facts relating to Nottebohm's connection with Liechtenstein in detail, the Court concluded that he had

*[n]o settled abode, no prolonged residence in that country at the time of his application for naturalization (...). No intention of settling there was shown (...). There is no allegation of any economic interests or of any activities exercised or to be exercised in Liechtenstein. It is unnecessary in this connection to attribute much importance to the promise to pay taxes levied at the time of his naturalization.*<sup>76</sup>

Considering that the connection between Nottebohm and Liechtenstein was *not effective*, the Court found that Liechtenstein could not validly exercise diplomatic protection on his behalf.<sup>77</sup> The Court found inspiration in the relevant practice of national courts and arbitral tribunals in cases of dual nationality, as well as in bilateral and multilateral treaties aiming at solving legal issues arising out of conflicts of nationalities.<sup>78</sup>

### **Significance for the development of PIL**

Although the Court in *Nottebohm* did not specifically refer to legislation or case law relating to private international law, its summary of the essence of nationality – “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”, “the juridical expression of the fact that the individual [concerned] is in fact more closely connected with the population of the State conferring nationality than with that of any other State”<sup>79</sup> – characterises nationality in a way very similar to the concept as used in private international law, notably choice of law, in so far as it applies nationality as a connecting factor. This is true, in particular where, in the case of multiple nationalities, a choice must be made between two or more potentially applicable laws, but, beyond this, in situations where a person has a single nationality, which is no longer the expression of a real connection with the State having conferred this nationality.<sup>80</sup>

*Nottebohm* decided an important but narrow issue: Liechtenstein did not have the right to accord diplomatic protection to Nottebohm.<sup>81</sup> The Court did not decide whether under public international law Liechtenstein was entitled to issue a passport to him, or whether Liechtenstein, or any other State applying the nationality principle in private international law, could claim that its private law was applicable to his personal relations.<sup>82</sup> The significance of the judgment, from a private international law perspective, concerns the Court's definition of the criteria to determine the effectiveness of nationality. However, although the criteria for determining the effectiveness of nationality for purposes of diplomatic protection and private international law are largely similar, the effectiveness test in the case of diplomatic protection is less severe than in the case of choice of law.<sup>83</sup> It is conceivable that a nationality which is considered *ineffective* for the purpose of determining which law should be applied in the case of a person with more than one nationality, or whether the law of a person's

<sup>76</sup> *Ibidem*, p. 25.

<sup>77</sup> Cf. W. Wengler, “The general principles of private international law”, *Recueil des Cours* 104 (1961 III), 279-459.

<sup>78</sup> *Nottebohm case (second phase)*, I.C.J. Reports, 1955, p. 22-23.

<sup>79</sup> *Nottebohm case (second phase)*, I.C.J. Reports, 1955, p. 23.

<sup>80</sup> Cf. e.g., the Belgian private international law code, article 1, para 2 : “Toute référence faite par la présente loi à la nationalité d'une personne physique qui a deux ou plusieurs nationalités vise :

[1° la nationalité belge si celle-ci figure parmi ses nationalités;]

2° dans les autres cas, la nationalité de l'Etat avec lequel, d'après l'ensemble des circonstances, cette personne possède les liens les plus étroits, en tenant compte, notamment, de la résidence habituelle. », and the Swiss Private International Law Act, Article 23, para 2 : « Lorsqu'une personne a plusieurs nationalités, celle de l'Etat avec lequel elle a les relations les plus étroites est seule retenue pour déterminer le droit applicable, à moins que la présente loi n'en dispose autrement ». And see K. Boele-Woelki, *Die Effektivitätsprüfung der Staatsangehörigkeit im niederländischen internationalen Familienrecht* (1982).

<sup>81</sup> As to the effects of this decision, it should be noted that the International Law Commission considered that, in applying the effective link requirement in the *Nottebohm* case, the Court did “not intend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein's position was required to show a genuine link between itself and Mr. Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection. ” ( *The International Law Commission Draft articles on diplomatic protection with commentaries, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, p. 33-34, par. 5).

<sup>82</sup> See W. Wengler, (*op cit*), 279-459 (at p.334).

<sup>83</sup> See H.-P. Mansel, *Personalstatut, Staatsangehörigkeit und Effektivität* (1988).

nationality or that of the habitual residence should apply, is considered effective for the purpose of diplomatic protection.<sup>84</sup>

### 2.1.2 Barcelona Traction

The issue of nationality in the framework of the exercise of diplomatic protection has also been brought to the Court in relation to corporations. The *Barcelona Traction* case concerned a company incorporated under Canadian law, but the shares of which belonged mainly to Belgian nationals. The company was mainly concerned with the financing of the construction and operation of electric power plants for Barcelona and Catalonia by a number of subsidiary companies it owned, some of which were companies under Canadian, and some under Spanish law. As a result of measures taken by the Spanish authorities, Barcelona Traction was judged as bankrupt in Spain. Belgium alleged that these measures deprived Barcelona Traction of all its assets for the benefit of a Spanish financier. The final ICJ judgment was preceded by lengthy proceedings, interrupted by a failed effort at settlement on the issue of jurisdiction of the Court, which Belgium based on Articles 36 (1) and 37 of the Statute and on the 1927 bilateral Treaty of Conciliation, Judicial Settlement and Arbitration between the two countries.

The key question, posed to the Court, was whether Belgium was entitled to exercise diplomatic protection of Belgian shareholders in a company that was a legal entity incorporated in Canada. This question, the Court stressed, in the absence of specific rules of international law, was essentially a question of national law, but not of a particular State but of “*rules generally accepted by municipal legal systems*”<sup>85</sup>. The Court then found that under those rules a “*firm distinction [is made] between the separate entity of the company and that of the shareholder, each with a distinct set of rights*” and that, in principle, “*whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action*”<sup>86</sup>. This has as a consequence on the international plane, that, in principle, it is the State under whose laws the company is incorporated, and not the State whose shareholders have been affected, that can bring a claim under international law.

The Court then examined whether, in the present case, there was occasion to make an exception to this rule, by analogy to the exceptional technique under municipal law of disregarding the legal entity, by “*lifting the corporate veil*”. That might be so in case of lack of capacity of Canada to act on its behalf. But Canada did not lack that capacity: “*The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office*”<sup>87</sup>. Although the Court specified that, contrary to the situation regarding the rules governing the nationality of physical persons, there is no generally accepted test of the “*genuine connection*” in the field of diplomatic protection of corporate entities, it did observe that the incorporation under Canadian law and the registered office there were not artificial but represented “*a close and permanent connection*” between the company and Canada, which suggested at least some level of effectiveness of the connection between the company and the State exercising diplomatic protection on its behalf.

#### ***Significance for the development of private international law***

In *Nottebohm* the Applicant State, Liechtenstein, failed to establish, to the satisfaction of the Court, that it had an effective link with its national, Nottebohm. In *Barcelona Traction*, the plaintiff State, here Belgium, did not succeed because the Court considered that the Barcelona Traction Company, the true party whose rights were at stake, was not a Belgian but a Canadian national, and that not Belgium, but Canada was entitled to exercise diplomatic protection on its behalf. In order for the State of incorporation of a company to be able to exercise its right of diplomatic protection, there must be an effective connection with that company, a condition which, according to the Court in this case would have been met by Canada.

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<sup>84</sup> *Ibidem*, p.201-202

<sup>85</sup> *Case concerning the Barcelona Traction, Light and Power company, Limited (new application: 1962), I.C.J., Reports, 1970*, p. 37, par. 50.

<sup>86</sup> *Ibidem*, p. 34-35, par. 41, 44.

<sup>87</sup> *Ibidem*, p. 42, par. 70.

Where this judgment, and the subsequent work of the ILC<sup>88</sup> may be of some relevance to private international law, it is with regard (not: to the right of a State to allow the incorporation under its laws of a company that has no effective connection with that State – which remains, see *Nottebohm* a matter of national law – but:) to the right to refuse recognition of the legal personality of a foreign company that is incorporated under the laws of State with which it has no effective connection. In those systems that apply the *siège reel* theory, according to which companies are subject to the company law of the State of the location of their central administration, this does not pose a problem. The question could arise, however, in those systems that apply the theory of incorporation, according to which a company is subject to the law of the State of incorporation, regardless of the location of the company's central administration. Of course, *Barcelona Traction* does not take any stand regarding either of these theories. But the judgment, might, perhaps, be used in support of a refusal to recognise such a foreign company, or some of its attributes, if although formally incorporated under the laws of a State it is in reality is no more than an empty shell without real links with that State, a phenomenon with which States applying the incorporation theory, such as the Netherlands, are regularly struggling. However, among the EU States, the right of free establishment of companies has been strongly upheld by the European Court of Justice<sup>89</sup>, and legislative measures to combat companies without connection with the State under whose law they were incorporated, have had to make an exception for companies set up under the company laws of these States and under those of the European Economic Area<sup>90</sup>.

Apart from its interest from a private international perspective, *Barcelona Traction* is interesting because of its overt use of the technique of borrowing, with a view to the construction of international law, from comparative national law, particularly, the theory of lifting the corporate veil: a clear demonstration of the osmosis between international law and national law.

## 2.2. State immunity: the case of Germany v. Italy (Greece intervening)

While State immunity concerns the status of the State as a subject of public international law, it also constitutes, in principle, an exception to the exercise by national courts and other authorities of their jurisdiction as well as to their powers to enforce judicial decisions against foreign States. State immunity from jurisdiction and from enforcement is a subject very much at the crossroads of public and private international law. Indeed, the issue arises rarely before the World Court but regularly before national courts, and also in international arbitration.<sup>91</sup> The significance of the judgment in *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)* of 3 February 2012 for private international law may therefore best be examined in the context of a discussion of the decision itself.

In this case the German claim was that Italy, by allowing civil claims for compensation for violations of international humanitarian law by the German Reich during World War II to be brought before its courts against the Federal Republic of Germany, had committed violations of its obligations to respect the jurisdictional immunity which Germany enjoyed under international law. The same applied, Germany held, to measures of constraint, taken by Italy against German property located in Italy, as well as to the enforcement by Italy of Greek judgments concerning civil claims similar to those rendered by Italian courts.

The Court proceeded on the basis of an extensive examination of relevant State practice as well as of *opinio juris*, so as to establish the content of customary international law on the issues. On the first question, concerning jurisdictional immunity, the Court considered that it must apply the law on State immunity at the time when the Italian courts refused immunity and exercised jurisdiction, and not as it was at the time of the Second World War. The judgment of the Court, therefore, reflects its view on the present state of the question of State

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<sup>88</sup> In its codification work relating to diplomatic protection, the ILC stated that the diplomatic protection should be exercised by the State under whose laws the corporation was incorporated, except when three cumulative conditions are met: (i) the corporation is controlled by nationals of another State or States, (ii) the corporation has no substantial business activities in the State of incorporation, and (iii) the seat of management and the financial control of the corporation are both located in another State. When the three conditions are met, it is the State where the seat of management and the financial control of the corporation are both located that will have the right to exercise diplomatic protection for the corporation, see: Article 9, Draft Articles on diplomatic protection and commentaries, International Law Commission, 2006; *Fourth Report on diplomatic protection by the Special Rapporteur, John Dugard*, 55<sup>th</sup> session of the International Law Commission (2003), UN doc. A/CN.4/530, p.4, para. 9.

<sup>89</sup> *Ueberseering v. Nordic Construction Company Baumanagement GmbH, C-208/00, Rec., 2002*, p. I-9919.

<sup>90</sup> *Ueberseering v. Nordic Construction Company Baumanagement GmbH, C-208/00, Rec., 2002*, p. I-9919; *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., C-167/01*, judgment of 30 September 2003. Cf. Struycken, General Course (*op cit*), p. 155-158.

<sup>91</sup> R. Higgins, The International Court of Justice and Private international law thoughts, in: *Themes and Theories, Selected Essays, Speeches and Writings in International Law*, Oxford, 2009, p.1310.

immunity, which makes it also relevant to current private international law. After a detailed analysis of the relevant State practice, the Court concluded that “*customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict*”<sup>92</sup>. Indeed, the Court found “*that under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict*”. The Court took care to stress, however, “*that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case*”<sup>93</sup>.

One may presume that the Court would make a similar reservation concerning any *civil* proceedings against such an official in relation to these serious crimes, an issue debated at length during the negotiations in the Hague Conference on what has become known as the “Judgments Project”<sup>94</sup>. The tendency to enable States to exercise universal criminal jurisdiction in respect of serious crimes when there is no clear connection between the State and the crime, may well lead to accompanying civil proceedings to obtain relief from the criminal in question.<sup>95</sup> The 1999 Hague preliminary draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters<sup>96</sup> and the 2001 Hague Interim text<sup>97</sup> make provision for the exercise of jurisdiction under national law in actions for civil damages in such cases.<sup>98</sup>

The Court arrived at its conclusion by distinguishing sharply between the rules of State immunity, on one hand, and, the rules of armed conflict, on the other. The former are “*procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful*”. Therefore, “[r]ecognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintain that situation (...)”.

Regarding the second question, immunity from enforcement on Germany’s property, the Court observed *that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than jurisdictional immunity enjoyed by those same States before foreign courts. Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory. The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (...) are distinct, and must be applied separately*”.<sup>99</sup> Before any measure of constraint may be taken against property belonging to a foreign State, it must be established that it is “*in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim*”. None of these conditions having been fulfilled, the property “*being used for governmental purposes that are entirely non-commercial*”, Italy, by applying a legal charge on the property in question, had violated its obligation to respect Germany’s immunity.

Finally, on the question of the enforcement by Italy of Greek judgments concerning civil claims similar to those rendered by Italian courts, the Court emphasized that this is again a question of immunity of jurisdiction,

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<sup>92</sup> *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, para. 78.

<sup>93</sup> *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, para. 91.

<sup>94</sup> See [http://www.hcch.net/index\\_en.php?act=text.display&tid=149](http://www.hcch.net/index_en.php?act=text.display&tid=149)

<sup>95</sup> Cf UN GA Resolution of 16 December 2005 A/RES/60/147 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, according to which victims of gross violations of international human rights and serious violations of international humanitarian law should be provided with “full and effective reparation”, including restitution of property and compensation for physical and material harm, loss of opportunities, material damages and loss of earnings and moral damage (par 18-23).

<sup>96</sup> See <http://www.hcch.net/upload/wop/jdgmpl11.pdf>

<sup>97</sup> See [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3499&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35)

<sup>98</sup> See the Report on the preliminary draft Convention by Peter Nygh and Fausto Pocar, [http://www.hcch.net/index\\_en.php?act=publications.details&pid=3494&dtid=35](http://www.hcch.net/index_en.php?act=publications.details&pid=3494&dtid=35), pp.80-81.

<sup>99</sup> *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, para. 113.

different from the question of enforcement raised by the second question. The question is not whether or not the Greek courts respected Germany's immunity, but whether the Italian courts, in allowing the application of *exequatur*, had respected Germany's jurisdictional immunity: "*the court seised of an application for exequatur of a foreign judgment rendered against a third State has to ask itself whether the respondent State enjoys immunity from jurisdiction — having regard to the nature of the case in which that judgment was given — before the courts of the State in which exequatur proceedings have been instituted. In other words, it has to ask itself whether, in the event that it had itself been seised of the merits of a dispute identical to that which was the subject of the foreign judgment, it would have been obliged under international law to accord immunity to the respondent State*".<sup>100</sup> The Italian courts which declared enforceable in Italy the decisions of Greek courts rendered against Germany violated Germany's immunity because it followed from the Court's ruling on the first question that, had they been seized of the merits of a case identical to the Greek cases, they would have been obliged to grant immunity to Germany.<sup>101</sup>

Because immunity questions arise most frequently before national courts, the ICJ turned to the case law on immunity of the national courts of various countries. As Rosalyn Higgins, then herself on the Court, had pointed out a few years earlier: "*The dilemma for the ICJ is that we are required to base our Judgments on "what international law allows", which on this topic will in significant part be determined by what national courts decide – applying always their reading of international law. We find ourselves both locked in a circle and at the cross-roads or private and public international law*".<sup>102</sup> This dilemma and what the Court distilled from national case law constrained it in its construction of the applicable law.

It is worth noting that in his extensive dissenting opinion, Judge Cançado Trindade, took a position radically different from that of the majority, arguing that international crimes perpetrated by States are neither acts *jure gestionis*, activities of a commercial nature which are not immune from the jurisdiction, nor acts *jure imperii*, activities of a governmental or public nature which are immune, but, as breaches of *jus cogens*, fall in a third category, "*delicta imperii for which there is no immunity*".

One is indeed left with the impression that there is in the judgment an unresolved tension between the right of access to justice in the case of grave violations of human rights and of humanitarian law, and the doctrine of sovereign immunity, that may well be further tested in future proceedings before national courts depending on the circumstances of each case.<sup>103</sup>

### 2.3. Violation of human rights – Ahmadou Sadio Diallo

Had the ICJ in earlier judgments taken the position that diplomatic protection by States of its nationals was limited to alleged violations of the minimum standard of treatment of aliens<sup>104</sup>, more recently, in the case concerning *Ahmadou Sadio Diallo*, brought by the Republic of Guinea against the Democratic Republic of Congo<sup>105</sup>, the Court has found that: "*Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope ratione materiae of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.*"<sup>106</sup> As a consequence the Court declared admissible claims which were based on diplomatic protection for violations of Mr. Diallo's human rights, guaranteed both by the UN Covenant on Civil and Political Rights (ICCPR) and the African Charter of Human and People's Rights as well as of his diplomatic privileges under the Vienna Convention on Consular Relations, and of his personal rights as *associé* of a company.<sup>107</sup>

<sup>100</sup> *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, para. 130.

<sup>101</sup> *Jurisdictional immunities of the State (Germany v. Italy: Greece intervening)*, judgment of 3 February 2012, para. 131.

<sup>102</sup> R. Higgins, (*op cit*), p.1312.

<sup>103</sup> Cf H. Muir Watt, "*Les droits fondamentaux devant les juges nationaux à l'épreuve des immunités juridictionnelles*", *Revue critique de droit international privé* 101 (2012), 539-552.

<sup>104</sup> See for example: *Case concerning the Barcelona Traction, Light and Power company, Limited (new application: 1962)*, I.C.J., Reports, 1970, p. 3.

<sup>105</sup> The Court confirmed the customary status of the definition of diplomatic protection included in Article 1 of the Draft Articles of the ILC on Diplomatic Protection. Accordingly, diplomatic protection "*consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility*" (*Ahmadou Sadio Diallo, (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, p. 599, para. 39).

<sup>106</sup> *Ibidem*.

<sup>107</sup> *Ahmadou Sadio Diallo, (République de Guinée c. République démocratique du Congo)*, exceptions préliminaires, arrêt, I.C.J. Reports, 2007, p. 599, para. 39 and p. 606, para. 65.

In the *Diallo* case the Court thus confirmed that the scope of the Court's jurisdiction regarding diplomatic protection<sup>108</sup> had widened to include violations of internationally guaranteed human rights. The Court declared Diallo's claims based on violation of his rights under civil law, including loss of property, admissible in part. Eventually it rejected them in its decision on the merits mainly because the claims were not sufficiently substantiated.

*Diallo* may well open the door for complaints, including for damages suffered by the victim, where such violations result from the application or interpretation of rules of private international law. In *Diallo*, Guinea maintained on the victim's behalf, among other complaints, that his expulsion by the DR of Congo to Guinea was intended to prevent him from recovering debts owed to his companies, including through judicial proceedings which he had instituted in Congo. It is not too difficult to imagine additional scenarios in similar situations, where an arbitrary refusal to provide access to the courts to a foreigner, or to recognize or enforce a foreign decision awarding compensation for damages, also amounts to a violation of a person's human rights, e.g. as guaranteed under Art.14 (right to a fair trial) of the ICCPR. Various cross-border issues in the field of family law, such as international child abduction by one of the parents, or the trafficking of children, may amount to an interference with the right to protection of family life or the rights of the child as guaranteed under the same Covenant (Arts. 23, 24) or under the 1989 UN Convention on the Rights of the Child.<sup>109</sup> They could become matters of significant public interest, and conceivably States could decide, where other national or international remedies are not available or fail, to bring such a case before the ICJ. This brings us to our next Chapter.

### ***Chapter III Some thoughts on the possible future role of the World Court for the development of Private international law***

The previous Chapter has shown that the World Court has so far played a relatively modest but not insignificant role in the development of private international law. Looking ahead, there can be little doubt that this role is bound to increase. The permeability of national borders as a consequence of globalization not only leads, horizontally, to increasing interaction between domestic legal systems, resulting in ever more private international legal issues occurring. It also reduces, vertically, the traditional distance between the spheres of public and private international law. On one hand, the ordering of the diversity of private law orders and systems – the core task of private international law – is increasingly also a matter of interest for public international law, e.g. through the negotiation and wider acceptance of Hague Conventions and other global, regional and bilateral instruments on private international law. On the other, norms of public international law are progressively interacting with, and shaping and informing norms of private international law, in particular where they are embodied in international instruments.

Even if no specific action were undertaken to enhance the role of the ICJ in matters of private international law, the growing interaction and mutual influence between public and private international law is likely to result in more cases being brought before the Court that concern or touch on private international law. The *Lugano* case, although it did not lead to any decision by the Court, and the State immunity case between Germany and Italy illustrate that even among European States united in the European Union with its own European Court of Justice, the ICJ retains a residual role in matters beyond the competence of the Union. But the ICJ's clientele has widely spread and today includes States from all over the world. States in Latin America<sup>110</sup>, Asia-Pacific<sup>111</sup> and, as the *Diallo* case illustrates, Africa, have turned to the Court. In the absence of regional supra-national judicial institutions in most parts of the world outside of Europe, the ICJ has the potential to become involved in a wide range of international legal issues that States in those regions may wish to submit to it, including questions on or concerning private international law, increasingly enveloped in global, regional or bilateral conventions.

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<sup>108</sup> As Judge Bennouna points out “ *il est clair que le droit de l'Etat, lorsqu'il prend fait et cause pour son ressortissant, n'a plus qu'un caractère procédural, celui d'engager une réclamation internationale. (...) Il s'agit là d'une évolution qui s'inscrit parfaitement dans le contexte du droit international contemporain* ” : M. Bennouna, « *La protection diplomatique : du standard minimum de traitement des étrangers aux droits de l'homme* », in : *The diversity of international law, Essays in honour of Professor Kalliopi K. Koufa*, M. Nijhoff, 2009, 486.

<sup>109</sup> On the confrontation of private international law with human rights, see, generally, P. Kinsch, « *Droits de l'homme, droits fondamentaux et droit international privé* », *Recueil des Cours, Vol 318 (2005)*, p. 9-331.

<sup>110</sup> See e.g.: *Case concerning Aerial Herbicide Spraying (Ecuador vs. Colombia)*; *Case concerning Pulp Mills on the river Uruguay (Argentina vs. Uruguay)*, judgment of 20 April 2010, I.C.J. Reports, p. 14.

<sup>111</sup> See e.g.: *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, (pending).

What is more, as international instruments, including those on private international law, continue to expand their reach *within* legal orders, the need for national courts to be guided in their interpretation of such instruments will increase, as a steadily swelling undercurrent. The pressure will grow, bottom-up, for such guidance to come from an authoritative neutral judicial body that reflects the various legal systems and cultures in the world.

Looking even further ahead, then, is there ground to take action to broaden access to the ICJ? The question, of course, may be asked for a wide range of other matters beyond private international law. Moreover, in so far as the possibility of a reference by national courts to the ICJ is concerned, it has institutional implications that need to be discussed in a wider context.

### 1. A precedent: the 1931 Hague Protocol

On 27 March 1931, 17 States, all European, signed a Protocol in The Hague through which they recognised the jurisdiction of the Permanent Court of International Justice to deal with “*any dispute between them concerning the interpretation of the Conventions drawn up by the Hague Conference on Private International Law, which they have ratified or to which they have acceded*”.<sup>112</sup> Nine of these States<sup>113</sup> ratified the Protocol, which entered into force on 12 April 1936.

At its seventh Diplomatic Session in 1951, which reviewed the pre-Second World War work of the Hague Conference and led to its establishment as a permanent international organisation, the Conference concluded that for those States that were parties to the Protocol and were bound by the Statute of the ICJ, the ICJ now had jurisdiction under its Art 37.<sup>114</sup> The Session recommended that the Netherlands government invite those States which were not yet bound by the Protocol to join this instrument.<sup>115</sup> The view of the Conference was, therefore, that the Protocol was still in force.<sup>116</sup>

The Protocol has never been denounced by any of the Parties, and we may therefore conclude that it is still in force among the nine States that ratified the instrument. Contrary to the Protocol, however, most of the early Hague Conventions to which the Protocol applies have been denounced by most of the States Parties. It has lost any practical importance, that is, unless we assume that the Protocol extends also to posterior, in particular the post-Second World War, Hague Conventions. However, the language used (“*Conventions élaborées*”, “*Conventions (...) qu'ils ont ratifiées ou auxquelles ils ont adhéré*”) appears to refer only to prior Hague Conventions, and suggests that the negotiators intended the Protocol to apply only to those instruments. It is most unlikely that States Parties to the Protocol would accept the view that it applies to any of the Conventions drawn up since 1951, none of which refers expressly to the Protocol or any other means of settlement by an international tribunal<sup>117</sup>, and we have not found any indication in the *travaux préparatoires* of the later Conventions for such a view.

That does not mean that the possibility of providing for an international tribunal to resolve issues of private international law, including questions of interpretation and of application of Hague Conventions, has not been considered in the context of negotiations on more recent Hague Conventions. The *Dyer* report drawn up in preparation of the 1980 Hague Child Abduction Convention<sup>118</sup> discussed, as one option, the establishment of an international tribunal, not to interpret the future treaty, but, more directly, “*for the purpose of solving cases of*

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<sup>112</sup>Original French text: *Les États contractants du présent Protocole, représentés par les soussignés dûment autorisés, reconnaissent la compétence de la Cour Permanente de Justice Internationale, pour connaître de tout différend entre eux concernant l'interprétation des Conventions élaborées par la Conférence de La Haye de Droit International Privé, qu'ils ont ratifiées ou auxquelles ils ont adhéré*. See [http://www.hcch.net/index\\_en.php?act=text.display&tid=116](http://www.hcch.net/index_en.php?act=text.display&tid=116)

<sup>113</sup> States that ratified the 1931 Protocol are: Belgium, Denmark, Estonia, Finland, Hungary, Netherlands, Norway, Portugal, and Sweden.

<sup>114</sup> Article 37 reads: *Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter, shall, as between the parties to the present Statute, be referred to the International Court of Justice.*

<sup>115</sup> Actes de la Septième Session, p 401.

<sup>116</sup> As a consequence, one might have expected the Netherlands in the *Boll* case a few years later, to base the jurisdiction of the ICJ on this Protocol, which also bound Sweden. However, the application only referred to the acceptance of the compulsory jurisdiction by both States under Art 36 of the Statute.

<sup>117</sup> Several procedural Hague Conventions drawn up since 1951 refer expressly to the settlement by diplomatic channels of difficulties arising in connection with their operation *cf.* 1954 Convention on Civil Procedure, Art. 9(2); 1965 Service Convention, Art.14; 1970 Evidence Convention, Art.36.

<sup>118</sup> Adair Dyer, Report on international child abduction by one parent (“legal kidnapping”), Prel.doc.no 1 of August 1978, *Actes et Documents de la Quatorzième session, Tome III, Child Abduction*, p 12-60 (at p.47).

*conflicting custody decisions in different States*".<sup>119</sup> However, the negotiators embarked on a novel approach and the 1989 Hague Child Abduction Convention does not settle or seek to settle the question of custodial rights, nor does it provide for the recognition and enforcement of decisions on such rights. Instead, it sets up a system based on administrative and judicial cooperation to avoid the abduction of children, and, where the child has already been removed, to obtain his or her immediate return. Thus, the question discussed in the *Dyer* report does not arise under the Convention.

Nevertheless, the courts and authorities of the Contracting States – ninety at this point from all continents<sup>120</sup> – are inevitably faced with issues of interpretation and application of the Convention, as they are, increasingly, in respect of other (Hague) Conventions on private international law.

## **2. Other ways to secure uniformity of interpretation and application of private international law conventions – their limitations**

As Hague Conventions, and private international law instruments in general, are self-executing, drafted in such a manner that they lend themselves to being directly applied within the legal order of each Contracting State<sup>121</sup>, great care is taken at The Hague, whenever possible, to define the rules and concepts used with maximum precision<sup>122</sup>. An extensive explanatory report for each Hague Convention provides additional assistance. Special Commission meetings to review the practical operation of Conventions assist in promoting consistency of their interpretation and application, and have led to the development of additional tools such as practical handbooks, guides to good practice, and a data base for case law on the instrument.

Yet, these tools have their limits. Two examples will illustrate this. The first concerns the interpretation of the Hague Evidence Convention, the second the application of the Hague Child Abduction Convention.

In *Société Nationale Industrielle Aérospatiale v. United States District Court* ("Aérospatiale")<sup>123</sup>, the Supreme Court of the United States of America ruled that the Hague Evidence Convention does not exclude national (federal or state) procedures, in particular with respect to "discovery". But the Court went further. The majority disagreed with the view of four judges that the Convention, although not exclusive, requires *presumptive* resort to its procedures. Instead, the majority ruled that the Convention was a means to facilitate discovery "*to which an American court should resort when it deems that course of action appropriate (...)*" as an alternative to domestic American discovery procedures. The Evidence Convention, based on the precept that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be "tolerable" in the State of execution and must also be "utilizable" in the forum of the State of origin where the action is pending"<sup>124</sup> was thus, in effect, reduced to an optional instrument. The decision caused concern among a number of States in view of the intrusive, and in their view "intolerable" discovery procedures available under US national civil procedure.<sup>125</sup>

The Special Commission of experts of the Hague Conference on the practical operation of the Evidence Convention that convened in 1989 "*took note of the fact that opinions remain divided as to whether or not the Convention is of exclusive application. However, having regard to the object of the Convention, the Commission thought that in all Contracting States, whatever their views as to its exclusive application, priority should be*

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<sup>119</sup> This discussion was prompted by the preparation by the Council of Europe of a draft text on such a tribunal, which was in the end abandoned. The *Dyer* report concluded that in the absence of sufficiently defined standards, decisions by a tribunal composed of judges of different countries and cultures on issues of custody would carry the risk of a more arbitrary nature than would be the case for judges within a single legal system.

<sup>120</sup> See [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24)

<sup>121</sup> With the exception of provisions that require further action from the Contracting States, such as the designation of (Central) authorities.

<sup>122</sup> The simultaneous drafting in two languages, English and French, greatly assists in this effort.

<sup>123</sup> *Société nationale industrielle Aérospatiale et al. V. United States district Court for the Southern District of Iowa*, No. 85-1695, 482 U.S. 522; 107 S. Ct. 2542.

<sup>124</sup> See Explanatory report by Ph.W. Amram, *Actes et Documents de la Onzième Session, Tome IV*, Obtention des preuves à l'étranger, pp. 202-216, also accessible at: [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2968&dtid=3](http://www.hcch.net/index_en.php?act=publications.details&pid=2968&dtid=3), at p. 202.

<sup>125</sup> The Hague Evidence Convention, which bridges vastly different systems of civil procedure, thus differs from that of the Council Regulation (EC) No 1206/2001 on cooperation between the EU Members in the taking of evidence, which operates against a background of more similar systems (and does not include provisions such as Articles 12 or 23 of the Evidence Convention). But even within this context, the Regulation, whose use is not exclusive according to the ECJ, may be "the only means" available, *cf.* the preliminary ruling ECJ 21 February 2013, C-332/11 (*Prorail v. Xpedys*), paragraphs 47 and 48.

given to the procedures offered by the Convention when evidence located abroad is being sought.”<sup>126</sup> The Special Commission thus, implicitly, expressed reservations on the majority decision and supported the minority. However, there are no indications that the conclusions of the Commission have had any significant impact on subsequent decisions of American courts.<sup>127</sup> Harold Koh, the former legal adviser of the US State Department, concludes with regret: “*American litigators will continue to avoid using the Evidence Convention, and the courts will defer to their choice by conducting pro-American interest-balancing on a “case-by-case basis”.*”<sup>128</sup>

One of the major challenges facing the judicial and administrative authorities under the Hague Child Abduction Convention is that of respecting their duty under the Convention to “act expeditiously in proceedings for the return of children” (Art 11). “Acting expeditiously” does not, of course, mean mechanically returning, or refusing to return, an abducted child, but starts with prompt action on the application (Art 9), followed by immediate further steps, preferably resulting in an amicable solution.

Special Commission meetings on the operation of the Convention have invariably reminded States parties of their duty to act without delay, and statistical research has been carried out and presented at the Special Commission meetings in support of the recommendations urging expeditious action. But the Special Commission has no powers to bind States Parties, let alone to enforce its recommendations. In actual practice, “acting expeditiously” has remained, for various reasons, a considerable challenge to many administrative and judicial authorities.

In this respect, the Convention has received support from both the European Court of Human Rights and the European Court of Justice. Starting in 2000<sup>129</sup>, the European Court of Human Rights (ECrHR) in several judgments concerning the application of the European Convention on Human Rights (ECHR), in particular its provisions on protection of family life (Art 8) and right to a fair trial (Art 6) and non-discrimination (Art 14), concluded that these provisions were violated because of failures in the application of the Hague Child Abduction Convention. Similarly, the European Court of Justice (ECJ), in applying the Brussels II bis Regulation which builds on the Hague Child Abduction Convention, has contributed to making the Convention effective in the relations between Member States of the European Union.

However, more recently the position of the ECrHR in relation to the Convention has raised concern. “*Some of the case law indicates that there should be a full assessment of the best interests of the child in return proceedings. This is beyond the scope of the summary return mechanism intended by the Convention, and instead begins to turn into a full review of the merits of the custody arrangement.*”<sup>130</sup> Not only has the ECrHR been insisting on an “in-depth examination of the entire family situation” seemingly without considering the limits which follow from the imperative of expeditious action in the context of a procedure which is not concerned with the merits of the custody issue. The ECrHR has also sometimes reviewed national courts’ decisions to an extent that it has appeared to act as a court of “fourth instance”. Moreover, its proceedings, unlike those of the ECJ which has established a special rapid procedure for these cases, also sometimes take a very long time.<sup>131</sup> If the ECrHR were to persist in its approach, this may put the Convention at risk, and not just in relation to States Parties to the ECHR. The ECrHR’s case law, which already often relates to removals of children from States outside Europe that are bound by the Hague Convention but not by the ECHR (e.g. Australia, Israel, United States), will inevitably have an effect on the application of the Hague Convention by these States. Moreover, assuming as it seems likely, that the ECJ will continue to pursue *its* current approach, the result could be that two European regional courts, the ECrHR and the ECJ, would be taking different stands on this important question. How would this conflict be resolved?

As these examples illustrate, transnational procedural issues, even if regulated by an international treaty, may present challenges to administrative authorities and courts, even at the regional level. The unrivalled strength of the Brussels Regulation on Jurisdiction and Recognition and Enforcement of Judgments in civil and commercial

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<sup>126</sup> See [http://www.hcch.net/index\\_en.php?act=publications.details&pid=2281&dtid=2](http://www.hcch.net/index_en.php?act=publications.details&pid=2281&dtid=2)

<sup>127</sup> There seem to be only a few cases where the US courts have applied the presumptive or first use of the Convention. The view of the Special Commission may have been known to the Federal Rules Advisory Committee that in 1989 proposed amendments to the federal discovery rules that would have codified the minority view in *Aerospatiale*. However, this proposal attracted criticism and was withdrawn, and the Federal Rules on this point have not been amended.

<sup>128</sup> See Harold H. Koh, *Transnational Litigation in United States Courts* (2008) at p.204.

<sup>129</sup> ECrHR 25 January 2000, No. 31679/96 (Ignaccolo-Zenide/Romania).

<sup>130</sup> P. Beaumont & L. Walker, “Post *Neulinger* case law of the European Court of Human Rights on the Hague Child Abduction Convention”, in *The Permanent Bureau of the Hague Conference on Private International Law* (ed.) , *A Commitment to Private International Law* (2013), pp. 17-30 (at p.18).

<sup>131</sup> *Ibid.*, p. 29. This is in contrast with the Court’s readiness in some cases to order protective interim measures.

matters, and its counterpart Brussels II bis, is that they are completed by a mechanism for supranational judicial review by the ECJ.

### 3. Is recourse to the ICJ an option?

It was precisely the unavailability of this judicial review mechanism which prompted the application by Belgium against Switzerland in the *Lugano* case before the ICJ. Among the preliminary objections raised by Switzerland, one is of particular interest, namely its claim that the Lugano Convention and its 2<sup>nd</sup> Protocol implicitly exclude the jurisdiction of the ICJ. This 2<sup>nd</sup> Protocol establishes three mechanisms to assist national courts in the interpretation of the Lugano Convention: it obliges the courts of Contracting States to duly take into account principles established by decisions of the courts of the other Contracting States; it sets up a system of mutual information concerning decisions on the application of the Brussels Convention (now Regulation) including those of the ECJ; and it creates a standing committee to exchange views on the operation of the Convention. The basic reason for designing this mechanism was that the possibility of conferring jurisdiction upon the ECJ was excluded. Does it follow, however, that, when the mechanisms under the 2<sup>nd</sup> Protocol fail as Belgium claimed, this is the end of the matter and any recourse to the ICJ is also barred?<sup>132</sup> Assuming that the ICJ could base its jurisdiction on Art 36(2) of its Statute (acceptances of its compulsory jurisdiction by the two countries)<sup>133</sup>, leaving aside the other preliminary objections by Switzerland<sup>134</sup>, would it be unreasonable for the World Court to step in and provide a judicial forum when and if a consultation procedure that is provided for leaves one State, or perhaps both States, unsatisfied? Would that not rather be its duty under international law? As the case was withdrawn, we will not have the answer from the ICJ.

The question whether and, if so, how to ensure uniformity of interpretation in matters concerning the jurisdiction of national courts under international treaties, is by no means defuncted, however. It might arise again at the regional level, and it remains on the table also at the global level. As Arthur von Mehren, one of the main negotiators involved in the Hague Judgments Project until the adoption of the 2005 Hague Choice of Court Convention, observed: “*The unavailability of a court system to interpret and apply a global convention so as to bind the national courts of all Contracting States is a serious shortcoming in international-convention practice; regrettably, a counterpart to the European Court of Justice – which authoritatively interprets and applies the Brussels Convention – is not available to non-regional international conventions such as emanate from the Hague Conference*”<sup>135</sup>. Referring to the discussions held in The Hague on a system of information and consultation such as that developed for the Lugano Convention<sup>136</sup>, he went on to state: “*It may be feasible to provide for the exchanges of information and occasional meetings to discuss the State Parties’ decisional law applying the convention. Such arrangements can, at best, encourage a greater measure of uniformity in the interpretation and application of the convention than would otherwise be the case. They would not, however, assure litigants that the convention’s provisions will be fairly and uniformly interpreted and applied by national courts.*”<sup>137</sup>

As Von Mehren notes, this “*institutional weakness*” need not be fatal. It may be a more serious issue in respect of a convention providing for multiple jurisdictional bases of the courts than in an instrument limited to the recognition and enforcement of such judgments, such as the 1958 UN Convention on the recognition and enforcement of foreign arbitral awards. The point is, however, that, given the limitations of the existing

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<sup>132</sup> See G. Möller “The Lugano Convention and the International Court of Justice”, in *A Commitment (op.cit.)* p. 381-387.

<sup>133</sup> In addition, Belgium based the jurisdiction of the ICJ on the European Convention on the Peaceful Settlement of Disputes of 29 April 1957, but Switzerland contested this jurisdictional basis.

<sup>134</sup> Namely, that there was not a real dispute between the two countries, and that Belgium had not exhausted the available local remedies.

<sup>135</sup> A.T. von Mehren, “Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?” *49 Am. J. Comp. L.*, 191. In footnote 22 (at p. 200), Von Mehren refers, by way of example, to the “contrasting views of the United States and of European States regarding the meaning of crucial provisions of the [Hague Service Convention], discussed in *Schlunk v. Volkswagenwerk A.G.*, 486 U.S.649 (1988)”.

<sup>136</sup> See, C. Kessedjian, “Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the effects of Foreign Judgments in Civil and Commercial Matters”, *Hague Conf. Prelim. Doc. No 9* (July 1988), [http://www.hcch.net/upload/wop/jdgm\\_pd8.pdf](http://www.hcch.net/upload/wop/jdgm_pd8.pdf), p. 45, no 118, and *Document submitted by the co-rapporteurs of the uniform interpretation of the proposed Convention on the jurisdiction, recognition and the enforcement of judgments in civil and commercial matters*, Work. Doc. no 94 of 10 November 1998, [http://www.hcch.net/upload/wop/jdgm\\_wd94e.pdf](http://www.hcch.net/upload/wop/jdgm_wd94e.pdf), and

<sup>137</sup> Von Mehren concedes that “[n]on regional international conventions, for example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, can, however, be highly successful despite this institutional weakness.” (*op. cit.*).

“arrangements”, there is a need to continue the search for creative solutions, including a role of the World Court.<sup>138</sup>

### 3.1. Reference of disputes to the ICJ?

In his address on *Private International Law and Public International Law: The Increasing Linkage to the European Group for Private International Law* in the Peace Palace in The Hague in 1997, Christopher Weeramantry, then Judge of the ICJ, made a visionary statement: “(...) *future conventions in the field of private international law may well include, almost on a routine basis, a clause accepting the jurisdiction of the [ICJ] to determine disputes relating to the interpretation or application of the treaty.*” He then referred in particular to the negotiations on a future broad Hague Convention on jurisdiction and recognition and enforcement of judgments.<sup>139</sup>

Leaving aside for a moment the general objections which will not fail to be raised concerning the workload of the Court, or its lack of expertise in matters of private international law<sup>140</sup>, we may reflect further on this idea of such a clause. There is a clear difference, however, between Weeramantry’s suggestion and Von Mehren’s observation. Weeramantry here had an inter-State dispute in mind. The “institutional weakness” signaled by Von Mehren concerns the lack of a mechanism as developed in the context of the Brussels system, under which national courts may turn to the ECJ for a preliminary ruling.

The two ideas are not mutually exclusive. As the Lugano case shows, disputes between private parties before national courts on issues relating to jurisdiction under an international instrument may rise to a level where the State assumes their case, which may then lead to an inter-State dispute, with a potential role for the World Court.

The question deserves to be discussed not just among private international lawyers, but in a broader dialogue which includes (former) judges of the ICJ. Even if the outcome were that a *general* clause, as suggested by Judge Weeramantry, accepting the jurisdiction of the Court to determine disputes on interpretation and application of the future instrument<sup>141</sup> would not be achievable, other options might be considered. One such possibility would be an *optional* clause, to be included in future conventions, mirroring Article 36 of the ICJ’s Statute, providing that any State Party to the future instrument recognizes as compulsory, in relation to any other State Party accepting the same obligation, the jurisdiction of the ICJ regarding the interpretation and application of the convention. For States having made the declaration under Article 36 (2) of the ICJ Statute, this should not be an issue, as this would not be more than a specific reminder of a larger commitment they have already accepted. States not having made the general declaration might be prepared to accept the optional clause for the purpose of furthering the operation of a new Hague Judgments Convention and other future private international law instruments.

### 3.2. Reference by national (or even regional) courts to the ICJ?

The more far-reaching question remains that of the lack of a preliminary ruling mechanism. Such a mechanism is not provided for under the Court’s Statute, and therefore raises a more wide-ranging issue that cannot simply be resolved by a clause in a convention, whether on private international law or, indeed, any other matter. It requires a broader examination.

The question of preliminary rulings by the International Court of Justice at the request of national courts in general was extensively discussed by our Association in 1987 on the basis of *Preadviezen* prepared by Stephen Schwebel, then Judge and later President of the ICJ, and Pieter VerLoren van Themaat, former Advocate-

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<sup>138</sup> The clause appearing in previous procedural conventions (1965 Hague Convention on Service of Documents Abroad; 1970 Hague Convention on the Taking of Evidence Abroad) according to which difficulties arising in connection with the operation of the Convention shall be settled through diplomatic channels is obviously of very limited assistance.

<sup>139</sup> C.G. Weeramantry (*op. cit.*) p. 181 (also published in *Rivista di diritto internazionale private e processuale*, 1988, p.7).

<sup>140</sup> It may be recalled that similar questions were raised when the ECJ acquired jurisdiction in matters of private international law following the entry into force in 1975 of the Protocol of 1971 that conferred upon the ECJ the power to interpret the *Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters*.

<sup>141</sup> Cf. Art. 38 of the 1951 *Convention Relating to the Status of Refugees*: “Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by the parties, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute”. Art IV of the 1967 Protocol has a similar provision. Examples can also be found in many Conventions relating to different aspects of human rights protection (e.g. slavery, genocide, stateless persons, racial discrimination, discrimination against women, torture)

General of the ECJ.<sup>142</sup> A Resolution of the House of Representatives of the United States of America, adopted in 1982, urging the President to explore the establishment of a UN body to channel requests by national courts for an advisory opinion of the ICJ regarding any question of international law of which they had jurisdiction, supported by a similar proposal of the American Bar Association (ABA), and the success of the procedure under Art.177 of the EEC treaty, formed the backdrop. Judge Schwebel expressed cautious support for the idea that provision should be made for reference by national courts of questions of international law to the ICJ. VerLoren van Themaat, who could express himself more freely, not only welcomed the idea, but also made practical suggestions for its implementation.

The main benefits as seen by the authors were:

- (1) *The quality of justice rendered to the parties in particular disputes before the national court – the national courts, after all, being the main organs of the international community to apply international law – would be enhanced by the opinions of the ICJ;*
- (2) *Uniform interpretation and application of international law would be promoted;*
- (3) *Links would be established between international law and national law systems, national courts, and indeed private parties, who are increasingly exposed to international law.*
- (4) *The ICJ would be strengthened by this broader constituency and the increased area in which it would contribute to development of international law.*

A crucial question, discussed by both authors, was the absence in the ICJ's Statute of provision for a reference procedure. Amending the Statute would be difficult, and should be circumvented if possible. The solution, already proposed by Wilfred Jenks and Louis Sohn, could be for such requests from national courts to be channeled through a committee of the UN General Assembly, which would screen and then forward them to the Court. The ICJ might need to decide whether such a process was in accordance with Art 96 of the UN Charter<sup>143</sup>, but there was precedent for such a process.<sup>144</sup> VerLoren van Themaat embraced the idea with conviction and fleshed out an "outline for a workable form of implementation of the system".

Participants in the rich discussion generally supported the proposal in principle. A consensus emerged around the idea to limit, at least in the beginning, the scope *ratione materiae* of the requests, perhaps to the interpretation of bilateral or multilateral treaties, and not to extend this scope to the interpretation of customary law or acts of organs of the UN.<sup>145</sup> Under the system courts *should not be under any obligation to request preliminary opinions*, and the *opinion of the ICJ should not be binding upon the courts*.<sup>146</sup> Some skeptic views were expressed, but the only fierce opposition came from Shabtai Rosenne who felt that the idea was premature, unnecessary because he could not think of any real problems of lack of uniformity of interpretation, and undesirable, as "*any decision to invoke the procedures of the International Court, whether contentious or advisory, is a political matter and should be kept that way (...)*".<sup>147</sup> VerLoren van Themaat, not impressed, ably dealt with these and other objections, stressing that practical questions such as the workload of the ICJ were secondary to the main question: is it a good idea?<sup>148</sup>

The possibility of preliminary rulings by the ICJ more specifically on the interpretation or application of conventions on *private international law* was evoked in connection with the above mentioned *Aerospatiale* judgment rendered just a few months earlier.<sup>149</sup>

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<sup>142</sup> "Preliminary rulings by the International Court of Justice at the request of national courts", Preadviezen van Stephen Schwebel en Pieter VerLoren van Themaat, *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* No.95 oktober 1987 (hereinafter: "Preadviezen"). The discussion appears in "Verslag van de Algemene Ledenvergadering" november 1987, *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* No.96, maart 1988 (hereinafter: "Verslag").

<sup>143</sup> Art 96: "(1). *The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.*

(2) *Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.*"

<sup>144</sup> See, *Preadviezen*, (Schwebel), at pp.14-16.

<sup>145</sup> This was also the view of L. Gross, Preadviezen, p. 25, and of Bos, Schermers, and Maas Geesteranus, *Verslag*, pp. 5-7, 12-15, 35-36.

<sup>146</sup> See *Verslag*, (VerLoren van Themaat, p.56).

<sup>147</sup> *Verslag*, p. 15-19, (at p.17).

<sup>148</sup> *Verslag*, p. 53-58.

<sup>149</sup> See *Verslag* (van Loon, p. 27-30; VerLoren van Themaat, p. 55, approving). Note that, contrary to what was stated on p.28, the ICJ in the *Boll* case assumed jurisdiction on the basis of the acceptances by the Netherlands and Sweden of its compulsory jurisdiction and not on the basis of the aforementioned 1931 Protocol.

The decision illustrates the weakness of the current system where *one* Supreme Court of *one* Contracting State on its own decides on an important question of interpretation of a multilateral private international law treaty, without at least having the option to ask for the guidance of a global court composed of judges representing the principal legal systems of the world. Indeed, as Gross noted, “*the judgments of national tribunals on controversial aspects of international law must not only be impartial but they must also appear to be impartial*”.<sup>150</sup> That is an inherent problem in respect of national courts, even where the *amicus curiae* device is available for foreign States to make their views known, as is the – exceptional – case in the United States, However, not only national courts might be assisted by the advice of the World Court.

In his *preadvies*, VerLoren van Themaat raised the question: “*Should the Court of Justice of the European Communities itself also be able to submit preliminary questions to the [ICJ] on questions of interpretation of international law?*” His answer was that, in theory, it should, but that this would require an amendment of the EEC-treaty.<sup>151</sup> Schermers felt the question was “*premature*” but, interestingly, did not agree that this would require an amendment of the treaty.<sup>152</sup> Just as the Luxembourg Court was the supreme authority for questions regarding community law, the ICJ was the “*most suitable authority for interpreting [the international legal] order*”. Rather than any hierarchy, he saw this as “*an appropriate division of labour*”.<sup>153</sup>

All in all, there was considerable support, indeed enthusiasm, for the idea that national courts, and possibly the ECJ, through a screening committee of the General Assembly of the United Nations, should have the possibility (not the duty!) to request from the ICJ a non-binding opinion on an important question of treaty interpretation, and there was a clear desire to pursue the idea not just at the academic level, but, at the practical, legislative and governmental levels. Hans Lammers, later to be the Legal Advisor of the Netherlands Ministry of Foreign Affairs, suggested an initiative at the international governmental level by the host country of the ICJ, the Netherlands, prepared by appropriate academic work, possibly within the International Law Association.<sup>154</sup> VerLoren van Themaat supported the idea.

In light of the successful meeting described, the next year our Association, as the Netherlands Branch of the ILA, proposed to the ILA to examine the possibility of establishing a reference procedure before the ICJ. However, following the advice of the Director of Studies of the ILA, Ian Brownlie, who had taken part in the discussions on the *Preadviezen* and had voiced skepticism at the idea<sup>155</sup>, the ILA’s Executive Council decided to create a *Committee on International Law in Municipal (later: National) Courts* with a much broader mandate, to study the various approaches of national courts towards principles and rules of public international law where these had an impact upon issues arising under domestic law.

The result of this dilution of the committee’s mandate, for our topic, was disappointing. The Committee, established in 1988<sup>156</sup>, produced its first report in 1994 which mentioned but did not go into the issue of such preliminary rulings by the ICJ.<sup>157</sup> Its next, 1996 report listed it as one of several issues that should be studied.<sup>158</sup> In its final report (1998), however, the Committee simply concluded that, although “*[t]he advantages of the suggested procedure are obvious: the Court’s stature is undoubted, its impartiality is assured, and any ruling by it would carry the greatest authority*”, the case load of the Court did not allow it, and the Court’s Statute would have to be amended.<sup>159</sup> The 1998 Final Resolution, therefore, concluded that “*il n’est pas réaliste à l’heure*

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<sup>150</sup> The US Supreme Court itself made the point “*with complete clarity*” (Gross, cited in *Preadviezen* (Schwebel), p. 25)) in the much debated *Sabbatino* case, where Justice Harlan, writing for the majority observed that it was unlikely that “*the decisions of the courts of the world’s major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.*”

<sup>151</sup> *Preadviezen*, p.82-84.

<sup>152</sup> “*None of our national legislations were amended in order to empower our national courts to bring preliminary questions to Luxembourg. (...) the right to raise such questions is inherent in the duty of a court to settle the case at hand and to collect all information needed for such settlement.*” (*Verslag* (Schermers), p. 15).

<sup>153</sup> *Ibidem*.

<sup>154</sup> “*The proposal should contain (...) a draft resolution of the UN General Assembly with a draft mandate of the committee to be charged with the task to screen requests for and advisory opinion from the ICJ presented by national courts*”, which could then be taken up by the Netherlands Government, who, following informal consultations with other Governments, could present it for consideration to the General Assembly.

<sup>155</sup> *Verslag*, pp. 7-12. The renowned British lawyer’s view may well have been influenced by the fact that the UK has a “*dualist*” system regarding the effect of treaties in the internal order. Cf. Chapter I.2.

<sup>156</sup> *63 Report Warsaw Conference, 1988*, 47.

<sup>157</sup> *66 Report Buenos Aires Conference., 1994*, 327-361 (at 360).

<sup>158</sup> *67 Report Helsinki Conference, 1996*, 570-593 (at 592).

<sup>159</sup> *68 Report Taipei Conference, 1998*, 659 – 674 (at 669) (Committee Report).

*actuelle*” to change the Court’s Statute.<sup>160</sup> But both these arguments had already been extensively discussed and disposed of at the 1987 meeting. The first had not convinced the meeting. Even Judge Schwebel had said that “*there is room for the Court to handle a good many more cases than it does*”. And, regarding the second objection, as we saw, an essential element of the discussion had been the idea that there would be a smart way to *avoid* an amendment of the Statute, via the General Assembly.<sup>161</sup>

The discussion continued, however, in a different forum and with a different focus. In an address to the General Assembly in 1999, then President Schwebel of the ICJ welcomed the appearance on the international scene of new international tribunals, but also suggested that “*in order to minimize (...) significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the [ICJ] on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law*”.<sup>162</sup> He was met with support the following year, in similar words, by then ICJ President Guillaume (who had also chaired the ILA Committee), in his address to the General Assembly.<sup>163</sup> Judge, and later President, Rosalyn Higgins, however, thought it “*simply cumbersome and unrealistic to suppose that other tribunals would wish to refer points of general international law to the [ICJ]*”.<sup>164</sup>

It is important to note that the possibility of preliminary rulings raised by the ICJ Presidents was provoked by the proliferation of *international*, and in particular, specialized tribunals such as the Law of the Sea Tribunal and the ICTY. The issue they discussed was *not* whether national courts might benefit from such rulings. Especially in the relations between the ICJ and specialized courts with a global mission, the best way forward, it would seem, is indeed close liaison and mutual information.<sup>165</sup> But that possibility is obviously not available in the relations between the ICJ and *national* courts. Moreover, the need for guidance of such courts (including those at the top of the judicial hierarchy), which are ever more frequently called upon to apply international law and international conventions, from an authoritative international judicial body is bound to deepen.

Regional courts, like national courts, also apply or refer to international law, and, as such, may be able to provide such guidance to a certain extent. But the regional perspective of a regionally composed court also has its limitations.<sup>166</sup> The discussions on the 1987 *Preadviezen* suggested that the ECJ might, on a particularly important issue of general international law, seek the benefit of advice from the ICJ. The ECrtHR, which sees human rights law as part of international law, might even have a more direct need for such guidance, e.g. where it has to interpret global conventions, with possible implications for the interpretation and application by non-European States, as we saw above in relation to the Hague Child Abduction Convention.

Clearly, more thought and discussion is needed. It is not that the jury is still out: a serious and structured international debate has yet to begin. Compared with 1987, the *Zeitgeist* may have changed for a less universal outlook currently, but it will inevitably change again. The question is important, in relation to private international law and other topics, and the political and practical issues, which of course must be further examined, should not obscure the possible benefits identified by our 1987 *Preadviseurs*, and which have only increased in their pertinence in the twenty-first century.

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### ***Propositions and points for discussion***

- (1) More than it is often realised, private individuals and companies are at the origin of disputes brought before the World Court. This may lead the Court to examine issues *relevant to* private international law

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<sup>160</sup> *Ibid.* 28-30 (Resolution).

<sup>161</sup> Meanwhile the broader question of the relationship between national courts and international has returned on the ILA’s agenda: a Study Group of the ILA on Principles on the Engagement of Domestic Courts with International Law is looking into questions such the increased relevance of domestic courts for international law, the varieties of domestic court engagement with international law and its different outcomes.

<sup>162</sup> A/54/PV 39, 3-4; emphasis added.

<sup>163</sup> A/55/PV 41, 3.

<sup>164</sup> R. Higgins, “*The ICJ, the EJC, and the integrity of international law*”, 52 *ICLQ*, 2001, 1-20 (at 18-20).

<sup>165</sup> *Ibidem*, 20.

<sup>166</sup> Some of which, in particular relating to the ECrtHR, transpire *ibidem* at 9-11.

(PIL) or even issues *of* PIL. Through its case-law on such issues – although limited in volume – the Court has, early on, for example:

- identified the relationship between PIL and public international law,
- shown foresight with regard to the internationalisation of PIL,
- acknowledged the role of party autonomy in international contracts,
- been attentive to the policy objectives of PIL rules, and
- recognised that choice of law rules may be subject, in specific circumstances, to the application of public policy rules and overriding mandatory provisions.

The Court has thus made a positive contribution to the development of private international law.

- (2) Although the Court decides in accordance with international law (Art 38 of the Statute of the ICJ), national law plays an important role in its construction of the law, including that of verifying compliance by States of their international obligations or of filling gaps in existing international law. Where possible, however, the Court bases its decisions on a *comparison* of national laws and court practices, and thus avoids putting itself in the position of a national court. This methodology has strengthened the Court's authority in developing its case law, including in the field of private international law, and it is a sound approach for future rulings of the Court in such matters.
- (3) It is likely that inter-State disputes concerning issues of PIL will be brought before the Court with greater frequency in the future. As multilateral treaties (conventions) on PIL grow both in volume and in numbers of States parties, differences in interpretation and application of such treaties at the national level may give rise to controversies at the international plane best resolved by a global court composed of judges representing the principal legal systems of the world. In addition, the widening of the scope *ratione materiae* of diplomatic protection (*Diallo*), may lead to more frequent cases of diplomatic protection being brought before the Court based on violations of human rights that result, at least in part, from the application or interpretation of rules of PIL.
- (4) Beyond these possible developments, consideration may be given to broadening the access to the World Court. An optional clause might be introduced in conventions, including PIL conventions, mirroring Art 36 of the Court's Statute, providing that any State party to the convention recognises as compulsory, in relation to any other State party accepting the same obligation, the jurisdiction of the ICJ regarding the interpretation and application of the convention. Moreover, as conventions, including those on PIL, continue to expand their reach *within* legal orders, the need for national courts to be guided in their interpretation and application of these instruments will increase. Against this background, the idea of allowing national courts, and perhaps even regional courts, to request a preliminary opinion on such questions from the ICJ should be seriously examined. National courts should not be under any obligation to request such a preliminary opinion, and the opinion of the ICJ should not be binding upon those courts.
- (5) The general idea presented above was discussed by our Association in 1987 based on *Preadviezen* by S. Schwebel and P. Verloren van Themaat. Realising that a modification of the ICJ' Statute would be difficult, the meeting supported the proposal that requests for a non-binding opinion on an important matter of treaty interpretation should pass a screening committee of the General Assembly, which would then submit the request to the ICJ. A *Committee on International Law in National Courts* was established by the ILA, which was supposed to examine the proposal. The Committee, however, turned its attention to other matters, and did not study the proposal in any detail. However, the idea has not lost its interest and deserves, once again, to be further examined.