The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua

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Abstract

A majority of the contentious cases brought to the International Court of Justice in recent years have involved questions of the legality of the use of force. This is a dramatic change in the subject matter of the Court's cases; Is it a dangerous development for the Court? In the Nicaragua *case the USA argued strongly that such disputes were non-justiciable, but the Court summarily rejected its arguments. The first part of this article considers how far defendant states have subsequently challenged admissibility and jurisdiction in cases involving the use of force. Despite the rejection of the US arguments in the* Nicaragua *case, several states have reverted to these; this article considers whether their use by states which are not members of the Security Council may be more acceptable than by the USA. The second part of this article focuses on provisional measures. It discusses whether the significant increase in the number of requests for provisional measures shows the emergence of a special regime in cases involving the use of force, and examines the divisions within the Court as to whether there should be a modification of the normal requirements for an indication of provisional measures. It concludes by considering the view the Court has taken of its role as the principal judicial organ of the UN and of its relationship to the Security Council in cases involving the use of force.*

1 Introduction

For the first time in its history, a majority of the contentious cases before the International Court of Justice in recent years have concerned the use of force: 16 of the 25 cases before the Court today[1] relate directly or indirectly to the use of force. The

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Nicaragua case[2] led to a large increase in the caseload of the Court; it has been followed by 25 applications to the Court in new contentious cases on the use of force (including the 10 *Cases concerning Legality of Use of Force* brought by Yugoslavia against NATO states[3]). The cases on this subject matter currently before the Court include two between African states: *Armed Activities on the Territory of the Congo (DRC v. Uganda)*,[4] and *DRC v. Rwanda (New Application 2002)*;[5] the *Oil Platforms* case between Iran and the USA;[6] and several others arising out of the conflict in the former Yugoslavia and in Kosovo.[7] Judgment has recently been given on the merits in the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*.[8] This is a dramatic change in the subject matter of cases. Is it to be welcomed or seen as an abuse of the Court? Is this a dangerous development for the Court? The question of the role of the Court with regard to cases concerning the use of force was examined by Schachter and others in response to the *Nicaragua* case,[9] but has been little considered since.[10] It is now due for reappraisal.

This subject matter may be seen as at the extreme of justiciability.[11] Respondent states typically resist the jurisdiction of the Court in cases concerning allegations of the illegal use of force; in no case (except *DRC v. Uganda*, where Uganda has so far simply reserved the right to challenge jurisdiction) has the respondent state let the issues of jurisdiction and admissibility go unchallenged. It is noteworthy that most of the cases on the use of force have not come to judgment on the merits.[12] And in

2 ICJ Reports (1986) 14.

3 *Provisional Measures*, ICJ Reports (1999) 124.

4 ICJ Reports (2000); 39 ILM (2000) 1100.

5 ICJ Reports (2002).

6 ICJ Reports (1996) 803.

7 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (i) Bosnia-Herzegovina v. Yugoslavia (Provisional Measures) ICJ Reports (1993) 3, at 325, (Preliminary Objections) ICJ Reports (1996) 545; (ii) Croatia v. Yugoslavia, Applications of 11 July 1999; *Cases concerning Legality of Use of Force*, Yugoslavia v. 10 NATO states (Provisional Measures) ICJ Reports (1999) 124. For convenience I will refer to *Belgium v. Yugoslavia*, except where there are significant differences between the cases; for a fuller discussion see note by Gray, 49 *ICLQ* (2000) 730.

8 ICJ Reports (2002).

9 Schachter, 'Disputes Involving the Use of Force', in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987) 223; Rostow, 'Disputes Involving the Inherent Right of Self-Defense', *ibid.*, 264; Acevedo, 'Disputes under Consideration by the UN Security Council or Regional Bodies', *ibid.*, at 242.

10 Greenwood, 'The ICJ and the Use of Force', in V. Lowe and G. Fitzmaurice (eds), *Fifty Years of the ICJ* (1996) 373.

11 It is increasingly accepted that this is a complex notion with no simple fixed meaning: see Schachter, *supra* note 9; Gordon, 'Legal Disputes under Article 36(2) of the Statute', in Damrosch, *supra* note 9, at 183; Higgins, 'Policy Considerations and the International Judicial Process', 17 *ICLQ* (1968) 58; H. Lauterpacht, *The Function of Law in the International Community* (1933) 19; Gowlland-Debbas, 'The Relationship between the ICJ and the Security Council in the Light of the Lockerbie Case', 88 *AJIL* (1994) 643. Whether in the sense that disputes may affect the vital interests of states or that differences are not capable of judicial settlement by the application of existing rules or that the result is not compatible with justice, disputes about the use of force are problematic.

12 Several cases on the use of force were withdrawn. The parties settled *Case Concerning Aerial Incident of 3 July 1988, Iran v. USA*; the USA paid compensation without acknowledging liability (ICJ Reports (1996) 9). Nicaragua withdrew its application in *Border and Transborder Armed Actions, Nicaragua v. Honduras*

Cameroon v. Nigeria, when judgment was given on the merits, the Court avoided any decision on the use of force. It has proved difficult to secure compliance, as reflected in the refusal of the respondent state to comply with the Court's judgment on the merits in the *Corfu Channel* (for 50 years)[13] and *Nicaragua* cases. In contrast there was no problem with compliance with the final judgments in *Frontier Dispute (Burkina Faso/Mali)*[14] and *Territorial Dispute (Libya/Chad)*[15] where the parties went to Court by special agreement and where the cases did not directly concern force. In the former, the case concerned a boundary dispute and the requests for provisional measures were made after fighting had broken out over the disputed boundary; in the latter, the case decided a territorial dispute which had involved long years of conflict.

Judge Oda in his Declaration at the provisional measures stage of *Armed Activities on the Territory of the Congo (DRC v. Uganda)* recalled that provisional measures indicated by the Court in cases involving armed force have not necessarily been complied with by the parties; he warned that 'If the Court agrees to be seised of the application or request for the indication of provisional measures of one State in such circumstances, then the repeated disregard of the judgments or orders of the Court by the parties will inevitably impair the dignity of the Court and raise doubts as to the judicial role to be played by the Court in the international community.'[16]

Is this cautious approach the correct one? The apparent revolution in the nature of the caseload of the Court raises questions about the role of the Court in the maintenance and restoration of international peace and security and also about the Court's relation with the UN Security Council.[17]

2 The USA in the *Nicaragua* Case

The USA notoriously employed a wide range of arguments to persuade the Court to refuse to decide the claims that the USA had illegally used force and intervened in Nicaragua; some of these US arguments directly related to the fact that the subject matter involved the use of force. All the US arguments on admissibility were

after a change of government brought a pro-Western government to power in Nicaragua (ICJ Reports (1992) 222). It also withdrew its case against Costa Rica (ICJ Reports (1987) 182). The DRC withdrew its applications in *Armed Activities on the Territory of the Congo, DRC v. Burundi* and *DRC v. Rwanda* on 1 February 2001 without explanation, but probably because the basis for jurisdiction was much weaker in these than in the third case, that against Uganda. The DRC subsequently brought a new case against Rwanda in 2002 (ICJ Reports (2002)).

[13] ICJ Reports (1949) 4.

[14] ICJ Reports (1986) 554.

[15] ICJ Reports (1994) 6.

[16] 39 ILM (2000) 1100, at 1113.

[17] Its contribution to the development of the substantive law on the use of force is beyond the scope of this article.

unanimously and unceremoniously rejected by the Court.[18] Even the US judge, Judge Schwebel, who dissented on all the other operative parts of the Court's judgment, agreed with the Court on this issue. He stressed the unprecedented nature of Nicaragua's Application to the Court, saying that 'never before has a state come to the Court requesting it to adjudge and declare that another state has the duty to cease and desist immediately from the use of force against it', but, while he did not agree with all of the Court's holdings on inadmissibility at the present stage, he did not find the contentions of the US concerning the inadmissibility of the case to be convincing at the Preliminary Objections stage.[19] Commentators, even pro-USA commentators otherwise critical of the Court's decision in this case, also generally supported the approach of the Court on admissibility.[20] The US arguments will nevertheless be set out in some detail here because it is now time to ask whether they have any merit in other contexts. The fact that some of these arguments have been invoked in later cases, in different guises, despite their rejection in the *Nicaragua* case, may indicate their importance to states or, alternatively, their preparedness to use any argument whatever to avoid the jurisdiction of the Court.

First, the USA argued that Nicaragua had failed to bring before the Court parties whose presence and participation was necessary for the rights of those parties to be protected and for the adjudication of the issues. The case involved claims to individual and collective self-defence by El Salvador, Costa Rica and Honduras, but they were not before the Court. The Court rejected this on the ground that there was no indispensable parties rule in the Statute of the Court or in the practice of international tribunals. The judgment was binding only on the parties and other states were free to apply to intervene in the proceedings.[21] Second, the USA said that Nicaragua's claim that the USA was engaged in an unlawful use of armed force, or breach of the peace, or acts of aggression against Nicaragua was a matter which was committed by the Charter and by practice to the competence of other organs, in particular, the United Nations Security Council and was therefore not a matter for the Court.[22] Third, the Court should hold the application to be inadmissible in view of the position of the Court within the United Nations system, including the impact of proceedings before the Court on the ongoing exercise of the inherent right of individual or collective self-defence under Article 51 of the Charter. The USA thus argued that the matter was essentially one for the Security Council since it concerned a complaint by Nicaragua involving the use of force. The Court took the second and third objections together; it reaffirmed its position that there is no doctrine of separation of powers which prevents the ICJ from hearing a case at the same time as the situation is before the Security

[18] ICJ Reports (1984) 392, at para. 84.

[19] ICJ Reports (1984) 558. At the merits stage, while maintaining his position that questions of self-defence and the continuing use of force were not exclusively for the Security Council, Judge Schwebel said that the Court should have held that the issue was not justiciable because of the incapacity of the Court to judge the necessity of the continuing use of force in the circumstances of this case (at paras 66–74).

[20] Rostow, *supra* note 9; see also 'Appraisals of the ICJ's decision: Nicaragua v. USA', 81 *AJIL* (1987) 77.

[21] ICJ Reports (1984) 392, at para. 86–88.

[22] *Ibid.*, at paras 89–90.

Council; moreover the Security Council had only primary, not exclusive, responsibility for the maintenance of international peace and security, the Court and the Security Council had separate but complementary functions. The Court had never shied away from a case because it had political implications or because it involved serious elements of the use of force, as was demonstrated in the *Corfu Channel* case. The USA itself had in the 1950s brought cases involving armed attacks to the Court. The Court was being asked to pass judgment on certain legal aspects of a situation which was entirely consonant with its position as the principal judicial organ of the United Nations.[23]

Fourth, the USA relied on the inability of the judicial function to deal with situations involving ongoing armed conflict; it said that the resort to force during ongoing armed conflict lacked the attributes necessary for the application of the judicial process, namely a pattern of legally relevant facts discernible by the means available to the adjudicating tribunal, establishable in conformity with applicable norms of evidence and proof, and not subject to further material evolution during the course of the judicial proceedings. Ongoing armed conflict should be entrusted to resolution by political processes. The Court could not give practical guidance to the parties in respect of measures required of them. The Court held that the situation of armed conflict was not the only one in which evidence of fact may be difficult to come by. It was the litigant seeking to establish a fact who bears the burden of proving it. As to the possibility of implementation of the judgment, the Court could not at this stage rule out *a priori* any judicial contribution to the settlement of the dispute.[24]

Fifth, the USA argued that Nicaragua had not exhausted the established regional processes for the resolution of conflicts occurring in Central America. The Contadora process had been recognized by the UN political organs and the Organization of American States (OAS) as the appropriate method for the resolution of the issue. Nicaragua had asked the Court to adjudicate only certain of the issues involved in the Contadora process and settlement of these issues by the Court would disrupt the balance of the negotiating process. The Court confirmed its earlier decisions in holding that it would not decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects. It said that the UN Charter did not require the exhaustion of regional processes before resort to the Court; just because there were regional processes did not mean the Security Council and the Court could not exercise their functions.[25]

3 Later Cases against the USA

The arguments used by the USA in the *Nicaragua* case have not been expressly used by the USA in later cases involving the use of force; the USA seems to have accepted that

[23] *Ibid.*, at paras 91–98.
[24] *Ibid.*, at paras 99–101.
[25] *Ibid.*, at paras 102–108.

these arguments would not be acceptable to the Court and would be unlikely to succeed. However, some of these arguments have been deployed in different forms. That is, the USA did not expressly use these arguments again in the *Aerial Incident of 3 July 1988*, *Oil Platforms* and *Legality of Use of Force* cases. It chose rather to focus on the scope of subject matter jurisdiction under the treaty on which the applicant state based the jurisdiction of the Court – an issue of crucial importance to the Court in many recent cases. In cases involving the use of force the Court has had to consider whether treaties apparently regulating quite distinct subject matter such as commerce or genocide were wide enough to cover claims of illegal use of force. In the *Nicaragua* case and elsewhere it has generally shown itself willing to adopt a flexible approach to the interpretation of treaties of amity. However, it has been somewhat less consistent with regard to the Genocide Convention.[26]

The *Case Concerning the Aerial Incident of 3 July 1988* brought by Iran against the USA was settled in 1996 by the payment of compensation by the USA without acknowledgement of liability.[27] This case arose out of the destruction of an Iranian aircraft and the killing of 290 passengers and crew by two missiles launched from the *USS Vincennes* on duty in the US Persian Gulf force during the 1980-1988 Iran–Iraq war. The USA's main arguments in its 1991 Preliminary Objections were challenges to the Court's jurisdiction under the Chicago Convention, the Montreal Convention and the 1955 Treaty of Amity.[28]

In the *Oil Platforms* case, which also arose out of the 1980-1988 Iran–Iraq war, Iran claimed that in attacking and destroying certain oil platforms the USA had breached its obligations to Iran under the Treaty of Amity and international law; and that, in adopting a patently hostile and threatening attitude towards Iran that culminated in the attack and destruction of the oil platforms, the USA had breached the object and purpose of the Treaty of Amity and international law.[29] These claims raised questions of general international law on the use of force. The USA did not in its 1996 Pleadings attempt openly to use the arguments set out above relating to the use of force which had been so firmly rejected by the Court in *Nicaragua*, but it did invoke again another argument which had failed in that case, that a Treaty of Amity could not cover disputes about the use of force. In *Oil Platforms* its main argument was that the Treaty of Amity on which Iran based the jurisdiction of the Court did not apply to questions concerning the use of force and so did not cover the claim. Essentially the dispute related to the lawfulness of actions by naval forces of the USA that involved

[26] In *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Provisional Measures) Bosnia-Herzegovina v. Yugoslavia*, ICJ Reports (1993) 3, the Court was prepared to accept a flexible interpretation of the Genocide Convention to allow claims for state responsibility for genocide, but it did not accept that the Convention covered claims to the right of self-defence. See note by Gray, 43 (1994) *ICLQ* 704. Thus Yugoslavia's claims based on the Genocide Convention in *Legality of Use of Force* mark a reversal of its earlier position in the *Bosnia-Herzegovina Genocide* case that claims of state responsibility were not possible.

[27] ICJ Reports (1996) 9; see 1996 AJ (1996) 278.

[28] ICJ Pleadings, *Aerial Incident of 3 July 1988*, Vols. I and II. Because the case was settled the Court did not have to pronounce on these objections.

[29] ICJ Reports (1996) 803; Iranian Pleadings CR 96/14.

combat operations. The Treaty of Amity was wholly commercial and consular and did not cover issues relating to the use of force.[30]

The Court held that the treaty imposed obligations on a variety of matters. Any action incompatible with those obligations was unlawful, regardless of the means by which it was brought about. Violation of rights under the treaty by means of the use of force was as unlawful as would be a violation by administrative decision or by any other means. Matters relating to the use of force were therefore not *per se* excluded from the reach of the treaty.[31]

Although the USA's main argument on the non-applicability of the 1955 Treaty to disputes concerning the use of force failed to convince the Court, its subsidiary argument on the interpretation of Article 1 of the treaty was accepted. Iran had argued that Article 1, which provided that 'There shall be firm and enduring peace and sincere friendship between the United States and Iran', imposed substantive obligations on the two parties and thus incorporated general rules of international law, including those on the use of force, into the treaty. Therefore the Court had jurisdiction under Article 1 to hear claims about the use of force. The Court rejected this; it accepted the US argument that even though Article 1 was included in the operative provisions of the treaty it should be interpreted in the light of the object and purpose of the treaty, that of a trade and consular treaty. As the aim of the treaty was *not* to regulate peaceful and friendly relations in a general sense, Article 1 should not be interpreted as incorporating into the treaty all provisions of international law on such relations.[32] This apparently indicates a cautious approach by the Court.

However, the Court found that there was a dispute as to the interpretation and application of Article X(I) of the treaty, which protected freedom of commerce and navigation, and so the Court had jurisdiction to decide the apparently narrow issue as to whether the destruction of the oil platforms had had an effect on freedom of commerce. This judgment seemed at first sight to indicate a reluctance by the Court to address issues of the use of force; it seemed to restrict the scope of the dispute before the Court and to limit the extent to which the Court would have to consider the general law on the use of force. But because the USA justified its actions against the oil platforms as lawful self-defence and therefore not a violation of Article X(I), the Court would have to decide whether the destruction of the oil platforms was in fact a lawful use of force; thus the exclusion of jurisdiction under Article 1 is not very significant. The wide scope of the Court's jurisdiction to consider difficult questions of self-defence under the Treaty of Amity became even more apparent after the Court ruled counterclaims by the USA admissible.[33]

[30] US Pleadings CR 96/12; CR 96/13; CR 96/16.

[31] ICJ Reports (1996) 9, at para. 21.The Court rejected a similar US argument in the *Nicaragua* case, ICJ Reports (1984) 392, at paras 77–83, where it held by 14 to two that it had jurisdiction under the 1956 Treaty of Friendship, Commerce and Navigation. The Court's reasoning in the *Nicaragua* case was very brief and did not go into the scope of the treaty, article by article; it made only passing reference to one article on freedom of commerce and navigation.

[32] Judge Shahabuddeen disagreed on this point in his Separate Opinion, ICJ Reports (1996) 822, at 834.

[33] Order of 10 March 1998, ICJ Reports (1998) 190.

After the Court's decision asserting jurisdiction and admissibility, the USA counterclaimed against Iran, asking the Court to declare that in attacking vessels, laying mines in the Gulf and otherwise engaging in military actions in 1987-1988 that were dangerous and detrimental to maritime commerce, Iran had breached its obligations to the United States under Article X of the 1955 Treaty. In a dramatic reversal of their previous positions, Iran now argued that the Court's jurisdiction should be narrowly construed, that the counterclaims were inadmissible because they fell outside Article X(I); they were sweeping and general and inconsistent with the USA's previously declared position on claims under the Treaty.[34] The USA now sought to widen the dispute to include claims concerning Iran's overall conduct throughout the period 1987-1988, when it had always been its position in the preliminary objection phase that such overall conduct was irrelevant in this case and when it had specifically brought its preliminary objection to limit Iran's claim as far as possible. The USA was now clearly on the offensive; it abandoned its previous attempts to deny jurisdiction under the Treaty of Amity and argued that Iran's pattern of attacks against neutral shipping created threatening conditions which interfered with the ability of US-flag and US-owned ships and US nationals to exercise their rights under the Treaty.[35]

In making these counterclaims and thus abandoning its objections to the Court's jurisdiction under the Treaty of Amity to decide issues involving the use of force, the USA made it clear that its objections had been tactical rather than based on principle.[36] The USA did not maintain any absolute objection to the interpretation of the Treaty of Amity to cover disputes involving the use of force, or to the Court's engaging in decisions on the legality of the use of force, but was prepared to adopt whatever position would further its case. In accepting the US counterclaims the Court made it clear that this would be a very substantial case on the use of force. In theory the case rests on Article X on the freedom of commerce, but in fact it necessarily involves fundamental questions of the law on the use of force.

When Yugoslavia applied for Provisional Measures in the *Legality of Use of Force* cases arising out of NATO's 1999 air campaign in Kosovo, the USA again based its main argument on the lack of *prima facie* jurisdiction of the Court. Yugoslavia claimed that the Court had jurisdiction under Article IX of the Genocide Convention, which provided for cases on the interpretation and application of the treaty to be referred to the ICJ, but the USA had made a reservation to the Genocide Convention excluding the application of this provision. Nevertheless the USA went on to argue that even if there were *prima facie* jurisdiction it was not appropriate for the Court to award provisional measures under Article 41: the measures sought were unrelated to the Genocide Convention. The measures sought by Yugoslavia in its request for provisional measures were that the USA should cease its acts of use of force; this did not protect rights under the Genocide Convention and should therefore be refused. The USA based

[34] *Ibid.*, at paras 6–20.
[35] *Ibid.*, at para. 25.
[36] The same can be said of the counterclaims by Nigeria in *Cameroon v. Nigeria*: see *infra* note 46.

this argument on the Court's Order in the *Bosnia-Herzegovina Genocide* case where it had found that the scope of its jurisdiction to decide on the protection of rights under the Genocide Convention did not extend to the protection of the right to self-defence of Bosnia-Herzegovina.[37] In this case the Court refused provisional measures on the basis of the US reservation.

Thus the main arguments in all three cases involving the USA as respondent state concerned the scope of jurisdiction. The USA did not expressly revert to the five arguments it had used in the *Nicaragua* case to challenge the right of the Court to decide cases involving the use of force. It did not expressly invoke the 'inseparability' argument which it had made in the *Nicaragua* case in the context of its fifth objection to admissibility, that the subject matter of the dispute was just one aspect of a complex dispute and should not be settled in isolation. This argument had been used by Iran in the *Tehran Hostages* case,[38] as well as by the USA in *Nicaragua* and by Honduras in *Nicaragua v. Honduras,*[39] and had been rejected by the Court in all cases. However, the USA pleadings in the *Oil Platforms* case clearly contained hints of this 'inseparability' argument, as was pointed out by Iran.[40] The USA stressed the context of the actions that formed the subject of Iran's application: it argued that the hostile encounters occurred during major international conflict and were therefore outside the scope of the 1955 Treaty. The attack on and destruction of the oil platforms occurred in the context of a long series of attacks by Iranian military and paramilitary forces on US and other neutral vessels engaged in peaceful commerce in the Persian Gulf.[41] In its later counterclaim the USA pursued this further. It abandoned any attempt to narrow the Court's jurisdiction and instead sought to put the Iranian claims in context: the US use of force had been defensive actions against the oil platforms taken in response to Iran's pattern of armed attacks.[42] The Court should look at the prior conduct of Iran leading to the US actions.

This went further than the argument the USA had adopted earlier in its Preliminary Objections in the *Aerial Incident of 3 July 1988.* Here also the USA returned to the argument it had made in the *Nicaragua* case, not as a direct challenge to the admissibility of the case but in its introductory remarks. It stressed that the incident occurred in the midst of an armed engagement between US and Iranian forces in the context of a long series of attacks on US and other vessels in the Gulf. The incident could not be separated from the events that preceded it and the hostile environment that existed due to actions of Iran's own military and paramilitary forces. For four years Iran had attacked merchant shipping. The USA set out the history of the Iran–Iraq war and its extension to the Gulf. Thus the USA did not expressly use the

[37] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia-Herzegovina v Yugoslavia)* ICJ Reports (1993) 3.

[38] *US Diplomatic and Consular Staff in Tehran*, ICJ Reports (1980) 3.

[39] *Border and Transborder Armed Actions*, ICJ Reports (1988) 69, at para. 54, where the Court showed some sympathy to this argument.

[40] See oral argument of Condorelli in Iranian Pleadings CR 96/15 at 3.

[41] US pleadings CR 96/12.

[42] *Oil Platforms (Counterclaim)* ICJ Reports (1998) 190, at para. 24.

'inseparability' argument from the *Nicaragua* case, but it did implicitly try to make the same case in its attempt to persuade the Court to refuse to decide the case.

Moreover, in *Oil Platforms* the USA did not expressly argue, as it had in its second and third objections to admissibility in the *Nicaragua* case, that disputes concerning the use of force were not suitable for the Court. But in its Oral Pleadings it came close to this in its argument that if the case on the merits did come to be decided by the Court, this would involve a great deal of time, effort and resources in fact-finding preparation and argument; the events of 10 years ago involved actions of dozens of ships and aircraft and thousands of people. Here the USA stressed the problems with a case concerning the use of force in the past; this contrasts with the argument in the *Nicaragua* case that *ongoing* conflict was unsuitable for judicial resolution. Clearly for the USA there is no correct time for a case concerning the use of force to be brought against it.[43] The USA said that the case would involve lengthy and difficult evidentiary proceedings, concerning events far more complex and far-ranging than *Corfu Channel*, such as the characteristics and origins of mines and missiles, the character and purpose of actions on Iranian platforms, and the sequence of events in hostile encounters. Proceedings would be more lengthy and complex than *Nicaragua* as both parties would be litigating and the case would occupy the Court for a very long time and would be a heavy drain on the resources of the Court. The USA did not openly argue that the case was non-justiciable, but this was the clear implication of its rather threatening account of the horrors awaiting the Court if it proceeded with the case. In its counterclaim it abandoned this position; its professed concern for the Court evaporated.

4 Revival of the USA's Arguments by Other States

A *Cameroon v. Nigeria*

In contrast, other respondent states in their arguments on jurisdiction and admissibility have resorted to the US arguments from the *Nicaragua* case contesting admissibility in subsequent cases involving the use of force, sometimes relabelling them in an apparent attempt to ensure that their arguments would avoid the fate of those of the USA in the *Nicaragua* case. In the *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*,[44] Cameroon claimed in its Application not

[43] In relation to the request for an Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the US position in its Statement to the Court was that the question concerned the hypothetical *future* use of force and therefore was not suitable for an Advisory Opinion. The Court rejected this, saying that it would not necessarily have to write scenarios, to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information (ICJ Reports (1996) 226, at para.15).

[44] ICJ Reports (2002).

only that the Bakassi Peninsula was part of the territory of Cameroon, but also that Nigeria by using force against Cameroon had violated and was still violating its obligations under international law; that its military occupation of the Peninsula was illegal; and that it had the duty to end its military presence and to effect an immediate and unconditional withdrawal of its troops. Cameroon subsequently extended its Application to make similar claims with regard to sovereignty and illegal occupation and use of force in the area of Lake Chad.

Nigeria made eight preliminary objections to jurisdiction and admissibility; some of these were strongly reminiscent of the US objections to admissibility in the *Nicaragua* case. In response to Cameroon's claims concerning the use of force, Nigeria made express arguments similar to those included in the US fourth objection: that, as the case concerned the ongoing use of force, there were serious evidential problems which should lead the Court to decline jurisdiction. Cameroon's presentation of the facts, including dates, circumstances and precise locations of alleged locations of the alleged incursions into Cameroonian territory, was inadequate and did not enable the Court to carry out fair and effective judicial determination of issues of state responsibility and reparation. The Court relied on the *Nicaragua* case in recalling that it was the litigant seeking to establish a fact who bears the burden of proving it; in cases where evidence may not be forthcoming a submission may in the judgment be rejected as unproved, but it is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof.[45]

In its subsequent counterclaims Nigeria reversed its position, as the USA had done in the *Oil Platforms* case; it argued that Cameroon had itself violated the law on the use of force in a series of incursions.[46] In the absence of objection by Cameroon, the Court found the counterclaims admissible.[47] As in the *Oil Platforms* case, this made it clear that the objection by Nigeria to the court's jurisdiction to hear claims involving the use of force was tactical rather than based on principle. That is, there is no absolute opposition by states to the Court's involvement in cases concerning force, only the use of a tactic typical of forensic legal argument — the adoption of a succession of incompatible arguments.

In its Third Preliminary Objection, Nigeria also tried an argument similar to that of the fifth objection of the USA; it claimed that the Lake Chad Commission was a regional body under Article 52 UN Charter which had exclusive jurisdiction in relation to issues of security and public order in the region of Lake Chad. The Court found that the Commission did not have as its purpose the settlement on a regional level of matters relating to the maintenance of international peace and security and thus did not fall within Chapter VII of the Charter. The Court again referred back to the decision in the *Nicaragua* case in holding that in any event, whatever their nature, the

[45] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections,* ICJ Reports (1998) 275, at para. 101. See *infra* note 68.

[46] ICJ Pleadings, Nigeria Counter-Memorial Vol. III (1999), Ch. 25.

[47] Order of 30 June 1999, ICJ Reports (1999).

existence of procedures for regional negotiation could not prevent the Court from exercising the functions conferred upon it.[48]

B *Armed Activities on the Territory of the Congo*

In *Armed Activities on the Territory of the Congo*[49] the DRC claimed that the invasion of Congolese territory by Burundian, Ugandan and Rwandan troops on 2 August 1998 constituted a violation of its sovereignty and of its territorial integrity as well as a threat to peace and security in central Africa in general and in the Great Lakes region in particular. The DRC accused the three states of having attempted to seize Kinshasa in order to overthrow the government and assassinate President Kabila, with the object of installing a regime under Tutsi control. The assistance given to Congolese rebellions and the issue of frontier security were mere pretexts designed to enable the aggressors to seize the assets of the territories invaded. The DRC accordingly asked the Court to declare that Burundi, Uganda and Rwanda were guilty of acts of aggression as well as breaches of the laws of war and treaties relating to civil aviation. It made a request for provisional measures only against Uganda; the chance of the Court's jurisdiction was strongest in this case.[50]

Uganda argued that the Court should refuse provisional measures as a matter of judicial propriety. Its arguments clearly reflect those of the USA in the *Nicaragua* case. First, it attempted an argument like that used by the USA in its fifth objection to admissibility with regard to the Contadora process, that the parties had committed themselves to a regional mechanism for the settlement of the dispute and should not undermine this by taking one part of the wider dispute to the Court.[51] Thus Uganda said that all the relevant states and other interested parties had expressly agreed to the resolution of outstanding issues exclusively by recourse to the modalities established by the Lusaka Agreement and the subsequent peace process. The Lusaka Agreement was the relevant regional public order system and this had been recognized by the Security Council. The Agreement effectively stood in place of interim measures. It had been endorsed by the Security Council in several resolutions and was the only viable process for achieving peace. The request by the DRC for immediate and unilateral withdrawal of Ugandan forces was in fundamental conflict with the Lusaka Agreement. The DRC had submitted a draft resolution to the Security Council to demand the immediate withdrawal of Ugandan forces. When this failed it came to the Court and requested provisional measures. The DRC replied that public order was constituted by the rules prohibiting the use of force and aggression and occupation. The Lusaka Agreement could on no account contradict these rules. The Agreement provided only for the procedures for withdrawal and could not compromise the requirement for withdrawal. It was also clear that the Lusaka Agreement in no way precluded any other procedure for the peaceful settlement of disputes.[52]

[48] ICJ Reports (1998) 275, at para. 61.
[49] Applications of 23 June 1999.
[50] ICJ Reports (2000), 39 ILM (2000) 1100.
[51] Uganda oral argument, CR 2000/23, at 8.
[52] DRC oral argument, CR 2000/24, at 3.

Uganda also resorted to a version of the indispensable parties rule, to be found in the USA's first objection to admissibility in the *Nicaragua* case. It objected that the DRC had singled out Uganda in these proceedings for provisional measures and was not pursuing Rwanda or Burundi, although it had also brought cases against them. It called this an argument of 'procedural fairness' – reclassifying the indispensable parties rule in the hope that it might prove acceptable and persuasive to the Court.[53] In reply to the argument on the absence of Rwanda, the DRC observed that a state is entitled to isolate procedurally a specific relationship with another state; it invoked the *Bosnia-Herzegovina Genocide* case in which proceedings were instituted only against Yugoslavia, not Croatia. As to procedural equity, the life of the inhabitants was the key criterion and not the fact that another — likewise guilty — state had not been brought before the Court; the key criterion was that the circumstances required the indication of provisional measures.[54]

The Court did not address these arguments in detail. It held simply that whereas the Lusaka Agreement was an international agreement binding on the parties, it did not, however, preclude the Court from acting in accordance with its Statute and Rules. Furthermore the Court was not precluded from indicating provisional measures in a case merely because a state which has simultaneously brought a number of similar cases before the Court seeks such measures in only one of them.[55]

In contrast, Judge Oda appeared to accept as applicable in this case two of the US arguments from the *Nicaragua* case, the second and third objections based on the division of powers between the Court and the Security Council.[56] He said in his Declaration that the subject matter was not suitable for judicial settlement in the absence of agreement between the parties and that the case was inadmissible. Unilateral referral to the Court of acts of armed aggression in which a state is directly involved does not fall within the purview of Article 36(2) of the Court's Statute. His position was that there were no legal disputes between the parties: the mere allegation that there had been armed aggression by Uganda in its territory did not mean that legal disputes existed concerning the alleged breach of the applicant's rights by the respondent.[57] The applicant had not shown that both parties had attempted to identify the legal disputes and to resolve these deputes by negotiation. Without such a mutual effort a mere allegation of armed aggression could not be deemed suitable for judicial settlement by the Court. 'The issues arising from unstable conditions in a disintegrating state could not constitute legal disputes before this court whose main function is to deal with the rights and obligations of states.' He went on to say that the UN Charter provides for the settlement through the Security Council of disputes

[53] Uganda oral argument CR 2000/23 (Brownlie), at 7.

[54] DRC oral argument CR 2000/24 (Corten), at 3.

[55] ICJ Reports (2000), 39 ILM (2000) 1100 at paras 37–38.

[56] Declaration of Judge Oda, 39 ILM (2000) 1100, at 1113. He had not discussed these questions in his Separate Opinion in the *Nicaragua* case itself, ICJ Reports (1984) 471.

[57] Judge Oda has developed over many years a strict doctrine of the nature of a dispute, at variance with that of the Court.

raising issues of armed aggression and threats to international peace, of the type seen in the present case. In fact, the Security Council, as well as the Secretary-General acting on its instructions, had made every effort over the past several years to ease the situation and restore peace in the region. Judge Oda's position thus seems to echo that of the USA in *Nicaragua*: the Court should respect the primary role of the Security Council and armed aggression was not a suitable matter for the Court in the absence of real agreement between the parties to submit a legal dispute to the Court.

C *Cases Concerning Legality of Use of Force*

The USA 'inseparability' argument made another appearance at the provisional measures stage of the *Legality of Use of Force* cases, not in the US pleadings, but in those of the other respondent states which were parties to the Optional Clause.[58] Yugoslavia in preparation for its claims against the NATO states, and in an attempt to ensure that the Court would not be able to examine its own past behaviour, had made a reservation limiting its acceptance of the Optional Clause jurisdiction to 'disputes arising or which may arise after the signature of the present Declaration (25 April 1999), with regard to the situations or facts subsequent to this signature'. Yugoslavia's claim was that the NATO bombing campaign had violated international obligations on the use of force, non-intervention, protection of civilian population and objects and protection of the environment. The respondent states used the 'inseparability' argument to interpret Yugoslavia's reservation in such a way as to prevent the Court from asserting jurisdiction, despite Yugoslavia's clear intent that the Court should have jurisdiction to hear claims arising out of events after 25 April 1999.

The respondent states argued, and the Court accepted, that because the bombings began on 24 March 1999, and had been conducted continuously over a period extending beyond 25 April, the legal dispute arose between Yugoslavia and the respondents well before 25 April. Each individual air attack could not have given rise to a separate subsequent dispute; the court therefore did not have *prima facie* jurisdiction. This finding that the dispute was ongoing and indivisible was crucial; the Court could not decide claims about NATO raids after 25 April because they were inseparable from the whole NATO campaign; they were just an aspect of a wider dispute. That is, the Court here accepted with very little discussion an argument which had not appealed to it in earlier cases. For the first time it accepted an 'inseparability' argument clearly similar in substance to that of the USA in *Nicaragua.* The Court refused cognizance of one aspect of the dispute because there was a wider dispute.[59] The Court seems to have been swayed by a determination not to let Yugoslavia use the court for its own purposes. Individual judges mentioned

[58] See oral argument by Canada, Netherlands and Portugal. Belgium did not itself make this argument, but the Court nevertheless discussed the issue (*Yugoslavia v. Belgium*, ICJ Reports (1999) 124, at para. 24); Spain and the UK had made reservations which deprived the Court of *prima facie* jurisdiction to award provisional measures. See note by Gray, 49 *ICLQ* (2000) 730.

[59] Judges Weeramantry, Shi, Vereshchetin and Kreca dissented strongly on this point (*Yugoslavia v. Belgium*, ICJ Reports (1999) 124, at 180, 205, 209, 216).

considerations of good faith as influencing their decisions to deny provisional measures; they regarded Yugoslavia's action as an abuse of the process of the Court.[60]

5 Reappraisal of the US Arguments

This invocation by other respondent states of arguments similar to the US objections to admissibility in *Nicaragua* provokes the question whether the use of these arguments is more justifiable when it is non-members or non-permanent members of the Security Council that invoke them. That is, are the arguments used by the USA in *Nicaragua* more legitimate and more persuasive in the mouths of other states?

It seems obviously disingenuous for a permanent member of the Security Council to plead that the matter is one for the Security Council rather than the Court when it has itself prevented the Security Council from taking effective action, as in the case of *Nicaragua*, or when it may be able to secure a result favourable to itself through the Security Council even when the legality of its actions is at least open to question, as in the *Lockerbie* cases.[61] This type of attempt by a permanent member to prevent a case going to the International Court of Justice is open to charges of bad faith in a way that could not apply to non-permanent members.

Resort to the Court appears at first to offer a valuable protection for weaker states against more powerful states, but can this be open to the charge of abuse of the judicial process and a potential source of danger for the Court? Respondent states involved in cases concerning the use of force routinely accuse the claimant states of using the Court for propaganda purposes; the Court itself has made it clear that it is not concerned with the motives for applications. But in cases where the respondent state is not a permanent member of the Security Council an argument by it that there is a danger that the claimant's application will lead the Court to take decisions which interfere with the primary role of the Security Council may seem more persuasive than the same argument in the mouth of a permanent member. Some claimant states have turned to the Court when they have failed to obtain the Security Council action they sought. Is this resort to the Court in the event of rejection by the Security Council justified?[62]

Is it possible to distinguish those cases where a permanent member is the respondent state and involved in Security Council decisions and to argue for a greater role for the Court in those cases than in those where no permanent member is directly involved? This may appear a superficially attractive argument but it is difficult to sustain. There are no signs that the Court has been willing openly to take such an approach, that it has been more willing to assert jurisdiction and admissibility in cases involving permanent members than in others.

States arguing that disputes involving the use of force are not suitable for the Court

[60] See note by Gray, *supra* note 7.

[61] *Question of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Libya v. UK*, ICJ Reports (1992) 3, (1998) 3; *Libya v. USA*, ICJ Reports (1992) 114; (1998) 115. See note by Lowe, 1992 *CLJ* 408.

[62] See *infra* note 153.

have not met with success; special factors have not led the Court to refuse to hear such cases. The Court asserted jurisdiction in *Cameroon/Nigeria* over a whole range of objections by Nigeria, similar in certain respects to those of the USA in *Nicaragua*. But in its decision on the merits it avoided any pronouncement on the law on the use of force, although it was called on by Cameroon to declare that Nigeria was responsible for violation of Article 2(4) of the UN Charter and of the principle of non-intervention, and although Nigeria argued that it was acting in self-defence. Cameroon claimed that from the mid-1980s the Nigerian army had made incursions into the Lake Chad area, escalating to a full-scale invasion in 1987; in the Bakassi Peninsula the Nigerian army had first infiltrated and then invaded in December 1993, followed by occupation in February 1996;[63] it was also responsible for a series of frontier incidents along the frontier between Lake Chad and the Bakassi Peninsula, which, taken as a whole, showed violations of the principles of non-use of force, territorial integrity and non-intervention.

Nigeria argued that Cameroon's application was misconceived in that it was inadmissible to introduce responsibility issues in a boundary case.[64] It was inappropriate in a case where the applicant state puts in issue the delimitation of the boundary for it at the same time to raise the question of international responsibility said to arise from incursions across a boundary which it regards as in issue. 'In principle it is undesirable to confuse boundary or territorial disputes on the one hand and claims to state responsibility on the other.' Very few boundary cases referred to the Court had sought to add issues of state responsibility, and in the handful of cases where this had been done the Court had never actually had occasion to deal with issues of state responsibility. In the present case Cameroon had sought to set a new pattern in this matter, one which was calculated only to make the eventual resolution of disputed boundaries more difficult. Nevertheless, in order for the parties to be in 'a position of equality' Nigeria maintained a series of counterclaims on the use of force.[65]

A fundamental division between the two states was apparent in their categorization of events. According to Cameroon, Nigeria had deliberately set out on a policy of invasion and annexation; it had illegally used force to override Cameroon's title to territory. In reply, Nigeria argued that there was a legitimate difference between the two states as to the location of the boundary and that therefore its use of force, if it had taken place in Cameroon territory, was not an unlawful use of force but the result of reasonable mistake or honest belief. It had been in peaceful occupation of Lake Chad and the Bakassi Peninsula; it had used force only to resolve internal problems and in response to encroachment by Cameroon in self-defence. If it turned out that Cameroon was the lawful sovereign then Nigeria's use of force was reasonable mistake or honest belief.[66]

Cameroon's claims to the disputed land territory were largely accepted by the

[63] *Cameroon v. Nigeria*, ICJ Reports (2002), at para. 310.
[64] ICJ Pleadings, *Cameroon v. Nigeria*, Nigeria Preliminary Objections, Ch. 6, at 6.15.
[65] ICJ Pleadings, Nigeria Counter-Memorial, Volume III, Counterclaims, Ch. 25, at para. 26.3.
[66] *Cameroon v. Nigeria*, ICJ Reports (2002), at para. 311.

Court, but its arguments on state responsibility were not successful. The Court avoided any pronouncement on the controversial issue as to whether Nigeria had illegally used force to invade and/or occupy disputed areas in the Lake Chad area and the Bakassi Peninsula. It was very brief on these issues, devoting only 16 of its 324 paragraph judgment to them. In this regard the Court seems to have been implicitly sympathetic to the Nigerian position that: 'This case is not essentially about state responsibility: it is about title to territory.'[67]

The Court had rejected Nigeria's preliminary objections that the vague and unspecific nature of Cameroon's allegations on use of force meant that this part of the case was inadmissible under Article 38(2) Rules of Court. It had also subsequently rejected Nigeria's request for interpretation of this part of the judgment on jurisdiction and admissibility.[68] Nevertheless the Court did seem anxious to avoid a decision on use of force at the merits stage, although it was not willing to offer much by way of explanation of its approach. There were clearly evidential difficulties which help to explain its reluctance to decide on the allegations of illegal use of force, at least as regards the frontier incidents, but the decision to avoid discussion and decision on the question of state responsibility for illegal use of force cannot be attributed solely to them.[69]

The Court's decision on the land boundary meant that Nigerian armed forces and administration were in place in areas determined by the Court to be Cameroonian territory and, to a lesser extent, Cameroonian forces were in areas determined to be Nigerian territory. The Court held that Nigeria was therefore under an obligation expeditiously and without condition to withdraw its administration and its military and police forces from the areas under Cameroonian sovereignty. Both parties were also under an obligation expeditiously and without condition to withdraw any administration or military or police forces which may be present in the areas falling within the sovereignty of the other along the land boundary between Lake Chad and the Bakassi Peninsula.[70]

However, Cameroon had asked not only for an end to Nigeria's administrative and military presence in Cameroonian territory, but also for guarantees of non-repetition in the future. The Court refused to order Nigeria to make such guarantees; this refusal seems justified in that it would necessarily have involved a finding of responsibility which the Court had carefully avoided.[71] But the Court's explanation for its refusal was not expressly made on this basis; it avoided any clear decision on responsibility and held that it could not envisage a situation where either party would fail to respect the territorial sovereignty of the other party now that the boundary had been specified

[67] ICJ Pleadings, *Cameroon v. Nigeria*, Rejoinder Part V para. 15.2.

[68] *Request for Interpretation of the Judgment of 11 June*, ICJ Reports (1999) 31.

[69] See *supra* note 45.

[70] The Court relied on the *Temple* case as a precedent in this context.

[71] The ILC Articles on State Responsibility, Article 30, provides that a state responsible for an internationally wrongful act is under an obligation to cease and to offer appropriate guarantees of non-repetition.

by the Court in definitive and mandatory terms. By the very fact of its judgment and the evacuation of the Cameroonian territory occupied by Nigeria, the injury suffered by Cameroon by reason of the occupation of its territory will have been sufficiently addressed. The Court does not therefore seek to ascertain whether and to what extent Nigeria's responsibility to Cameroon had been engaged as a result of that occupation.[72]

This decision not to pronounce on the arguments on state responsibility and the use of force was challenged only by *ad hoc* Judge Mbaye; in his Separate Opinion he emphasized that the Court's decision that the withdrawal of administrative and armed forces was sufficient to remedy the consequences of the Nigerian occupation did not mean that Nigeria was *not* responsible. The Court had determined at paragraph 64 that the Nigerian *effectivités* in the territory of Cameroon should be considered as acts *contra legem*, that is as illegal acts. Although he agreed that there was no need to award reparation beyond the judgment itself, he said that the Court should have held that Nigeria had acted illegally.[73] The Court seemed anxious to avoid finding responsibility; it did not even stress the duty to settle territorial disputes peacefully. There is a marked contrast between the lengthy arguments of the parties on the use of force and the extreme brevity of the Court's decision in this part of the judgment.

Claims about the special nature of disputes concerning use of force have also led to converse arguments that the Court should play a more active role. Pakistan, in bringing its case against India, argued that India should be willing to try peaceful means of settlement, including resort to the Court, because the dispute concerned the use of force. Pakistan revived the argument tried by the UK in *Corfu Channel* that Article 36(1) Statute of the Court, which gives the Court jurisdiction over 'matters specially provided for in the Charter', imposed a duty on states to settle disputes which could lead to a breach of the peace.[74] The refusal of India to accept all peaceful means was of ominous significance; there was a basis for the Court to use its residual jurisdiction as principal judicial organ of the UN. India answered that no matters were specially provided for in the Charter and that the Court had no implied jurisdiction.[75] It was clear that there was no real chance of jurisdiction in this case and that Pakistan was seizing the opportunity to focus international attention on the Kashmir dispute. The Court, in finding that it lacked jurisdiction, implicitly rejected Pakistan's claim that the use of force was a special case and reaffirmed the normal principles as regards the need for consent to the Court's jurisdiction.

[72] *Cameroon v. Nigeria*, ICJ Reports (2002), at para. 318.
[73] Judge Mbaye, Separate Opinion, ICJ Reports (2002), at para. 148.
[74] ICJ Pleadings, Pakistan Memorial, 10 January 2000, at para. 5.
[75] ICJ Pleadings, India Counter-Memorial, at paras 39–50.

6 The Impact of the *Nicaragua* Case

A *Resort to the Court*

Although there was concern at the time of the *Nicaragua* case that the USA's withdrawal from the case and subsequent denunciation of the Optional Clause[76] might harm the Court, it seems that the opposite has proved true. Any conclusions as to the motives of states for choosing to resort to the Court or not must necessarily be speculative, but it seems from the caseload of the Court that developing states have been more willing to turn to the Court since the judgment in the *Nicaragua* case. Earlier accusations of pro-Western bias have faded, balanced by the US accusations of favouritism towards developing states. Failure by the Security Council to enforce the judgment in the *Nicaragua* case in the face of US intransigence and UK equivocation has not put off other states from resort to the Court in cases involving armed force.[77] States such as Libya and Iran have felt encouraged to use the Court in cases against the USA. Moreover, several cases involving the use of force have been brought unilaterally where there was no apparent basis for jurisdiction,[78] or only a very tenuous basis.[79] Since the *Nicaragua* case many African states have brought cases on a wide range of subjects. At first the majority were boundary cases where, depending on the scope of the dispute, each side could expect to secure stability, not to win or lose. Some of these boundary cases clearly provided a means for the state parties to end or avert a conflict involving force, as in *Frontier Dispute*, where provisional measures were requested after the outbreak of fighting between Mali and Burkina Faso on the disputed boundary,[80] and *Libya/Chad* where the parties turned to peaceful settlement after many years of conflict.[81] Later *Cameroon/Nigeria* combined a boundary dispute and the use of force[82] and *DRC v. Uganda*[83] and *DRC v. Rwanda (2002 New Application)*[84] directly concerned the use of force.

B *Reservations to the Optional Clause*

It is interesting also that very few states have made new reservations to their acceptances of the Optional Clause after the decision in the *Nicaragua* case in order to try to exclude disputes concerning the use of force from the Court's jurisdiction. This state practice is clearly a significant reflection of the attitude of states to the role of the Court; there is no general view that disputes involving the use of force should be

[76] 24 ILM (1985) 246, 1742.

[77] *UNYB* (1986) 186.

[78] In the absence of any objective basis for jurisdiction the claimant state asked the respondent to accept the jurisdiction of the Court – without success in *Yugoslavia v. NATO* (1994) and the threatened case by Bosnia-Herzegovina against the UK.

[79] As in *DRC v. Rwanda, DRC v. Burundi, DRC v. Rwanda* (2002) and *Pakistan/India*, ICJ Reports (1999).

[80] *Frontier Dispute, Burkina Faso/Mali*, Provisional Measures, ICJ Reports (1986) 3.

[81] *Territorial Dispute, Libya/Chad*, ICJ Reports (1994) 6.

[82] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, ICJ Reports (1998) 275.

[83] Provisional Measures, 39 ILM (2000) 1100.

[84] Provisional Measures, ICJ Reports (2002).

excluded from the Court's jurisdiction. At the time of the *Nicaragua* case only three out of 47 states, El Salvador, India and Israel, had made reservations which excluded the use of force.[85] The Optional Clause acceptances of El Salvador and Israel have since terminated and not been renewed.

India's declaration reserved 'disputes relating to or connected with facts or situations of hostilities, armed conflicts, individual or collective action taken in self-defence, resistance to aggression, fulfilment of obligations imposed by international bodies, and other similar or related acts, measures or situations in which India is, has been, or may in future be involved'. However, it did not invoke this in *Aerial Incident (Pakistan v. India)*, preferring to rely on other reservations.[86] In this case Pakistan instituted proceedings against India for its destruction on 10 August 1999 of a Pakistani aircraft; it alleged that in the period leading up to the Indian general election in 1999 India had adopted an aggressive posture over Kashmir which had culminated in this incident. An unarmed Pakistani aircraft had been conducting a training mission over Pakistani territory and had been struck by an air-to-air missile from an Indian combat aircraft, killing 16 officers. The Court found that it had no jurisdiction under the Optional Clause and the 1928 General Act. This decision by India not to invoke its reservation on hostilities is a significant indication of the sensitive and problematic nature of the reservation. States may not want to acknowledge a situation of armed conflict. They may not want to risk a Court judgment on the wider dispute; they may not want to accept the possibility of the application of laws of war. In the case of Kashmir, India prefers to see the issue of the future of the territory as a domestic matter for India, although it accuses Pakistan of fomenting terrorist attacks on the government.

After the 1984 judgment on jurisdiction and admissibility in the *Nicaragua* case only a few states reacted by making new reservations to protect themselves from such actions in the future.[87] One of these was Honduras which made a new reservation on 22 May 1986 modifying its original 1960 Optional Clause acceptance; it did so in order to pre-empt the Nicaraguan application which it suspected was about to follow. And after the conclusion of the *Nicaragua* case on 27 June 1986 Nicaragua indeed brought a case against Honduras on 25 July 1986. Honduras' aim, like that of the USA in introducing a new reservation before it was sued by Nicaragua, was to ensure that it could not be sued. Like the USA, it was unsuccessful. This new reservation excluded the jurisdiction of the Court 'in disputes relating to acts or situations originating in armed conflict or acts of a similar nature which may affect the territory of the Republic of Honduras, and in which it may find itself involved directly or indirectly'.

A crucial question about the interpretation of such reservations then arose: What approach should be taken to the term 'armed conflict'? The parties adopted radically

[85] See Schachter, *supra* note 9, at 223.

[86] *Aerial Incident of 10 August 1999, Pakistan/India*, ICJ Reports (1999); 39 ILM (2000) 1116.

[87] Other states' reservations merely excluded disputes arising out of belligerent or military occupation (Kenya, Malawi, Malta, Mauritius). The last two also excluded disputes arising out of recommendations or decisions of organs of the United Nations.

different positions. Honduras in its Memorial simply said that the essence of the Nicaraguan complaint was that Honduras had allowed its territory to become the base for hostile, armed expeditions by the contras and also by the armed forces of Honduras itself against Nicaragua. The dispute was therefore necessarily one covered by the reservation and the Court had no jurisdiction to hear the case.[88] Nicaragua in its Counter-Memorial argued that the reservation was too narrow to exclude the jurisdiction of the Court in this case; there was no armed conflict between the parties and therefore the reservation could not deprive the Court of jurisdiction. The situation was merely one of frontier incidents and border tension. Nicaragua discussed the concept of armed conflict; it argued that certain factors were required for the use of force to constitute an armed conflict: notification to the Security Council, that the conflict should be persistent, of a marked intensity, should be the subject of a request by one of the parties for help by way of collective self-defence, should involve the application of the laws of belligerency and neutrality *vis-à-vis* third states, should be incompatible with the maintenance of normal diplomatic and economic relations, and that it should be recognized by states as an armed conflict. That is, Nicaragua argued for a relatively narrow, technical interpretation of the term 'armed conflict' in Honduras' reservation. Applying these criteria, it claimed that the situation was not one of armed conflict and that therefore the reservation did not operate.[89]

In the Oral proceedings Honduras argued that its intention in making the reservation had been to exclude the type of application made by Nicaragua. The terms of the reservation invited an interpretation based on common sense and the plain ordinary meaning of words. Nicaragua sought to avoid that approach and invited the Court to adopt a technical approach by identifying an armed conflict or acts of a similar nature by a number of criteria, said to derive from logic and policy. They certainly did not derive from the law.[90] The Court did not pronounce on this issue as it found jurisdiction on the basis of the Pact of Bogota. The position of Honduras seems consistent with the approach to the interpretation of reservations adopted by the Court in later cases such as *Fisheries Jurisdiction (Canada v. Spain)*.[91]

Greece, in making a new declaration in 1993, adopted a different form of words. It excluded 'any dispute relating to defensive military action taken by the Hellenic Republic for reasons of national defence'. Clearly this raises further difficult issues of interpretation: Would it be wide enough to cover situations where there was doubt as to whether Greece was acting in self-defence? Is this a self-judging reservation and, if

[88] ICJ Pleadings, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Vol. I Honduras Memorial, at 56.

[89] *Ibid.* Nicaragua Counter Memorial Vol. 1, at 349. This argument by Nicaragua is reminiscent of the Court's distinction between armed attack and mere frontier incident in *Nicaragua v. USA*, ICJ Reports (1986) 14, at para. 195.

[90] ICJ Pleadings, *Border and Transborder Armed Actions (Nicaragua v. Honduras)* Honduras Oral Arguments, Vol. II, at 23.

[91] ICJ Reports (1998) 432, at paras 44–49.

so, how should it be interpreted? It seems unlikely that such questions would be purely preliminary matters which could be disposed of at the jurisdictional stage of a case.[92]

In accepting the Optional Clause in 1992, Hungary had made a wider reservation of

> disputes relating to, or connected with, facts or situations of hostilities, war, armed conflicts, individual or collective actions taken in self-defence or the discharge of any functions pursuant to any resolution or recommendation of the United Nations, and other similar or related acts, measures or situations in which the Republic of Hungary is, has been or may in future be involved.

Again this reservation seems to raise issues which would go to the merits of any case concerning the use of force. For example, would expeditions to rescue ethnic Hungarians in neighbouring states be covered? Similar questions arise with regard to the subsequent reservation by Nigeria. Nigeria, too late to prevent the case brought by Cameroon in 1994, made a new reservation in 1998 of 'disputes relating to or connected with facts or situations of hostilities or armed conflict whether internal or international in character'.

Thus there is room for doubt as to how far these reservations would be effective to exclude the Court's jurisdiction in cases involving the use of force. Even if the Court does not accept technical arguments like those of Nicaragua in the *Nicaragua v. Honduras* case, the interpretation of these reservations raises complex issues concerning the use of force. They certainly do not enable the Court to avoid all decision-making on this subject. More significant is the very small number of such reservations; most states which have accepted the Optional Clause have clearly decided that they do not want to exclude such matters from judicial settlement; they accept that the use of force is a suitable matter for judicial settlement.

7 Provisional Measures: A Special Regime for Cases concerning the Use of Force?

Requests for provisional measures in cases involving the use of force are now commonplace. These requests were granted in full or in part in *Nicaragua* itself, and subsequently in *Frontier Dispute*, *Bosnia-Herzegovina Genocide*, *Cameroon/Nigeria*, and *DRC v. Uganda.* They were refused in *Lockerbie*, *Cases Concerning Legality of Use of Force*, and *DRC v. Rwanda (New Application 2002)*.[93] Some have expressed general concern; Judge Oda in *DRC v. Uganda*, as quoted above, was anxious that provisional measures would be ignored and would bring the Court into disrepute.[94] Judge *ad hoc* Dugard in his Separate Opinion in *DRC v. Rwanda (2002)* expressed a more general fear that the

[92] See argument by Nicaragua in its Counter Memorial, ICJ Pleadings, *Nicaragua v. Honduras*, Vol. 1, 281 at 358.

[93] The request was withdrawn in *Nicaragua v. Honduras* after the Foreign Minister of Honduras gave assurances that US troops would be withdrawn from Honduras, ICJ Pleadings, *Nicaragua v. Honduras*, Vol. 1, at 521.

[94] See *supra* note 16.

Court would be inundated with requests for provisional measures, following the Court's finding in *LaGrand* that an order for provisional measures is binding.[95]

The requests for provisional measures in cases involving the use of force have given rise to serious differences as to the proper role of the Court in such cases, and as to its relation with the Security Council. In a case concerning the use of force should the Court assume a special role because of its position as principal judicial organ of the United Nations? Does it have a special duty to maintain international peace and security which gives it wide powers in this context, so that the normal rules governing provisional measures do not apply? Different judges have drawn different conclusions about the impact of the subject matter on the indication of measures.

A Prima facie *Jurisdiction*

A few judges have made the radical argument that in cases involving the use of force requests for provisional measures should not be refused on grounds of lack of *prima facie* jurisdiction on the merits. That is, a normal precondition for an order should be abandoned in these special cases in order to further international peace and security.[96] In certain cases where provisional measures were refused some judges argued that the Court's role required that it should have acted *proprio motu* (on its own initiative) to indicate measures to maintain international peace and security or, at least, should have called on the parties in an independent measure.

Thus in the *Cases Concerning Legality of Use of Force*,[97] certain judges argued that the Court should not have refused to make an order for provisional measures. Yugoslavia had asked the Court to order 10 NATO states to cease immediately their acts of use of force in Kosovo. Judge Shi in his Dissenting Opinion said that faced with the urgent situation the Court ought to have contributed to the maintenance of international peace and security so far as its judicial functions permitted. It would have been fully justified immediately on receipt of the request for provisional measures and regardless of what might have been its conclusion on *prima facie* jurisdiction if it had issued a general statement appealing to the parties to act in compliance with the Charter, and all other rules of international law, and at least not to aggravate or extend the dispute. As principal judicial organ it had been assigned a role for the maintenance of international peace and security and therefore should have acted *proprio motu*.[98]

Judge Weeramantry in his Dissenting Opinion took a similar line (as he had earlier in *Lockerbie*): if international law is to grow and serve the cause of peace, the Court cannot avoid its responsibility in this regard. In the *Cases Concerning Legality of Use of Force* there was not just a possible resort to force as there had been in *Lockerbie*, but an actual and continuing use of force. 'In a world legal order based upon the pursuit of peace and peaceful settlement, the message that law can and should be used for

[95] ICJ Reports (2002).

[96] Merrills, 'Interim Measures of Protection and the Substantive Jurisdiction of the International Court', *CLJ* (1977) 86; Mendelson, 'Interim Measures of Protection in Cases of Contested Jurisdiction', 46 *BYbIL* (1972/73) 259.

[97] ICJ Reports (1999) 124.

[98] ICJ Reports (1999) 205, at 207.

avoiding the use of force is one which reverberates with special strength.' The responsibility lies very heavily upon the Court in a situation where force is already being used to take such steps as it can within its legal powers to halt the continuance of violence and the escalation of the conflict. The Court should have given provisional measures or at least issued an appropriate communication to the parties.[99] Judge Vereshchetin also argued that the Court should have acted on its own initiative, even if it could not have indicated fully fledged provisional measures. He did not concur with the inaction of the Court.[100]

In the operative part of its Order in this case, the Court refused provisional measures, but in the final paragraph of its reasoning it said

> whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means; whereas in this context the parties should take care not to aggravate or extend the dispute; whereas, when such a dispute gives rise to a threat to the peace, breach of the peace or act of aggression, the Security Council has special responsibilities under Chapter VII of the Charter.[101]

This reminder of the responsibility of the parties was not criticized by any of the judges in this case.[102]

In contrast, when the Court adopted a similar formula in *Armed Activities on the Territory of the Congo (DRC v. Rwanda, New Application 2002)* certain judges expressly discussed the propriety of the Court's pronouncement; they differed as to whether the Court had acted correctly in making such an appeal to the parties. The DRC brought the action claiming that flagrant and serious violations of human rights and of international humanitarian law had resulted from acts of armed aggression perpetrated by Rwanda on the territory of the DRC. Although the Court refused provisional measures because of the lack of *prima facie* jurisdiction on the merits, it nevertheless made a statement like that in the *Cases Concerning Legality of Use of Force* on the duties of the parties not to violate human rights or international humanitarian law.[103] It added that the Court could not but note in this respect that the Security Council had adopted a great number of resolutions concerning the situation in the region; that the Security Council had demanded on many occasions that all parties to the conflict put an end to violations of human rights and international humanitarian law. The Court stressed the necessity for the parties to these proceedings to use their influence to prevent the repeated grave violations of human rights and international humanitarian law.

[99] In this case Libya sought provisional measures in part because the USA and the UK had not ruled out the use of armed force against Libya (ICJ Reports (1992) 3 and 114, at para. 9). Judge Weeramantry in his Dissenting Opinion (*ibid.*, at 50) said 'I would indicate provisional measures *proprio motu* against both parties preventing such aggravation or extension of the dispute as might result in the use of force.'

[100] ICJ Reports (1999) 209.

[101] *Legality of Use of Force*, ICJ Reports (1999) 124, at paras 48–50.

[102] Judge Koroma in his Declaration expressed his approval of this part of the Order, *ibid.*, at 142.

[103] *DRC v. Rwanda*, ICJ Reports (2002) at para. 55.

This statement was considered by some of the judges in separate opinions; they divided as to whether the Court has a special role in disputes involving the use of force. Judges Koroma and Buergenthal took opposing positions on the propriety of such a pronouncement by the Court and on the role of the Court. For Judge Koroma the Court 'rightly and judiciously' expressed its deep concern over the deplorable human tragedy, loss of life and enormous suffering in the east of the DRC resulting from the fighting there. While it was not possible for the Court to grant the request for provisional measures, the Court had nevertheless discharged its responsibilities in maintaining international peace and security and preventing the aggravation of the dispute. It was a judicial position and it was in the interests of all concerned to hearken to the call of the Court.[104] Judge *ad hoc* Dugard agreed.[105] Judge El-Araby went further; for him the Court should have used its wide-ranging discretion actually to indicate provisional measures. The Court's reference to the Security Council underlined the prominence of the link between the Court and the Council in matters relating to the maintenance of international peace and security. The jurisdiction of the Court need not be established at this early stage of proceedings.[106]

In contrast, Judge Buergenthal disagreed with the inclusion in the Court's Order of the passage referred to; he did not object to the high-minded propositions they express but considered that they deal with matters the Court has no jurisdiction to address once it has ruled that it lacks *prima facie* jurisdiction to issue the requested provisional measures. In his view, the Court's function is to pronounce itself on matters within its jurisdiction and not to voice personal sentiments or to make comments, general or specific, which despite their admittedly 'feel-good' qualities have no legitimate place in this Order. The Court's responsibilities in the maintenance of peace and security under the Charter are not general. They are strictly limited to the exercise of its judicial functions in cases over which it has jurisdiction. Hence when the court, without having the requisite jurisdiction, makes pronouncements such as those in the Order which read like preambles to resolutions of the UN General Assembly or Security Council, it is not acting like a judicial body. Even though the statement is even-handed in that it addresses both parties it is inappropriate, first because the Court has no jurisdiction to call on the state parties to respect the Geneva Conventions. Second, since the request by the DRC for provisional measures sought a cessation by Rwanda of activities which might be considered to be violations of the Geneva Conventions, the Court's pronouncement can be deemed to lend some credence to the DRC claim. The language of the Order bears close resemblance to some of the language which the Court would most likely employ if it had granted the provisional measures request. The Court's pronouncements might be deemed to lend credence to the factual allegations submitted by the party seeking the provisional measures. In the future they might also encourage states to file provisional measures requests, knowing that even though they would be unable to demonstrate the requisite *prima facie*

[104] Declaration, Judge Koroma.
[105] Separate Opinion, Judge Dugard.
[106] Declaration, Judge El-Araby.

jurisdiction, they would obtain from the Court some pronouncements that could be interpreted as supporting their claim against the other party.[107]

In *DRC v. Uganda*, where the Court did award provisional measures, Judge Oda apparently accepted that provisional measures on the use of force were special. He disagreed with the Court's finding that there was *prima facie* jurisdiction on the merits; he believed that the Court was not in a position to grant provisional measures because the case was inadmissible but nevertheless he was willing to acquiesce in the Court's Order. He said that he had voted in favour of the Court's Order only because he could not but agree that, in order to restore peace in the region, the measures indicated by the Court in the Order should be taken by the parties — measures on which few would ever disagree.[108]

There is thus a fundamental division among the judges as to the role of the Court in cases involving the use of force. For some, the need to maintain international peace and security overrides the established requirement of *prima facie* jurisdiction on the merits, or at least justifies a special appeal to the parties to observe international human rights and humanitarian law; for others this goes beyond the judicial function.

B *Effect of Subject Matter on the Content of Provisional Measures*

Another aspect of the question whether there is, or should be, a special regime for provisional measures in cases involving the use of force concerns the substance of an order. In the cases concerning the use of force where provisional measures have been awarded, the Orders have mostly been balanced, even if the request was made by one party for measures against the other. The Court normally takes great care not to prejudge or to determine responsibility, with the one apparent exception of the *Bosnia-Herzegovina Genocide* case.

Thus, in *Frontier Dispute* both Mali and Burkina Faso requested measures when fighting broke out after they had submitted their boundary dispute to the Court. The Court addressed its Order in identical terms to both parties: to refrain from action which might extend or aggravate the dispute, or which might impede the gathering of evidence; to withdraw their forces behind lines to be agreed and to continue to observe the recently agreed ceasefire.[109] In *Cameroon v. Nigeria* Cameroon, in requesting provisional measures, specifically asked that they be addressed to both parties. Cameroon argued that the 1996 incursions by Nigerian forces and continued clashes showed that Nigeria intended to continue the conquest of the Bakassi Peninsula and asked the Court to indicate that the armed forces of both parties should withdraw to the position they were occupying before the Nigerian armed attack; should abstain from all military activity along the entire boundary; and abstain from any act which

[107] Declaration, Judge Buergenthal.

[108] *Armed Activities on the Territory of the Congo*, DRC v. Uganda, ICJ Reports (2000); 39 ILM (2000) 1100, at 1113.

[109] *Frontier Dispute (Provisional Measures)* ICJ Reports (1986) 3.

might hamper the gathering of evidence. The Court in its Order indicated in more neutral terms that both parties should ensure that no action of any kind, and particularly no action by their armed forces, be taken which might prejudice the rights of the other or which might aggravate or extend the dispute; both parties should observe the agreement reached between the ministers for Foreign Affairs for the cessation of all hostilities in the Bakassi Peninsula and that the presence of any armed forces in the Bakassi Peninsula should not extend beyond the positions in which they were prior to 3 February 1996; they should conserve evidence and assist the UN fact-finding mission.[110] In contrast, in *DRC v. Uganda* the DRC asked for far-reaching measures against Uganda, but the measures indicated were directed to both parties rather than just to Uganda.[111]

Only in the *Bosnia-Herzegovina Genocide* case was the Court apparently not swayed by any concern with balance; this is perhaps understandable in light of the mood at the time, but the one-sided nature of the Order is striking.[112] The Court ordered Yugoslavia in wide terms to take all measures in its power to prevent commission of the crime of genocide and to ensure that military and paramilitary units directed or supported by it as well as organizations and persons subject to its control, direction or influence do not commit acts of genocide. Despite its statement that there was a grave risk of genocide being committed and that both Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally attributable to them, were under a clear duty to do all in their power to prevent the commission of such acts in the future, the Court said that it did not find that circumstances were such as to require a more specific indication of measures addressed to Bosnia-Herzegovina in response to Yugoslavia's request for provisional measures.[113] The Court did, however, include in its Order a call in neutral terms to both parties not to 'aggravate or extend the dispute'. This follows the practice which has developed in cases on the use of force: the Court

[110] *Case Concerning the Land and Maritime Boundary between Cameroon v. Nigeria*, Provisional Measures, ICJ Reports (1996) 13.

[111] *DRC v. Uganda, Provisional Measures*, 39 ILM (2000) 1100, at para. 47. The Court said that it was not disputed that Ugandan forces were present on the territory of the Congo, that fighting had taken place on that territory between those forces and the forces of a neighbouring state (Rwanda), that the fighting had caused a large number of civilian casualties in addition to substantial material damage, that the humanitarian situation remained of profound concern and that grave and repeated violations of human rights and international humanitarian law had been committed on the territory of the DRC; in the circumstances persons, assets and resources present on the territory of the Congo, particularly in the area of conflict, remained extremely vulnerable and there was a serious risk that the rights at issue in this case would suffer irreparable prejudice. The Court, in its Order, said that both parties must refrain from any action and in particular any armed action which might prejudice the rights of the other party or which might aggravate or extend the dispute or make it more difficult to resolve. Both parties must take all measures necessary to comply with all their obligations under international law, in particular those under the UN Charter, the Charter of the OAU and with UN Security Council Resolution 1304; and that they should take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and humanitarian law.

[112] As was argued by Judge Tarassov, ICJ Reports (1993) 3, at 26, and 325, at 449.

[113] ICJ Reports (1993) 3, at para. 45; 325, at para. 46. Judge Oda (at 351) said that the Court should have addressed Yugoslavia's request and Judges Tarassov (at 449) and Kreca (at 453) said that it should have addressed the Order to both parties.

has made regular use of its power to indicate provisional measures independently of the requests of the parties, in order to prevent the aggravation or extension of the dispute.[114]

But the need to avoid pre-judgment in cases where the central facts concerning the use of force are disputed has posed serious difficulties for the Court. In *Cameroon v. Nigeria*, the Court was faced with the need to determine the positions to which the parties should withdraw their forces. The parties had given a contradictory account of the fighting on 3 February, which had led to the request for provisional measures by Cameroon, and the Court acknowledged that it had not been able to form any clear and precise idea of these events. In trying to achieve a balance and to avoid pre-judgment, the Court ordered that the parties should withdraw their forces to the positions they had occupied before 3 February 1996. But this seemed unlikely to help the parties avoid conflict. Judge Shahabuddeen said that provisional measures should be framed in self-executing terms. In the case of a provisional measure limiting the movement of armed forces, an essential element was the prescription of a clear physical benchmark, in the nature of a stipulation of positions or lines. The evidence had not permitted the Court to identify such a benchmark. In the result, the provisional measures would not serve the intended purpose of avoiding conflict in the area, but on the contrary, might provide a basis for a fresh dispute.[115] Judges Weeramantry, Shi and Vereshchetin in their Joint Declaration[116] and Judge *ad hoc* Ajibola in his Separate Opinion took a similar position.[117] The fears expressed about the inadequacy of the Order in this case seem to have been justified. At the merits stage the Court was unable to pronounce on Cameroon's claim that Nigeria had violated the Order for Provisional Measures because Cameroon had not established the facts.[118]

[114] Judge Ajibola, in *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Provisional Measures)* went into the history of this practice. In the recent past the Court had been more inclined to indicate provisional measures in matters involving armed conflicts or violent incidents, as in the *Bosnia-Herzegovina Genocide* case, *Frontier Dispute* and the *Nicaragua* case. After a cautious approach to the protection of rights, the *Nicaragua* case unanimously indicated that the USA and Nicaragua should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court. In all cases involving questions of armed conflicts involving the loss of lives and properties, the protection of the respective rights of the parties includes the need for the avoidance by the parties of any aggravation or extension of the dispute or hostile incidents. This was boldly announced in the *Frontier Dispute* case and confirmed in the *Bosnia Genocide* case. Judge Ajibola therefore supported this part of the Order, while rejecting the rest as based on facts not yet determined. In both *Cameroon v. Nigeria* and *DRC v. Uganda* the Court made this type of order not to aggravate or extend the dispute. It also went beyond this and expressly invoked its power under Article 75(2) of the Rules of the Court to indicate more specific and far-reaching measures which are in whole or in part other than those requested.

[115] *Cameroon/Nigeria (Provisional Measures)* ICJ Reports (1996) 13, at 28.

[116] *Ibid.*, at 31.

[117] *Ibid.*, at 35. The parties had given two entirely different versions of the incidents of 3 February, which involved entirely different positions in regard to the location of their armed forces on that date. The Court's order left it to each party to determine what that position was and to act upon that determination. These positions might well be contradictory and left open the possibility of confusion on the ground; the Order could thus be interpreted as containing an internal contradiction.

[118] *Cameroon v. Nigeria*, ICJ Reports (2002), at para. 320.

Given the uncertainty as to what was required by the provisional measures, this failure does not seem surprising.

A similar issue had arisen earlier in *Frontier Dispute*, but in that case the Court had left it to the parties to resolve. It requested the two governments to withdraw their armed forces to positions behind lines which were to be determined within 20 days by agreement, and failing that, by the Court. The Court said that the selection of those positions would require a knowledge of the geographical and strategic context of the conflict which the Chamber did not possess, and which in all probability it could not obtain without undertaking an expert survey. These two cases highlight the potential problems with the determination of facts in cases involving the use of force.[119]

C *Urgency*

In the recent cases concerning the use of force where provisional measures were indicated, the normal requirement of the Court that provisional measures be urgently needed seems to be taken for granted, or at any rate generously interpreted, in the light of the seriousness of the possible harm.[120] Thus in *Frontier Dispute* the Court expressly treated the use of force as a special case. It said that when two states have decided to have recourse to a chamber of the Court, the principal judicial organ of the UN, with a view to peaceful settlement, and 'incidents subsequently occur which are not merely likely to extend or aggravate the dispute but comprise a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes, there can be no doubt of the Chamber's power and duty to indicate, if need be, such provisional measures as may conduce to the due administration of justice.'[121] In this case it ordered provisional measures, even though the parties had actually stopped fighting. And in all cases, apart from *Aegean Sea Continental Shelf*,[122] the fact that a ceasefire had been agreed or called for by the Security Council did not prevent the award of provisional measures.

The *Aegean Sea Continental Shelf* case arose out of a maritime boundary dispute between Greece and Turkey. When Turkey granted exploration licences over the disputed areas of the continental shelf Greece went to the Court and sought provisional measures, including an order that both parties should refrain from taking further military measures or action which may endanger their peaceful relations. The Court refused these provisional measures. It said that the Security Council was also seised of the dispute; it had called on the parties in Resolution 395 to resume direct negotiations, and had recalled the principles of the Charter on peaceful settlement; both Greece and Turkey, as members of the UN, had expressly recognized the responsibility of the Security Council for the maintenance of international peace and security; as the Security Council had recalled to them their obligations under the Charter, it was not to be presumed that either party would fail to heed its obligations

[119] See *infra* note 142.

[120] On the requirement of urgency, see Merrills, 'Interim Protection in the Recent Jurisprudence of the ICJ', 44 *ICLQ* (1995) 90.

[121] *Frontier Dispute, Burkina Faso/Mali, Provisional Measures,* ICJ Reports (1986) 3, at para. 19.

[122] ICJ Reports (1976) 3, at paras 37–42.

under the Charter or fail to heed the recommendations of the Security Council addressed to them with respect to their present dispute.[123]

However, this remains an isolated decision. Since then the Court has abandoned this approach and taken the line that a ceasefire agreed between the parties or required by the Security Council need not prevent the order of provisional measures. In *Frontier Dispute*, Mali argued that the agreement on a ceasefire made it inappropriate for the Chamber to rule on an aspect of the conflict which was the subject of direct agreement between the parties. The Court welcomed the fact that the parties had reached a ceasefire and had thus brought to an end the armed actions which gave rise to the requests for the indication of provisional measures. Nevertheless there was a duty under Article 41 to ascertain what provisional measures were necessary to eliminate the risk of future action likely to aggravate or extend the dispute. The Chamber ordered measures including the withdrawal of the troops of both parties to such positions as to avoid the recrudescence of regrettable incidents.[124] Similarly, in *Cameroon v. Nigeria*, Nigeria argued that the request had become moot because of mediation by Togo which had led to a ceasefire. The Court said that this circumstance did not deprive the Court of the right to indicate provisional measures.[125]

In *DRC v. Uganda*, Uganda claimed that provisional measures would be moot and prejudicial because it had undertaken to withdraw all its troops from the Kisangani region and had already begun the process of withdrawal. The DRC said that these promises only related to one region and were not an adequate guarantee; such undertakings had been broken in the past.[126] The DRC observed that the fact that certain Ugandan high authorities had officially stated that they agreed to withdraw their forces from the Kisangani region and that the beginnings of a withdrawal had in fact taken place could in no way call into question the need for the indication of measures as a matter of urgency. Under the Court's jurisprudence the existence of obligations, whereby one or other party agrees to put an end to the acts underlying the request for the indication of provisional measures, did not prevent the Court from acceding to that request. The Lusaka agreement did not preclude the Court from acting in accordance with its Statute and Rules.[127] The Court accepted the urgency of the request and indicated provisional measures. Thus in cases involving the use of force the Court has been flexible in the application of its requirement that the provisional measures be urgently required.

[123] The Court went on to find that it had no jurisdiction; Judge Shahabuddeen in *Lockerbie* considered whether to order interim measures to restrain the alleged threat of force by the respondents, but decided that it was not necessary, given Security Council Resolution 748. The Court could safely assume that the respondents would not resort to force unless authorized by the Security Council (ICJ Reports (1992) 3, at 29).

[124] ICJ Reports (1986) 3, at paras 23–25.

[125] *Cameroon v. Nigeria (Provisional Measures)*, ICJ Reports (1996) 13, at paras 36–37.

[126] DRC Pleadings CR 2000/20, at 17–18; CR 2000/24; Uganda Pleadings CR 2000/23, at 19.

[127] 39 ILM (2000) 1100, at para 20.

8 A Special Role for the Court?

The question of the special nature of provisional measures in cases involving the use of force has proved divisive and gives rise to fundamental questions about the role of the Court and its relation to the Security Council. Judge Ranjeva considered this issue in his Declaration in *Cameroon v. Nigeria (Provisional Measures)*.[128] He said that since the decision in *Frontier Dispute*, a new practice had been adopted by the Court: the operative part of its Orders was not confined to the indication of measures preserving rights in the traditional sense. The Court had directly invited the parties to take measures of a military nature: cessation of hostilities, refraining from any action by armed forces, freezing of the position of armed forces. Judge Ranjeva asserted that this indication of measures of a military character did not form part of a general regulatory function, which neither the Charter nor the Statute had conferred on the Court. When ordering these provisional measures the Court was not acting as an authority invested with any general police power, but as the principal judicial organ participating in the objectives of the maintenance of international peace and security.

In marked contrast, Judge *ad hoc* Ajibola took a different line in his lengthy Separate Opinion.[129] He argued that the Court should refrain from orders with diplomatic or political content or matters concerning mediation or negotiation, since strictly speaking these matters were outside the legal assignment of the Court. Although the Court is the principal judicial organ of the UN such matters should be left to the Security Council, General Assembly and the Secretary-General.

These contrasting statements directly address the issue of the role of the Court in the Charter scheme. Many of the cases on provisional measures as well as those on jurisdiction and admissibility raise issues of the relation of the Court and the Security Council. The Court avoided the controversial issue of judicial review of Security Council decisions in the *Lockerbie* and *Bosnia-Herzegovina Genocide* cases, where there was a direct challenge to the validity of a Security Council resolution passed under Chapter VII, and it is not proposed to reopen that debate here.[130] But even if the Court does not go so far as outright judicial review there are difficult questions as to the nature of the complementary role it has repeatedly claimed for itself. The Court's

[128] ICJ Reports (1996) 13, at 29.

[129] *Cameroon/Nigeria (Provisional Measures)* ICJ Reports (1996) 13, at 35.

[130] Writers on judicial review and the relation of the Security Council and the Court (and judges in favour of judicial review) have written surprisingly little on this, preferring to focus on issues of principle about the existence of a right of judicial review and the applicable standards, with little discussion of the practical problems of any Court decision inconsistent with Security Council decisions and actions. See, e.g., Franck, 'The Power of Appreciation: Who Is the Ultimate Guardian of UN Legality', 86 *AJIL* (1992) 515; Watson, 'Constitutionalism, Judicial Review and the World Court', *Harvard ILJ* (1993) 1; Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case', 88 *AJIL* (1994) 643; Reisman, 'The Constitutional Crisis in the United Nations', 87 *AJIL* (1993) 83; Macdonald, 'Changing Relations between the International Court of Justice and the Security Council of the United Nations', *Canadian Yearbook* (1993) 3; Graefrath, 'Leave to the Court What Belongs to the Court — The Libyan Case', 4 *EJIL* (1993) 184; Bowett, 'The Impact of Security Council Decisions on Dispute Settlement Procedures', 5 *EJIL* (1993) 101; Alvarez, 'Judging the Security Council', AJ (1996) 1; Akande, 'The ICJ and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the UN?', 46 *ICLQ* (1997) 309.

consistent position is that there is no doctrine of separation of powers; there is no provision on the relation of the Security Council and the Court comparable to that in Article 12 UN Charter on the relation between the Security Council and the General Assembly. Both organs can perform their separate but complementary functions with respect to the same events.[131] Questions remain, however, as to the practical implications of this pronouncement of principle, including the question as to the significance of the primary role of the Security Council in the maintenance of international peace and security.

The USA was clearly disingenuous in its argument in *Nicaragua* that the matter was one for the Security Council rather than the Court, when it had used its veto power as a permanent member to ensure that Nicaragua's pleas to the Security Council were not discussed. In the mouths of other states who are not able to rely on the threat or use of veto, this seems potentially a more attractive argument. But is such a call for self-restraint likely to be acceptable to the Court? How far should the Court defer to the Security Council with regard to the latter's findings of fact, pronouncements on the legal classification of a particular use of force, and involvement in a settlement process?

It is well known that the Court was prepared to defer to the Security Council in the *Lockerbie* cases when Libya asked it to declare *ultra vires* resolutions requiring the surrender of the alleged bombers to the USA and the UK. At least at the provisional measures stage, the Court assumed the validity of the Security Council resolution passed under Chapter VII and would not order provisional measures incompatible with that resolution.[132] It seems very likely that the Court will continue whenever possible to avoid any direct challenge to Security Council decisions under Chapter VII. The Court in the *Nicaragua v. USA* case distinguished between issues concerning Article 2(4) and Chapter VII of the UN Charter, and suggested rather cryptically that the Court's role might depend on whether the case concerned the former or the latter.[133] Thus the Court would almost certainly accept as authoritative a determination of aggression by the Security Council, even if it is less likely expressly to acknowledge that the Security Council's power is exclusive.[134]

Less clear-cut would be the common situation where the Security Council had deliberately chosen not to characterize the situation as one of aggression but rather to find a breach of the peace or threat to the peace. Even when a determination under Article 39 of the UN Charter that a state has been guilty of aggression would be justified, the Security Council, in its pursuit of conciliation and settlement and in order to secure consensus among its members, has only very rarely, if ever, made such a

[131] *Nicaragua* ICJ Reports (1984) 392, at para. 95; *Bosnia-Herzegovina Genocide* Provisional Measures, ICJ Reports (1993) 3, at para. 33; *DRC v. Uganda* Provisional Measures, 39 ILM (2000) 1100, at para. 36.

[132] *Lockerbie*, ICJ Reports (1992) 3.

[133] *Nicaragua v. USA*, ICJ Reports (1986) 14, at para. 94.

[134] This question as to whether the Security Council has an exclusive right to make authoritative determinations of aggression was also an intractable problem in drafting the Rome Statute of the International Criminal Court.

determination.[135] Is it then open to the Court to choose the more serious classification when it is asked to declare that a state is responsible for acts of aggression as it was in *Armed Activities on the Territory of Congo, DRC v. Rwanda (2002)* and the *Croatia/Yugoslavia Genocide* cases? There would be no logical objection to such an independent finding by the Court going further than the Security Council had, as a matter of practical politics, chosen to go. But in cases involving ongoing armed conflict it is conceivable that such a determination by the Court would be unhelpful to the political settlement process being pursued by the Security Council.

The Court showed itself ready to make determinations of self-defence and rejected arguments that this was a matter exclusively for the Security Council in the *Nicaragua* case, but on the particular facts there had been no finding by the Council under Article 51, and indeed such express pronouncements by the Security Council are also rare.[136] Similarly, in *Oil Platforms*, where the Court was called on to decide whether the USA had been acting in self-defence, the Security Council had not made any pronouncement as to whether the relevant US actions were self-defence. In the *Bosnia-Herzegovina Genocide* case, where there was a direct challenge to a Security Council resolution on the ground that it was inconsistent with the right to self-defence under Article 51, the Court avoided a decision on jurisdictional grounds.[137]

Questions also remain about the Court's parallel functions with regard to Security Council decisions on non-Chapter VII action or in cases where less direct challenges to Security Council decisions may arise.[138] Questions as to whether there was a situation of armed conflict and as to the classification of such a conflict may arise before both the Security Council and the Court. We have seen that this could occur in the interpretation of reservations such as that of Honduras;[139] the question of classification also arose in Iran's pleadings in *Aerial Incident of 3 July 1988* where it argued that there was no international armed conflict;[140] and the issue also arose, but was avoided by the Court, in the *Bosnia-Herzegovina Genocide* case where the parties took opposing positions as to the categorization of the conflict.[141]

The determination of disputed facts is a particularly difficult area for the Court in use of force cases. These difficulties were much discussed in the context of the *Nicaragua* case, but actually there were far fewer difficulties in that case than in some others because of the relatively large amount of information available.[142] In conflicts in Africa there are typically far fewer public statements of the sort relied on by the Court in the *Nicaragua* case and generally far less information available. In *Cameroon v.*

[135] See C. Gray, *International Law and the Use of Force* (2000), at 146. The Security Council has occasionally found 'acts of aggression' but has not done so on the basis of express reference to Article 39.

[136] *Ibid.*, at 84–85.

[137] See Gray, 'Bosnia and Herzegovina: Civil War or Inter-state Conflict? Characterization and Consequences', 67 *BYbIL* (1996) 155.

[138] As, e.g., under the reservations to the Optional Clause of India, Hungary, Malta and Mauritius.

[139] See *supra* note 87.

[140] ICJ Pleadings, *Aerial Incident of 3 July 1988*, Vol. II, at 517.

[141] See Gray, *supra* note 137.

[142] See Judge Jennings, ICJ Reports (1986), at 544; Highet, 'Evidence, the Court and the Nicaragua Case', 81 *AJIL* (1987) 1; Highet, 'Evidence and Proof of Facts', in Damrosch, *supra* note 9, at 355.

Nigeria it seems to have been problems with the determination of the facts which contributed to the decision of the Court not to make any pronouncement on state responsibility. Certainly the claims and counterclaims on boundary incidents occurring not only in the Bakassi Peninsula and the Lake Chad area, but also at sea and all along the land boundary between the two states between 1970 and 2001, were not decided by the Court. Cameroon had argued that it was not seeking a ruling on Nigeria's responsibility in respect of each of these incidents taken in isolation, but that the repeated incursions were violations of international law. Nigeria's position was that these submissions could not be ruled upon as a whole and that the alleged incidents must be considered one by one. It also counterclaimed concerning numerous incidents engaging Cameroon's responsibility. The Court avoided any pronouncements on principle; it found that neither party had sufficiently proved the facts which it alleged or their imputability to the other party. The Court was therefore unable to uphold either side's submissions with regard to boundary incidents; neither side had sufficiently proved the facts of imputability.[143]

Both sides had argued at length about incursions and forcible actions in the disputed territory. Each party argued that the other's claims of illegal incursions were not adequately backed by evidence. Given that the parties relied almost exclusively on their own government's one-sided evidence in the form of diplomatic protests, communications to the UN Security Council and to the OAU, internal notes, national commissions of inquiry, reports and other administrative documents, to try to support their claims — something which had been unacceptable to the Court in the *Nicaragua* case[144] — it is not surprising that the Court now felt itself unable to pronounce, but it is perhaps a little surprising that it did not revisit the issue of what would constitute satisfactory evidence.

In this context too the relation of the Court with the Security Council may be problematic; How far should a determination of fact by the Security Council be treated as decisive? In *DRC v. Uganda* the Court simply noted information from the Security Council and left any issues of principle aside. It said,

> Whereas the Court is in possession of information on the facts of this case, and in particular that contained in the above-mentioned Security Council resolution 1304(2000) of 16 June 2000; whereas, however, the Court's duty at this stage of the proceedings is limited to examining whether the circumstances brought to its attention require the indication of provisional measures; and whereas it cannot make definitive findings of fact or of imputability, since the right of each of the Parties to submit arguments in respect of the merits must remain unaffected by the Court's decision.[145]

It was able to rely on facts not disputed by the parties.

The absence of express discussion of these issues of the relationship between the Security Council and the Court with regard to the classification of conflicts,

[143] *Cameroon v. Nigeria*, ICJ Reports (2002), at paras 323–324.
[144] ICJ Reports (1986), at paras 57–74.
[145] ICJ Reports (2000); 39 ILM (2000) 1100, at para. 41.

determinations under the Charter and decisions on facts by the Court is not surprising. There are nevertheless in the cases discussed above repeated indications of judicial deference and implicit acknowledgement of the significance of the primary role of the Security Council in the maintenance of international peace and security. Thus in the *Cases Concerning Legality of Use of Force*[146] the Court made repeated reference to the special responsibilities of the Security Council; in *DRC v. Rwanda* the Court noted the relevant resolutions;[147]in *DRC v. Uganda* it noted that the Security Council had condemned the fighting between Rwanda and Uganda in the DRC.[148] Such references are not decisive but are a clear indication that the Court is likely to stress agreement with the Security Council whenever possible. Another example of the Court paying attention to the role of the Security Council came in *Cameroon v. Nigeria (Provisional Measures)* when the Court referred to the fact that the President of the Security Council had called on the two parties to respect the ceasefire they had agreed, to refrain from further violence and had further called on the parties to return their forces to the positions they occupied before the dispute was referred to the Court.[149]

Should the Court defer to the Security Council with regard to settlement efforts in order to ensure that the judicial mechanism does not interfere with the political settlement process, in which settlement provisions may not be based on the law or involve any attribution of legal responsibility for breach of international law on the use of force? The Court has consistently refused to treat any regional settlement process either as a necessary precondition for jurisdiction or as a reason for declining to hear a case. But what of Security Council attempts at political settlement of a conflict or cases where the Security Council has approved a regional process or settlement? And should a distinction be made here between an ongoing conflict and a past conflict? It is in the former that the possibility of destabilizing disagreement between the two UN organs seems most dangerous.

In *DRC v. Uganda (Provisional Measures)* the question of the relation between the political process in the Security Council and the Court case was crucial. Both parties invoked the existence of Security Council Resolution 1304 as supporting their position. Uganda relied primarily on the Lusaka agreement between the parties, which had been approved by the Security Council in Resolution 1304 and other resolutions, in arguing that any move to seek alternative ways of solving the dispute was an act of bad faith and a form of undermining the entire peace process. It asked the Court to reject the application for provisional measures so that the Parties could concentrate on implementing the resolution of the Security Council and fulfilling their obligations under the Lusaka agreement which had been approved by the Security Council in its resolutions. This did not require immediate and unilateral withdrawal as requested by the DRC, but set out a precise timetable and a sequence of defined events. Uganda claimed that the subject matter of the request for provisional measures was

[146] ICJ Reports (1999), at 124.
[147] ICJ Reports (2002).
[148] 39 ILM (2000) 1100, at para. 10.
[149] ICJ Reports (1996) 13 at para. 45.

essentially the same as the matters addressed by Security Council Resolution 1304 and that the principles invoked in the *Lockerbie* cases must therefore apply and should lead the Court to refuse the measures requested. In the alternative it argued that the DRC request had the same subject matter as the Security Council resolution, that Uganda accepted the resolution which was binding under Chapter VII, that pursuant to the resolution Uganda had withdrawn all its forces from Kisangani and therefore the request had in practical terms been rendered redundant.[150]

The Court reasserted the well-established position that the Court and the Security Council could perform separate but complementary functions with respect to the same events. The Security Council resolution did not *prima facie* preclude the rights claimed by the Congo from being regarded as appropriate for the protection by the indication of provisional measures.[151] The Court thus implicitly rejected Uganda's argument that there was any inconsistency between Security Council Resolution 1304 and the provisional measures sought. The Court set out the resolution in full; it required the immediate and complete withdrawal of Ugandan forces from Kisangani and the whole territory without further delay in conformity with the timetable of the ceasefire agreement and the disengagement plan. It does seem that there is an apparent inconsistency here: the provisional measures sought by the DRC required *immediate* withdrawal of Ugandan forces from the DRC, whereas the Security Council resolution required withdrawal in accordance with a timetable. However, the Court seems to have glossed over this difference; its order was general and did not specifically call for immediate withdrawal by Uganda. The Court did not accept that the situation was the same as that in the *Lockerbie* cases where there had been a possible conflict between the Security Council resolution and the provisional relief sought by Libya. It clearly adopted a cautious approach and went some way to avoid any conflict with the Security Council.

In some of the cases concerning the use of force the claimant state has resorted to the Court after it has failed to secure what it wants from the Security Council. Thus, when the Security Council rejects a resolution, then states have turned to the Court and requested provisional measures. In the *Cases Concerning Legality of Use of Force*, Yugoslavia asked the Court to indicate measures to interrupt NATO's intervention in Kosovo after a resolution demanding an end to the NATO bombing campaign had been defeated in the Security Council.[152] Portugal argued in its Oral Pleadings that this was not a proper use of the Court; it was an abuse of procedure since the provisional measures requested would have the effect of interrupting the NATO

[150] 39 ILM (2000) 1100, at para. 24. The DRC argued at para. 23 that there was nothing in the political or diplomatic context which might prevent the Court from taking provisional measures. SC Res. 1304 had demanded that Uganda withdraw its forces not only from Kisangani but from all Congolese territory; the withdrawal of Ugandan forces was in substance what the Congo was asking the Court to indicate, not as a political measure with a view to the maintenance of international peace and security, but as a judicial measure; it was not possible to derive from these parallel powers of the Security Council and of the Court any bar to the exercise by the latter of its jurisdiction.

[151] 39 ILM (2000) 1100, at para. 36.

[152] *UNYB* (1999) 333, at 343–344.

action, a decision which had been rejected by the Security Council, the competent organ in the UN system with regard to this subject matter. The content of the draft resolution submitted to the Security Council was identical to the provisional measures requested by Yugoslavia. Yugoslavia was thus trying to induce the Court to annul a decision contrary to its interests taken by the Security Council.[153] Of course there is no necessary incompatibility here: the Security Council's failure to condemn does not necessarily indicate that NATO's campaign was legal. This is a different situation from that in which the Court is asked to order provisional measures or to make a judgment in direct conflict with an actual Security Council resolution. Nevertheless, it may be seen as a challenge to a Security Council vote and thus to its primary role in the maintenance of international peace and security.

The same argument as Portugal made was also put forward by Uganda in *DRC v. Uganda*, but again it was not discussed by the Court. In its pleadings, Uganda said that Congo had presented a draft resolution to the Security Council seeking the immediate withdrawal of Ugandan forces and another proposal sought a deadline of four months to carry out the withdrawal. Both drafts were rejected by the Council in favour of the timetable for withdrawal agreed by the parties in the Lusaka agreement. Having failed to obtain the resolution it requested from the Security Council, the DRC came to the Court on the first business day following the Council's adoption of Resolution 1304, and asked the Court to order the same measure that the Council rejected. The measures requested stood in direct conflict with Resolution 1304.[154] The Court did not address the issue of principle as to whether this was a proper use of the Court. Thus in these cases there was no direct clash between Court and Security Council, but the potential difficulties of their complementary relationship are apparent.

9 Conclusion

Although many cases concerning the use of force have been initiated in the 16 years since the judgment in the *Nicaragua* case, only *Cameroon v. Nigeria* has reached judgment on the merits, and in that case the Court avoided any decision on the use of force.[155] Does this mean that the cases, despite their large number, are of only limited significance in the development of the law? Detailed discussion of the substantive law is not the focus of this article, but even in the absence of judgments on the merits the cases may help to clarify the positions of states. The written and oral pleadings, now of greater significance in the development of the law because many of them are available on the internet, set out the positions of the parties. Even before the merits stage of a case is reached state parties have gone out of their way to put their positions on the law and the facts on record in the large number of applications for provisional cases. In *Oil Platforms*, *Iran/US Aerial Incident*, *DRC v. Uganda* and *DRC v. Rwanda*, the parties

[153] Portugal Oral Pleadings, at 3.1.5.

[154] Uganda Pleadings 2000/23, at 18.

[155] On the contribution of the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996) 226; see L. Boisson de Chazournes and P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999).

went into detail on the law or the facts or both. Similarly, in the *Cases Concerning Legality of Use of Force* Yugoslavia put its legal position on the use of force at some length. Most of the defendant states did not go into the merits of the law on the use of force, but Belgium did address this in a series of arguments that are especially important given the limited legal justification by NATO of its campaign. Fundamental differences were apparent on the interpretation of Article 2(4) of the UN Charter, on humanitarian intervention and implied authorization by the Security Council. Also at the jurisdictional stage of *Pakistan v. India* the parties set out the history of the conflict in the region, and gave conflicting accounts of the sequence of events involved in the particular case. Central issues on the use of force in relation to genocide have been raised in the recent cases. In the *Bosnia-Herzegovina Genocide* case, the relation of genocide and the general law on self-defence was at issue; in the *Cases concerning Legality of Use of Force*, the question of the need for intent in state responsibility for genocide was central; in *Croatia v. Yugoslavia*, genocide will be before the Court again.

The large increase in the number of cases on the use of force taken to the ICJ in recent years can be interpreted in a variety of ways. Taken most favourably, it shows the willingness of states to use the Court to reaffirm their conviction in the legality of their position in a conflict against a stronger opponent. Seen less favourably, such cases are an unhelpful move in a propaganda war where settlement is already being pursued through other means; weak cases may be brought as a means of distracting, delaying or inconveniencing an opponent.

It is apparent that there is no general, principled reluctance by states to submit cases on such controversial subject matter to the Court. Even those states which initially challenged the Court's jurisdiction to hear claims on the use of force, like the USA and Nigeria, subsequently reversed their positions in making counterclaims on the same subject matter. And the practice of states in making reservations to their Optional Clause acceptances shows that very few states have tried to exclude such disputes from the Court's jurisdiction. Similarly, there is no general reluctance by the Court to take on cases on the use of force. The arguments used by the USA in *Nicaragua* were no more successful when invoked subsequently in *Cameron v. Nigeria* and *DRC v. Uganda.* The Court's decisions on compromisory clauses demonstrate that it is willing to contemplate central and controversial issues in this area. The Court has not taken the opportunities offered to it to hold that a particular dispute is already being handled by a regional body and is therefore inadmissible.

However, it is clear that the Court is divided as to how far its role as 'the principal judicial organ of the UN' should lead it to take an especially active role in disputes on the use of force. These divisions are clear in the context of provisional measures, where states have brought applications in an apparent attempt to use the Court to strengthen their case even where it was apparent that the chances of jurisdiction on the merits were slight. Some judges seem ready to abandon traditional requirements for the indication of measures, or to indicate far-reaching measures, in order to play an active part in the maintenance of international peace and security.

The Court has avoided addressing the question of its relation with the Security Council in this sphere head on, but its deference shines through the cases. It seems to

lose no opportunity to stress the primary role of the Security Council. This could be dismissed as meaningless rhetoric in that it makes no difference to the outcome, but certainly in those cases where the applicant state had first tried – and failed – to secure relief through the Security Council, the Court has shown itself to be unwilling to contradict or act inconsistently with the Council's decision.