All Things to All People? The International Court of Justice and its Commentators

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Abstract

Despite the technical prowess of both the editors and the contributors to this unique and comprehensive commentary on the Statute of the ICJ, a book of this nature cannot be all things to all people. The practitioner will miss a closer reading of the Court's jurisprudence and a more exhaustive bibliography; the theoretician will lament the lack of theoretical foundations for many of the dogmatic arguments put forward. But this volume is as good as they come, both in terms of the medium and format chosen. The commentary fulfils most of the demands made of it by practitioners and scholars alike.

1 Introduction

This commentary on the Statute of the International Court of Justice (Statute) represents neither the first multi-contributor commentary of its kind in international law – this Germanic peculiarity in legal literature has some antecedents, most famously Bruno Simma's commentary on the UN Charter[1] – nor the first large-volume

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1 B. Simma (ed.), *Charta der Vereinten Nationen. Kommentar* (1991); B. Simma (ed.), *The Charter of the United Nations. A Commentary* (1st edn., 1994; 2nd edn., 2002).

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treatment of the Court's procedural law, *vide* Rosenne's *The Law and Practice of the International Court*, now in its fourth edition.[2]

This commentary, however, is unique in the sense that it sets out to be all things to all people: it is intended to be both substantively exhaustive whilst remaining relatively 'slim' (at nearly 1,600 pages); it discusses the Statute article by article and yet tries not to succumb to a narrow *Begriffsjurisprudenz*-like literalist interpretation of each article in isolation; it is international and yet the majority of the contributors were recruited from the small, well-known group of scholars closely connected to the Court. How does it fare in the eyes of the beholder – and which criteria should be used to determine how such a book 'fares'?

When a massive undertaking such as the tome under review here is concluded, the critics inevitably focus on this or that detail and seek to show, in effect, that this or that detail is symptomatic of the project as a whole. The work is judged by how well the contributors have done. We would argue that in large-volume commentaries or encyclopaedias the tasks of the editor(s) – as person(s) ostensibly responsible for and representing the whole – are formal, rather than substantive. Their job is to ensure that they choose their contributors wisely. They seek to make the contributions coherent and readable while not losing sight of each scholar's distinctive traits. That is their real responsibility; they ought to suffer as little for their authors' 'idiosyncrasies' as journal editors do. The responsibility of individual authors, however, is not for the whole either. It is their duty to write the best possible text within the confines placed upon them by the editor(s); it is their duty to effect a modicum of integration with the other texts and with the project as a whole. But, ultimately, each text must be able to stand on its own, especially if a commentary assumes monograph size, as Pellet's treatise on Article 38 does (at 677–792). Thus, the first section of this essay will discuss the formal editorial issues and the following sections will examine a selection of important topics included in the more than 80 contributions to the volume to show how the authors have portrayed the complex doctrine and jurisprudence of the world's most important tribunal.

2 The Editors' Work

The choice of contributors may very well be the editors' most important task, for – despite citation guides, informal and formal contracts on the content of a contribution and the copy-editing process – the editors of a collective work in effect have very little influence on the outcome once a colleague is entrusted with the task of writing a contribution. It is this choice which largely determines the quality and representative character of a commentary. Zimmermann, Tomuschat and Oellers-Frahm managed to internationalize the authorship; the majority (28 out of 49) are not German or Austrian scholars. In addition, the authors are not exclusively established and world-renowned specialist international lawyers. There is also a significant proportion

[2] S. Rosenne, *The Law and Practice of the International Court* (4th edn., 2003).

of younger scholars. Our impression is that the list of contributors is representative and well-balanced.

Three smaller points are linked to the work's material sources. First, a general problem suffered by a commentary which depends on jurisprudence is that it can quite easily become dated by a surprising change in the Court's views. Cases decided after publication clearly cannot be included. The choice of the editors of the third edition of the *Max Planck Encyclopaedia of Public International Law* to offer both an electronic and a printed version, and to ask contributors to agree to update their contributions over a certain period after the initial publication, may be the way forward in light of the increased amount of jurisprudence produced by international tribunals in recent years.

Second, we could not discern a system in the choice of books for the Commentary's general bibliography (xvi–xvii). Not only were non-specific monographs taken on board (e.g. Kelsen's *Law of the United Nations*),[3] but also some very specific papers that may only be relevant to specific topics (for instance, an article by Spiermann, 'Who Attempts Too Much', particularly given that he subsequently published a monograph dealing much more broadly with the same topic).[4]

Third, there appears at times to be a predilection for quoting the provisions of texts, especially of previous versions of the Rules of Court but sometimes also of authors, merely for the sake of quotation. Examples of this tendency include the commentaries on Article 34 (at 552, 554–556), Article 62 (at 1333, 1342–1343, 1366–1368), and Article 63 (at 1371–1372, 1383, 1386–1387, 1391). Although we would expect no less of a work of reference in terms of thoroughness, even a work of this nature would benefit from less reliance on lengthy quotations of provisions and greater use of references to provisions in footnotes.

3 Tomuschat on Jurisdiction (Article 36)

Jurisdiction, within the international community, leads a troubled existence. Uncontroversial, undoubted, though no longer unlimited, as to a state's jurisdiction over natural and legal persons and property within its territory, controversies abound regarding its extension extra-territorially as well as its establishment internationally. Crucial to a proper understanding of the Court's jurisdiction is the prerequisite in international law of a manifestation of consent on the part of those states parties to a dispute brought before the Court for settlement. One is left, after reading Christian Tomuschat's commentary, with a somewhat sketchy idea as to why exactly consent is required in the first place. Although the answer to this question may be gleaned from references here and there to positive law and case-law, we would have expected a discussion of the concept of sovereignty and the ways in which it permeates international

[3] H. Kelsen, *The Law of the United Nations* (1950).

[4] Spiermann, '"Who Attempts Too Much Does Nothing Well": The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice', 73 *BYbIL* (2003) 187; O. Spiermann, *International Legal Argument and the Permanent Court of International Justice. The Rise of the International Judiciary* (2005).

law in general and restrains the possibilities of international adjudication in particular. In our opinion, it is the traditional notion of the sovereignty of states as denial of the existence of any higher authority over them[5] that accounts for '[t]he absolute freedom of States either to accept or to reject judicial settlement' that would 'appear to be anachronistic in the world of today where so many supranational regimes have come into existence' (at 602–603). But compliance with judgments of the Court would be abysmal '[i]f States were forced under the jurisdiction of the Court' (at 603), which explains why 'developments should take place cautiously, step by step' (at 603).

All the more surprising then, at least to us, is Tomuschat's suggestion that 'there seems to be no serious reason militating against decisions of the Security Council that would enjoin States confronting one another about issues affecting international peace and security, to bring their disputes before the Court' (at 617). Tomuschat is, naturally, fully aware that the Court has held, in respect of the phrase 'all matters specially provided for in the Charter of the United Nations' featuring in Article 36(1) of the Statute, that 'the United Nations Charter contains no specific provision of itself conferring compulsory jurisdiction on the Court'.[6] Yet he argues that Article 36(3) of the Charter – allowing the Security Council to recommend to parties referral of their dispute to the Court[7] – does not prejudice the powers of the Security Council under Chapter VII of the Charter. His inspiration appears to lie with his assessment that such a mode of settlement would be 'infinitely more appropriate than a decision of the Security Council making binding determinations' (at 617), supplemented by his comment that the settlement of the Iraq-Kuwait war by way of Security Council Resolution 687 (1991) 'went extremely far' (at 617, fn. 154).

In his desire to counteract apparently far-reaching Security Council action, Tomuschat fails to appreciate that he must necessarily rely on the same extensive, some would say excessive, reading of the powers of the Security Council that gave rise to its action in relation to Iraq. In essence, he will either have to interpret Article 41 of the Charter extensively, or claim the existence of an implied power along the lines of the Court's broad acceptance in the *Reparation* opinion,[8] to allow for a binding decision of

[5] On a different view, however, the only legal sovereign is the law itself; the states as partial legal orders are 'sovereign' only relative to each other. For the Pure Theory of Law, all legal subjects – however fundamental they may seem – are constituted by the law. Cf. H. Kelsen, *Principles of International Law* (1952), at 438–444; Kammerhofer, 'The Benefits of the Pure Theory of Law for International Lawyers, Or: What Use is Kelsenian Theory?', 12 *International Legal Theory* (2007) 5, at 27–40.

[6] *Aerial Incident of 10 August 1999 (Pakistan* v. *India)*, Jurisdiction, Judgment of 21 June 2000, ICJ Reports (2000) 12, at 32 (para. 48). See Tomuschat on Article 36, at 617.

[7] One may also note that a sizeable number of judges observed in their opinions to the *Corfu Channel* case that recommendations under Article 36(3) of the Charter could not found the jurisdiction of the Court. Cf. *Corfu Channel (United Kingdom* v. *Albania)*, Preliminary Objection, Judgment of 25 March 1948, ICJ Reports (1948) 15, at 31–32 (Joint Separate opinion Judges Basdevant, Alvarez, Winiarski, Zoričić, De Visscher, Badawi Pasha and Krylov), 35 (Dissenting opinion Judge *ad hoc* Daxner).

[8] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949) 174, at 182. The standard formulated by the Court to determine the existence of implied powers for the United Nations, 'essential to the performance of its duties', was criticized by Judge Hackworth (Dissenting opinion Judge Hackworth, at 198) as overly broad.

conferral of jurisdiction to the Court. The ICTY's reading of Article 41 of the Charter as not excluding any kind of measure to maintain or restore international peace and security, subject to a determination under Article 39, as long as it is not military in nature,[9] has by now even paved the way for general norm-creation by the Council that could arguably be called 'legislation'.[10]

Even though Tomuschat might therefore be right, in principle, that settlement by the Court would be more appropriate than settlement through binding determination by the Council – a political rather than legal claim – his remedy is worse than the disease. It will allow the Security Council to go yet another mile where it already has gone so many. Surely the permanent members of the Council will cheer Tomuschat's suggestion: with only four more votes they could impose (compulsory) jurisdiction on the rest of the world, and strengthen their exceptionalist position by refusing subordination to such jurisdiction for themselves.

Another noteworthy consideration of sovereignty as a guiding concept in matters of jurisdiction lies with the doctrine expounded in the *Monetary Gold* case, where the Court refused to render a judgment deciding a dispute between the UK and Italy because to do so would be to rule, necessarily and inevitably, on a dispute between Italy and Albania.[11] This doctrine of the 'indispensable (third) party', well settled in the Court's jurisprudence (at 603–607), though somewhat variable in terms of application, is based on the maxim *nemo dat quod non habet*: states that have consented to the Court's jurisdiction cannot authorize it to rule on the legal position of a state not before the Court.

An interesting question arises whether the doctrine would apply to the settlement of disputes with international organizations, regarding which the requirement of consent applies *mutatis mutandis*. On this score, Tomuschat argues that the doctrine can have no application in relation to acts of (other) organs of the United Nations. The short answer as to why not is that the United Nations is not 'a sovereign entity' and that, as the Court is one of its organs, the United Nations is 'debarred from arguing that no judicial determination on its rights and obligations may be carried out in its absence' (at 604). An example of this might relate to the conduct of the personnel of a UN peacekeeping operation, where the lawfulness of such conduct constitutes the subject-matter of the case before the court. Since such conduct is attributable to the UN,[12] a determination of unlawfulness by the Court would necessarily imply a finding of responsibility of the UN. Furthermore, he claims, given the UN's involvement in many of today's international crises, the Court's judicial function could be seriously damaged by recourse to the doctrine.

[9] Cf. ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadič a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 33–36.

[10] Cf. SC Res. 1373 (2001), paras 1–2; SC Res. 1540 (2004), paras 1–3.

[11] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment of 15 June 1954, ICJ Reports (1954) 19, at 32.

[12] Cf. ILC Draft Article 4, Responsibility of International Organizations, in Report of the International Law Commission (2006), UN Doc A/61/10. at 253–254, available at http://untreaty.un.org/ilc/reports/2006/-2006report.htm.

At this point a reference to Judge Schwebel's dissent in the *Lockerbie* case would have been opportune. Schwebel quite forcefully argued that the Court cannot decide the legality of a Security Council decision in its absence, considering also that the Court's judgment would not bind the Council in view of Article 59 of the Statute.[12] Of course, Tomuschat's observation appears geared towards the lawfulness of specific acts or admissions by UN bodies or agents, rather than the question of the validity of the legal acts of its organs and the possibility of review thereof.[13] On the relationship between the Court and the Council, he bluntly states (at 601): 'The ICJ may not issue orders which contradict binding resolutions of the Security Council.' How these two viewpoints can be reconciled remains somewhat obscure.

Where a violation of international law by the UN would flow directly from a binding decision of the Council, one would expect the Court to be able to 'contradict' and order cessation of wrongful conduct, restitution and, possibly, guarantees against repetition.[14] Moreover, the interpretation and manner of application of Security Council resolutions will probably not be grasped by the doctrine. However, if the validity of a resolution were challenged, and hence its very existence questioned,[15] the absence of an express power of review of the Court would appear to counsel caution in deciding any such matter in proceedings to which the UN is not a party. In any event, the presumption of validity attaching to UN acts,[16] generally, will most likely prevent such challenges to be raised lightly or entertained by the Court in other than the most serious cases.

Tomuschat, in his commentary, does display a certain tendency to adopt positions without providing analysis or authority. For example, he argues as to the US withdrawal from the Optional Protocol to the Vienna Convention on Consular Relations, '[s]ince that instrument contains no termination clause, it is doubtful whether the intended withdrawal will produce the desired effect' (at 619, fn. 169), but there is no further exploration of why that would be so. On another occasion, he suggests that '[i]t is well known that the Court shies away from resorting in its case law to the notion of *jus cogens*, due, in particular, to French resistance to that notion' (at 606, fn. 77), but that seems quite a striking claim to make without further evidence. These are, however, just quibbles. The breadth of topics discussed, the arguments recounted, and the detailed discussion of case-law, amply make up for such indiscretions.

[13] On which see again Judge Schwebel's dissent, *ibid.*, at 73–81.

[14] Cf. G. Gaja, *Fifth Report on the Responsibility of International Organizations*, UN Doc. A/CN.4/583, 2 May 2007, 7 (para. 17, and proposed draft Article 33), 13 (para. 43), 16 (proposed draft Article 38).

[15] Norms do not have a real existence independent of their validity. Validity is the specific form of 'existence' of norms and a non-valid norm is a *contradictio in adiecto*. (H. Kelsen, *Reine Rechtslehre* (2nd ed., 1960), at 9–15; H. Kelsen, *Allgemeine Theorie der Normen* (1979), at 2.)

[16] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962) 151, at 168; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports (1971) 16, at 21–22 (para. 20). But note that the Court pointed to the possible existence of fundamental defects, such as acting *ultra vires*, in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports (1996) 66, at 82–83 (para. 29).

4 Pellet on Sources (Article 38)

What a devilishly difficult task it is to write a commentary on Article 38 of the Statute! If one writes too much, one stands accused of having written a monograph on the sources of international law; if one writes too little, one will be called out for not having considered the article's connection to the sources of international law. The editors chose well with Alain Pellet: an *exposé* on this topic requires someone with his experience and careful attention to detail.

As we see it, the task for a commentary on Article 38 is threefold. First, its strongest emphasis must be placed on a description of the function of Article 38 as the 'applicable law' clause of the International Court of Justice. Second, the author will be expected to provide a rather more general description of the formal sources of international law. Third, a commentary on what arguably is the most fundamental provision of the Statute must also raise, and have an awareness of, the theoretical problems which Article 38 and the whole notion of sources brings to the fore, both with respect to its more pragmatic function as the 'applicable law' clause of a tribunal and in relation to the problems associated with the creation of norms (the sources of law). How, then, has Pellet fared in this conceptual minefield?

The chapter can rightly be called the 'lead contribution'[17] in the work as a whole. Not only is the topic singularly important, but Pellet's approach to it is characteristic for the entire book. It therefore seems understandable that such a contribution will take up more space than others; still, 115 pages is quite a handful. Pellet organizes his quasi-monograph as follows: first, he explains the drafting history of the provision (at 680–693); second, the function of Article 38 *as an applicable law clause* of the Court (at 693–735); and third, sources *as such* (at 735–792).

Pellet here correctly distinguishes between the two roles of Article 38. On the one hand, Article 38 is 'only' the applicable law clause (*qua lex arbitri*) of the International Court of Justice; on the other hand, Article 38 is cited simply too often by scholarship as (at least) the epistemological 'fount' of the formal sources of international law *as a whole* to be ignored by a commentary. Because traditional scholarship has this (falsely) heightened expectation of Article 38, Pellet has had to consider customary international law (at 748–764), for example, as such rather than as *lex arbitri*. However, even in doing so he sticks colsely to the Court's use of that source.

Yet the closeness of Pellet's arguments to the 'past practice' of the Court in these matters (salutary though this may be in a commentary of this sort) has an unwelcome side. For example, he approvingly cites Richard Kearney: 'In short, "Article 38(1) has not caused any serious difficulties … A reasonable number of flaws have been detected by commentators – *none of which have hampered the Court*."'[18] (at 703,

[17] The late Robert Jennings' introduction (at 3–37) falls into a different category.

[18] Citing Kearney, 'Sources of Law and the International Court of Justice', in L. Gross (ed.), *The Future of the International Court of Justice* (1976) 610, at 707.

emphasis added) In doing so, he expresses two things at the same time. Article 38 is seen as a mere element in the *Rechtserzeugungsbedingungen* of the Court's judgments (in their function as individual norms) – which we consider to be the correct understanding. But there is in this passage also a troubling equivocation of what actually happens (the Court's institutional behaviour) with what ought to happen (general law): *ens et bonum est commune*. The factual attitude of the Court does not answer theoretical questions; it seems as though Pellet wants to make us believe that this *modus operandi* at the very least obviates the need for further discussion in a commentary, even if it does not actually solve the theoretical problem of the formal sources beyond the Court's concrete norm-creation. This is also manifested in Pellet's approach to the conditions for law-creation themselves. Article 38(1) does not mean that 'International Law [is] the *Only* Basis for the Court's Decision' (700, emphasis added). Statements such as this can be seen as confusing the empowerment to create norms with the law of causality. Such a view leads to *Begriffsjurisprudenz* – but the decision of the Court is not a logical deduction from 'international law'. *Despite being subject to legal conditions*, positive norm-creation is always a constitutive decision depending on an act of will which cannot be replaced by cognitive processes analysing the particular conditions for law-creation.

This, then, is the only slight qualm that one could have with Pellet's contribution: where he touches upon the theoretical aspects of his topic – though we are happy that his contribution contains no shortage of theoretical arguments (e.g. at 700–704, 714, 762, 767, 769) because Article 38 and its relationship with the formal sources of international law is an inherently theoretical topic – he is a little apodictic and sweeping in the theoretical decisions upon which he bases his doctrinal arguments. This may very well be unavoidable within the framework of a commentary, but at crucial points we would have preferred to be presented with an overview of the theoretical options and their effects on doctrine.

One example of this may be found in Pellet's implicit acceptance of the Court's construction of its role in customary international law-making. This may be the most important aspect of its work, because writers on international law rely to a large degree on tribunal jurisprudence (foremost, of course, the Court's) for their proof of what is international law. Strictly speaking – not taking into account the possibility that international law is a common law where judgments engender *general* norms – the vast majority of these judicial pronouncements must be references to what the tribunal in question believes to be customary international law on the subject. The judgments serve as *evidence* of customary international norms and are typically not probed by the writers (judicial pronouncements are taken as probative of customary international law's validity). This means that the process preceding this 'taking' by scholarship – the process whereby the Court obtains its view of what is customary law – is absolutely crucial for the vast majority of international legal scholarship today. If, as we would argue, the Court's work needs to be questioned more often than is the case, then scholars cannot rely on jurisprudence to the degree they have been doing so far. In this sense, the commentary under review also tends to exhibit this unquestioning attitude.

5 Kolb on 'General Principles of Procedural Law'

Robert Kolb writes on what is termed 'general principles of procedural law'; a sub-species, presumably, of those principles in Article 38(1)(c). The very notion of including a section on these 'principles' is fraught with theoretical difficulties, because here we have a commentary on the Statute that seems to rely on something outside the Statute – perhaps even outside positive international law.

The problem with 'general principles' lies not with their substantive content, but in how their existence is justified, and how the 'source' is traced. Kolb's commentary cannot be faulted for concentrating on the substance of the principles – and he does so admirably – but he can be faulted for not discussing the theoretical problem, for devoting the introductory pages to a classification (at 794–799) rather than a justification, for the apodictic assumption of the possibility and of its origin in natural law.

For if we were to trace the outlines of a more critical introduction, one that discusses theory rather than avoids it, what would we find? We would find Kolb arguing that the origin of principles lies in natural law: 'From the objective nature of the judicial function … flow a series of imperative rules of procedure', but natural law's influence has become idea-giving, for he continues that these rules 'are binding on the Court by virtue of the Statute' (at 798). Yet the first part of the sentence remains revealing: things have an 'objective nature' which needs only to be discovered by man. Norms, the sentence implies, flow from this nature immediately. As they are conceived here, the idea of general principles *cannot be conceived outside the natural law context* – and hang together with the fate of natural law. On this (orthodox) view, no 'positivist' international lawyer ought to have false ideas about what he or she is supporting – natural law in yet another guise.

On a positivist reading, what *can* 'principles' be other than subjective values imported by scholars under the guise of the absolute, the objective? They can, in essence, be two things: they can be generalizations by legal science of a mass of norms of more specific scope of application; or they can be norms of a particularly wide material scope of application – whatever source they may belong to. Principles are, however, not something categorically different to other norms, as Kolb also points out (at 794–795).

In all cases, the relationship to the positive treaty norms of the Statute is limited. Kolb uses the term in the sense of a scientific generalization when he constructs the principle of procedural equality from a mass of articles from the Charter and Statute (at 800). In this case – if 'principles' are a scientific generalization – he is completely within the bounds of legal science strictly conceived. But one must be careful not to draw *legal* conclusions from his *scientific* generalizations *vulgo* principles – they remain constructs of scientists' minds and do not *as such* have or acquire normative status. Conceived as natural law or as a third formal source of international law,[19] the norms by definition come from another legal order than the international treaty law of the Charter and Statute. As such – and even if 'general principles' and treaty law were coordinated legal sources of the same legal order – they postulate the same claim to

[19] Cf. Pellet on Article 38(1)(c).

be valid and cannot change the procedural treaty norms. Actions or omissions of the Court that comply with the Charter and Statute but violate one of the general procedural principles would by definition not be illegal under the Court's procedural law (leaving aside the question of the consequences of *ultra vires* acts of the Court).

But the problem is compounded (or eased) by the existence of Article 38(1)(c). Whatever the status of 'general principles of law' as a formal source of international law beyond the applicable law clause of Article 38,[20] its inclusion changes the legal situation. In effect, as Hans Kelsen notes, the result is 'that the Court is authorized to apply a rule *which the Court considers to be* a general principle of law … which implies an almost unlimited discretion'.[21] '[*Es handelt sich um Normen,*] *die* dadurch *von dem Internationalen Gerichtshof anzuwendendes Völkerrecht werden, daß Art. 38 § 1c den Internationalen Gerichtshof ermächtigt, sie anzuwenden.*'[22] The stipulation in Article 38 has resulted in the Court having discretion to create the general principles as it applies them – but does this also hold true for the Court's procedure? An argument could be made that the Court is a creature born of the Charter and Statute – the basis of its procedure is treaty law. On this view, it could be argued that the applicable law clause in Article 38 determines the procedure, which would be exhaustively laid down in the treaty instruments.[23] But this review is not the place for such a discussion. Nevertheless, even if one does not share these doubts, the theoretical problems are real. Kolb's commentary on such a problematic 'source' should, in our view, have discussed them.

6 Chinkin on Intervention (Articles 62 and 63)

The critical requirement of consent in establishing the jurisdiction of the Court accounts for its discussion, among others, in the commentaries on the provisions of intervention by Christine Chinkin. The history of intervention before the Court under Article 62 of the Statute is one of failure to provide clear guidance on the exact purpose of intervention, its admissible scope, the legal status obtained and its repercussions for the position of the states already before the Court. Thus controversies have abounded over the requirement of a jurisdictional link, status of party or non-party, and the question of entitlement to appoint a judge *ad hoc*. Chinkin suggests that the Court 'did not have to face these conflicting views before the Chamber acceded to Nicaragua's

[20] *Ibid.*

[21] Kelsen, *supra* note 5 , at 393 (emphasis added).

[22] '[They are norms] of international law to be applied by the International Court of Justice *only because* Article 38(1)(c) empowers the International Court of Justice to apply them.' H. Kelsen, *Allgemeine Theorie der Normen* (1979) 99 (authors' translation).

[23] Kammerhofer, 'The Binding Nature of Provisional Measures of the International Court of Justice: The 'Settlement' of the Issue in the *LaGrand* Case', 16 *Leiden Journal of International Law* (2003) 67, at 82–83; Kammerhofer, 'Scratching an Itch is not a Treatment. Instrumentalist Non-theory *contra* Normativist *Konsequenz* and the Problem of Systemic Integration', in G. Nolte and P. Hilpold (eds), *Auslandsinvestitionen – Entwicklung großer Kodifikationen – Fragmentierung des Völkerrechts – Status des Kosovo. Beiträge zum 31. Österreichischen Völkerrechtstag in München* (forthcoming, 2008).

request' (at 1357). Yet this misconstrues the role played by the Court in all of this, because its rejection of prior requests to intervene resulted precisely from a lack of agreement among the judges on the proper scope of intervention (cf. 1346, 1365). When the Chamber established to decide certain disputes between El Salvador and Honduras granted Nicaragua permission to intervene in respect of the legal regime in the Gulf of Fonseca,[24] this was possible only by ignoring the contradictions inherent in the Court's case-law.

The case between E1 Salvador and Honduras turned, among others, on the legal status of the Gulf of Fonseca. That Gulf was subject to differing claims by the two states: 'a régime of community, co-ownership or joint sovereignty' or 'condominium' (EI Salvador), or 'a community of interest' generating 'a special legal régime' (Honduras). Nicaragua as the third riparian state claimed an interest of a legal nature, and the Chamber accepted that such interest would be affected by its decision.[26]

That Chamber judgment, which the Statute considers as rendered by the Court as a whole (Article 27 Statute), constitutes the watershed that might allow for broader use of the provision on intervention, Cutting a number of Gordian knots as to the proper scope of intervention, the Chamber decided that the purpose of intervention is to inform the Court of interests and rights 'in order to ensure that no legal interest may be "affected" without the intervener being heard' and not to seek 'a judicial pronouncement' on an intervener's own claims; that the consent of states pursuant to Article 36 establishing the jurisdiction of the Court renders those states parties to the case in the sense of Article 59 and that 'no State may involve itself in the proceedings without the consent of the original parties'; that a jurisdictional link between the original parties and the intervener is not required, since the consent of states in becoming parties to the Statute accounts for the exercise of powers by the Court under the Statute; and finally that an intervening state does not become a party and hence will not be bound by the eventual judgment of the Court.[25]

And yet there is something unsatisfying about these findings, however sound the reasoning would appear to be. Not surprisingly, this feeling is occasioned by the relative character of the Court's jurisdiction, based as it is on the consent of the states concerned. If, as the Chamber found, the Gulf of Fonseca constitutes a historic bay subject to the joint sovereignty or joint entitlement of the coastal states,[26] would this not signify that Nicaragua's legal interest formed, at least jointly with the other coastal states, 'the very subject-matter of the decision'? And if such were the case, would a non-party status, the intervener not bound but also not able to invoke rights as against the parties, be sufficient to allow the Court to decide the matter? One would think not and perhaps this might explain the second thoughts two out of five judges of the Chamber expressed in arguing that Nicaragua was nevertheless bound.[27]

[24] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment of 13 September 1990, ICJ Reports (1990) 92.

[25] *Ibid.*, at 130–131, 133–135 (paras 90, 92, 95–100).

[26] *Ibid.*, at 119–122 (paras 67–72).

[27] *Ibid.*, at 619–620 (Declaration Judge Oda), and 730–731 (para. 208) (Separate opinion Judge Torres Bernárdez).

At various points Chinkin comments on the conflict and required balance between party autonomy and third party interests (at 1359, 1363, 1368). That conflict and that balance may well need to be reassessed when the interest of a legal nature of a third state constitutes 'the very subject-matter of the decision'. In some circumstances such a state might be better off invoking the protection of the doctrine expounded in the *Monetary Gold* case. If such a state nevertheless requests permission to intervene, it would be fully justified in arguing the necessity of party-status and the consequent right to appoint a judge *ad hoc*.[28] In putting forward its request, a would-be intervener would of course place itself at the mercy of the Court, which will have to decide whether the interest of a legal nature would be 'merely' affected or would constitute the subject-matter of its future decision.

At the other end of the spectrum of intervention we find a right to intervene under Article 63 of the Statute in respect of the construction of a convention to which the intervening state is a party. The legal status of a state availing itself of this right is relatively straightforward, in that the interpretation provided by the Court will be equally binding. As this is spelled out in the text and the purpose of such intervention is limited to questions of interpretation, the controversies over party or non-party status, and hence over jurisdiction, have largely passed by Article 63. As Chinkin notes, 'the required nexus between the intervener and the parties is supplied by the common membership of the relevant treaty and no other jurisdictional link is required' (at 1385). Her use of the word 'other' is not intended to suggest the requirement of a jurisdictional link under the relevant treaty, since she points to the intervention of Cuba, in the *Haya de la Torre* case,[29] which could not establish any relevant basis of jurisdiction.

A matter exposing some ambiguity concerns the stipulation in Article 63(2) that the interpretation will be *equally* binding on the intervening state. In this respect Chinkin notes that Article 59 of the Statute only provides for the binding force of a decision in respect of the particular case and that therefore the *equally* binding interpretation 'must also be limited to the judgment in the case, for it would be illogical for a third party to have a greater commitment under a judgment than the parties' (at 1391).

Though sensible enough *as a matter of logic*, at the same time an *equally* illogical consequence arises when an intervening state has no tangible or concrete interest in the case before the Court. In such a case, which more likely than not would be the normal case, an intervening state would remain free to pursue a different interpretation than that adopted by the Court in all later unrelated cases, i.e. *not particular*, to the decision at hand. In both situations, the case before the Court and later cases, the binding character of the interpretation given for the intervening state would be devoid of practical application.

Both forms of intervention provided for in the Statute, therefore, require an assessment by a third state as to the merits of an attempted intrusion into a case before the

[28] Earlier, see de Hoogh, 'Intervention under Article 62 of the Statute and the Quest for Incidental Jurisdiction without the Consent of the Principal Parties', 6 *Leiden Journal of International Law* (1993) 17, at 39.

[29] *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, ICJ Reports (1951) 71, at 76–77.

Court. On the one hand, a successful intervention may provide it with an opportunity to influence the Court's decision to its advantage. On the other hand, its position in future cases may be compromised if matters do not quite turn out as anticipated. An assessment by third states may thus well be to rely on the effect of Article 59 of the Statute and their potential status as indispensable parties. Certainly, practice since Nicaragua's successful attempt – two requests for permission to intervene, one granted, one denied[30] – does not bode well for the prospects of intervention.

A somewhat disturbing feature of the commentaries on intervention is that the references to doctrine would appear not to have been kept up to date: no authors writing on the topic are referred to after 1995 (and sometimes before). Though completeness ought not to be pursued for the sake of completeness alone, we would have expected at least some references, even if not all authors could be considered 'most highly qualified publicists'. But perhaps this has simply been consequential upon delays in deliveries of contributions by some authors, as a result of which other authors that produced early on in the project's lifespan suffered from the dialectics of progress. Be that as it may, Chinkin's grasp of the legal issues concerned, extensive reference to case-law and sound conclusions make her commentaries a worthwhile read.

7 Conclusion

Perhaps the worst thing one can say about a book nowadays is that one's emotions are not stirred by it, for we forever demand new thrills, new experiences – yes, we would argue that there is such a thing as an academic adrenaline rush. In these cases, it is quite irrelevant whether the reader is thrilled to find his or her prejudices endorsed or whether they are challenged. But this is not such a book; it cannot be, it does not strive to be. It is the voice of orthodoxy, the voice that writes standard and reference works that has guided the publication. Is it a boring book? No, because it serves a particular purpose. We are to learn from it, we are to complete our knowledge. Its orthodoxy, its volume, its calmness are its capital and we believe that that is a good thing.

But there is a sting, one that arises not so much from the concrete contributions but from the traditional style of international legal scholarship, that cannot be avoided. It is what one might call 'difficulty avoidance scheme'. When Robert Kolb writes on general principles, for example, that the principle of the proper administration of justice is one 'of which no legal order can divest itself', he envisages it to serve in a problem-solving capacity:

> This ubiquity of the principle is essential to its function, which is to perform the task of a flexible 'fire-brigade' which the judge can invoke whenever he feels it necessary, because he finds no specific rule in the applicable instruments, namely the Statute and the Rules. (at 807)

[30] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, Application to Intervene, Order of 21 October 1999, ICJ Reports (1999) 1029; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Application for Permission to Intervene, Judgment of 23 October 2001, ICJ Reports (2001) 575.

The avoidance of problems is pragmatic: if one cannot find law, one will supplant one's subjective values for those the law does not have. This is, however, only a pragmatic solution, it cannot change the law – Kolb's 'fire-brigade' extinguishes the fire with 'make-believe water'.[31] This is the moral of the story from the much-misunderstood *Lotus* dictum:[32] if one cannot prove a norm, one cannot simply assume a norm's validity, just because it seems convenient or necessary.

In the end, is this book then all things to all people? No, but it is as close as one can get. It is limited, but it has to be. There is no doubt in our minds that this book is a standard work which anyone conducting research on the International Court of Justice will at least have to consult, if not actually cite.

[31] 'You never exactly knew whether there would be a real meal or just a make-believe, it all depended upon Peter's whim: he could eat, really eat, if it was part of a game, but he could not stodge just to feel stodgy, which is what most children like better than anything else; the next best thing being to talk about it. Make-believe was so real to him that during a meal of it you could see him getting rounder.' J. M. Barrie, *Peter Pan* (1911).

[32] *The Case of the SS 'Lotus' (France* v. *Turkey)*, Judgment of 7 September 1927, PCIJ Series A, No. 10, at 18.