V. THE COURT'S JURISDICTION

Emphasis has already been laid on the fact that the jurisdiction of the Court, like that of any international judicial or arbitral body, is based upon the consent of States. The application of this principle is however complicated as a result of the fact that the Court is a permanent institution.

In the first place, the Court is a treaty-based institution, created and regulated by the United Nations Charter and the Statute of the Court (which is in fact an 'integral part' of the Charter: Article 92); this means that the general scope of its jurisdiction, and the conditions of its exercise, are defined *ne varietur* by those instruments. Jurisdiction in this sense, relating to access to the Court, and to the general nature of the powers it possesses, is thus a function of the will of the body of States parties to the Charter and Statute, not of the will of the specific parties to a given dispute. The consent of the parties to the dispute cannot therefore abrogate or modify statutory provisions of this kind; it is in fact those provisions that determine how, for example, the necessary consent may be given for the creation of jurisdiction in specific cases.

Secondly, the jurisdiction of the Court may be, and frequently is, asserted on the basis of treaty instruments of a general nature conferring future jurisdiction over a range or category of disputes. When the instrument was concluded, no such disputes will have been in existence, but the possibility that such may arise will have been foreseen, and consent given in advance to the binding determination of them by the Court. When a dispute is subsequently brought before the Court on the basis of a clause of this kind, that advance consent creative of jurisdiction is still operative (assuming that the treaty has not been denounced), but it may well not be accompanied, at the time that the matter is brought to the Court, by actual contemporary consent or willingness to have that particular dispute settled by decision of the Court. The respondent State may therefore seek to deny that the general consent given in the past applies to the specific dispute, because, for example, it does not really fall within the category of disputes contemplated, or because any conditions attached to it have not been met in the specific case. The Court, in order to be satisfied that consent to its dealing with the dispute has actually been given, will have to analyse, in sometimes painstaking detail, the provisions of the relevant instruments in order to trace a link between the 'blanket' consent given by the respondent and the facts of the particular case. The principle remains simple: has the respondent State given consent to jurisdiction? Its application may however involve much subtle and complex argument.

A. JURISDICTION: STRUCTURAL LIMITATIONS

The most basic limitation on the Court's jurisdiction is that provided in Article 38 of the Statute: 'Only States may be parties to cases before the Court'. The reference is of course to sovereign States in the sense of the principal category of subjects of international law, and excludes the component States of federations, for example.

A case cannot be brought by or against a non-State entity, such as an individual, a non-governmental organization, or a multinational, even if the other party is a State and consents to the case being brought. Nor can an intergovernmental international organization (not even the United Nations itself) be a party, though the major ones are empowered to ask the Court for advisory opinions.

To be a party to a case, a State must also be one of those to which the Court is 'open', or having 'access' to the Court under Article 35 of the Statute. The principal category of States with such access is that of the members of the United Nations, but technically this is because they are automatically parties to the Statute of the Court (Article 35(1)). It is possible for a State to become a party to the Statute without joining the United Nations; Article 93(2), of the Charter provides that the conditions for this are to be laid down by the General Assembly, on the recommendation of the Security Council.[15] Furthermore, under Article 35(2) of the Statute, the Security Council is empowered to lay down the conditions on which other States not parties to the Statute may have access to the Court. Security Council Resolution 9 (1946) implements this provision, and provides for the deposit with the Secretary-General of a declaration accepting the jurisdiction of the Court and undertaking to comply with its decisions.

The application of these provisions is normally simple, inasmuch as it is generally evident at the outset of a case whether the parties are States having access to the Court;[16] and if one of them is not, then the case cannot proceed, even with the consent of the other party. If for example an individual attempts to bring a case before the Court (as frequently happens), the Registrar draws his attention to the provisions of Article 38, and no further action is necessary.

A similar limitation is imposed by the provisions of the Statute concerning the nature of the Court's judgment, which is 'final and without appeal'. The Court cannot, even at the request of the parties, give a provisional or conditional judgment (though it can give a declaratory judgment, confined, for example, to certain aspects of a dispute). For example, parties to a case before the Permanent Court of International Justice requested the Court to give an informal and non-binding indication of how it was minded to decide, so that they could negotiate a settlement on that basis; but the Court declined, on the basis that it had no power to give a ruling

[15] This procedure was followed for Switzerland (1946), Liechtenstein (1949), San Marino (1953), and Nauru (1987).

[16] An exception is the case of the *Application of the Genocide Convention (Bosnia and Herzegovina* v *Yugoslavia)*. Following the break-up of the former Socialist Federal Republic of Yugoslavia, for a time the new Republic of Yugoslavia (Serbia and Montenegro) was treated by the United Nations as the successor of the old Yugoslavia, and on that basis it was made respondent to the proceedings before the Court. On 1 November 2002, however, after the Court had indicated certain provisional measures in the case, and had given judgment dismissing certain preliminary objections, the new Yugoslavia was admitted to the United Nations as a new member. Yugoslavia filed an Application for Revision of the Court's judgment on the preliminary objections on the basis that this admission showed that it had not previously been a party to the Statute. The Court however dismissed the Application on the ground that this event was not a 'new fact' within the meaning of Article 61 of the Statute (see Section *vi.*C, p 21, below).

of this kind, which would be dependent for its implementation on the wishes of the parties.[17]

B. JURISDICTION IN PARTICULAR CASES

1. Special agreements and compromissory clauses

The simplest means of putting into effect the principle that jurisdiction is conferred on the Court by the consent of the parties is for two States that wish a dispute to be settled by the Court to enter into an agreement to that effect. This is the classic *compromis* or Special Agreement, used for many years prior to the establishment of the Court for the submission of a dispute to arbitration. Such an agreement will define the dispute and record the agreement of the parties to accept the Court's decision on it as binding—this last being theoretically unnecessary in view of the provisions of the Charter and Statute. It may also contain provisions as to the procedure to be followed (number and order of written pleadings, possibly waiver of the right to appoint judges ad hoc, etc.). Normally no jurisdictional problems arise in a case brought before the Court by special agreement, since the consent of the parties is real and contemporaneous, rather than given in advance and in general terms. When a special agreement has been concluded, the procedural step by which a case is brought before the Court, in technical language the seising of the Court, is the notification of the agreement to the Court. Whether this is done by one party or by both parties jointly, the essence of a case of this kind is that it is a joint approach to the Court, not an action commenced by one party against the other.

Where jurisdiction is asserted on the basis of some instrument other than a special agreement, the Court is seised unilaterally, by an application, indicating the subject of the dispute and the parties. The active State claims that the other party to the dispute has in the past consented to settlement of disputes of a particular category being referred unilaterally to the Court for settlement, and that the instant dispute falls into that category. In a case of this kind, the consent creative of jurisdiction will, according to the applicant, have been given in advance. It may take the form of a compromissory clause, that is to say a clause in a treaty providing that all disputes relating to the application or interpretation of the treaty may be brought by one or the other party before the Court by unilateral application. Alternatively, the treaty itself may have been concluded for the purpose of making advance provision for the settlement by the Court of all disputes (or certain categories of disputes) that may subsequently arise between the parties: a treaty of judicial settlement (often combined with a treaty of friendship or commercial relations).

If a case is brought before the Court by unilateral application, there is thus normally a pre-existing title of jurisdiction in the form of a treaty between the parties of this kind, or in the form of acceptances of jurisdiction under the 'optional clause',

[17] *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, PCIJ, Ser A, No 24,* at p 14.

to be discussed below. This does not mean, however, that an application that fails to specify such a pre-existing title is invalid; the Statute of the Court (Article 40) only requires an application to specify 'the subject of the dispute and the parties', and the Rules of Court (Article 38(2)) only require that it indicate 'as far as possible' the basis of jurisdiction relied on. Consequently, an application may be made which in effect invites the State named as respondent to consent to jurisdiction simply for the purposes of that particular case, a process known as *forum prorogatum*. At one time this possibility was being abused for political ends, applications being made simply for publicity purposes against States whose known attitude to judicial settlement made it certain that no such consent would be forthcoming. As a result, a special provision (Article 38(5)) was included in the Rules of Court in 1978 whereby an application of this kind is treated for procedural purposes as ineffective until the consent of the named respondent is forthcoming—usually it is not.

2. The 'optional clause' system

At the time of the drafting of the Statute of the Permanent Court in 1920, it was first envisaged that the new Court would have universal compulsory jurisdiction, in the sense that any State party to the Statute could bring before the Court, by unilateral application, any dispute whatever with another State party to the Statute. The necessary consent conferring jurisdiction would thus be given simply by accession to the Statute. However, it was soon realized that the majority of States were not ready for so radical an innovation, and the optional clause system was devised as being the furthest that it was then possible to go in the direction of compulsory jurisdiction. This system was carried over, without change of substance, into the Statute of the post-war Court, and it is in that context that it will be examined here.[18]

Under Article 36(2), of the Statute, a State may deposit with the UN Secretary-General a declaration that it accepts the jurisdiction of the Court for disputes in respect of a number of matters enumerated in Article 36 (in effect, all international legal disputes), 'in relation to any other State accepting the same obligation'. The intended effect of this was that those States that were ready to accept compulsory jurisdiction could do so among themselves, while other States would have to rely on obtaining the consent ad hoc of any State with which they might have a dispute, if that dispute were to be brought before the Court. There would thus simply be two classes of 'clients' of the Court, those within the 'optional clause' system and those outside it. This simple vision became complicated however as a result of the recognition by Article 36 of the possibility of making reservations to an optional clause declaration. Specifically, the reservations foreseen were 'a condition of reciprocity on the part of several or certain States' and acceptance 'for a certain time'. The simplicity

[18] Article 36(5) of the Statute of the post-war Court preserves, as between parties to that Statute, any declarations of acceptance of jurisdiction made under the PCIJ Statute: cf *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984*, p 392, para 14. (See also n 2 above.)

of the system was already compromised by this facility; but the question soon arose whether any *other* reservations were effective (eg, the exclusion of disputes of a specified type, or of disputes arising before or after a specified date). No reservation was challenged before the Permanent Court as being unauthorized by the Statute, and the inclusion of reservations became standard State practice. The prevailing view became that, since a State was free to decide to accept or not to accept the optional clause jurisdiction in its entirety, it was also free to accept it subject to whatever reservations it saw fit to make.[19]

Furthermore, Article 36(2) of the Statute employed the term 'reciprocity', and provided for acceptances of jurisdiction 'in relation to any other State accepting *the same obligation*'. If a State which had made a reservation to its acceptance brought proceedings against a State which had made none, was the jurisdiction of the Court affected by the reservation? The Permanent Court held that it was; that the respondent State could invoke the applicant State's reservation, or to put it another way, that the Court's jurisdiction was defined by the narrower of the two acceptances.[20] Some of the cases concern reservations that must necessarily operate bilaterally, for example the reservation limiting jurisdiction to disputes arising after a certain date: if a dispute arises after such date for one party to it, then it must equally do so for the other.[21] A more striking example of the application of this principle is afforded by the *Certain Norwegian Loans* case, in which the reservation made by France, the applicant, excluding disputes within the domestic jurisdiction of France could be turned against it by Norway, the respondent, so as to exclude a dispute on the ground that it was within the domestic jurisdiction of Norway.[22]

The consequence was that, instead of the simple system of universal compulsory jurisdiction within a limited group of States, foreseen by the draftsmen of the Statute, the jurisdiction of the Court under Article 36(2) became a complex network of bilateral relationships. The fact that two States have each made a declaration of acceptance no longer signifies that any dispute between them can be brought by either of them unilaterally before the Court, unless both acceptances are entirely without reservations. If that is not so, it is necessary to find the lowest common denominator

[19] See the statement in the report of Subcommittee IV/1/D of the San Francisco Conference that drafted the Statute of the post-war Court: UNCIO, vol 13, pp 391, 559. The League Assembly had taken the view as early as 1928 that reservations were not limited to those specifically contemplated in the Statute: see the resolution of the Assembly quoted in *Aerial Incident of 10 August 1999 (Pakistan v India), ICJ Reports 2000*, p 12, para 37.

[20] *Electricity Company of Sofia and Bulgaria, Judgment, 1939, PCIJ, Ser A/B, No 77*, p 64 at p 81; see also *Certain Norwegian Loans, Judgment, ICJ Reports 1957*, p 9 at p 24.

[21] See, eg, the Orders on provisional measures in the cases concerning the *Legality of Use of Force*, brought by Yugoslavia against the member States of NATO: for example, *Yugoslavia v Belgium, Provisional Measures, Order of 2 June 1999, ICJ Reports 1999*, p 124, paras 22ff.

[22] *Certain Norwegian Loans, Judgment, ICJ Reports 1957*, p 9: the reservation was in fact of the 'Connally' type (see below). Cf also the *Aegean Sea Continental Shelf, Judgment, ICJ Reports 1978*, p 3, where a reservation made by Greece (applicant) excluding matters of the 'territorial integrity' of Greece applied to exclude a matter concerning the territorial integrity of Turkey (respondent), though this case related, not to Article 36(2) of the Statute, but to the 1928 General Act for the Pacific Settlement of International Disputes.

of the jurisdiction *not* excluded by reservations on each side, and consider whether the particular dispute falls within it.

Another disruptive development, though one that has now more or less passed out of use, was the invention of the 'self-judging' reservation, designed to retain control of the extent of the jurisdictional obligation in the hands of the State making the declaration. In the form pioneered by the United States, and known as the 'Connally reservation', this was a reservation excluding matters within the domestic jurisdiction of the reserving State *as determined by the reserving State*. This reservation apparently enabled the reserving State to declare, even after the Court had been seised of a dispute on the basis of the optional clause declaration, that the dispute was a matter of domestic jurisdiction, and that the Court had therefore no jurisdiction. It was generally felt that a reservation of this kind was objectionable as being incompatible with the system of Article 36, and in particular with the principle of the *compétence de la compétence* stated in Article 36(6) (see below), but the Court nevertheless gave effect to the reservation. However, it has been convincingly argued that to rule that the reservation was invalid would lead to the consequence that the whole declaration of acceptance was invalid, so that the reserving State would still be able to escape the jurisdiction of the Court.[23]

There is however nothing illicit about attaching even extensive reservations to an acceptance of jurisdiction. The Court has had occasion to emphasize the 'fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law'.[24] The fact that a reservation to an optional-clause declaration excludes jurisdiction over acts of which the legality may be doubtful does not render the reservation invalid; the reservation may have been made specifically because there is doubt about the matter, and this does not mean that the reserving State is claiming a licence to commit wrongful acts with impunity. This is another application of the principle that, since a State is free not to accept the jurisdiction of the Court at all, it must also be free to decide for itself what limitations it will impose on such acceptance as it does consent to make.

C. JURISDICTION AND ITS EXERCISE

In principle, if the Court finds that it has jurisdiction to entertain a particular case, it is under a duty to exercise that jurisdiction, to the extent that it has been conferred and to the extent of the claims of the parties before it (the rule *ne ultra petita*). In a few

[23] See *Certain Norwegian Loans, Judgment, ICJ Reports 1957*, p 9, Separate Opinion of Judge Lauterpacht, p 34 at pp 56ff. This was on the basis that it would not be proper to 'sever' the reservation from the acceptance, since to do so would be to impose on the State concerned an obligation that it had clearly not consented to accept. The European Court of Human Rights, on the basis of a virtually identical provision in its constituent instrument, has however taken a different view on this point: see *Belilos* v *Switzerland*, Judgment of 29 April 1988, ECtHR, Ser A, No 132 (10 *EHRR* 418), and *Loizidou* v *Turkey (Preliminary Objections)*, Judgment of 23 March 1995, ECtHR, Ser A, No 310 (20 *EHRR* 99).

[24] *Fisheries Jurisdiction (Spain* v *Canada), Jurisdiction of the Court, Judgment, ICJ Reports 1998*, p 432, para 55.

cases, the Court has however found that, even before inquiring into the existence of jurisdiction, it sees reasons for not exercising it. One example of a category of cases of this kind is where to decide the case would involve deciding the legal situation of a State not a party to the case (the *Monetary Gold* principle, examined further in Section VII below). Another is where any judgment given would be ineffective, because the legal situation is such that the decision would have no 'forward reach',[25] or because the claims of the applicant have in effect been satisfied, so that the case has become 'without object' or 'moot'.[26] Since a refusal to exercise jurisdiction would normally be a renunciation of the very function of the Court, these cases are however highly exceptional.

D. VERIFICATION OF JURISDICTION AND ADMISSIBILITY: PRELIMINARY OBJECTIONS

A well-established principle of the law relating to international arbitral and judicial proceedings is that a tribunal (arbitral or judicial) has power to decide, with binding effect for the parties, any question as to the existence or scope of its jurisdiction. This principle is known as that of the *compétence de la compétence*, the jurisdiction to decide jurisdiction. It is in fact inherent in the concept of consensual jurisdiction: if a party, having consented to dispute settlement by a third party, were then to claim the right to determine for itself the extent of the third party's jurisdiction, it would be in effect withdrawing the consent given.

The principle is stated as applicable to the Court by Article 36(6) of the Statute: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'. The text makes it clear that if the two parties agree on the extent of jurisdiction, the Court can and must accept that agreement (provided the question is one of consensual jurisdiction—see above); and that the decision of the Court on a jurisdictional question is binding on the parties.[27] It should however be made clear that the matter is not merely one of application of the Statute: the principle of the *compétence de la compétence* is a general one, which would operate even if Article 36(6) were not included in the Statute.

The Court must exercise this power in any case in which the existence of its jurisdiction is disputed. It is not merely debarred from *deciding* a case in which the parties have not conferred jurisdiction upon it by consent: it may not even entertain it, that is to say begin to receive written or oral argument upon it. The existence of a special agreement will of course guarantee jurisdiction; in the case of an application, the ground of jurisdiction relied on will normally be indicated (and if it is conceded

[25] *Northern Cameroons, Judgment, ICJ Reports 1963*, p 15 at p 37.

[26] *Nuclear Tests (Australia* v *France), Judgment, ICJ Reports 1974*, p 253, paras 55ff.

[27] Note that the matter is 'settled' by a 'decision', and under Article 59 of the Statute the decision has 'binding force' for the parties in respect of that particular case.

that there is no pre-existing jurisdiction, the case will not proceed, as explained above). Sometimes the attitude of the respondent State in disputing jurisdiction is fully justified: the applicant State may be trying to extend a limited acceptance of jurisdiction by its opponent to cover a dispute of a kind that was never contemplated in the instrument relied on. Sometimes, on the other hand, the respondent is trying to evade its obligation to accept settlement of the dispute by the Court because the ruling, or even any discussion of the matter before the Court, is likely to cause political embarrassment.

A State named as respondent that considers that the case has been brought without a jurisdictional title will normally raise this at an early stage, and the usual procedure is to file a 'preliminary objection', defined by the Rules of Court as 'Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits . . .' (Article 79(1)). Such an objection is usually presented in response to the Memorial filed by the applicant (though it may be filed earlier). Objections to jurisdiction are of course denials that the respondent State ever gave its consent to the particular dispute being brought before the Court, or that the particular dispute falls within a category of disputes for which it did accept jurisdiction. Objections to admissibility are less easy to define: they include the contention that the applicant lacks *locus standi* (ie, has no legally protected interest), that local remedies have not been exhausted; that the case is, or has become, 'without object' or moot; that the presence as a party of a third State is essential to the proceedings, etc.

In accordance with the principle mentioned above, the effect of a preliminary objection is that the proceedings on the merits of the case (the actual dispute brought before the Court) are suspended (Rules, Article 79(3)), and will never be resumed if an objection to jurisdiction is upheld (some objections to admissibility may be 'curable' and make the continuation of the proceedings possible after certain steps have been taken). A separate phase of the proceedings is opened to deal with the objection: the applicant has the opportunity of responding in writing to the objection, in a pleading entitled 'Observations', and in the subsequent oral proceedings the respondent speaks first to present its objection, and the applicant replies. This is the application of a principle of procedural law, *in excipiendo reus fit actor* (by submitting an objection the defendant becomes the plaintiff). The Court may uphold an objection or reject it; but it may also 'declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character' (Article 79(7)). This possibility, introduced in the revision of the Rules of 1978, is still somewhat obscure, but its effect is apparently that the objection is not determined at the preliminary stage, but may be re-presented and re-argued along with the merits.