

**PROCEEDINGS OF THE PUBLIC PART  
OF THE ANNUAL GENERAL MEETING**

**1 November 2013**

**held in the Historic Reading Room of the Peace Palace,  
Carnegieplein 2, 2517 KJ The Hague**

The public part of the Annual General Meeting was presided by the Society's Chairman, prof.mr dr W.J.M. van Genugten. The introductions and the discussion set out below represent the written report of what took place during the meeting and do not attempt to replicate literally what was said by the authors of the papers and the other participants in the discussion.

**1. Introduction by Prof.dr R.C.H. Lesaffer**

The 19th-century international peace movement sprang from the reaction against the devastation and horror the Napoleonic Wars and the War of 1812 had wrought. It had its roots in Anglo-American nonconformist protestant circles, but quickly spread over the globe and became more pluralist and then secular. All through the century and beyond, British and American peace activists dominated the movement and set its agenda. During the last quarter of the century the peace movement gained more political influence thanks to its alliance with the emerging discipline of international law. This was, again, particularly true for Britain, and most of all, the United States. Two major points stood out on the agenda of the 'peace through law' movement: disarmament and arbitration.

Whereas the movement could attain very little to nothing in relation to disarmament in the years before the Great War, the movement found allies in political circles to foster the cause of arbitration. In the United States, Britain and the Latin-American Republics, arbitration moved up the agenda of foreign policy makers and diplomats after the successful Alabama Award in 1872. The Alabama Case had shown arbitration to be an appropriate instrument to manage tactical disputes among States that wanted to avoid strategic clashes.

In 1899, the cause of 'peace through law' scored an unexpected success. The Hague Conference, which first had been called by the Russian government for reasons of high power politics, had – to a large extent thanks to the endeavours of the Russian international lawyer Fyodor Martens – been hijacked for the 'peace through law' agenda when these reasons dissipated. One of the main outcomes was the establishment of the Permanent Court of Arbitration at The Hague. In 1903, the American industrialist turned philanthropist, Andrew Carnegie, made a lavish gift to build a 'Temple of Peace' for the Court at The Hague. It can be said, with the benefit of hindsight, that this set the destiny of The Hague as legal capital of the world in stone.

To Carnegie and many other peace activists, the foundation of the Permanent Court was an important step towards banning [eliminating?] war and replacing it by arbitration and adjudication. As events would show, this was not to be. Over the following years, the peace movement proved unable to influence the world of high

diplomacy and turn it away from its course of confrontation or from the armaments race. But at The Hague, a seed was planted which would survive the great conflagration of 1914-1918 and start to grow after 1919, the seed that carried the promise that international justice can be an alternative for war and that, sometimes, right would win over might.

## 2. **Introduction by Drs J.B. Vervliet**

A clear nineteenth century historical development of international arbitration finds its conclusion in the Hague Peace Conferences of 1899 and 1907. In the 1899 and 1907 Hague Conventions the so-called Convention for the Pacific Settlement of International Disputes is essential. The phrasing and vocabulary in International Law whenever it deals with pacific settlement of international disputes thereafter originates by and large from this epoch. The decade of the 1920s ending with the outlawing of war in the Kellogg-Briand Pact and the General Act for the Pacific Settlement of International Disputes of 1928 is sometimes neglected but highly interesting. The political arena of the United Nations and the political positions taken by States after World War II have resulted in prioritising the phenomenon of political negotiations for the resolution of disputes over settlement by law, until the revival of pacific settlement of international disputes by arbitration and adjudication since the 1990s. A central element remains the role the 'Optional Clause' has played, either positively or negatively, in the worldwide, partial or full acceptance of the jurisdiction of the International Court of Justice.

## 3. **Introduction by Dr J.H.A. van Loon and Ms. S. De Dycker, LL.M.**

### **Dr J.H.A. van Loon**

First of all, Stéphanie de Dycker and I would like to thank the board of the KNVIR for their invitation to write this *Preadvies* on *The Role of the International Court of Justice in the development of Private International Law*. I should add that I might not have accepted the invitation originally extended to me during this rather busy transition period following my retirement as Secretary General of the Hague Conference on Private International Law, if I had not had the good fortune of discovering the article written by Stéphanie De Dycker, then law clerk at the International Court of Justice, entitled "Private International Law Disputes before the International Court of Justice", published in 2010 in the *Journal of International Dispute Settlement*, and if she had not kindly agreed to write the *Preadvies* with me.

Before we start this short presentation of our *Preadvies*, I may perhaps put a brief footnote to the first point of discussion raised by Professor Lesaffer in his interesting *Preadvies* concerning the origins of The Hague's position as "legal capital of the world" (an *epitheton* sometimes ascribed to Boutros Boutros Ghali – who in fact has referred to The Hague as the "Judicial Capital of the United Nations", which is not quite the same!). The reason for this footnote is that the origins of the first Peace Conference are not unrelated to The Hague's role as the Mecca of Private International Law, a role which began in 1893.

In a letter to Prof.dr. H.T. Colenbrander published in 1913, Tobias Asser explained the choice of The Hague for the first Peace Conference: "The Czar [...] hesitated [...]"

between Brussels and The Hague. De Martens, his adviser in everything concerning the Peace Conference, pleaded for The Hague and with this brought forward, an argument, in favour of The Hague, that in 1893 and 1894 the Conferences on Private International Law, attended by De Martens as first Russian delegate, were held there, owing to which, as he said, the suitability of the Netherlands and the Dutch for the organisation and guidance of such gatherings had been proved. As De Martens wrote me then, that argument was the decisive factor in favour of The Hague [...] [W]hen the Dutch Government, in 1892, upon my suggestion, applied to the other European Powers inviting them to a Conference to be held at The Hague that was to endeavour to draft a codification of Private International Law, it was unable to foresee what would arise from this in the future; actually, however, this did have as a result that, in the international sphere, The Hague has acquired an exceptional significance.”<sup>1</sup>

Two further preliminary points:

Firstly, unfortunately, the published *Preadvies* is not based on the latest, corrected, version of our text, but on an earlier version. It contains several small linguistic and stylistic mistakes, and a few substantial errors. The board of the KNVIR has kindly agreed to publish the correct version on the KNVIR website.

Secondly, by way of clarification: at pp. 81- 82 we explain that a State may bring cases before the International Court of Justice either because it has been *directly* affected by an international wrongful act committed by the other State, or through diplomatic protection, which would then require the exhaustion of local remedies. This might create impression that diplomatic protection could not *also* be based on the violation of a treaty, which is in fact quite possible and which frequently happens. In that case the State is, again, directly affected and exhaustion of local remedies is not a prerequisite for an action before the International Court of Justice.

#### **S. De Dycker, LL.M.**

Thank you very much. It is a great honour for me to have the opportunity to speak before such an expert audience on a topic that I have found fascinating for some time now. I will start this brief introduction with some general remarks, and then turn to the concrete contribution of the case law of the International court of Justice to the development of private international law.

The idea behind this topic is the increasing awareness that although public international law and private international law are different techniques, they are not operating in different universes: there are, to the contrary, many interactions between the two and the case law of the International Court of Justice illustrates this in many respects.

The magnitude of such interaction depends on the concept of private international law one considers. For the purposes of this [study](#), private international law refers to (i)

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<sup>1</sup> Quoted in A. Eyffinger, *T.M.C. Asser [1838-1913] Founder of The Hague Tradition*, The Hague, 2011, p. 48

E.L. van Praag, 29-1-14 19:52

**Opmerking [1]:** perhaps "preadvies" instead of "study"?

conflicts of laws, (ii) conflicts of jurisdiction, (iii) recognition and enforcement of foreign judgment, and (iv) administrative and judicial cooperation. Based on this definition, the number of judgments directly deciding a private international law issue is rather limited: One can basically refer to the cases of the Permanent Court of International Justice regarding *Serbian loans* and *Brazilian loans* as well as the *Boll* case and the more recent *Lugano* case (which was discontinued) of the International Court of Justice. These cases are analysed in section 1 of chapter II of our *preadvies*. This study however also examines other cases that are at the crossroads between public international law and private international law. Indeed, although they do not directly concern a private international law issue, these cases turned out to contribute, indirectly, to the development of private international law. These cases are examined in section 2 of Chapter II of this *preadvies*).

As a last general remark, I would like to stress that the International Court of Justice decides in accordance with international law, as provided in article 38 of the Statute, thereby excluding the application of national law. The analysis of the case law shows, however, that national law *de facto* plays a role in the case law of the Court: for instance, the International Court of Justice very frequently compares different national laws and/or national courts' practice, as was seen in the recent *Germany vs. Italy* case.

I will now turn to the contribution of the International Court of Justice and its predecessor to the development of private international law. Early on, in the *Serbian loans* and *Brazilian loans* cases, the Permanent Court of international Justice offered a modern view of the relationship between public international law and private international law, saying essentially, that the question of determining the applicable law to a contract between two States is a question of private international law and that, while private international law rules are part of national law, some of them are found in conventions, thereby having the character of public international law. The Permanent court also insisted on the role of party autonomy in the determination of applicable law as well as that of public policy.

In the *Boll* case, the International Court of Justice highlighted the role of policy objectives in private international law rules. In its analysis, the Court distinguished between the policy objectives behind the 1902 Hague Convention on guardianship of infants and that of the Swedish national law on protective upbringing. In the Court's view, the difference in policy objectives led to a difference of scopes, of competent authorities and of effects, thereby concluding that Swedish national law could not have violated the 1902 Hague Convention. Moreover, when the 1902 Hague Convention was revised by the 1961 Convention, and later by the 1996 Convention, State parties took great care to determine a larger policy objective, i.e. the protection of minors instead of guardianship only.

The *Lugano* case revealed that the International Court of Justice is seen as a residuary interstate dispute settlement mechanism for questions of private international law, *in casu* the interpretation and application of the 1980 Lugano Convention and general international law.

Finally, there are several cases at the crossroads of public international law and private international law that indirectly contributed to the development of private international

law: in the *Nottebohm* case, the Court identified criteria for the effectiveness of nationality which are referred to as well in private international law. Also, in the *Barcelona Traction* case, the Court confirmed that diplomatic protection should be exercised by the State of incorporation of a company provided that there is an effective connection with that State. The recent Germany vs. Italy judgment provided some important clarifications on State immunity in war crimes, and the *Ahmadou Sadio Diallo* judgment confirmed that the *ratione materiae* scope of diplomatic protection had widened to include, in particular, internationally guaranteed human rights.

#### **Dr J.H.A. van Loon**

Recent cases before the World Court – *Ahmadou Sadio Diallo* between the Republic of Guinea and the Democratic Republic of Congo (Ch. II 2.3), Germany v. Italy (Greece intervening) (Ch. II 2.2) and the Lugano Convention case between Belgium and Switzerland (Ch. II 1.2.2) – suggest that issues of private international law, or at the crossroads of private and public international law, may well be brought with greater frequency before the International Court of Justice in the future. They reflect profound changes in the international environment, which we have briefly characterised at p. 105: increased permeability of national borders leads, horizontally, to increasing interaction between national or domestic legal systems, and vertically, to increasing interaction between the spheres of public international law and national law.

Global, regional and bilateral treaties on private international law continue to grow in volume as well as in numbers of States parties. Differences of interpretation and application at the national level may give rise to controversies on the international plane, and States increasingly may wish to turn to the International Court of Justice as the global court composed of judges representing the principal legal systems of the world, to resolve such disputes. *Diallo* may lead to more frequent cases of diplomatic protection before the Court, based on violations of human rights that result from the application or interpretation of rules of private international law. So, even if no further initiatives were taken, we may expect more International Court of Justice cases on private international law issues in the future.

But is there a need to take action to broaden access to the International Court of Justice? This is the subject matter of Chapter III, where we go beyond the overall theme of the *Preadviezen* “One Century Peace Palace, from Past to Present”, and look into the *future*. However, there is precedent: under a 1931 Hague Protocol, which is still formally in force, nine European States recognise the jurisdiction of the World Court – initially the Permanent Court of International Justice, now the International Court of Justice – to deal with any dispute concerning the interpretation of the Hague Conventions on private international law. This Protocol, however, has lost its practical meaning, because it does not apply to the post-Second World War, active, Hague Conventions. Instead, a wide range of alternatives for dispute resolution has been developed, in particular regular meetings reviewing the practical operation of Hague Conventions. But these meetings, and the tools that have been developed as a result, have their limitations. Arthur von Mehren, among others, has pointed to this shortcoming in the context of the Hague Conference’s “Judgment Project”, and has spoken of an “institutional weakness” (pp. 111-112).

Since 2000 the European Courts have provided additional support. The European Court of Human Rights, in particular, has found, on several occasions, violations of Arts 6, 8 and 14 of the European Convention on Human Rights because of non-respect of the Hague Child Abduction Convention. More recently, however, its case law raises questions, because by requiring a full assessment of the best interests of the child in return proceedings, the Court seems to go beyond the scope of the summary return mechanism intended by the Child Abduction Convention. The Court of Justice of the European Union (ECJ), on the other hand, insists on strict application of the return mechanism, reinforced as it is by the Brussels II Regulation. Conclusion: transnational procedural issues, in particular, present challenges not just to national courts but also to regional courts. Therefore: Is recourse to the International Court of Justice an option? That is the subject of paragraph 3 of Chapter III.

An interesting preliminary point came up in the aforementioned Lugano case. There, Switzerland's claim was that the 2<sup>nd</sup> Protocol to the Lugano Convention established a mechanism – not to enable States Parties to request advice from the ECJ but – of mutual information and a duty to take into account each other's decisions that barred recourse to the International Court of Justice. We are inclined to think that this claim goes too far, and that the International Court of Justice would not do its job if it were to accept this argument (pp. 110-111).

A future role of the World Court might take the form of a reference of disputes to the International Court of Justice – this is the idea of the 1931 Protocol. Conceivably, a clause to that effect could be inserted in future Hague Conventions, as former International Court of Justice Judge Weeramantry suggested (Ch. III 3.1). But there may be a greater need for another mechanism: reference by national, or even regional, courts to the International Court of Justice. This idea is not new, and indeed, was discussed by our Society in 1987, on the basis of *Preadviezen* by VerLoren van Themaat and Schwebel. We tell the story in the final paragraph (Ch. III 3.2).

Our Society took the initiative for an ILA Committee to examine the matter further, but this Committee turned its attention to other matters, and did not go into the question discussed by our Society. Subsequently, in another context, two presidents of the International Court of Justice suggested that other *international* tribunals should be enabled to request advisory opinions from the International Court of Justice. Later ICJ president Rosalyn Higgins objected to this and suggested that close liaison and mutual information among international tribunals was a better solution, and we agree. But *national* courts, in particular the supreme courts, are in a quite different situation. Their need for guidance by an authoritative court with a global composition, especially when it comes to the interpretation and application of (private international law) treaties, as we have said, is bound to increase.

The suggestion is not for any form of mandatory procedure. National courts should merely have an option to submit questions to the International Court of Justice, and the International Court of Justice should not give binding opinions. A modification of the Statute would not be necessary, if the requests are channelled via the General Assembly. The question we should ask ourselves is: Is it a good idea? Practical questions (the case load of the International Court of Justice, its expertise in private

international law) are subordinate. We believe the matter deserves serious discussion, because the potential benefits as seen by our predecessors in 1987 and set out on p.114, have not lost their pertinence.

#### 4. **Questions, Answers and Debate**

**Mr dr O. Spijkers, Utrecht University**

*Addressed to Prof. Lesaffer*

You seem to suggest that one of the reasons the Peace Palace was built in The Hague is because the Netherlands at the time was a neutral and politically uncontroversial State. The same is sometimes said of the reason why the Treaty of Utrecht took place in our country in 1713. My question is: Is this reputation of being politically uncontroversial a reputation to cherish? We seem to be steering a different course now. The Netherlands wishes to be seen as an active promoter of international peace and justice, and this involves taking position. For example: Just today the decision was taken to send soldiers to Mali.

**Prof. Lesaffer**

It was decided not to hold the conference at Petersburg, because for the location of the Peace Palace they were looking for a small neutral power. There were four likely candidates: Brussels, Geneva or Bern, Copenhagen and The Hague. All the competitors for The Hague were discarded. Brussels for one ruled itself out because the Belgian government feared a rift with the Holy See as it would not be invited. The choice for the placement of the Peace Palace in the Netherlands was thus a choice by default, although The Hague also had much to say for itself. It was easily accessible by sea, it was quiet, the Romanovs held good family relations with the House of Orange and Martens knew it, thanks to the Private International Law conferences.

The Hague now has a well-established position as the legal capital of the world. Whereas the fact that the Netherlands was a relatively small and neutral power was instrumental in its selection in 1898-1899, this counts for less today. Nevertheless, it remains of some importance that other states feel that it offers a safe and neutral ground. If the Netherlands constantly stood in the forefront of international strife, that might become a problem.

The choice of Utrecht in 1711-1713 was a very different story. On the one hand, it was logical to hold the peace conference in the Republic, because the Republic was the linchpin of the wartime diplomacy of the Grand Alliance. On the other hand, the Dutch did not want to have the conference at The Hague, because they felt the conference to be a betrayal by Britain of the alliance and wanted to hold it away from the political centre.

**Prof.dr. N.M. Blokker, Leiden University**

*Addressed to Drs Vervliet*

My question relates to one word in your paper, namely the word “obviously” on page 68. My question is, if now is not the time to accept the idea of compulsory jurisdiction, what then would be the appropriate time?

**Drs Vervliet**

I admit that there is indeed a contradiction between the words “obviously” in my paper and my personal hope and expectation. However, nearly all states follow the same course of action after having survived chaotic war moments: they first clean up their own position and they redress their national structure. Consequently, they do not easily get into international relations during that stage, for by doing so, they would more or less give away their recently reconquered sovereignty.

**Prof.mr dr W.J.M. van Genugten, Tilburg University**

*Addressed to Drs Vervliet*

Why is the number of UN Member States accepting the compulsory jurisdiction of the International Court of Justice not growing while international relations are changing and the concept of sovereignty is changing as well?

**Drs Vervliet**

One of the main lines of my paper is the statement that there is a strong tension between sovereignty, politics, the work of the courts and compulsory jurisdiction of the courts. Nowadays we see a decrease in declarations as a consequence of the problem that so many countries struggle with the sovereignty principle.

**Prof.dr N.M. Blokker**

In my view there is room for hope and I am not a pessimist. This year there has been one country that accepted the compulsory jurisdiction of the court, so there certainly is room for hope. It is not necessary to have another world war to achieve this.

**Prof.dr K.R.S.D. Boele-Woelki, Utrecht University**

In 1997, the Netherlands Supreme Court recognised a choice of applicable law by the parties, although the Hague Convention on the law applicable to maintenance of 1973 does not contain any possibility for such a choice of law (NJ 1998, 416). In other contracting states it has been argued that this decision violates international law. There is no remedy to redress this issue. There are many other examples. It touches upon the uniform interpretation of the Hague Conventions, which contain specific rules reminding us that as regards the interpretation of the conventional rules the international character of the convention should be taken into account. My question is: What should judges do in this respect? Where do they obtain information as to how judges in other contracting states have applied the conventions? The collection of national decisions applying the Hague Conventions by Mathilde Sumampouw is out-

dated<sup>2</sup> and it has not been replaced by an extensive and easily accessible database where judges can get information about the application of the Hague Conventions in other countries. What can we do better in the future?

#### **Dr Van Loon**

The collection of case law on the application by national courts of the post Second World War Hague Conventions on private international law, *Les Nouvelles Conventions*, published by the Asser Institute in five volumes between 1976 and 1996, offered a magnificent tool for the comparison, and promotion of consistency and uniformity, of the interpretation and application of Hague Conventions. The Permanent Bureau of the Hague Conference, due to lack of resources, has only partly been able to make up for the discontinuation of this series, with its database on the application of the Hague Child Abduction Convention (INCADAT [www.incadat.com](http://www.incadat.com)), and handbooks on the practical application of other Hague Conventions, such as the Hague Service Convention, and the Hague Evidence Convention, all accessible on the website of the Hague Conference, [www.hcch.net](http://www.hcch.net).

However useful such tools are, they lack the authority of interpretations given by an international judicial body. Special Commission meetings of governmental experts convened by the Hague Conference to discuss the practical operation of Hague Conventions may from time to time express views on the correct or preferable interpretation of Conventions, but experience shows that the effect of these views is limited. As the Hague Conference has increasingly become a global organisation, and many of its Conventions now have a global reach, and are applied in different regions and various cultural contexts, the case for uniform interpretation, at the request of national courts, in the form of an advisory opinion by a global court composed of judges representing the principal legal systems of the world becomes less far-fetched than it may have been in the past. Think, for example, of the highest courts of emerging countries, such as the Philippines, or Georgia, or Costa Rica; would they not feel assisted, when they have to interpret Hague or other Conventions on private international law, or international transport law, if they could ask the International Court of Justice for advice on the interpretation of such instruments?

It is interesting to note that the idea of preliminary rulings as a way to promote uniform interpretation of treaties has recently taken shape, in a regional context, by the adoption of the XVI<sup>th</sup> Protocol to the European Convention on Human Rights. This Protocol introduces the possibility for the highest national courts of States Parties to the European Convention, to ask the European Court of Human Rights for an advisory opinion.<sup>3</sup>

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<sup>2</sup> T.M.C. ASSER INSTITUUT - Les nouvelles Conventions de La Haye: leur application par les juges nationaux; Recueil des décisions et bibliographie, établi par M. Sumampouw, Vol. I, 1976; Vol. II, 1980; Vol. III, 1984, Vol. IV, 1994

<sup>3</sup> The Netherlands signed this Protocol on 7 November 2013

**Prof. Van Genugten**

*Addressed to the audience*

What are we going to do about this?

**Ms. F.E.M. Stikkelbroeck, LL.M.**

I would suggest taking this up in the context of an ILA Committee.

**Prof. mr A.H.A. Soons, Utrecht University**

Having participated in the discussions on this idea in 1987, I remain convinced that it is a very worthwhile idea and it has to be taken further. The question is indeed: How can you cause this idea to be further advanced with a view to its adoption? This can only be achieved if one government or a group of governments introduces this proposal to the General Assembly of the United Nations. The best way to get the issue at the intergovernmental level is to convince governments to take up the problem, rather than going back to the ILA. We can look to the Dutch government. Its Advisory Commission for Public International Law (the 'CAVV') could take this up on its own initiative or at the ministers' initiative, requesting the Commission to issue a report where all these aspects and all of the ins and outs can be discussed, including its feasibility. After that the Dutch government can take a position whether or not it will advance the idea at the intergovernmental level.

**Prof. dr J.G. Lammers**

I support the idea that Prof. Soons has presented. We should not go back to the ILA. Preparatory work could be done in another circle, perhaps in the CAVV, the Advisory Committee on Issues of International Law of the Netherlands Ministry of Foreign Affairs. There is no need to amend the statute of the International Court of Justice or amend the UN Charter. There is a way around this, and it seems to me that this way is not very difficult. The General Assembly could be persuaded to establish a 'screening committee' to screen requests from supreme courts for an advisory opinion from the International Court of Justice. Maybe we should establish a committee composed of members of the International Law Commission or another committee. We must make sure that only a reasonable request could be referred to the International Court of Justice. But the main question is whether the International Court of Justice would like this idea. I had the idea that in the autumn of 1987, when this question was also discussed, the judges were not very fond of the idea. But this should not keep us from making the proposal. My guess is that the number of requests from supreme courts will not be very high. In the 1986 Vienna Convention on the Law of Treaties between States one can already find a procedure in Article 66 to request through the UN General Assembly an advisory opinion from the International Court of Justice in the case of a dispute between a State and an International Organisation, which must be accepted as binding by the parties to the dispute concerned. This is a way around the problem that International Organisations cannot be a party in a contentious case before the International Court of Justice. A similar procedure could be followed when a supreme court would like to obtain an advisory opinion from the International Court of Justice on a question of international law with which it is confronted.

### **Sir Kenneth Keith, International Court of Justice**

It is technically possible for such matters to come before the Court as with the Guardianship and Lugano cases and more recently the Torture case. They came as contentious cases. There is also the advisory route as with the Reservations case.

I would also mention other existing methods for getting rulings and understandings of such treaties, for instance the work of The Hague Conference on Private International Law in respect of its family law conventions and the World Customs Organization's opinions on tariff classification. They have certainly been useful to New Zealand courts.

I also should like to add a quick comment to Niels Blokker's question on compulsory jurisdiction. After World War II there was a strong support for compulsory jurisdiction, but the Soviet Union and the U.S.A. opposed. In the end, the countries who were pushing very hard for this, including for instance New Zealand, had to become more cautious because the pressure turned into a threat to the whole enterprise, given the political problem of sovereignty, but also of outdated and unsatisfactory law. A steady increase in the number of States filing acceptances of jurisdiction, most recently the Marshall Islands with Romania and Italy in prospect.

### **B.C. Punt, LL.M.**

I think that we are dealing with a change of legal culture and changes of culture are always very difficult to achieve. I fear that if we restrict the discussion to the legal domain, those who resist, both governments and citizens, will not be very impressed. It may be a good idea to find out what other, non-legal arguments can be found for the change. And also whether other organisations, for instance the World Bank, could see the advantages. Would such organisations also be given the right to raise preliminary questions? And would the World Bank support this idea? It will be necessary to increase support for the proposal before we present it for the second time. If the World Bank finds it a good idea and says that it is important for economic development, it will be harder for governments to object or hesitate. If you wish to continue with this idea, I think that you should first seek a lot of support in the economic field.

### **R.P. Streng, LL.M.**

If international tribunal laws also apply national laws is there a reason for them to have a possibility of preliminary reference for Dutch courts?

### **Dr Van Loon**

I understand your question to mean: Might there not be a need for the International Court of Justice to be able to address itself to the supreme courts of States, for example, to the Dutch *Hoge Raad*, to request an interpretation of a particular domestic law? It is true, as we have pointed out, that national law is very much present in the case law of the Court. Although the Court's role is not to apply national law *per se*, it will always look at national law in the context of determining the applicable international law. National law serves specific functions in this context, including that of verifying compliance by States with their international obligations, or of filling *lacunae* in

E.L. van Praag 14-12-13 14:07

**Opmerking [2]:** The authors of the Report are not certain they got this question/comment right. Their notes are incomplete on this point, unfortunately.

existing international law. Admittedly, the Court may sometimes go rather deeply into domestic law, as it did, for example, in the Serbian and Brazilian Loans case when it examined the interpretation and application by the French courts of French law in so far as the latter applied, in the Court's view, to the currency question (p. 87 of our *Preadvies*). What the French law on this point was, had been extensively argued before the Court, and the Court felt quite comfortable to apply it. If however, in such a case, the Court needed more information on the national law in question, it could call on the Parties in the dispute, who in any case would present different views even on an interpretation of the law of a given State by the highest court of that State – after all, (most likely) only *one* of the Parties in the case. But, as the *Boll* case illustrates, the Court will tend to look at national law from a comparative viewpoint. In *Boll*, the Court did not examine whether the Swedish law on protective upbringing had been applied correctly, but noted that “*laws such as the Swedish Law now in question were enacted in several countries to meet the [social problem of children in need of protection]*” (pp.91-92).

So, the relationship between international law and national law is not the same, whether you look at it from the perspective of the International Court of Justice or through the eyes of a national court. While, arguably, there is a need for national courts to be guided by a single supreme world judicial body in their interpretation of international law, as incorporated in the domestic law they must apply, the International Court of Justice, called to apply international law, in the determination of which national laws may play a role, has the procedural means to obtain clarification on the meaning of a specific national law from the Parties, and could not easily rely on the views of the supreme court of the State in question on its law, authoritative as that court might be, as it remains an organ of one of the Parties to the dispute.

**Dr F. Baetens, LL.M., Leiden University**

I have a joint question for Messrs. Lesaffer and Vervliet. I was struck by the optimism in your papers. We have been moving away from power politics since the 19th century, peaceful settlement is seen as normal. I was wondering at what point optimism becomes naivety? There are still quite some disputes, there still is a wall in Palestine etc. Have we indeed moved away from high power politics from the 19th century? And should international lawyers not think more of enforcement rather than new rules?

**Prof. Lesaffer**

I did not want to express such a ‘millenarian’ optimism with the line to which you are referring. What I refer to here is that at the end of the 19th century positive international law developed into an autonomous discipline and profession, giving international law discourse its own place in the field of international relations. This does not necessarily express optimism about its impact.

**Drs Vervliet**

In juxtaposition to the pessimism I apparently put forward in a previous part of the exchange of ideas with Blokker, I do not see myself as much of a pessimist but more as

an optimist. The weaving of a network of courts and tribunals to which countries adhere in a compulsory sense, as expressed in my paper, is a sign of optimism and shows how states more and more relate to one another in real life. One of the elements of *Realpolitik* now is that the UN charter is not going to be changed, nor is the Statute of the International Court of Justice. As long as that is the case, we have to work on the issue in other ways. Finding solutions through law only is not the right avenue. One of the main lines of my paper is my hesitance to the proper and sole belief in law to overcome international controversies. I am increasingly confident about political negotiations. Reacting to Lesaffer: In the very early days of the Peace Palace it was not only a temple for peace through law. It was also a permanent forum for political negotiations, but increasingly it became a temple for peace through law. On many levels we can benefit from the experience of the law profession in The Hague and The Netherlands at large in political negotiations as well, supported by law where possible. I hope that politicians and lawyers can find each other once again as when they established the first peace conference.

**Dr P.J.L.M. de Waart**

*Addressed to Drs Vervliet*

I very much appreciate your picture of the history and legacy of the 1899 and 1907 Hague conventions in respect of the peaceful settlement of disputes. I wonder, however, whether you do not overestimate the significance of the compulsory jurisdiction of the International Court of Justice. You rightly state that the sovereignty of the State still is the main obstacle to the acceptance of compulsory jurisdiction (pp. 43 and 72). As it were in the same breath, you also note that the International Court of Justice suffers today from what was once seen as a solution: the optional clause. For, in your view, the pertinent declarations under the Optional Clause now even limit to some extent the competence of the International Court of Justice. Be this as it may, it is doubtful that an invitation of the International Court of Justice to States to increase the belief in the acceptance of compulsory jurisdiction by collaboratively weaving 'a sophisticated tapestry of declarations under Art. 36 of its Statute' will be helpful in that respect. After all, one should not overlook the fact that many disputes between States relate to the maintenance of international peace and security and that these disputes do not easily lend themselves to being settled by the International Court of Justice, taking into account the main responsibility of the Security Council. As for other disputes, other courts and tribunals may do the job as well as the International Court of Justice or even better! It is questionable, therefore, whether worldwide acceptance of compulsory jurisdiction will really enhance the position of the International Court of Justice in peaceful settlement of disputes between States. As for reconfirming peaceful settlement of disputes on the basis of law as a quintessential principle, it might be a better idea if the International Court of Justice will highlight the significance of objective fact-finding for States in order to prevent their disputes getting out of hand.

**Drs Vervliet**

About overestimating the compulsory jurisdiction of the International Court of Justice: My intention was to show the weaknesses of the system of compulsory jurisdiction and write on the tension between the optional clause as an obstacle or a solution, and to

demonstrate that, for example, political negotiations are as much a legitimate means of dispute resolution.

**Prof. mr A.V.M. Struycken**

In the 1950s, the International Court of Justice did not have enough to do. The Dutch government tried to invent cases and it came up with the Boll case. It was a government initiative. A government can take the initiative to translate some problems into court cases and thus contribute to the development of international law, by eliciting good judgments on the application of public international conventions on hot issues.

**Ms. De Dycker**

Indeed, I think this shows the importance of political decisions to bring a case to the court. It is interesting to see time and again the usefulness of states bringing cases to the International Court of Justice, leading to fostering and harmonising interpretation of existing international law or to the development of main stream interpretations.

**Dr Van Loon**

In our paper we expressly refrained from a discussion on the past or present caseload of the Court, or on the effect on this caseload of the suggested reference by national (or even regional) courts. Not because this is not important, but because we believe that is not the primary question that needs to be addressed. The key question is whether the reference procedure is a good idea or not. If it is, if there is a need for such a reference procedure, then there may be an additional caseload, which the Court should certainly be given the means to handle. Remember, however, that it is envisaged that the requests will be channelled through a screening committee of the General Assembly, that, moreover, the Court probably should have the power to refuse to reply to certain questions, and that in any event, any additional caseload is likely to gradually develop over time.

**Prof. Van Genugten**

Let me raise another practical issue, related to thesis number 4 of Jeroen Vervliet, where he suggests that not only states may be able to bring cases to the International Court of Justice but also others, such as is the case before for instance the Permanent Court of Arbitration. Is that a good idea?

**Prof. Van Genugten**

My question goes a bit further and relates to contentious cases. Should not only states be able to bring them before the International Court of Justice?

**Prof. Lammers**

I recall that it was Minister of Foreign Affairs Van Mierlo who at some occasion made the proposal that not only states but also public international law organisations could be a party in a contentious case before the International Court of Justice. This was not taken up, but still international organisations have the possibility through the General

Assembly to bring a case before the International Court of Justice, though only for advisory opinions. There are historical reasons why only states are entitled to bring a case before the Court, but why should public organisations not be allowed to do so?

**Ms. De Dycker**

In the rules of the Court there is an interesting provision. The construction of a convention can be questioned in a case before the Court, so there already is a door open for the international organisations to participate.

**Mr. K.H. Ameli**

Under the Statute of the Court, Article 34 and Rules of the Court, Article 66, an international organisation may provide information and observations in a contentious case between States, without the organisation itself being able to sue or more importantly be sued, where the organisation may be controlled by the offending State. The intervention of the organisation is at times unfortunately highly political or perceived as such. The intervention may also be seen as disturbing the equality of the parties before the Court. It is for these reasons perhaps that in the history of the Court, only in the *Aerial Incident of 3 July 1988 (Iran v. USA)*, the International Civil Aviation Organization submitted observations, which were also objected to by the applicant State.<sup>4</sup> Limiting the access of international organisations to the Court to advisory opinions under the Statute, Article 65, especially where the governing body of the organisation decides to make the request has also politicised the matter and caused difficulties. For example, in the *Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons (8 July 1996)*, the UN General Assembly had to reformulate the issue and submit a separate request to the one made by the World Health Organization. My point is that changes are long overdue and should be made to the Statute and the Rules of the Court to allow international organisations to sue and, more importantly, for the sake of accountability, be sued by States and other international organisations before the Court. The Steering Committee of Permanent Court of Arbitration, of which I was a member, has been able to amend the PCA Arbitrations Rules to allow such access for and against international organisations since 1993, despite the limitations of the 1899 and 1907 Conventions on Pacific Settlement of International Disputes.

**A.M.M. Orie, LL.M., International Criminal Tribunal for the former Yugoslavia**

I have a question about compulsory jurisdiction. It was a surprise when we were confronted with compulsory jurisdiction in the 1990s in the domain of international criminal law, when the Security Council imposed an obligation on all states to cooperate with the jurisdiction it had established in relation to conflicts in Yugoslavia and Rwanda. I know it is about individuals but if they are heads of state they are linked to some extent to what happens in the state. As to the International Criminal Court, we

E.L. van Praag 14-12-13 14:07

**Opmerking [3]:** The authors of the Report made a note here that this needs clarification.

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<sup>4</sup> For the criticism to Art. 34 and practice under it, see *The Statute of the International Court of Justice: A Commentary*, Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, Eds, pp.554-56 and 551-54, Oxford University Press (2006).

have the interesting development that if you do not wish to be a party to the Rome Statute, the SC can still refer a situation to the Court. Does the experience we gain through these mechanisms encourage or discourage others considering or thinking in a similar direction in international disputes which directly threaten peace and security? For instance, in cases where there is an imminent threat to peace and security.

**Drs Vervliet**

My paper deliberately did not address international criminal jurisdiction. In that domain we see special ways of looking at jurisdiction, which cannot easily be transferred to other legal domains. That relates amongst other things to the type of norms involved. Simultaneously, we see the downside of that: If the rules on jurisdiction are becoming too strict, states become more hesitant. A good example is the case of Kenya before the International Criminal Court. There is a danger that other countries are being discouraged by the current development.

**Mr. Orié**

I agree that if as a result of SC referrals everyone would withdraw from the International Criminal Court Statute, the pressure would be counterproductive. But the involvement of the SC also overcomes part of the problem, because withdrawal is becoming less and less an option and thus would not be helpful anymore.

**Prof. Struycken**

We deal with the International Court of Justice in this house, but it was first of all built for the Permanent Court of Arbitration. I should like to draw attention to the fact that the case law of the Permanent Court of Arbitration is interesting for the International Court of Justice as well. Since 1962, the Permanent Court of Arbitration not only deals with disputes between states but also between states and foreign companies. To some extent the International Court of Justice and the Permanent Court of Arbitration are competitors, fishing in the same pond for cases.

**Prof. Van Genugten**

Professor Struycken rightly underlines the position of the Permanent Court of Arbitration in the Peace Palace, while appreciating the fact that over the last decades the Permanent Court of Arbitration found very fertile ground in dealing with conflicts not only between states. Could I take some comments on that?

**Drs Vervliet**

The Permanent Court of Arbitration is now dealing with some 60 cases. Many cases relate to investment issues between states and non-state actors. To me, this is a very nice way to get full circle in a century for the Permanent Court of Arbitration. The points raised about new kinds of issues and approaches underline one of the points in my paper: due to globalisation, world structures are changing and states are not the only powerful parties we have to deal with, but also other parties, such a multinational companies. It is good to see their wish to solve their conflicts by means of arbitration.

**Dr Van Loon**

I agree with Professor Struycken. The roles of the two institutions are a bit different, but both fulfil important roles alongside one another. It is always amazing to hear about the growing caseload of the Permanent Court of Arbitration and to see in what type of conflicts it is involved.

**Dr O.M. Ribbelink, T.M.C. Asser Instituut / Utrecht University**

I agree, but the problem is that information over at least half of the Permanent Court of Arbitration cases is not disclosed to others than the parties involved. This is a disadvantage of the Permanent Court of Arbitration in terms of lessons that can be learned, while it does not help academic research either.

**Ms. N.R. Okany, LL.M., University of Amsterdam**

*Addressed to Ms. De Dycker*

My question concerns the issue of preliminary rulings: Earlier this afternoon we had an interesting discussion about national courts applying and developing international law and on the rules of international courts. Do you see any tensions between the application of international law by national courts and the way the International Court of Justice interprets substantive international law? And also: Do national courts have stronger cases to ask for preliminary rulings and interpretations by the International Court of Justice or would something similar apply to other international courts as well? In your view, should the latter courts also be able to request preliminary rulings from the International Court of Justice?

**Ms. De Dycker**

It is interesting to see that there is important work going on of national law applicable in international issues and the other way round. It is good to see that national courts apply international court issues. And yes, international tribunals should be able to ask questions as well. Domestic courts have a problem with the interpretation of conflict of law [rules]. A conflict of two tribunals with an interpretation problem can arise. It is ideal to have the International Court of Justice help national as well as international courts with such interpretation issues.

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