Preface

My decision to write the present book on the International Court of Justice perhaps needs no justification, but a word of explanation does seem to be in order. The decision came at the confluence of three streams of my work, each of which contributed, in its own way, to making the book an entirely natural outcome, even if not perhaps an inevitable one. *First*, those considering any major question of international law are, all too frequently, forced to realise that hardly any monographs have been published in recent times dealing in the round with the particular subject in which they happen to be interested. This is even more true of French language publications than of those in English. The dearth of comprehensive texts on particular issues even extends to the International Court of Justice (ICJ) itself. In this context, little need be said here about the Court's existence and activities. It is surely enough to note that the ICJ is the oldest permanent international jurisdiction to which States can turn for the resolution of inter-State legal disputes. For decades, the Court has been the principal international jurisdiction, the main judicial organ not only of the United Nations but of public international law itself. Its jurisdiction is general rather than specific, in the sense that it extends to all inter-State disputes that are to be decided according to the norms of public international law. No other international tribunal has so general a jurisdiction: all of them are confined to one or more particular fields, such as the law of the sea, financial claims resulting from particular events, human rights and so on. Nowadays, the International Court is ever more frequently in the international spotlight. It is the subject of considerable media comment, by no means all of it accurate. Consequently, it is often the case that people have vaguely heard of the Court, while knowing very little about it. The increasing interest in the Court is in large measure due to the fact that, in recent years, a series of important and highly political questions have been argued before the judges at The Hague. These questions have been wide-ranging, including the request for an opinion on the legality of the threat or use of nuclear weapons; the *Genocide* case (*Bosnia-Herzegovina v Serbia and Montenegro*); the *Serbian bombing case* (*Serbia v ten NATO States*); the case between the Democratic Republic of the Congo and Uganda (military activities and occupation); and requests for consultative opinions on the Israeli wall and Kosovo.

The Court's importance can be assessed in both quantitative and qualitative terms. As the principal judicial organ of the United Nations available for the peaceful resolution of legal disputes, both to UN Member States and to non-Members, and thus playing its part in strengthening understanding between States and peaceful international relations, the Court has never been as busy as it is today. This is so despite the fact that public international law is currently going through a period of crisis. The importance of public international law can be assessed by reflecting that the material rules of international law applicable to dispute resolution are only marginally stronger than the mechanisms for dispute resolution existing to give effect to those rules.[1] At the end of the day, it is only through the peaceful resolution

[1] Rightly, this maxim of equal strength was strongly highlighted by L Caflisch, 'Cent ans de règlement pacifique des différends interétatiques' *CCHAIL*, vol 288 (2001) 261, 270.

of disputes – as to which the Court plays a pivotal part through its central role in interpreting and applying the relevant rules – that international peace, the international order, and a reasonable degree of mutual confidence between States (all obvious preconditions for civilised international relations) can be safeguarded and developed. For this reason, the settlement of disputes is not just a bilateral concern: it is truly a collective interest of the international community. If one takes a medium- or long-term view, unless peaceful dispute resolution is progressively reinforced, the danger is that, sooner or later, international relations may decline into a kind of primitive anarchy. That grim prospect is the exact opposite of the soothing image presented by the Court. Like the two faces of Janus, anarchy and private 'justice' present a flaming contrast to the cool orderliness of institutional international law. The implications for our world, if one thinks them through, are deeply sobering. Efforts to strengthen any social order always involve working to develop appropriate law and institutions. This in turn involves improving the mechanisms for the peaceful settlement of disputes, including, where appropriate, by judicial decisions. In all these respects, the international community is no different from a national one.

The most important existing studies of the ICJ are indicated in the Select Bibliography. Amongst general treatises on the Court, particularly noteworthy are A Zimmermann, C Tomuschat, K Oellers-Frahm and CJ Tams, *The Statute of the International Court of Justice: A Commentary* 2nd edn (Oxford, Oxford University Press, 2012); S Rosenne, *The Law and Practice of the International Court*, 4th edn (2006; 1st edn 1965, 3rd edn 1997); M Dubisson, *La Cour internationale de Justice* (1964); G Guyomar, *Commentaire du Règlement de la Cour internationale de Justice* (1983); and, for the Permanent Court of International Justice (PCIJ), which was the ICJ's predecessor, MO Hudson, *The Permanent Court of International Justice, 1920–1942* (1943); AP Fachiri, *The Permanent Court of International Justice*, 2nd edn (1932); and AS de Bustamante, *The World Court* (1925). Mention should also be made of the superbly written and highly influential little book by N Politis entitled *La justice internationale* (1924). In light of the foregoing, it seems appropriate to try to bring together the law on the Court in a single up-to-date study.

Second, to speak personally for a moment, I have always had a strong interest in the Court, to the point where, after my doctoral thesis, I made the Court an offer of my services. My interest has not declined with the passing years. After decades of poring over the relevant materials, it seems only natural to draw the threads together in the present study. It is, of course, easy to admit to an interest in the Court as an institution. It is slightly harder to confess also, especially to English-speaking readers, to a taste for legal subtleties. Perhaps the taste is slightly self-indulgent, but at least it is not (at least I hope it is not) carping or quarrelsome. Indeed, it was already there in a favourite thought-game with which I used, in my student days, to entertain myself while rambling in the countryside. I would act out – quite strenuously – the imagined roles of the various players in a five-judge court responsible for deciding disputes. The disputes were invented ones, derived from my personal activities. The game involved applying a sort of personalised law code. I had to think up five different lines of argument, one for each of the five judges; the overall objective was for each judge to shed his own distinctive light on the issues. The game often threw up subtle procedural and substantive issues. And these were no ordinary judges; each represented one of the nobler (or at least more mentionable) organs of the human body. The personalised law code prohibited, amongst other things, any decision prejudicial to the legal position of a third party, recognising, as it did, their equal status and independent standing. Between them, the members of the court ended up developing quite a dense

body of jurisprudence on the inadmissibility of questions affecting such third parties. Subsequently, I came across unexpected traces of many of the same ideas in ICJ rulings on cases such as *Monetary Gold* (1954) and *Nicaragua* (1984). The five-judge court also developed some rather subtle doctrines on competence and jurisdiction, on the admissibility or rejection of substantive applications, and especially on the relationships between these concepts. Here too, when I subsequently came to study the ICJ's judgments, I was often reminded of those adolescent country rambles. The sheer richness and complexity of the Court's procedural law struck chords right away, and although, over time, I have tended to focus increasingly on substantive issues, the music has never entirely died away. In the end, therefore, it seemed entirely reasonable to write a book about the Court.

Third, in order to write about the interpretative function in public international law, I needed to re-read, annotate and categorise the whole corpus of international court judgments since 1923, starting with the *Wimbledon* case at the PCIJ. This overall review of the two world courts' jurisprudence was an intense and systematic exercise, carried out just a few short years ago. Helpfully, it prepared me for the task now in hand, and has to a considerable extent lightened my load. In a sense, the writing of this book provided a means of profiting from that still fairly recent work, before its form and shape faded across the horizon of time.

Three points remain to be made, one on style, one on the way the material is presented, and one the expression of gratitude.

In writing this book I have found it impossible to make any real concession about the use of the necessary technical vocabulary, both procedural and substantive. To that extent, the book is aimed, not at interested members of the general public, but at lawyers (or those aiming to become lawyers), especially international lawyers. Nevertheless, of course I have tried to use the most simple and direct language and grammar possible, avoiding obscurity wherever I can. It is all too easy to forget that unnecessarily complex or luxuriant language is bound to be harmful, not only to style, but also to the substantive thinking itself. There is more than a grain of truth in the saying that the wise think like lawyers, but speak like peasants.

As to the presentation, I decided, from the outset, not to load the text with too many footnotes. They would be out of place, and, given the work's overall length, it is essential to eliminate anything that would make it longer still. To compensate for this, I have included a fairly extensive bibliography, designed to facilitate reference to the legal literature on the Court. And of course the books and articles in the bibliography, in their turn, contain a plethora of general and specific bilbliographical information. I have deliberately adopted a selective approach to the handling of material, trying to be fairly comprehensive in at least a relative sense, but not attempting to cover all possible questions. This approach has inevitable dangers, but was unavoidable if the book was to be kept within reasonable bounds. However the detailed studies cited above, and in particular the Commentary on the *Statute of the International Court of Justice*, supply much of the material omitted here. The topics this book deals with are the ones which seem to me to be important in debate and in practice. At the same time, I have managed to make space for a number of topics that are rarely discussed, each an interesting legal question and a pioneering exploration of which seems likely to be useful, even if, at least for the time being, the practical applications are limited. Here and there, I have also included occasional digressions into, or developments of, work I had done previously. Sometimes, where it seems helpful, readers are cross-referred to other passages in this book, but on other occasions (I confess that their number is fairly

large, perhaps too large), it has seemed preferable to repeat the substance of a point already made. Of course repetition can be inherently undesirable. But in a book as long and detailed as this, which the overwhelming majority of readers will be using as a reference work to consult as and when a specific problem arises (rather than to read uninterruptedly from start to finish), it is often helpful to repeat particular elements, so that all the relevant arguments are immediately before the reader. If any hardy soul is prepared to read the book from end to end, he will, I hope, excuse the seemingly redundant repetitions.

My particular thanks are due to Sandra Krähenmann, who did most of the work on the bibliography, and to Marianne von Senger, whom I cannot thank adequately for having, once again, taken on the heavy burden of re-reading the whole text with a view to eliminating the numerous errors that had escaped me. My particular thanks are also due to Alan Perry, a practising English lawyer with considerable experience of boundary delimitation by the Court, who has translated this extensive work into English. I can easily imagine the many painstaking hours spent seeking the most apposite ways to translate subtle shades of meaning and a wide range of complex concepts from French, which is so different in expression, character and historical development, into the characteristic sobrieties of English legal prose. However, time having passed since the writing of the French text of this treatise, the author took the opportunity to make some additions in the present English text.

Finally, two technical points of explanation. Where the bound version of the ICJ Reports has already been published, citations of the Court's judgments indicate the relevant page numbers. Where the bound version has not yet come out, references are to the relevant paragraphs. I have done this because nowadays it seems unlikely that, prior to the publication of the bound texts, readers will have before them the individual fascicules published by the Court as it goes along; they are much more likely to have accessed the report via the Court's website. Finally, as to the timing of publication, this book takes account of the Court's jurisprudence up to the *Diallo* decision of 30 November 2010. Some subsequent pronouncements of the Court are nevertheless included, on a limited basis, where this has been possible.

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