

## NGOs at the World Court

*Lessons from the past*

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### **Abstract.**

An inquiry into the previous history of the Court's involvement with non-governmental organizations shows that neither the PCIJ nor the ICJ were entirely immune to submissions by non-governmental entities before the 1990s. The examination of these submissions and their subsequent treatment by the Court remains extremely fruitful as far as any conceptual framework for the participation of NGOs is concerned. This article first considers the practice of the PCIJ related to non-state organizations (I), before dwelling on the treatment of NGOs by the International Court of Justice from 1947 to 2003 (II) and finally considering the new 'regime' set out by the 2004 Practice Directions (III).

### **Introduction**

There is a growing sense in the contemporary international legal literature that non-governmental organizations are becoming inescapable players on the international legal scene. Nongovernmental organizations (NGOs) are battling their way up to the international stage, pressing global decision makers and the international media to have their voice heard. Often, though not always, they speak loud, pressuring States and intergovernmental organizations for action, voicing concerns, asking for changes, monitoring progress and overall vindicating their way up to a potent stature on the international scene.

Such pressure might sometimes be hard to bear and most intergovernmental fora have now put into place some form or another of consultation with NGOs, if only to win back some of their favour and avoid criticisms from the loudest quarters of international civil society. International tribunals have not been immune to such pressure and most of such institutions have long arranged for some sort of *amicus curiae* mechanism.<sup>1</sup>

The International Court of Justice (ICJ) has generally been described as one of the most narrow-minded international tribunal in that respect, with no known practice of dealing with NGOs and no apparent interest in such interactions. There is also a

<sup>1</sup> The most complete and relevant study of these mechanisms may be found at D. Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings', (1994) 88 AJIL 611.

significant shortage of literature regarding the involvement of NGOs in proceedings before the Court and even less scientific effort has been devoted to studying the relationship between non-state actors and the ICJ's ancestor, the Permanent Court of International Justice (PCIJ).

This situation might be linked to the notion of the World Court as the principal judicial organ of the United Nations and thus being the international jurisdiction *par excellence*, not having been established for, nor willing to be involved with, any entity outside of States and, to some extent, intergovernmental organizations (IGOs).

Article 34 of the Statute expressly provides that "Only States may be parties in cases before the Court", thereby excluding any other entity from standing before the Court as a party.<sup>2</sup> NGOs, however, have many other ways, both formal and informal, to participate in proceedings taking place before an international jurisdiction.<sup>3</sup>

Both the Statute and the Rules of the ICJ remain either silent or ambiguous on such participation of non-governmental third parties in the proceedings before the Court. Relevant provisions are scarce, including mainly articles 66(2) and, to some extent, 34(2) of the Statute. Their implementation, however, have shed no light on the matter of NGO participation at the ICJ, as will be seen below. The situation remained extremely foggy until the Court itself promulgated new "Practice Directions" in July 2004, thereby abruptly ending its official dismissal of NGOs and introducing them into the framework of the Court.<sup>4</sup>

The very idea of allowing nongovernmental organizations to participate in any kind of international judicial proceedings has been widely debated in the literature and within intergovernmental fora such as the Dispute Settlement Body of the World Trade Organization. Both *pro* and *con* arguments have been often reiterated and it is outside the scope of this paper to discuss them. As a matter of principle, we shall consider that the provision of arrangements for some form of NGO participation before international tribunals is neither good, nor bad, but inevitable – as shown by the experience of the World Court itself, as well as other international jurisdictions. Our goal will therefore not be to justify the participation of NGOs in World Court proceedings, but rather to set out the rules, both as provided by the Statute and other instruments and as construed by the Court itself and identify patterns of practice related to the participation of private, not-for-profit groupings in proceedings before the World Court since its inception in 1919.

In that respect, the above-mentioned directive promulgated in 2004 was but the last episode in a longer course of interactions between the Court and international civil

<sup>2</sup> Art. 34(1), Statute of the International Court of Justice, in I. Brownlie (ed.), *Basic Documents in International Law* (1994), 395. Art. 65 of the Statute excludes NGOs from the right of requesting advisory opinions, *ibid.* One author seems to believe that NGOs might soon be awarded the right to request advisory opinions, though his reasons are unclear – see F. O. Vicuna, 'Individuals and Non-State Entities before International Courts and Tribunals', (2001) 5 Max Planck Yb. of Int'l. L. 53, at 57.

<sup>3</sup> We shall not deal with non-formal ways for NGOs to interact with the Court – *e.g.* acting as counsel to parties or pressuring parties to initiate proceedings before the Court. See A. K. Lindblom, *The Legal Status of International Non-Governmental Organizations in International Law* (2001) at 212.

<sup>4</sup> See Practice Direction XII, dated 30 July 2004, at [www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasic\\_practice\\_directions\\_20040730\\_I-XII.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasic_practice_directions_20040730_I-XII.htm).

society organizations. An inquiry into the previous history of the Court's involvement with non-governmental organizations shows that neither the PCIJ nor the ICJ were entirely immune to submissions by non-governmental entities before the 1990s. The examination of these submissions and their subsequent treatment by the Court remains extremely fruitful as far as any conceptual framework for the participation of NGOs is concerned. We shall first consider the practice of the PCIJ related to non-state organizations (I), before dwelling on the treatment of NGOs by the International Court of Justice from 1947 to 2003 (II) and finally considering the new 'regime' set out by the 2004 Practice Directions (III).

## 1. PCIJ Practice (1919–1946)

The Permanent Court of International of Justice, though short in life, has been grand in high-stakes, principled case-law, settling down some of the most crucial notions and principles that one still finds governing international law today.<sup>5</sup> This general mantra of international law applies equally to the rules regulating access of NGOs to the World Court. The practice of the PCIJ on this matter can give us a wider lesson as to what issues emerge when NGOs become involved with international jurisdictions and how to properly deal with them. The involvement of international trade unions with the Court's advisory proceedings was the first time international lawyers had to deal with NGOs in an international court room. The wording of some of the correspondence between the Registrar and these unions' officers is often disconcerting and compels us to address the contemporary issue of so-called *amicus curiae* participation with a fresh look. The issue did not seem as clear-cut to our predecessors as it does now to some of the *pro* and *cons* of *amici curiae*.

### 1.1. *An evolving practice*

The provision governing admission of NGOs to advisory proceedings was strikingly simple by the time the Court started its operations. Article 73 of its Rules was promulgated in 1922:

'The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, and to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

Notice of such request shall also be given to any international organizations which are likely to be able to furnish information on the question'.<sup>6</sup>

Paragraph 1 deals with notices to be given by the Registrar to various States and is not related to NGOs as such. Paragraph 2, however, deals with 'international organizations', without specifying what kind of entities might be included under this generic

<sup>5</sup> See O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: the Rise of the International Judiciary* (2004), generally.

<sup>6</sup> PCIJ Rep Series D No 1 (1922), p. 33.

term. It is the provision on which the regime of NGO participation at the PCIJ first had to be construed. Its wording is remarkably vague, referring to any organization with an (undefined) international character that might have some “information” related to the case. This openness of the Court can easily be correlated with the attitude adopted by the League of Nations towards NGOs, where private international organizations used to seat in various committees together with governments representatives.<sup>7</sup> Article 73(2), however, was bound to leave many issues unsettled as a result of its vagueness and was largely completed when the Rules were revised in 1926.<sup>8</sup> Those issues are interesting because they are still the ones that beset any system of NGO participation at the World Court – or in international proceedings generally – today and their subsequent amendment is equally telling, inasmuch as it shows how rapidly and stringently these issues arose and had to be dealt with by the Court. Accordingly, there were five main questions that the original provision did not touch upon:

- (1) *what organizations* were entitled to receive notice of the request for an advisory opinion, *i.e.* what were the criteria for an “international organization” under article 73?
- (2) *who* was responsible for deciding if any particular organization was eligible under those criteria – the Registrar, the Court, the organization itself, etc.?
- (3) *what* was their contribution supposed to deal with? Article 73 only mentions “information”, without reference to the nature of this information: should it be factual or legal? should it be of a general nature or should it be related to the case being scrutinized by the Court, etc.?
- (4) *how* was the envisioned contribution to be made: orally or in writing? What were the practical rules hitherto (e.g. size of the paper, duration of the oral argument to be presented, etc.)?
- (5) *when* was the envisioned contribution to take place? What were the deadlines for submitting papers, etc.?<sup>9</sup>

None of these issues were addressed by the original provision, leaving it entirely to the discretion of the Court. We shall see that some of them had to be addressed in the course of on-going proceedings by the Registrar or the Court, but most of the other issues plaguing article 73(2) were readily addressed in the 1926 revision. The new version of the provision reads as follows:

‘The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.’<sup>10</sup>

<sup>7</sup> See W. Hummer, *Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung – Abgrenzung Handlungsbefugnisse, Rechtsnatur*, in K. Dicke *et al.* (ed.), *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System* (2000), 45 at 90.

<sup>8</sup> The provisions were subsequently transferred to article 66 of the Statute in 1929 (entering into force on 1 February 1936). See M. O. Hudson, ‘The 1936 Rules of the Permanent Court of International Justice’, (1936) 30 *Am. J. Int’L*. 463: ‘Experience under [the 1922 Rules] soon indicated that lacunae existed and that some changes were necessary [. . .]’. These provisions can still be found in article 66 of the ICJ’s Statute today. The substance of the article was not altered during the course of these transfers.

<sup>9</sup> These five questions we formulated. We are not aware of any previous scholarly work analyzing the 1922 provision and formulating such issues.

<sup>10</sup> PCIJ Series D No 1 (1926). at 127

The new provision was obviously more detailed and one can clearly see a transition from the initial, cheerful openness of 1921 to the 1926 atmosphere of deadlines, direct communications, special sittings and authorizations.

The question of *who* was now specifically addressed: the authority for delivering notices rests with the Court or, should it not be sitting, with the President.

The question of *how* was dealt with as well: both oral and written contributions were admissible.

Lastly, the crucial question of *when* clearly became of concern, as time limits were being established, though they remained to be set by the President in light of the particular circumstances surrounding each case.

One could easily think that this clarification of the Rules was related to the Court being flooded by overwhelming requests for participation coming from all kinds of NGOs. The reality, however, is different and a thorough examination of the records shows a remarkably scarce practice of private participation: only four cases involved private international organizations in the entire history of the PCIJ.<sup>11</sup>

This scarcity is even more striking when one reads the minutes of some sittings. Records of the first advisory cases show an overwhelmingly receptive attitude from the Court, where NGOs are readily mixed up with IGOs on the speaker's list, with no signs of the latter having any kind of precedence over the former.<sup>12</sup> One can even find a letter from an organization to the Registrar, asking him to postpone the Court's sitting in the case, so that it would be more convenient for its representatives to attend the session.<sup>13</sup> In that particular case, the organization was duly reminded by the Registrar that the Court had authority over its agenda and that the union's officers' presence was not needed to hold the sitting. But the mere fact that the union considered and sent such a letter shows how self-evident their participation to the proceedings seemed to be. Participation was evidently not considered a privilege and NGOs seemed to consider themselves as true parties to the proceedings.<sup>14</sup>

<sup>11</sup> We found these 4 cases of participation of private organizations out of a total of 27 advisory proceedings that took place before the PCIJ from 1922 to 1940. NGOs were allowed to present arguments, either in writing or orally, in the following proceedings:

- *Nomination of the Worker's Delegate for the Netherlands at the Third Session of the International Labour Conference*, PCIJ Rep Series B No 1 (1922).
- *Competence of the International Labour Organisation in regard to international regulation of the conditions of labour of persons employed in agriculture*, PCIJ Rep Series B No 2 & 3 (1922).
- *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer*, PCIJ Rep Series B No 13 (1926).
- *Interpretation of the Convention of 1919 Concerning Employment of Women during the Night*, PCIJ Rep Series A/B No 50 (1932).

<sup>12</sup> PCIJ Rep Series C Nos. 1–3 (1922), at 11–12. Mentions of the notices sent to these IGOs and NGOs are equally undifferentiated, *ibid.*, at 4. The language of diplomacy was even used when referring to the documents establishing the power of the unions' representatives to represent them: *ibid.*, at 13.

<sup>13</sup> The letter was sent by the *Organisation Internationale des Employeurs Industriels*. PCIJ Rep Series C No 12 (1926), at 267 (item No 20).

<sup>14</sup> PCIJ Rep Series C No 12 (1926), at 268 (item No 21).

### 1.2. *Relevance of PCIJ's dealings with 'NGOs'*

The PCIJ was the first international jurisdiction to confront the rise of international NGOs and to try and accommodate them into its proceedings. However, its experience in dealing with so-called 'non-governmental organizations' might be tempered somewhat, as a closer look into the names and nature of the organizations involved shows. Every private international organization that we encountered in PCIJ proceedings was a trade union, admitted to participate in proceedings involving the International Labour Organization (ILO).

This observation could significantly reduce the relevance of the whole PCIJ experiment because of the peculiar position of international trade unions in the ILO realm. Unions are outright members of state delegations to the ILO and can therefore be considered as having a "personal" stake in the fate of the ILO's structure itself. This stake might in turn explain why the trade unions involved, as well as the Court, seemed so ready and even eager to include these peculiar NGOs in the advisory proceedings related to the ILO. It is equally striking that we found no record of NGO participation in advisory proceedings not related to the ILO and that the Court did not use article 50 of its Statute to call in these trade unions as "experts".<sup>15</sup> The actual reason for including trade unions in PCIJ proceedings might have been, when construed with some hindsight, their belonging to this peculiarly inclusive international structure, and not their assumed expertise or knowledge of the facts. Even there however, the PCIJ experiment might prove revealing, insofar as it might show that some NGOs are included in international judicial proceedings because of the stake they have in the outcome of the decision, be it direct or (as in the case of unions simply belonging to the ILO structure and interested in any decision affecting this structure) indirect.

The lessons that we may draw from the PCIJ's dealings with international trade unions in the 1920s and 1930s might be applicable *a fortiori* to interactions between the Court and other non-governmental organizations. The restrictions imposed by the Court on submissions by trade unions with a direct stake in the outcome of the proceedings should arguably be even more stringently applied to other NGOs with no peculiar, direct interest in the case. Above all, neither the Court itself, nor the Registrar seem to have ever taken into account the peculiar relationship between the trade unions and the cases involved. The regime for participation of non-state, not-for-profit organizations is consequently the same, be these organizations trade unions or other kinds of NGOs.

### 1.3. *Lessons from the case law*

The case law of the PCIJ and its own reports also offer valuable insights on the regime of NGO participation at the World Court, regarding both the *initiative* of such participation and its *scope*.

<sup>15</sup> The mechanism provided for by article 50 was used by the PCIJ in two occasions, namely the *Greco-Bulgarian "Communities"* proceedings (PCIJ Rep Series B No 17 (1930)) and the *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer* case: cited by Shelton. *supra* note 1 at 677

The issue of the *initiative* of the participation is crucial because the very existence of a system of *amicus curiae* briefs depends on it. Arguably, if the initiative of the consultation rests with the tribunal itself and NGOs have no possibility whatsoever to interact with the tribunal absent an invitation from the jurisdiction itself to do so, the regime of participation is one of witness/experts, not *amicus curiae*. NGOs need to be granted the right to make submissions on their own initiative or, at least, to apply for a leave to make such submissions with the tribunal, in order for the regime to constitute an *amicus curiae* system.

In that respect, an examination of the records shows without ambiguity that, under the PCIJ regime, the initiative of the participation rested with the Court. It was up to the Court, or its President, to decide which organizations should be given notice of the request and which organizations should not, even though these organizations did not have to respond to the Court's invitation if they did not wish to. The 1926 Report of the PCIJ asserts that:

'The question of the international organizations permitted to furnish information (Rules, Article 73) was considered during the revision of the Rules in 1926 and it was established that the initiative always rested with the Court both in the case of a State and of an international organization'.<sup>16</sup>

The principle seems well-established, but still needs to be tempered, insofar as the Court sometimes requested advice from some third parties as to which organizations would be suitable to contact. We found evidence of this practice, when the Registrar solicited advice from the ILO's director, asking him which organizations would be of interest for the Court to hear from.<sup>17</sup>

There is also ample evidence of non-invited organizations applying for a leave to present an oral or written argument before the Court. One would have expected the Court, in light of its interpretation of article 73 as resting the initiative of the relationship with itself, to reject such applications immediately upon receipt. Even though that might actually have happened, the Court usually justified its rejection of applications on other grounds – including the lack of an international character of the organization<sup>18</sup> or its belonging to an umbrella organization already invited to submit an argument in the case.<sup>19</sup> Though disturbing, these letters still do not seem to alter the rule that the initiative of inviting the organizations rests with the Court. In these two particular cases, the organization did not qualify at all to appear before the PCIJ – either because it was a national entity<sup>20</sup> or because, as a member of an umbrella organization, it was already

<sup>16</sup> PCIJ Rep Series E No 3 (1927), at 225.

<sup>17</sup> PCIJ Rep Series C No 12 (1926), at 259 (item No 10). See also the reply by Albert Thomas, Director-General of the ILO at 260.

<sup>18</sup> PCIJ Rep Series C No 1 (1922), at 449 (item No 16).

<sup>19</sup> E.g. the *Union Internationale des Fédérations des Ouvriers et Ouvrières de l'Alimentation*, a member of the International Federation of Trade Unions: 'If the Union in question wishes to submit observations to the Court, it would accordingly be natural for it to do so through the intermediary of the Federation of Trade Unions'. PCIJ Rep Series C No 12, at 261 (appendix to item No 12).

<sup>20</sup> According to C. CHINKIN, the PCIJ was willing to include national organizations in its advisory proceedings as well. We found no evidence of such practice. See C. Chinkin, *Third parties in International Law* (1993), 230.

represented in the proceedings. If they had qualified, then the Court would probably still have rejected their application as not having been solicited.<sup>21</sup>

The documents pertaining to the *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer* case offer a final insight into the *scope* of the argument to be presented by NGOs to the Court. In a letter addressed to the secretary-general of the *Fédération Syndicale Internationale*, the Registrar clearly dealt with what was acceptable and what was not acceptable in the union's submission, stating that:

'C'est sans doute à la Cour seule qu'il appartient d'examiner quelle réponse il convient [de] donner au point de vue juridique. Ce fait, cependant, ne doit pas être compris comme empêchant les organisations intéressées, une fois admises à fournir à la Cour des renseignements oraux, de se faire représenter, à cette fin, par des jurisconsultes. Mais ceux-ci, en développant leurs arguments, *ne sont pas appelés à indiquer la conclusion à laquelle, dans leur opinion, la Cour devrait arriver*'.<sup>22</sup>

The point is interesting, insofar as it illustrates the role that the Registrar envisioned for NGOs in advisory proceedings. Private international organizations were not supposed to advise the Court as to its final decision, but simply to provide it with information that may help the judges fulfill their mission. Their role was one of bringing some expertise and/or knowledge of the case to the Court, very much like 'experts' or 'witnesses' would do. Such notion is the one of the traditional *amicus curiae*, 'friend of the court' as they used to be known in common law countries' courts and tribunals.<sup>23</sup>

The PCIJ thus did set the first premises and principles for dealing with NGOs at the World Court. The same principles would be found in the rules and practice of the ICJ, which proved hesitant when faced with its first submissions by NGOs, before quickly heading towards a very restrictive attitude towards private international organizations.

## 2. Past Practice of the ICJ (1947–2003)

### 2.1. *Access still limited to advisory proceedings*

The provisions governing NGO access to the newly created International Court of Justice did not differ much from the PCIJ's rules, though some innovations were clearly introduced, including a second paragraph that was added to article 34 of the Statute. The new provision reads as follows:

<sup>21</sup> We are aware that this interpretation might seem far too restrictive and literal. The Court possibly invited some organizations following their requesting such invitation. However, we have found no evidence of this in the correspondence of the Registrar and the practice was hence never recognized as such. The pattern nevertheless might have existed and it clearly did, starting with the 1990s, eventually leading to the issuance of the above mentioned Practice Directions in July 2004 – *see supra* note 3. The principle nevertheless remained untouched until that date.

<sup>22</sup> PCIJ Rep Series C No 12 (1926), at 282 (emphasis added).

<sup>23</sup> For insights on this conception, as well as the subsequent shift of *amici curiae* towards a partisan, advocacy role in the United States, see S. Krislov, 'The Amicus Curiae Brief: from Friendship to Advocacy', (1963) 72 *Yale L J* 694

1. Only States may be parties in cases before the Court.
2. The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.<sup>24</sup>

The adjunction of this new provision to article 34 led some to believe that access to contentious proceedings was now available to NGOs as it had already been available in advisory proceedings under the PCIJ regime. This interpretation was bound to face objections though, since article 34(2) and article 66(2) contain a significant dissimilarity in language. Whereas article 66(2) simply refers to ‘international organizations’, both in the PCIJ and the ICJ statutes, the newly drafted article 34(2) refers to ‘*public* international organizations’ (emphasis added).

The *travaux préparatoires* of the 1945 Statute are inconclusive as to whether its drafters intended to establish dissimilar regimes for advisory and contentious proceedings.<sup>25</sup> It seems plausible that article 66(2) was not discussed, inadvertently leaving open the possibility for any kind of international organization to be tolerated in the realm of advisory proceedings.<sup>26</sup>

As for article 34(2), the *travaux préparatoires* show that the drafting committee did intend to include only organizations whose membership consists of States, thereby excluding ‘scientific societies’ and the like.<sup>27</sup> This interpretation clearly rules out any possibility for NGOs to present arguments to the Court in contentious proceedings. One organization nevertheless attempted to submit briefs to the Court in the *Asylum* case, asserting that the term ‘public’ referred to the nature of the *interest* pursued by an organization.<sup>28</sup> Any international body could thus qualify as a ‘public’ international organization as long as its goals were of public interest, *i.e.* ‘public international organizations’ actually meant ‘public interest international organizations’. This tentative interpretation was put forward by the League for the Rights of Man (later known as the International League for Human Rights) in a letter to the Registrar, dated 7 March 1950, asking that “the Court determines whether the League is a public international organization within the meaning of article 34”.<sup>29</sup> The League’s request was quickly dismissed by the Registrar in the shape of a telegram.<sup>30</sup>

The attempt by the League rested on an interesting interpretation of article 34(2). Such interpretation, however, was definitely ruled out by the new Rules of 1978, whose article 69 now mentions that ‘in the foregoing paragraphs, the term “public international organization” denotes an international organization of States’,<sup>31</sup> thereby

<sup>24</sup> Article 34 of the Statute is to be read together with article 69 of the new Rules (cited *infra*).

<sup>25</sup> For a study of these *travaux préparatoires*, see Shelton, *supra* note 1, at 621.

<sup>26</sup> *Ibid.*

<sup>27</sup> Cited by Shelton, *ibid.* at 621.

<sup>28</sup> *Asylum* (Columbia v. Peru), Pleadings, [1950] ICJ Pleadings, oral arguments, documents, at 227.

<sup>29</sup> *Ibid.*

<sup>30</sup> The Registrar expressly grounded his decision on the language discrepancy between articles 34(2) and 66(2): *ibid.* at 228.

<sup>31</sup> The 1946 contained no such provision: see ICJ Rep Series D No 1 (1946), at 72. Though nongovernmental organizations clearly do not qualify as ‘public international organizations’ under that provision, there remains the issue of organizations composed of both private entities and States, *e.g.* the International Union for the Conservation of Nature and Natural Resources (IUCN). People familiar with the court, though, feel

excluding any selection based on the nature of the goals pursued by the applicant organization.

This discrepancy has led to a complete divergence in the regimes of NGO access in advisory proceedings, where participation remains conceivable under the vague wording of article 66(2), and contentious proceedings, where NGOs were barred from access from the outset. This situation seems bizarre, as one can hardly find a reason in the nature of the proceeding to include or exclude private international organizations – but still prevailed, theoretically, until the ICJ issued the above-mentioned new Practice Directions in July 2004.<sup>32</sup>

## 2.2. *The 1949 South West Africa case: a missed opportunity*

The experience of the first advisory proceedings before the ICJ shows that the Court seemed to acknowledge at first that difference of language between article 34(2) and article 66(2), before rejecting NGOs from advisory proceedings as well. Its attitude towards the first request for participation by the League for the Rights of Man in the *International Status of South West Africa* case was strikingly open, before abruptly converting into an outright closure in later cases.<sup>33</sup>

This fast alteration of the Court's attitude towards NGOs can be attributed to the League's errancies in its proceedings. The first request was sent to the Court by Mr Delson, a member of the League's Council based in New York, on 7 March 1950, apparently without prior invitation from the Court.<sup>34</sup> The well-drafted document made some reference to the League's consultative status with the ECOSOC and argued that the League would be able to bring its expertise to the Court and provide it/her with valuable information on the case, other than the one provided for by the States involved.<sup>35</sup> The Registrar stated, by telegram, as soon as 16 March 1950 that the Court would welcome a written presentation from the League and extended the deadline for submitting it to 10 April 1950.<sup>36</sup>

The League's clumsiness became apparent the day after, when Mr Gordon F. Mairehead, also a member of the League but based in London, sent a statement to the Court from Reverend Scott, an activist for the Herero tribe in Namibia.<sup>37</sup> The document

that such major, well-established organizations with a shadowy international legal status such as the IUCN or the International Committee of the Red Cross might be accepted by the Court as *amici curiae* anyway – cf. Section III *infra*.

It should also be noted that a State might choose to append a brief drafted by an NGO to its own submissions, in which case the brief is to be considered as part of the submission of the said State, not a submission by the NGO. Such device was used in the *Gabcikovo-Nagymaros* case – see Lindblom note 3, *supra*.

<sup>32</sup> Practice Direction XII does not mention the nature of the proceeding as a condition for NGOs to be entitled to submit briefs – see *supra* note 3.

<sup>33</sup> For a thorough account of relations between the Court and the League in that case, see R. S. Clark, 'The International League for Human Rights and South West Africa 1947–1957: The Human Rights NGO as Catalyst in the International Legal Process', (1981) *Hum. Rts. Quat.*, 101.

<sup>34</sup> *International Status of South West Africa*, [1950] ICJ Pleadings, oral arguments, documents, at 324.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* at 327.

<sup>37</sup> *Ibid.* at 328–329.

had evidently been sent from London without knowledge of the prior request by New York-based Mr Delson and was not in line with the Court's requirements regarding the form of the submissions. The Registrar duly exposed to Mr Mairehead that every communication between the League and the Court had to be channelled through the League's headquarters in New York, that a prior request for submission had been filed with the Court and that it had been accepted.<sup>38</sup>

The missives from the Registrar yielded no response from either of the two applicants and a third gentleman, introducing himself as a counsel to the League, sent a letter with no signature, but with a memorandum attached to it, to the Court on 9 May 1950 – e.g. one month past the deadline for submitting the written memorandum – and further requesting the leave to make an oral presentation to the Court.<sup>39</sup> The Deputy-Registrar replied on 12 May 1950, letting this Mr Laws know that the memorandum had been submitted way past the deadline, that the Court had already declined the help of the League in its oral proceedings and reminded him “as a matter of form” that letters generally ought to be signed by their authors.<sup>40</sup>

The dismal performance of the League in this instance – despite the League being one of the most prominent NGOs of the time – has been termed a missed opportunity by many. It was obviously not the best way to embark on a long-term, fruitful relationship between the Court and civil society and the subsequent decades found the ICJ wilfully ill-disposed towards NGOs, and especially the League for the Rights of Man.

### 2.3. *A steady policy of rejection*

The subsequent occurrences of requests to submit arguments by private international organizations are remarkably scarce until the beginning of the 1990s. As a matter of fact, a closer examination of the facts and cases involved reveals only two other attempts by civil society organizations to get involved in advisory proceedings at the ICJ between 1950 and 1989.

The first one was again related to the successive disputes over what is now the Republic of Namibia, with the above-mentioned Herero's herald Reverend Scott still involved. Several individuals and the League attempted to gain access to the Court in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* case and their attempts were repeated and seem at times almost desperate. The first one to apply was Pr M. Reisman from Yale University, who based his request on the League's precedent.<sup>41</sup> His letter to the Registrar on 10 September 1970 is an interesting document insofar as it offers a good overview of the (stated) motives of individuals and NGOs for submitting such “amicus curiae” briefs:

<sup>38</sup> *Ibid.* at 329.

<sup>39</sup> *Ibid.* at 343.

<sup>40</sup> *Ibid.* at 346.

<sup>41</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Pleadings, ICJ Pleadings, , oral arguments, documents, vol. II, at 636.

‘Because I am deeply concerned about the trend of events in Namibia and because I feel that critical legal issues are raised by the question posed to the Court by the Security Council, I should like to explore the possibility of submitting some form of *amicus curiae* brief to the International Court of Justice’.<sup>42</sup>

The request aroused a negative, but detailed response from the Registrar.<sup>43</sup> It is equally interesting, insofar as it plainly states the most commonly used reason for not allowing *amicus curiae* mechanisms in international fora. The Registrar, speaking “not in his capacity as the regular channel of the Court”, says he “believe[s] the Court would be unwilling to open the floodgates to what might be a vast amount of proffered assistance”.<sup>44</sup> As to the League’s application anyway, the Registrar clearly intended to let it known that, despite the provision in article 66(2) of its Statute, it was not prepared to let any NGO submit arguments in the course of advisory proceedings before it. The Court stuck to this position in the following months by rejecting the application submitted by the League on 10 November 1970, as well as all other applications by other international NGOs.<sup>45</sup>

This answer from the Registrar is worthy of more than a footnote because it introduced, for the very first time, one of the keywords of the debate over participation of NGOs at the World Court as *amici curiae*. Over and over, governments and courts themselves have been warning of “opening the floodgates” to hordes of multitudinous, untested NGOs ever since the Registrar first issued his warning in his 1970 letter. Critics of the opening of international jurisdictions to such organizations have been repeating the mantra of the opening floodgates for more than three decades and this letter is arguably the first of these.<sup>46</sup>

The very example of subsequent dealings by the ICJ with NGOs could nevertheless have exemplified the folly of such argument. The Court was faced with very few applications from NGOs in the following years. The International Commission of Jurists applied for participation in the *Difference relating to immunity from legal process of a Special Rapporteur of the Commission of Human Rights* case in 1998.<sup>47</sup> An Israeli organization also made contact with the Court regarding the *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory* case, before revealing to be of the unreliable sort in terms of management of its application, just the way the League had been fifty-three years ago.<sup>48</sup>

<sup>42</sup> *Ibid.*, at 636–637.

<sup>43</sup> *Ibid.*, at 638.

<sup>44</sup> *Ibid.*

<sup>45</sup> The application by Pr Reisman could have been rejected *prima facie* anyway, because article 66(2) explicitly mentions “organizations”, a fact mentioned in the Registrar’s letter to Pr Reisman at 638. This was the course of action the Registrar adopted when a subsequent request arrived from Reverend Scott, dismissed because of his being an individual – see the request *ibid.*, at 644 and the reply, *ibid.*, at 647.

The Court also rejected, outside from the League’s and American Committee on Africa’s requests discussed in the paper, an application by an indigenous organization from Namibia – see *ibid.*, at 677 and 678.

<sup>46</sup> At least, it is one of the first of such occurrences: we have not found any earlier use of the “floodgates” metaphor.

<sup>47</sup> Source undisclosed.

<sup>48</sup> This organization introduced herself as « the civil coalition of Israel ». The secretariat of the Court tried to contact the organization, but to no avail (the phone and fax numbers contained in its initial letter proved inexistent) – *idem*.

The only instance where the Court's activity actually arose some kind of interest from the world's civil society organizations was in the years 1994 to 1996 when the Court dealt with the *Legality of the Threat or Use of Nuclear Weapons* case. The issues at stake in the matters brought to the scrutiny of the Court were immense and its proceedings attracted much attention from every quarter of the media and the NGO community.<sup>49</sup> Numerous briefs were sent to the Court based on article 66 of the Statute, from organizations such as the International Peace Bureau or the IPPNW (International Physicians for the Prevention of Nuclear War) and the Court received letters from individuals and signatures numbering in the millions.<sup>50</sup>

The Court did not accept any of these briefs as official submissions but ordered the briefs to be stored inside the Peace Palace library.<sup>51</sup> This decision by the ICJ made way for the 2004 instruction,<sup>52</sup> but did not amount to any kind of formal acceptance of the briefs into the advisory proceedings of the Court.

The practice of the International Court of Justice from 1947 through the 1990s hence appears remarkably steady: based on the information at our disposal, no information was ever *sought* from non-governmental organizations and all applications to submit briefs from such organizations were *rejected* with varying haste, though with constant courtesy – and with the practical arrangement of the library storage for the *Legality* briefs.<sup>53</sup>

<sup>49</sup> See e.g. S. Kinzer, 'World Court Weighs Legality of Atomic War', *New York Times*, 20 November 1995, 6 and J. Burroughs, 'The Legality of Threat or Use of Nuclear Weapons: a Guide to the Historic Opinion of the International Court of Justice' (1998), generally.

<sup>50</sup> See Lindblom, *supra* note 3, at 213.

<sup>51</sup> *Ibid.*

<sup>52</sup> Cf. *infra* Section III.

<sup>53</sup> For instance, courtesy was said to be the only reason for which the secretariat tried to make contact with the Israeli organization mentioned earlier – see *supra*.

There are only two other cases of attempts by an international NGO to participate in the Court's advisory proceedings in this "early" period of 1947–1989. Both attempts were by the Federation of International Civil Servants' Association, respectively in 1954 and 1984. It is to be understood in the peculiar context of the ICJ's so-called "advisory" jurisdiction over awards of the ILO's administrative tribunal (ILOAT) and therefore does not qualify as a valid precedent for any further participation of NGOs at the World Court.

This jurisdiction was awarded to the Court by the ILO Constitution and has now disappeared. It was, in effect, an appeal procedure against judgements of the ILOAT involving individual members of the organization's staff and the specific nature of these proceedings has been overlooked by some authors when analyzing the Federation's attempt to submit a brief.

Cases heard by the Court within the realm of this appellate jurisdiction involved individuals, namely international civil servants of the ILO or other IGOs. A fair treatment of the case thus required the Court to hear from the individuals whose fate was to be dealt with during the proceeding and peculiar mechanisms had been set into place for that purpose. The applications by the Federation of International Civil Servants, whom the involved individuals were apparently members of, need to be understood against this background. It was but an example of a trade union supporting its member's claim against its employer – nothing worth noticing here and certainly nothing approaching the brief of an *amicus* sympathetic to the Court's workload.

The move by this particular NGO bears more of a resemblance with collective action, e.g. an action by an association to protect the collective interests of its members and/or the public interest it itself perceives to be defending. This kind of NGO participation was dismissed in 1954 by the Registrar in a letter dated 25 January 1954, a mere six days after the Federation applied for a leave to file the brief, but was welcomed by the Court in 1984, apparently on the basis of article 66(2) of the Statute.

On the 1954 case, see Shelton, note 1 *supra*, at XX.

In dealing with these requests, the Court and the Registrar, like the PCIJ itself, proved unable to stick with some of the policies established by the Permanent Court. The discrepancy, which sometimes borders with simple clumsiness, is again most apparent over the crucial issue of the initiative of the participation.<sup>54</sup> The PCIJ held in its above-mentioned report that the initiative of the consultation rested with the Court only, but only rarely mentioned it as the rationale for rejecting application for leaves by NGOs.<sup>55</sup>

The ICJ and its Registrar seemed to follow the same, unclear path. All applicants were eventually turned down, but some of their unsolicited applications were actually reviewed by the Court. This is most apparent in the *Legal Consequences* case. The application by the League was not rejected immediately like Pr Reisman's, but was first submitted to the consideration of the Court by the Registrar:<sup>56</sup> the Court then rejected the application only 'after careful consideration'.<sup>57</sup>

It is our guess, based on the Registrar's prior assertion, that the Court never intended to accept the League's submission. The Registrar nevertheless did transmit the request to the Court, which in turn examined it. The procedure followed in this instance clearly departs from the mechanism envisioned at article 66(2) of the Statute, as construed by the PCIJ in its 1926 report. No "special and direct" communication was made by the Registrar to the League at all. The request came spontaneously and the Court nevertheless deemed fit to consider it and not to dismiss it *prima facie*.

The point was clearly emphasised by the Registrar's dismissive response to a letter by the American Committee on Africa in the *Legal Consequences* case. After having seen their request for submission dismissed by the Registrar because of its lack of an international character and its affiliation to the League,<sup>58</sup> the Committee fought back by arguing that "no reasonable interpretation of the article [66(2)] compels the Court to reject valuable 'information' merely because the Court was unaware of the existence of an organization prepared to present it".<sup>59</sup>

The Registrar dismissed the Committee's argument,<sup>60</sup> hinting towards the original PCIJ determination: only the Court may initiate a formal consultation with non-governmental organizations, based on article 66(2) of the Statute. No brief or application for leave to submit a brief may be reviewed by the Court – an alternative regime

On the 1984 case, see P. Tavernier, 'L'avis consultatif de la Cour Internationale de Justice du 27 mai 1987 dans l'affaire de la demande de réformation du jugement n°333 du tribunal administratif des Nations Unies (affaire Yakimetz)', (1987) XXXIII Ann. Fr. Dr. Int'l 211, at 216.

<sup>54</sup> See *supra* 1.2.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Pleadings, ICJ Pleadings, oral arguments, documents, vol. II, at 644.

<sup>57</sup> *Ibid.* at 672.

<sup>58</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Pleadings, ICJ Pleadings, oral arguments, documents, vol. II, at 647. Both arguments were already – and rightly – used by the PCIJ in 1922, as mentioned earlier – see notes 16 & 17 *supra*.

<sup>59</sup> The letter of the Committee also interestingly mentioned as a reason for the Court to consider its arguments its "lack of bureaucratic inhibition"! *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Pleadings, ICJ Pleadings, oral arguments, documents, vol. II, at 649.

<sup>60</sup> *Ibid.*, at 652.

therefore had to be put in place to accommodate the mounting pressure on the Court by non-governmental organizations.

### 3. Towards more openness (2004– . . .)

#### 3.1 *Mounting pressure*

The practice of NGOs submitting information to the Court since the PCIJ's inception has been relatively sporadic. No general pattern seems to be available in that respect and the NGO's interest at first seems less than occasional. A closer look at the time periods when the Court was faced with non-governmental submissions, though, reveals an unmistakable trend towards *more* participation, or at least more interest from international civil society quarters in the past decade than ever before.

With only a few instances of NGOs applying for *amicus curiae* status with the Court since 1947, we found rather instructive that *one or more NGOs have applied for amicus curiae position in all and every advisory proceedings since 1993*. We already mentioned the application by NGOs in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case and the *Difference relating to immunity from legal process of a special rapporteur of the commission on human rights*.<sup>61</sup> Also, in the *Legality of the Threat or Use of Nuclear Weapons* case, the Registry of the Court received hundreds of letters from various organizations, almost none of which were considered by the Court.<sup>62</sup>

The pattern is therefore one of almost inexistent interactions with civil society until the 1990s, followed by sudden, though still limited, interest from civil society organizations in the work of the Court. The International Court of Justice is actually being faced with one of the most powerful trends of contemporary international relations – the exponential growth of international civil society organizations. But because the Court generally deals with issues that are not the primary focus of international NGOs, such as territorial disputes or diplomatic immunities, the pressure to admit NGOs has been far less important than it has been on institutions such as the Dispute Resolution Body of the World Trade Organization or international human rights bodies and jurisdictions.<sup>63</sup> The ICJ has been immune to sieges by international NGOs in regard to most of the cases brought before her, thanks to the peculiar nature of the matters concerned and has adopted an outright restrictive approach to such participation, arguably because of its willingness not to offend Member States, which may see the Court as the very last international forum freed the meddling of such private organizations.

<sup>61</sup> Cf. Section II (C), *supra*.

<sup>62</sup> Source undisclosed.

<sup>63</sup> The admission of NGOs at the World Trade Organization has been one of the most hotly debated aspect of the international legal status of NGOs in the past decade: *see réf.*

All major international human rights tribunals do accept *amicus curiae* from NGOs, albeit to a varying extent: *see Lindblom, supra* note 3, at 305, 325 and 336.

### 3.2 *The practice direction of 30 July 2004*

The comparatively circumscribed increase in NGO applications in the previous years nevertheless prompted the Court to act and try to prevent any future squabbling over civil society participation in advisory proceedings.<sup>64</sup> Until this month of July 2004, the ICJ remained the only international tribunal with no mechanism whatsoever to deal with non-governmental involvement in its proceedings.

The Court filled that gap with its practice direction No. XII dated 30 July 2004, whereby:

- ‘1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.
2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.’<sup>65</sup>

This instruction, which legal status remains unclear,<sup>66</sup> is the first provision ever in the history of the World Court dealing explicitly with the participation of ‘non-governmental organizations’, *i.e.* explicitly mentioning private international organizations as being potentially relevant to the work of the Court outside of the expert/witness-calling system at article 50 of the Statute. The 2004 practice direction is therefore the first (though probably not final) framework for involvement of NGOs at the International Court of Justice.

However, the text is still far from incepting a real, fully-fledged status for NGO participation. The tone of the new provisions is more defensive than out-reaching. The first paragraph is clearly not intended to welcome NGOs to the Court’s proceedings, but rather to exclude them, by stating that any document submitted by a private international organization should not be considered as juridically relevant to the proceedings. Surely such provision is to the effect of implicitly acknowledging that NGOs do send various contributions and memorandums to the Court and that they are entitled to do so. By the way, it is also to the effect to forbid NGOs to send such memos within con-

<sup>64</sup> It should be noted that no NGO, nor the Court, ever mentioned the idea of NGOs being involved in contentious proceedings in the recent years – for the attempt by the League for the Rights of Man, cf. Section II(A), *supra*.

<sup>65</sup> Available at [http://www.icj-ij.org/icjwww/ibasicdocuments/ibasic\\_text/ibasic\\_practice\\_directions\\_20040730\\_I-XII.htm](http://www.icj-ij.org/icjwww/ibasicdocuments/ibasic_text/ibasic_practice_directions_20040730_I-XII.htm).

<sup>66</sup> Article 30 of the Statute empowers the Court to ‘frame rules for carrying out its functions. In particular, it shall lay down rules of procedure’. Such rules could then certainly encompass other provisions than the officially laid down ‘Rules of the Court’, *e.g.* the ‘practice directions’ issued by the Court in 2004. Rosenne does seem to acknowledge the power of the Court to issue ‘general directions’ regarding the proceedings being held before it – cf. S. Rosenne, ‘The Law and Practice of the International Court, 1920–1996’

tentious proceedings, since the provision does not mention them. But the Court denies any procedural relevance to any such document by stating clearly that they are ‘not to be considered as part of the case file’.<sup>67</sup>

So as to make its point even more clear, the Courts specifies that the (real) parties to the proceedings remain free to review these documents ‘in the same manner as publications in the public domain’.<sup>68</sup> Implied is the affirmation that *the authors of these documents are not parties to the proceedings being held before the Court* – they should not even be considered as *amici curiae*, since their contributions should not have any more value than any other published work. The instruction ostensibly is a step forward towards more participation, while it is actually nothing but a standstill.

It might even be a step back: paragraph 3 of the instruction contains an apparent *obiter dictum* mentioning States and ‘intergovernmental organizations’ presenting arguments under article 66 of the Statute.<sup>69</sup> The reference made to article 66 here is clearly superfluous, which warrants another, more effective meaning to it: it is thus our understanding that, by explicitly mentioning “intergovernmental organizations [. . .] article 66”, the Court meant to exclude non-intergovernmental organizations from the purview of article 66. In other words, if the provisions of the instruction of 30 July 2004 are to be correctly interpreted, *NGOs do not qualify as ‘international organizations’ within the meaning of article 66 of the Statute*. Such implication is unmistakable from the wording of the instruction and was no doubt deliberate from the Court’s judges, among which the matter of the interpretation of article 66(2) was repeatedly debated.<sup>70</sup> No ‘special and direct communication’ can be made to an NGO, whose only opportunity to interact with the Court is to leave a memo – or any other kind of document for that matter – at the Peace Palace’s library.<sup>71</sup>

The situation at the World Court is ultimately similar to the situations at many other major international jurisdictions, where NGOs are free to leave as many “*amicus curiae*” briefs as they wish to, but where no reference is ever made to such briefs in the tribunal’s findings. In that sense, the procedure set forth in the instruction of 30 July 2004 might qualify as an “*amicus curiae*” system.<sup>72</sup> The decision by the Court to direct NGO briefs to the library might just be blunter, or even more cynical than the decision by other Courts’ statutes, because the Court here professes its lack of interest in the NGOs’ input, while other courts and tribunals ostensibly welcome such participation, while actually putting it aside when taking a decision.

(1997), at 1072–1074. The French version of article 30, though, does not provide for any direction to be issued by the Court outside of its *règlement*.

<sup>67</sup> *Ibid.*, at §2.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, at §3.

<sup>70</sup> Source undisclosed.

<sup>71</sup> In a sense, the mechanism would better qualify as a means of free supply of the library than a scheme for NGO participation!

<sup>72</sup> We might even see here the early examples of a larger pattern for *amicus curiae* participation at international courts and tribunals. The words of *amicus curiae* used in the context of international jurisdictions would thus cover a different reality than they do when used in the context of national jurisdictions.

However one may appraise such approach to NGO participation, it is still hard to see why NGOs should continue to be treated differently in contentious and advisory proceedings.<sup>73</sup> Since article 66 of the Statute is now definitely held to be inapplicable to contentious proceedings and because the distinct treatments of NGOs in contentious and advisory proceedings derived from the distinct wording of articles 66 and 34 of the Statute, the right to put briefs in the library granted to NGOs should apply equally in the context of contentious and advisory proceedings.

At any rate though, and whatever its real legal significance, the practice directions could not and does not annul article 66 of the Statute, whose discrepancy with article 34 is still apparent. Such practice directions are but rules of the Court and may not nullify the provisions of the Statute.<sup>74</sup> When construed strictly, the provisions of article 66 do warrant an extension of the possibility for the Court to request information to non intergovernmental organizations. People familiar with the Court even hint that such request by the Court could be contemplated in respect to some peculiar, major international non-governmental organizations such as the International Committee of the Red Cross.<sup>75</sup> The exclusion of NGOs from the purview of article 66 might not be as definitive as the wording of the 2004 instruction might indicate: such wording, though, acts as a strong signal that the Court is less than ever ready to admit NGOs to participate in its proceedings.

All in all, the situation of NGOs at the ICJ remains extraordinarily unclear: a thorough clarification is now required. The artifice set forth in the instruction does not resolve the underlying discrepancy between article 66 and 34 of the Statute, as well as between article 66 and the practice of the Court. It is now necessary to change the provisions of the Statute, in order to cope with the growing reality of increasing civil society on the international scene in general, and before the World Court in particular:

- *article 66(2) of the Statute should be rephrased.* The new version of article 66(2) shall be clear as to what kind of international organizations are encompassed by its provisions and whether nongovernmental organizations, or some specific non-governmental organizations may receive the ‘special and direction communication’ envisioned by the said provision;
- *new provisions should be added to the Statute, or the Rules, dealing specifically with access of non-governmental organizations to contentious and advisory proceedings of the Court.* Such provisions might as well enshrine the mechanism set forth in the 2004 instruction, or provide for greater openness of the Court towards NGOs. But whatever decision the States parties to the Statute may make, they need to make one so that the regime of NGO participation at the World Court is made clear once and for all.

The International Court of Justice deserves better than a clumsy regime based on unclear provisions and unfounded provisions to deal with the biggest challenge to the

<sup>73</sup> As evident from paragraph 1 of the 2004 instruction: see *supra*.

<sup>74</sup> See note 65, *supra*.

<sup>75</sup> Source undisclosed.

incumbent international legal system of the times. The regime for civil society involvement in the work of the Court that has been chosen in 2004 is in line with a growing practice among international courts and tribunals. It is worthy of conservation, but should be set out more clearly and comprehensively, in order for the Court to take full advantage of the knowledge and skills that non-governmental organizations might bring to the intergovernmental, judiciary process.

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