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The International Court of Justice and the Idea of Liberal International Law

*Russell Buchan**

1. Introduction

The International Court of Justice (also referred to as the ICJ or World Court) was established by the United Nations (UN) Charter in 1945 and came into existence upon the election of its first cohort of judges in 1946. The ICJ constitutes ‘the principal judicial organ of the United Nations’¹ and, as such, it plays a critical role in realising the UN’s objectives to ‘[m]aintain international peace and security’² and ‘[a]chieve international cooperation in solving international problems’.³ The function of the World Court is ‘to decide in accordance with international law such disputes as are submitted to it’⁴ and its jurisdiction is of two kinds: contentious jurisdiction,⁵ under which states bring their dispute to the Court for binding decision; and advisory jurisdiction,⁶ according to which the Court issues non-binding opinions ‘on any legal question’ upon request by organs of the UN and its specialised agencies.⁷

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¹ Article 92 of the UN Charter 1945 and Article 1 of the Statute of the International Court of Justice 1945.

² Article 1(1) UN Charter.

³ *Ibid.*, Article 1(3). ‘[The ICJ] is designed not merely as a forum at the service of states seeking to work out their differences in accordance with law, but constitutes a part of an overall international strategy aimed at maintaining peace’, Yuval Shany and Rotem Giladi, ‘International Court of Justice’ in Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) 166.

⁴ Article 38(1) ICJ Statute.

⁵ *Ibid.*

⁶ *Ibid.*, Article 65(1).

⁷ *Ibid.*

A review of the ICJ's caseload reveals that, in quantitative terms, it is rendering more judgments and opinions than ever before.⁸ But what about the qualitative nature of the Court's engagement with international law or, in other words, with what *types* of international law does the ICJ interact? This chapter examines the contribution of the ICJ to the protection of fundamental human rights under international law, a particularly important exercise given that the UN has long regarded the protection of human rights as one of its key objectives.⁹

In reviewing the ICJ's jurisprudence, this chapter distinguishes between two phases in the Court's life.¹⁰ Section 2 claims that, due to the political environment prevailing during the Cold War era, from 1946-1990 the Court's primary concern was to facilitate the peaceful resolution of inter-state disputes and to do so by protecting and maintaining state sovereignty. As a result, during the Cold War the ICJ exhibited little engagement with international human rights law and thus contributed little to the protection of human rights. By contrast, section 3 maintains that, since the end of the Cold War and the transformative impact this event had upon the international society, the Court has been far more prepared to engage with international human rights law. Indeed, this section goes further and argues that, such is the ICJ's commitment to promoting respect for human dignity in the post-Cold War era, it has progressively interpreted international law in order to enhance the protection accorded to human rights. When cast in this light, and as section 4 concludes, the ICJ has come to occupy

⁸ 'During the past decade [from 2006-2016], the Court has had to deal with cases of increasing complexity and variety, to settle difficult legal issues, and to rule on questions of fact resting on evidence of a scientific or technical nature', Ronny Abraham, 'Presentation of the International Court of Justice over the Last Ten Years' (2016) 7 *Journal of International Dispute Settlement* 297, 307.

⁹ See <http://www.un.org/en/sections/what-we-do/protect-human-rights/> last accessed 22 October 2020.

¹⁰ Bruno Simma, 'Human Rights Before the International Court of Justice: Community Interest Coming to Life?' in Holger P Hestermeyer, Doris König, Nele Matz-Lück, Volker Röben, Anja Seibert-Fohr, Peter-Tobias Stoll and Silja Vöneky (eds), *Coexistence, Cooperation and Solidarity* (Martinus Nijhoff 2011) 579.

an important role in the international society's broader effort to promulgate what I have previously termed 'liberal international law'.¹¹

2. The First Phase: 1946-1990

When faced with the devastation wrought by the Second World War, states sought to devise a more effective system for maintaining international peace and security. In response, states created an international society – which was later institutionalised by the UN¹² – that is predicated upon the principle of the sovereign equality of states.¹³ According to this principle, 'whatever inequality may exist between states as regards their size, power, degree of civilization, wealth and other qualities, they are nevertheless equals as international persons'.¹⁴ As sovereign entities, states exercise supreme authority within their territory and over their population and, unless otherwise consented to, external actors are prohibited from interfering in their internal affairs.¹⁵ The principle of the sovereign equality of states is widely regarded as representing the constitutional basis of the international society and, as such, this society has developed a vast array of international legal rules in order to protect and promote its foundational norm.¹⁶

¹¹ Russell Buchan, 'Developing Democracy through Liberal International Law' (2015) 4 *Cambridge Journal of International and Comparative Law* 319.

¹² '[T]he UN has been called upon to play the role of implementation mechanism ... the UN ultimately acts in the interest and on behalf of the whole world community, of which it is the legitimate representative', Antonio Cassese, *International Law in a Divided World* (Clarendon Press 1986) 159.

¹³ Article 2(1) UN Charter.

¹⁴ Lassa Oppenheim, *International Law: A Treatise, Volume I* (Longmans Green & Co 1920-21) 15.

¹⁵ '[F]rom the perspective of any particular state what it chiefly hopes to gain from participation in the society of states is recognition of its independence of outside authority, and in particular of its supreme jurisdiction over its subjects and territory. The chief price it has to pay for this is recognition of like rights to independence and sovereignty on the part of other states', Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Palgrave 2002) 16-17.

¹⁶ '[There are] many rules of international law which protect sovereignty in general', *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Preliminary Objections) (ICJ Reports 2018) 1, para. 93. 'The national sovereign State has constituted the backbone of the world order for a long time. International law as we know it today has been developed on the basis of this notion [...] Rules of international law, whether related to non-intervention, the use of force, economic cooperation, diplomatic and consular relations, or functional co-

In addition to their sovereign equality, the member states of the international society recognised that they shared other values and interests that were also deserving of protection. For example, the UN Charter makes a number of references to the importance of ‘the dignity and worth of the human person’.¹⁷ Indeed, in 1948 the Universal Declaration of Human Rights was adopted under the auspices of the UN, which proclaims that ‘the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.¹⁸ Accordingly, the international society has implemented a range of international legal rules the purpose of which are to protect human dignity, a body of law that is referred to generally as international human rights law.

The onset of the Cold War at the start of the 1950s raised the possibility of a third world war and in particular a world war that may involve nuclear conflict. Determined to prevent this, the protection of state sovereignty rapidly emerged as the international society’s overriding objective, consuming much of its time, energy and resources and thus preventing it from pursuing other interests such as the promotion of human dignity.¹⁹ The international society’s Cold War pre-occupation with maintaining the sovereign authority of the state – and its agnosticism towards the protection of the human rights of the individual – is exemplified

operation through inter-governmental organizations, to mention just a few areas, have a reciprocal State interest as their rationale [namely, protecting state sovereignty]’, Marcel Brus, ‘Bridging the Gap Between State Sovereignty and International Governance: The Authority of Law’ in Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth De Vos, and John Dugard (eds), *State, Sovereignty, and International Governance* (Oxford University Press 2002) 3-4. ‘It is safe to conclude that sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest’, Antonio Cassese, *International Law* (Oxford University Press 2005) 48.

¹⁷ Preamble UN Charter. See also Articles 1(3) and 55(c) UN Charter. ‘The inclusion of the human rights language in the Charter of the United Nations was a critical juncture that channeled the history of post-war global governance in the direction of setting international norms and law about the international promotion of human rights’, Kathryn Sikkink, ‘Latin American Countries as Norm Protagonists of the Idea of International Human Rights’ (2014) 20 *Global Governance* 389, 395.

¹⁸ Preamble, Universal Declaration of Human Rights 1948.

¹⁹ Brian Frederking, *The United States and the Security Council: Collective Security Since the Cold War* (Routledge 2007) 13 (explaining that during the Cold War ‘the traditional notion of state sovereignty trumped human rights [...] How states treated their own citizens was considered a domestic matter’).

in the practice of UN organs such as the Security Council and the General Assembly²⁰ as well as the ICJ, the latter of which is the focus of this chapter.

All UN member states are *ipso facto* parties to the Statute of the International Court of Justice, which is an international treaty regulating the activities of the Court. Crucially, when concluding this Statute, states prescribed that the ICJ can only exercise its jurisdiction in contentious proceedings where the disputing states grant their consent.²¹ That the Court's authority is conferred by the consent of the disputing parties is a 'corollary of the sovereign equality of States' because, as we have seen, central to this principle is that state sovereignty can only be limited where it is consented to by the state.²²

The ICJ Statute provides a number of different ways in which states can manifest their consent. First, through a special agreement (*compromis*) between the parties; second, by positive conduct that invites the jurisdiction of the Court (*forum prorogatum*); third, where a treaty contains a compromissory clause that confers jurisdiction upon the ICJ to arbitrate disputes arising under it; and fourth, accession to the 'optional clause' under Article 36(2)

²⁰ For a review of this practice see Russell Buchan, *International Law and the Construction of the Liberal Peace* (Hart 2013) chapter 4.

²¹ '[The Court's] jurisdiction depends on the consent of States and, consequently, the Court may not compel a State to appear before it', *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Judgment) (Preliminary Objections) (ICJ Reports 1992) 240, para. 53. 'It is well established in international law that no State can, without its consent be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement', *Status of the Eastern Carelia* (Advisory Opinion) (PCIJ Reports 1923) Series B No. 5, para. 33. 'The principle of consensuality is as fundamental to adjudication by the Court as to arbitration and means that, unless all the states involved in a particular dispute have given their consent, there is no jurisdiction to give a decision', John G Merrills, *International Dispute Settlement* (Cambridge University Press 2017) 124-125.

²² 'The Court's contentious jurisdiction is based on the consent of the States parties to a dispute. The basic rule, reflected in Article 36 of the Statute of the Court, is a corollary of the sovereign equality of States. This latter principle not only lies at the very heart of the United Nations Charter, but also, more generally, still underpins the current international legal order', Philippe Couvreur, *The International Court of Justice and the Effectiveness of International Law* (Martinus Nijhoff 2017) 36. '[T]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent', *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)* (Judgment) (Preliminary Objections) (ICJ Reports 1954) 19, 32.

ICJ Statute, which is where states prospectively accept the jurisdiction of the ICJ when certain conditions are met.²³

Whether the parties to a dispute have accepted the ICJ's jurisdiction is decided by the Court.²⁴ Case law demonstrates that, during the Cold War era, the ICJ was meticulous in ensuring that states had clearly and unambiguously consented to its jurisdiction before contentious proceedings could ensue. As an illustration, consider the *South West Africa Cases*, which concerned the interpretation of a compromissory clause.²⁵

2.1 *South West Africa Cases*

Ethiopia and Liberia argued before the ICJ that South Africa had violated the obligations it owed to South West Africa under a League of Nations Mandate because, by introducing apartheid, it had failed to protect the material and moral well-being of that territory's inhabitants. Whether the ICJ possessed jurisdiction hinged on the compromissory clause contained in Article 7(2) of the Mandate for South West Africa, which read:

The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice [and subsequently to the ICJ].

South Africa denied that the Court possessed jurisdiction. *Inter alia*, South Africa argued that there was no 'dispute' between itself and Ethiopia/Liberia under Article 7(2) of

²³ Requests for advisory opinions do not require the consent of affected states. However, advisory opinions do not constitute binding decisions, *Interpretation of Peace Treaties* (Advisory Opinion) (ICJ Reports 1950) 65, 71 ('The Court's reply is only of an advisory character: as such, it has no binding force').

²⁴ Article 36(6) ICJ Statute.

²⁵ For an in-depth discussion see Rosalyn Higgins, 'The International Court and South West Africa: The Implications of the Judgment' (1966) 42 *International Affairs* 573.

the Mandate due to the fact that these latter states had no legal right or interest in whether it was lawfully implementing its obligations under the Mandate. In its judgment on preliminary objections in 1962, the Court dismissed South Africa's objection and established jurisdiction on the basis that the 'scope and purport' of the compromissory clause 'indicate[s] that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members'.²⁶

In 1966, the case entered its second phase. Rather than examining the merits of the case (as was expected), the Court declared that it had to address an 'antecedent'²⁷ question, namely, whether Ethiopia and Liberia had a 'legal interest' in challenging the legality of South Africa's conduct before the Court. Unlike the 1962 Court – which as we have seen interpreted Article 7(2) as conferring upon all states parties an inherent right to bring a case before the ICJ in the event that the Mandatory violated its obligations under the Mandate – the 1966 Court concluded that under Article 7(2) states parties only had a right to challenge the conduct of a Mandatory where they are able to demonstrate a special, national interest in ensuring the lawful performance of the Mandate. In arriving at this decision, the 1966 Court explained that the language of Article 7(2) was:

broad and ambiguous ... [and] it could never be supposed however that on the basis of this wide language the accepting State, by invoking this clause, was absolved from establishing a legal right or interest in the subject-matter of its claim. Otherwise, the conclusion would have to be that by accepting the compulsory jurisdiction of the Court in the widest terms possible, States could additionally create a legal right or interest for themselves in the subject-matter of any claim they chose to bring, and a

²⁶ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Judgment) (Preliminary Objections) (ICJ Reports 1962) 319, 343.

²⁷ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Judgment) (Second Phase) (ICJ Reports 1966) 6, para. 4.

corresponding answerability on the part of the other accepting State concerned. The underlying proposition that by conferring competence on the Court, a jurisdictional clause can thereby and of itself confer a substantive right, is one which the Court must decline to entertain.²⁸

After finding that neither Ethiopia nor Liberia had a special interest in whether South Africa was promoting the material and moral well-being of the mandated territory's inhabitants, the Court declined jurisdiction and refused to adjudicate upon the merits of the case. The importance of this decision in the context of this chapter is that, according to its interpretation of the Article 7(2) compromissory clause, the 1966 Court's view was that the states parties (Ethiopia and Liberia) to the Mandate were not entitled to a pronouncement from the Court on the merits of the case because the Mandatory (South Africa) had not given its consent for these states to challenge the performance of its legal obligations before the Court. The Court therefore had to decline jurisdiction because it was incompatible with South Africa's sovereignty to compel it to appear before the Court in circumstances to which it had not consented.²⁹

In essence, the Court reversed its 1962 decision.³⁰ In doing so, the Court adopted a narrow interpretation of the Article 7(2) compromissory clause, thereby exhibiting 'a dazzling display of formalism'.³¹ As one commentator explains, the Court was 'loathe to subject the Mandatory to obligations which it did not assume expressly and unequivocally',

²⁸ *Ibid.*, paras. 72-73.

²⁹ Although for a different explanation – which instead focuses upon the politics of the ICJ's then President Sir Percy Spender – see Victor Kattan, 'There was an Elephant in the Court Room': Reflections on the Role of Judge Sir Percy Spender (1897-1985) in the *South West Africa Cases* (1960-1966) after Half a Century' (2018) 31 *Leiden Journal of International Law* 147.

³⁰ While the 1966 Court did not expressly state that it was reversing the decision of the 1962 Court, nevertheless this was the view of Judge Jessup in his Dissenting Opinion, *South West Africa* (Second Phase) (Dissenting Opinion of Judge Jessup) (n 27) 330 ('In effect reversing its Judgment of 21 December 1962...').

³¹ Malcolm Langford, 'The New Apologists: The International Court of Justice and Human Rights' (2015) 48 *Retfoerd* 49, 51. In his Dissenting Opinion Judge Tanaka criticised the Court's 'strict juristic formalism', *South West Africa* (Second Phase) (Dissenting Opinion of Judge Tanaka) (n 27) 276.

the result of which was to ‘sacrifice the ideals of the Mandates System to the principles of State sovereignty in a context where such sovereignty was to be the servant of humanitarian ideals’.³² Said differently, the 1966 Court adopted an interpretation of international law that prioritised the protection of the principle of state sovereignty above and beyond the protection of the principle of human dignity.

2.2 Nicaragua

The *Nicaragua* case (1986) also illustrates the ICJ’s commitment to maintaining state sovereignty, even when this is at the expense of human rights protection. This case involved an allegation by Nicaragua that the US was assisting the *contra* rebels in their military operations against the Nicaraguan government, and by doing so the US was intervening in Nicaragua’s internal affairs in violation of international law, specifically, the principle of non-intervention and the prohibition on the use of force.³³ In short, the Court had to decide whether customary international law had modified the scope of these international legal principles to the extent that they recognise that states are able to lawfully intervene in the internal affairs of another state where necessary to protect fundamental human rights. After reviewing state practice in the area, the ICJ concluded that ‘no such general right of intervention, in support of an opposition within another State, exists in contemporary international law’.³⁴ In fact, the Court expressly supported the sovereign right of states to

³² ‘The South West Africa Cases: *Ut Res Magis Pereat Quam Valeat*’ (1967) 115 *University of Pennsylvania Law Review* 1170, 1190. As Lauterpacht explains, Courts impose restrictive interpretations on treaty provisions in order to protect the sovereignty of states: ‘The main explanation of the prominence of the rule of restrictive interpretation in the international sphere is that it has been resorted to by reference to and on account of the sovereignty of independent states. It is not only that in case of doubt the contractual obligation must be interpreted in favour of the debtor; it is because states are sovereign that a restrictive interpretation must be put upon their obligations’, Hersch Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 *British Yearbook of International Law* 48, 57-58.

³³ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Judgment) (Merits) (ICJ Reports 1986) 14.

³⁴ *Ibid.*, para. 209.

choose their own ‘political, economic, social and cultural system’³⁵ and explained that ‘[t]he Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system’.³⁶ In this sense, the Court interpreted the non-intervention principle expansively so as to protect state sovereignty from external intrusion, even though Nicaragua had agreed to protect human rights under international law and had subsequently exercised its sovereignty in such a way as to endanger them.

As said previously, human dignity is a key principle of the UN and its protection is ensured by the doctrine of international human rights law. This notwithstanding, the ICJ played little role in protecting human rights during the Cold War.³⁷ It is of course correct that the Court’s capacity to hear human rights disputes is limited. First, the Court is only open to disputes between states; hence, non-state actors such as individuals cannot initiate proceedings before the ICJ arguing that states have violated their rights under international human rights law.³⁸ Second, human rights treaties usually establish regimes that are designed to monitor and enforce the obligations contained therein, the implication being that any dispute arising under those treaties is more appropriately settled by the specialist treaty body rather than a more generalist court such as the ICJ. However, these limitations should not be overstated. In relation to the first point, while the ICJ is an inter-state Court, human rights issues can appear on the Court’s radar ‘indirectly’ such as when a state claims that a breach of human rights adversely affects its own interests or where human rights questions arise during the course of

³⁵ Ibid., para. 205.

³⁶ Ibid., para. 263.

³⁷ ‘Historically, the International Court of Justice ... has not played a significant role in this process [of applying and developing international human rights law]’, Chloe Gall, ‘Coming to Terms with a New Role: The Approach of the International Court of Justice to the Interpretation of Human Rights Treaties’ (2014) 21 *Australian Journal of International Law* 21, 55.

³⁸ Article 34(1) ICJ Statute provides that ‘[o]nly states may be parties in cases before the Court’.

advisory proceedings.³⁹ With regard to the second point, even though human rights are ideally litigated before human rights tribunals, the ICJ is not jurisdictionally barred from addressing questions on international human rights law if and when they arise during trial. Indeed, during the 1946-1990 period the ICJ was not wholly indifferent towards the protection of human rights. Nevertheless, it is apparent that the Court engaged with the principle of human dignity in a cursory, marginal and incidental manner.⁴⁰

2.3 *Corfu Channel*

The first contentious case to come before the Court was in 1949 and it involved an allegation by the UK that Albania was responsible under international law for the damage suffered to its warships when they struck mines in Albania's territorial waters.⁴¹ The Court found Albania liable under international law for its failure to clear its territorial waters of mines on the basis of 'certain general and well-recognized principles, namely: elementary considerations of humanity'.⁴² Yet, it is telling that the Court did not explain what are these elementary considerations of humanity or identify the doctrinal evidence necessary to justify their crystallisation as 'general and well-recognised' principles of international law.

2.4 *Barcelona Traction*

In *Barcelona Traction* (1970) Belgium sought diplomatic protection for its nationals – shareholders of a company – as a result of acts undertaken by Spain contrary to international

³⁹ '[T]he Court hears only disputes between States, and therefore only indirectly rules on questions of individual human rights', Abraham (n 8) 304.

⁴⁰ '[During the Cold War period] human rights considerations appear in more or less incidental ways [before the ICJ]; the legal reasoning in the cases concerned essentially turns round matters which have nothing to do with human rights, or in regard to which human rights play a mere subordinate role and are thus mentioned more or less *obiter*, not necessarily in an entirely positive, fully welcoming sense', Simma (n 10) 581.

⁴¹ *Corfu Channel (United Kingdom v. Albania)* (Judgment) (ICJ Reports 1949) 4.

⁴² *Ibid.*, 22.

law.⁴³ While the focus of the Court was upon the international law aspects of company law, it explained that there was a distinction in international law between those obligations states owe bilaterally and those they owe to the international society as a whole (to which the Court referred to as obligations *erga omnes*).⁴⁴ For the Court, examples of obligations *erga omnes* include those deriving from ‘the principles and rules concerning the basic rights of the human person’.⁴⁵ The significance of obligations *erga omnes* is that all states of the international society have a legal interest in their conservation. Thus, by identifying the rules relating to the basic rights of the human person as having attained *erga omnes* status, the ICJ enhanced the capacity of the international society to ensure their protection. However, the Court’s endorsement of the concept of *erga omnes* was mentioned *obiter* and the Court cited little evidence to support its claim that this doctrine had emerged as positive international law.

To summarise, during the Cold War the ICJ discharged its mandate with ‘hesitation and restraint’,⁴⁶ interpreting international law cautiously and with a view to protecting the intentions of sovereign states as they were articulated in formally adopted international legal rules.⁴⁷ Put differently, the Court’s approach to dispute resolution was ‘deeply classical and Westphalian’,⁴⁸ that is, ‘pronouncedly deferential to national sovereignty’.⁴⁹ Given the emphasis accorded to the protection of state sovereignty, during the Cold War years the ICJ exhibited little engagement with international human rights law and therefore did little to promote the principle of human dignity within the international society.

3. The Second Phase: 1990-

⁴³ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (Judgment) (ICJ Reports 1970) 3.

⁴⁴ *Ibid.*, para. 33.

⁴⁵ *Ibid.*, para. 34.

⁴⁶ Bruno Simma, ‘Mainstreaming Human Rights: The Contribution of the International Court of Justice’ (2012) 3 *Journal of International Dispute Settlement* 7, 9.

⁴⁷ As a result, the ICJ quickly developed ‘a reputation for conservatism and formalism’, Langford (n 31) 49.

⁴⁸ *Ibid.*, 49.

⁴⁹ Simma (n 46) 10.

The end of the Cold War represented a fundamental shift in the political and legal structure of the international society. In particular, the end of Cold War yielded two discrete consequences: first, it substantially reduced the possibility of a third world war; and second, it signalled the triumph of liberal democracy as the only legitimate form of political governance within the international society.⁵⁰

As this ‘new world order’ came into existence,⁵¹ UN organs such as the Security Council and General Assembly recalibrated their normative commitments and started adopting resolutions allowing for the protection and promotion of fundamental human rights.⁵² This section argues that, as the UN’s political organs took the lead in this area, the ICJ eventually followed suit.⁵³

3.1 *Wall*

In its 2004 *Wall*⁵⁴ advisory opinion, the ICJ determined that Israel’s construction of a security wall to protect itself against terrorist attacks violated a number of its international law obligations, including those contained in human rights treaties.⁵⁵ Indeed, the Court subjected

⁵⁰ Francis Fukuyama, *The End of History and the Last Man* (Penguin 2012).

⁵¹ President George HW Bush, *Address Before a Joint Session of the Congress on the State of the Union*, 29 January 1991, available at: <https://millercenter.org/the-presidency/presidential-speeches/january-29-1991-state-union-address> last accessed 22 October 2020.

⁵² See Buchan (n 20) chapter 4.

⁵³ ‘While in the long first period described above [1946-1990] human rights considerations essentially arose in incidental ways and played subordinate or marginal roles, the Court has now begun to tackle human rights issues in more straightforward ways and has turned to deciding cases focusing squarely on allegations of human rights violations’, Simma (n 10) 590. Elsewhere, Simma explains that ‘it was natural ... that case law with human rights elements would develop in tandem with the widening and thickening of international human rights as a growth industry within post-Second World War international law’, Simma (n 46) 10.

⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (ICJ Reports 2004) 136.

⁵⁵ Although the Court had indicated that international human rights law applies during times of armed conflict in the 1996 *Nuclear Weapons* advisory opinion (*Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ Reports 1996) 226, para. 25), it was in the *Wall* opinion that the Court first discussed the relationship between international human rights law and international humanitarian law in detail.

various international legal instruments to expansive interpretations in order to advance the protection of human rights. In this regard, three points can be recorded.

First, the Court held that international human rights law applies during times of armed conflict, ending a long and acrimonious debate concerning the interaction between international human rights law and international humanitarian law.⁵⁶ For the Court, ‘the protection offered by human rights treaties does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights’.⁵⁷

Second, the Court found that states owe human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) 1966 not just to individuals located within their territory but also to individuals located within foreign territory under their effective control.⁵⁸ The Court therefore concluded that Israel was required to protect the human rights guaranteed by the ICCPR to those individuals situated within occupied Palestinian territories.⁵⁹ This is a significant determination by the Court given that a number of states have long argued against the extraterritorial application of the Covenant,⁶⁰ including Israel.⁶¹ In fact, a literal reading of Article 2(1) ICCPR seems to rule out the possibility of extraterritorial application because it stipulates that states parties must protect Covenant rights in relation to those ‘individuals within its territory and subject to its jurisdiction’ – the use of the word ‘and’ therefore appears to require that individuals must be within a state’s territory for the ICCPR to apply. However, the ICJ determined that the ICCPR is capable of extraterritorial application and did so by adopting a disjunctive (rather than conjunctive)

⁵⁶ For a discussion see Anthony E Cassimatis, ‘International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law’ (2007) 56 *International and Comparative Law Quarterly* 623.

⁵⁷ *Wall* (n 54) para. 106.

⁵⁸ *Ibid.*, para. 109.

⁵⁹ *Ibid.*, para. 112.

⁶⁰ US Department of State (Matthew Waxman), *Report Concerning the International Covenant on Civil and Political Rights (ICCPR): Opening Statement to the UN Human Rights Committee* (17 July 2006).

⁶¹ Human Rights Committee, *Sixty-Third Session*, CCPR/C/SR.1675 (21 July 1998) para. 27.

reading of Article 2(1), namely, that states owe human rights obligation to those individuals that are either located within their territory *or* subject to their jurisdiction. The Court justified its deviation from the ordinary meaning of this provision on the basis of: the object and purpose of the Covenant; the Covenant's *travaux préparatoires*; as well as taking the unprecedented step of referring (and indeed deferring) to the jurisprudence of the Human Rights Committee (HRC), which had already confirmed the extraterritorial application of the ICCPR,⁶² specifically, its decisions in *Lopez*⁶³ and *Celiberti*.⁶⁴ The Court then corroborated its finding that Israel owes the obligations contained within the ICCPR to individuals located in occupied Palestinian territories by again referring to the jurisprudence of the HRC, this time to its concluding observations on Israel in 1998⁶⁵ and 2003.⁶⁶

Third, the Court ruled that reparations must be made available to individuals (and not just to states, as was conventionally the case⁶⁷) when they are subject to human rights and humanitarian law violations.⁶⁸ For this reason alone, the *Wall* opinion is a 'landmark finding of the Court'⁶⁹ and, by '[a]cknowledging and awarding natural and legal persons a direct right to reparations arising out of a breach of human rights and humanitarian law instruments',⁷⁰ it represents 'a tangible contribution of the Court towards the full implementation of human rights and humanitarian law'.⁷¹

3.2 *LaGrand* and *Avena*

⁶² *Wall* (n 54) paras. 109-110.

⁶³ *Lopez v. Uruguay*, Comm No R.12/52, UN Doc Supp No 40 A/36/40 (1981).

⁶⁴ *Celiberti v. Uruguay*, Comm No 56/1979, UN Doc CCPR /C/OP /1 (1984).

⁶⁵ UN Doc CCPR/C/79/Add.93 (1998) para. 10.

⁶⁶ UN Doc CCPR/CO/78/ISR (2003) para. 11.

⁶⁷ Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 497, 507.

⁶⁸ *Wall* (n 54) para. 153.

⁶⁹ Gentian Zyberi, 'The Development and Interpretation of International Human Rights and Humanitarian Law Rules and Principles through the Case-Law of the International Court of Justice' (2007) 25 *Netherlands Quarterly of Human Rights* 117, 130.

⁷⁰ *Ibid.*, 131.

⁷¹ *Ibid.*

The Court's engagement with the doctrine of diplomatic protection since the turn of the twenty-first century also demonstrates its growing commitment to the cause of human rights protection. In *LaGrand* (2001), two German nationals were convicted of first-degree murder in the US and sentenced to death.⁷² *Inter alia*, Germany argued that Article 36(1) of the Vienna Convention on Consular Relations (VCCR) 1963 conferred upon nationals an individual right to seek consular assistance from their home state while detained by a foreign government and, by failing to notify the detained German nationals of this right, the US violated international law. The ICJ upheld Germany's argument and permitted it to extend diplomatic protection over its nationals and vindicate their rights before the Court.

Germany maintained that Article 36(1) VCCR also confers upon detained nationals a *human right* to access assistance from their home state. However, the Court refused to opine on this matter given that it had already decided that Article 36(1) VCCR provides detained persons with an individual right to access consular assistance, the breach of which can be adequately protected by the home state invoking the doctrine of diplomatic protection.

The Court's reticence on the issue of human rights is surprising given that both the General Assembly and the Inter-American Court of Human Rights have previously determined that, because of its importance to maintaining due process, access to consular assistance under Article 36(1) VCCR constitutes an internationally protected human right.⁷³ Yet, the ICJ arrived at a similar decision in the *Avena* case in 2004.⁷⁴ Here, the Court held that the US had violated the individual rights of Mexican nationals under Article 36(1) VCCR to access consular assistance from their home state and that Mexico could extend diplomatic protection over its nationals in order to vindicate their rights. As in *LaGrand*, the ICJ refused

⁷² *LaGrand (Germany v. United States of America)* (Judgment) (ICJ Reports 2001) 466.

⁷³ See respectively UN General Assembly, *Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live* (13 December 1985) Article 5 and Advisory Opinion OC-16/1999, para. 121.

⁷⁴ *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) (ICJ Reports 2004) 12.

to determine whether this provision confers upon individuals a legally enforceable *human right*.⁷⁵

All in all, the reasoning employed in these cases – that is, the Court’s resort to the doctrine of diplomatic protection – indicates that it was more concerned with protecting the *sovereign right* of a state to protect its nationals when they are detained by a foreign government than protecting a *human right* to receive consular assistance in and by itself.

3.3 Diallo

It was not until 2010 that the Court broke free from the doctrine of diplomatic protection and began focusing upon the protection of individual rights *qua* human rights. In the *Diallo* (2010) case Guinea averred before the Court that the arrest and imprisonment of a Guinean national by the Democratic Republic of the Congo (DRC) – as well as his subsequent expulsion from Congolese territory – constituted a violation of the DRC’s obligations under the ICCPR, the African Charter on Human and Peoples’ Rights (ACHPR) 1981 and the VCCR.⁷⁶ Importantly, the Court found the DRC in violation of international law on the basis that its conduct was incompatible with Diallo’s *human rights*, rather than ‘try[ing] to translate them back to Diallo’s home state [of Guinea]’.⁷⁷ By focusing upon the impact of the DRC’s conduct on Diallo’s human rights, the Court ‘emancipated itself from the dogmatic straitjacket of diplomatic protection’⁷⁸ and ‘moved away from the emasculated and overly traditionalist view of diplomatic protection it had expressed [previously]’.⁷⁹

⁷⁵ *Ibid.*, para. 124.

⁷⁶ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Judgment) (Merits) (ICJ Reports 2010) 639.

⁷⁷ *Simma* (n 10) 593.

⁷⁸ *Ibid.*

⁷⁹ Eirik Bjorge, ‘Sadio Diallo’ (2011) 105 *American Journal of International Law* 534, 539.

Of course, Diallo as an individual did not bring the case to Court; as we have seen, individuals do not have *locus standi* before the ICJ. Instead, this was a case brought by the state of Guinea against the state of the DRC. But notwithstanding this inter-state dimension, the Court's resolution of this dispute on the basis that the DRC had transgressed Diallo's rights under international human rights law is significant because it 'marks a sea change' in the Court's preparedness to protect human rights.⁸⁰ This was recognised by Judge Cançado Trindade in his Separate Opinion:

The present *A. S. Diallo* case shows that diplomatic protection was initially resorted to herein, keeping in mind property rights or investments, but the dynamics of the case, at the stage of its merits, underwent a metamorphosis, and it reassuringly turned out to be a case, ultimately, of human rights protection, of the rights inherent to the human person, concerning its liberty and legal security. It is reassuring to see that even a tool conceived in the inter-State optics like diplomatic protection, may turn out to be utilized to safeguard human rights.⁸¹

Additionally, the *Diallo* decision is important because of the Court's progressive interpretation of the right to freedom from unlawful expulsion under Article 13 ICCPR and Article 12(4) ACHPR. According to these provisions, a state can expel an alien from its territory where that decision is taken 'in accordance with the law'. If this means that a state must only comply with its domestic law in order to effect a lawful expulsion, the DRC's decision to expel Diallo did not violate Article 13 ICCPR and Article 12(4) ACHPR because it met the requirements prescribed by Congolese law.

⁸⁰ *Ibid.*, 539. Gall refers to Diallo as a 'landmark decision' in the turn of the Court to the protection of human rights, Gall (n 37) 62.

⁸¹ *Diallo* (n 76) para. 213 (Separate Opinion of Judge Cançado Trindade). At para. 229 of his Separate Opinion, Judge Cançado Trindade further explains that '[t]he fact that a human rights case has at last been decided by the ICJ itself is particularly significant to me'.

However, the Court adopted a broader interpretation of these human rights provisions and read them to require that, to be lawful, expulsion decisions must be *non-arbitrary*.⁸² On this reading, Guinea could succeed in establishing a violation of Diallo's human rights because the DRC could not satisfy the Court that the expulsion order was necessary to meet a legitimate aim. By introducing the requirement that expulsions must be non-arbitrary, the Court arrogated to itself the power to assess the merits of expulsion decisions and thus to ensure their compatibility with the precepts of fundamental human rights.

The Court justified this limitation of non-arbitrariness by adopting a teleological interpretation of the ICCPR and the ACHPR, namely, that 'protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights'.⁸³ Moreover, the Court cited the jurisprudence of other human rights bodies to confirm its expansive interpretation of the right to freedom from unlawful expulsion, including the Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and Peoples' Rights.⁸⁴ By doing so, the Court sought to align its reasoning and jurisprudence with that of prominent human rights bodies.

Judges Greenwood and Keith produced a Joint Declaration rejecting the Court's broad interpretation of the right to freedom from unlawful expulsion. For these judges, the requirement that expulsion orders cannot be arbitrary was erroneous because: other provisions of the ICCPR and the ACHPR expressly require that decisions must not be taken in an arbitrary manner and, given that Article 13 ICCPR and Article 12(4) ACHPR omit any reference to this requirement, it can be inferred that the states parties did not intend to subject the right to freedom from expulsion to a limitation of non-arbitrariness; the limitation of non-

⁸² *Diallo* (n 76) para. 65

⁸³ *Ibid.*

⁸⁴ *Ibid.*, paras. 66-68.

arbitrariness cannot be implied from the object and purpose of the human rights treaties; and the *travaux préparatoires* to the ICCPR and the ACHPR do not indicate that expulsion is lawful only where it is non-arbitrary.⁸⁵

For these reasons, the Joint Declaration of Judges Greenwood and Keith ‘more accurately’ captures the ordinary meaning of Article 13 ICCPR and Article 12(4) ACHPR ‘than the opinion of the Court’.⁸⁶ But the important point is that the Court undertook a progressive interpretation of these provisions because it afforded greater protection to human rights. Thus, ‘[b]y developing international human rights law in this way, the International Court in *Diallo* forcefully staked its claim as an arbiter of human rights to be reckoned with’.⁸⁷

3.4 Croatia

When charting the turn of the ICJ towards the protection of fundamental human rights, the *Croatia* (2008) case is noteworthy.⁸⁸ Background to the breakup of Yugoslavia is necessary to set the scene. In the early 1990s, the Socialist Federal Republic of Yugoslavia (SFRY) – a founding member state of the UN – fell into violent conflict and began to disintegrate. A number of its provinces declared independence (notably Croatia) and, in 1992, they were admitted to the UN as independent member states. The Federal Republic of Yugoslavia (FRY) (which comprised Serbia and Montenegro) claimed to be the continuator state of the SFRY and, as such, it sought to assume the SFRY’s rights and responsibilities under international law, including retaining the SFRY’s membership of the UN. By Resolution 47/1 (1992), the

⁸⁵ *Diallo* (n 76) paras. 7-15 (Joint Declaration by Judges Greenwood and Keith).

⁸⁶ Sandy Ghandi, ‘Human Rights and the International Court of Justice in the *Ahmadou Sadio Diallo* Case’ (2011) 11 *Human Rights Law Review* 527, 545.

⁸⁷ Bjorge (n 79) 540.

⁸⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, (Judgment) (Preliminary Objections) (ICJ Reports 2008) 412.

General Assembly determined that the FRY could not assume (and thus automatically continue) the SFRY's UN membership. As a result, the FRY had to apply for UN membership and, after having done so, on 1 November 2000 it was admitted as a UN member. Montenegro became an independent state on 3 June 2006 (and a UN member on 28 June 2006) and Serbia declared its independence on 5 June 2006 (and was permitted to retain the FRY's membership of the UN).

Croatia argued that the FRY – and thus Serbia as its successor state – had violated its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide 1948 during the 1990s and, invoking the Article IX compromissory clause contained within this agreement, sought to engage the jurisdiction of the ICJ. Serbia objected to the Court's jurisdiction on the basis that, *inter alia*, it lacked legal capacity to be party to the proceedings. Serbia grounded its argument in the ICJ's earlier decision in *Legality of the Use of Force* (2004).⁸⁹ Here, the Court determined that the question as to whether it has jurisdiction to hear a case has to be assessed at the date the applicant filed its application to institute proceedings before the Court.⁹⁰ Applying this rule, the Court found that the FRY was barred from bringing proceedings against those NATO states that had bombed its territory during the Kosovo crisis because it was not a member of the UN (and thus a party to the ICJ Statute) on the 29 April 1999, which is when it filed its application with the Court (as previously said, the UN did not accept the FRY as a member until 1 November 2000).⁹¹ Employing this line of reasoning Serbia argued that, because Croatia submitted its application to the ICJ prior to the FRY's (and thus Serbia's) admission to the UN in 2000, the Court could not exercise jurisdiction over the dispute.

⁸⁹ *Legality of the Use of Force (Serbia and Montenegro v. Belgium)* (Judgment) (Preliminary Objections) (ICJ Reports 2004) 279.

⁹⁰ *Ibid.*, para. 263.

⁹¹ *Croatia* (n 88) para. 79.

The Court dismissed Serbia's objections and established its jurisdiction to adjudicate upon the merits of the case. The Court recognised that it was departing from its judgment in *Legality of the Use of Force* but stressed that the question of jurisdiction had to be approached with 'realism and flexibility in certain situations'.⁹² The Court placed considerable emphasis upon the fact that, if it declined jurisdiction, Croatia would have simply re-filed its application to the Court and, because Serbia was now a member of the UN and thus a party to the ICJ Statute, the Court would have possessed jurisdiction.⁹³ The Court therefore found it was in the 'sound administration of justice' to overlook the procedural defect in Croatia's application and exercise jurisdiction.⁹⁴ The Court distinguished the *Legality of the Use of Force* on the basis that the FRY 'did not have the intention of pursuing its claim [against NATO states] by way of new applications'⁹⁵ and, as a result, in that case the Court did not regard it as being in the sound administration of justice to ignore the application's procedural deficiencies.

Understandably, the Court was anxious to provide legal justification for its decision.⁹⁶ To do this, the Court cited the Permanent Court of International Justice's decision in *Mavrommatis* (1924),⁹⁷ which explains that '[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law.'⁹⁸ In light of this, the Court took the view that, where an application contains procedural defects that are easily remedied and which produce effects

⁹² Ibid., para. 81.

⁹³ Ibid., para. 90.

⁹⁴ '[There is] no convincing reason why an applicant's deficiency might be overcome in the course of proceedings, while that of a respondent may not be. What matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled, if it so wishes, to bring fresh proceedings in which the initially unmet condition would be fulfilled. In such a situation, it is not in the interests of the sound administration of justice to compel the applicant to begin proceedings anew ... and it is preferable ... to conclude that the condition has, from that point on, been fulfilled', Ibid., para. 85.

⁹⁵ Ibid., para. 89.

⁹⁶ 'It would require compelling reasons for the Court to depart from the conclusions reached in [the *Legality of the Use of Force* case]'; Ibid., para. 54.

⁹⁷ *The Mavrommatis Palestine Concessions* (Judgment) (PCIJ Reports 1924) Series A No. 2.

⁹⁸ *Croatia* (n 88) para. 82 (quoting *Mavrommatis*, *ibid.*, 34).

that are temporary and trivial, it can adopt a more pragmatic approach to determining jurisdiction.

The Court's decision was strongly criticised by four judges. In their Joint Declaration – which reads more like a joint dissenting opinion – the judges lambasted the Court's reasoning on the grounds that it:

not only lacks legal validity and consistency but is even *contra legem* and untenable. This Court is not entitled to exercise jurisdiction based on a *contra legem* interpretation of a convention, such as the United Nations Charter or the Statute of the Court. Any such Judgment cannot but be extra-legal. It is regrettable that this Court, as a court of law, should have taken such a position.⁹⁹

These judges dismissed the Court's reliance upon the *Mavrommatis* principle because, for them, it is designed 'to excuse *procedural* imperfections that the applicant could rectify *ex ante* by re-filing a corrected application' as opposed to 'the situation in the present case, which involves, rather, a *fundamental* question which is only known to resolve itself *ex post*'.¹⁰⁰ So, for these judges the defect with Croatia's application was not of a procedural (and thus trivial) nature that the Court could resolve prospectively and without requiring Croatia to re-submit its application. Instead, it raised a fundamental question pertaining to when the FRY gained admission to the UN and whether Croatia's application was submitted subsequent to this date, which required full deliberation in open court.

There is no doubt that the ICJ's decision in *Croatia* deviated from its previous approach to determining jurisdiction.¹⁰¹ Thus, the decision of the Court in *Croatia* 'has not enhanced its reputation as a tribunal motivated solely by legal considerations, to the exclusion

⁹⁹ Ibid., para. 1 (Joint Declaration of Judges Ranjeva, Shi, Koroma and Parra-Aranguren).

¹⁰⁰ Ibid., para. 7.

¹⁰¹ As Simma notes, the Croatia case represents 'a truly remarkable effort [by the ICJ] to arrive at jurisdiction', Simma (n 46) 20.

of extra-legal motives'.¹⁰² But the reason why the Court adopted this approach is clear: the Court was determined to avail itself of the opportunity to interpret and clarify the scope of the obligations contained in the Genocide Convention and, by doing so, to deter violations of this agreement.¹⁰³ By compelling Serbia to submit to its authority even though it had not acceded to the ICJ Statute at the time the application was filed, it is apparent that the Court was more concerned with hearing a case involving allegations of severe human rights abuses than respecting state sovereignty by strictly implementing its jurisdictional rules.

3.5 Georgia

The objective of the previous discussion was to demonstrate that, since the end of the Cold War and in particular the beginning of the twenty-first century, the Court is prepared to engage with international human rights law and, moreover, to expansively interpret this doctrine in order to enhance the protection of human dignity. Yet, this discussion paints an overly simplistic picture of the Court's post-Cold War jurisprudence because, at times, it has taken decisions that are deferential to state sovereignty even though they inhibit the protection of human rights.

Consider, for example, the ICJ's decision in *Georgia* (2011). In this case, Georgia argued that Russia had breached its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965 by perpetrating racially-motivated violence against ethnic Georgians in Georgian provinces since 1990, including

¹⁰² Yehuda Z Blum, 'Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (Croatia v. Serbia)' (2009) 103 *American Journal of International Law* 264, 271.

¹⁰³ As Werner notes, 'it is to be applauded that the ICJ can now shed light on yet another part of the breakdown of Yugoslavia and has the opportunity to further develop and apply the concept of genocide', Wouter Werner, 'Preliminary Objections in the *Croatia v. Serbia* Case: A Commentary' (2008) *Hague Justice Portal* 1, 4, available at: http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Werner_Croatia_En.pdf last accessed 22 October 2020.

murder, rape, torture, forced deportation and imprisonment. Article 22 CERD contains the following compromissory clause:

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision.

At the provisional measures stage, Georgia alleged that ethnic Georgians faced an imminent risk of racial violence, which would have entailed an imminent risk of irreparable prejudice to the rights of Georgia under CERD. The ICJ found the preconditions stipulated by Article 22 CERD had been met *prima facie* and awarded provisional measures.¹⁰⁴ Subsequently, Russia raised a number of preliminary objections to the Court's jurisdiction under Article 22 CERD.¹⁰⁵

First, Russia maintained that there was no 'dispute' between itself and Georgia under Article 22 CERD. In dismissing Russia's objection, the Court explained that, at the time of the filing of its application, there must have been 'positive opposition' between the parties as to the interpretation or application of the Convention for a dispute to arise.¹⁰⁶ The Court was satisfied that a dispute between the parties existed because, first, there had been exchanges between the Georgian and Russian representatives to the UN Security Council on 10 August 2008 concerning Russia's compliance with CERD

¹⁰⁴ *Application of the International Convention on the Elimination of All Forms of Discrimination (Georgia v. Russian Federation)* (Provisional Measures) (ICJ Reports 2008) 353.

¹⁰⁵ *Application of the International Convention on the Elimination of All Forms of Discrimination (Georgia v. Russian Federation)* (Judgment) (Preliminary Objections) (ICJ Reports 2011) 70.

¹⁰⁶ *Ibid.*, para. 20.

and, second, on 9 and 11 August 2008 the Georgian President had made a number of public allegations against Russia and its persecution of ethnic Georgians.¹⁰⁷

Second, Russia claimed that the ICJ can only exercise jurisdiction under Article 22 CERD where the applicant has made a *bona fide* – even if ultimately unsuccessful – attempt to negotiate a solution to the dispute with the opposing party. The Court agreed with Russia’s interpretation of Article 22¹⁰⁸ and found that, while there was a series of accusations and denials exchanged between Georgia and Russia in early August 2008, Russia’s compliance with CERD:

had not become the subject of genuine negotiations or attempts at negotiations between the Parties. The Court is [therefore] of the view that although the claims and counter-claims concerning ethnic cleansing may evidence the existence of a dispute as to the interpretation and application of CERD, they do not constitute attempts at negotiations by either Party.¹⁰⁹

Accordingly, the Court found that the preconditions for the exercise of jurisdiction under Article 22 CERD had not been met.

Five judges produced a Joint Dissenting Opinion criticising the Court’s interpretation of Article 22 CERD.¹¹⁰ For these judges:

The condition requiring an attempt to settle the dispute by negotiation must be understood and applied realistically and substantively, not in the unrealistic and formalistic manner applied by the Judgment.¹¹¹

¹⁰⁷ Ibid., para. 113.

¹⁰⁸ Ibid., para. 159.

¹⁰⁹ Ibid., para. 178.

¹¹⁰ *Georgia* (n 105) (Joint Dissenting Opinion of President Owada and Judges Simma, Abraham and Donoghue and Judge Ad Hoc Gaja).

¹¹¹ Ibid., para. 12.

Evidently, their understanding of the interactions between Georgia and Russia was that the applicant had sought to settle its dispute with the respondent in good faith but that, ultimately, this endeavour had proved futile, thus leaving no choice but to seek recourse to the World Court.

In light of the Court's previous case law and its preparedness to engage with international human rights law, its decision to interpret Article 22 CERD narrowly and thus decline jurisdiction is startling. First, it meant the Court could not adjudicate upon a long-running dispute between Georgia and Russia, which had inflicted considerable human suffering; and second, and more prospectively, it restricts the capacity of states parties to access the Court where a dispute emerges under CERD, a human rights treaty that plays an important role in eliminating racial discrimination within the international society.¹¹²

Interesting, Article 22 CERD came before the ICJ in late 2019 when Ukraine alleged that, *inter alia*, Russia had violated its obligations under this convention in Crimea.¹¹³ Russia denied that the Court could exercise its jurisdiction under CERD on the basis that, as in the *Georgia* case, the applicant had not sought to settle its dispute with the respondent through good faith negotiations. The Court reaffirmed its decision in *Georgia*¹¹⁴ and held that the applicant must have genuinely attempted to resolve the dispute with the respondent before it can engage its jurisdiction.¹¹⁵ Importantly, the

¹¹² '[The Court] took a distinctly formalist and originalist approach ... In their adoption of this approach [the requirement to attempt negotiation] the majority of judges appear to favour traditional principles of state consent that do not sit comfortably with international human rights law', Gall (n 37) 68-69. In his Dissenting Opinion, Judge Cançado Trindade criticised the Court's formalistic approach and explained that 'the realization of justice' would be seriously impeded if the Court remains a 'hostage of State consent', *Georgia* (n 105) para. 198 (Dissenting Opinion of Judge Cançado Trindade). For a similar reading of this decision see Phoebe Okowa, 'The International Court of Justice and the Georgia/Russia Dispute' (2011) 11 *Human Rights Law Review* 739.

¹¹³ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v Russian Federation)* (Judgment) (Preliminary Objections) (ICJ Reports 2019) 1.

¹¹⁴ *Ibid.*, para. 116.

¹¹⁵ *Ibid.*, para. 120.

Court identified a series of diplomatic exchanges between Ukraine and Russia over Russia's alleged lack of compliance with CERD and concluded that these interactions, albeit unsuccessful, 'indicates that a genuine attempt at negotiation was made by Ukraine'.¹¹⁶ The Court therefore established its jurisdiction under CERD.¹¹⁷

In the *Ukraine* judgment, the Court appeared to take heed of the advice of the Joint Dissenting Opinion in the *Georgia* case when it adopted a more realistic and flexible approach to determining what constitutes a genuine attempt by the applicant to resolve the dispute through negotiation. Admittedly, the interactions between Ukraine and Russia were more intense and more protracted than those between Georgia and Russia. Nevertheless, in *Ukraine* the Court demonstrated a greater determination to establish its jurisdiction under Article 22 CERD (and to thereby subject Russia's actions against the Crimean population to judicial scrutiny) than it did in the *Georgia* judgment.

3.6 *Belgium*

Belgium (2012) is noteworthy because it reveals the tension within the ICJ between, on the one hand, adopting a decision that is protective of state sovereignty but, on the other, pushing for an interpretation of international law that is protective of human dignity.¹¹⁸ In this case, Belgium sought to enforce Senegal's obligation under Article 5(2) of the Convention Against Torture (CAT) 1984 to either prosecute or extradite Hissene Habré for the crimes of torture that he had committed during his eight-year presidency of Chad (Habré had fled to Senegal after being deposed from power in December 1990). Article 30 CAT contains a compromissory clause that allows states parties to bring a case before the ICJ when a dispute

¹¹⁶ Ibid.

¹¹⁷ Ibid., para. 121.

¹¹⁸ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) (ICJ Reports 2012) 422, para. 68. For a general discussion see Sangeeta Shah, 'Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)' (2013) 13 *Human Rights Law Review* 351.

emerges under the Convention. A critical issue was whether Belgium had a right to challenge before the ICJ the legality of Senegal's failure to prosecute or extradite Habré. The Court found that Belgium had legal standing on the basis that the obligation of *aut dedere aut judicare* contained within the CAT is of *erga omnes* status.¹¹⁹

The significance of the Court's decision lies in its determination that a procedural obligation (as opposed to a substantive rule) can be of *erga omnes* character.¹²⁰ From a doctrinal perspective, this conclusion is problematic for three reasons. First, whether an obligation is owed *erga omnes* is determined by its construction. Yet, there is no indication in this provision that other states parties to the Convention have a general interest in its performance. Second, there are various mechanisms built into CAT to ensure that states parties comply with their obligations, such as the supervisory powers exercised by the Committee Against Torture (CmAT) and the ICJ, which means that '[it] would not seem possible to draw the conclusion that the [procedural] obligations under the CAT are owed *erga omnes partes*'.¹²¹ Third, there is little state practice to support the contention that the *aut dedere aut judicare* obligation contained within Article 5(2) CAT is owed *erga omnes*.¹²²

In order to establish jurisdiction and thus afford itself the opportunity to determine whether Senegal had met its obligation to prosecute or extradite individuals accused of torture, the Court subjected the CAT to a 'teleological interpretation'.¹²³ By progressively developing the law in this way, the ICJ made a 'substantial contribution' to the development of international human rights law¹²⁴ and, in the words of Simma, this decision represents 'the

¹¹⁹ *Belgium* (n 118) para. 68.

¹²⁰ As one commentator observes, 'this is a remarkable step forward for the ICJ's jurisprudence on obligations *erga omnes* and one that will please many human rights activists. For the first time, the ICJ has held that a common interest in performance of an obligation gives rise to an entitlement to bring a case before the Court', Shah (n 118) 358.

¹²¹ Gall (n 37) 72.

¹²² Shah (n 118) 358 ('State practice has not so far reflected this understanding of the CAT regime').

¹²³ *Belgium* (n 118) para. 145 (Dissenting Opinion of Judge ad hoc Sur).

¹²⁴ Abraham (n 8) 305.

most clean-cut, “unpolitical”, as it were, human rights case so far handled by the Court. If a full-fledged “*droits de l’homme*” were to express it somewhat colloquially: this is a human rights case which is almost too good to be true’.¹²⁵

This being said, this exuberance must be tempered because, while the Court recognised Belgium’s legal capacity to bring a claim against Senegal, it found that the obligation to prosecute or extradite offenders under the CAT only applied to acts of torture committed *after* its entry into force for the state concerned.¹²⁶ This aspect of the Court’s decision was unexpected because, as Judge Cançado Trindade observed in his Separate Opinion,¹²⁷ both Belgium¹²⁸ and Senegal¹²⁹ accepted in their submissions to the Court that the obligation upon a state to prosecute or extradite under Article 7 CAT applies to offences even though they allegedly occurred before the signing of the Convention and, moreover, that this interpretation of Article 7 CAT had been accepted by the CmAT on several occasions. For example, in *Bouabdallah Ltaief v Tunisia*¹³⁰ (2003) the Committee considered allegations of torture stemming from 1987, even though Tunisia ratified the CAT in 1988. Similarly, in *Souleymane Guengueng et al v Senegal* (2006) the Committee pronounced upon the legality of allegations of torture regardless of whether they were committed before or after the CAT entered into force in Senegal in 1986.¹³¹ The Court’s decision to impose a temporal limitation points to a reversion to formalism,¹³² which is surprising given that it prevented the Court

¹²⁵ Simma (n 10) 594-595.

¹²⁶ *Belgium* (n 118) para. 100.

¹²⁷ *Ibid.*, paras. 163-164 (Separate Opinion of Judge Cançado Trindade).

¹²⁸ Questions Put to the Parties by Members of the Court at the Close of the Public Hearing Held on 16 March 2012: Compilation of the Oral and Written Replies and the Written Comments on those Replies, Doc BS-2012/39, of 17 April 2012, pp 50-52, paras. 49 and 52.

¹²⁹ *Ibid.*, 52.

¹³⁰ *Bouabdallah Ltaief v. Tunisia*, UN Doc CAT/C/31/D/189/2001, Communication No 189/2001 (November 2003) paras. 1.2 and 10.1-10.9.

¹³¹ *Souleymane Guengueng and al. v. Senegal*, UN Doc CAT/C/36/D/181/2001, Communication No 181/2001, (19 May 2006) paras. 1.2 and 9.1-11.

¹³² *Belgium* (n 118) para. 165 (Separate Opinion of Judge Cançado Trindade). Judge Owada also criticised the Court’s approach, describing its reasoning as ‘purely formalistic’ and relying upon a ‘largely artificial logic’, para. 12 (Declaration of Judge Owada).

from examining whether a state had complied with its international law obligation to prosecute or extradite individuals accused of torture.

3.7 *Marshall Islands*

The *Marshall Islands* (2016) cases also illustrate the ICJ's preparedness to narrowly interpret its jurisdictional rules.¹³³ Here, the Marshall Islands brought separate cases against India, Pakistan and the UK, alleging that they had violated their customary international law obligation to engage in good faith negotiations and secure nuclear disarmament. The respondent states claimed that the Court did not possess jurisdiction because, at the date the Marshall Islands filed its applications with the Court, a 'dispute' between themselves and the applicant was not in existence. The Court found that the critical moment for determining the existence of a dispute is when the application is filed, and not at a later point such as when the Court delivers its judgment on the case. In adopting this reasoning, the Court declined jurisdiction on the basis that, at the date of the applications, there was no dispute because the respondent states were not aware that '[their] views were "positively opposed" by the applicant'.¹³⁴

These decisions clearly conflict with the Court's previous judgment in *Croatia*, which seemed to inaugurate a new and more flexible rule to the effect that, where an application suffers from a procedural defect that can be easily remedied, it is in the interests of justice for the ICJ to ignore the defect and establish jurisdiction. Surely, in the *Marshall Islands* cases

¹³³ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (Judgment) (Jurisdiction and Admissibility) (ICJ Reports 2016) 255; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)* (Judgment) (Jurisdiction and Admissibility) (ICJ Reports 2016) 552; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* (Judgment) (Jurisdiction and Admissibility) (ICJ Reports 2016) 833.

¹³⁴ *Marshall Island v. India* (n 133) para. 38.

the interests of justice required the Court to exercise jurisdiction because, while the respondent states were not aware of the Marshall Islands allegations at the time the application was submitted to the Court, the application could be simply re-submitted to the Court and, given the conduct of the parties subsequent to the initial application, the respondents would be aware of the allegations and a dispute would be in existence?¹³⁵ By departing from a previous decision that invoked pragmatism and flexibility in the name of human rights protection, the Court signalled a return to jurisdictional formalism and a staunch defence of the principle of sovereignty. Almost certainly, the Court reached this decision in order to avoid the highly charged political debate surrounding the possession and use of nuclear weapons.¹³⁶ However, the upshot is that the ICJ missed a unique opportunity to enhance international peace and security and to promote human dignity by clarifying the nature of the customary international law obligations upon states to work together to secure nuclear disarmament.

3.8 *Chagos Islands*

In 1810 Britain captured Mauritius from France. At the time, Mauritius comprised an archipelago known as the Chagos Islands. In 1964, a survey was carried out by the US and UK and it concluded that Diego Garcia – the largest island in the Chagos archipelago – would make a suitable military base for the US. In 1965, the Lancaster House Agreement was signed between the UK and local authorities in Mauritius, which detached the Chagos Islands from Mauritius. The UK proceeded to establish a new colony over the islands and it became known as the British Indian Ocean Territory. In 1966, the UK and US adopted an agreement

¹³⁵ ‘What makes this line of argument particularly compelling is that ... the Applicant was not barred from re-introducing fresh applications immediately after the judgments were delivered’, Vincent-Joël Proulx, ‘The World Court’s Jurisdictional Formalism and its Lost Market Share: The *Marshall Islands* Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes’ (2017) 30 *Leiden Journal of International Law* 925, 934.

¹³⁶ *Ibid.*, 936-943.

permitting the US to establish a military base on Diego Garcia. To make way for this base, the inhabitants of the Chagos Islands were removed, with most being resettled in Mauritius. On 12 March 1968, Mauritius declared its independence and emerged as a sovereign state.

Mauritius has demanded the return of the Chagos Islands for many decades. On 22 June 2017, the General Assembly adopted Resolution 71/292 requesting an advisory opinion from the ICJ. The General Assembly sought answers to two questions: 1) had the process of de-colonisation been lawfully completed when Mauritius was granted independence in 1968; and 2) what are the legal consequences flowing from the UK's continued administration of the Chagos Islands.

Before addressing these questions, the Court first had to determine whether it possessed jurisdiction to give an advisory opinion.¹³⁷ As we have seen, the Court can only decide disputes between states where they consent to its jurisdiction. Hence, if the questions posed by the General Assembly required the Court to effectively settle a territorial dispute between Mauritius and the UK, the Court would have to decline jurisdiction on the basis that the UK was clearly withholding its consent. Ultimately, the Court concluded that it was able to exercise jurisdiction and did so by treating the questions posed by the General Assembly as relating to issues of de-colonisation and self-determination rather than to which state exercised sovereignty over the disputed territory.¹³⁸

From a human rights perspective, the ICJ's determination to establish jurisdiction is important because it allowed the Court to pronounce on whether the UK had breached the principle of self-determination by separating the Chagos Islands from Mauritius and, moreover, whether this breach is continuing and, if so, what are its legal consequences. Yet, it is equally clear that Mauritius and the UK have been involved in a longstanding dispute as to

¹³⁷ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) (ICJ Reports 2019) 95.

¹³⁸ *Ibid.*, paras. 83-91.

who exercises sovereignty over the Chagos Islands.¹³⁹ By determining that the detachment of the Chagos Islands from Mauritius breached the principle of self-determination, the Court essentially rejected the UK's claim to sovereignty over the islands in favour of Mauritius. When cast in this light, it is apparent that the Court approached the question of jurisdiction with pragmatism and flexibility and did so in order to afford itself the opportunity to opine on the important question of whether the right of self-determination was being denied, regardless of whether this determination impinged upon the UK's claim to sovereignty over the Chagos Islands.

Moving to the specific questions posed by the General Assembly, the Court found that – by the time the UK detached the Chagos Islands from Mauritius – the principle of self-determination had crystallised as a rule of customary international law.¹⁴⁰ The Court arrived at this decision rather liberally by pointing to a series of General Assembly resolutions adopted prior to 1968 on the topic of self-determination and without engaging in an extensive examination of state practice and *opinio juris*. With the rule established, the Court went on to conclude that, because the separation of the Chagos Islands from Mauritius was not 'based on the free and genuine expression of the will of the people concerned',¹⁴¹ the UK's actions breached the principle of self-determination and that a breach of this principle is continuing.

With regard to the General Assembly's second question, the Court held that the UK is under an obligation to terminate its administration of the Chagos Islands.¹⁴² In addition, the Court characterised the principle of self-determination as an *erga omnes* rule and, as such, all

¹³⁹ For an overview see *ibid* paras. 98-112.

¹⁴⁰ *Ibid.*, para. 160.

¹⁴¹ *Ibid.*, para. 172.

¹⁴² *Ibid.*, para 178.

states are under a duty to cooperate with the UN to bring this violation to an end and facilitate the de-colonisation of Mauritius.¹⁴³

On the one hand, the UK played down the importance of the ICJ's determination on the basis that it is an advisory opinion and not legally binding.¹⁴⁴ On the other hand, the significance of the Court's progressive ruling is already being felt. In May 2019, the General Assembly adopted a resolution endorsing the ICJ's advisory opinion and, within six months, it required the UK to withdraw unconditionally from the Chagos Islands.¹⁴⁵ At the time of writing, the UK continues to administer the Chagos Islands.

4. Conclusion

This chapter has not sought to provide a comprehensive assessment of the Court's case law since its inception in 1946. Rather, the purpose of this chapter has been to track and map the normative developments in the ICJ's jurisprudence and, in doing so, it has distinguished between two periods in the Court's life. The first period appertains to the Cold War era. During this phase, the ICJ interpreted international law narrowly so as to give full effect to the intentions of states and thus ensure that it did not 'overstep the sanctity of state sovereignty in a manner to which the state had not consented'.¹⁴⁶ Furthermore, notwithstanding the international society's commitment to the principle of human dignity, during the Cold War period the ICJ did not make any meaningful attempt to engage with international human rights law and to promote respect for fundamental human rights.

¹⁴³ Ibid., para. 180.

¹⁴⁴ Owen Bowcott, 'UN Courts Rejects UK's Claim of Sovereignty over Chagos Islands', *The Guardian*, 25 February 2019, <https://www.theguardian.com/world/2019/feb/25/un-court-rejects-uk-claim-to-sovereignty-over-chagos-islands> (where a UK Foreign Office Spokesperson is quoted as saying: 'This is an advisory opinion, not a judgment').

¹⁴⁵ UNGA Res 73/295 (2019).

¹⁴⁶ Thomas J Pax, 'Nicaragua v United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?' (1985) 8 *Boston College International and Comparative Law Review* 471, 480.

The second phase relates to the post-Cold War era. Since the end of the Cold War, UN organs have increasingly exercised their powers in such a way as to protect human dignity. Through an analysis of its decisions and advisory opinions, this chapter has revealed that the ICJ has gradually emerged as ‘a full participant in the development of international human rights law’.¹⁴⁷ In the words of Bruno Simma – a former Judge on the ICJ – ‘the human rights genie has escaped from the bottle’,¹⁴⁸ and according to Rosalyn Higgins – a former President of the ICJ – the protection of human rights now represents a ‘judicial lodestar’¹⁴⁹ that guides the activities of the Court. But we should be careful not to overstate the ICJ’s commitment to human rights and its promulgation of a liberally-oriented international law. As this chapter has demonstrated, the ICJ has not been able to relinquish fully its ‘conservative leanings’.¹⁵⁰ Where prominent interests of sovereign states are impinged and especially where these states are powerful actors within the international society, the Court has reverted to its Cold War mind-set of narrowly interpreting international law in order to protect state sovereignty, even though such an approach negatively impacts upon the protection of fundamental human rights.¹⁵¹

¹⁴⁷ ‘Through these decisions [the ICJ’s case law from 2006-2016], the Court’s role as a full participant in the development of international human rights law has, to my mind, been established’, Abraham (n 8) 307; ‘[T]he ICJ has had an important involvement in the development of a modern law of international human rights’, Stephen M Schwebel, ‘The Treatment of Human Rights and of Aliens in the International Criminal Court’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in Memory of Sir Robert Jennings* (Cambridge University Press 1996) 329; ‘[Recent ICJ cases] provide a clear illustration of the fact that the Court has dealt with and has clarified a wide range of issues falling under the realm of [the] international law of human rights and humanitarian law’, Zyberi (n 69) 136; ‘[The ICJ] has played a non-negligible and on occasion a significant role in the development of international human rights law and the place it occupies within general international law’, Vera Gowlland-Debbas, ‘The ICJ and the Challenges of Human Rights Law’ in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (Cambridge University Press 2015) 110.

¹⁴⁸ Simma (n 46) 25.

¹⁴⁹ *Legality of the Threat or Use of Nuclear Weapons* (n 55) para. 41 (Dissenting Opinion of Judge Higgins).

¹⁵⁰ Shany and Giladi (n 3) 185.

¹⁵¹ ‘[The Court has] avoided controversial issues by declining jurisdiction or through other avoidance techniques, often directed by the need to manage expectations and legitimacy’, Ibid 181. ‘The state-centric character of the ICJ does not sit neatly with the adjudication of human rights treaties’, Gall (n 37) 56. See further Andrea Bianchi, ‘Choice and (the Awareness of) its Consequences: The ICJ’s “Structural Bias” Strikes Again in the *Marshall Islands Case*’ (2017) 111 *American Journal of International Law Unbound* 81, 85-86.