CHAPTER 14

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The Judicial Role of the International Court of Justice in the Development of International Law

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Abstract

At the heart of modern international law stands the principle of peaceful settlement of international disputes. Traditionally, States' right to resort to war for the resolution of international disputes was seldomly challenged. For centuries, use of force or threat of use of force was common in international relations. Not until the founding of the United Nations (UN) and the adoption of the Charter of the United Nations was non-use of force in international relations legally prohibited, and peaceful settlement of international disputes established as one of the fundamental principles in international law.[1] In this development, the International Court of Justice (ICJ) was and continues to be a key actor. As will become clear in the following, however, the role of the Court goes beyond settling disputes. It has entailed the significant task of developing, without legislating, international law through judicial law-making. The case law analysed in this chapter shows that this is particularly the case when the existing law is inadequate, unclear or uncertain, and when the law needs to be developed first through progressive interpretation. In this role, the Court faces a tension inherent in the nature of law as such, i.e., between stability on the one hand, and evolution in view of economic and social progress on the other hand. This raises the question whether and to what extent self-restraint by the Court might be necessary. The chapter concludes by emphasizing three core challenges the Court faces, and how they might impact its work in the future.

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1 Charter of the United Nations, art 2(3) and (4). Although the 1928 Kellogg-Briand Pact (Renunciation of War as an Instrument of National Policy) was considered the first international treaty that prohibited Sates to use force for the "solution of international controversies, and … as an instrument of national policy in their relations with one another" (art 1), that was not accepted as part of general international law. See, for example, Miller 1928; Shotwell 1929; Brownlie 1963.

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1 Introduction and Historical Context

The world has gone a long way in searching for effective, reliable, and trustworthy mechanisms for dispute resolution with a view to maintaining peace and normal conduct of State relations. Apart from bilateral negotiations, third-party dispute settlement mechanisms, in particular those with binding effect, such as arbitration and judicial settlement, were long pursued but with very few successes. The first international court for the peaceful settlement of international disputes was not the ICJ, but the Permanent Court of Arbitration (PCA), which was established by the two Peace Conferences held in the Hague respectively in 1899 and 1907. However, the PCA is not a physically-standing court in the true sense of the term. It is a mechanism, with one permanent Bureau, a set of rules of arbitration and a roster of arbitrators appointed by States.[2] It serves primarily to standardize and facilitate international arbitrations for the peaceful settlement of international disputes.

The idea to set up a world court for judicial settlement of international disputes, a step further from arbitration, was raised during the Hague Conferences, but was rejected by the participating States. Apart from the reason that States would not wish to submit their national affairs to a few judges, they very much doubted that there could be any effective way to ensure that independent judges be chosen and able to act impartially and conscientiously.[3] The idea to establish a world court was finally materialized when the Permanent Court of International Justice (hereinafter "PCIJ") was founded in 1922 by the League of Nations. The Court was composed of fifteen judges, who were elected jointly by the Council and the Assembly of the League. Besides, the League would also ensure budget for the operation of the judicial organ.[4] This model, as well as its

2 See 1899 Convention for the Pacific Settlement of International Disputes, Chapter 2; 1907 Convention for the Pacific Settlement of International Disputes, Chapter 2.

3 At the second Hague Peace Conference, a recommendation for a Judicial Arbitration Court was adopted. Elihu Root, the then American Secretary of State, in his instructions to the American delegates to the 1907 Hague Peace Conference, as recorded, stated: "There can be no doubt that the principal objection to arbitration rests not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitrations to which they submit may not be impartial. It has been a very general practice for arbitrators to act, not as judges deciding questions of act and law upon record before them under a sense of judicial responsibility, but as negotiators effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents [...]" (Hobér 2006).

4 Although institutionally the Permanent Court of International Justice (PCIJ) was not part of the League, the election of the judges and the budget of the Court were controlled by the League. Covenant of the League of Nations, art 14; Statute of the Permanent Court

Statute and Rules of Procedure, to a large extent, was adopted by the ICJ subsequently.[5] Thanks to this institutional link, the PCIJ and the ICJ are frequently referred to as "the World Court".[6]

After nearly a century of judicial practice, the World Court has, to a large extent, won the trust and confidence of States as an effective and reliable means for the settlement of international disputes and States in general attach importance to its settled jurisprudence.

2 Institutional Design and Jurisdiction

The ICJ is one of the six major organs and the principal judicial organ of the UN.[7] According to the UN Charter, its Statute forms an integral part of the Charter, to which all UN members are *ipso facto* parties.[8] The Court, composed of fifteen judges who are elected jointly by the General Assembly and the Security Council must, as a whole, represent the main forms of civilization and the principal legal systems of the world.[9]

The Court has general jurisdiction over disputes between States. It can deal with all cases that States submit to it and all matters specially provided for in the Charter or in treaties and conventions in force. Generally speaking, the Court is competent to deal with two kinds of cases: to adjudicate disputes

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of International Justice, arts 3, 4, 32 and 33. Under the 1920 Statute, the PCIJ consisted of eleven judges and four deputy-judges, who would not sit on the bench unless any judges could not perform their functions. The 1929 revised Statutes expanded the number of judges from eleven to fifteen and added a new chapter addressing advisory opinions. In 1930, the Assembly decided to elect fifteen judges and four deputy-judges. The deputy-judges ceased to exercise their function when the revised Statute came into force in 1936. The PCIJ received 63 cases (36 contentious cases and 27 requests for advisory opinions) on its docket in the 18 years of its judicial function from 1922 to 1940. The Court ceased to function after 1940 because of the outbreak of the Second World War. For the history of the Permanent Court of International Justice, see further, for example, Hudson 1944; Spiermann 2005; Rosenne 2006.

5 Charter of the United Nations, art 92.

6 Another example for the institutional link between the PCIJ and the ICJ: in October 1945, the PCIJ met for the last time and decided to transfer its archives and effects to the ICJ. The election of the first members of the ICJ took place six days after the resignment of all the judges of the PCIJ at the First Session of the UN General Assembly and Security Council on 6 February 1946. Months later, Judge José Gustavo Guerrero (El Salvador), the last President of the PCIJ, was elected as the first President of the ICJ.

7 Charter of the United Nations, arts 7 and 92.

8 Charter of the United Nations, arts 92 and 93.

9 On the composition of the Court and the election of judges, see Statute of the International Court of Justice, arts 2–15.

between States (contentious cases) and to answer legal questions requested by the General Assembly, the Security Council or any other competent organ of the United Nations (advisory proceedings). In contentious cases, the judgment of the Court is binding on the parties in respect of the case concerned.[10] In the advisory proceedings, although the advisory opinion is not binding, it carries significant legal weight.

One essential feature of the Court is that the jurisdiction of the Court must be based on the consent of the States. In other words, both parties to a dispute must agree to submit their case to the Court for settlement.[11] There are several ways by which a State may accept the jurisdiction of the Court. They may do so by concluding a special agreement, or by accepting the dispute settlement clause (the compromissory clause) of a treaty, or by a declaration.[12] This voluntarism stands in sharp contrast with the compulsory nature of domestic jurisdictions. In respect of advisory proceedings, according to Article 96 of the Charter, the General Assembly or the Security Council may request an advisory opinion from the Court on any legal question of international law. Other UN organs and specialized agencies which are duly authorized by the General Assembly, may request advisory opinions from the Court on a legal question that arises from the scope of their activities.

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10 Statute of the International Court of Justice, art 59.

11 The Court has consistently stressed: "a State is not obligated to allow its disputes to be submitted to judicial settlement without its consent." *Western Sahara, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975*, p. 25, para. 33; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion of 15 December 1989, I.C.J. Reports 1989*, p. 191, para. 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004*, p. 158, para. 47. Similar pronouncement was made in a series of contentious cases, for instance, *Monetary Gold Removed from Rome in 1943* (*Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America*), *Preliminary Question, Judgment of 15 June 1954, I.C.J. Reports 1954*, p. 32; *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), *Application to Intervene, Judgment of 21 March 1984, I.C.J. Reports 1984*, p. 24, para. 38; *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*), *Application to Intervene, Judgment of 13 September 1990, I.C.J. Report 1990*, p. 115, para. 54; *Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*), *Preliminary Objections, Judgment of 26 June 1992, I.C.J. Reports 1992*, p. 260, para. 53.

12 Among 193 States parties to the Statute, 74 States have made declarations accepting the compulsory jurisdiction of the Court. There are over 300 treaties which contain a clause providing that if a dispute relating to the interpretation and application of the treaty cannot be settled by negotiation or other means, at the request of one party, the dispute may be submitted to the Court for settlement. If a State party did not make a reservation to such a clause at the time it became a party to the treaty, it means it has accepted the jurisdiction of the Court.

The ICJ, in the course of its 75 years of judicial function, has dealt with a very broad range of subject-matters of public international law, from traditional subjects of territorial disputes and maritime delimitation to contemporary areas of international law, such as human rights, use of force, environmental law, sanctions, etc. Its rich jurisprudence has been an imperative source of legal studies for the development of international law. To date, there have been 150 contentious cases filed in the Court and 27 requests for advisory opinions. Over 100 States have appeared before the Court in contentious cases and more than 130 States have participated in the advisory proceedings.[13]

3 Judicial Function of the Court

In accordance with the Statute, the judgment of the Court is final and without appeal.[14] States parties undertake legal obligations under Article 94 of the Charter to comply with the decision of the Court if it is a party to the case. Moreover, if any party to a case fails to do so, the other party may request the Security Council to take measures so as to give effect to the judgment. Throughout the Court's history, the Security Council has rarely got involved in the implementation of the Court's judgments. For the most part, the Court's judgments have been respected and implemented; in some complicated cases, the process of implementation may extend over a long period of time.[15]

13 For States' participation in contentious cases, see "Contentious cases organized by State on the website of the ICJ", available at: <https://www.icj-cij.org/en/cases-by-country>. For States' participation in advisory proceedings, see "The International Court of Justice: Handbook", pp. 87–88, available at: <https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf> The statistics in the Handbook were as of 31 December 2018.

14 Statute of the International Court of Justice, art 60.

15 For instance, in *Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*), one year after the Court rendered its Judgment of 25 September 1997, Slovakia filed in the Registry of the Court a request for an additional judgment in the case due to the alleged unwillingness of Hungary to implement the Judgment. After the filing by Hungary of a statement of its position on Slovakia's request, the Parties resumed negotiations and informed the Court on a regular basis of the progress. On 30 June 2017, Slovakia requested that the Court place on record the discontinuance of the proceedings for an additional judgment, to which Hungary did not oppose. However, both Parties reserved their respective right under Article 5, paragraph 3, of the Special Agreement to request the Court to render an additional judgment to determine the means of executing its Judgment of 25 September 1997, and the case remains pending on the Court's General List till the present day.

The progressively strengthened role of the Court in the peaceful settlement of disputes did not come easily. In the early days of the World Court, there was a severe insufficiency of codified international law; the Court was often alarmed to find that it had to settle disputes on the basis of vague principles and the rules to be interpreted and even created by itself. The idea of developing international law through the restatement of existing customary rules or through making new rules did not arise only in the time of the PCIJ. Serious attempts to develop international law were made since the late eighteenth century by prominent scholars, learned societies (e.g., Institut de Droit International and International Law Association),[16] and Governments, before and after the First World War,[17] notwithstanding their limited success and Euro-centric nature.

The situation was greatly improved after the Second World War, when the UN Charter laid down fundamental principles and norms of international law as the basis of the post-War world order. For that purpose, the General Assembly was entrusted with the responsibilities under Article 13 of the Charter to initiate studies and make recommendations for the purpose of encouraging "progressive development of international law and its codification". In 1947, it established the International Law Commission (ILC) to codify international law, preparing legal instruments for the adoption by States. The ILC is composed of eminent legal experts of international law; currently there are thirty-four members. They are elected by the General Assembly from different geographical regions and represent the principal legal systems of the world. The Commission directly reports to the General Assembly and maintains close

16 Inter-governmental regulation of legal questions may be found to have originated at the Congress of Vienna (1814–1815), where the signatory Powers of the Treaty of Paris of 1814 adopted provisions relating to the regime of international rivers, the abolition of the slave trade and the rank of diplomatic agents. Since then, codification of international law has been developed at diplomatic conferences on many subjects, such as the law of war, the regulation of maritime and aerial navigation, the pacific settlement of international disputes, the protection of intellectual property, the regulation of postal services and telecommunications. See, for example, Vec in Fassbender and Peters 2012.

17 The League of Nations created a standing organ—the Committee of Experts for the Progressive Codification of International Law—which, consisting of seventeen experts, was to prepare a list of subjects "the regulation of which by international agreement" was most "desirable and realizable" and thereafter to examine the comments of Governments on this list and report on the questions which were "sufficiently ripe", as well as on the procedure to be followed in preparing for conferences for their solution. This was the first attempt on a worldwide basis to codify and develop general international law rather than simply regulating illegal problems separately. Further information on the codification efforts by the League, see, for example, Rosenne 1972; Hudson 1930.

contact with State governments. Based on the list of subjects for codification,[18] the Commission has, to date, produced more than 50 legal instruments, some of which were subsequently adopted as international treaties. Much due to the ILC's efforts, nowadays, international treaty law covers almost every area of public international law, becoming the major source of the law for application.

Draft articles adopted by the ILC contain commentaries, which explain the terms of each article and policy considerations for State practice. The commentaries usually contain rich sources of research materials on State practice, decisions of international courts and tribunals and scholarly writings on the relevant subject matters. It is there one can find a dynamic synergy between the Court and the Commission for the development of international law. In the codification process, the Commission would consider the established jurisprudence of the Court in ascertaining the existence of customary rules and principles, while the Court frequently turns to the drafting work of the Commission to decide what constitute international rules, *lex lata*, and what is a progressive development, *lex ferenda*, the proposed (future) law.[19]

As a judicial organ, the task for the Court is to settle disputes in accordance with international law. The Court has stated on a number of occasions that the function of the Court is to state the law, but not to legislate.[20] At the same time,

18 In 1949, based on the survey of international law prepared by the Secretariat, the ILC at its first session reviewed twenty-five topics for possible inclusion in a list of topics for study and drew up a provisional list of fourteen topics selected for codification, as follows: recognition of States and Governments; succession of States and Governments; jurisdictional immunities of States and their property; jurisdiction with regard to crimes committed outside national territory; regime of the high seas; regime of territorial waters; nationality, including statelessness; treatment of aliens; right of asylum; law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; State responsibility; and arbitral procedure. The Commission has submitted a final report on all of the topics above, except for the following: recognition of States and Governments; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; and right of asylum. The 1949 list of topics was further supplemented by a series of topics. Further information is available at: <https://legal.un.org/ilc/programme.shtml>.

19 For instance, in the ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) UN Doc A/56/10, the Court was referred to 89 times in total, with numerous cases cited as evidence of customary rules. On ICJ's part, for example, when interpreting Article 36 of Vienna Convention on Consular Relations in a recent case, the Court studied the *travaux préparatoires* of Article 36, including the discussions of the International Law Commission in detail. *Jadhav* (*India* v. *Pakistan*), *Judgment of 17 July 2019, I.C.J. Reports 2019*, pp. 439–441, paras. 77–83.

20 For instance, the Court stated in *Northern Cameroons* case that "[t]he function of the Court is to state the law." *Northern Cameroons* (*Cameroon* v. *United Kingdom*), *Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963*, p. 33. In *Fisheries Jurisdiction*, the Court indicated that "there is no incompatibility with its judicial function in making

however, no one denies that the Court positively contributes to the development of international law. How should one understand this seemingly paradoxical phenomenon?

Pursuant to Article 56 of the Statute, the Court shall in its judgment state the reasons for its decision. Moreover, the judgment shall contain the names of the judges who have taken part in adjudicating the case and voted in the decision. If the Court is not unanimous in its decision, the majority's views will be the basis for the judgment. If the Court is equally divided, the President will cast the deciding vote.[21] Judges in the minority have the right to append their individual opinions to explain the reasons for their position in the vote, which constitute part of the judgment.[22] The individual opinions may be given as a dissenting or separate opinion, or in the form of a declaration. It is this legal reasoning, either in the judgment or in the individual opinions, that exerts judicial persuasion for the resolution of the dispute. It follows, therefore, that a unanimously-adopted judgment is supposedly more persuasive than that adopted by a deeply-divided Court.

3.1 *The Tool of Legal Interpretation*

Law, by its nature, indefinitely confronts the problems of *non liquet*, and open texture, namely, the very existence of a law may be in question, or its content may be unclear and vague. A court, by its function, cannot refuse to adjudicate a case on the ground that the law is uncertain or inadequate. It must interpret the law to make it sound and applicable. At the international level, in the absence of any legislative body, an international court more often finds itself in such a situation, as the state of international law is less certain and codified than that of domestic law.[23] In clarifying the content of a rule, removing

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a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach; this does not mean that the Court should declare the law between the Parties as it might be at the date of expiration of the interim agreement, a task beyond the powers of any tribunal." *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland*), *Merits, Judgment of 25 July 1974, I.C.J. Reports 1974*, p. 19, para. 40. In *Legality of the Threat or Use of Nuclear Weapons*, the Court reiterated: "[i]t is clear that the Court cannot legislate." *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 237, para. 18.

21 Statute of the International Court of Justice, art 55.

22 Statute of the International Court of Justice, art 57.

23 The arduousness of the work of the Court also lies in the role of the Court in the international system—the principal judicial organ of the United Nations with no compulsory jurisdiction, as discussed above. For further discussion on the role of the Court in the international system, Professor Alain Pellet pointed out, there are three elements in the Court's role as the "principal judicial organ of the United Nations"—an "organ", a "principal

ambiguity or obscurity in the law, avoiding absurdity of an interpretation, and, if necessary, laying down new rules, the Court develops the law.

3.2 *The Indirect Effect of Precedent*

It is true that according to Article 59 of the Statute, the decision of the Court has no binding force except between the parties and in respect of that particular case. The fact that the Court's decision has no binding force on third States does not mean, however, that the decision of the Court has no effect as a precedent for the Court.[24] The Court will interpret and apply the same rule in the same way in future cases.[25] This consistent legal position constitutes its jurisprudence. Unless there are compelling reasons, the Court will not deviate from its settled jurisprudence. Any State, therefore, must pay attention to the jurisprudence of the Court in its interpretation and application of the legal principles that the Court has dealt with.

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organ", and a "judicial organ". Alain Pellet's presentation at the 50th Anniversary of the Court, in Peck and Lee 1997, 235–236: Ces tensions sont au cœur de la problématique de toute étude envisageant la Cour en tant qu' "organe judiciaire principal des Nations Unies": parce qu'elle est un "organe", un "organe principal" et un "organe judiciaire", elle bénéficie d'un statut unique qui lui confère une autorité exceptionnelle mais lui impose aussi certaines contraintes (I) qu'elle rencontre tout particulièrement dans ses relations avec les autres organes principaux des Nations Unies, essentiellement dans le domaine, si central, du maintien de la paix et de la sécurité internationales (II).

24 This was well observed by the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice in discussing Article 59 of the Statute of the PCIJ (identical to that of the ICJ Statute): The effect of this provision has, in our opinion, sometimes been misinterpreted. What it means is not that the decisions of the Court have no effect as precedents for the Court or for international law in general, but that they do not possess the binding force of particular decisions in the relations between the countries who are parties to the Statute. The provision in question in no way prevents the Court from treating its own judgments as precedents.

Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 10 February 1944, p. 15, para. 63.

25 For instance, in its judgment on preliminary objections in the *Temple of Preah Vihear*, the Court made it clear that according to Article 59, the decision in the *Aerial Incident of 27 July 1955* case between Israel and Bulgaria is not binding on Thailand as such; nevertheless, the legal reasoning leading to that decision was relevant to the dispute at issue. *Temple of Preah Vihear* (*Cambodia* v. *Thailand*), *Preliminary Objections, Judgment of 26 May 1961, I.C.J. Reports 1961*, pp. 27–28.

4 How the Court Contributes to the Development of International Law through Judicial Law-Making

As mentioned above, when legal principles or rules are uncertain, ambiguous, or inadequate, the Court has to interpret them in such a way that it clarifies and ascertains the law so that it can apply the principles or the rules to a particular case. It is through this process that the Court contributes to the development of international law.

4.1 *When the Law Is Inadequate*

In the early days of the United Nations, the status of international organizations was not clear; whether they were, like States, a subject of international law and possessed international personality was an open question. This issue greatly affected international organizations in fulfilling their functions and interacting with member States. With a growing number of intergovernmental organizations created after the Second World War, this issue required a definite legal answer.

In 1948, when the UN Mediator and other members of the UN Mission to Palestine were assassinated in Jerusalem, the General Assembly asked the Court to address the issue, among others, whether the United Nations had the capacity to bring an international claim against the State responsible with a view to obtaining reparation for damage caused to the Organization and to the victim. In its Advisory Opinion of 11 April 1949, the Court held that the UN was intended to exercise functions and rights which could only be explained "on the basis of the possession of a large measure of international personality and the capacity to operate upon the international plane".[26] It followed that the organization had the capacity to bring a claim for reparation of damage it had suffered.[27] The Court further declared that the organization could claim reparation not only in respect of damage caused to itself, but also for the victim or persons entitled through him. The Court stated that although, according to the traditional rule, diplomatic protection has to be exercised by the national State of the victim, the organization should be regarded in international law as possessing such powers essentially for the purpose of discharging its functions, even if such powers are not expressly stated in the Charter. The Court observed that the organization may have to entrust its agents with important missions in disturbed parts of the world. In such cases, it is necessary that the

26 *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949, I.C.J. Reports 1949*, p. 179.

27 Ibid, p. 180.

agents should receive suitable support and protection that the organization is capable of providing.[28]

In the ensuing years, the Court gave a few more opinions with regard to different aspects of the status, functions, privileges and immunities of international organizations.[29] By these advisory opinions, the Court affirmed the international personality of international organizations, as a full subject of international law alongside States. This major development of international law greatly reinforced the role of international organizations in world affairs and accordingly the changing structure in the world legal order.[30] Nowadays no one questions that international organizations are full-fledged subjects of international law, with international personality necessary to fulfil their functions.

4.2 *When the Law Is Unclear or Uncertain*

When the law is unclear or uncertain, the Court's decisions provide legal guidance for States. After the Second World War, with the 1945 Truman Proclamation on the Continental Shelf and Latin-American countries' claims for 200 nautical miles' territorial sea, maritime rights became a focused area in international law. By the 1960s, the concept of continental shelf was generally accepted by States, but the principles for the delimitation of the continental shelf were still developing.[31]

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28 Ibid, pp. 181–184.

29 On the legal status of international organizations, see, for example, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, I.C.J. Reports 1980*, p. 73. On the privileges and immunities of international organizations and their staff, see, for example, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, supra note 11, p. 177; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion of 29 April 1999, I.C.J. Reports 1999*, p. 62. On the host State's international obligations, see, for example, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory opinion of 26 April 1988, I.C.J. Reports 1988*, p. 12. On the scope of the powers of international organizations, see, for example, *Certain Expenses of the United Nations* (*Article 17, paragraph 2, of the Charter*), *Advisory Opinion of 20 July 1962, I.C.J. Reports 1962*, p. 151; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, p. 66.

30 For further study on status of international organizations and their role in international society, see, for example, Schermers and Blokker *2018*, 1026–1065.

31 The first UN Conference on the Law of the Sea was held in 1958 where 86 States participated. For fear of States' hesitation to join, four separate conventions were adopted instead of a comprehensive one, with their States parties varying from 39 to 63. Convention on the High Seas (adopted 29 April 1958, entered into force 3 January 1963) 450 UNTS 11, has 63 parties; Convention on the Continental Shelf (adopted 29 April 1958, entered into

In 1967, the Federal Republic of Germany with Denmark and the Netherlands respectively, by special agreements, submitted to the Court their applications concerning the delimitation of the continental shelf of the North Sea as between the Federal Republic of Germany and Denmark, and as between the Federal Republic of Germany and the Netherlands. They specifically asked the Court not to draw the maritime lines for them, but just to state the applicable principles and rules for the delimitation of the areas of the continental shelf in the North Sea which appertain to each of them.[32] They undertook thereafter to carry out the delimitations on the basis of the decisions of the Court. As the two cases presented identical issues, the Court joined the two proceedings.

In its Judgment of 20 February 1969, with regard to the contention advanced by Denmark and the Netherlands that the equidistance rule as reflected in Article 6 of the 1958 Convention on the Continental Shelf should be applicable, the Court discussed at length the legal status of the equidistance rule in international law, as the Federal Republic of Germany was not a party to the 1958 Convention and Article 6 thereof was not applicable to it. By reviewing the short history of the general legal regime of continental shelf, the Court took the view that the equitable principle, as reflecting *opinio juris* (acceptance as law), should be the applicable principle in the matter of delimitation.[33] Rejecting equidistance as an established rule, the Court stated that "no one single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement [...] and secondly, that it should be effected on equitable principles."[34] Under the equitable principle, the Court further established three major factors to be taken into consideration: geographical configuration of the coastlines, the

force 10 June 1964) 499 UNTS 311, has 58 parties; Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 22 November 1964) 516 UNTS 205, has 52 parties; Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285, has 39 parties. The régime of exclusive economic zone was yet to be adopted by then. See, for example, Jessup 1959.

32 *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), *Judgment of 20 February 1969, I.C.J. Reports 1969*, pp. 6–7.

33 In particular, the Court found the application of equitable principle in accordance with "the ideas which have always underlain the development of [the legal régime of continental shelf]", namely: (*a*) the parties' obligation to enter into meaningful negotiations; (*b*) the parties' obligation to take all the circumstances into account in an equitable way; and (c) a State's continental shelf "must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another State." Ibid, p. 47, para. 85.

34 Ibid, p. 36, para. 55; see also pp. 46–47, para. 85, p. 50, para. 92.

unity of any deposits, and a reasonable degree of proportionality between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines.[35] The jurisprudence established in the *North Sea Continental Shelf* cases was further developed in the subsequent cases, which gradually developed into a set of rules and methodologies for maritime delimitation.[36]

It is fair to say that the Court's jurisprudence on the maritime delimitation has not only contributed to the peaceful settlement of specific disputes between coastal States, adjacent or opposite, on the delimitation of maritime areas, it has also provided legal clarity and certainty to the modern law of the sea in respect of maritime delimitation.[37] Moreover, its pronouncement on the formation of customary international law in the *North Sea Continental Shelf* cases is a valuable contribution to the development of customary international law.[38]

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35 Ibid, pp. 50–52, paras. 93–98.

36 See, for example, *Continental Shelf* (*Tunisia*/*Libyan Arab Jamahiriya*), *Judgment of 24 February 1982, I.C.J. Reports 1982*, p. 18; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada*/*United States of America*), *Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246; *Continental Shelf* (*Libyan Arab Jamahiriya*/*Malta*), *Judgment of 3 June 1985, I.C.J. Reports 1985*, p. 13; *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway*), *Judgment of 14 June 1993, I.C.J. Reports 1993*, p. 38; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar* v. *Bahrain*), *Merits, Judgment of 16 March 2001, I.C.J. Reports 2001*, p. 40; *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria: Equatorial Guinea intervening*), *Judgment of 10 October 2002, I.C.J. Reports 2002*, p. 303; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), *Judgment of 8 October 2007, I.C.J. Reports 2007*, p. 659; *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), *Judgment of 3 February 2009, I.C.J. Reports 2009*, p. 61; *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), *Judgment of 19 November 2012, I.C.J. Reports 2012*, p. 624; *Maritime Dispute* (*Peru* v. *Chile*), *Judgment of 27 January 2014, I.C.J. Reports 2014*, p. 3; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica* v. *Nicaragua*), *Judgment of 2 February 2018, I.C.J. Reports 2018*, p. 139.

37 On the Court's contribution to the development of the law of the sea, see, for example, Tams and Sloan 2013.

38 *North Sea Continental Shelf*, supra note 32, p. 44, para. 77: "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." The influence of the *North Sea Continental Shelf* cases and further development on customary international law, see, for example, ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN Doc A/73/10.

4.3 *When the Law Needs to Be Developed through Progressive Interpretation*

Although occasionally the Court has to supplement and even expand the law for application, for the most part, its task is to interpret and apply the existing law. However, in practice, when circumstances have fundamentally changed, the Court, in responding to the changes, also has to give progressive interpretation.

The cases concerning the principle of self-determination and the *Whaling* case (Australia v. Japan) serve as vivid examples in this respect.

Since the birth of the United Nations, more than 80 former colonies comprising some 750 million people have gained independence. This could not have been achieved without the persistent efforts of the United Nations in solidifying the abstract purpose of the UN Charter into a concrete legal right to self-determination in international law.[39] The principle of self-determination is enshrined in Article 1, paragraph 2 of the Charter, which addresses the purposes of the United Nations. In line with this principle, a Trusteeship Council was established as one of the six principal organs of the United Nations. The Court's deep involvement in this process and its essential role in clarifying the law are reflected in several of its judgments and advisory opinions, such as, the 1971 Opinion on *Namibia* (*South West Africa*), the 1975 Opinion on *Western Sahara*, the 1995 Judgment in *East Timor* case, and most recently, the 2019 Opinion on *Chagos Archipelago*.

In the 1950s and 1960s, many African and Asian countries overthrew colonial domination and acquired independence. During this decolonization movement, the General Assembly adopted resolution 1514 (XV) on 14 December 1960 entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples". Although in the UN Charter, there is a special chapter on non-self-governing territories, the question whether and when the principle of self-determination became customary international law remained unclarified.

In 2017, by Resolution 71/292, the General Assembly requested the Court to render an advisory opinion on two legal questions: first, whether the decolonization of Mauritius was lawfully completed in 1968 when Mauritius obtained independence from the United Kingdom; and second, what consequences under international law arise from the United Kingdom's continued administration of the Chagos Archipelago. The Chagos Archipelago as part of Mauritius was under British colonial rule for many years. It was detached from Mauritius by the United Kingdom three years before its independence. By an agreement

39 See Charter of the United Nations, art 7, Chapters 12–13.

between the United Kingdom and the United States, the Chagos islands were leased to the latter for 50 years (renewed automatically in December 2016 for a further 20 years) for the purpose of establishment of a military base.[40]

In its Advisory Opinion, the Court recalled that the Charter has made respect for the principle of equal rights and self-determination of peoples one of the purposes of the UN and included provisions that would enable non-self-governing territories ultimately to govern themselves.[41] It stated, moreover, that "[t]he adoption of resolution 1514 (XV) … represents a defining moment in the consolidation of State practice on decolonization" and that "[b]oth State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination".[42] The Court in this statement clearly determined the moment when the principle of self-determination was established as a rule of customary law. More importantly, it pronounced that since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right. With Chagos, the Court declared that all States must cooperate with the UN so that Mauritius' right to self-determination as to Chagos will be respected and exercised.[43]

In the decolonization movement in the early days, the Court delivered a number of opinions relating to self-determination, however, it had never been so clear and determinative as to place the principle at such a high level, which reflects the importance of human rights today. That said, it is not to be forgotten that the Court once went through a dormant period as a result of its failure to follow the discernible trend of international law on self-determination in its 1966 judgment in *South West Africa* cases, which concerned the obligations of South Africa under the mandate system towards the South West African people.[44]

In 1960, Ethiopia and Liberia, in their capacity as former States Members of the League of Nations, instituted separate proceedings against South Africa on its obligations under the mandate towards the Mandate Territory, South West

40 United Kingdom of Great Britain and Northern Ireland and Unites States of America: Exchange of Notes Constituting an Agreement concerning the Availability for Defense Purposes of the British Indian Ocean Territory (with annexes) (entered into force 30 December 1966) 603 UNTS 273.

41 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019, I.C.J. Reports 2019*, p. 131, paras. 146–148.

42 Ibid, p. 132, para. 150, p. 134, para. 160.

43 Ibid, p. 139, para. 180.

44 For scholarly writings on South West Africa dispute, see, for example, Dugard 1973.

Africa.[45] In rejecting the applicants' claims on behalf of the South West African people, the Court gave a rather narrow reason to disqualify the applicants' standing to institute the proceedings.[46] With the votes equally divided (7–7) and the casting vote of President Spender, the majority of the Court found that the applicants had no "legal right or interest appertaining to them in the subject-matter of the present claims".[47] By taking such a mechanical positivist approach, the Court virtually let the apartheid régime "legally" continue in South West Africa, in total disregard of the overwhelming views of States against apartheid. Three months right after the delivery of the judgment, General Assembly by Resolution 2145 (XXI) on 27 October 1966, reaffirmed the inalienable right to self-determination by the people of South West Africa, declared the breach of the mandate by South Africa through the application of apartheid régime, and in due regard terminated the mandate.[48]

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45 South West Africa was the name for the modern-day Namibia when it was under the administration of South Africa as a declared League of Nations Class C Mandate Territory under the Treaty of Versailles. With the dissolution of the League and the creation of the United Nations, General Assembly by Resolution 9(I) in 1946 invited all States administering mandate territories to place the respective territories under the UN trusteeship system. The invitation was responded by all but not South Africa. In its advisory opinion on *International Status of South West Africa* in 1950, the Court found that the dissolution of the League had not entailed the lapse of the mandate, and that South Africa was still under an obligation to give an account of its administration to the UN, which discharged the supervisory functions formerly exercised by the League. See *International Status of South West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, p. 128. To be noted, the Court found in p. 144 that "Chapter 12 of the Charter do not impose on the Union of South Africa a legal obligation to place the Territory under the Trusteeship System;" but instead, "the provisions of Chapter 12 of the Charter are applicable to the Territory of South-West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System." Afterwards, the General Assembly's consistent requests that South Africa should perform its obligations were all in vain. As an extension of its domestic racial policy, South Africa administered South West Africa under the apartheid laws.

46 *South West Africa* (*Ethiopia* v. *South Africa; Liberia* v. *South Africa*), *Second Phase, Judgment of 18 July 1966, I.C.J. Reports 1966*, p. 23, para. 16. In particular, the Court emphasized that "it is necessary not to confuse the moral ideal with the legal rules intended to give it effect", and that the legal rights and obligations were those and those alone from the mandate instruments within the framework of the League. Ibid, p. 35, para. 52.

47 Ibid, p. 51, para. 99. Sir Gerald Fitzmaurice is known to have been the principal author of the majority opinion. See, for example, McWhinney 1987, 39.

48 UNGA Res 2145(XXI) (27 October 1966) UN Doc A/RES/2145(XXI). The Security Council by Resolution 276 in 1970 reaffirmed that General Assembly Resolution and declared the continued presence of and all acts taken by South Africa in Namibia illegal. UNSC Res 276 (1970) (30 January 1970) UN Doc S/RES/276 (1970).

The judgment of the Court in *South West Africa* caused a devastating damage to the Court's credibility, as a result, the Court's caseload drastically descended.[49]

In 1970, the Security Council decided to request of the Court an advisory opinion on the legal consequences for States of the continued presence of South Africa in Namibia.[50] This time when interpreting the same mandate, with the majority of the judges re-elected, the Court adopted an entirely different approach in treaty interpretation, embracing the prevailing discernable trend of State practice and opinions, reaffirming self-determination and independence of the people concerned as the ultimate objective of the sacred trust placed in the United Nations.[51] Consequently, in its advisory opinion in 1971, the Court found the continued presence of South Africa in Namibia illegal, South Africa under an obligation to withdraw forthwith its administration therefrom, and that UN Members States under an obligation to recognize the illegality of South Africa's presence and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts implying recognition of the legality of, or lending support or assistance to, such presence and administration.[52]

Indeed, treaty interpretation is never static; it is a living matter. This is also the situation in the environmental field. In May 2010, Australia instituted proceedings against Japan in respect of "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II')". Australia accused Japan of breaching its obligations under the 1946 International Convention for the Regulation of Whaling (hereinafter "ICRW"). New Zealand intervened under Article 63 of the Statute to give its own interpretation to the provisions of the ICRW.

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49 For years, half of its caseloads concerned maritime delimitation and fisheries matters.

50 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J. Reports 1971*, p. 17.

51 Ibid, p. 31, para. 53: "[T]he Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned."

52 Ibid, p. 58, para. 133.

In this case, the key provision of the ICRW over which the Parties held opposing views is Article VIII, paragraph 1 on scientific research, which reads:

> Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals *a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention*. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted [emphasis added].

Clearly, this provision gives full discretion to a State party to authorize whaling for scientific research purposes. The State party itself has the right to decide the scale and the number of killing of whales, and treatment of whale meat after the use for scientific research.[53] If interpreted strictly by its ordinary meaning of the terms, Article VIII, paragraph 1, gives a free hand to Japan to grant a permit to JARPA II project. In other words, Japan followed exactly Article VIII, paragraph 1, of the ICRW. But why did the Court come to a different conclusion, deciding that Japan breached its obligation under the Convention? In the Judgment, the Court basically considered two elements: first, the reasonableness of the number of killing for the purposes of JARPA II, and secondly, the actual scientific effect and necessity of the scale of killing of the project.[54] The Court admitted that killing of non-endangered whales for scientific purposes is permitted under the Convention and the minke whales that JARPA II was to kill was not endangered species.[55] However, under JARPA II, the project permitted the killing of minke whales up to over 800 per year. Australia adduced substantial evidence to prove its claim that Japan used scientific whaling in disguise so as to circumvent the moratorium on commercial whaling. Besides, the testimony given by the Japan-appointed expert also cast doubt on the scale of the killing for scientific research purposes.

Traditionally, whaling was essential for industry and human needs. As a result of growing commercial whaling, the resources were rapidly depleted.

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53 *Whaling in the Antarctic* (*Australia* v. *Japan: New Zealand intervening*), *Merits, Judgment of 31 March 2014, I.C.J. Reports 2014, Separate Opinion of Judge Xue*, pp. 421–422, paras. 5–7.

54 Ibid, *Judgment of 31 March 2014*, pp. 292–293, paras. 224–227.

55 Ibid, pp. 250–252, paras. 55–58; p. 292, para. 224.

Since early 1930s, sustainability of the whaling industry gave rise to international actions. Prior to the adoption of the ICRW, there had been two international treaties on the regulation of whaling.[56] In expressing the desire of the States parties "to secure the prosperity of the whaling industry and, for that purpose, to maintain the stock of whales",[57] these treaties prohibited the taking of certain categories of whales, designated seasons for different types of whaling, closed certain geographic areas to whaling and imposed regulations on the industry. The ICRW, adopted in 1946, was aimed at more institutionalized mechanism for whaling regulation, as was declared by the sponsor of the international whaling conference, "to provide for the co-ordination and codification of existent regulations" and to establish an "effective administrative machinery for the modification of these regulations from time to time in the future as conditions may require".[58]

As whale utilization was eventually replaced by other resources, industrial and commercial whaling were put on a permanent moratorium under the ICRW. The Convention mechanisms turned their attention to conservation and protection. However, this approach has been consistently opposed by a few whaling States, such as Japan and Norway. For many years, environmental NGOs keep attacking Japan for killing and consuming whales, prompting whaling to become a public issue in some countries.[59]

Although the reasoning of the Court's Judgment was largely based on an examination of the JARPA II programme itself, it is evident that the object and purpose of the Convention have gradually evolved from sustainable utilization to conservation, and the functions of the Scientific Committees under the ICRW have also turned to a different direction.[60] Therefore, when commercial whaling was virtually terminated, a large scale of whaling, even if for scientific research purposes as claimed by Japan, cannot be considered as falling within the sole discretion of a State party, in this case, Japan. As long as Japan remains a party to the ICRW, it should observe the treaty as it stands today, not as in

56 Geneva Convention for Regulation of Whaling (adopted 24 September 1931, entered into force 16 January 1935) 155 LNTS 349; International Agreement for the Regulation of Whaling (with Declaration) (adopted 8 June 1937, entered into force 7 May 1938) 190 LNTS 79.

57 International Agreement for the Regulation of Whaling, ibid, preamble.

58 Opening address made by Mr. Dean Acheson, then Acting Secretary of State of the United States in 1946, at the international conference on whaling convened on the initiative of the United States. *Whaling in the Antarctic*, supra note 54, p. 247, para. 44.

59 On whaling policy, politics and legislation, see, for example, Tønnessen and Johnsen 1982; Friedheim 2001; Heazle 2006; Fitzmaurice 2015.

60 *Whaling in the Antarctic*, supra note 53, p. 423, para. 11.

1946. Through treaty interpretation and application, the Court took cognizance of that change. As the Court stated before, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[61] Interpretation of the ICRW must be in line with the rising standards on environmental protection under modern international law.

After the Judgment, Japan, in its new research programme, lowered the number of killing to around 300 per year.[62] Notwithstanding that readjustment, Japan nevertheless maintains its position on sustainable whaling. For that purpose, it has taken two legal actions: one, it withdrew from the ICRW and second, it modified the scope of its optional clause declaration, specifically precluding disputes relating to living marine resources from the Court's jurisdiction.[63] That is to say, in the future Japan will not accept the jurisdiction of the Court to settle any dispute relating to whaling. This may seem unfortunate for the Court, but it in a way illustrates the limits of judicial settlement in international relations.

In conclusion, by ascertaining, clarifying and developing the law, the Court, while performing the functions of settling disputes, contributes to the development of international law.

5 Limits of Judicial Law-Making: Is Self-Restraint Necessary?

One of the inherent features of law lies in the *antinomy* of stability and evolution in view of economic and social progress. To better serve the society, the judiciary should be capable of accommodating such inherent antinomy in law and respond in a positive way. This equally applies to the ICJ. In exercising its judicial functions, the Court nevertheless is not a legislative body. As the Court is obliged "to decide [the disputes] in accordance with international law",[64] its role in law-making, therefore, is inherently limited. In this regard, two aspects need constant review.

61 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), supra note 50, p. 31, para. 53.

62 See, for example, Matsuoka, Mogoe, and Pastene 2016.

63 See, for example, Becker 2015, available at: https://www.ejiltalk.org/japans-new-optional-clause-declaration-at-the-icj-a-pre-emptive-strike/>, accessed 16 June 2022.

64 Statute of the International Court of Justice, art 38.

First, to what extent the Court may exercise judicial activism in the interpretation of the law. In settling disputes, one major aspect of the Court's function is to interpret the law, conventional or customary, as the case may be. With regard to treaty interpretation, the Court, in its early days, gave predominant effect to the wording of treaty provisions.[65] Gradually, with the development of treaty law, the Court also resorted to other elements in interpretation, emphasizing more the context of a provision, object and purpose of the treaty, the drafting history, etc.[66] As is provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. This holistic approach has been affirmed on numerous occasions by the Court as reflecting the established customary rules on treaty interpretation.[67]

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65 In the time of PCIJ, the approach of textualism dominated among others. *The Case of S.S. "Wimbledon", Judgment, P.C.I.J. Publications 1923, Series A, no. 1*, p. 22: "[t]he Court considers that the terms of article 380 are categorical and give rise to no doubt;" *The Case of S.S. "Lotus", Judgment, PCIJ Publications 1928, Series A, no. 10*, p. 16: "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself;" *Jurisdiction of the Courts of Danzig, Advisory Opinion, P.C.I.J. Publications 1928, Series B, no.* 15, p. 18: "[t]he intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive."

66 Such an approach of textualism continued to exert its influence in the time of the ICJ, though the ICJ went through a rather zigzag path in respect of treaty interpretation over time. In *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion of 3 March 1950, I.C.J. Reports 1950*, p. 8: "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation …." The Court in *South West Africa* adopted two different approaches at preliminary phase (a more related textualism) and merits phase (strict textualism). *South West Africa* (*Ethiopia* v. *South Africa; Liberia* v. *South Africa*), *Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962*, p. 336: "[the rule of natural and ordinary meaning of the words employed in the provision] is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it;" cf *South West Africa, Second Phase*, supra note 46, p. 6.

67 The Court first recognized Articles 31 and 32 of the Vienna Convention on the Law of Treaties as reflecting customary international law in 1991. *Arbitral Award of 31 July 1989* (*Guinea-Bissau* v. *Senegal*), *Judgment of 12 November 1991, I.C.J. Reports 1991*, p. 69, para. 48: "These principles are reflected in Articles 31 and 32 of the Vienna Convention

Evidently, treaty interpretation is not purely a technical matter. The holistic approach that places less emphasis on the text of a treaty does not imply that the text is no longer determinative. On the contrary, it means that the text should continue to serve as the base of interpretation, but that base alone may not be sufficient for the purpose of interpretation. Either excessive expansion of the ordinary meaning of, or a departure from, the actual terms of treaty provisions, is contrary to the treaty law. As is pointed out by the Court, "in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties […] Interpretation must be based above all upon the text of the treaty".[68] When the Court is obliged to take into account such additional and relevant elements as context, object and purpose, drafting history etc., it does not suggest that the Court has a free hand in interpreting the law. A good faith interpretation should, first and foremost, reflect what the State parties intended to undertake when they concluded the treaty in question.

In reality, difficulties often arise when the treaty practice has undergone substantial changes, as in the *Whaling* case, the ordinary meaning of the text has to be examined in the light of the object and purpose of the treaty and its subsequent practice. To what extent the Court may construe the treaty beyond its actual terms in view of the changing circumstances is not merely a theoretical question.

In the recent case instituted by Qatar against the United Arab Emirates (UAE) for the alleged violations of the International Convention on the Elimination of

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on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point." Ever since *Arbitral Award of 31 July 1989*, the Court has consistently applied rules of customary international law on treaty interpretation as reflected in Articles 31 and 32 of the Vienna Convention. See, for example, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua* v. *Colombia*), *Preliminary Objections, Judgment of 17 March 2016, I.C.J. Reports 2016* (*I*), p. 116, para. 33; *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 of 8 November 2019, I.C.J. Reports*, p. 598, para. 106. Moreover, the Court explicitly adopted the holistic approach of treaty interpretation in *Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), *Preliminary Objections, Judgment of 2 February 2017, I.C.J. Reports 2017*, p. 29, para. 64: "Article 31, paragraph 1, of the Vienna Convention provides … These elements of interpretation—ordinary meaning, context and object and purpose—are to be considered as a whole".

68 *Territorial Dispute* (*Libyan Arab Jamahiriya/Chad*), *Judgment of 3 February 1994*, *I.C.J. Reports 1994*, pp. 21–22, para. 41; cf *Oil Platforms* (*Islamic Republic of Iran* v. *United States of America*), *Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996*, p. 803.

All Forms of Racial Discrimination of 21 December 1965 (CERD),[69] the Parties held opposing views on the term of Article 1, paragraph 1, of the Convention, according to which, the State parties are obliged to prohibit racial discrimination on the bases of "race, colour, descent, or national or ethnic origin".[70] Qatar contended that the measures imposed by the UAE on the Qatari nationals constituted racial discrimination, as the term "national origin" provided in CERD encompassed current nationality.[71] In this regard, it particularly referred to General Recommendation XXX adopted by the CERD Committee, an expert body established under the Convention for the treaty implementation. In that General Recommendation, the CERD Committee took the view that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".[72] The UAE, on the other hand, maintained that the term "national origin" under CERD did not encompass current nationality and therefore, its measures against Qatari nationals did not violate the Convention. In its view, the CERD Committee's general recommendations did not constitute subsequent practice or agreement of States parties to CERD regarding the interpretation of the Convention.[73]

The Court first examined the term "national origin" in the context of the Convention in the light of the object and purpose of CERD and, to confirm its conclusion, further reviewed *travaux préparatoires*, the drafting history of the Convention, the practice of the CERD Committee and the jurisprudence of the human rights bodies. Based on these considerations, the Court found that the term "national origin" in Article 1, paragraph 1, of the Convention did not encompass current nationality. With regard to the practice of the CERD

69 The Court delivered its Judgment on jurisdiction and admissibility on 4 February 2021.

70 Article 1, paragraph 1, of the Convention reads: In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

71 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar* v. *United Arab Emirates*), *Preliminary Objections, Judgment of 4 February 2021*, para. 74.

72 UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXX on Discrimination Against Non Citizens (1 October 2002), para. 4.

73 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, supra note 71, para. 74.

Committee, the Court recalled its previous statement in the *Diallo* case, that, in exercising its judicial functions, the Court was "in no way obliged [...] to model its own interpretation of the Covenant on that of the Committee", but to apply the relevant customary rules on treaty interpretation.[74] In light of these reasons, the Court upheld the preliminary objection raised by the UAE and decided that it had no jurisdiction to entertain the application filed by Qatar.[75]

Rules of treaty interpretation serve to maintain the stability, certainty and generality of contractual relations between the States parties to a treaty. A faithful interpretation that genuinely reflects what the States parties have undertaken to fulfil under international law would only strengthen the treaty regime. A State party may always choose to withdraw from a treaty if it considers that its obligations under the treaty have been unduly expanded by the Court without its consent.[76]

Another aspect of judicial limits relates to the settled jurisprudence. To render judgments on sound reasoning, the Court must follow its established jurisprudence. Unless there are compelling reasons, the Court should not deviate from that jurisprudence. To determine whether there exists any compelling reason, the Court has to assess the specific circumstances in each case. This precaution is not without merit.

In the cases filed either against or by the Federal Republic of Yugoslavia (FRY), the Court took different positions on the legal status of the State at different stages. In *Bosnia and Herzegovina* v. *Serbia and Montenegro*, the Court found that the Parties, since the entry into force on 14 December 1995 of the Dayton-Paris Agreement, recognized each other as sovereign States, and by succession, became parties to the Genocide Convention.[77] The Court did not consider that there was any legal obstacle for the FRY to be a party before the Court. In the following cases filed by Serbia and Montenegro (formerly called the FRY) against several NATO member States on *Legality of Use of Force*, the Court took a different position on the status of the State. Having recalled the historical events with the FRY, the Court came to the conclusion that Serbia and Montenegro was not a Member of the United Nations, and in that capacity a State party to the Statute of the Court, at the time of filing its application

74 Ibid, para. 101, citing *Ahmadou Sadio Diallo* (*Republic of Guinea* v. *Democratic Republic of the Congo*), *Merits, Judgment of 30 November 2010, I.C.J. Reports 2010* (*II*), p. 664, para. 66.

75 Ibid, paras. 114–115.

76 Japan's actions in the wake of the Court's Judgment in *Whaling* case illustrate this point.

77 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina* v. *Serbia and Montenegro*), *Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996*, pp. 613–614, para. 26.

to institute the proceedings before the Court on 29 April 1999, and therefore, Serbia and Montenegro did not have access to the Court under Article 35 of the Statute. Consequently, the Court dismissed the cases for lack of jurisdiction.[78] In July 1999, Croatia instituted proceedings in the Court against Serbia for alleged violations of the Genocide Convention. This time the Court did not address the question of access, but confined its consideration to the applicability of the Genocide Convention to Serbia.[79]

Evidently, the reasons given by the Court in these cases are not consistent. If Serbia (formerly the FRY, then Serbia and Montenegro), as was confirmed by the Court in its 2004 Judgments in the cases concerning *Legality of Use of Force*, was not a Member of the United Nations until 1 November 2000 and therefore not a party to the Statute before that date, the Court could not have had jurisdiction in the subsequent case filed by Croatia against Serbia. It should be pointed out, in particular, that the 2004 Judgments were adopted by the Court in unanimity. The change of the Court's composition in the latter case cannot justify this inconsistency.[80] Predictability and certainty of the jurisprudence of the Court are imperative to maintain the trust and confidence of States in the judicial settlement. Notwithstanding its prominent position in the UN, the Court's credibility lies in its sound judgments.

78 *Legality of Use of Force* (*Serbia and Montenegro* v. *United Kingdom*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 1307, pp. 1328–1341, paras. 50–89. See also *Legality of Use of Force* (*Serbia and Montenegro* v. *Belgium*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 279; *Legality of Use of Force* (*Serbia and Montenegro* v. *Canada*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 429; *Legality of Use of Force* (*Serbia and Montenegro* v. *France*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 575; *Legality of Use of Force* (*Serbia and Montenegro* v. *Germany*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 720; *Legality of Use of Force* (*Serbia and Montenegro* v. *Italy*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 865; *Legality of Use of Force* (*Serbia and Montenegro* v. *Netherlands*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 1011; *Legality of Use of Force* (*Serbia and Montenegro* v. *Portugal*), *Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004*, p. 1160.

79 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), *Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008*, p. 412; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), *Merits, Judgment of 3 February 2015, I.C.J. Reports 2015,* p. 3.

80 For criticism of the case, see, for example, Yehuda Z. Blum, 'Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (Croatia v. Serbia)' (2009) 103(2) American Journal of International Law 264.

6 Challenges Ahead

Looking ahead, there are three major challenges facing the Court: institutional proliferation, fragmentation of the law, and credibility of third-party settlement. Since these issues, each of them, deserve a separate study, they will be briefly discussed here.

First, the post-Cold War era has witnessed a rapid growth of judicial and arbitral activities at both international and regional levels. Although the revival of the existing arbitral institutions and the creation of new courts and tribunals are generally perceived as a positive development for the peaceful settlement of international disputes, they pose challenges to the ICJ's role in the field; States may choose different forums to settle their disputes. Top talents can go and serve in other judicial institutions. More importantly, the Court must constantly improve its judicial practice so as to live up to the expectations of States.

Secondly, with multiple third-party settlement mechanisms, fragmented jurisprudence is inevitable. At the international level, there is no hierarchy among different courts and tribunals; they each act within their given competence and develop their own jurisprudence. They are not obliged to give deference to the jurisprudence of other courts and tribunals. Therefore, when a treaty clause can be interpreted differently by different tribunals, where and by whom a case is to be adjudicated becomes decisive. Consequently, "forum-shopping" and judge-selection could render the international adjudication process opportunistic. Even though for permanent courts and tribunals, such matters seldom arise, fragmented legal practice is not conducive to the development of third-party settlement.[81]

Lastly, notwithstanding the increasing workload of the Court, increasing unilateral institutions of proceedings are worth noting. In some of these cases, respondent States have either chosen not to appear,[82] or modified their

81 On proliferation of international courts and tribunals and fragmentation of international law, see, for example, ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi (13 April 2006) UN Doc A/CN.4/L.682; Treves, in Wolfrum and Roeben 2005; Zimmermann and Hofmann 2006.

82 Recently, in *Arbitral Award of 3 October 1899* (*Guyana* v. *Venezuela*), Venezuela did not appear before the Court during the preliminary phase. In *Relocation of the United States Embassy to Jerusalem* (*Palestine* v. *United States of America*), the Trump Administration informed the Court that the United States would not participate in the case. The basis for the Court to adjudicate in the situation of non-appearance of a party is Article 53 of its Statute. See Mangoldt and Zimmermann, in Zimmermann, Tomuschat, and

acceptance of the Court's jurisdiction afterwards. In the past eight years, six States have modified or withdrawn their acceptance of the Court's jurisdiction after they were sued in the Court. For instance, after the Marshall Islands nuclear disarmament cases against nine nuclear-weapon States,[83] the United Kingdom, India and Pakistan each amended their Optional Clause declarations under Article 36, paragraph 2, of the Statute, narrowing down the scope of their acceptance of the Court's compulsory jurisdiction.[84] As discussed before,

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Oellers-Frahm 2006, 1141–1170. For more discussion of non-appearance, see, for example, Thirlway 1985.

83 On 24 April 2014, the Republic of the Marshall Islands filed applications against nine States (China, Democratic People's Republic of Korea, France, India, Israel, Pakistan, Russian Federation, United Kingdom and United States of America), accusing them of not fulfilling their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament. Out of the nine States, three had accepted the Court's compulsory jurisdiction (India, Pakistan and United Kingdom) while the other six had not. In accordance with Article 38, paragraph 5, of the Rules of Court, the applications filed against these six States were transmitted to them but not entered in the General List, and no action was taken in the proceedings in the absence of their consent. Later, jurisdiction was not found by the Court for the cases against the rest three States. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands* v. *India*), *Preliminary Objections, Judgment 5 October 2016, I.C.J. Reports 2016*, p. 255; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands* v. *Pakistan*), *Preliminary Objections, Judgment 5 October 2016, I.C.J. Reports 2016*, p. 552; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands* v. *United Kingdom*), *Preliminary Objections, Judgment 5 October 2016, I.C.J. Reports 2016*, p. 833.

84 On 22 February 2017, the United Kingdom revised its declaration under Article 36(2) of the Statute of the Court dated 30 December 2014, excluding from the Court's jurisdiction, among others: "any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question." On 29 March 2017, Pakistan revised its declaration under Article 36(2) of the Statute of the Court dated 12 September 1960, excluding from the Court's jurisdiction, among others: "disputes relating to or connected with any aspect of hostilities, armed conflicts, individual or collective self-defence or the discharge of any functions pursuant to any decision or recommendation of international bodies, the deployment of armed forces abroad, as well as action relating and ancillary thereto in which Pakistan is, has been or may in future be involved;" and "all matters related to the national security of the Islamic Republic of Pakistan." On 27 September 2019, India also revised its declaration under Article 36(2) of the Statute of the Court dated 18 September 1974, further excluding from the Court's jurisdiction, among others: "disputes relating to … measures taken for protection of national security and ensuring national defence." See "Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the

Japan modified its declaration of acceptance after the *Whaling* case. Colombia withdrew from the Pact of Bogotá, a treaty on which the Court founded its jurisdiction in the case instituted by Nicaragua against Colombia.[85] Recently, after Iran, on the basis of the 1955 Treaty of Amity, Economic Relations and Consular Rights between Iran and the United States, sued the United States in the Court in two cases, the United States terminated the said treaty.[86]

These cases show that jurisdiction of the Court bears heavily on the national interests of States. Whether a dispute should be submitted to a third-party for a binding settlement, whether a dispute should be subject to judicial scrutiny, and whether a dispute should be examined as a separate legal issue detached from the overall political context: all these are not purely legal issues. They are political questions, first and foremost, for political decisions.[87] Undoubtedly, the Court cannot dictate how States should submit their disputes to the Court for settlement, unilaterally or otherwise by agreement. The Court can only act in accordance with the Statute and Rules of the Court to settle the disputes in question. What is at stake is the credibility of the Court if judicial decisions fail to bring about effective resolutions to the disputes.

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85 See *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), supra note 36, p. 624.

86 The two pending cases based on the 1955 Treaty are*: Certain Iranian Assets* (*Islamic Republic of Iran* v. *United States of America*)*, Preliminary Objections, Judgment of 13 February 2019, I.C.J. Reports 2019*, p. 7; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights* (*Islamic Republic of Iran* v. *United States of America*)*, Preliminary Objections, Judgment of 3 February 2021*. (In the past, Iran also brought three other cases based on the 1955 Treaty (and on other bases): *United States Diplomatic and Consular Staff in Tehran* (*United States of America* v. *Iran*)*, Judgment of 24 May 1980, I.C.J. Reports 1980*, p. 3; *Aerial Incident of 3 July 1988* (*Islamic Republic of Iran* v. *United States of America*)*, Memorial of the Islamic Republic of Iran, 24 July 1990*; *Oil Platforms*, supra note 68, p. 803).

87 For example, Rosenne 2006, Vol. II, 803 observes: "The question whether and to what extent the Court has jurisdiction is frequently of political importance no less than the decision on the merits, if not more. When a respondent raises a matter of jurisdiction […] it frequently indicates the absence of political agreement that the Court should entertain the case. These are not mere technical issues."

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