# The Humanitarian Face of the International Court of Justice. Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles

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# The Humanitarian Face of the International Court of Justice

## Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles

Het humanitaire gezicht van het Internationaal Gerechtshof
De bijdrage aan de interpretatie en ontwikkeling van normen en beginselen van internationale mensenrechten en internationaal humanitair recht

(met een samenvatting in het Nederlands)

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in het openbaar te verdedigen
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door

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geboren op 1 augustus 1977
te Dajç, Albanië

Promotoren: Prof. dr. C. Flinterman
Prof. dr. T.D. Gill

To my parents, Xhemal and Fetije Zyberi

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Gentian Zyberi

February 2008

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# LIST OF ABBREVIATIONS

**Journals and other academic publications**

| | |
|---|---|
| AFDI | Annuaire Français de Droit International |
| AJIL | American Journal of International Law |
| AJPIL | Austrian Journal of Public and International Law |
| ALC | Annotated Leading Cases of International Criminal Tribunals |
| AYbIL | Australian Yearbook of International Law |
| BYbIL | British Yearbook of International Law |
| CJIL | Chinese Journal of International Law |
| CJTL | Columbia Journal of Transnational Law |
| CWILJ | California Western International Law Journal |
| CYbIL | Canadian Yearbook of International Law |
| DJIL | Dickinson Journal of International Law |
| DJCIL | Duke Journal of Comparative and International Law |
| DJILP | Denver Journal of International Law and Policy |
| EJIL | European Journal of International Law |
| FILJ | Fordham International Law Journal |
| GLJ | German Law Journal |
| GYbIL | German Yearbook of International Law |
| HILJ | Harvard International Law Journal |
| HRJ | Human Rights Journal |
| HYbIL | Hague Yearbook of International Law |
| ICJ Reports | Reports of Judgments, Advisory Opinions and Orders |
| ICLQ | International and Comparative Law Quarterly |
| IJIL | Indian Journal of International Law |
| IL | International Lawyer |
| ILC Yearbook | Yearbook of the International Law Commission |
| ILP | International Law and Politics |
| IRRC | International Review of the Red Cross |
| IYbIL | Israel Yearbook of International Law |
| JCSL | Journal of Conflict and Security Law |
| LJIL | Leiden Journal of International Law |
| MJIL | Melbourne Journal of International Law |
| MLLWR | Military Law and Law of War Review |
| NILR | Netherlands International Law Review |
| NJIL | Nordic Journal of International Law |

| | |
|---|---|
| NQHR | Netherlands Quarterly of Human Rights |
| NYbIL | Netherlands Yearbook of International Law |
| NYUJILP | New York University Journal of International Law and Politics |
| RdC | Recueil des Cours de l'Académie de Droit International |
| RECIEL | Review of European Community and International Environmental Law |
| SJIL | Stanford Journal of International Law |
| TILJ | Texas International Law Journal |
| VJIL | Virginia Journal of International Law |
| VJTL | Vanderbilt Journal of Transnational Law |
| WA | World Affairs (Journal) |
| YJIL | Yale Journal of International Law |

**Institutions, organs, other bodies**

| | |
|---|---|
| ACABQ | UN Advisory Committee for Administrative and Budgetary Matters |
| ASIL | American Society of International Law |
| CHR | United Nations Human Rights Commission |
| CmAT | Committee against Torture |
| CmEDAW | Committee on Elimination of Discrimination against Women |
| CmERD | Committee on Elimination of Racial Discrimination |
| CmESCR | Committee on Economic, Social and Cultural Rights |
| CmRC | Committee on the Rights of the Child |
| CmRMW | Committee on the Rights of Migrant Workers |
| ECOSOC | United Nations Economic and Social Council |
| ECtHR | European Court of Human Rights |
| GA (UNGA) | General Assembly |
| HRCm | United Nations Human Rights Committee |
| HRCn | Human Rights Council |
| I-ACtHR | Inter-American Court of Human Rights |
| ICJ | International Court of Justice |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTs | International Courts and Tribunals |
| ICTY | International Criminal Tribunal for former Yugoslavia |
| ILC | International Law Commission |
| IQJBs | International Quasi-Judicial Bodies |
| ITLOS | International Tribunal on the Law of the Sea |
| MONUC | United Nations Mission in the Democratic Republic of Congo |
| OAS | Organization of American States |
| PCIJ | Permanent Court of International Justice |
| PICT | Project on International Courts and Tribunals |
| SC (UNSC) | Security Council |

| | |
|---|---|
| UN | United Nations |
| SG (UNSG) | Secretary-General of the UN |
| WHO | World Health Organization |

**International Treaties**

| | |
|---|---|
| ARSIWA | International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001) |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women (1979) |
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination (1965) |
| CMW | International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) |
| CPPED | International Convention for the Protection of All Persons from Enforced Disappearance (2006) |
| CRC | Convention on the Rights of the Child (1989) |
| CRPD | Convention on the Rights of Persons with Disabilities (2007) |
| ICCPR | International Covenant on Civil and Political Rights (1966) |
| ICESCR | International Covenant on Economic, Social and Cultural Rights (1966) |
| UDHR | Universal Declaration on Human Rights (1948) |
| VCLT | Vienna Convention on the Law of Treaties (1969) |

**Miscellaneous**

| | |
|---|---|
| MDGs | Millennium Development Goals |
| WWII | Second World War |

# CHAPTER 1
# INTRODUCTION

## 1.1 INTRODUCTION

In analyzing and describing the contribution and the role of an important international judicial body such as the International Court of Justice (ICJ, World Court, or simply the Court) in the interpretation and the development of international human rights and humanitarian law rules and principles one can employ different methodologies and adopt different perspectives. Scholars, practitioners, different organizations and institutions, and finally Judges of the Court itself, use their own methodology based on their concerns and the degree of involvement and knowledge of the Court. In spite of the extensive literature that has covered the activities of the ICJ over the six decades of its existence, there is to date hardly any systematic detailed study of the contribution and the role of the World Court in these two branches of international law in the form of a monograph or a dissertation.[1] This book aims to fill this gap. Its readership would include primarily law students, scholars, and international law practitioners, but at the same time it can also assist human rights activists and laypersons who have a general interest in and a knowledge of international law thereby creating a better understanding of the role and contribution of the ICJ with regard to the interpretation and the development of the international law of human rights and humanitarian law rules and principles. With 'interpretation' is here understood the legal process through which the ICJ has clarified the aim, scope and application of specific international human rights and humanitarian law rules and principles. 'Development' stands not only for the Court's contribution to the interpretation and application of existing rules of international law, but also for the innovations that the Court has introduced when dealing with different cases closely concerned with human rights and humanitarian law issues.

There are a number of factors which have contributed to the relative lack of detailed studies on this topic. First, the ICJ was established as the principal judicial organ of the United Nations (UN) system at the end of the Second World War (WWII) to carry on the function of its predecessor, the Permanent Court of International Justice

1 However, mention should be made here of the monograph by Sh.RS Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing: Oxford-Portland Oregon, 2007. While this author, as the title itself suggests, focuses on the individual contribution of the Judges of the Court to the development of human rights law, this monograph takes a broader approach focusing on the contribution and the role of the Court as a whole in interpreting and developing international human rights and humanitarian law rules and principles. A book which focuses on the contribution of the Court to human rights is that of R. Goy, *La Cour Internationale de Justice et les droits de l'homme*, Bruylant: Bruxelles, 2002.

(PCIJ). That judicial function would be fulfilled through settling traditional inter-State disputes on the basis of the consent of the parties and through providing legal advice to the political organs and specialized agencies of the UN when they so request. Consequently, the conception of the ICJ predates the subsequent development of human rights law and the emergence of the individual as a participant in the international legal sphere as a bearer, concurrently, of rights and duties. This is reflected in the Court's Statute and the Court's Rules, which only allow States to appear as parties in contentious cases before it. States entitled to appear before the Court can be divided into three categories, namely States that are parties to the UN Charter and *ipso facto* parties to the Statute of the Court, States that are not members of the UN but that are parties to the Statute, and, finally, States that are not parties to the Statute.[2] Although the number of States party to the Statute of the Court has increased almost fourfold from the 51 original UN members to 192, it is evident that the Court's 'clientele' remains limited.[3]

The exclusion of individuals and other non-State actors from contentious proceedings before the Court has been and still is a factor which imposes a severe limitation upon the Court's functioning in two areas of international law, which by their very nature are concerned with protecting the rights and the well-being of the individual. It should be noted, however, that although individuals do not have standing before the ICJ there are quite a few cases where States have taken up a case on behalf of their nationals.[4] As Lauterpacht noted, with regard to these cases it could be asserted that it 'is not that the State asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere'.[5] Needless to say that humanitarians operating at any level,[6] be that national, regional or international, look to the Court with hope and confidence that human rights pertaining to individuals shall be taken duly into account and shall be safeguarded in cases which come before this international judicial body.

Further, the general lack of a detailed study concerning the contribution of the Court to human rights and humanitarian law is a natural consequence of the subsequent development of human rights through the adoption of a large number of human rights treaties at an international and a regional level and the considerable growth of supervisory and adjudicatory mechanisms which largely bypass traditional dispute

2 See *States Entitled to Appear before the Court*, on the official webpage of the Court at: *http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a*

3 *Ibidem*.

4 Notably, the *Breard* case (1998), the *Diallo* case (1998), the *LaGrand* case (1999), the *Avena and other Mexican Nationals* case (2003). See also the *Pakistani Prisoners of War* case (1973), the *Hostages* case (1979), the *Certain Property* case (2001), and so on. All cases can be consulted online at the Court's official website: *http://www.icj-cij.org* or in the Court's own yearly official publication of its decisions, known as the I.C.J. Reports.

5 H. Lauterpacht, *International Law and Human Rights*, Stevens and Sons Ltd: London, 1950, p. 27.

6 For a definition of the concept of 'humanitarians' see D. Kennedy, *The Dark Sides of Virtue: Reassessing international humanitarianism*, Princeton University Press, 2004, p. 236.

settlement procedures. International human rights treaties provide for specific means of enforcement and supervision, which in many respects differ fundamentally from more traditional concepts of dispute settlement such as those employed at the ICJ. In particular the existence of human rights courts and individual complaints procedures has made it possible for individuals to bring allegations of violations of their rights under those conventions before specialized international judicial and quasi-judicial bodies, a development which would not have been possible within the context of the ICJ. While this plethora of different forums where individuals can assert their rights is an important tool both for the protection and the promotion of human rights, this development brings certain risks relating to overlapping jurisdictions, such as forum shopping and conflicting decisions.[7]

The existence of these specialized procedures and the steady growth of the jurisprudence of human rights courts have led international human rights scholarship to focus primarily on the specifics of these procedures, with correspondingly little attention being paid to the role that more traditional dispute settlement procedures potentially has in the development of the international law of human rights. This has even led to a significant degree of overspecialisation whereby international human rights scholarship has, to a considerable extent, tended to view the international law of human rights as a specific legal system in itself and not as part of general international law. At the same time most writers on the ICJ have not devoted much attention to the contribution which the Court has made and is increasingly making to human rights law, due at least partially to the perception of human rights law as a somewhat separate branch of international law. The same is probably true, albeit to a somewhat lesser extent, in relation to the humanitarian law of armed conflict, especially since the establishment of specialised international criminal tribunals, such as the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the more recent International Criminal Court (ICC), which have been established for the purpose of determining individual criminal responsibility rather than settling inter-State disputes. Thus, by looking at international human rights and humanitarian law as integral parts of public international law and at the function of the Court as an organ of international law this research aims at increasing the understanding of the role and contribution of the Court to interpreting and developing rules and principles pertaining to these two branches of international law. Below follows a description of the scope of this research, its structure, its methodology and the precise topical questions to be addressed.

## 1.2 SCOPE OF THE RESEARCH

The core subject of this research is the contribution and the role of the World Court in interpreting and developing international human rights and humanitarian law rules and

7 For a detailed study on this subject see *inter alia* Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press: New York, 2003.

principles. A thorough analysis of this topic implies addressing three main areas which form the three pillars upon which this research is built. First, it is necessary to address the possibilities and limitations arising from the specific institutional characteristics of the ICJ. That provides the reader with the necessary overview of the potential of the Court with regard to its past and possible future contribution to the interpretation and development of human rights and humanitarian law. Second, the contribution of the Court is exposed through a detailed analysis of its case law dealing with international human rights and humanitarian law issues. The period covered stretches from the establishment of the Court in 1946 to 1 September 2007. Last, but not least, the third pillar of this research focuses on the relationship between the ICJ and specialised international human rights and humanitarian law courts and tribunals (ICTs) and international quasi-judicial bodies (IQJBs). Indeed, that is a necessary step before drawing conclusions and making recommendations aiming, firstly, at clarifying the position and the role of the ICJ in the area of human rights and humanitarian law and, secondly, at improving the existing international legal order concerned with the promotion and the protection of human rights.

Obviously, the essential foundation for this research can only be laid through an analysis of the institutional characteristics of the ICJ, its role in international adjudication and the specific possibilities and limitations that these entail with regard to interpreting and developing international human rights and humanitarian law rules and principles. Thus, such an analysis considers, on the one hand, the possibilities arising from the Court's function as an adjudicatory body of general jurisdiction designed to resolve inter-State disputes and render advisory opinions to authorized international institutions and, on the other hand, the inherent limitations upon its capability to exert a leading influence upon the development of international human rights and humanitarian law. It should be kept in mind, however, that the subsequent development of human rights and humanitarian law inevitably influenced general public international law, thereby bringing the Court increasingly into contact with international disputes or legal issues intrinsically related to human rights and humanitarian law. The detailed analysis of the Court's specific possibilities and limitations related to its function, as laid down in its Statute and as shaped by its own practice and the evolving attitude of States with regard to the utilisation of its procedures, assists in better understanding the contribution which the Court has made and can potentially make to interpreting and developing the international law of human rights and humanitarian law rules and principles.

The main part of this research is based on a detailed and thorough examination of the case law of the Court which deals with international human rights and humanitarian law issues. Certainly, the extent to which such issues have come to the fore and are considered by the Court is dependent on factors such as the extent to which parties have put forward arguments relating to human rights and humanitarian law, evolving considerations within the context of their litigation strategies, and the stage of the development of international human rights and humanitarian law at the time of the relevant proceedings. While decisions of the Court as a whole are the focus of our

examination, on a few occasions also dissenting and separate opinions by individual judges are considered.[8] Those opinions have been included only to the extent that they make a contribution to that ongoing process of interpreting and developing international human rights and humanitarian law rules and principles. Further, they also illustrate the differences among the judges with regard to certain competing or conflicting principles of international law and the continuous tension which exists between the *lege lata* and the *lege ferenda*. As it is not easy to evaluate the real measure of the impact of decisions of the ICJ upon the development of international human rights and humanitarian law rules and principles, it can be said that by shedding some light on numerous debatable issues the Court has proven to be an important component of the progress made in these two areas of law.

The third part of this research relates to the considerable multiplication of specialized judicial and quasi-judicial bodies in the fields of human rights law and humanitarian law. This development raises the question of the relationship of these bodies with the ICJ as 'the principal judicial organ of the United Nations'.[9] It is rather obvious by now that the coming into being of many international criminal tribunals during the last two decades has substantially changed the mosaic of the international legal system. These ICTs have generated a considerable body of case law, thus contributing to the further development of rules and principles of international human rights and humanitarian law. As there is no *stare decisis* on an international level, or any kind of regulated hierarchical relationship within the context of international adjudication, there are clear possibilities for jurisdiction overlapping between different adjudicatory bodies and, what is worrying, for potential conflicts in interpretation. This is by no means a purely academic hypothesis, as is illustrated by a decision of the Appeals Chamber of the Tribunal for former Yugoslavia in which that body extensively reviewed a previous decision of the ICJ.[10] The possibilities of such a potential clash between these international judicial bodies are likely to increase in the coming years and necessitate a study of the effects this can have upon the international legal system, the legitimacy of the respective institutions, and the integrity of international law itself. As the focus of the research remains the ICJ's contribution and role, a closer look shall be taken at the interrelationship between this Court and the ICTs and the IQJBs operating in the fields of international human rights and humanitarian law. That enables us to create a complete picture of the accumulated and the potential contributions

8 On dissenting and separate opinions see *inter alia* I. Hussain, *Dissenting and Separate Opinions of the World Court*, Nijhoff, 1984. For the contribution of the Judges of the Court to human rights law see *inter alia* S.RS Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, *supra* note 1.

9 UN Charter, Article 92.

10 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment of 15 July 1999, in *Annotated Leading Cases of International Criminal Tribunals* (ALC), A. Clip and G. Sluiter (eds.), Vol. III, Intersentia, 2001, pp. 761-867 with a following commentary from T.D. Gill on pp. 868-875. The judgment is also available at: *http://www.un.org/icty/tadic/appeal/judgement/index.htm* (last accessed on 1 November 2007).

which these international judicial and quasi-judicial bodies can make in interpreting and developing international human rights and humanitarian law rules and principles.

Through this three-pronged approach, which also reflects the reasons for undertaking this research, the author aims to increase the understanding of one important and potentially binding element of the international legal system, the World Court, which as a principal organ of the UN is likely to have an increasingly greater impact upon the interpretation and development of human rights and humanitarian law. The research is aimed at bridging, at least partially, the gap between human rights research and the literature devoted to the specific institutional role of the ICJ and its contribution to the interpretation and development of the international law of human rights and humanitarian law as part of general international law. This analysis will consequently be based on an approach that takes as a starting point that notwithstanding their specific characteristics and terms of reference, both the international law of human rights and humanitarian law form part of the corpus of general public international law.

## 1.3 STRUCTURE OF THE RESEARCH

The growing resolve and efforts of the international community to have disputes resolved through judicial settlement, rather than by war, have led to the establishment of several international dispute settlement mechanisms. The present international legal system has a large set of courts and tribunals which apply international law. In this context, a 'court' refers to a corps of judges, whether a standing body or one created *ad hoc*, which is empowered by its constituent instrument *jus dicere*, to decide disputes or other international questions on the basis of international law, following accepted international judicial procedures based on the equality of the parties, the principle of procedural parity, and the collegiate decision.[11] On the whole the *ratione personae* jurisdiction of these international judicial and quasi-judicial bodies encompasses States, international organizations, and also legal and natural persons. The ICJ itself is an international court of general jurisdiction where the right of standing is limited to States. Being the successor of the PCIJ had its advantages for the ICJ, for as Rosenne has put it, the accumulated experience of the PCIJ, its dispassionate and unhurried consideration of the issues brought before it, the high standards of personal integrity and professional competence, and worldly wisdom, of its members, the fact that the judicial pronouncements were endowed with strong moral authority in addition to their formal finality, provided the foundations for the reconstituted system of international adjudication after the dust of the Second World War had started to settle.[12] The ICJ's considerable period of activity, extending for over six decades, together with the steady growth of the international legal system create both the

11 S. Rosenne, *Perplexities of Modern International Law: general course on public international law*, *Recueil des Cours* (RdC), Martinus Nijhoff, 2002, p. 87.

12 S. Rosenne, *The Law and Practice of the International Court 1920-1996*, Martinus Nijhoff: Dordrecht, 1997, p. 14.

necessary setting and the necessity for undertaking such research. There will now follow a brief description of the issues to be discussed in the following chapters.

*A) Overview of Chapter 2*

Laying the ground for this research requires an analysis of the institutional characteristics of the ICJ, which have influenced and obviously continue to influence the contribution which the Court has made and can potentially continue to make to interpreting and developing international human rights and humanitarian law rules and principles. That serves to create a clear picture of the possibilities and limitations of the ICJ in this regard. The first part of this chapter provides the background, starting with a brief introduction of the Court and continuing with the discussion of its place within the framework of international dispute settlement mechanisms. The second part of the chapter focuses on the ICJ's possibilities and limitations. It starts with a brief overview of the law which may be applied by the Court while carrying out its contentious and advisory jurisdiction functions. In order to understand the role of the ICJ as part of the international legal system it is necessary to look at the Court's place within the UN system and the relationship between the Court and two of the main organs of the UN, namely the Security Council (SC) and the General Assembly (GA). Further, the approach of the Court in interpreting international human rights and humanitarian law instruments is also an important factor, conditioning ultimately the role and contribution it can make to these two branches of international law.

Issues such as the value of precedents, evidentiary matters and judicial inferences, relating to the legal practice of the Court, are certainly influential with regard to the contribution of the Court in the fields of international human rights and humanitarian law. Another subject requiring attention in view of the aim of this part of the research is that of *locus standi* before the ICJ. The broad issue of the jurisdiction of the Court and the forms it can take cannot be omitted from the discussion of the Court's possibilities and limitations in the fields of international human rights and humanitarian law. Preliminary objections are intrinsically linked with that of jurisdiction; therefore, this issue has also been included and dealt with here. Another issue discussed in this chapter is that of provisional measures as an important tool for protecting human rights in view of their binding effect. The Court's function besides settling inter-State disputes includes also the rendering of advisory opinions on legal issues referred to it by the main organs of the UN and specialized organs. Thus, issues such as the advantages and disadvantages of advisory opinions, the discretion of the Court and so on are dealt with. The possibility of bringing *actio popularis* cases before the Court is also an interesting issue, especially in view of the Articles on State Responsibility adopted by the International Law Commission (ILC) in 2001. By considering issues related to the law which may be applied by the Court, *locus standi*, jurisdiction, preliminary objections, provisional measures and advisory opinions, it is hoped to make clear the pre-existing possibilities and limitations relating to the contribution the Court can

make and the role it can play with regard to the interpretation and development of the international law of human rights and humanitarian law rules and principles.[13]

The discussion of some of the main features of the Court is followed by some conclusions focusing on the role of the Court in the international arena and the possible contribution it can continue to make to the further interpretation and development of international human rights and humanitarian law.

*B) Overview of Chapter 3*

This chapter focuses on the contribution of the ICJ in interpreting and developing international human rights law rules and principles. It is divided into three parts. In the first part a brief synopsis of the development of human rights law is provided. It is indeed self-evident that the body of international human rights law has experienced a significant growth in recent decades. Scholars have largely discussed that development by compartmentalizing human rights into three generations of human rights. However, although compartmentalized for scholarly purposes, these generations are intrinsically connected and complementary. The importance of human rights in international relations and discourse and the *jus cogens* status that certain human rights have acquired certainly derives from the fact that the promotion and protection of human rights is one of the main aims of the UN as enshrined in the articles of the UN Charter. After addressing the processes of standard-setting and enforcement of human rights at an international level this part of the chapter deals with the imprint and the role of the ICJ in the development of this branch of international law.

The second part of this chapter deals with the ICJ's case law on international human rights law issues. A detailed examination of the case law of the Court aims to expose its contribution in interpreting and developing rules and principles of human rights law, such as the internationalization of the protection of human rights, the coining and clarification of fundamental principles of human rights, the prohibition of genocide, the right of peoples to self-determination, the status and treatment of human rights rapporteurs, the right to asylum, diplomatic protection and consular assistance, the applicability of human rights treaties during armed conflict or in occupied territories and individual criminal responsibility for internationally recognized crimes. From a basic reading of the Court's case law a few points seem to immediately come to the surface. First, the human rights clauses of the UN Charter contain binding legal obligations.[14] Second, the principles and rules of international law concerning the

13 See *inter alia* R.P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, Asia Publications House: New York, 1961; R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice,* Martinus Nijhoff: Boston, 1993; J. Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, American Journal of International Law (AJIL), Vol. 81, No. 4, 1987, pp. 855-857.

14 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, pp. 56-58, paras. 128-132. In paragraph 131 of this advisory opinion (p. 57) the Court stated: 'Under the Charter of the United Nations, the former

fundamental rights of human beings engender obligations *erga omnes*, as stated in the celebrated Court *dictum* in the *Barcelona Traction* case.[15] Obligations *erga omnes* are concerned with the enforceability of norms of international law, the violation of which is deemed to be an offence not only against the state directly affected by the breach, but also against all members of the international community.[16] These obligations apply to a broad range of matters, arguably including the entire array of internationally recognized human rights. In its *dictum* the Court itself listed the outlawing of acts of aggression, genocide, and the basic rights of the human person, including protection from slavery and racial discrimination, as examples of rights engendering obligations *erga omnes*. Thus, even from a cursory look at the Court's jurisprudence one can conclude that the Court's constant position has been that fundamental human rights must be respected by all States.

Cases are put together according to the specific human rights issues they pertain and to which they contribute. A loose list of contentious cases to be analysed in the course of this chapter includes the *Corfu Channel* case (1947-1949), the *South West Africa Cases* (1960-1966), the *Barcelona Traction* case (1958-1961 and 1962-1970), the *Asylum* cases (1949-1951), the *Nottebohm* case (1951-1955), the *United States Diplomatic and Consular Staff in Tehran* (1979-1980), the *Ahmadou Sadio Diallo* case (1998-ongoing), the *East Timor* case (1991-1995), the *Application of the Genocide Convention* cases (*Bosnia-Herzegovina v. former Yugoslavia*, 1993-2007), the *Vienna Convention on Consular Relations* case (1998), the *LaGrand* case (1999-2001), the *Avena and Other Mexican Nationals* case (*Mexico v. United States*, 2003-2004), the *Arrest Warrant* case (2000-2002), the *Case Concerning Certain Criminal Proceedings in France* (2003-ongoing), and the *Armed Activities in the Territory of the Congo* (1999-2005). The advisory opinions dealt with include the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (1949-1950), the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1950-1951), the four advisory opinion relating to the decolonization of South West Africa (1950-1971), the *Western Sahara* (1974-1975), the *Legality of the Threat or Use of Nuclear Weapons* (1993-1996), the *Mazilu Case* (1989), the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1998-1999), and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2003-2004). As expected, the detailed examination of the

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Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for al1 without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.'

15 ICJ, *Barcelona Traction, Light and Power Company*, *Limited* (Belgium *v*. Spain), (*Second Phase*), Judgment of 5 February 1970, ICJ Reports 1970, p. 32, para. 34 (*Barcelona Traction* case).

16 For more details see *inter alia* A.J.J de Hoogh, *The Relationship between jus cogens, Obligations erga omnes and International Crimes: Peremptory Norms in Perspective*, Austrian Journal of Public and International Law (AJPIL), Vol. 42, 1991, pp. 183-214.

relevant cases before the Court involving human rights issues constitutes the main body of this chapter.

In the third part there is a general appraisal of the Court's contribution to interpreting and developing international human rights rules and principles. It should be noted here that due to the overlap of international human rights and humanitarian law issues some cases are dealt with in both chapter three and chapter four, being of importance to both these branches of law.

*C) Overview of Chapter 4*

Chapter four is also composed of three parts. The first part, as in the previous chapter, prepares the background for the ensuing detailed analysis of the case law of the Court. After discussing, in sequence, issues concerning the applicability of the Geneva Conventions (GCs) and Additional Protocols (APs) to international and internal armed conflict, as well as discussing customary international humanitarian law and new developments in international humanitarian law, attention shifts to the relationship between international humanitarian law and international human rights law. While both the international law of human rights and international humanitarian law strive to protect the lives, health and dignity of human beings, there are differences between them as to the scope and the situation in which they operate. International humanitarian law is applicable in times of armed conflict, international or internal, while the international law of human rights applies at all times, i.e. in peacetime and during situations of armed conflict. The doctrine of military intervention for humanitarian purposes as developed, understood, and applied in recent times is also discussed as part of the background to this chapter. Further, the author has made an effort to elucidate the Court's position on this issue, departing from the Court's pronouncements in the *Corfu Channel* case,[17] and later on in the *Nicaragua* case.[18]

The second part of this chapter consists of an examination of the relevant cases before the Court which touch upon humanitarian law issues. That constitutes the main body of this chapter. A list of cases dealt with includes the *Corfu Channel* case (1947-1949), the *Legality of the Threat or Use of Nuclear Weapons* case (1994-1996), the *Military and Paramilitary Activities in and against Nicaragua* case (1984-1991), the *Armed Activities in the Territory of the Congo* case (1999-2005), and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2003-2004).

The third part consists of a general appraisal of the Court's contribution to interpreting and developing international humanitarian law rules and principles.

17 ICJ, *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland *v.* Albania), (*Merits*), Judgment of 9 April 1949, ICJ Reports 1949, p. 191 (*Corfu Channel* case).

18 See *infra* section 4.8.

*D) Overview of Chapter 5*

This chapter is divided into four parts. The first part deals with the need to peruse the general relationship between the ICJ and other international courts and tribunals and international quasi-judicial bodies operating in the fields of international human rights and humanitarian law. Certainly the focus remains with the ICJ. In view of the large number of ICTs and IQJBs only a limited number of these bodies have been dealt with, respectively in parts two and three. Obviously, in part two the focus remains on the interaction and relationship between the ICJ and human rights courts and criminal tribunals leaving aside special courts established for dealing with economic maters or other particular issues, as the latter fall outside the domain of our research.[19] It is important to realize beforehand that, although operating as a distinct international judicial institution, the Court carries out its function within the larger framework of peaceful resolution of disputes as provided for in the UN Charter. Our examination of the relationship between the ICJ and the ICTs includes the *ad hoc* criminal tribunal for Yugoslavia and that for Rwanda,[20] the ICC, the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (I-ACtHR). This selection is thought to be representative of the most important ICTs in the fields of international human rights and humanitarian law.

A temporal classification of international courts and tribunals, based on their continuation in time, would categorize them as standing or *ad hoc*. Based on this classification there are, to date, three standing judicial organs, namely the ICJ, the International Tribunal on the Law of the Sea (ITLOS), and the ICC. It should be noted that among other international judicial bodies the ICJ is the only existing court that has general jurisdiction, while the jurisdiction of the other standing bodies is limited both *ratione personae* and *ratione materiae* by their constituent treaties, respectively the United Nations Convention on the Law of the Sea (UNCLOS)[21] and the Rome Statute of the International Criminal Court.[22] Unlike the above-mentioned courts it was the SC acting under Chapter VII of the UN Charter which established the two *ad hoc* tribunals, vesting them with jurisdiction to try individuals accused of committing internationally recognized crimes, irrespective of their official function. Their establishment is aimed at restoring and furthering peace and reconciliation in the affected areas and legality in international relations in a general sense. By punishing the individual

19 This synoptic chart was prepared by C.P.R. Romano within the framework of the Project on International Courts and Tribunals (PICT). Available onine at: *http://www.pict-pcti.org/publications/ synoptic_ chart/Synop_C4.pdf*.

20 On the case law of these tribunals see *inter alia* the database of the Netherlands Institute of Human Rights (SIM). Available at: *http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/(Accused_All)?OpenView*.

21 M.D. Evans, *Blackstone's International Law Documents*, 6th ed., Oxford University Press: New York, 2003, pp. 215-308. For more information on Oceans and Law of the Sea visit: *http://www.un.org/Depts/ los/index.htm* (last accessed on 1 November 2007).

22 Evans, *supra* note 21, pp. 463-515. Also available at: *http://www.un.org/law/icc* (last accessed on 1 November 2007).

perpetrators of such grave crimes the international community seeks to provide relief to the victims and to set an example that such crimes do not go unpunished.[23] Through their work the courts and tribunals which are dealt with here contribute to interpreting and developing international human rights and humanitarian law rules and principles.

The Court's role in the development and clarification of the law – itself a sub-function of its chief task of adjudicating disputes between states – is consequently largely influenced by the manner in which States choose to have recourse to it, the manner in which they conduct the proceedings, and the content of their arguments, evidence and submissions.[24] Thus due attention is paid to the way States have utilised the Court's legal procedures and the extent to which they have put forward arguments based on international human rights and humanitarian law rules and principles enshrined in the respective international treaties in force. Possible factors that have led to an increasing involvement of the Court with human rights and humanitarian law issues are also touched upon here as they can also explain the ups and downs in the contribution and the role which the Court has played since its creation in 1946.

The third part of this chapter deals with the relationship between the ICJ and IQJBs. After giving a brief overview of the UN system of human rights promotion and protection, attention shifts to the relationship and interaction between the ICJ and the Human Rights Committee (HRCm), the monitoring body of the International Covenant on Civil and Political Rights (ICCPR) of 1966. Besides the HRCm, the other international body dealt with here is the ICRC. Although the ICRC is not a quasi-judicial body, its relationship with the ICJ is dealt with in view of the ICRC's importance with regard to international humanitarian law and the Court's references to this body's work in its case law. Although only two international bodies have been selected here they are certainly fairly representative of, respectively, international human rights law and humanitarian law.

Part four gives a general appraisal and recommendations regarding the relationship between the ICJ and ICTs, and IQJBs in the fields of international human rights and humanitarian law. As part of this concluding fourth part the complementary role of ICTs to domestic courts in attaining a better protection of human rights is discussed. Further, also the complementarity of ICTs and IQJBs within the international system of human rights protection is discussed. By working in tandem, these components of the international legal system, namely the ICJ, the ICTs, and the IQJBs can achieve a higher level of protection of human rights.

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23 Retribution, deterrence, and rehabilitation – each of which are important factors to be taken into account when determining the sentence – have been acknowledged as being the purposes of punishment by the ICTY. See ICTY, *Prosecutor v Delalic, Mucic, Delic, and Landzo* (the *Celebici* case), Case No. IT-96-21-A, Judgment of 20 February 2001, para. 806, in ALC, *supra* note 10, Vol. V, 2003, p. 555. Also available at: *http://www.un.org/icty/celebici/appeal/judgement/index.htm* (last accessed on 1 November 2007).

24 T.D. Gill, *Litigation Strategy at the International Court. A Case Study of the Nicaragua v. United States Dispute*, Martinus Nijhoff Publishers: Dordrecht/Boston/London, 1989, p. 342 .

*E) Overview of Chapter 6*

Chapter six provides a synthesis of the issues discussed in the previous chapters, focusing especially on the contribution of the ICJ in interpreting and developing international human rights and humanitarian law rules and principles and the relationship between the ICJ and the ICTs and IQJBs operating in these fields. The contribution and the role of the ICJ in this respect come to the fore through a process of involvement and evolvement. The number of cases brought before the Court dealing with international human rights and humanitarian law issues demonstrates *prima facie* the contribution and the potential of the Court in the fields of international human rights and humanitarian law issues. Notwithstanding the differences between human rights courts and international criminal tribunals, and a traditional inter-State dispute settlement judicial mechanism like the ICJ, it is important not to lose sight of the relationship between international human rights, humanitarian law and general international law. More specifically, despite the fact that the ICJ is not a human rights court, this does not signify that it has played no role of importance, or cannot play an increasingly important role in the development of human rights and humanitarian law in the coming years.

The rapid development of human rights law and of humanitarian law in recent decades has been reflected in a growing number of cases before the ICJ that call into question important issues of human rights and humanitarian law. This is due both to an increase in the caseload of the ICJ in general and the increasing prominence of human rights law and humanitarian law within the overall context of international legal disputes in recent years. Some recommendations shall be drawn on the ways of increasing the use and appeal of the World Court through the use of structural reform and increased judicial cooperation. Questions dealt with in the framework of these recommendations aiming at increasing the efficiency of the Court with minimum changes to the Statute of the Court and the least expenses are: Should the main UN bodies such as the SC and the GA be given the right to institute proceedings against a State before the ICJ in the case of a breach of the international law of human rights and human rights treaties? And should ICTs and IQJBs be given explicit access to the advisory jurisdiction of the Court as part of an effort aimed at retaining the fabric of international law? Should the number of Judges at the Court be increased? The Court's position in the plurality of ICTs and IQJBs has also received some attention. Finally, some concluding remarks are made on the Court's contribution to the interpretation and development of human rights and humanitarian law rules and principles.

## 1.4 METHODOLOGY

The research is based on an examination of the ample literature dealing with the institutional characteristics of the Court and the rather limited literature dealing with the Court's contribution to international human rights and humanitarian law. As expected, the main part of this research is made up of a detailed analysis of the

relevant case law of the Court in order to illustrate its contribution to interpreting and developing international human rights and humanitarian law rules and principles. The decisions of the Court have been perused and selected on the basis of their relevance to the process of the interpretation and development of international human rights and humanitarian law rules and principles. That choice is rather simple when the Court discusses the application of relevant provisions of a human rights or humanitarian law instrument to a certain situation. But that selection becomes more difficult when human rights or humanitarian law issues are peripheral to the main issue. The decisions of the Court have been consulted both in printed form through the Court's own yearly publication, entitled 'Reports of Judgments, Advisory Opinions and Orders' (ICJ Reports), and in an electronic format through the Court's official website. The recent changes to the official website of the Court have made it possible to consult all legal materials related to a case online. Furthermore, this material is also text searchable. It should be noted that the summaries of the orders, judgments, and advisory opinions of the Court are rather helpful, not only for the purposes of this research, but also to members of the general public who have an interest in the work of this important international court.

Besides the examination of the institutional characteristics of the ICJ and its case law, another examination has also taken place regarding the institutional relationship, wherever applicable, between the ICJ and the ICTs and IQJBs, and the case law of the latter which relates or makes reference to the case law of the ICJ. That has been done by making use of the respective databases on the case law of these ICTs and IQJBs. The regional human rights courts have their own databases, while for the databases of the ICTY, the ICTR, and the HRCm the database of the Netherlands Institute of Human Rights has been used. Besides this database, also official publications and the information available on their own websites have been used. Keywords such as 'International Court of Justice' and 'International Law' have been entered in the Boolean search available in these databases with the aim of finding the case law of these judicial bodies referring to the ICJ. On the other hand, also the relevant case law of the ICJ has been searched for any possible references to the selected ICTs and IQJBs. The cases which have come up have been read and, whenever relevant, discussed in considerable detail.

The above-mentioned areas of literature research are, in principle, sufficient to find answers to the research questions and to draw adequate conclusions. Alongside the literature on the Court, materials prepared within the Court such as the yearly speeches by the Presidents of the Court delivered to the GA of the UN and the Court's yearly reports have been given due attention, especially when considering issues relating to the contribution and the position of the Court in applying and developing international law and increasing the efficiency of the Court's work. Apart from consulting the relevant literature through searching different sources, such as the Peace Palace

Library, the PiCarta database,[25] the library of the School of Law of Utrecht University, and different international legal databases available through this library, the author has also followed some of the proceedings before the ICJ and has been a member of several Defence legal teams at the ICTY. This practical experience and the insights gained through this practical work have hopefully been reflected in the book. Lectures, seminars and conferences on the work of the ICJ and other related issues were helpful in gathering material and also discussing parts of the research with other scholars. Last, but not least, a meeting with Judge Koroma at the end of June 2007 was also helpful to this author, although in all fairness it should be said that interviews with Judges of the Court were not part of the methodology of this research.

## 1.5 MOTIVATION FOR THE RESEARCH

As a renowned figure like Whewell has noted,[26] 'The progress of the study of international law, …and the increase and regard for the authority of such law, are among the most hopeful avenues to that noble ideal of the lovers of mankind, a Perpetual Peace – the most hopeful, because along this avenue we can already see a long historical progress, as well as a great moral aim.'[27] While international law has made great strides forward since these luminous words were spoken, it is only by making the observance of the rule of law and respect for human rights as its cornerstones that the international legal system can maintain and enhance its effectiveness and credibility. In recent years the growing relevance of human rights and humanitarian law within the overall context of international law has been reflected in a growing number of disputes involving these areas of the law being submitted to the ICJ. At the same time, the establishment of specialised international human rights and humanitarian law tribunals is both evidence of this increased relevance and the need for some kind of guidance in the increasingly complex system of international adjudication and dispute resolution. While there are understandable reasons behind the tendency towards specialisation, there are definite dangers of a growing divergence between specialists in human rights law and humanitarian law including international criminal law and general international law. The diversity of the respective approach should not lead to ignorance concerning the specific role and contribution which each branch of the law has to make, otherwise such ignorance and parochialism will result in needless clashes of competence and interpretation that would result in damage to the whole legitimacy of

25 This is an integrated database which allows one to search for all legal materials existing at a given time in any public library in the Netherlands.

26 About William Whewell see *inter alia*: *http://plato.stanford.edu/entries/whewell* (last accessed on 1 November 2007).

27 Whewell, as quoted in R.Y. Jennings, R.Y. Jennings, *The Progress of International Law* (1958), in Collected Writings of Sir Robert Jennings, Kluwer Law International, 1998, p. 296.

the international legal system, presuming that such an international legal system exists.[28]

Whilst international adjudication, as an integral part of international law, has made substantial leaps forward since the *Alabama* claims,[29] it is true that ICTs and IQJBs continue to face organisational and administrative impediments. The international legal system is quite complex and thus not wholly satisfactory for the needs of the international community. From a human rights protection perspective there are several weaknesses inherent in international adjudication, such as the usually consent-based jurisdiction of international courts and tribunals, the limited number of actors having access to the ICJ's contentious or advisory function, no adequate enforcement authority, and no system for solving any potential jurisdictional conflicts arising between different ICTs. While shedding some light on the World Court's characteristics and its contribution to the interpretation and development of the international law of human rights and humanitarian law rules and principles it is also sought to clarify the Court's position within the larger framework of the international legal system concerned with the protection of human rights.

By undertaking this research the author hopes to contribute at least modestly towards answering the following thought-provoking questions, which are of considerable importance for improving the understanding of an important element of the international legal system such as the World Court.

## 1.6 RESEARCH QUESTIONS

The three questions that shall be answered here, which are both distinct and at the same time intrinsically related, are the following:

1. *What is the role and contribution of the World Court with respect to the interpretation and development of the international law of human rights and humanitarian law rules and principles?*
2. *What is the relationship between this Court and other international judicial and quasi-judicial bodies operating in the areas of international human rights and humanitarian law?*
3. *What steps should be taken in order to increase the efficiency and effectiveness of the Court and with that its potential contribution with regard to interpreting and developing the international law of human rights and humanitarian law rules and principles?*

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28 On the issue of whether there is an international legal system see *inter alia* Yuval Shanny, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press: New York, 2003, pp. 87-94.

29 For more details on the *Alabama* case see *inter alia*: *http://www.state.gov/r/pa/ho/time/cw/17610.htm* (last accessed on 1 November 2007).

# CHAPTER 2
# THE INTERNATIONAL COURT OF JUSTICE: POSSIBILITIES AND LIMITAIONS IN THE FIELDS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

## PART I BACKGROUND

*International law has now for some decades been developing rapidly. In particular the classical orthodoxy that it is a law only between states and does not apply to other entities and to individuals has gone for good. Public international law nowadays is a mater of personal concern to everybody whether they are aware of it or not. It is symptomatic of the splendid changes of international law for the better that the International Court of Justice is now mirabile dictum steadily occupied with important cases under its contentious jurisdiction.*

Sir Robert Jennings [1913-2004][1]

### 2.1 THE INTERNATIONAL COURT OF JUSTICE IN BRIEF

The ICJ is one of the main organs of the UN and the principal judicial organ thereof.[2] That gives the ICJ a special position within as well as outside this international organization. This is reflected *inter alia* in the amount of scholarly articles devoted to and the influence that its decisions exert in the understanding and in the further development of international law. As expected, the Court's possibilities and limitations in the fields of international human rights and humanitarian law stem primarily from its Statute and its Rules, and are dependant above all on States' willingness to engage the Court and ultimately to comply with its decisions. The jurisdiction of the Court includes functions of both a contentious and an advisory nature. Thus, besides settling inter-State disputes, the Court can upon request render an advisory opinion to the designated UN organs and specialised agencies on a specific legal question. Some of the features of the Court conditioning its efficiency, effectiveness and scope of activity are dealt with below.

The Court consists of fifteen members, no two of whom may be nationals of the same State,[3] serving on the Bench for a nine-year term with the possibility of re-

1 Sir R. Jennings, *International Lawyers and the Progressive Development of International Law*, in Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzystof Skubiszewski, Kluwer Law International, 1996, p. 423.

2 UN Charter, Articles 7(1) and 92.

3 ICJ Statute, Article 3.

election.[4] Together they form a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.[5] Another requirement of the Court's Statute is that at every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.[6] A considerable number of judges from all over the world have sat on the Bench since the Court started its work in 1946.[7] It should be noted that as a result of an unwritten rule, the five permanent members of the SC always have a member of their nationality on the Bench.

Generally, cases brought before the Court are decided by a full Court, which includes in contentious cases also the judges *ad hoc* designated by the parties which do not have a judge of their nationality sitting on the Bench. Even a cursory look at the case law of the Court would show that States have been rather keen to make use of this possibility. That illustrates and substantiates the assertion that there are no minor or unimportant cases before the ICJ. From time to time, the Court may form one or more Chambers, composed of three or more judges for dealing with particular categories of cases.[8] However, this possibility provided for under the Court's Statute has been used very rarely.[9] States' reluctance to have their cases heard by a Chamber of the Court,

4 ICJ Statute, Article 13.

5 ICJ Statute, Article 2.

6 ICJ Statute, Article 9.

7 Bedi puts the number at 185 (including 94 Judges *ad hoc*) according to statistics from 8 April 2005. See S.R.S. Bedi, *The development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing: Oxford – Portland Oregon, 2007, p. 8 and footnote 22. Up to now, 95 permanent Judges have sat on its Bench, see *http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2* (last accessed on 1 November 2007).

8 ICJ Statute, Article 26.

9 Five cases have so far been dealt with by Chambers of the ICJ, namely the *Gulf of Maine* case (Canada *v*. US), see ICJ Press Release No. 82/1 of 26 January 1982, available at: *http://www.icj-cij.org/docket/files/67/9799.pdf*; the *Frontier Dispute* case (Burkina Faso *v*. Mali), see ICJ Press Release No. 85/6 of 10 April 1985, available at: *http://www.icj-cij.org/docket/files/69/9929.pdf*; the *Electronica Sicula S.p.A* (*ELSI*) case (US *v*. Italy), see ICJ Press Release No. 87/2 of 9 February 1987, available at: *http://www.icj-cij.org/docket/files/76/9997*.pdf; the *Frontier Dispute* case (Benin *v.* Niger), see ICJ Press Release No. 2002/41 of 20 December 2002, available at: *http://www.icj-cij.org/docket/index.php?pr=69&code=bn&p1=3&p2=3&p3=6&case=125&k=94*; and the *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute* (El Salvador *v*. Honduras*: Nicaragua intervening*) (El Salvador *v.* Honduras), see ICJ Press Release No. 2002/40 of 20 December 2002, available at: *http://www.icj-cij.org/docket/index.php?pr=586&code=esh&p1=3&p2=3&p3=6&case=127&k=2e*. The Court has three types of chambers, namely the Chamber of Summary Procedure to speedily despatch of business, chambers formed to deal with certain categories of cases, such as labour and communications, and chambers formed to deal with a particular case at the request of the parties. For more details see *http://www.icj-cij.org/court/index.php?p1=1&p2=4&PHPSESSID=5c407* (last accessed on 1 November 2007). Lastly it should be noted

although their judgment is considered as having been rendered by the Court,[10] has curtailed the latter's ability to deal with a larger number of cases.

Although the Court's Statute and Rules lay down the procedural framework for the conduct of litigation, due to their general nature they inevitably leave untouched a number of practical procedural matters. In an effort to address identified deficiencies in this regard and make its procedures more expeditious and efficient the ICJ has adopted, further amended and complemented a set of regulations, known as Practice Directions.[11] They do not substitute or alter the Rules of the Court, but are additional thereto. Since October 2001 that initial set of nine Practice Directions has been further amended and complemented.[12] The last changes were those made in December 2006.[13] Needless to say, the adoption of Practice Directions is aimed primarily at improving the Court's working methods and accelerating its procedure, in this way increasing the number of decisions that it renders each year. It is noteworthy that Practice Direction III notes an 'excessive tendency' towards the 'proliferation and protraction' of annexes to written pleadings, and strongly urges parties to append to their pleadings only 'strictly selected' documents. Further, Practice Directions VII and VIII are aimed at safeguarding the interest of the sound administration of justice. Namely, they call on the parties not to appoint as agent, counsel or advocate in a case before the Court individuals who have been holding a high position within the Court until the expiration of the period of three years after their last appearance before or appointment with the Court. The adoption of these regulations shows that the Court is continuously engaged in a process of reviewing its working methods. Possible steps aimed at enhancing the effectiveness of the Court's work, in view of an increasing caseload, are discussed in more detail in the last chapter of this book.

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that in 1994 the Court established a chamber to deal with environmental matters (Chamber for Environmental Matters). That Chamber was never used and ultimately it was abandoned in the last elections which took place in 2006: see ICJ Press Release 2006/6 of 16 February 2006.

10 ICJ Statute, Article 27.

11 For a detailed discussion of these Practice Directions see *inter alia* A. Watts, *New Practice Directions of the International Court of Justice*, *The* Law and Practice of International Courts and Tribunals 1, pp. 247–256, Kluwer Law International, 2002; S. Rosenne, *International Court of Justice: Practice Directions on Judges Ad Hoc; Agents, Counsel and Advocates; and Submission of New Documents*, The Law and Practice of International Courts and Tribunals 1, pp. 223–245, Kluwer Law International, 2002; A. Watts, *The ICJ's Practice Directions Of 30 July 2004*, *The Law and Practice of International Courts and Tribunals* 3, pp. 385–394, Koninklijke Brill, 2004.

12 Annual Report of the ICJ, 2001-2002, pp. 96-99, paras. 368-373.

13 Annual Report of the ICJ, 2006-2007, pp. 40-42, paras. 200-202. For a complete and up-to-date text of the Practice Directions click on Practice Directions under Basic Documents at the Court's website, or go directly to: *http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0* (last visited on 1 November 2007).

## 2.2 THE INTERNATIONAL COURT OF JUSTICE IN THE FRAMEWORK OF INTERNATIONAL DISPUTE SETTLEMENT MECHANISMS

When the international community turned its back on the failed League of Nations, it decided to preserve what the example of the PCIJ had achieved. On the one hand, this was a fortunate continuation, as it helped to preserve the accomplishment of the international community in creating a standing international judicial settlement mechanism and gave the ICJ jurisdiction from the beginning to adjudicate issues arising from treaties which conferred jurisdiction on the PCIJ, together with the possibility to refer to the case law of the PCIJ. On the other hand, it must be acknowledged that following the PCIJ model gave rise to the very difficulties and limitations that the ICJ encounters in carrying out its judicial functions and in being more involved with international human rights and humanitarian law issues. In spite of attempts to provide compulsory jurisdiction for the ICJ, '[t]he Major Powers (but not only they) blocked these attempts, thereby maintaining the consensual basis of international adjudication and the resulting marginalization of the Court…It is of course also a reflection of the international power relationships and the attitude of States towards the judicial process.'[14] While certainty over the result of a projected litigation can never exist, a government's ability to estimate its chances of success is certainly an important actor enabling it to reach its political decision on whether to submit a contentious case to the Court.[15]

Article 33 of the UN Charter enumerates various means for the pacific settlement of international disputes, which can be broadly categorized as being either political or legal.[16] Since the end of the Second World War arbitral awards and arbitration procedures have existed for the settlement of disputes between (a) international intergovernmental organizations and between such organizations and states, a form of dispute settlement which is to some extent institutionalized in international treaties; (b) awards rendered by an international tribunal to decide a number of distinct claims, usually by an individual against a foreign state; and (c) what are termed 'transnational arbitrations', that is arbitrations involving at least one party which is not a state or an international intergovernmental organization.[17] With the prohibition of the use of force, albeit with some exceptions, States are under a general obligation to settle their disputes peacefully, so as not to endanger the maintenance of international peace and security.

14 See T.D. Gill, *Litigation Strategy at The International Court: A Case Study of the Nicaragua v. United States Dispute*, Martinus Nijhoff Publishers: Dordrecht/Boston/London, 1982, p. 12.

15 S. Rosenne, *The Law and Practice of the International Court 1920-1996*, Martinus Nijhoff: Dordrecht, 1997, p. 398.

16 Article 33 (1) of the UN Charter states: 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

17 S. Rosenne, *The International Court of Justice and International Arbitration*, Leiden Journal of International Law (LJIL), Vol. 6, 1993, pp. 297-8.

Thus, a State whose rights under international law have been violated by another State can have recourse to an increasing number of judicial and quasi-judicial mechanisms alongside the more traditional diplomatic means of settlement. An international judicial body that figures prominently in the framework of international dispute settlement mechanisms is the ICJ. The Court's importance within this framework stems from the UN Charter where the Court is recognized as one of the organization's main organs and as '(the) principal judicial organ' thereof.[18] Since the beginning of its work the Court has acknowledged that it is an organ of international law, created with the aim of ensuring respect for international law.[19] As the Court itself has noted, its task must be to respond, on the basis of international law, to the particular legal dispute brought before it and as it interprets and applies the law, it will be mindful of context, but its task cannot go beyond that.[20] Hence, the Court's work is framed and carried out within the boundaries of international law.

As part of its role within the framework of international dispute settlement, the Court has also rendered its contribution with regard to preventing conflict situations which are prone to endanger international peace and security. Further, the ICJ has acknowledged the political context of legal disputes, even more accentuated in a crisis situation. In the Court's words:

> [L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.[21]

Thus, the ICJ has had to fend off arguments, which if accepted, would have seriously reduced its role and function in the field of international dispute settlement. Rosenne has succinctly described the importance of the Court's existence and its potential influence in a State's choice in trying a 'solution away from law' or a 'solution through the law'. In Rosenne's words:

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18 UN Charter, Articles 7(1) and 92.

19 ICJ, *Corfu Channel* (UK *v.* Albania), (*Merits*), Judgment of 9 April 1949, ICJ Reports 1949, p. 35. *Inter alia* the Court stated: '…to ensure respect for international law, of which it is the organ…'

20 ICJ, *Armed Activities in the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, para. 26.

21 ICJ, *United States Diplomatic and Consular Staff in Tehran* (USA *v.* Iran), Judgment of 24 May 1980, ICJ Reports 1980, p. 20, para. 37 (*Hostages* case); ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* USA), (*Decision on Jurisdiction and Admissibility*), Judgment of 26 November 1984, ICJ Reports 1984, p. 433, para. 93 (*Nicaragua* case).

> The existence and '[T]he permanency of the Court, which transforms into constants most of the variables inherent in international arbitration, makes of the Court the most refined instrument now existing for the depoliticization of the process of pacific settlement and its authorized through the application of legal techniques, which is to say, in the words of Charles de Visscher, the renunciation by the parties of their individual powers of decision and their submission to the impersonal criteria of the law'.[22]

As expected, States seeking to resolve a dispute will assess the option of having recourse to the Court as one of the overall number of options available. Indeed, what makes recourse to the Court attractive is that in the end the parties will obtain an authoritative decision based on international law and custom. Practice shows that recourse to the Court usually occurs when other efforts at finding an agreeable solution for the parties have already failed. At that stage the dispute would certainly be ripe for being brought before the Court for judicial settlement. The ICJ has held that the fact that negotiations are taking place at the same time as legal proceedings is not a bar to the exercise by the latter of its judicial function.[23] However, it has explicitly noted that, 'Pending a decision on the merits, any negotiation between the parties with a view to achieving a direct and friendly settlement is to be welcomed'.[24] As a matter of fact there have been quite a few instances where cases have been withdrawn from the docket of the Court at the request of the parties, as a result of a political agreement reached through negotiations taking place simultaneously with the legal proceedings before the Court.[25]

The adoption over the years of a large number of human rights treaties within the framework of the UN has increased the possibility of the ICJ to be involved in the interpretation of these treaties.[26] These international instruments, which provide for

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22 See *supra* note 17 and S. Rosenne, *The Law and Practice of the International Court 1920-2005* (Rosenne), p. 11 and footnote 18.

23 ICJ, *Aegean Sea Continental Shelf* (Greece *v.* Turkey), ICJ Reports 1978, p. 12, para. 29, stating: '[t]he fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function'.

24 ICJ, *Great Belt* (Finland *v.* Denmark), ICJ Reports, 1992, p. 348, *Frontier Dispute* (Burkina Faso *v.* Republic of Mali), ICJ Reports 1986, p. 10, para. 24.

25 Cases include *inter alia* the *Great Belt* case (Finland *v.* Denmark), the *Aerial Incident of 3 July 1988* case (Iran *v.* USA), the *Trial of Pakistani Prisoners of War* case (Pakistan *v.* India), the *Lockerbie* case (Libya *v.* USA, Libya *v.* UK).

26 The most important international human rights instruments are the International Covenant on Civil and Political Rights (ICCPR) of 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1965, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984, the Convention on the Rights of the Child (CRC) of 1989, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) of 1990, the International Convention for the Protection of All Persons from Enforced Disappearance (CPPED) of 2006 and the Convention on the Rights of Persons with Disabilities (CRPD) of 30 March 2007. The last two conventions have not entered into force as of yet (as of November 2007). From these human rights treaties CERD, CEDAW, CAT, CMW and CPPED include

general protection or protection for certain sets of human rights or categories of persons, establish their own supervisory mechanisms. Presently, a considerable number of supervisory or treaty-monitoring bodies create the possibility for individuals to file individual communications or individual complaints. That major change in the position of the individual before such quasi-judicial mechanisms is an exemplary reflection of the development of international law and the international legal system. Indeed, for a long time the dominant view has been that individuals have no independent role in the international legal system. That classical view of international law was reflected in Article 34 of the ICJ's Statute which reads: 'Only States may be parties in cases before the Court'. This article, however, should be seen as just what it in fact is, a provision defining the competence of the Court.

The position of the individual as a subject of international law has often been obscured by the failure to observe the distinction between the recognition, in an international instrument, of rights enuring to the benefit of the individual and the enforceability of these rights at his instance.[27] As Lauterpacht asserted, the fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them.[28] Indeed, the sovereignty of States remains an important value, but the prerogatives it entails have been limited and redefined to accommodate the newly recognized values of international human rights.[29] After all, the notion of moving beyond state-centrism is implicit in the idea of an international law of human rights, since the rights with which this law is concerned are those of individuals, or groups of individuals, rather than those of states.[30] Noting this shift the ICTY has held:

> 'If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.'[31]

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provisions referring disputes related to the interpretation or application of these treaties to the ICJ, respectively CERD in Article 22, CEDAW in article 29, CAT in Article 30, CMW in Article 92 and CCPED in Article 42. For more information on the core international human rights instruments and their monitoring bodies visit the official website of the Office of the United Nations High Commissioner for Human Rights at: *http://www2.ohchr.org/english/law/index.htm* (last accessed on 1 February 2008).

27 H. Lauterpacht, *International Law and Human Rights*, Stevens and Sons: London, 1950, p. 27.

28 *Ibidem*.

29 B.S. Brown, *Nationality and Internationality in International Humanitarian Law*, Stanford Journal of International Law (SJIL) , Vol. 34, 1998, p. 395.

30 *Ibidem*.

31 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 97, in ALC, A. Clip and G. Sluiter (eds.), Vol. I, Intersentia, 1999, pp. 69-70.

Chapter 2

The emergence of the individual as a participant in the international legal order and the accompanying process of the humanization of international law have changed considerably the mosaic of the international legal system and with it that of legal dispute settlement.[32]

It is noteworthy that the decisions of some of the international judicial bodies, which are discussed in more detail in the course of the fifth chapter, have exercised a significant influence with regard to the protection of human rights on a domestic level on State organs be they judicial, legislative or executive.[33] It can be asserted that through their jurisprudence these international judicial bodies have carried across and have cultivated that civilizing spirit of international law, this 'gentle civilizer of nations', to borrow Koskenniemi's words.[34] Echoing the words of Hudson, 'The jurisprudence of international tribunals over a period of one hundred and fifty years has proved that the application of international law is possible in disputes between States, even in the absence of what might be called a code of international law'.[35] Although existing and operating as a discrete and distinct mechanism in the field of international dispute settlement, the Court, as an 'organ of international law', occupies a prominent place in that general international framework of mechanisms for the peaceful resolution of disputes.

32 On the humanization of international law see *inter alia* T. Meron, *The Humanization of International Law*, Martinus Nijhoff Publishers: Leiden/Boston, 2006, pp. 314-318.

33 For the impact of the decisions of the ECtHR on the domestic legal order see *inter alia* G. Ress, *The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order*, Texas International Law Journal (TILJ), Vol. 40, No. 3, 2005, pp. 359-382; A.Z. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study*, Oxford University Press: New York, 1983. Other regional courts such as the European Court of Justice and the I-ACtHR have also had a considerable impact on the national legal systems of their respective member States. It should also be mentioned that after the judgment of the ICJ on the *Congo v. Belgium* case the Belgian legislator moved to amend its national legislation regarding the prosecution of internationally recognized crimes. However, it remains dubious whether that change can be attributed to the Court's judgment. On this issue see *inter alia* D.M. Reilly and S. Ordóñez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, International Law and Politics (ILP), Vol. 28, 1995-1996, pp. 435-483.

34 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2004.

35 M.O. Hudson, *International Tribunals: Past and Future*, Washington, Carnegie Endowment for International Peace and Brookings Institution, 1944, p. 246.

## PART II THE ICJ'S POSSIBILITIES AND LIMITATIONS

After briefly introducing the Court and its place within the framework of international dispute settlement mechanisms the focus will now shift to its possibilities and limitations which condition its role and contribution in the fields of international human rights and humanitarian law. Hence, we shall be dealing with issues such as the applicable law, the Court's approach in interpreting international human rights and humanitarian law instruments, its position within the UN and its relationship with two of the UN's other main organs, several issues related to jurisdiction, *locus standi*, preliminary objections, provisional measures, advisory opinions and their importance in further developing the law in these fields.

Evidently, these issues encompass the Court's main features and help to put its work in the proper context. Their elaboration should create the necessary background for a proper understanding of the Court's nature and of its case law, whose analysis follows in the forthcoming chapters. Thus, we deal first with the issue of the applicable law. Needless to say, the applicable law determines the depth into which the Court can go into the merits of a dispute brought before it. Further, as also pointed out elsewhere in the book, a general lack of compromissory clauses in international human rights and humanitarian law instruments significantly curtails the Court's reach into these areas of international law. In addition to the issue of the applicable law, the Court's approach to the general method of interpreting instruments in these areas of international law is certainly of significant relevance.

A close look at the Court's position within the UN and its relationship with two other main UN organs, namely the GA and the SC, is necessary for setting out its importance and role within the UN framework. Further, numerous jurisdictional issues are dealt with in quite some detail. Dealing with these issues underlines a main feature of the Court, stemming from a basic feature of international law, namely the latter's consensual nature. That feature is translated, in turn, into the consensual nature of the Court's jurisdiction. The consensual nature of the Court's jurisdiction is reflected in the first phase of the Court's proceedings, namely that of preliminary objections. During this phase the respondent State has ample opportunity to present its objections with regard to the issues of jurisdiction and admissibility. This is an important step in the legal proceedings which usually takes a considerable amount of time.

Further, the issue of standing before the Court is also dealt with in the course of this chapter. Standing before the Court is inherently related to the issue of access to international justice. In that regard the Court's Statute illustrates the initial and, to some extent, the still existing divide between substantial and procedural norms of international law, which used to and still limits individuals' access to international justice. Indeed, the lack of standing for individuals is one of the obstacles influencing the Court's contribution to interpreting and developing international human rights and humanitarian law. However, as explained in the last sections of this chapter, that shortcoming could be rectified to some extent by making use of the Court's advisory function. In this respect the advisory jurisdiction of the Court could be an important

tool if properly used. Finally, part III of this chapter provides a final appraisal of the Court's possibilities and limitations in the fields of international human rights and humanitarian law.

## 2.3 APPLICABLE SOURCES OF LAW AND SOME ASPECTS OF ICJ'S PRACTICE

The sources of law which can be applied by the Court in rendering its judgments, advisory opinions, and orders, generally referred to as decisions, are enumerated in Article 38 of its Statute, which reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilised nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

This article is widely considered as indicative of the sources of international law. Although this formulation leaves open the question of priority between the listed sources, it however firmly lays down those sources which the Court can draw upon in making its decisions.

It is also noteworthy that Article 38 besides the settlement of disputes in accordance with international law provides for, subject to the consent of the relevant parties, another procedure, namely that *ex aequo et bono*.[36] So far no State has opted for the *ex aequo et bono* method of settling a dispute. It is highly likely that such attitude by States is based on their understanding of this procedure as being 'outside the realm of international law'. That misconception is further exacerbated by the fear that the concepts of 'fair' and 'good' and their margin of appreciation lay the ground for rather subjective decisions in contrast with the perceived stricter limits to be applied in settling a dispute on the basis of international law. Besides the sources of law to be applied there are three issues related to the practice of the ICJ, which are rather important, namely the value of precedent, evidentiary matters, and judicial inferences. These three issues are dealt with below.

36 See *infra* section 2.8.7.

### 2.3.1 The Value of Precedent

It is quite common for the Court to refer back in its decisions to its own case law or to that of the PCIJ. Article 59 of the Statute of the Court restricts the binding force of the decision of the Court only to the parties to the dispute and in respect of that particular case on the basis of the principle of *res inter alios acta*.[37] However, the Court has often supported its legal findings by relying on previous decisions cited from its own or from the PCIJ's case law. Thus, the effect of the precedent, to use the words of Rosenne, can be described as follows:

> Without allowing precedents to become–in the words of Sir Samuel Evans in *The Odessa*, [1915] P. 52 at p. 62–'shackles to bind', they are insistent in demanding that attention be paid to them, and this means to the facts which provoked the statement of law. Precedents may be followed or discarded, but never disregarded.[38]

Such a practice, a common feature of the Court's decisions, contributes *inter alia* to the consolidation of a reliable and transparent *corpus juris*. As the late Judge Lauterpacht noted, the practice of referring to its own decisions 'has resulted, over a prolonged period of years, in the formulation – or clarification – of an imposing body of rules of international law'.[39] There have even been suggestions calling for the implementation of the doctrine of *stare decisis* in the Statute of the Court.[40] With regard to this far-reaching proposal one should keep in mind that aside from positive effects, such as certainty in the law, undertaking such a step can also have negative implications, such as the 'freezing' effect of the precedent, which can affect the ability of the Court to be more flexible in serving the evolving needs of the international community.

### 2.3.2 Evidentiary Matters

The presenting of and entering into evidence together with the later step of the weighing of that evidence are certainly the most crucial elements of any judicial proceedings. It is for this reason that, although briefly, evidentiary maters are dealt with here. According to its Statute the Court makes all arrangements connected with the taking of evidence.[41] The evidence is presented by the parties, through written and oral

37 For a detailed elaboration of this topic see *inter alia* M. Shahabuddeen, *Precedent in the World Court*, Cambridge University Press, 1996.

38 S. Rosenne, *The International Court of Justice*, Leyden: A.W. Sijthoff, 1957, p. 10.

39 H. Lauterpacht, *The Development of International Law by the International Court*, Steven and Sons: London, 1958, p. 76.

40 H.V. Clemons, *The Ethos of the International Court of Justice Is Dependant upon the Statutory Authority Attributed to Its Rhetoric: A Metadiscourse*, Fordham International Law Journal (FILJ), Vol. 20, 1997, p. 1509. For more details on the issue of the application of the doctrine of *stare decisis* by the ICJ see *inter alia* Shahabuddeen, *supra* note 37, pp. 97-109.

41 ICJ Statute, Article 48.

submissions, with the Court remaining largely passive in this respect.[42] Nonetheless, the Court may, at any time, entrust any individual body, bureau, commission, or other organization that it may select with the task of carrying out an inquiry or giving an expert opinion.[43] Thus far the Court has used this option only twice, as a full Court in the *Corfu Channel* case and as a Chamber in the *Gulf of Maine* case.[44] With regard to the final process of weighing the evidence the Court has remarked that it will treat with caution any evidentiary materials specially prepared for a case and also materials emanating from a single source, preferring contemporaneous evidence from persons with direct knowledge.[45] Further, it has stated that it will give particular attention to reliable evidence acknowledging facts or conduct which is unfavourable to the State represented by the person making them.[46] The Court has also noted that evidence obtained by the examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention.[47]

In further clarifying the weight to be given to evidence presented before it, the Court has observed that a member of the government of a State engaged in litigation before it – and especially litigation relating to armed conflict – 'will probably tend to identify himself with the interests of his country'.[48] The same may be said of a senior military officer of such a State, and 'while in no way impugning the honour or veracity' of such a person, the Court has noted that it should 'treat such evidence with great reserve'.[49] From the above one can get a clearer understanding of the Court's approach to weighing evidence which the parties to a case have placed before it. As mentioned above, in order to increase the efficiency of its work the Court has issued a considerable number of Practice Directions, which *inter alia* try to regulate and streamline the presenting of evidence.[50] These guidelines issued by the Court are aimed at enhancing its internal functioning in order to cope better with the increasing caseload.

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42 However, the Court is empowered by its Statute to call upon the agents of the parties to produce any document or to supply any explanations (Article 49), and to put any relevant questions to the witnesses and experts on the basis of its rules of procedure (Article 51).

43 ICJ Statute, Article 50.

44 See *inter alia* G. White, *The Use of Experts by the International Court*, in Fifty Years of the International Court of Justice: Essays in honour of Sir Robert Jennings, Cambridge University Press, 1996, pp. 528-540; C.J. Tams, Article 50, in *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann et al. (eds.), Oxford University Press, 2006, pp. 1109-1118.

45 ICJ, *Nicaragua* case, (*Merits*), ICJ Reports 1986, p. 41. para. 64.

46 *Ibidem*.

47 ICJ, *Armed Activities in the Territory of the Congo* (DRC *v.* Uganda), Judgment of 19 December 2005, para. 61 (*Armed Activities* case).

48 ICJ, *Nicaragua* case, (*Merits*), ICJ Reports 1986, p. 43, para. 70.

49 ICJ, *Armed Activities* case (DRC *v.* Uganda), Judgment of 19 December 2005, para. 65.

50 See the Court's Annual Report 2001-2002, pp. 96-100, paras. 368-373, and Annual Report 2003-2004, pp. 46-48, paras. 247-249.

### 2.3.3 Judicial Inferences

It is normal for the ICJ, as for every court, to draw inferences from established facts. These are known as judicial inferences.[51] An example can be taken from the *Corfu Channel* case where the Court took the view that exclusive territorial control by a State was important in establishing the knowledge of that State concerning events which took place in its territory.[52] This is a case where on the basis of a judicial inference an inversion of the burden of proof seems to take place. Taking into account the difficulties a State would have in obtaining proof in the territory of another State the Court held:

> Such a State should be allowed a more liberal course to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.[53]

On the whole judicial inferences are an important tool which allows the Court to arrive at a conclusion concerning a specific issue. Understandably, judicial inferences are drawn concerning evidence which is not conclusive, but circumstantial. A necessary condition for drawing such inferences, as emphasized by the Court in the *Corfu Channel* case, is that, 'The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt.'[54] Just like the ICJ, other ICTs also use judicial inferences as an instrument of legal reasoning.

## 2.4 ICJ's Approach in Interpreting International Human Rights and Humanitarian Law Instruments

Having dealt in the previous section with the issue of the applicable sources of law we shall now turn to another topic, namely the ICJ's approach with regard to interpreting important instruments of both international human rights and humanitarian law. As only States have standing before this Court the issue becomes all the more important, as the approach the latter follows has important ramifications for the level of protection accruing to individuals under these international instruments. Indeed, on several occasions the Court has clarified the obligations of States under such instruments *vis-*

51 See *inter alia* C.F. Amerasinghe, *Presumptions and Inferences in Evidence in International Litigation*, The Law and Practice of International Courts and Tribunals 3, Koninklijke Brill NV, 2004, pp. 395-410.

52 Earlier in the judgment the Court had stated: 'But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that the State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.' *Corfu Channel* case, ICJ Reports 1949, p. 18.

53 *Ibidem*.

54 *Ibidem*, emphasis in the original.

*à-vis* individuals under their jurisdiction. Two aspects of the Court's approach to the interpretation of international human rights and humanitarian law instruments are especially relevant, namely the inter-temporal element and the method of interpretation.

In dealing with the inter-temporal aspect of the interpretation of an international instrument the Court seems to have relied mainly on the nature of that instrument. If the instrument coming under the scrutiny of the Court is related to boundary delimitation issues or economic treaties, or issues relating generally to establishing or maintaining territorial sovereignty then the Court has taken the view that they would have to be interpreted according to the meaning existing at the time of their adoption. In contrast, if the instruments would relate to human rights or environmental issues the Court seems to be inclined towards applying and interpreting them within the framework of contemporary international law.[55] Thus, with regard to the inter-temporal element of interpretation the Court's approach has generally been that it cannot ignore the subsequent developments in international human rights or humanitarian law. That is an approach followed also by the European Court of Human Rights (ECtHR).[56]

The method of interpretation of international human rights and humanitarian law instruments by the Court is also of primary relevance.[57] Thus, starting with the advisory opinion in the *Reservations to the Genocide Convention* the Court held that, given that the intention of the GA was that as many States as possible become a party to this Convention, the object and purpose of the Genocide Convention would limit both the freedom of making reservations and that of objecting to them.[58] This method of interpretation has found expression in Article 31, paragraph 1, of the Vienna Conven-

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55 On the issue of inter-temporal law see *inter alia* T.O., Elias, *The Doctrine of Intertemporal Law*, AJIL, Vol. 74, No. 2, pp. 285-307; R. Higgins, *Some Observations on the Inter-Temporal Rule in International Law*, in Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzystof Skubiszewski, Kluwer Law International, 1996, pp. 173-181; A. A-Khavari, *The Passage of Time in Environmental Disputes*, Murdoch University Electronic Journal of Law (MUEJL), Vol. 10, No. 4, 2003, available at: *http://www.murdoch.edu.au/elaw/issues/v10n4/akhavari104.html* (last accessed on 1 November 2007). With regard to the effect of environmental norms in the interpretation of the validity of treaties see the *Gabčíkovo - Nagymaros* case, ICJ Reports 1996, respectively paras. 112 and 140-141, pp. 67-68 and pp. 77-78.

56 ECtHR, *Case of Tyrer v. United Kingdom*, Application No. 5856/72, Judgment of 25 April 1978, para. 31. The European Court stated *inter alia*: 'The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.'

57 It should be noted here that through its case law the Court has contributed significantly to the development of the law on the interpretation of treaties. Part of that law was codified in the Vienna Convention on the Law of Treaties of 1969 (VCLT), while the International Law Commission (ILC) is continuing its work on the topic of 'Reservations to Treaties'. For more information on the work of the ILC on this topic see: *http://untreaty.un.org/ilc/guide/1_8.htm* (last visited on 1 November 2007).

58 ICJ, *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 24. See *infra* section 3.8.1 for a detailed discussion of this case.

tion on the Law of Treaties (VCLT) which reads: '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.' With regard to the interpretation of international treaties directly or indirectly related to human rights the Court seems to have adopted a value-oriented approach based on the principle of effectiveness.[59] The *ratio decidendi* of such an approach is expressed in the Court's finding in the *Reservations to the Genocide Convention*, where it stated:

> In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.[60]

By holding that certain treaties, such as that on the prohibition of genocide, are of a civilizing character and States have no interest of their own, but adopt the international obligations provided therein in the interest of humanity itself, the Court supports openly an interpretation which takes into consideration the civilizing mission of such international instruments. Moreover, such an approach takes into account the evolving conditions and needs of the human society and the subsequent developments in the fields of human rights and humanitarian law.

### 2.5 THE COURT'S POSITION WITHIN THE UNITED NATIONS

It goes without saying that the Court occupies a special position within the UN as one of the principal organs and as the principal judicial organ thereof.[61] Judging from the *travaux préparatoires*, the Court was not deemed to be the exclusive organ for interpreting the Charter.[62] It has nevertheless managed to play a constructive role within the institutional framework of the UN by first recognizing the international legal personality of the latter; secondly, by laying the legal basis for peace-keeping and other quasi-military operations of the UN; and, thirdly, through the preservation of the integrity and autonomy of the general legal regime and the organs established by or according to the UN Charter.[63] That has been made possible by Article 96 of the UN Charter, which provides the GA, the SC, and other organs of the UN and specialized agencies with the possibility to address the Court with a legal question. While the GA and the SC can ask the Court for an advisory opinion on any legal question, other

59 For a more detailed discussion of this issue see *infra* section 3.8.1, Part III of the third chapter and M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, 1997, p. 72

60 ICJ, *Reservations to the Genocide Convention*, ICJ Reports 1951, p. 23.

61 On the basis of Articles 7(1) and 92 of the UN Charter. On this topic see *inter alia* M.S.M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, Kluwer Law International, 2003.

62 Amr, *supra* note 61, p. 124 and footnote 9.

63 S. Rosenne, *The Contribution of the International Court of Justice to the United Nations*, Indian Journal of International Law (IJIL), Vol. 35, 1995, pp. 67-76.

organs of the UN and specialized agencies can only ask questions which arise within the scope of their activities. The Economic and Social Council (ECOSOC) has acted as a channel through which recommendations regarding the authorization of the specialized agencies to request advisory opinions were brought before the GA. While the ECOSOC has a general responsibility to coordinate the work of the specialized agencies, both ECOSOC and the specialized agencies have not made much use of the Court's advisory jurisdiction.[64] ECOSOC itself has made use of this possibility only twice.[65] Yet, this reluctance on the part of ECOSOC has been somehow balanced by an easily discerned readiness on the part of the GA to ask for guidance on different legal issues.

The Court's contribution to the good functioning of the UN was timely. So, in the 1949 advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (*Reparations for Injuries*) the Court stated:

> The subjects of law in any legal system are not necessary identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action on the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But, *to achieve these ends the attribution of international personality is indispensable* (emphasis added).[66]

Having acknowledged the international personality of the UN, the Court continued by clarifying the nature of the UN and the functions this organization was to discharge. The Court held:

> In the opinion of the Court, the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate

64 The ECOSOC has twice asked for an Advisory Opinion, namely in the *Applicability of Article VI, Section 22, of The Convention on The Privileges and Immunities of The United Nations* (1989) and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (1999); the WHO has twice asked for an opinion, namely in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (1980) and the *Legality of Use of Nuclear Weapons,* (1996); UNESCO once, namely in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO* (1956); the IMCO (now IMO) once, namely in the *Constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organization* (1960). The total number of Advisory opinions so requested amounts to 6, leaving aside the three requests made by the Committee on Applications for Review of Administrative Tribunal Judgments, on which the appellate jurisdiction of the ICJ has been abolished since 1 January 1996.

65 See *supra* note 64. However, in both of these cases an important issue, namely the status and treatment of a rapporteur of the UN, gave rise to the request.

66 ICJ, *Reparation for Injuries*, ICJ Reports 1949, p. 178.

> upon an international plane. It is at present the supreme type of international organization, and it could not carry out the intentions of its founders if it was devoid of international personality. It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.[67]

Finally, in closing the Court concluded that the organization was indeed an international person, but cautiously went on to address the differences between the organization and a State. In the Court's words:

> Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.[68]

Needless to say, at the time when this ground-laying advisory opinion was delivered, it was probably inconceivable how much the law of international organizations would develop over the half century which lay ahead. Even less obvious was the remarkable impact on the protection, respect and enjoyment of human rights which those intergovernmental organizations would have both on an international and on a national level. There is today not a branch of international law and a great deal of the internal law of states too in which the UN and the other major intergovernmental organizations are not themselves directly involved.[69] Were the Court to embrace a rigid interpretation of the Charter, the UN would have been severely handicapped and without many possibilities to carry on its founding purposes and principles in the face of anything but predictable events that took place since its inception in 1945. Thus, it can be safely asserted that the Court laid the foundations for this development.

Be that as it may, on a procedural level of international adjudication all international organizations are on a different footing from States. While all means of pacific settlement enlisted in Article 33 of the Charter are available to the UN and other international organizations, recourse to the Court itself is limited to some of them in the case of advisory opinions while none of them has standing in a contentious case. In the plethora of suggestions made to amend the Statute of the ICJ one with the effect of permitting international intergovernmental organizations to be parties in contentious cases has been put forward, but so far to no avail. Leaving aside the difficulties connected with the cumbersome procedures for changing the Statute of the Court, how

67 *Ibid.*, p. 179.
68 *Ibidem*.
69 Rosenne, *supra* note 63, p. 68.

can giving the UN organs standing in contentious cases be reconciled with the long-standing maxim *in propria causa nemo judex*?[70] Although over the six decades of its existence the Court has demonstrated independence and impartiality, giving standing in contentious cases to, for example the GA, while the latter decides upon the budget of the Court, would naturally give rise to serious doubts regarding the outcome of such a case. In this light careful use of the advisory opinions option, aside from political efforts, might be a better way of resolving disputes between the UN and its specialized agencies and States. Indeed, creating the possibility for different specialized UN agencies to ask for an advisory opinion within the scope of their activity does not require changes to the Statute, while at the same time making available to them an important legal forum to which they could turn for advice whenever necessary.

### 2.5.1 The General Relationship between the Court and the Political Organs of the United Nations

The relationship between the main organs of the UN has been subjected to the scrutiny of the Court on several occasions. The Court has clarified that, 'the Court does not have powers of judicial review or appeal in respect of the decisions taken by the UN organs concerned…however, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from these resolutions.'[71] Such language is rather ambiguous and leaves ample room for differing interpretations, given that the Charter itself is silent on this issue. On another occasion, the Court in interpreting Article 24 of the UN Charter came to the conclusion that the SC was entrusted under this instrument with *primary* but not with *exclusive* responsibility for maintaining peace and security.[72] It continued noting that Article 12 of the Charter provided for a clear demarcation of functions between the GA and the SC, in respect of any dispute or situation, where the former was not to make any recommendations unless the SC so required.[73] Having noted that there was no such provision in the Charter the Court drew a distinction between the functions of a political nature assigned to the SC and the purely judicial functions it had to exercise.[74] It concluded that both organs could perform their separate but complementary functions with regard to the same events.[75] The Court, however, has refrained from reviewing decisions taken by the SC concerning their legality.

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70 Black's Law Dictionary, 7th edition, West Group, 1999, p. 1646.

71 ICJ, *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, ICJ Reports 1971, p. 45, para. 89.

72 ICJ, *Nicaragua* case (*Jurisdiction and Admissibility*), ICJ Reports 1984, pp. 434-5, para. 95.

73 *Ibidem*.

74 *Ibidem*.

75 *Ibidem*.

Emphasizing the complementary nature of the specific functions of the SC and the Court and the blurred distinction between political and legal disputes, Judge Lachs in a Separate Opinion held:

> Now, it has become clear that the dividing line between political and legal disputes is blurred, as the law becomes ever more frequently an integral element of international controversies. The Court, for reasons well known so frequently shunned in the past, is thus called upon to play an ever greater role. Hence it is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony – though not, of course, in concert – and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers.[76]

Further down in his opinion Judge Lachs stated that in any event it was to be hoped that the two principal organs concerned would be able to operate with due consideration for their mutual involvement in the preservation of the rule of law.[77] So far these two organs have been able to fulfil their respective roles, thus avoiding any possible collision.

*A) The Court and the General Assembly*

Although the Judges of the Court are elected by the GA and the SC proceeding independently, once elected they are independent in discharging their duties. In particular, Articles 18 and 32 of the Court's Statute are aimed at ensuring their independence. According to Article 18, paragraph 1, no member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions. Another safeguard to the Judges' independence once in office is also Article 32, paragraph 5, which guarantees that the salaries, allowances and compensation fixed by the GA may not be decreased during their term of office. In contrast to other organs which have the possibility to ask for an advisory opinion, the GA has made quite an extensive use of the advisory competence of the Court. During the period from 1946 to 2004 it requested an advisory opinion on 14 occasions, a number which, if compared with the use made of the Court by other UN organs, is quite impressive. With regard to the possibility of the GA to ask for an advisory opinion the Court has noted that there is nothing in the Charter or its own Statute to limit either the competence of the GA to request an advisory opinion, or to the competence of the Court to give one, to existing rights or obligations.[78]

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76 ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiria *v.* United Kingdom), (*Provisional Measures*), Order of April 14 1992, Separate Opinion of Judge Lachs, ICJ Reports 1992, p. 27.

77 *Ibidem*.

78 ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 19, para. 18.

In its 1971 advisory opinion on South-West Africa the Court found that it would not be correct to assume that, because the GA is in principle vested with recommendatory powers, it is debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design.[79] The GA had declared that as the Mandate for this Territory had been terminated South Africa had no other right to administer it.[80] Describing the nature of and listing some conditions which are necessary for establishing the existence of a rule or the emergence of *opinion juris* from GA resolutions the Court stated:

> The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[81]

Indeed, the fact that some GA resolutions are adopted unanimously and without a vote certainly increases their significance. The Court has noted that by lending its assistance in the solution of a problem confronting the GA it would discharge its functions as the principal judicial organ of the UN.[82] Indeed, the Court has not once refrained from rendering an advisory opinion requested by the GA.

The bond between the Court and the GA is especially strong in view of the control which the latter exerts in terms of budgetary (financial) control. While the funds made available to the Court have increased over time, they are still not sufficient to enable the Court to discharge, effectively and on time, the duties incumbent upon it in accordance with the UN Charter and its Statute. This lack of funding has been raised before the GA time and again by the Presidents of the Court in their yearly speeches delivered in October or November.[83] A former chairman of the Advisory Committee

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79 ICJ, *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, ICJ Reports 1971, p. 50, para. 105.

80 *Ibidem*.

81 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, pp. 254-255, para. 70.

82 ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 21, para. 23.

83 In his speech before the GA on 26 October 2000 President Guillaume emphasized the peculiar nature of the Court's need for resources by stating: 'Unlike other United Nations organs, the Court cannot adapt its programmes to its available resources. Its resources must be adjusted to meet the legitimate expectations of the States that turn to it.' He went on to say: 'The Advisory Committee on Administrative and Budgetary Questions (ACABQ)… recommended 'that the resource implications of the dramatic increase in the number of the cases before the Court be reviewed in order to ensure that the ability of the Court to discharge its mandate is not adversely affected'(document A 54/7).' In concluding he stated: 'It is for you to decide whether the Court, the principal judicial organ of the United Nations, is to die a slow death or whether you will give it the wherewithal to live.'

for Administrative and Budgetary Matters (ACABQ) of the UN has noted that anything which impaired the prestige of the International Court would also impair the prestige of the UN itself.[84] However, ultimately, the UN's own underfunding is also reflected in the insufficient funds allocated to the Court. At least the resources made available for the Court should be on a par with those for other ICTs.

*B) The Court and the Security Council*

Presently, the Court shares two features with the SC: they have the same number of members, namely fifteen, and they are both the only principal organs of the UN able to make binding decisions. In the case of the SC it can take binding decisions for all the members of the UN under Chapter VII of the UN Charter,[85] and in the case of the ICJ its decisions are binding for the states parties in the contentious cases before it.[86] An important link between these two organs is created by Article 94(2) of the Charter which reads: 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give to the judgment.' Thus, the Court is dependent on the SC with regard to the enforcement of its decisions, as long as they are not willingly complied with by the States party to a case. While there are uncertainties as to what measures can be taken by the SC when a State does not comply with a decision of the ICJ, there have been to date only a few instances when that has happened.[87]

The Court has clarified different aspects of the work of the SC and the latter's functions according to the UN Charter. In setting out the legal consequences of SC resolutions the Court held:

> When the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.[88]

84 As quoted in Rosenne, p. 495 and footnote 87.

85 See *inter alia* P. Hulsroj, *The Legal Function of the Security Council*, CJIL, Vol. 1, No. 1, 2002, pp. 65-68.

86 Respectively under Article 25 of the UN Charter and Articles 59 and 60 of the Statute of the ICJ.

87 Namely, in the *Corfu Channel* case Albania did not accept the decision of the ICJ on 15 December 1949 on the award of compensation (UK *v.* Albania). A settlement was only reached in 1992, when a Memorandum of Understanding between the two countries was signed in Rome. Other cases include *The Fisheries Jurisdiction* cases (Federal Republic of Germany *v.* Iceland, UK *v.* Iceland) and the *Military and Paramilitary Activities in and against Nicaragua* case (Nicaragua *v.* US).

88 ICJ, *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, ICJ Reports 1971, p. 54, para. 116.

Further, the Court clarified that a binding determination made by a competent organ of the UN to the effect that a situation is illegal cannot remain without consequence.[89] In this way the Court clarified and re-emphasized the binding power of SC resolutions.

The SC was generally prevented from taking action during the Cold War by the threat or the use of the veto by one or more of the permanent members. An enormous shift came as a result of the changes which occurred in the late 1980s. In statistical terms the SC has passed more resolutions in the period between 1990 to the present than in its four and a half decades of prior existence. This resurrection has given rise to the question of finding appropriate mechanisms that will ensure the legitimacy of the SC's resolutions and promote its accountability. An interesting question, namely whether the ICJ can, and if so, whether it should exercise judicial review over SC decisions taken under Chapter VII, has given rise to many scholarly writings.[90] In considering what is the right answer to this question there are a number of issues that need to be taken into account, namely: first, the Court cannot make the SC a party to a binding judgment,[91] second, it ultimately relies on the SC for the enforcement of its decisions,[92] and last but not least the UN Charter is silent about the possibility of a judicial review or the finding of the illegality of such decisions. Challenges to SC decisions in other judicial fora, either already materialised or conceivable, are not considered here.[93]

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89 *Ibid*., p. 54, para. 117.

90 See *inter alia*: T.M Franck, *The Powers of Appreciation: Who Is the Ultimate Guardian of UN Legality?*, AJIL, Vol. 86, No. 3, 1992, pp. 519-523; W.M. Reisman, *The Constitutional Crisis in the United Nations*, AJIL, Vol. 87, No. 1, 1993, pp. 83-100; R.S.J Macdonald, *Changing Relations between the International Court of Justice and the Security Council of the United Nations*, Canadian Yearbook of International Law (CYbIL), 1993, pp. 3-32; G.R. Watson, *Constitutionalism, Judicial Review, and the World Court*, Harvard International Law Journal (HILJ), Vol. 34, 1993, pp. 1-45; V. Gowlland-Debbas, *The Relationship between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, AJIL, Vol. 88, No. 4, 1994, pp. 643-677; M. Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts*, Brill Publishers, 1995, I. Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law*, in *Essays in Honour of Wang Tieya*, Martinus Nijhoff Publishers, 1994, pp. 91-102; T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, Netherlands Yearbook of International Law (NYbIL), 1995, pp. 33-138; J.E Alvarez, *Judging the Security Council*, AJIL, Vol. 90, No. 1, 1996, pp. 1-39; D. Akande, *The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, International and Comparative Law Quarterly (ICLQ), Vol. 46, April 1997, pp. 309-343; E. de Wet and A. Nollkamper (eds.), *Review of the Security Council by Member States*, Intersentia, 2003, C. Gray, *The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after Nicaragua*, European Journal of International Law (EJIL), Vol. 14, No. 5, 2003, pp. 867-905; I. Petculescu, *The Review of the United Nations Security Council Decisions by the International Court of Justice*, Netherlands International Law Review (NILR), 2005, pp. 167-195.

91 Article 34 of the Court's Statute allows only States to be parties in contentious cases.

92 See Articles 59 and 60 of the ICJ Statute and Article 94 (2) of the UN Charter.

93 See European Court of Justice (Court of First Instance), Yusuf and Al Barakaat International Foundation v Council of the European Union and the Commission of the European Communities, Case T-306/01; Kadi v Council of the European Union and the Commission of the European Communities,

The Court has been asked to judicially review a decision of the SC in the *Lockerbie* case[94] and the *Application of the Genocide Convention* case.[95] The Court has found that there is an absence of hierarchy between the SC and itself and that neither organ is subordinate to the other. In the *Nicaragua* case the Court held:

> 'The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.'[96]

The situation is the more complicated, as Judge Bedjaoui noted, when the applicant State requests the Court to nullify the decision of the SC.[97] The question which naturally arises in this context is whether the SC is bound to act in accordance with international law when discharging its duties for the maintenance of international peace and security. According to Kelsen:

> 'The purpose of the enforcement action under Article 39 is not to maintain or restore the law but to maintain or restore peace, which is not necessarily identical with the law…the decisions enforced by the Security Council may create new law for the concrete case.'[98]

Indeed, from a joint reading of Articles 25 and 103 of the Charter one can conclude that the member States agree to accept and carry out the decisions of the SC and whenever obligations of member States of UN under the Charter come in conflict with a treaty the Charter obligations shall prevail.

As the Charter does not explicitly provide for a judicial review by the Court of decisions of UN organs the Court has so far chosen not to embark upon such a mission. So, in an advisory opinion, part of the *South West Africa* decolonization process, the Court stated:

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Case T-315/01; Ayadi v Council of the European Union, Case T-253/02; available at *http://curia.europa.eu*. See *inter alia* C. Lehnardt, *European Court Rules on UN and EU Terrorist Suspect Blacklists*, ASIL Insight, Volume 11, Issue 1, 31 January 2007.

94 ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, (Libya *v.* US, Libya *v.* UK), (*Provisional Measures*), ICJ Reports 1992, p. 3.

95 ICJ, *Application of the Convention on Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina *v*. Yugoslavia (Serbia and Montenegro)), (*Request for the Indication of Provisional Measures*), Order of 8 April 1993, ICJ Reports 1993, p. 6.

96 *Nicaragua* case, (*Decision on Jurisdiction*), ICJ Reports 1984, p. 435, para. 95.

97 Judge Bedjaoui in his dissenting Opinion in the *Lockerbie* case stated: '[i]f the concomitant exercise of the concurrent but not exclusive powers has thus far not given rise to serious problems, the present case, by contrast, presents the Court not only with the grave question of the possible influence of the decisions of a principal organ on the consideration of the same question by another principal organ, but also, more fundamentally, with the question of the possible inconsistency between the decisions of the two organs and how to deal with so delicate a situation', ICJ Reports 1992, p. 33, para. 2.

98 H. Kelsen, *The Law of the United Nations. A Critical Analysis of its Fundamental Problems*, Stevens and Sons: London, 1951, p. 294.

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned…However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.[99]

Nevertheless, the Court did look whether the actions were *ultra vires* the competences of the organs that had taken them.[100]

How can the Court be seized with the legal review of SC resolutions? As only States have standing before the Court then this issue might only arise incidentally in a dispute between two States or from an advisory opinion requested by the GA or, although highly unlikely, by the SC itself, or other organs of the UN authorized by the GA.[101] In fact it is only the GA and the SC that have competence to request an opinion on any legal question, whether or not arising within the scope of their activities. The option of a legal review through an advisory opinion is very unlikely to happen as other organs of the UN and specialized agencies would not be keen to be seen as trying to undermine the authority of the SC. Moreover, the possibility still remains that even if they went through with their request the Court could use its discretionary power and decide to refrain from rendering an advisory opinion. But what would be the consequences of a finding of illegality? Although an advisory opinion is not binding and the SC is not bound to follow the opinion of the Court, such pronouncements are not devoid of political and legal force. While in the short run an ICJ judgment or an advisory opinion that critically reviews a SC decision would upset the SC's standing, in the long run it could be beneficial to the UN constitutional order and strengthen international law in general. UN member States that might be inclined to question the legality of Council action might be convinced by a judicial determination of legality and be more willing to comply with that action in the wake of such an opinion.[102]

It is commonly agreed that the SC is not omnipotent and that some legal limits to its powers and competences do exist. Thus, the SC in carrying out its duties has to respect the Charter and international law in general, norms of *jus cogens*,[103] and human rights obligations ensuing directly from the Charter.[104] According to Gill: 'the Council

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99 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276* (1970) (*Namibia* case), Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 45, para. 89.

100 In the *Namibia* case, *supra* and also in *Certain Expenses of the United Nations* case (*Certain Expenses*), ICJ Reports 1962, p. 151.

101 UN Charter, Articles 34 (1) and 96.

102 J.E. Alvarez, *Judging the Security Council*, AJIL, Vol. 90, No. 1, 1996, p. 27 and footnote 148.

103 See D. Akande, *The International Court of Justice and the Security Council: Is there Room for Judicial Control of Decisions of the Political Organs of the United Nations?*, ICLQ, Vol. 46, April 1997, pp. 322-5.

104 Article 1(4) states that it is one of the Purposes of the United Nations 'to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for

will *at a minimum* be bound by the rules of human rights contained in the International Bill of Human Rights from which no derogation is permitted in time of emergency or armed conflict.'[105] Only in the unlikely case that the Council's decision imposes an absolute embargo which makes impossible the access to food and medicine for the targeted population, or violates peremptory norms of humanitarian or human rights law, or the measures it imposes are clearly disproportionate to the aims sought, should the Court judicially review such a decision and eventually declare it illegal under international law.

### 2.6 *LOCUS STANDI*

According to Article 34 of its Statute only States may be parties in cases before the Court. Obviously, such a restriction represents an inherent obstacle in the work of the Court towards contributing to interpreting and developing international human rights and humanitarian law rules and principles, given that individuals cannot bring a case before the Court. Giving individuals standing before the ICJ would require changes to its Statute, which depend upon the political will of all the member States of the UN and especially of the permanent members of the SC. In considering whether it was possible for individuals to bear rights and duties under international law the predecessor of the ICJ, the PCIJ, held:

> '[i]t cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.[106]

For a long time there was no independent ability for individuals to bring claims before international judicial bodies, an understanding of international law which was carried over in the Statute of the ICJ from that of its predecessor.[107] However, later developments of international law have made it possible for individuals to bring forward claims in cases of human rights violations before international judicial and quasi-judicial bodies. Although considering individuals as objects of international law is in line with classical international law,[108] the ICJ in its *Reparation for Injuries* advisory opinion acknowledged that there can be other subjects of international law apart from

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all…' and Article 55 (c) states that '…the United Nations shall promote…c) universal respect for, and observance of, human rights and fundamental freedoms for all…'.

105 T.D. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, NYbIL, 1995, p. 79.

106 PCIJ, *Jurisdiction of the Courts of Danzig*, Advisory Opinion, Series B, No. 15, 1928, pp. 17-18.

107 Article 34 of the PCIJ Statute reads: 'Only States or Members of the League of Nations can be parties in cases before the Court.'

108 Sir Hersch Lauterpacht long ago held a different opinion: 'Fundamental human rights are rights superior to the law of the sovereign state…[and must lead to the] consequent recognition of the individual human being as a subject of international law', in *International Law and Human Rights*, 1950, p. 72.

States.[109] As the Court pointed out, these other subjects do not possess the same rights and duties and it is not necessary that these rights and duties be on the international plane alone. Through this opinion the ICJ acknowledged that the UN has legal personality and later on in another advisory opinion by applying the same principles it extended it to other international organizations.[110]

The question whether individuals are subjects of international law has been answered in the positive since that advisory opinion of the PCIJ in the *Jurisdiction of the Courts of Danzig* case. There the Court admittedly accepted that the contracting Parties might create rights and obligations for private parties.[111] Whether that quality extends to the capacity of enforcing these rights should at least be answered pragmatically on a case by case approach, by reference to the given situation and to the relevant international instrument. But is the whole discourse of subjects and objects of international law of any relevance at all? Many scholars doubt the value of such a distinction. Indeed, the discussion of this issue on such terms has been subject to criticism by different authors, such as Koskenniemi,[112] Charlesworth,[113] Chinkin,[114] and Higgins.[115] While this distinction is still widely used, this author is more inclined to use the term 'participant' in the international legal system, as defined by Higgins.[116] This change of term would take into account the tremendous development of international law in the last few decades and the emergence of the individual as the bearer of rights and duties.[117] A plausible reason that supports the claim above is that individuals are the real actors behind the State, as the latter is just a legal fiction and cannot act by itself.

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109 ICJ, *Reparation for Injuries*, ICJ Reports 1949, pp. 178-9.

110 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports 1996.

111 PCIJ, *Jurisdiction of the Courts of Danzig*, Advisory Opinion, Series B, No. 15, 1928, pp. 17-18 stating: 'It might be readily admitted that, according to a well established principle of international law, the *Beamteabkommen*, being an international agreement, cannot as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, *according to the intention of the contracting Parties* (emphasis added), may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.'

112 M. Koskenniemi, *The gentle civilizer of nations: the rise and fall of international law 1870-1960*, Cambridge University Press, 2002; D. Kennedy and M. Koskenniemi, *International Law*, Ashgate Publishing, 2001.

113 H. Charlesworth and C. Chinkin, *The boundaries of international law: a feminist analysis*, Manchester University Press, 2000.

114 C. Chinkin, *Third parties in international law*, Oxford, Clarendon Press, 1993.

115 See R. Higgins, *Problems and process: international law and how we use it*, Oxford University Press: New York, 1994, pp. 48-55.

116 *Ibidem*.

117 On the issue of the position of the individual under international law see *inter alia* C.A. Nørgaard, *The Position of the Individual in International Law*, Ejnar Munksgaard: Copenhagen, 1962, A. Orakhelashvili, *The Position of the Individual in International Law*, California Western International Law Journal (CWILJ), Vol. 31, 2001, pp. 241-276, R. McCorquodale, *The Individual and the International Legal System*, in International Law, M.D. Evans, (ed.), 2nd edition, Oxford University Press, 2006, pp. 307-332.

Furthermore, participation as a framework for considering the role of individuals is not constricted to a State-centred concept of the international legal system, or the appearance before an international body (be it judicial or quasi-judicial).

Despite the lack of standing of individuals the ICJ has been seized of cases which had direct consequences for the fate of individuals.[118] Thus, seemingly the factor of a lack of standing, hindering though it might be, has not proved to be a major handicap for the ICJ. States on many occasions have taken up the case of one or more of their citizens at the World Court. Certainly, the institution of diplomatic protection has proved to be a good vehicle for States in protecting the interests of their citizens abroad. Even though individuals have no standing before the ICJ, the latter's decisions have and shall continue to influence the rights and duties they enjoy under the framework of international law. Although hindered by its Statute the Court has been able to make an invaluable contribution to the development of human rights principles, as shall be illustrated and explained at length in the next chapter.

## 2.7 *ACTIO POPULARIS* BEFORE THE WORLD COURT?

Is there any possibility for an *actio popularis* before the ICJ? Basically, the assumption of an *actio popularis* rests on the right of every State to bring a case before the World Court in the case of a breach by a State of an *erga omnes* obligation. It is possible to argue that some actions by some actors in the international arena justify an international claim supported by diplomatic correspondence, reprisal or other enforcement; provide 'standing' for a complaint before the judicial arm of the UN; or relate solely to the 'international community' being able to lodge the international legal order's equivalent of a 'criminal' complaint against specific actors.[119] The phrase '*actio popularis*' has already appeared in argument before the ICJ, but in that particular case, the application of the concept was denied.[120] In fact the argument of 'necessity' raised by the Applicants in that case amounted to a plea that the Court should allow the equivalent of an *actio popularis,* or the right of a resident in any member of a community to take legal action in vindication of a public interest. The Court found that such a right was not known to international law as it stood at present: and the Court was unable to regard it as imported by 'the general principles of law' referred to in Article 38, paragraph 1 (c), of its Statute.[121] The precise legal effects of asserting some action to represent a violation of the law *erga omnes* are not clear and it appears that in no instance has its application been affirmed by the Court.

However, the existence of *erga omnes* obligations seems to imply a right on the part of any State to take action against the violator of obligations of such a nature. That

118 See *infra* Part II of chapter 3 for a detailed discussion of the case law of the Court related to human rights issues.

119 A.P. Rubin, *Actio Popularis, Jus Cogens and Offences Erga Omnes*, Mellen Press, 2001.

120 ICJ, *South-West Africa Cases*, (*Second Phase*), Judgment of 18 July 1966, p. 47, para. 88.

121 *Ibidem*.

possibility was incorporated into international law in the 2001 ILC Articles on State Responsibility.[122] The likelihood of a State taking that duty upon itself on behalf of the international community, though, seems slim in view of the reluctance of States to go as far as to initiate legal proceedings unless their own State interests are at stake. Such initiatives have remained a dead letter even in the case of treaty-based complaint procedures. Nevertheless, legal proceedings are not the only means of ensuring compliance with *erga omnes* obligations. It remains to be seen whether any State will have recourse to such a concept in the future. Although at the moment only a theoretical possibility, *actio popularis* before the ICJ can be seen as one of the indicators of the dedication of States to a just world order.

## 2.8 THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

The concept of jurisdiction as embodied in Article 36(1) of the ICJ Statute includes two forms of jurisdiction, namely contentious jurisdiction and advisory jurisdiction.[123] The contentious jurisdiction of the Court involves the Court's authority to render binding decisions in a certain dispute brought before it by one or both of the parties involved. The advisory jurisdiction of the Court involves its authority for rendering an advisory opinion to the SC, the GA or other authorized UN organs and specialized agencies on the basis of a request from the latter. In order to understand better the capacity of the ICJ a few features of its jurisdiction are discussed in more detail below.

### 2.8.1 Scope of Jurisdiction

The concept of jurisdiction is intrinsically linked with that of justiciability and the existence of disputes, as basic preconditions for jurisdiction to exist.[124] The Court's jurisdiction according to Article 36 of the Statute extends to all cases, which the parties refer to it, and all matters specially provided for in the Charter of the UN or in treaties or conventions in force. Its function is to decide in accordance with international law such disputes as are submitted to it.[125] The Court has been careful in not limiting itself

122 See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, pp. 276-280.

123 On the issue of jurisdiction see *inter alia* S. Rosenne, *The World Court: What It is and how It works*, Sixth Completely Revised Edition by Terry D. Gill, Martinus Nijhoff Publishers: Leiden/Boston, 2003, pp. 67-89.

124 The Court in the *Nuclear Tests* case (Australia *v.* France), stated: 'The Court, as a court of law is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function', ICJ Reports 1974, p. 270-1, para. 55. In the same wording this opinion is to be found in the *Nuclear Test* case (New Zealand *v.* France), ICJ Reports 1974, p. 476, para. 58.

125 ICJ Statute, Article 38.

by giving a narrow definition of the term dispute.[126] This term serves to 'express in a legally discrete term the matter in connection with which the Court is empowered to make a judicial decision having final and binding force on the parties'.[127] The Court has made rendering a decision incumbent upon the dispute existing at the time when the decision is taken by stating:

> [I]t is not sufficient for one party to assert that there is a dispute, since 'whether there exists an international dispute is a matter for objective determination' by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania*, (First Phase), Advisory Opinion, I.C.J Reports 1950, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision.[128]

Despite the fact that in the last few years proceedings have been started before the Court as a means of exerting pressure on the respondent State, this does not *per se* affect the Court's jurisdiction, as the Court itself has recognized:

> [T]he Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Curt has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of such disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances to choose judicial settlement.[129]

However, in spite of the strong political undertones, the high international resonance, and even explicit requests from States that it should decline from rendering a judgment or an advisory opinion on a certain question, the latter has not shied away from handling such sensitive and difficult questions which have been placed before it.

An important element conditioning the work of the Court is that of State consent with regard to its jurisdiction. For the establishment of jurisdiction as a first step before ruling on the merits of a dispute the Court always looks at the existence of State consent as an indispensable requirement for the Court to proceed with a case. Further, the Court has been very careful in looking and pronouncing only on issues for which

126 In the *Mavrommatis* case the PCIJ provided the following definition of a 'dispute': 'A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.' In *The Mavrommatis Palestine Concessions* (Greece *v.* United Kingdom), (*Objection to the Jurisdiction of the Court*), Judgment of 30 August 1924, Collection of Judgments, Series A, No. 2, p. 11.

127 Rosenne, p. 519.

128 ICJ, *Nuclear Tests* (Australia *v.* France), Judgment, ICJ Reports 1974, pp. 270-1, para. 55.

129 ICJ, *Border and Transborder Armed Actions* (Nicaragua *v.* Honduras), Judgment, ICJ Reports 1988, p. 91, para. 52.

jurisdiction has been accepted by both parties to the dispute. Thus, in the *Application of the Genocide Convention* case the Court stated:

> It [the Court – author's note]] has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.[130]

This finding gives an idea of how narrowly the Court has construed its jurisdiction in view of the requirement of State consent. It remains to be seen whether the Court will continue to construe its jurisdiction so narrowly in the future in view of the 2001 ILC Articles on State Responsibility. Article 48 of these Articles provides for the invocation of responsibility by a State other than an injured State when the obligation breached is owed to the international community as a whole.[131] If the invocation of responsibility includes taking action before the ICJ, in view of the Court's finding above, one is left wondering what course the Court would take if a case was brought before it on allegations of a breach of obligations *erga omnes* by a State other than an injured State? While the possibility of this last scenario materializing appears to be rather thin, seemingly the Court would be inclined to find that it has no jurisdiction to rule on the merits of such a case.

### 2.8.2 The Issue of Propriety

The ability of the Court to be seized of a case and to decide upon it is distinguishable from the issue whether this would be proper with regard to its position within the UN and the judicial character of its function. In this regard, the Court enjoys some discretion in the exercise of its function. In the *Northern Cameroons* case the Court stated:

> There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be guardian of the Court's judicial integrity.[132]

Given that the Court depends on States' compliance for the enforcement of its decisions one is tempted to conclude that maybe it is better for it not to deliver a decision in cases where it is foreseeable that the decision could remain a dead letter. Yet, the judicial function of the Court is to be distinguished from questions of enforceability

130 ICJ, *Application of the Genocide Convention* (Bosnia and Herzegovina *v*. Serbia and Montenegro), (*Merits*), Judgment of 26 February 2007, para. 147.
131 Article 48(1)(b) of the 2001 ILC Articles on State Responsibility for Internationally Wrongful Acts.
132 ICJ, *Northern Cameroons* (Cameroon *v*. United Kingdom), Judgment, ICJ Reports 1963, p. 29.

and execution, which are not the province of the Court, but are of a political nature. In the eloquent words of Judge Weeramantry:

> The Court, by its very constitution lacks the means of enforcement and is not to be deterred from pronouncing upon the proper legal determination of a dispute it would otherwise have decided, merely because, for political or other reasons, that determination is unlikely to be implemented. The *raison d'être* of the Court's jurisdiction is adjudication and clarification of the law, not enforcement and implementation.[133]

In any case, important in the Court's exercise of its discretion is whether the judgment to be rendered is to be effective.[134] Moreover, the Court in the *Nuclear Test* cases held:

> The Court…sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.[135]

More recently, Judge Higgins in her separate opinion in the *Legality of Use of Force* cases held that it was reasonable, necessary, and appropriate for the Court to strike the case off the List as an exercise of its inherent power to protect the integrity of the judicial process.[136] She based her position on the Court's findings in the *Nuclear Tests* cases and the *Northern Cameroons* case mentioned above.

If the claims brought before the Court no longer have any object, i.e. have become moot, they are usually not dealt with. It goes without saying that the discretion enjoyed by the Court in striking out such claims should be exercised carefully so as not to expose it to criticisms of arbitrariness. Such an issue could be resolved by the Court by applying the principle of good faith, which is a cornerstone of international law. As this Court has observed in the *Nuclear Tests* cases this principle is 'one of the basic principles governing the creation and performance of legal obligations, whatever their source…Trust and confidence are inherent in international cooperation'.[137] A corollary of the principle of good faith is the principle of *abus de droit*, or the equitable doctrine of 'clean hands', which has long been acknowledged in judgments and individual

133 ICJ, *East Timor* (Portugal *v*. Australia), Dissenting Opinion of Judge Weeramantry, ICJ Reports 1995, p. 219.

134 *Ibid*. pp. 33-34 stating: 'The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.'

135 ICJ, *Nuclear Tests* (Australia *v.* France), Judgment of 20 December 1974, ICJ Reports 1974, pp. 270-1, para. 55.

136 ICJ, *Legality of Use of Force* (Yugoslavia *v.* Belgium), (*Preliminary Objections*), Separate Opinion of Judge Higgins, ICJ Reports 2004, p. 1217, para. 12.

137 ICJ, *Nuclear Tests*, (Australia *v.* France; New Zealand *v.* France), ICJ Reports 1974, respectively p. 253 and 457, and paras. 46 and 49.

opinions of the Judges of the Court as constituting a general principle of international law. By keeping these principles in mind the Court can prevent itself from being abused by parties whose intentions are ill-aimed. The Court, in principle, ought to decide every case validly submitted before it. The Statute itself makes no specific mention of the Court's discretion to deal with contentious cases.

As regards propriety in delivering an advisory opinion the Court dealt with the issue in its 1989 advisory opinion on the so-called *Mazilu* case.[138] There the Court stated that while the absence of Romania's consent to the proceedings before the Court could have no effect on its jurisdiction, the Court found that this was a matter to be considered when examining the propriety of giving an opinion.[139] Referring to its earlier jurisprudence the Court stated, *inter alia,* that in 'certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character' and an 'instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent'.[140] The Court considered that in this case to give a reply would have no such effect.[141] Noting that the SC, in its resolution 1989/75, did conclude that a difference had arisen between the UN and the Government of Romania as to the *applicability* of the Convention . . . towards Mr Dumitru Mazilu, the Court held, nevertheless, that this difference, and the question put to the Court in the light thereof, was not to be confused with the dispute between the UN and Romania with respect to the *application* of the General Convention in the case of Mr Mazilu.[142] Having not found any 'compelling reason' to refuse an advisory opinion, the Court decided to answer the legal question on which such an opinion had been requested. The issue of propriety was also at issue in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[143]

### 2.8.3 Consent to the Court's Contentious Jurisdiction

The jurisdiction of the Court in contentious proceedings is based on the consent of the States to which it is open.[144] The Court has in many instances recalled that 'one of the fundamental principles of its Statute is that it cannot decide a dispute between States

138 ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, ICJ Reports 1989, pp. 190-192, paras. 37-39.
139 *Ibid*., para. 37.
140 *Ibidem*.
141 *Ibid*., para. 38.
142 *Ibidem* (emphasis in original).
143 For more details on this issue see *infra* section 3.13.1.
144 More generally on the topic of the Court's jurisdiction see Rosenne, *supra* note 22, Vol. II, pp. 505-585. As for the issue of the basis of the Court's jurisdiction in contentious cases visit: *http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2* (last accessed on 1 November 2007).

without the consent of those States to its jurisdiction'.[145] Indeed, a well-known manifestation of sovereignty in international law and international relations finds expression in the rule that a State cannot be compelled to engage in contentious litigation before an international court or tribunal without its consent.[146] There is a distinction between the validity of duly constituted proceedings and their essential validity, which may make it impossible for the Court to deliver a decision on the merits of a case. State consent to submit to the jurisdiction of the Court can be expressed in three forms: through accepting the compulsory jurisdiction of the Court,[147] through the vehicle of *forum prorogatum*, and by a special agreement (*compromis*) between the parties to bring their dispute before the Court. One should add here that also the Court's jurisdiction to decide *ex aequo et bono* would come under this third option of consent through a special agreement between the disputing parties. However, this form of jurisdiction is discussed separately. In any case, all of these options shall be discussed in more detail here below.

### 2.8.4 Compulsory Jurisdiction

Compulsory jurisdiction is conferred upon the Court by virtue of Article 36, paragraphs 2 and 3, and Article 37 of its Statute. It should be noted that even though it is commonly referred to as compulsory jurisdiction this kind of jurisdiction is nevertheless based on previously expressed State consent.[148] Compulsory jurisdiction does not

145 ICJ, *East Timor* (Portugal *v*. Australia), Judgment, ICJ Reports 1995, p. 101, para. 26.

146 See on this issue *inter alia The Statute of the International Court of Justice: A Commentary*, A. Zimmermann et al. (eds.), Oxford University Press, 2006, pp. 602-603.

147 Note in this respect the continued calls for accepting the compulsory jurisdiction of the Court such as the resolution of the Institut de Droit International of 11 September 1959 on the compulsory jurisdiction of international courts and tribunals, 48 Annuaire de l'Institut de Droit International, Neuchâtel, 1959, pp. 380-382. Further, the GA has also time and again called upon States to accept the ICJ's compulsory jurisdiction, see GA resolution 3232 (XXIX), of 12 November 1974, entitled 'Review of the role of the International Court of Justice' and the more recent GA resolution A/Res/60/1 of 24 October 2005, known also as the 2005 World Summit Outcome document, in Annex 2 of this book. On the issue of the compulsory jurisdiction of the ICJ see *inter alia* R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Martinus Nijhoff Publishers, 1993.

148 In the *Anglo-Iranian Oil Co.* case, ICJ Reports 1952, p. 102-103, the Court stated: '[t]he general rules laid down in Article 36 of the Statute…are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction.' Later in the *Ambatielos* case, (*Merits*), ICJ Reports 1953, p. 19, the Court stated: 'The Court is not departing from the principle, which is well-established in international law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration, without its consent'. Reference to this principle has been made in other cases as well, namely in the *Continental Shelf* (Libya *v.* Malta, Italy intervening), ICJ Reports 1984, p. 22, para. 34, the *Land, Island and Maritime Frontier Dispute* (El Salvador *v*. Honduras, Nicaragua intervening), ICJ Reports 1990, p.133, para. 95, the *Certain Phosphate Lands in Nauru* (Nauru *v*. Australia), ICJ Reports 1992, p. 260, para. 53, and the *East Timor* (Portugal *v*. Australia), ICJ Reports 1995, p. 101, para. 26.

mean, though, that it can be used without appropriate safeguards that would prevent the surprise institution of proceedings without a previous indication against an unwilling and unknowing respondent.[149] When the respondent is 'unwilling', the Court has to establish its consent as a matter of law, not of policy, through careful and sometimes subtle reasoning and the examination of relevant legal texts in light of broader judicial policy. This has brought about a major difference between political willingness to engage in international litigation and the legal obligation to do so, a matter also affecting compliance with the judicial decision.[150] There are at present 65 Declarations recognizing as compulsory the jurisdiction of the Court.[151] Thus, roughly one third of the Member States of the UN composing the international community have accepted that they should submit the resolution of their legal disputes to the ICJ. Despite several calls for States to recognize the compulsory jurisdiction of the Court, that has not led to a general acceptance of its jurisdiction. From the permanent members of the SC only the United Kingdom has accepted the compulsory jurisdiction of the Court on 5 July 2004.

### 2.8.5 Consent by Conduct (*forum prorogatum*)

The Court has interpreted Article 36 (1) as permitting it to apply the doctrine of *forum prorogatum*,[152] as an informal way of founding its jurisdiction over disputes which parties might refer to it. The origins of the application of this doctrine by the Court can be traced all the way back to the first case coming before the Court, the *Corfu Channel* case, where the Court interpreted a letter by the government of Albania dated 23 July 1947 as conceding jurisdiction to entertain the case brought unilaterally before the Court by the United Kingdom.[153] A recent return of this doctrine to the Court is signalled by the acceptance of France to recognize the jurisdiction of the Court to entertain the case filed against it by Congo via a letter stating that it consented 'to the jurisdiction of the Court to entertain the Application pursuant to Article 38, paragraph

149 Notable in this respect is the *Case Concerning the Right of Passage Over Indian Territory* (Portugal *v*. India), (*Preliminary Objections*), Judgment of 26 November 1957, ICJ Reports 1957, p. 125. Portugal instituted proceedings against India just three days after having accepted the compulsory jurisdiction of the Court, *ibid*., p. 130.

150 S. Rosenne, *A Role for the ICJ in Crisis Management*, in State, Sovereignty, and International Governance, G. Kreijen *et al.* (eds.), Oxford University Press, 2002, p. 196.

151 According to the information available on the Court's official website: *http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3* (last accessed on 1 November 2007). The full texts of these Declarations can also be consulted on this webpage.

152 For a detailed elaboration see S. Yee, *Forum Prorogatum and the Indication of Provisional Measures in the International Court of Justice*, in *The Reality of International Law: Essays in Honour of Ian Brownlie*, G.S. Goodwin-Gill and S. Talmon (eds.), Oxford University Press, 1999, pp. 565-584; S. Yee, *Forum Prorogatum in the International Court*, German Yearbook of International Law (GYbIL), 2000, pp. 145-191; S. Yee, *Forum Prorogatum and the Advisory Proceedings of the International Court*, AJIL, Vol. 95, 2001, pp. 381-5.

153 ICJ, *Corfu Channel*, (*Preliminary Objections*), ICJ Reports 1948-1949, p. 19.

5'.[154] In a similar way France also accepted the jurisdiction of the Court in the *Certain Questions of Mutual Assistance in Criminal Matters* case.[155] Whatever the reasons for France acceding to the jurisdiction of the Court in these two cases, such an open attitude is one to be commended. If anything, such acceptance is remarkable in itself coming from one of the permanent members of the SC which has yet to accept the compulsory jurisdiction of the Court.

Practice shows that States are by default reluctant to place themselves in a position where they have to deal with charges brought unilaterally against them. However, *forum prorogatum* increases the ability of the Court to be seized of cases which it would otherwise not be able to hear.[156] Yee calls this the lottery effect of *forum prorogatum*.[157] However, besides instances when *forum prorogatum* would be the sole basis of jurisdiction there is also the possibility of employing *forum prorogatum* as an additional basis of jurisdiction.[158] The internationalists can now hope that the French decision to resort to the doctrine of *forum prorogatum* presages the beginning of the greater use of the doctrine (the dormancy of which might have given some the premature impression that it is passé), a more ready resort to the judicial settlement of international disputes, which are legion, and ultimately the deepening of the rule of law in the international community.[159] While commending France's acceptance to have this dispute settled by the Court, this remains an isolated example of a State willingly submitting to the jurisdiction of the Court. States willingness to submit to the jurisdiction of the Court is in the end the litmus test of the amount of trust they put in the Court and ultimately on international law.

### 2.8.6 Special Agreement by the Parties

A dispute can be referred to the Court by a special agreement of the parties to a dispute.[160] So far there have been fifteen cases that have been brought before the Court in this way.[161] The agreement between the Parties is often referred to as a *compromis*

154 ICJ, *Certain Criminal Proceedings in France* (Congo *v.* France), (*Request for the Indication of a Provisional Measure*), Order of 17 June 2003, ICJ Reports 2003, p. 103, para. 6. Available at: *http://www.icj-cij.org/docket/files/129/8204.pdf* .

155 ICJ, *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti *v.* France), Letter from the Minister for Foreign Affairs of the French Republic (Consent to the Jurisdiction of the Court to Entertain the Application Pursuant to Article 38, paragraph 5, of the Rules of Court), 25 July 2006. See at: *http://www.icj-cij.org/docket/index.php?p1=3&p2=1&k=93&case=136&code=djf&p3=10*.

156 On *forum prorogatum* see *inter alia The Statute of the International Court of Justice: A Commentary*, A. Zimmermann et al. (eds.), Oxford University Press, 2006, pp. 898-909.

157 S. Yee, *Forum Prorogatum Returns to the International Court of Justice*, LJIL, Vol. 16, 2003, p. 712

158 *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann et al. (eds.), Oxford University Press, 2006, pp. 863-864.

159 Yee, *supra* note 157, p. 713.

160 ICJ Statute, Article 40(1).

161 S. Rosenne, *The World Court: What It is and how It works*, Sixth Completely Revised Edition by Terry D. Gill, Martinus Nijhoff Publishers, 2003, p. 71 and footnotes 6 and 7; a non-exhaustive list can also be found in Office of Public Information, *The International Court of Justice*, 4th edition, 1996, pp. 37-8.

of the Parties to have their dispute settled by the Court. There is no requirement that the achieved *compromis* to resort to the Court should be filed through a joint application. It has also occurred that one State has unilaterally initiated proceedings before the Court and the other State has recognized the Court's jurisdiction subsequently (*forum prorogatum*).[162] It may be that one of the States moves to bring the application before the Court. Generally, such a special agreement by the parties agreeing to bring a dispute before the World Court has been entered with regard to land or sea border delimitation cases. In such a case there is definitely a need to resort, in solving a dispute on the basis of international law, to an independent third party such as the ICJ.

### 2.8.7 Jurisdiction to Decide *Ex Aequo Et Bono*

When applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice, without relying only on legal considerations. However, the application of equitable principles is to be distinguished from a decision *ex aequo et bono*, or according to the right and good. The Court can decide to render a decision *ex aequo et bono* only on condition that the Parties to the dispute agree.[163] The Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement.[164] Thus, although the genuine function of the Court is to settle disputes that come before it on the basis of international law there is also the *ex aequo et bono* option.[165]

States have not yet made use of the possibility of the Court to render a decision *ex aequo et bono*. Hence, it remains unclear what deciding in this way exactly means.[166] While doubts have been expressed as to whether this function is a function of a court of law which should rely only on the application of legal rules, the Court itself has a record of self-restraint from attaching legislative power to itself, which seems likely to be endowed to the Court in such a case. It appears that the application of such a means of settling a dispute is a secure valve for cases when the application of the existing law itself would not offer a satisfactory solution to the parties. So far it seems

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162 *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann *et al*. (eds.), Oxford University Press, 2006, pp. 613-617.

163 ICJ Statute, Art. 38(2).

164 ICJ, *Continental Shelf* (Tunisia *v.* Libya), Judgment, ICJ Reports 1982, p. 60, para. 71.

165 *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann *et al*. (eds.), Oxford University Press, 2006, pp. 731-735.

166 Alain Pellet gives three caveats for the application of this principle. First, a discretion to decide in this way does not mean that the Court can leave the general framework of international law, and especially cannot rule out *jus cogens* norms; second, such judgments, although legally binding, would hardly be part of the jurisprudence of the Court envisaged as a 'subsidiary means for the determination of rules of law' within the meaning of Article 38(1)(d) of the ICJ Statute; third, such an authorization does not prevent the Court from applying international law but authorizes it to base itself also on extra-legal considerations. See *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann *et al*. (eds.), Oxford University Press, 2006, p. 734.

that legal safety and strict legal solutions are more appealing to States than solutions according to the principle of what is fair and just.

## 2.9 PRELIMINARY OBJECTIONS

Unless brought by a special agreement between the parties to a dispute, or the Respondent State bringing forward no objections, a contentious case before the Court would usually go through the preliminary objections procedure. There is a basic rule of international law and a principle of international relations that a State is not obliged to give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established.[167] Being an almost inevitable step, the preliminary objections phase certainly adds to the time that legal proceedings take before the Court. However, together with the application instituting proceedings the Applicant State can also file a request asking the Court to indicate provisional measures in order to safeguard its interests. In such a case the Court could indicate the requested provisional measures, also called *interim* measures, given that it is satisfied *prima facie* that a) it has jurisdiction; b) that there is a sense of urgency; and, c) such a step is necessary in order to preserve the rights of the parties concerned. Nonetheless, even in such a case the Court would usually arrange for a hearing so as to give the parties the possibility to express their views.

### 2.9.1 *Compétence de la Compétence*

As usual for any court of law the ICJ, according to Article 36, paragraph 6, of its Statute, has competence to decide whether it has jurisdiction to hear a case referred to it. In other words this is known as *compétence de la compétence*, or Kompetenz-Kompetenz. So far the Court has shown great restraint in establishing its jurisdiction to entertain a contentious case. As for advisory opinions the Court has, with only one exception,[168] found that it had jurisdiction to render the required advisory opinions. Thus, one can discern a somewhat different approach to the two different jurisdictions by the Court. That can be explained by the different nature of the recipients of the Court's decisions, namely States in a contentious case and UN organs and specialized agencies in the case of advisory opinions and the different nature and aim of the legal proceedings in respectively contentious and advisory proceedings. Practice shows that the Court may require the Respondent State to invoke any relevant basis for preliminary objections to jurisdiction and, as stated above, challenges to the jurisdiction of the Court are almost routine. However, as with any court of law the competence to decide whether it shall reach the merits of the case remains with the Court.

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167 S. Rosenne, *The World Court: What It is and how It works*, Sixth Completely Revised Edition by Terry D. Gill, Martinus Nijhoff Publishers, 2003, p. 81.

168 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 66.

### 2.9.2 Character of the Judgment on Preliminary Objections

It is common practice that the respondent State raises one or more preliminary objections with regard to the Court's jurisdiction. The aim is to prevent the Court from delivering a judgment on the merits of the case. There are a variety of grounds on which a preliminary objection may be raised. In settling the objections over its jurisdiction the Court may uphold the preliminary objections raised and remove the case from the list, dismiss them, or join them to the merits. The decision of the Court is final and without appeal.

## 2.10 PROVISIONAL MEASURES

Under Article 41 of its Statute the ICJ has been given the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.[169] Such powers can be compared with those that domestic courts have to issue injunction orders pending a final settlement of the dispute. There are several examples where States have requested the Court for the indication of provisional or *interim* measures in order to protect the human rights of individuals from potential or ongoing violations. Requests for the indication of provisional measures are treated with the highest priority by the Court.

### 2.10.1 Provisional Measures and Their Importance for Protecting Human Rights

As mentioned above the legal basis for indicating provisional measures is Article 41 of the Statute of the Court which provides that 'The Court shall have the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party'. From the wording of this article two difficulties seem to arise. *First*, what is the threshold to be reached for the Court to indicate provisional measures and *second* what status do provisional measures enjoy once they are indicated by the Court.[170] With regard to the first issue it is clear that the Court will not indicate provisional measures unless the provisions invoked by the Applicant State seem to afford a *prima facie* basis upon which the jurisdiction of the Court is to be founded. So, as Judge Arèchaga has pointed out: 'interim measures will not be granted, unless a majority of judges believes at the time that there will be jurisdiction over the merits'.[171] The threshold is set fairly high,

169 See *inter alia Provisional Measures of Protection* in S. Rosenne, *The World Court: What It is and how It works*, Sixth Completely Revised Edition by Terry D. Gill, Martinus Nijhoff Publishers, 2003, pp. 79-81 and S. Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford University Press, 2005.

170 See section 2.10.2 *infra*.

171 E.J. de Arèchaga, *International Law in the Past Third of a Century*, Human Rights Journal (HRJ), 1978, pp.1-161.

as the provisional measures should protect rights that are the subject of the dispute at the risk of irreparable damage.[172] Judge Higgins has emphasized the importance of provisional measures for the protection of human rights: 'As seen in many cases the Court has indicated provisional measures in instances when human rights linked issues have been at stake. Indeed, one can assert that provisional measures are a very useful tool in protecting the human rights of individuals or groups.'[173]

Indeed, there have been quite a large number of cases in which the Applicant State has requested the Court to take provisional measures pending the final judgment. Such requests have been increasingly motivated on humanitarian grounds. Even by calling on the Parties to refrain from taking any action which aggravates the situation, until a decision on the merits is reached the Court could exert, if not an appeasing effect, at least a 'conflict-freezing' one in a crisis situation. The dissolution of the former Yugoslavia provides an example of a complex crisis that included also resorting from time to time to the World Court for provisional measures on humanitarian grounds. Judicial treatment of appropriate elements of the crisis can, although not necessarily will, perform a significant, albeit not exclusive, role in the management of that crisis.[174] Following the *Anglo-Iranian Oil Co.* case, there has been increasing use of proceedings for provisional measures of protection as a way to involve the ICJ in crisis situations, if the State taking the initiative can show *prima facie* jurisdiction and an element of urgency, even if it is on weak ground.[175] Despite the potentially fortifying effect which the indication of provisional measures has in the ability of the Court to contribute to the maintenance of peace and security and the protection of human rights, exceeding the bounds of reminding States of their obligations in the fields of human rights and humanitarian law, or inviting them to continue negotiating in good faith, would represent a step too far for the Court. Indeed, a more intrusive approach besides essentially departing with the judicial nature of the activity of the Court would unnecessarily eclipse the primary responsibility for the maintenance of peace and security entrusted to the SC under Chapter VII.

172 For example, that was the case of Walter LaGrand whose execution was scheduled to take place in a matter of hours when Germany asked for and the Court ordered a stay of his execution until the Court had decided the case on its merits. See *LaGrand* (Germany *v.* United States of America), (*Provisional Measures*), Order of 3 March 1999, ICJ Reports 1999, pp. 15-16 and paras. 26-29. Also available at: *http://www.icj-cij.org/docket/files/104/7726.pdf* (last accessed on 1 November 2007).

173 See *inter alia*, R. Higgins, *Interim Measures for the Protection of Human Rights*, Columbia Journal of Transnational Law (CJTL), Vol. 36, 1997, 91-108; S. Rosenne, *Interim Measures in International Law*, Oxford University Press, 2004.

174 S. Rosenne, *A Role for the ICJ in Crisis Management*, in *State, Sovereignty, and International Governance*, G. Kreijen *et al*. (eds.), Oxford University Press, 2002, p. 198.

175 *Ibid*., p. 212.

### 2.10.2 Legal Character of Provisional Measures under Contemporary International Law

For a long time opinions were divided with regard to the legal nature of the provisional measures of the Court. Probably, the very ambiguity of the binding power of provisional measures for a long time provided a non-encouraging record of compliance by States. Finally, the Court itself ended every speculation as to the binding nature of its provisional measures in the *LaGrand* case.[176] After noting first that neither the PCIJ, nor the present Court to date, had been called upon to determine the legal effects of orders made under Article 41 of the Statute,[177] the Court resorted to an examination of the wording of Article 41 itself and the relevant articles in the UN Charter, namely Articles 59 and 94. In analyzing the relevant legal texts the Court relied upon paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties (VCLT), which states that 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'[178] On the basis of a thorough analysis the Court came to the conclusion that provisional measures are indeed legally binding.[179]

The Court has noted that provisional measures are only justified if they are a matter of urgency.[180] Indeed, the ICJ has responded with adequate expeditiousness to requests put before it for the indication of provisional measures.[181] In addition, the Court under Article 78 of its Rules has the authority to request information from the parties on any matter concerned with the implementation of any provisional measures it has indicated, which enables it to ensure that these measures are complied with. Moreover, now that the question of their obligatory nature has been clarified, States can no longer ignore such measures without the risk of incurring a breach of their obligations under international law and being held accountable.[182] The indication of provisional measures when there is no surety whether the Court has jurisdiction to hear a particular case, by construing that the concept of *prima facie* jurisdiction is a novelty, has enhanced the Court's ability to cope with unforeseen circumstances. Nevertheless, one should not overrate the role which judicial organs and in our case the Court can play in crisis management, which in the end is a political function. In the end, it is diplo-

176 ICJ, *LaGrand* (Germany *v.* US), Judgment, ICJ Reports 2001, pp. 498-508, paras. 92-116.
177 *Ibid*., p. 501, para. 98.
178 *Ibid*., p. 502, para. 101.
179 *Ibid*., p. 516, para. 128 (5).
180 See the *Passage through the Great Belt* (Finland *v*. Denmark), (*Provisional Measures*), Order of 29 July 1991, ICJ Reports 1991, p. 17, para. 23; *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, (Cameroon *v.* Nigeria), (*Provisional Measures*), Order of 15 March 1996, ICJ Reports 1996, pp. 21-22, para. 35.
181 The most remarkable situation being the case of the *LaGrand* brothers where the Court indicated provisional measures in a time frame of several hours from the filing of the application by the Republic of Germany. See Counter-Memorial of the US, para. 57.
182 See *infra* sections 3.8.2 (*Application of the Genocide Convention*), 3.11.2 (*LaGrand*), and 4.11.1 (*Armed Activities in the Territory of the Congo*) for a discussion of cases where the Court found the Respondent States to be in violation of the Court's Order on Provisional Measures.

matic actions that will have the upper hand in solving the conflict and finding an acceptable political solution for the parties involved.

## 2.11 ADVISORY OPINIONS

Advisory opinions of the ICJ are judicial statements on legal questions submitted to the Court by organs of the United Nations and other international legal bodies so authorized.[183] States do not have access to the advisory competence of the Court. Although not binding from a strict legal perspective, given these opinions are legal pronouncements of international law by an authoritative international judicial organ such as the ICJ they carry considerable legal weight. They are a very important component of the ICJ's possibilities to contribute to the interpretation and development of international human rights and humanitarian law rules and principles.[184] While it is true that, on the one hand, advisory opinions are not binding, on the other the Court has clarified that 'the consent of states is not a condition precedent to the competence of the Court to give them'.[185] Had the Court made the rendering of advisory opinions dependent upon State consent it would have inherently impaired its competences in this field.

The advisory function was certainly one of the important features retained from the PCIJ model when the ICJ was established. Article 14 of the Covenant of the League of Nations stated: 'The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.' It should be noted that the PCIJ's and the ICJ's advisory function was a novelty in the field of international dispute settlement mechanisms. Despite similarities, there are some differences between the PCIJ and the ICJ as to the subjects able to ask for an advisory opinion, and the use made of the advisory function of these judicial bodies by the organs that had access to it. Thus, the capacity to ask for an advisory opinion is wider under the UN Charter than under the League Covenant. Second, statistically speaking, the PCIJ rendered 27 advisory opinions in its 24 years of existence, namely from 1922 to 1946, compared to a total of 24 by the ICJ from 1946 to 2007. Statistically that is indicative of an apathetic attitude in making any substantial use of this function of the Court on the part of the main UN bodies (SC and GA) and the specialized agencies.

In accordance with the legal function of the Court, and in order to prevent it from making general statements on political issues, or become a semi-legislative organ,[186] its advisory jurisdiction has been confined to questions of law applying to definite

183 *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann et al. (eds.), Oxford University Press, 2006, p. 182.

184 See *inter alia* M.M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005*, Springer Berlin/Heidelberg, 2006.

185 ICJ, *Reparation for Injuries*, ICJ Reports 1949, p. 188.

186 Note in this respect the role of the European Court of Justice in clarifying European Union law commented upon by many authors as a quasi-legislative function.

circumstances and not of a general or abstract character. The Court itself has the power to decide whether a question is of a legal or of a political nature.

> The categories of request have included questions which the requesting body puts to the Court to secure guidance for itself as to its future action; questions put in the course of dealing with a particular dispute or situation, with or without the consent of the States parties to that dispute or situation; and (theoretically) questions put at the request of the States concerned when the body is dealing with a dispute between those States. These were frequently encountered in the League of Nations, but rarely encountered in the United Nations.[187]

In all the requests for an advisory opinion that have come before the Court, the request has been in the form of a formal resolution or decision adopted in the normal manner by the requesting organ.[188] Nevertheless, this does not mean that this is mandatory and the request is not valid if it is adopted in a different way. The Court has taken a generous view of the inadequate formulation of requests, and has made ample use of its inherent power to interpret them. While this phenomenon should be taken with a certain degree of reserve, it however seems unavoidable in view of the setting where the request is drafted, namely that of a political debate between representatives of different member States of the UN. The advantages and shortcomings of contentious cases and advisory proceedings in furthering international human rights and humanitarian law shall be discussed briefly below.

### 2.11.1 Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles through Advisory Opinions

As pointed out in Rosenne's 'The World Court', the Court's advisory process is dominated by two characteristic ambiguities.[189] The first ambiguity is the absence from the proceedings of 'parties' in the strict sense of the term and the second ambiguity is that the advisory opinion rendered does not have the quality of *res judicata* accompanied with the obligation of compliance. Theoretically, though, 'this does not prevent an agreement outside the Court's proceedings from conferring a decisive or binding quality on an advisory opinion, but strictly speaking that is not a matter for the Court in the exercise of its general discretion whether to give an advisory opinion at all'.[190] Although an advisory opinion does not in itself attract the consequences of *res judicata,* its legal authority is beyond discussion. As Judge Shahabuddeen, a former Judge of the Court, has stated, '…although an advisory opinion has no binding force under article 59 of the Statute, it is as authoritative a statement of the law as a judgment

187 Rosenne, pp. 287-288.

188 Rosenne, p. 342.

189 S. Rosenne, *The World Court: What It is and how It works*, Sixth Completely Revised Edition by Terry D. Gill, Martinus Nijhoff Publishers: Leiden/Boston, 2003, p. 236.

190 *Ibidem*.

rendered in contentious proceedings'.[191] When one considers the importance of the advisory opinions in light of their non-binding nature, the impact of the work of the Court becomes more evident.[192] The legal effect of the Court's decisions upon contentious cases has been clearly laid down in the Court's Statute. Thus, unlike advisory opinions, according to the Court's Statute a judgment of the Court is binding (solely) upon the parties to the dispute, final and without appeal.[193]

A considerable number of requests for advisory opinions touching upon matters of considerable political controversy were referred to the Court from 1946 to 1990, despite the ongoing Cold War.[194] Thus, seemingly this political tug-of-war between the two camps did not affect the use of the Court, as far as its advisory function is concerned. It can even be said that this function of the Court had a constructive and appeasing effect in providing an independent legal forum for solving differences by means of international law. However, notably in the case of advisory opinions asked by the main UN organs arising from differences between them and States, or between States themselves, the position adopted by concerned governments in the aftermath of such an advisory opinion was in many instances one of non-acceptance. South Africa in the *South-West Africa cases*, Morocco in the *Western Sahara*, and Israel in the *Legal Consequences of the Building of a Wall in the Occupied Palestinian Territory* being prominent examples. With the benefit of hindsight, probably it would not be helpful for the Court's standing to be often involved in such controversial disputes, unless there is enough willingness on the part of the other main UN organs, namely the SC and the GA, to ensure that the Court's advisory opinion is ultimately complied with.

As illustrated in the analysis of some of the advisory opinions in the following chapters, through its advisory opinions the Court has certainly made an invaluable contribution to the development of international human rights and humanitarian law rules and principles. An interesting question would be whether advisory opinions are a better vehicle for the interpretation and development of the law in this respect. Although one has to consider that an advisory opinion is not binding, indubitably it offers the Court ample opportunities to clarify certain areas of law which still remain open. In rendering an advisory opinion the Court might have more latitude to deal with different related legal issues than in a contentious one, however, the legal value of its findings remains the same. In a contentious case the Court is limited under the *non*

191 M. Shahabuddeen, *Precedent in the World Court*, Grotius Publications, Cambridge University Press, 1996, p. 171.

192 One can refer here to the advisory opinions on the *Reparation for Injuries Suffered in the Service of the United Nations* (*Reparations* case), on the *Certain Expenses of the United Nations* (*Certain Expenses* case), and the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*Reservations* case) to mention just a few.

193 Respectively Articles 59 and 60 of the ICJ Statute.

194 From 1946 to 1990 20 requests for an advisory opinion were referred to the ICJ all of which were complied with (from these requests the one on *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* was divided into two phases, see respectively ICJ Reports 1950 p. 65 and p. 221).

*ultra petita* rule to passing judgment only on the claims put forward by the parties to the proceedings. Similarly, in an advisory opinion the Court would have to limit its findings to the question posed before it. Thus, apparently both options have their own advantages and shortcomings as far as the interpretation and development of international human rights and humanitarian law rules and principles are concerned. Concern was expressed over the obliteration of the distinction between the two spheres of the Court's jurisdiction, and the fundamental principle of the independence of States, were the advisory procedure used as a means of bypassing the consent of a State.[195] As the Court has noted, it has undoubtedly been the usual situation for an advisory opinion of the Court to pronounce on existing rights and obligations, or on their coming into existence, modification or termination, or on the powers of international organs.[196] The Court has made use of these opportunities and until now, with one exception,[197] has never refused to answer the questions put before it by the UN organs or the authorized agencies.

This willingness of the Court to render its contribution to the good functioning of the UN and the overall satisfactory record it has built in the meantime give rise to a simple question: Should this advisory function of the Court be made available to other UN organs and agencies? The reasons for taking such steps are twofold. First, giving access to a larger number of other organs and agencies operating in the fields of international human rights and humanitarian law gives them an important tool they can use whenever necessary to get useful and authoritative legal advice in fulfilling their functions. Second, such a step would potentially help in countering the further fragmentation of international law, thus making it possible to use the synergy between different branches of international law resulting in a better protection for human rights. That would be a step in the direction of a better regulation and organization of the international legal order and crystallizing the role and position of the Court within it.[198] The advantage of this approach is that increasing the number of bodies able to request an advisory opinion from the Court does not necessitate changes in the Court's Statute or the UN Charter, but could be done by means of GA resolutions. This issue is further explored in the last chapter.

195 ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, pp. 22-3, para. 27.
196 *Western Sahara*, p. 20, para. 19.
197 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 66.
198 See *infra* sections 6.1.2 and 6.1.3.2.

## PART III APPRAISAL OF THE COURT'S POSSIBILITIES AND LIMITATIONS IN THE FIELDS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

The degree of the openness and the receptiveness of States towards the activity and function of the World Court can and should be deduced from their willingness to submit to its jurisdiction and to bestow upon international law and judicial dispute settlement mechanisms in general a prominent and constructive place in their international relations, along other means available for the peaceful settlements of international disputes. As Rosenne aptly puts it, the attitude of States toward the Court is a manifestation of their more fundamental attitude and the real respect in which they hold international law.[199] Certainly, the Court does not constitute an exclusive, self-contained world, but exists as part of a wide-ranging set of mechanisms and means for the resolution of inter-state disputes.[200] Notwithstanding its inherent limitations, the Court has found innovative ways of adapting to a rapidly developing human society. In the constantly fluid international scene and throughout the tensions of the Cold War and beyond the Court has played a pacifying and stabilizing role. By taking steps to revise its Rules of Procedure and by issuing its Practice Directions, the ICJ has continuously been trying to shorten the gap between the filing of a case and the rendering of a decision. Those have been some of the internal steps taken by the Court to improve its effectiveness in order to provide a better legal service to the international community according to the Roman maxim '*Justitia non est neganda, non differenda*'.[201]

The system of protection and promotion of human rights at present is composed of a three-layered structure: national, regional, and international. Each of these layers is important, in that each one separately and jointly has an important role to play in defending the humanitarian values that both international human rights and humanitarian law embody. The ICJ stands at the apex of international legal development,[202] and thus can play an important role with regard to these two branches of international law both substantially and institutionally. Regarding the role of the Court in the development of international law Rosenne has observed:

> More important than particular attitudes on individual problems of law is the general approach adopted by the Court. Here the Court has introduced an element of healthy dynamism well matching the new trends of international organization and the requirements of international society. It displays no signs of moribund conservatism and excessive formalism said to be characteristic of a lawyer. Far from it. Many of its pronouncements are marked by vigour and zeal to bring the principles of the law and its application into harmony

199 Rosenne, p. 176.

200 M.N. Shaw, *The International Court of Justice: a practical perspective*, ICLQ, Vol. 46, 1997, p. 864.

201 *Justitia non est neganda, non differenda* (Lat.) – Justice is not to be denied or delayed. See in Black's Law Dictionary, 7th edition, West Group, 1999, p. 1651.

202 T.M. Franck, *Fairness in International Law and Institutions*, Oxford: Clarendon Press, 1995, p. 318.

> with present-day necessities…The Court–taking its cue from the practice of States and from arguments advanced before it–has shown its awareness of the unsatisfactory features of classic international law and has been conscientious in readapting that law to the requirements of modern international life.[203]

Even within the limited sphere of its activity, hedged in by the sacrosanct limits of consent and curbed by the absence of any execution machinery, the International Court has done a remarkable job in building a body of case law which is evidence of existing international law of the highest value.[204] That body of case law shall be dealt with in detail in the following chapters.

The Court is not the only international judicial body operating in the fields of international human rights and humanitarian law. At present there exist a considerable number of international courts and tribunals. Just a glimpse at this multi-pieced mosaic reveals that although international courts and tribunals are generally praised and paid a lot of lipservice in different circles, they encounter quite a few problems in discharging their duties ranging from political acceptance and State cooperation to the more mundane administrative hurdles. As an example the recently established ICC, entrusted with the prosecution of persons suspected of having committed grave international crimes, such as genocide, war crimes and crimes against humanity, is lacking the support of some of the most important actors on the international level. Thus, it is important to take into account that at the end of the line is international polity, which determines the efficiency of international criminal courts. This pre-existing situation and the risk that the 'proliferation' of ICTs brings with it have compelled President Guillame of the ICJ to suggest that 'the international legislator should ask himself whether the judicial review functions for which he thus wishes to provide could not be better carried out by an existing court'.[205] Indeed, a strengthening of the existing ICTs and focusing on enforcing the existing human rights and humanitarian law instruments would better serve the protection and the enjoyment of human rights.

In clarifying the constitutional-like role of international tribunals for the international community Judge Fitzmaurice has stated:

> In the international field there is at present nothing comparable to a legislature, and the operation of the so-called law making treaty is both uncertain and leaves many loose ends. The international community is therefore peculiarly dependent on its international tribunals

203 S. Rosenne, *The International Court of Justice*, Sijthoff: Leyden, 1957, p. 13.

204 R.P Anand, *The International Court as a 'Legislator'*, IJIL, Vol. 35, 1995, p. 125.

205 Speech by H.E Judge G. Guillame, former President of the ICJ, given at the Lauterpacht Centre for International Law, University of Cambridge, on 9 November 2001 (on file with the author). Available at: *http://www.lcil.cam.ac.uk/Media/lectures/doc/Guillaume.doc* (last accessed on 1 November 2007). He had expressed a similar view in somehow more categorical terms also before the GA in his speech of 31 October 2001. In his words: 'No new international court should be created without first questioning whether the duties which the international legislator intends to confer on it could not be better performed by an existing court.' Available at: *http://www.icj-cij.org/court/index.php?pr=82&pt=3&p1=1&p2=3&p3=1* (last accessed on 1 November 2007).

> for the development and clarification of the law, and for lending to it an authority more substantial and less precarious than can be drawn from often divergent or uncertain practices of States, or even from the opinions of individual publicists, whatever their repute.[206]

National courts, along with other State organs, have a duty to implement the decisions of international courts and tribunals. Obviously, non-compliance with such decisions can trigger State responsibility. As the PCIJ has clarified with regard to the relationship between the domestic and the international judicial layer it is impossible to attribute 'to a judgment of a municipal court power indirectly to invalidate a judgment of an international court'.[207] The instructive role of international courts and tribunals with regard to the enforcement of human rights and humanitarian law instruments is beyond discussion. As shall become evident from the following chapters not only can an international court such as the ICJ apply human rights and humanitarian law instruments in the settlement of disputes or in answering questions for an advisory opinion brought before it, but it can also help in its clarification, systematization and development. It is commonly accepted that the fiction that courts do not 'make' the law but only 'discover' or 'reveal' it is no longer plausible on an international or even on a national level.[208] Indeed, the legislative and judicial process are connected and 'the act of the Court is a creative act in spite of our conspiracy to express as something else'.[209] Despite the reluctance of the Court in acknowledging this fact, or even stating the contrary,[210] it is clear that through its case law it has made an important contribution in clarifying different areas of international law, and especially international human rights and humanitarian law.

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206 Sir Gerald Fitzmaurice, *Hersch Lauterpacht: The Scholar as Judge, Part I*, British Yearbook of International Law (BYbIL), 1961, p. 18.

207 PCIJ, *Factory at Chorzów*, (*Merits*), Series A, No. 17, 1928, para. 33.

208 ICTY, *Prosecutor v. Delalic et al*., Case No. IT-96-21-T, Judgment of 16 November 1998, para. 165. Trial Chamber II of the ICTY stated: 'The interpretative role of the judiciary is, however, never denied.' Nevertheless concerns have been voiced concerning this view. W.A. Schabas has noted: 'In the future, judges will have greater difficulty undertaking the judicial lawmaking that the *ad hoc* Tribunal for Yugoslavia performed in the *Tadić* case, and this will make it harder for justice to keep up with the imagination and inventiveness of war criminals. Indeed, the Tadić Appeals Chamber may well have frightened States with its bold judicial making, who then resolved that they would leave far less room for such developments in any statute of an international criminal court.' W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2001, p. 42. On the issue of law-making by the Court see *inter alia* Shahabuddeen, *supra* note 23, pp. 67-96, A. Pellet, in *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann et al. (eds.), Oxford University Press, 2006, pp. 788-790.

209 J.L. Brierly, *The Judicial Settlement of International Disputes*, in H. Lauterpacht and C.H.M Waldock, (ed.), *The Basis of Obligation in International Law*, Oxford: Clarendon Press, 1958, p. 98.

210 See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 237, para. 18. There the Court stated: 'It is clear that the Court cannot legislate… Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable…The Court… states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.'

The Court's direct involvement with the fate of individuals when States have proceeded on the basis of the right of diplomatic protection to bring a case before the Court on behalf of one or more of their citizens is a good example of the Court's potential in the field of human rights protection.[211] Having on several occasions emphasized that it is an 'organ of international law' and a 'court of law', the Court has nevertheless accepted that it can take account of moral principles, albeit only in so far as these are given a sufficient expression in legal form.[212] That interplay between morality and international law seems to lie at the heart of the Court's findings in several contentious cases and advisory opinions.[213] To the extent that the Court has managed to be a factor in the protection and promotion of human rights values it has made clever and innovative use of the tools provided by international law, despite the lack of clarity and precision in the principles of international law and the skepticism of States concerning the submission of their disputes to the adjudicatory process. In the words of Judge Lachs: 'In fact the Court is the guardian of legality for the international community as a whole, both within and without the United Nations.'[214] In fulfilling that difficult duty the Court has also contributed to the development and interpretation of international human rights and humanitarian law rules and principles.

211 Examples include the *Breard* case, the *LaGrand* case, and the *Avena and Other Mexican Nationals* case. For a detailed discussion see *infra* section 3.11.

212 ICJ, *South-West Africa Cases*, (Second Phase), ICJ Reports 1966, p. 34, para. 49.

213 See *inter alia* the *Corfu Channel* case and the *Barcelona Traction* case *infra*. On the interplay between morality and law Judge Fuad Ammoun stated: 'Morality, it has been said, hovers around the law: and one may add, with N. Politis and following Ulpian and Cicero, that it should have dominion over it. In turning away from it, international law condemns itself to sterility in face of a society bubbling over with life. The normative school and its pure theory of law, in rejecting the moral, social and political elements, described as metajuridical, become isolated from international realities and their progressive institutions: *ubi societas, ibi jus*.' ICJ, *North Sea Continental Shelf* (Federal Republic of Germany *v.* The Netherlands), Separate Opinion of Judge Ammoun, ICJ Reports 1969, p. 137.

214 ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (*Libyan Arab Jamahiria v. United Kingdom*), (*Provisional Measures*), Order of April 14 1992, Separate Opinion of Judge Lachs, ICJ Reports 1992, p. 27.

# CHAPTER 3
# THE ICJ'S CONTRIBUTION TO THE INTERPRETATION AND DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW RULES AND PRINCIPLES

## PART I BACKGROUND

*The Universal Declaration of Human Rights – This great and inspiring instrument was born of an increased sense of responsibility by the international community for the promotion and protection of man's basic rights and freedoms. The world has come to a clear realization of the fact that freedom, justice and world peace can only be assured through the international promotion and protection of these rights and freedoms.*

U Thant, Third United Nations Secretary-General, 1961-1971

### 3.1 INTRODUCTION

This chapter represents an effort to place the contribution of the ICJ to the interpretation and development of rules and principles of international human rights law in a systematic perspective.[1] While a few general articles have been written on this topic,[2] and a number of articles on specific judgments or advisory opinions delivered by the

1 While there is no accepted definition of human rights many authors agree that these are rights one holds as a virtue of being a human being. See *inter alia* J. Donnelly, *Human Rights, Individual Rights and Collective Rights*, in Human Rights in a Pluralist World, 1990, p. 39; H.V. Kondé, *A Handbook of International Human Rights Terminology*, 2nd ed., University of Nebraska Press, 2004, p. 111.

2 See *inter alia* E. Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, AJIL, Vol. 66, 1972, pp. 337-351; N.S. Rodley, *Human Rights and Humanitarian Intervention: The Case Law of the World Court*, ICLQ, Vol. 38, April 1989, pp. 321-333; S.M. Schwebel, *Human Rights in the World Court*, in International Law in Transition: essays in memory of Judge Nagendra Singh, R.S Pathak (ed.), Martinus Nijhoff Publishers, 1992, pp. 267-290; S.M. Schwebel, *The Treatment of Human Rights and of Aliens in the International Court of Justice*, in Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings, V. Lowe and M. Fitzmaurice (eds.), Cambridge University Press 1996, pp. 327-350; R. Higgins, *The International Court of Justice and Human Rights*, in International Law: Theory and Practice: Essays in Honour of Eric Suy, K. Wellens (ed.), Kluwer Law International, 1998, pp. 691-705; A. Duxbury, *Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights*, California Western International Law Journal, Vol. 31, 2000, pp. 141-176; J. Grimheden, *The International Court of Justice in Furthering the Justiciability of Human Rights*, in G. Alfredsson *et al.* (eds.), International Human Rights Monitoring Mechanisms, Kluwer Law International, 2001, pp. 469-484, G. 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, Netherlands Quarterly of Human Rights (NQHR), Vol. 25, 2007, pp. 117-139.

Court,[3] a systematic detailed study, which could be of particular theoretical and practical use, has hitherto been largely lacking.[4] Identifying the relevance of the Court's cases or advisory opinions to the interpretation and development of international human rights law is not always an easy and straightforward task. Such a contribution might sometimes be implicit, making the process of identifying and analyzing it a more daunting task. A possible risk of such an undertaking is also that of being perceived as overly critical or overly lenient in the assessment of this part of the activity of the Court. However, all things being considered this is a risk that is worth taking, for the Court's findings, besides their practical value, are historical milestones which have marked the development of our society and of international law.

Along with maintaining international peace and security, the promotion and protection of human rights is one of the main purposes of the UN, of which the ICJ is the principal judicial organ. A large number of international human rights instruments have been concluded within the ambit of the UN. These instruments usually provide for their own human rights enforcement and monitoring mechanisms. Over time the UN has developed into an important actor in the context of human rights, along with its many other areas of activity. The intention of the founders of the UN to foster the promotion and protection of human rights becomes clearer from a joint reading of some of the provisions of the UN Charter, namely Articles 1, paragraphs (3) and (4), 13, 55, 56, 62, and 68. For a better understanding of this role of the UN, and consequently also of the Court as an important component of this key international organization, it is proper to quote these articles, although in a slightly different order.

Article 1, paragraphs (3) and (4), read:

> The Purposes of the United Nations are:
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and *in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion* (emphasis added).
> 4. *To be a center for harmonizing the actions of nations in the attainment of these common ends* (emphasis added).

3 For a detailed list of sources see the bibliography in this book.

4 So far there are two publications on this issue, namely R. Goy, *La Cour Internationale de Justice et les* Droits de l'Homme, Bruylant: Brussels, 2002, and S.R.S Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing: Oxford – Portland Oregon, 2007. For the contribution of the PCIJ to human rights see R. Goy, *La Cour Permanente De Justice Internationale Et Les Droits De L'Homme*, in Liber Amicorum Marc-André Eissen, Bruylant: Brussels, 1995, pp. 199-232.

Article 55 reads:

> 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
> (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
> (c) *universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion* (emphasis added).'

Article 56 reads:

> 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.'

In order to achieve the above-mentioned aims the GA can initiate studies and make recommendations for the purpose of *inter alia* promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[5] Further, ECOSOC, one of the main organs of the UN can make recommendations for the purpose of promoting respect for, and the observance of, human rights and fundamental freedoms for all.[6] Moreover, Article 68 of the UN Charter foresees that ECOSOC shall set up commissions in economic and social fields and for the *promotion of human rights* (emphasis added). Thus, even a superficial reading of these articles would prompt the conclusion that the UN with its organs and specialized agencies represents the main vehicle for the promotion and protection of human rights worldwide. Being one of the main organs of the UN and its principal judicial organ, the ICJ, since the beginning, has played and will continue to play an important role in the continuous endeavour of achieving the aims enumerated in the UN Charter. These rather broadly formulated aims were subsequently detailed and incorporated into the International Bill of Human Rights – a term including the Universal Declaration of Human Rights (UDHR) of 1948 and the two International Covenants of 1966 – and other international human rights instruments.

A brief overview of the development of international human rights law will be given below in order to ensure better clarity and to put into perspective the ICJ's contribution to the interpretation and development of rules and principles of this branch of international law. By way of illustration, suffice it to mention here the *obiter dictum* in the *Barcelona Traction* case concerning the *erga omnes* nature of funda-

5 UN Charter, Article 13.
6 UN Charter, Article 62.

mental human rights which lies at the roots of the development and the acquired importance of the international law of human rights.[7] Although the ICJ is somehow restricted in this respect due to the lack of *locus standi* for individuals, it has been seized with cases where issues of the international law of human rights either form the subject-matter of the dispute or are closely related to it. Numerous examples of the Court's contribution to this branch of international law are given in the second part of this chapter which focuses on relevant case law.

Although in the course of its work the ICJ has dealt rather extensively with issues intrinsically related to or touching upon human rights, this has been reflected in only a few publications where the contribution of the Court in interpreting and developing international human rights law rules and principles has been the main subject of the research.[8] Through a detailed discussion of the relevant case law it is hoped that the role of this international judicial body will become clearer and provide some useful guidance to those who are involved in the field of standard-setting and the enforcement of international human rights law. Indeed, it is important that knowledge concerning this contribution does not remain in the sole domain of a limited number of scholars. The case law relating to the contribution of the Court to human rights has been organized in separate topics, namely that on fundamental principles of human rights, on the right of people to self-determination, on the prohibition of genocide, on the right to asylum, on diplomatic protection and consular relations disputes, on the status and treatment of human rights rapporteurs, on the application of international human rights instruments in armed conflicts, and on individual criminal responsibility for internationally recognized crimes. Such an approach, instead of a chronological, case-by-case discussion, will hopefully provide better clarity on the contribution of the Court to international human rights law.

The list of the cases to be discussed in this chapter is more extensive than the following one relating to humanitarian law issues. The reason for this difference in quantity, besides the fact that the jurisdiction of the Court cannot be found in humanitarian law instruments, due to the complete lack of compromissory clauses therein, can also be the wider array of rights that international human rights law encompasses. Secondly, peace rather than armed conflict is the usual state of affairs in our society. Thirdly, this numerical difference in cases can also be explained by the strict nexus of international humanitarian law with armed conflict, while international human rights instruments, save for in-built derogations, apply both in peacetime and during armed conflict or occupation. A thorough examination of the Court's relevant case law regarding its contribution to the development and interpretation of rules and principles of the international law of human rights has been provided in the second part of this chapter. The third and final part aims to provide an appraisal of this contribution by the Court.

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7 ICJ, *Barcelona Traction* (Belgium *v*. Spain), (*Merits*), Judgment of 5 February 1970, ICJ Reports 1970, p. 32, para. 33. For a detailed discussion of this case see *infra* section 3.6.

8 See *supra* notes 2 and 4.

## 3.2 THE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW

When dealing with human rights the first question that arises is where do human rights stem from? In many important international human rights instruments it is stated that human rights derive from the inherent dignity and worth of the human being.[9] Besides legal entitlements, human rights are also a value which is often referred to as the 'common heritage' or the 'common language' of humankind.[10] As Shestack has summarized, in general, when referring to human rights, one may be speaking of one or more of the following qualities:

(1) intrinsic value,
(2) instrumental value,
(3) value in a scheme of rights,
(4) importance in not being outweighed by other considerations, or
(5) importance as a structural support for the system of the good life.[11]

For our purposes here the international law of human rights is understood as being that part of international law which comprises numerous international instruments and to a significant extent is reflected in customary international law, and these instruments have been adopted with the aim of achieving a proper promotion and protection of the human rights and dignity of all human beings without adverse discrimination. The international instruments adopted for this aim comprise a rather detailed normative framework. Indeed, over a relatively short period of time international human rights law has developed to 'create a body of universal standards and values at the service of human dignity, equality and non-discrimination, and human freedoms'.[12] It is obvious, not only to the human rights scholar, but also to the average layperson that the body of international human rights law experienced a large and substantial growth

9 See the preamble to the Universal Declaration of Human Rights (1948), the preamble to the ICCPR and the ICESCR (1976), the Vienna Declaration and Programme of Action (1993), the American Declaration of the Rights and Duties of Man (1948), the American Convention on Human Rights or the Pact of San Jose (1978), the European Convention of Human Rights and Fundamental Freedoms (1950), the African Charter on Human and People's Rights or the Banjul Charter (1986). For a general discussion of human rights based on the concept of human dignity see *inter alia* M.S. McDougal, H.D. Lasswell, and L.C. Chen, *Human Rights and World Public Order*, Yale University Press: New Haven, Connecticut, 1980.

10 J. Symonides (ed.), *Human Rights: Concept and Standards*, Ashgate: Dartmouth, UNESCO Publishing, 2000, p. xi. See *inter alia* Vienna Declaration and Programme of Action, UN Doc., A/CONF. 157/23, 12 July 1993; Universal Declaration on the Human Genome and Human Rights, UNESCO, 11 November 1997; 2005 World Summit Outcome (Millennium Development Goals), GA Resolution 60/1, 16 September 2005 (Annex 2); K. Baslar, *The Concept of the Common Heritage of Mankind in International Law*, The Hague/Boston/London: Martinus Nijhoff Publishers, 1998, pp. 318-335.

11 J.J. Shestack, *The Philosophical Foundations of Human Rights*, in Human Rights: Concept and Standards, J. Symonides (ed.), Ashgate: Dartmouth, UNESCO Publishing, 2000, p. 33.

12 J. Symonides (ed.), *Human Rights: Concept and Standards*, Ashgate: Dartmouth, UNESCO Publishing, 2000, p. xi.

in the decades following the Second World War.[13] For Buergenthal, a member of the ICJ since March 2000, the idea that the protection of human rights knows no international boundaries, and that the international community has an obligation to ensure that governments guarantee and protect human rights wherever they may be violated, has gradually captured the imagination of mankind.[14] However, against this impressive development in the conceptualization, standard-setting and institutionalization of the protection of human rights, practice shows that still quite a lot remains to be done to fully implement these commonly agreed human rights standards.

The importance of human rights, illustrated amongst other things also by the *jus cogens* status that certain human rights have achieved, is largely due to the emergence, the development and the acquired importance of the human rights discourse in the international arena. This development stems from the human rights clauses of the UN Charter and, obviously, from the moral and legal weight that command the duty to respect and to ensure respect for human rights. There is a huge difference from the former situation where the individual was considered to be just an object of international law to nowadays when few would argue against the fact that the individual is a participant in the international legal system.[15] Indeed, at present the individual enjoys a set of rights provided for by numerous international human rights instruments, while at the same time also bears certain duties and responsibilities. While individuals usually do not have specific duties under human rights treaties, international law provides for individual criminal responsibility for violations that constitute internationally recognized crimes such as genocide, war crimes, crimes against humanity, and torture.[16] The latest developments seem to suggest that the above-mentioned crimes have come to be subject to universal jurisdiction,[17] just like piracy and the slave trade.

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13 For a list of core international human rights instruments and their monitoring bodies see the official website of the Office of the High Commissioner for Human Rights at: *http://www.ohchr.org/english/law/index.htm* (last accessed on 1 November 2007).

14 T. Buergenthal, *International Human Rights in an Historical Perspective*, in Human Rights: Concept and Standards, J. Symonides (ed.), Ashgate: Dartmouth, UNESCO Publishing, 2000, p. 4.

15 The term participant in as opposed to the object or subject of international law was first introduced by Rosalyn Higgins, see R. Higgins, *Problems and Process. International Law and How We Use It*, Oxford, Clarendon Press, 1994, pp. 48-55. As mentioned at the beginning of chapter 1, the substantial change in the perception of the position of the individual under international law since the establishment of the ICJ, and a widespread perception of the latter as essentially extraneous to human rights, have been among the reasons why such a study has been largely lacking until now.

16 See *inter alia* T. Meron, *War Crimes Law Comes of Age*, Oxford University Press: New York, 1999.

17 On the issue of universal jurisdiction see *inter alia* the following articles: B. Graefrath, *Universal Jurisdiction and an International Criminal Court*, EJIL, Vol. 1, No. 1, 1990, pp. 67-89; A. Bianchi, *Immunity versus Human Rights: The Pinochet Case*, EJIL, Vol. 10, No. 2, 1999, pp. 237-279; S. Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case before the French Cour de Cassation*, EJIL, Vol. 12, No. 3, 2001, pp. 595-613; A. Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, EJIL, Vol. 13, No. 4, 2002, pp. 853-877; S. Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, EJIL, Vol. 13, No. 4, 2002, pp. 877-895; M. Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non*

The question of the possibility of individuals being the subjects of international law came before the predecessor of the ICJ, the PCIJ, and was answered in the positive. In the advisory opinion of the PCIJ in the *Jurisdiction of the Courts of Danzig* case,[18] this court admittedly accepted that the contracting Parties might create rights and obligations for private parties. At earlier stages the exertion by States of the right to diplomatic protection on behalf of their citizens necessarily shifted attention to the rights of the individual, better reflected in the words of the PCIJ, stating that 'the fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them'.[19] That paradigm shift paved the way for further advancements regarding the position and the standing of individuals under international law. Whether entitlement is accompanied by the capacity to enforce these human rights is an issue which should be answered on a case by case approach with reference to the given situation and to the relevant international instrument.

With the establishment of international or mixed criminal courts and tribunals international human rights law has finally achieved a new qualitative and quantitative level of enforcement. At present, besides regional human rights judicial bodies, accountability for gross violations of human rights such as genocide and crimes against humanity stemming from principles of international human rights law can also be achieved at an international level through these recently established international criminal judicial bodies. This last development is mainly due to the end of the Cold War, which reinvigorated the human rights movement and made it less likely for violators of human rights to be shielded from international prosecution and condemnation for political reasons. Thus, nowadays individuals as well as States can be held responsible for massive and systematic violations of human rights. There are quite a few examples of former heads of States or senior state officials indicted or facing trial

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*Datur?*, EJIL, Vol. 13, No. 4, 2002, pp. 895-902. See also M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, School of Human Rights Research Series, No. 19, Intersentia, 2005. There are several compilations of principles on universal jurisdiction: see *inter alia* the Princeton Principles on Universal Jurisdiction available at: *http://www.princeton.edu/~lapa/unive_jur.pdf*; the Amnesty International Principles on Universal Jurisdiction available at: *http://web.amnesty.org/pages/uj-index-eng*.

18 PCIJ, *Jurisdiction of the Courts of Danzig*, Advisory Opinion, Series B, No. 15, pp. 17-21 stating: 'It might be readily admitted that, according to a well established principle of international law, the *Beamteabkommen*, being an international agreement, cannot as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, *according to the intention of the contracting Parties* (emphasis added), may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.'

19 PCIJ, *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (*The Peter Pázmány University v. The State of Czechoslovakia*) , Series A/B, No. 61, 1933, p. 231 (*Peter Pázmány* case).

on charges of genocide and crimes against humanity.[20] Thus, individual criminal responsibility for large-scale and widespread violations of internationally protected human rights has become a tangible reality.

Partly, but not only for didactical purposes, the development of human rights law has been compartmentalized into so-called generations.[21] This compartmentalization has its roots in the ideological divide that existed for most of the twentieth century between the two main blocs, namely the Western and the Eastern one: each of them putting more stress on the priority of that set of rights closely related to their ideology. While the Western bloc countries considered civil and political rights to be more important, the Eastern bloc countries deemed economic, social and cultural rights to be the principal individual rights. Such a preference for one set of rights over the other was reflected in a political tug-of-war finding expression ultimately in the adoption of two separate International Covenants, that on Civil and Political rights, and that on Economic, Social, and Cultural Rights. Article 2 of the ICCPR states that every State Party to this Covenant undertakes to ensure that any person whose rights or freedoms recognized in the Covenant, are violated shall have an *effective remedy* (emphasis added), notwithstanding that the violation might have been committed by persons acting in an official capacity. On the contrary, Article 2 of the ICESCR is couched in less stringent terms. It states that each State Party undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by all appropriate means, including particularly the adoption of legislative measures. Although initially the background to these rights and the support they enjoyed came from different ideologies, it has become widely accepted that these two sets of rights are complementary and interdependent.

This polarized and tense political situation which prevailed during the Cold War was prone to and did in fact impinge upon the work of the ICJ. Under these circumstances the Court had to take extra care not to be perceived as overstepping its competences and making findings that would alienate its clients and ultimately bring its activity to an impasse. For example, the Court in the *Nicaragua* case, despite claims entered by the US arguing that its actions were an exercise of self-defence in view of

20 Slobodan Milošević, the former President of the FRY, was charged while in office and appeared before the ICTY on 3 July 2001 – his death in detention in The Hague on 11 March 2006 put an end to his trial on charges of genocide, war crimes, and crimes against humanity; Hissène Habré, the former ruler of Chad will face trial in Senegal on charges of torture and crimes against humanity; Augusto Pinochet was indicted in Spain and other countries, including his own, Chile, for crimes such as torture and forced disappearances – he died on 10 December 2006; Jean Kambanda, the former Prime Minister of Rwanda, was tried and sentenced to life imprisonment by the ICTR on charges of genocide and crimes against humanity; Charles Taylor, the former President of Liberia, is facing trial before the Special Court for Sierra Leone for crimes against humanity; Ahmad Harun, Sudan's minister of State for humanitarian affairs indicted before the ICC in February 2007 still remains at large.

21 See *inter alia* C. Flinterman, *Three Generations of Human Rights*, in Human Rights in a Pluralist World: Individuals and Collectivities, J. Berting *et al*. (eds.), Meckler: Westport, 1990, p. 75-81.

the breaches by the Nicaraguan government of it commitments to the Nicaraguan people, the US, and the Organization of American States (OAS) (among those breaches being political ideology and alignment, totalitarianism, and human rights violations), avoided going into the sensitive area of enquiring into which system of government inherently violates human rights.[22] A direct pronouncement on that issue when the Cold War was at its height would have had an adverse impact on the Court's image and case-load. Thus, while not unnecessarily alienating the Eastern bloc countries, the Court, however, clarified that human rights-related issues were of a domestic nature as long as they did not violate international law obligations.[23] A clear answer to that question came later through the Vienna Declaration and Programme of Action of 1993 where it was stated that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.[24] However, that widely agreed statement came after the fall of communism, which was followed in turn by a worldwide revival of the international human rights movement.

Besides these two early generations there is a third generation of human rights comprising of broader rights such as the right to sustainable development,[25] the right to a clean environment,[26] the right to peace, and so on, known and also referred to as solidarity rights.[27] Clearly, there is a noticeable difference between these three genera-

22 *Nicaragua* case, (*Merits*), paras. 257-259.

23 *Ibid*., para. 259. The Court stated: 'A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems.'.

24 This issue was addressed in paragraph 8 of the Vienna Declaration and Programme of Action of 1993. This paragraph reads: 'Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.' UN Doc., A/CONF. 157/ 23, 12 July 1993.

25 See *inter alia* the Declaration on the Right to Development, GA Resolution 41/128, December 1986. It is interesting to note that Article 2 (1) reads: 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development.' The Declaration goes on to call upon States, which bear primary responsibility for the implementation of this resolution, to take all necessary measures at a national and international level to implement this Declaration.

26 See paras. 27-33 of the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, pp. 241-243. The Court noted that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

27 From the right to development the emphasis has shifted to sustainable development, a concept which accommodates legitimate environmental concerns. As for the right to peace, while it is in principle a fundamental right, it appears rather difficult to transform it unto a legal obligation. A shift might come when States parties to the Rome Statute establishing the ICC agree on a definition of aggression, which will finally provide the necessary legal basis for making this crime punishable by the ICC.

tions of human rights, first in their nature and consequently also in their enforceability. While some of these rights, usually the civil and the political ones, are enforceable in a court of law, the rest are mainly standards of achievement to be attained primarily through State or inter-State action or co-operation. However, at the same time it is also clear that all these rights are interconnected and interdependent to the degree that they can and should be considered indivisible. By way of illustration, in addressing the right to development, Judge Weeramantry stated:

> After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.
> It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of the modern international law. It is compendiously referred to as sustainable development.[28]

Despite the differences in their nature, enforceability or other aspects, human rights are intrinsically linked.[29] Therefore, the issue of the applicability of different human rights generations is not a matter of 'either, or', but of a complementary one aimed at attaining the highest human rights standards. The ICJ itself has ruled on the applicability of provisions coming from both the ICCPR and the ICESCR in a number of cases which are discussed in more detail below.

Human rights are broadly conceived as being based and stemming from the concept of human dignity, are inherent in every person and are aimed at preserving that very dignity and worth of the human being. Human dignity is indivisible, and its preservation can be neither sought nor attained by the superficial division between civil and political rights, and economic, social, and cultural rights.[30] This truism was deservedly emphasized on different occasions. As stated in the Tehran Conference of Human Rights in 1968, the first global conference on human rights:

> Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights, without the enjoyment of economic, social and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent

28 ICJ, *Gabcíkovo-Nagymaros* (Hungary *v.* Slovakia) Separate Opinion of Judge Weeramantry, ICJ Reports 1997, p. 92.

29 For a discussion of the position of human rights norms within international law see *inter alia* I.D. Seiderman, *Hierarchy in International Law: The Human Rights Dimension*, Hart – Intersentia, 2001.

30 C. Beyani, *The Legal Premises for the International Protection of Human Rights,* in The Reality of International Law: Essays in Honour of Ian Brownlie, G.S Goodwin-Gill and S. Talmon (eds.), Oxford: Clarendon Press, 1999, p. 25.

upon sound and effective national and international policies of economic and social development.[31]

The fact that both sets of rights, civil and political rights and social, economic, and cultural rights are intrinsically linked and interdependent on each other was again further emphasized in the World Conference on Human Rights of 1993.[32]

The development of international human rights, as that of any branch of international law, is an ongoing process, which takes place within the international legal and political framework with its own laws, procedures, and institutions that shape the form and content of human rights. As Steiner and Alston assert 'it would be impossible to grasp the character of the human rights movement without a basic knowledge about international law and its contributions to it'.[33] Indeed, the development of rules and principles of international human rights law is intrinsically linked with international law and international institutions. National and international human rights promotion and protection represent respectively the horizontal and the vertical strand where the attainment of commonly agreed human rights standards takes place. Since the ICJ, which is the focal point of our study, is an international judicial body, our focus remains primarily on the vertical strand of the international law of human rights that is meant to bind States. In today's world, human rights is characteristically imagined as a movement involving international law and institutions, as well as a movement involving the spread of liberal constitutions among states.[34] Although, understandably, national governments have a primary responsibility to promote and protect the human rights of persons under their jurisdiction, the international promotion and protection of human rights has been and continues to be an essential element of the human rights system.

### 3.3 International Protection and Promotion of Human Rights

That modern process described as the internationalization of human rights and the 'humanization' of international law was kick-started with the adoption of the UN Charter, although its roots certainly predate the latter. Indeed, the treaties of the 19th century banning the slave trade and the ones on the protection of minorities in the

31 UN Doc. A/CONF. 32/41 of 13 May 1968.

32 See A/CONF.157/23 of 12 July 1993. As emphasized in the Vienna Declaration and Programme of Action: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'.

33 H.J. Steiner and P. Alston, *International Human Rights in Context*: *Law, Politics, Morals*, 2nd edition, Oxford University Press, 2000, p. 57.

34 *Ibidem*.

Ottoman Empire can be considered as the first human rights treaties.[35] The possibility of placing limitations upon the principle of State sovereignty, as recognized by the PCIJ since 1923,[36] have paved the way for the development of the international law of human rights in general and for the increased importance of this branch of law in particular. Albeit the expansion of international human rights law has inescapably brought with it the potential risk of diminishing the objective value of human rights and the phenomenon of the use of human rights discourse for unorthodox political purposes, the international system of human rights protection has served to create awareness, to prevent, stop or at least to alleviate human suffering in different areas around the globe. The international protection and promotion of human rights is achieved through the intrinsically linked processes of standard-setting and that of enforcement. Needless to say, the Court's findings with regard to violations of international human rights instruments and the obligations arising from these violations form an important part of the enforcement of this branch of law at an inter-State level. Moreover, the findings of the Court clarifying the meaning of certain concepts or provisions of international human rights instruments can be seen as a contribution by the Court to the process of standard-setting through the process of interpretation. Both of these processes are discussed in more detail below.

*A) Standard-Setting*

The concept of human rights as currently understood and applied was elaborated after the Second World War; thus, in that respect, it is quite a recent concept. Given that at the international level human society is organized as an assembly of sovereign States, it is primarily the duty of national governments to respect and ensure respect for the human rights of individuals under their jurisdiction. On an international level there are a considerable number of international human rights instruments, treaty bodies and some international judicial bodies entrusted with the work of complementing the State system for a better promotion and enforcement of individual human rights stemming from these international human rights instruments. The important role played by treaties in the development and elaboration of human rights rules and principles is widely acknowledged by jurists.[37] Furthermore, until now there have been three main international conferences with a central focus on human rights issues, namely the Conference of Tehran of May 1968, the Vienna Conference of June 1993, and the UN Millennium Summit of September 2000. The Declaration and Programme of Action of the Vienna Conference of 1993 reads:

35 With the Treaty of Paris of 30 March 1856 and the Treaty of Berlin of 13 July 1878 the Christian minorities of the Ottoman Empire were put under the diplomatic and military protection of the Concert of Europe.

36 PCIJ, *Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco*, Series B, No. 4, 1923.

37 C. Beyani, *The Legal Premises for the International Protection of Human Rights*, in The Reality of International Law: Essays in Honour of Ian Brownlie, G.S. Goodwin-Gill & S. Talmon (eds.), Clarendon Press Oxford, 1999, p. 23.

> 1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.
>
> In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations.
>
> Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.[38]

The Vienna Conference provided, *inter alia*, a unique opportunity to carry out a comprehensive evaluation of the international human rights system and of the existing machinery for the enforcement and the supervision of human rights. As acknowledged in the text of the Vienna Declaration itself, the promotion and protection of human rights is and remains a matter of priority for the international community. The underlying aim was to enhance and thus promote a fuller observance of those rights, in a just and balanced manner in view also of the change of the political climate after the fall of the Iron Curtain. The Vienna Declaration and Programme of Action is considered by many scholars as a comprehensive document setting forth not only the state of affairs regarding human rights and realizations in this field, but also the course of action to be taken to improve the situation on the ground.

Another important step was taken seven years later. The agenda set by the UN Millennium Summit of September 2000 gave rise to the Millennium Development Goals (MDGs). The MDGs are eight goals to be achieved by 2015 that respond to the world's main development challenges and which are drawn from the actions and targets contained in the Millennium Declaration that was adopted by 189 nations and was signed by 147 heads of state and governments during the UN Millennium Summit.[39] Responding to the world's main development challenges and to the calls of civil society, the MDGs promote poverty reduction, education, maternal health, gender equality, and aim to combat child mortality, AIDS and other diseases. An important undertaking under the Millennium Declaration was to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.[40]

Under the heading 'Peace, security and disarmament' the heads of State and governments resolved to strengthen respect for the rule of law in international as well as in national affairs and, in particular, to ensure compliance by member States with the decisions of the ICJ, in compliance with the UN Charter, in cases to which they are

38 Vienna Conference on Human Rights, UN Doc., A/CONF. 157/ 23, 12 July 1993.

39 For more details visit: *http://www.un.org/millenniumgoals* and *http://www.undp.org/mdg*.

40 GA Res. A/55/L.2, United Nations Millennium Declaration, Section V: Human rights, democracy and good governance, Items 24 and 25, 8 September 2000.

parties.[41] Furthermore, as part of the strengthening of the UN, it was resolved to strengthen the role of the ICJ in order to ensure justice and the rule of law in international affairs.[42] It was deemed that encouraging regular consultations and coordination among the principal organs of the United Nations in pursuit of their functions would make the UN a more effective instrument in pursuing all the priorities set by this Summit.[43] By acknowledging the role of the ICJ in ensuring justice and the rule of law in international affairs and by undertaking to strengthen its authority, the UN Millennium Declaration reaffirmed the importance of the principal judicial organ of the UN in establishing a just and lasting peace for human society in accordance with the purposes and principles of the Charter.

A great deal of the contribution with regard to standard-setting in the field of human rights has been given by the GA through the numerous resolutions on various human rights issues adopted in the course of its work. Other organs of the UN such as the Charter-based ECOSOC and the Commission on Human Rights (CHR), replaced by the recently-established Human Rights Council (HRCn), should also be mentioned. Further, the UN treaty-monitoring bodies, namely the HRCm, the Committee on the Elimination of Racial Discrimination (CmERD), the Committee on Economic, Social and Cultural Rights (CmESCR), the Committee against Torture (CmAT), the Committee on the Elimination of Discrimination against Women (CmEDAW), the Committee on the Rights of the Child (CmRC), and the Committee on the Rights of Migrant Workers (CmRMW) have been instrumental in this process, besides the monitoring and enforcement duties incumbent upon them. The work of all these bodies in its entirety, be it in the form of recommendations, manuals, binding opinions, or mere advice, has been essential for the humanization of international law and the setting of suitable international standards in the field of human rights.

*B) Enforcement*

As already stated above, the creation of the conditions for the enjoyment of human rights and their enforcement is primarily incumbent upon the domestic organs of any given State. Obviously, a domestic court of law has an important role to play with regard to the enforcement of individual human rights.[44] That is the usual forum where a person would seek redress in case of a violation of his/her human rights. However, our focus remains on the vertical strand of human rights protection, i.e. the enforcement of human rights at the international level. A variety of international supervisory organs of a judicial, quasi-judicial, or political nature are involved in this process.

41 *Ibid*., Section II: Peace, security and disarmament, Item 9.

42 *Ibid*., Section VIII: Strengthening the United Nations, Item 30.

43 *Ibidem*.

44 With that this author does not imply that the enforcement of human rights is carried out only in a court of law. Indeed, many disputes are resolved out of court, but resorting to the courts always remains a last resort when other means have been tried and have failed to produce an acceptable solution to the parties involved in a given dispute.

Several permanent or *ad hoc* international of internationalized judicial bodies are entrusted with the enforcement of international human rights; at a quasi-judicial level this duty is carried out by the HRCm and a small number of other treaty monitoring bodies;[45] at a political level the protection of human rights has been largely carried out by the CHR through its special procedures.[46] Further, the SC, usually acting under Chapter VII of the UN Charter, has in several instances taken active steps to put a stop to ongoing mass human right violations.

The main organ for monitoring the promotion and the protection of human rights under the UN Charter is the ECOSOC.[47] However, most of the work of the UN with regard to human rights was carried on by the CHR, assisted in its work by the Sub-Commission on the Promotion and Protection of Human Rights, a number of working groups, a network of individual experts and representatives and human rights rapporteurs,[48] mandated to report on different specific issues. As part of the UN reform the CHR has been recently replaced by the Human Rights Council (HRCn).[49] One of the most important tasks entrusted to the Commission has been the elaboration of human rights standards. After finishing its work on the UDHR the Commission developed standards relating, *inter alia*, to the right to development, civil and political rights, economic, social and cultural rights, the elimination of racial discrimination, torture, the rights of the child and the rights of human rights defenders.

The promotion and protection of human rights at an international level is done through a variety of mechanisms.[50] Procedures of State reporting, State complaints, or individual complaints provided for under these instruments have considerably strengthened the system of human rights protection. Several general or specific human rights instruments establish their own treaty-monitoring bodies. Through the adoption of concluding observations on the State reports these treaty bodies have carried out an important task, namely that of providing necessary guidance to State parties for bringing their legislation and practice into line with the obligations undertaken in that respective treaty. The general comments or recommendations of these treaty bodies on the meaning of specific articles of these treaties have also contributed to a better understanding of human rights.[51] Moreover, the innovations introduced in the course

45 The list includes *inter alia* the following human rights bodies: HRCm, CmAT, CmEDAW, CmRC, CmERD, CmESCR, CmRMW.

46 For more information visit: *http://www.unhchr.ch/html/menu2/2/mechanisms.htm* (last accessed 1 November 2007).

47 See the organization schema of the UN, available at: *http://www.un.org/aboutun/chart.html* (last accessed on 1 November 2007).

48 See *infra* section 3.12.

49 GA Res. 60/251 of 15 March 2006.

50 More information is available at: *http://www.ohchr.org/english/bodies* (last accessed on 1 November 2007).

51 The actions taken by CmEDAW in the field of violence against women resulted in CmEDAW's manual on gender equality and CmEDAW's interpretation of domestic violence, genital mutilation, and crimes of honour as discrimination against women are an example of the work and innovations introduced in the course of the work of a treaty body.

of their work by different treaty bodies are evidence of the potential these organs have in monitoring the implementation of relevant provisions of international human rights law. In exercising their mandate under the respective treaties several of these monitoring bodies have delivered a considerable number of decisions, which further develop and interpret human rights rules and principles.[52] Further, the HRCm has instituted a mechanism that allows it to monitor closely State compliance with its decisions on individual complaints. Although this particular function cannot be found in the instituting document of the HRCm itself,[53] State parties have generally been cooperative. Needless to say, the exhaustion of domestic remedies is usually a prerequisite for having a case considered before an international body, unless such domestic remedies are non-existent.[54]

In recent times the organized international community has increasingly been taking a stronger and more dynamic approach in addressing large-scale violations of human rights. Thus, the SC has issued a large number of resolutions generally requesting all the parties to a conflict to put an end to it and to abide by the obligations provided under international human rights treaties. Given the primary role that the SC has been given under the UN Charter to deal with threats to international peace and security, the adoption of these resolutions is an important step towards addressing violations of international human rights in conflict areas. Using its wide powers under Chapter VII of the Charter the SC even legitimized, albeit *ex post facto*, the use of force for preventing gross violations of human rights, which it had already considered as a threat to peace.[55] Further, there are a considerable number of peace-keeping and peace-enforcing operations being carried out under the UN flag.[56] Besides the adoption of resolutions, or authorizations for the use of force it is noteworthy to mention also the diplomatic efforts aimed at achieving and fostering peace made by the UN, by other organizations, by various individual States, or by groups of States. As part of these efforts special envoys of the Secretary-General of the UN (UNSG), of regional organizations, or of different States have been sent to conflict areas to mediate a

52 A large number of human rights databases and other human rights documents can be accessed through the SIM database at: *http://sim.law.uu.nl/sim/Dochome.nsf*.

53 Optional Protocol to the ICCPR, GA. Res. 2200A (XXI) of 16 December 1966.

54 For example, in the case Z.T. *v.* Norway, CAT Comm. No. 238/2003, the CmAT held that the denial of legal aid runs contrary to the purpose of the principle of exhaustion of domestic remedies. Available in the SIM database, available at: *http://sim.law.uu.nl/SIM/Dochome.nsf?Open* (last accessed on 1 November 2007).

55 The SC has addressed many situations where gross human rights violations were occurring. Some examples include SC Resolution 1199 of 23 September 1998 where the SC considered the deterioration of the situation in Kosova as a 'threat to peace and security in the region'; SC Res. 1272 of 25 October 1999 on East Timor; SC Res. 1234 of 9 April 1999 on the Democratic Republic of the Congo; SC Res. 1657 of 6 February 2006 on the situation in Côte d'Ivoire and so on. On the powers of the Security Council to use force see *inter alia The Security Council and the Use of Force: Theory and Reality – A Need for Change*, N. Blokker and N. Schrijver (eds.), Brill Publishers, 2005.

56 For a list of the UN peace-keeping operations visit: *http://www.un.org/Depts/dpko/list/list.pdf* (last accessed on 1 November 2007).

solution in order to put an end to conflicts. Further, the establishment of a number of international criminal courts and tribunals bears witness to such an approach.

It was widely believed and, indeed, expected that the fall of the Iron Curtain would finally lead to a lasting world peace and the flourishing of a human rights-oriented culture. Unfortunately, those hopes were short-lived as the end of the Cold War was followed by far-reaching changes in international relations resulting in extreme tensions and conflicts in many areas of the world which caused many violations of human rights. In order to force an end to such armed conflicts or at least to attract the attention of the international community, the affected State often has had to have recourse to the ICJ. This can be explained with the position of the Court as the principal judicial organ of the UN and the stigma attached to being brought before the World Court as an aggressor State. In several of the cases where gross human rights violations were alleged to have taken place the Court did indicate provisional measures directed towards all the parties concerned, calling on them to comply with their obligations under international human rights treaties. By way of illustration, in the *Armed Activities in the Territory of the Congo* case (Congo *v*. Uganda) the Court indicated that both parties should take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights.[57]

The ICJ has indicated that human rights are to be respected even in the absence of a formal legal commitment to that end.[58] Indeed, in the *Nicaragua* case the Court stated in *obiter dictum* that the absence of a 'legal commitment' on the part of Nicaragua to the Organization of American States (OAS) would not mean that Nicaragua could violate human rights with impunity.[59] Thus, in the Court's opinion a formal legal commitment not to violate human rights is not a prerequisite for triggering that State's international responsibility in case of their violation. However, the Court added that where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.[60]

Even though a large number of international human rights treaties with their complex supervisory and enforcement mechanisms are already in place, human rights enforcement remains problematic in different areas of the world. Regrettably, gross violations of human rights still take place in different States and regions, often under the horrified staring eyes of the international community. The scale and frequency of gruesome violations of human rights such as cruel and inhuman treatment, torture, murder, unlawful imprisonment, forced disappearances, and ethnic cleansing campaigns are a powerful reminder of the pressing need for a better enforcement of principles and rules of the international law of human rights. In this light the above-

57 See *infra*, section 3.13.3.

58 See F.R. Teson, *Le Peuple, C'est Moi! The World Court and Human Rights*, AJIL, Vol. 81, No. 1, January 1987, p. 176.

59 *Nicaragua* case, (*Merits*), p. 134, para. 267.

60 *Ibidem*.

mentioned protection and monitoring mechanisms, the SC, the regional security agencies/arrangements, the international, hybrid and domestic judicial bodies, and other relevant actors should strive to achieve a better co-operation for upholding human values and enforcing commonly-agreed human rights standards.

## 3.4 THE WORLD COURT AND INTERNATIONAL HUMAN RIGHTS LAW

While, on the one hand, the work of the Court has exerted a considerable influence upon the development of the international law of human rights, on the other hand the development of this branch of law itself has also exerted a considerable influence on the jurisprudence and the caseload of the Court. Obviously, that mutual interaction takes place in a political, socio-economic, and legal environment, which has and continues to form and shape human society. Thus, the findings of the Court cannot be properly assessed, or even understood, if taken out of the context of the development of our society and the laws in force at a given time. In an advisory opinion the Court stated that 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] Certainly, that very legal system the Court refers to is itself the product of political and societal needs and human development and thus has to serve those needs. The development of the international law of human rights has gone through three main phases which have conditioned to a large extent the contribution made by the Court to this branch of law. The number of cases being brought before the Court dealing with human rights issues differs from one period to the other. However, it should be noted that this number has notably increased since the *Nicaragua* case and the fall of the Iron Curtain.

A distinguishing characteristic of the first phase of the development of the international law of human rights is the process of standard-setting. This important process started in 1945 with the establishment of the UN, which made the protection and the promotion of human rights one of its main purposes.[62] As a matter of fact, in this period the Court's involvement with human rights issues was at a low level, as instruments on the international law of human rights were scarce. But two of the first advisory opinions, although they were mainly concerned with treaty interpretation, allowed the Court to propagate the concept of the internationalization of human rights,[63] and of the civilizing purpose of such human rights treaties.[64] Furthermore, in this first phase the Court helped in clarifying a very important principle of human rights law, namely the right of peoples to self-determination. This right was to be embedded in Article 1 of both the ICCPR and ICESCR adopted in 1966. This year

61 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, Advisory Opinion of 21 June 1971, p. 31, para. 53.

62 UN Charter, Article 1 (3).

63 Namely the advisory opinion on the *Interpretation of the Peace Treaties*, ICJ Reports 1950.

64 Namely the advisory opinion on the *Reservations to the Genocide Convention*, ICJ Reports 1951.

marks the beginning of the second phase, namely that of the implementation and enforcement of the standards already set by that still small body of the international law of human rights. That does not mean that the standard-setting process and the body of the international law of human rights instruments stopped developing – for that is an ongoing process accompanying the development of human society – but that the main foundations of this branch of law were finally laid with the International Bill of Human Rights and the Genocide Convention.[65] During this period the Court was faced with a considerable number of cases which touched upon many intricate and contentious issues, such as decolonization, the immunity of human rights rapporteurs, and diplomatic protection. That second phase of the development of the international law of human rights finished in 1989 with the end of the Cold War, which marks an important shift in the international world order.

Indeed, the end of the Cold War marked the beginning of a new phase in the activity of the ICJ where developing countries have shown an increased willingness to have their disputes settled by the Court. Furthermore, the end of this era saved the Court from a lurking risk of being trapped in that ideological debate or being perceived as taking sides therein, which would have resulted in undesirable repercussions for its work. From the fall of the Berlin Wall in 1989 to the present we have entered the third phase of the development of human rights, namely that of mainstreaming human rights. According to the UN High Commissioner for Human Rights mainstreaming human rights refers to the concept of enhancing the human rights programme and integrating it into the broad range of UN activities, also in the areas of development and humanitarian action. The contribution that the Court can make to mainstreaming human rights from the position of one of the main organs of the UN and the principal judicial organ needs no explanation.

The development of international human rights law through the adoption of many international and regional treaties and the ensuing recognition of direct entitlements of individuals to these rights have influenced the frequency of cases dealing with human rights brought before the Court. Commenting upon this development Higgins observed that, 'this vast explosion of human rights conventions could, it might have been thought, lead to a heavy human rights component in the Court's work. The reality, however, is different.'[66] It should be noted, though, that, although not amounting to an 'explosion', the human rights component of cases brought before the World Court has increased considerably over time. Suffice it to mention here the substantial increase in cases touching upon human rights brought before the Court since the 1990s.[67] Consequently, a distinguishable and strong human rights element has been

65 The International Bill of Human Rights is composed of the Universal Declaration of Human Rights (UDHR) of 1948 and the ICCPR and the ICESCR of 1966.

66 R. Higgins, *The International Court of Justice and Human Rights*, in International law: theory and practice: essays in honour of Eric Suy, Karel Wellens (ed.), 1998, p. 693.

67 Suffice it to mention here the *East Timor* case, the *Diplomatic Protection* cases, the *Arrest Warrant* case, the *Armed Activities in the Territory of the Congo* cases, the *Certain Criminal Proceedings* case, the advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons* case, the *Difference*

present in proceedings before the Court both in contentious cases and requests for an advisory opinion. Potentially, the Court will receive more cases arising from violations of human rights, whether committed in peacetime or during armed conflicts. However, any increased role of the Court with regard to the interpretation and development of international human rights rules and principles also necessitates a change in State behaviour and in substantive and procedural international law, and last but not least a substantial increase in the capacities of the Court.

The adoption of numerous instruments on the international law of human rights and the importance attached to the protection and promotion of human rights contributed to an upsurge in the case law of the Court dealing with issues concerning human rights. While this considerable case law is analyzed in detail below, suffice it to say beforehand that the Court has generally taken a firm position in favour of human rights and has clarified how certain human rights rules principles were to be understood and applied. Indeed, since the beginning of its work, the Court coined and emphasized the importance of *elementary considerations of humanity*,[68] which lie at the heart of international human rights law. Although not an exhaustive list, issues concerning human rights which have come before the Court include the right of people to self-determination, the status and treatment of special UN rapporteurs, consular relations or diplomatic protection, the application of the Genocide Convention, the immunity of senior State officials, the right to asylum, the application of human rights treaties in territories under occupation and so on. By interpreting and developing rules and principles of human rights related to these issues the Court has contributed towards creating more clarity and ultimately to a further improvement of the human rights protection system.

Some of the above-mentioned issues have been subject to the work of the ILC, whose mission is to work towards the codification and progressive development of international law in general. Diplomatic protection, for example, was identified as a topic which was appropriate for codification and progressive development by the ILC.[69] The ILC acknowledged the useful dialogue with the ICJ on this issue.[70] In clarifying the relation between human rights and diplomatic protection the ILC referred to quite a few cases decided by the ICJ.[71] In fact the Special Rapporteur of the ILC on this topic went as far as to propose making it obligatory for States to exercise diplomatic protection where a norm of *jus cogens* had been violated with respect to the individual in question.[72] If this proposal were to be endorsed and further upheld by the ICJ in its case law, it would decisively qualify as a progressive development for the

*Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, and the *Wall* case.

68 *Corfu Channel Case*, (Merits), ICJ Reports 1949, p. 22.

69 For more details on the work of the ILC on this topic see *inter alia*: *http://untreaty.un.org/ilc/ summaries/9_8.htm* (last accessed on 1 November 2007).

70 Yearbook of ILC, 1998, Vol. 2, Part II, p. 16.

71 Yearbook of ILC, 1998, Vol. 2, Part II, pp. 46-48.

72 A/CN.4/506 and Corr. 1 and Add.1.

international law of human rights. A look at the summaries of the work of the ILC reveals that some important topics under consideration are: reservations to treaties; the effect of armed conflicts on treaties; the obligation to extradite or prosecute (*aut dedere aut judicare*); the responsibility of international organizations; and the expulsion of aliens.[73] Given the important ramifications that the ILC's work on these topics can have for the international law of human rights, the case law of the ICJ can provide some guidance in choosing the right approach and *vice versa*.[74] Some of the topics completed by the ILC are: diplomatic protection, nationality including statelessness; the formulation of the Nürnberg Principles; the question of international criminal jurisdiction; the definition of aggression included in the draft code of crimes against the peace and security of mankind; state responsibility and so on. Given that issues related to some of these topics have arisen and have been dealt with by the ICJ, the interaction between the ILC, as a body entrusted with codification and progressive development, and the ICJ, as an organ of international law, will be given due attention in the course of the elaboration of relevant case law wherever it is deemed appropriate.

73 For a detailed overview of the work of the ILC check the 'Analytical Guide to the Work of the ILC' at: *http://untreaty.un.org/ilc/guide/gfra.htm*.

74 See the Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the 59th Session of the International Law Commission, 10 July 2007, in Statements by the President, available at: *http://www.icj-cij.org/presscom/files/9/13919.pdf* (last accessed on 1 November 2007).

## PART II CASE LAW ANALYSIS

As noted in the introduction to the book the analysis of the case law of the ICJ which is relevant to the interpretation and development of rules and principles of the international law of human rights includes a considerable number of contentious cases and advisory opinions starting from the beginning of its activity in April 1946 until 2006. Between 1946 and 2006 105 cases were referred to the Court, 12 of which are still pending.[75] The Court delivered a total of 92 judgments and 25 advisory opinions.[76] However, from all this jurisprudence only 11 advisory opinions and 16 contentious cases have been selected as having a direct relation to international human rights law. Other jurisprudence is mentioned or discussed only to the extent that is relevant to the topic of this chapter.

The summaries of the cases and advisory opinions provided on the Court's official website provided a useful means for identifying the cases which are relevant to the interpretation and development of principles of international human rights law. This initial process led in turn to a careful reading and a detailed analysis of the case law of the Court. Obviously, other important sources such as the Court's Reports, books, articles, and other materials have been used. The case law of the Court has been organized in several topics, each forming a section, because of the inherent link that they have with each other. The advantages of this approach are twofold: first, the contribution of the Court is demonstrated in a comprehensive, topical way; second, such an approach makes it easier for readers to follow and use the findings of the Court in their scholarly or practical work. A chronological order for elaborating the jurisprudence of the Court has not been employed here as that has been done in the seminal writings of Professor Rosenne,[77] although not from the angle adopted here, namely that of the Court's contribution to human rights.

Part II is followed in turn by an appraisal of the contribution of the Court in relation to the development and interpretation of the rules and principles of the international law of human rights. As noted elsewhere in this book the ICJ is not a human rights court. Thus, one has to be aware of the inherent limitations the Court faces in making a significant contribution to international human rights law, which by its very nature is concerned with the individual.[78] Against this background, the considerable jurispru-

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75 The source is the official website of the Court, click on Press Room, then on Questions and Answers About the Court. The information is available in PDF format in *The Court at a glance – A short description of the role and functioning of the Court*, available at: *http://www.icj-cij.org/presscom/index.php?p1=6&p2=7* (last accessed on 1 November 2007).

76 *Ibidem*.

77 See S. Rosenne, *The Law and Practice of the International Court*, *1945-2005*, 4th edition, Brill Publishers, March 2006 (Rosenne); *Rosenne's The World Court: What It Is and how It Works*, 6th edition by T.D. Gill, Martinus Nijhoff Publishers, 2003.

78 The possibilities and limitations of the Court in contributing to the interpretation and development of international human rights and humanitarian law rules and principles have been discussed *supra* in chapter 2.

dence which is explored in considerable detail below constitutes *prima facie* evidence of the positive contribution the Court has been able to make to this branch of international law.

## 3.5 INTERNATIONALIZATION OF THE PROTECTION OF INDIVIDUAL HUMAN RIGHTS

Although at present it is often taken for granted, the international efforts to protect the human rights of individuals in a certain State was for a long time perceived as unwelcome intervention in the domestic affairs of that State, lessening its international standing, and weakening its sovereignty. However, history proved, beyond reasonable doubt, that besides domestic remedies providing individuals with possibilities for the rectification of their breached rights another level of protection was necessary. Introducing the layer of the international protection of human rights was due to the recognition of the fact that States are increasingly interdependent on each other for the preservation of international peace and security, as well as the fact that the protection of human rights is the concern of the whole international community. At the beginning of its work the Court did not deal with many cases relating to human rights simply because of the fact that there was only a limited body of international human rights treaties. However, despite these initial limitations, the Court in the advisory opinion on the *Interpretation of Peace Treaties* hinted that human rights were not solely a domestic affair shielded from the eyes and the interest of the outside world. Further, in another advisory opinion, namely that on the *Reservations to the Genocide Convention*, the Court clarified that certain treaties, such as that on the prohibition of genocide, are of a civilizing character and States have no interest of their own in such treaties, but adopt the international obligations provided therein in the interest of humanity itself. Here only the advisory opinion on the *Interpretation of Peace Treaties* is dealt with. The mere fact that the case had been brought before the ICJ placed the issue of human rights protection at centre stage, although the issue was couched and mainly dealt with in terms of treaty interpretation.

### 3.5.1 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* Advisory Opinion of 30 March 1950 (First Phase); Advisory Opinion of 18 July 1950 (Second Phase)

*A) Background*

The questions concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* were referred to the Court for an advisory opinion by a resolution of the GA entitled 'Observance in Bulgaria, Hungary and Romania of Human Rights and Fundamental Freedoms'.[79] In the diplomatic correspondence submitted to the Court,

79 GA Res. 294 (IV) of 22 October 1949.

the United Kingdom, acting in association with Australia, Canada, New Zealand, and the United States of America charged Bulgaria, Hungary and Romania with having violated, in various ways, the provisions of the articles dealing with human rights and fundamental freedoms in the Peace Treaties and called upon the three Governments to take remedial measures to carry out their obligations under the Treaties.[80] In April 1949, the GA considering that the governments of Bulgaria and Hungary had been accused before it of acts contrary to the Purposes of the UN and to their obligations under the Peace Treaties *to ensure to all persons within their respective jurisdictions the enjoyment of human rights and fundamental freedoms* (emphasis added) drew the attention of these governments to the obligations incumbent upon them under the Peace Treaties, including the obligation to co-operate in the settlement of all these questions.[81] When returning to the issue of the observance of human rights in Bulgaria, Hungary, and Romania on 22 October 1949, the GA decided to refer the four questions related to this matter to the ICJ.[82] In this resolution, the GA recorded its opinion that the refusal of the Governments of Bulgaria, Hungary and Romania to co-operate in its efforts to examine the grave charges with regard to the observance of human rights and fundamental freedoms justified its concern about the state of affairs prevailing in Bulgaria, Hungary and Romania in this respect.[83]

*B) Human Rights Issues on the Court's Doorstep*

The four questions put before the Court by means of this resolution were:

I. Do the diplomatic exchanges between the three States and certain Allied and Associated Powers disclose disputes subject to the provisions for the settlement of disputes contained in the Treaties?

II. In the event of an affirmative reply, are the three States obligated to carry out the provisions of the Articles in the Peace Treaties for the settlement of disputes, including the provisions for the appointment of their representatives to the Commissions?

80 ICJ, *Interpretation of Peace Treaties with Bulgaria*, *Hungary*, *and Romania*, (*First Phase*), Advisory Opinion of 30 March 1950, ICJ Reports 1950, p. 74 (*Interpretation of Peace Treaties*).

81 GA Res. 272 (III) of 30 April 1949.

82 Certain of the Allied and Associated Powers which were signatories to the Treaties of Peace with Bulgaria, Hungary and Romania charged the latter with violations of the Treaties of Peace and called upon those Governments to take remedial measures. After the refusal by these Governments to comply with the request of the Allied and Associated Powers to appoint representatives to the Treaty Commissions (stating that they were under no legal obligation to do so), the GA also on behalf of the Secretary-General (authorized by the Treaties of Peace upon request by either party to a dispute, to appoint the third member of a Treaty Commission if the parties fail to agree upon the appointment of the third member) asked for authoritative advice by the ICJ concerning the scope of the SG's authority under the Treaties of Peace. See G.A. Resolution 294 (IV) of 22 October 1949.

83 *Interpretation of Peace Treaties*, (*First Phase*), ICJ Reports 1950, p. 67.

III. In the event of an affirmative reply to question II and if within thirty days from the date when the Court delivered its opinion the designation has not been made, is the Secretary-General of the United Nations authorised to appoint the third Member of the Commission?

IV. In the event of an affirmative reply to Question III would a Commission so composed be competent to make a definitive and binding decision in settlement of a dispute?[84]

The Court in its advisory opinion of 30 March 1950 dealt with questions I and II and in its second advisory opinion of 18 July 1950 with questions III and IV.[85] The power of the Court to exercise its advisory function was contested not only by Bulgaria, Hungary and Romania, but also by several other governments in their communications addressed to the Court.[86] The contention was that the request for an opinion was an action *ultra vires* on the part of the GA because, in dealing with the question of the observance of human rights and fundamental freedoms in these three States, it was 'interfering' or 'intervening' in matters essentially within the domestic jurisdiction of States.[87] The alleged non-competence of the GA to request such an opinion was deduced from Article 2, paragraph 7 of the Charter.[88]

The Court noted that the GA justified the adoption of its resolution by stating that 'the UN, pursuant to Article 55 of the Charter, shall promote universal respect for and observance of human rights and fundamental freedoms, for all without distinction as to race, sex, language or religion'.[89] Further, taking into account that the request was directed solely at obtaining certain clarifications of a legal nature concerning the interpretation of the terms of a treaty; thus, as such not to be considered as a question essentially within the domestic jurisdiction of a State, but a question of international law, the Court decided to deliver an advisory opinion in this case.[90] Although the Court clarified that the object of the request was limited to legal clarifications regarding the applicability of the procedure for the settlement of disputes by the Commissions provided for in the express terms of the Peace Treaties, it implicitly departed from the view that the question of the observance of human rights is a domestic issue. The relevance of this implicit shift in view, from a traditional one where respect for human rights is a purely domestic issue to one where respect for human rights is not only part of the domain of domestic affairs, but also a matter of concern for the international community, is remarkable. Indeed, that signalled paradigm shift was at the same time

84 *Ibid*., pp. 67-68.

85 A summary of this advisory opinion, delivered by the Court in two phases was delivered in the first phase on 30 March 1950 and in the second phase on 18 July 1950 and is available at: *http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=8b&case=8&code=bhr&p3=5* (last accessed on 1 November 2007).

86 *Interpretation of Peace Treaties*, (*First Phase*), ICJ Reports 1950, p. 70.

87 *Ibidem*.

88 *Ibidem*.

89 *Ibidem*.

90 *Ibid*., pp. 70-71.

both an incentive and an invitation for the establishment of other international human rights instruments and supervisory bodies aiming at the improvement of human rights standards worldwide. The international scrutiny of the observance of human rights by a State is a tool that has not lost its importance over the years and will continue to be such for a long time to come.

The second argument put forward by the Governments of Bulgaria, Hungary and Romania against the Court rendering an advisory opinion was that this would violate the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.[91] Noting the difference between the principles governing contentious procedures and those which are applicable to advisory opinions the Court concluded that no State, whether a Member of the UN or not, can prevent the issuing of an advisory opinion which the UN considers to be desirable in order to obtain enlightenment as to the course of action it should take.[92] Having found itself entitled and under a duty to answer the first two questions, the Court first quoted Article 2 of the Treaty with Bulgaria, corresponding to Article 2, paragraph I, of the Treaty with Hungary and Article 3, paragraph I of the Treaty with Romania. That article reads: 'Bulgaria shall take all measures necessary to secure to all persons under Bulgarian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.'[93] The other relevant articles the Court quoted relate to the application of the Treaties and the means for the settlement of disputes arising thereunder.[94] In the Court's view a situation had arisen in which the two sides, namely Bulgaria, Hungary and Romania and each of the Allied and Associated States held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.[95] Further, the Court clarified that this dispute, inasmuch as it related to the question of the performance or non-performance of the obligations provided in the articles dealing with human rights and fundamental freedoms, clearly concerned the interpretation or execution of the Peace Treaties.[96] Having thus answered the first question in the affirmative, the Court turned to the second question.

In determining the scope of the expression 'the provisions of the articles referred to in Question I' the Court took the view that it referred only to the articles providing for the settlement of disputes, and not to the articles dealing with human rights.[97] As the Court pointed out it did not think that the GA would have asked it whether Bulgaria, Hungary and Romania were obligated to carry out the articles concerning human

91 *Ibid*., p. 71.
92 *Ibidem*.
93 *Ibid*., p. 73.
94 *Ibid*., pp. 73-74.
95 *Ibid*., p. 74.
96 *Ibid*., p. 75.
97 *Ibidem*.

rights, for, in the first place, the three Governments had not denied that they were obligated to implement these articles.[98] Further, there was no reason why the GA would have made the consideration of the question concerning human rights dependent on an affirmative answer to a question relating to the existence of disputes.[99] Thus, in the Court's view, the articles concerning human rights were mentioned in Question I only by way of describing the subject-matter of the diplomatic exchanges between the States concerned.[100] Given that the Treaties provided that any dispute would be referred to a Commission 'at the request of either party', it followed that either party was obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative.[101] Thus, also the reply to Question II was in the affirmative.[102] It should be noted that the Court adopted this opinion by thirteen votes to three, with the Judges of the Eastern bloc dissenting.[103]

In view of the fact that Bulgaria, Hungary and Romania had failed to appoint their representatives to the Treaty Commissions the Court was called upon to answer Question III of GA resolution of 22 October 1949.[104] For the Court the question at issue was whether the provision empowering the Secretary-General to appoint the third member of the Commission applied to the present case in which one of the parties refused to appoint its own representative to the Commission.[105] In the Court's view the power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member could not be extended to the much more serious case of a complete refusal to co-operate by one of them.[106] The Court noted that the decisions of a Commission of two members, one of whom is appointed by one party only, would not have the same degree of moral authority as those of a three-member Commission; a result contrary to the letter as well as the spirit of the Treaties.[107] Recalling its finding in the earlier Advisory Opinion as to the obligation of Bulgaria, Hungary and Romania to appoint their representatives to the Commission the Court held that it was clear that a refusal to fulfil a treaty obligation entailed international responsibility; however, that could not alter the conditions contemplated in the Treaties for the exercise by the Secretary-General of his power of appointment.[108] The Court noted that it was its duty to interpret the Treaties but not to revise them.[109]

98 *Ibid*., p. 76.
99 *Ibidem*.
100 *Ibidem*.
101 *Ibid*., p. 77.
102 *Ibidem*.
103 *Ibid*, p. 78. The Eastern bloc Judges, namely Judge Winiarski (Poland), Judge Zoričić (Yugoslavia) and Judge Krylov (USSR), considered that the Court should have declined to give an opinion in this case.
104 *Interpretation of Peace Treaties*, (*Second Phase*), Advisory Opinion of 18 July 1950, ICJ Reports 1950, p. 226.
105 *Ibid*., p. 227.
106 *Ibidem*.
107 *Ibid*., p. 228.
108 *Ibidem*.
109 *Ibid*., p. 229.

Having found that it had to answer Question III in the negative, the Court decided that it was not necessary for it to consider Question IV.[110]

*C) Concluding Remarks*

The Court, albeit implicitly, hinted that the issue of the observance of human rights is not only a matter of domestic jurisdiction, as provided for under article 2(7) of the UN Charter. As acknowledged by the Court, the UN in discharging its duties under Article 55 of the UN Charter, in promoting universal respect for and the observance of human rights, could ask the Court questions which had a bearing on the human rights situation in a certain country, without making them dependant on the question of any relation to the existence of a dispute. Also, as the Court noted, the issue of the application of the articles of the Peace Treaties to human rights was not at issue, as the three Governments had not denied that they were obligated to implement these articles. At the very least, the proceedings before the Court further increased awareness about the human rights violations that were taking place in the States concerned, thereby giving an international dimension to this issue. Despite the legal form which this case took, the underlying concern expressed by the Allied and Associated Powers about violations of human rights and fundamental freedoms was the main reason why this issue was brought before the Court. Although this issue ultimately led to a dead-end in view of the recalcitrant attitude of the governments concerned, the Court pointed to the international responsibility incurred by these governments because of their refusal to appoint their Commission members. These advisory opinions also illustrate the opposing views of the Judges coming respectively from the Western or the Eastern bloc.[111] This ideological 'tug-of-war' between members of the Court repeatedly affected the voting pattern of the Court until the fall of the Iron Curtain.

## 3.6 FUNDAMENTAL PRINCIPLES OF INTERNATIONAL HUMAN RIGHTS LAW

> The enormous developments in the field of human rights in the post-war years, commencing with the Universal Declaration of Human Rights in 1948, must necessarily make their impact on assessments of such concepts as 'considerations of humanity' and 'dictates of the public conscience'. This development in human rights concepts, both in their formulation and in their universal acceptance, is more substantial than the developments in this field for centuries before. The public conscience of the global community has thus been greatly

110 *Ibid*., p. 230.

111 In his Dissenting Opinion Judge Read stated that the importance of the maintenance of human rights and fundamental freedoms is emphasized by their inclusion in the purposes of the United Nations as set forth in Article I of the Charter, and by the central position taken by the Human Rights Articles of the Treaties of Peace. For him it was inconceivable that the Allied and Associated Powers would have consented to the setting up of machinery for the settlement of disputes arising out of such important matters which could be rendered ineffective by the sole will of any of the three Governments concerned, Bulgaria, Hungary and Romania. See the Dissenting Opinion of Judge Read, ICJ Reports 1950, pp. 231-247.

> strengthened and sensitized to 'considerations of humanity' and 'dictates of public conscience'. Since the vast structure of internationally accepted human rights norms and standards has become part of common global consciousness today in a manner unknown before World War II, its principles tend to be invoked immediately and automatically whenever a question arises of humanitarian standards.[112]

As Judge Weeramantry pointed out in his dissenting opinion in the *Nuclear Weapons* advisory opinion, considerations of humanity and dictates of public conscience command a heightened respect today as compared to the period before WWII. Amongst other actors, the ICJ has also rendered an important contribution in developing and interpreting these fundamental principles of international human rights law. Two cases that stand out due to the considerable leaps made through them regarding the identification of fundamental concepts of international human rights law are dealt with here, namely the *Corfu Channel* case and the *Barcelona Traction* case. Those fundamental concepts are 'elementary considerations of humanity' and 'obligations *erga omnes*'. The importance of first coining and later of giving these concepts their substance cannot be overemphasized. Through these concepts human rights gained both the high moral ground expressed in the form of a general legal principle and the necessary international community oversight and responsibility regarding their protection.

### 3.6.1 *Corfu Channel Case* (United Kingdom *v.* Albania, Judgment of 9 April 1949, Merits)

*A) Background*

The first case to be adjudicated by the ICJ was the one between the United Kingdom (UK) and Albania shortly after the Court was set up. This case arose out of incidents that occurred in October and November 1946 in the territorial waters of Albania in the Corfu Channel. On 22 October 1946 two British warships, *HMS Saumarez* and *Volage*, struck mines and incurred heavy material damage and loss of human life. On 22 May 1947 the UK brought the case before the Court.[113] Although all three judgments in this case are rather interesting for the legal issues dealt with in them,[114] our focus remains on the second judgment in this case dealing with the merits.

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112 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, ICJ Reports 1996, p. 493.

113 In its Application instituting proceedings the UK stated that the purpose of the claim was to secure a decision of the Court that the Albanian Government was internationally responsible for the loss and injury resulting from the fact that two destroyers of the Royal Navy struck mines in Albanian territorial waters in the Corfu Channel and to have the reparation or compensation therefore due from the Albanian Government determined by the Court. See *Corfu Channel Case* (UK *v.* Albania), (*Preliminary Objections*), Judgment of 25 March 1948, ICJ Reports 1948, p. 17.

114 Namely the Judgment of 25 March 1948 (*Preliminary Objections*), ICJ Reports 1948, pp. 15-30; the Judgment of 9 April 1949 (*Merits*), ICJ Reports 1949, pp. 4-38; and the Judgment of 15 December 1949 (*Assessment of the Amount of Compensation*), ICJ Reports 1949, pp. 244-25.

*B) Elementary Considerations of Humanity*

In the relevant passage from this judgment the Court stated:

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: *elementary considerations of humanity*, *even more exacting in peace than in war* (emphasis added).[115]

The concept of *elementary considerations of humanity* is rooted in such basic concepts as human dignity, respect for human life, and universal principles of justice recognized by all civilized nations, aimed at ensuring friendly relations among States. It is the norms of behaviour based on common sense which aim to prevent unnecessary harm being inflicted upon other human beings or State interests. This concept, which is strongly grounded on moral ethics, besides its legal component, places upon States an obligation to behave in a certain manner that takes into due account human rights and values. The failure of the Albanian authorities to inform other States of the presence of a minefield in its territorial waters for the benefit of shipping in general engaged this State's responsibility when British warships incurred loss of life among their crew and other heavy material damage. Thus, it seems that damage to life and limb of British Navy personnel, albeit not the only consideration, was indeed an important consideration for the Court in reaching the conclusion that Albania was internationally responsible and therefore had to make reparations.

A question arises as to what the Court exactly meant by the phrase 'elementary considerations of humanity, *even more exacting in peace than in war*' (emphasis added)? There being no state of war between the two countries, the Court appears to have been emphasizing that elementary considerations of humanity were even more exacting upon Albania, thereby imposing upon Albania the obligation to make the existence of a minefield in its territorial waters a matter of general knowledge: for the benefit of shipping in general and the innocent passage of warships in particular. However, this statement cannot be read as implying an acceptance by the Court of diminished compliance with legal obligations for States in a war-like situation, for that understanding would go against the very concept of elementary considerations of humanity itself. A plausible explanation would then be that the Court was simply emphasizing this fact as being an aggravating circumstance in its assessment of State conduct in this particular case.

Not only did the Court coin the concept of 'elementary considerations of humanity' at an early stage of its activity – finding that this concept imposed certain obligations

115 *Corfu Channel Case*, (UK *v*. Albania), (*Merits*), Judgment of 9 April 1949, ICJ Reports 1949, p. 22.

upon a State – but it also reiterated the applicability of the same concept in different circumstances in several other cases.[116] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the Court stated that 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and '*elementary considerations of humanity*' (emphasis added)', and that they are 'to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.[117] Referring to this concept again in the advisory opinion on the Wall, the Court declared that in its view these rules incorporate obligations which are essentially of an *erga omnes* character.[118] Apparently, in the Court's view not only customary rules of humanitarian law, but also those rules stemming from elementary considerations of humanity impose upon States certain obligations of an *erga omnes* character.

*C) Concluding Remarks*

As a matter of fact elementary considerations of humanity are a fundamental legal concept both in international human rights and humanitarian law because of their intrinsic link with the principle of humanity,[119] as a thread which permeates these two branches of international law in their entirety.[120] Due to the strong tendency of the international community towards normativity this concept has had a considerable influence in humanizing international law. The impressive development of international human rights instruments and monitoring and enforcement mechanisms and the importance that international human rights law has achieved is indeed, to a large extent, due to the identified need of the international community to properly address and fulfil those very elementary considerations of humanity.

### 3.6.2 *The Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belgium *v.* Spain, 1958-1961 and 1962-1970, Judgment of 5 February 1970 (*Merits*))

The *Barcelona Traction* case is among those cases that took the longest to be decided by the ICJ. Although it is true that the proceedings lasted for no less than twelve years, it should not be forgotten that it was mainly the litigating Parties which were responsi-

116 The *Nicaragua* case, the *Legality of the Threat or Use of Nuclear Weapons* case, and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case.

117 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996 (I), p. 257, para. 79.

118 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 199, para. 157 (*Wall*).

119 See *inter alia* R. Coupland, *Humanity: What it is and how does it influence international law*, IRRC, Vol. 83, No. 844, pp. 969-989.

120 See *infra* sections 4.5 and 4.7 A).

ble for this long period of time.[121] Thus, Belgium brought the case before the ICJ in an application in September 1958, but withdrew it in March 1961 only to resubmit it in June 1962. Only the judgment on the merits containing the famous *dictum* is relevant for our purposes.[122] This *dictum* gave rise to an important fundamental legal concept for international human rights law, namely that of obligations *erga omnes*. This case is also deemed to mark a new phase in the activity of the ICJ, after the infamous decision in the *South-West Africa* cases, with the Court shifting away from an extremely reserved and rigid attitude in interpreting international law.

*A) Diplomatic Protection of the Belgian Shareholders*

Before addressing the general implications of the Court's famous *dictum* some consideration will be given to the issue at hand here, namely the protection of the interests of the shareholders of the company sought by Belgium in its claims. The Court observed that when a State admitted into its territory foreign investments or foreign nationals it was bound to extend to them the protection of the law and it assumed obligations concerning the treatment to be afforded to them.[123] In determining the applicable law in this case the Court noted that it had to bear in mind the continuous evolution of international law.[124] It stated that diplomatic protection deals with a very sensitive area of international relations, since the interest of a foreign State in the protection of its nationals confronts the rights of the territorial sovereign, a fact of which the general law on the subject has had to take cognizance in order to prevent abuses and friction.[125] The Court clarified that the concept and structure of the company are founded on and determined by a firm distinction between the separate entity of the company and that of the shareholder, each with a distinct set of rights.[126] Only the company, which was endowed with legal personality, could take action in respect of matters that were of a corporate character.[127] Although it acknowledged that a wrong done to the company frequently caused prejudice to its shareholders, in the Court's view that did not imply that both were entitled to claim compensation.[128] Whenever a shareholder's interests were harmed by an act carried out against the company, it was to the latter that he had to look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one

121 Besides the litigating Parties playing the main role, it was widely felt that the Court should have exercised more control over the pleadings, both written and oral. See *Rosenne's The World Court: What It Is and How It Works*, T.D. Gill (ed.), Martinus Nijhoff Publishers, Leiden/Boston, 2003, p. 160.

122 Although called a judgment on the merits, the Court decided that it would not pronounce upon any material aspects of the case given that Belgium had not established its *jus standi*.

123 *Barcelona Traction*, (*Merits*), Judgment of 5 February 1970, ICJ Reports 1970, p. 32, para. 33.

124 *Ibid*., p. 33, para. 37.

125 *Ibid*em.

126 *Ibid*., p. 34, para. 41.

127 *Ibid*., p. 34, para. 42.

128 *Ibid*., p. 35, para. 44.

entity whose rights have been infringed.[129] For the Court it was not a mere interest which may have been affected, but solely a right which had been infringed that involved responsibility, so that an act directed against and infringing the company's rights does not involve responsibility towards the shareholders, even if their interests were affected.[130]

In order for the situation to be different, the act complained of had to be aimed at the direct rights of the shareholder as such, which was not the case here since the Belgian Government had itself admitted that it had not based its claim on an infringement of the direct rights of the shareholders.[131] The Court accepted that on an international plane there could in principle be special circumstances which justified the lifting of the veil in the interest of the shareholders.[132] In finding whether this was the case two specific cases involving encroachment upon the legal entity had to be considered, namely:

> (1) first, the treatment of enemy and allied property, during and after the First and Second World Wars, in peace treaties and other international instruments;
> (2) secondly, the treatment of foreign property consequent upon the nationalizations carried out in recent years by many States.[133]

The Court reached the conclusion that these cases being rather specific provided no guidance in the present case.[134] Other special circumstances the Court decided to consider which would prevent the general rule from taking effect were:

> *(a)* the case of the company having ceased to exist, and
> *(b)* the case of the protecting State of the company lacking capacity to take action.[135]

As regards the first of these possibilities, the Court observed that whilst Barcelona Traction had lost all its assets in Spain and had been placed in receivership in Canada, it could not be contended that the corporate entity of the company had ceased to exist or that it had lost its capacity to take corporate action.[136] So far as the second possibility was concerned, it was not disputed by the Parties that the company had been incorporated in Canada and had its registered office in that country.[137] Consequently, its Canadian nationality had received general recognition.[138] The Canadian Govern-

129 *Ibid*em.
130 *Ibid*., p. 36, para. 46.
131 *Ibid*., p. 36, para. 47.
132 *Ibid*., p. 39, para. 58.
133 *Ibid*., p. 39, para. 59.
134 *Ibid*., p. 39-40, paras. 60-61.
135 *Ibid*., p. 40, para. 64.
136 *Ibid*., p. 41, paras. 67-68.
137 *Ibid*., para. 42, para. 71.
138 *Ibid*., para. 42, para. 72.

ment had protected Barcelona Traction for a number of years.[139] If at a certain point the Canadian Government ceased to act on behalf of Barcelona Traction, it nonetheless retained its capacity to do so; a capacity which the Spanish Government had not questioned.[140] The Court held that whatever the reasons for the Canadian Government's change of attitude, that fact could not constitute a justification for the exercise of diplomatic protection by another government, unless there was some independent and otherwise valid ground for this.[141] Noting that it was also maintained that, for reasons of equity, a State should be able, in certain cases, to take up the protection of its nationals who were shareholders in a company that had been the victim of a violation of international law, the Court stated that whatever the validity of this theory, Spain not being the national State of the company, made it inapplicable.[142] Further, the Court considered that the adoption of the theory of diplomatic protection of shareholders as such, by opening the door to competing diplomatic claims, could create an *atmosphere of confusion and insecurity in international economic relations* (emphasis added).[143] In the particular circumstances of the present case, where the company's national State was able to act, the Court was not of the opinion that *jus standi* was conferred on the Belgian Government by considerations of equity.[144]

After taking cognizance of the great amount of documentary and other evidence submitted by the Parties, the Court noted its appreciation of the importance of the legal problems raised by the allegation which was at the root of the Belgian claim and which concerned denials of justice allegedly committed by organs of the Spanish State.[145] However, given that the possession by the Belgian Government of a right of protection was a prerequisite for the examination of such problems, and since no *jus standi* before the Court had been established, it was not for the Court to pronounce upon any other aspect of the case.[146] Therefore, based also on the fact that Canada was not hindered in continuing to grant its diplomatic protection to Barcelona Traction, thus relying upon a strict interpretation of the nationality of the company doctrine the Court decided not to pronounce on the material aspects of the case.

*B) A Denial of Justice?*

Addressing Belgium's claim of a *denial of justice* the Court stated:

> With regard more particularly to human rights, to which reference has already been made…it should be noted that these also include protection against denial of justice.

139 *Ibid*., pp. 43-44, paras. 75-76.
140 *Ibid*., p. 44, para. 77.
141 *Ibid*., p. 44, para. 79.
142 *Ibid*., p. 48, para. 92.
143 *Ibid*., p. 49, para. 96.
144 *Ibid*., p. 50, para. 101.
145 *Ibid*., p. 51, para. 102.
146 *Ibidem*.

> However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.[147]

In rather clear terms the Court pointed out what is still deemed by many to be a weakness in the system of protection created by international human rights law instruments, namely that instigating a denial of justice claim is a prerogative of the State of nationality of the victim of such a violation. However, as the Court rightly noted, opening the door to competing diplomatic claims could create an atmosphere of confusion and insecurity. Overcoming this fear, while at the same time addressing the need for legal remedies for individuals, led to the establishment of regional human rights systems, where amongst other things such a nationality link is not a must.[148]

*C) Erga Omnes Obligations*

Let us now turn the ground-breaking *dictum*, which is widely known, quoted, and discussed.[149] The importance of this *dictum* for the development and increased importance of the international law of human rights within the framework of general international law cannot be overemphasized. Firstly, by pointing at the *erga omnes* nature of certain human rights the Court internationalized the issue of respect for human rights, changing its nature as an issue solely within a State's domestic jurisdiction. This statement by the Court dispels any doubts that State performance in respecting the human rights of its citizens is a legitimate concern of the international community and therefore falls within international scrutiny. Obligations on the part of particular States towards ensuring respect for human rights were due to all States forming what is often referred to as 'the international community' as all of them had an interest in upholding commonly shared human values. That finding certainly invigorated the international human rights movement. Secondly, by determining that all States had a legal interest in ensuring respect for obligations deriving from principles and rules concerning certain basic rights of the human person, the Court seems

147 *Barcelona Traction*, (*Merits*), p. 47, para. 91.

148 See Article 33 of the ECHR, Articles 61and 62 of the AfCHR. For a more detailed discussion of the human rights system created by the ECHR see *infra* section 5.6.

149 *Barcelona Traction*, (*Merits*), ICJ Reports 1970, p. 32, para. 34. For a detailed discussion of the concept and the application of *erga omnes* obligations see *inter alia* A.J.J de Hoogh, *Obligations erga omnes and international crimes: a theoretical inquiry into the implementation and enforcement of the international responsibility of States*, Nijmegen, 1996; M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford: Clarendon Press, 1997; C.J. Tams, *Enforcing obligations erga omnes in international law*, Cambridge University Press Cambridge, UK/ New York, 2005; C. Tomuschat and J.M. Thouvenin, (eds.), *The fundamental rules of the international legal order: jus cogens and obligations erga omnes*, Martinus Nijhoff Publishers: Leiden/Boston, 2006.

to implicitly acknowledge the position of the individual as a participant in the international arena in his or her own right.[150]

The Court stated:

> In particular, an essential distinction should be drawn between obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the sphere of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations *erga omnes*. Such obligations derive, for example in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law…; others are conferred by international instruments of a universal or quasi-universal character.[151]

This *dictum* was indeed a giant leap forward for international human rights law as the Court found that *erga omnes* obligations of States towards the international community derive also from principles and rules concerning the protection of basic rights of the human person. On the basis of the Court's examples of *erga omnes* obligations Ragazzi has identified five common elements:[152]

a) they are narrowly defined obligations;
b) essentially they refer to prohibitions rather than positive obligations;
c) they are obligations in the strict sense, to the exclusion of other fundamental legal conceptions;
d) such obligations derive from rules of general international law belonging to *jus cogens* and codified by international treaties to which a large number of States have become parties;
e) such obligations are instrumental to the main political objectives of the present time, which in turn reflect basic moral values.

As Ragazzi notes, the dictum identifies two characteristic features of this concept: first, *universality*, in that obligations *erga omnes* are binding on all States without exception; and, second, *solidarity*, in the sense that every State is deemed to have a legal interest in their protection.[153] Indeed, in view of the increasing support of the international community towards the protection and promotion of human rights it is not by

150 See R. Higgins, *Problems and Process. International Law and How We Use It*, Oxford: Clarendon Press, 1994, pp. 48-55.
151 *Barcelona Traction*, (*Merits*), ICJ Reports 1970, p. 32, para. 33.
152 M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, 1997, p. 215.
153 Ragazzi, *supra* note 152, p. 17.

chance that of the four examples of *erga omnes* obligations given by the Court three of them relate to human rights. Further, the listed examples of protection from slavery and racial discrimination were no coincidence, but a practical contribution by the Court to human rights and the voices of the international community opposed to such terrible practices being applied in South Africa and South-East Africa.

The emergence of this concept marked the beginning of important inroads into the principle of state sovereignty. As noted above the often articulated position that human rights practices of States were a matter of domestic affairs became untenable in the face of this *dictum*. One can reasonably infer that a breach of these *erga omnes* obligations would trigger State responsibility. Thus, a State could be called to account by other States if acts of aggression, genocide, or other grave and widespread infringements upon basic rights of the human person were occurring in or stemming from a State's territory. Recently, a great impetus was given to this concept through the codification of the rules on State responsibility, which found expression in the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[154] Article 26 of ARSIWA entitled 'Compliance with peremptory norms' clarifies that none of the circumstances precluding wrongfulness would preclude the wrongfulness of any act of State which is not in conformity with an obligation arising under a peremptory norm of general international law. This article is based on the joint application of the concept of *erga omnes* obligations and that of *jus cogens* norms.[155] These two concepts have found expression in Articles 41 and 42 on serious breaches of obligations under peremptory norms of general international law and in Article 48 which allows for the invocation of responsibility by a State other than an injured State.

*D) Concluding Remarks*

This *dictum* was meant *inter alia* to encourage developing States to resort to the Court after their bitter disappointment in its earlier ruling in the *South-West Africa* case. The Court stated that obligations *erga omnes* derive also from 'principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.' Notably, the list provided by the Court is by no means exhaustive. However, in spite of the adoption of a vast number of international and regional human rights instruments the concept of core human rights still remains an elusive issue. The Court's *dictum* leaves open the possibility that other human rights could give rise to obligations *erga omnes*. Since then it has been accepted by the Court that also the right to self-determination is a right which gives rise to *erga omnes* obliga-

154 The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts were adopted on 9 August 2001. For a detailed discussion see J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2003.

155 By using the term 'peremptory norm of general international law' the ILC preserves the language of the Vienna Convention on the Law of Treaties (Article 53 of this Convention) thus ensuring legal clarity and uniformity in the development of international law.

tions.[156] Further, the concept of 'obligations *erga omnes*' provides another valid justification for the international monitoring of human rights practices of States.

Unsurprisingly, this concept provides the basis upon which many rules and principles of international law concerning the protection and the treatment to be afforded to individuals are based. Obligations *erga omnes* can reasonably be equated with obligations arising under a peremptory norm of general international law (*jus cogens* norms). By emphasizing that the international community as a whole has a legal interest in protecting basic human rights, the ICJ made an essential contribution to the increased importance of the international law of human rights in the international arena. As the Court put it, all States have a *legal interest* in the protection of principles and rules concerning the basic human rights of the human person; thus, this entails the possibility of taking legal action against the State which would be in breach of these obligations.[157] Seemingly, in filling a lacuna of international law and at the same time giving effect to this *dictum* the ILC drafted Article 48 of the ARSIWA.[158] While the Court has frequently referred to and invoked the concept of *erga omnes* obligations, it remains to be seen how this latter provision of ARSIWA, allowing for the invocation of responsibility by a State other than an injured State, will be interpreted and applied by the Court.

## 3.7 THE RIGHT OF PEOPLES TO SELF-DETERMINATION

Without a doubt, the development of the right of peoples to self-determination has an impressive history and a special place in the corpus of the international law of human rights. Therefore it comes as no surprise that this issue has generated extensive case law, stretching for most of the Court's existence. The right of peoples to self-determination is a collective human right, whose *erga omnes* character has been acknowledged and emphasized in the jurisprudence of the Court. Respect for the principle of

156 Only a year later, namely on 21 June 1971 in the Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, p. 56, para. 126, the Court acknowledged the *erga omnes* character of the right to self-determination. See also see *East Timor* (Portugal *v*. Australia), Judgment, ICJ Reports 1995, p. 102, para. 29 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 171-172, para. 88.

157 Further, it is submitted that if such action aimed at protecting common human values enshrined in rules and principles of international human rights law proves to be fruitless States would be entitled to take enforcement action according to the relevant articles under the UN Charter.

158 Article 48(1) of the ARSIWA reads:
1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
(*a*) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
(*b*) The obligation breached is owed to the international community as a whole.

the self-determination of peoples was first included in the UN Charter[159] and was later codified in both International Covenants.[160] However, as Higgins pointed out, when the Court addressed this matter in the *South-West Africa* (Namibia) and *Western Sahara* cases, there were still those who insisted that self-determination was nothing more than a political aspiration.[161] Her assertion is best illustrated by the position taken by South Africa with regard to South-West Africa and that of Spain with regard to Western Sahara.

The process of decolonization was more than just the implementation of the right of peoples to self-determination. A pivotal role in bringing this long and arduous process to an end was played by the main organs of the UN. That colonialism was one of the main concerns of the international community after the end of WWII is illustrated by the mere fact that no less than three Chapters of the UN Charter, namely Chapters XI, XII and XIII, deal with Trust and Non-Self-Governing Territories. It was the adoption by the GA of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (the Decolonization Declaration) which emphasized the importance of the process of decolonization.[162] According to a 2001 statement by the then SG of the UN, Kofi Annan, since the adoption of the Decolonization Declaration more than 80 million people had attained independence, but there were still 17 Non-Self-Governing Territories remaining.[163] Seeing the decolonization process to its end means raising awareness in the international community about any such outstanding issues, a better coordination of the wider UN system, and the carrying out of their statutory duties in good faith by the administering Powers.

It is noteworthy that whether the exercise of the right of self-determination entails becoming independent from a colonial power or seceding from an independent State, the broad limitation of the principle of *uti possidetis juris* applies. The main aim of this principle is to achieve the stability of territorial boundaries by preserving the former administrative or colonial boundaries of a State. The ICJ recognized the application of this principle in a frontier delimitation case which arose in the context of emerging States on the African continent. With regard to the rationale for the application of this principle the Court stated:

159 Article 1(2) of the UN Charter reads: 'The Purposes of the United Nations are: …2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.'

160 Article 1, paragraph 1, of both the ICCPR and ICESCR reads: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'.

161 R. Higgins, *The International Court of Justice and Human Rights*, in International law: Theory and Practice: essays in honour of Eric Suy, Karel Wellens (ed.), 1998, p. 694.

162 GA Res. 1514 (XV) of 14 December 1960.

163 Statement of the UN Secretary-General Kofi Annan read by Maria Maldonado, Chief of Decolonization Unit of the Department of Political Affairs in the opening of the Caribbean Regional Seminar held on 23 May 2001, Press Release GA/COL/3044.

> [T]he maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it [*i.e* of *uti possidetis* – author's note] in the interpretation of the principle of self-determination of peoples.[164]

The UN Charter provided the necessary legal framework to be applied in the decolonization process. Chapters XI, XII, and XIII deal respectively with non-self-governing territories, the international trusteeship system, and the trusteeship council. Article 73 of the UN Charter on Non-Self-Governing Territories (Chapter XI) lists the duties incumbent upon those members of the UN which assumed responsibilities for the administration of territories whose people had not yet attained a full measure of self-government.[165] Article 76 dealing with the International Trusteeship System (Chapter XII) lists as the main objectives of the trusteeship system the promotion of political, economic, social and educational advancement of the inhabitants of the trust territories, encouragement of respect for human rights and fundamental freedoms, and ensuring equal treatment in social, economic, and commercial maters for all Members of the United Nations.[166] It is noteworthy that the international trusteeship system was

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164 ICJ, *Case Concerning the Frontier Dispute* (Burkina Faso *v*. Mali), ICJ Reports 1986, p. 567. The Court, despite recognizing that *uti possidetis* is a 'general principle' and a 'rule of general scope' in the case of decolonization, as stated in *the Frontier Dispute* (Burkina Faso *v*. Mali) case, it never adjudicated whether *uti possidetis* is a norm of customary law. This is so because, '[i]n these types of border disputes, both parties have stipulated by *compromis* or otherwise that their boundary would be determined according to the borders in effect at the time of independence. Nevertheless, the repeated assumption by the Court that *uti possidetis* is a norm of international law is probative. Without definitely opining on the issue, one may thus assume some support for regarding *uti possidetis* as a norm of regional customary law in Latin America and Africa, if not a general norm as well, in the context of decolonization. For more details see *inter alia* S.R. Ratner, *Drawing A Better Line: Uti Possidetis and the Borders of New States*, AJIL, Vol. 90, 1996, p. 590.

165 This article reads: 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end: a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social and educational advancement, their just treatment, and their protection against abuses; b) to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; c) to further international peace and security; d) to promote constructive measures of development….

166 This article reads: 'The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:
a) to further international peace and security;
b) to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be

devised as a dignified treatment of the inhabitants of the territories put under trusteeship during the transitional period towards independence. It is in this light that the ICJ interpreted the duties of the administering Powers vis-à-vis the inhabitants of these territories.

In setting out the competences of the Trusteeship Council (Chapter XIII), operating under the authority of the General Assembly, article 87 of the Charter included these functions, namely:

a) to consider reports submitted by the administering authority;
b) to accept petitions and examine them in consultation with the administering authority;
c) to provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
d) to take these and other actions in conformity with the terms of the trusteeship agreements.

A joint reading of the three above-mentioned articles gives a clear idea of the *raison d'être* and the *modus operandi* of the UN Trusteeship System. That is a necessary basis for understanding the contribution of the Court in interpreting and developing the concept of the rights of peoples to self-determination and the legal framework which applied to the process of decolonization. As stated in the Decolonization Declaration itself, the process of liberation was irresistible and irreversible and that, in order to avoid serious crises, and end was to be put to colonialism and all practices of segregation and discrimination associated therewith.[167] The contribution of the Court towards clarifying this very important principle of international human rights law is illustrated by focusing on some of the Court's important findings in the *South-West Africa* cases, the *Western Sahara* case, the *East Timor* case and the more recent case of the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

### 3.7.1 The *South-West Africa* Cases

The referral of the question of the international status of South-West Africa (now Namibia) to the Court by the GA in December 1949 marked just the start of what

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appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the people concerned, as may be provided by the terms of each trusteeship agreement;
c) to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and to encourage recognition of the interdependence of the peoples of the world;
d) To ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice…

167 GA Res. 1514 (XV) of 14 December 1960.

became a long and intricate judicial process.[168] That first advisory opinion was delivered on 11 July 1950.[169] The clarification of the international status of this territory by the Court paved the way for many of the actions which were undertaken later by the GA, the SC, and certain concerned States, for compelling South Africa, the Mandatory Power, to secure the process leading to the independence of this territory. From 1949 until 1966 the Court remained actively engaged with different legal issues concerning the decolonization process of South-West Africa,[170] issuing a considerable number of advisory opinions and judgments.

Those advisory opinions and judgments of the Court are presented below in chronological order. It should be noted that the Court was faced with difficult legal questions conditioned amongst other factors also from the inter-temporal application of the law. The analysis of the cases below is relevant for shedding light on the contribution of the Court to the right of peoples to self-determination in the process of the decolonization of this territory. This contribution also includes the Court's upholding of the human rights enjoyed by the inhabitants of South-West Africa and the condemnation of the inhuman policy of apartheid applied there by South Africa.

### *1. International Status of South-West Africa* (Advisory Opinion of 11 July 1950)

On 6 December 1949 the GA requested the Court's advisory opinion on a few questions concerning the international status of South-West Africa, now known as Namibia.[171] Before WWI the territory of South-West Africa was one of the German overseas colonies. After the war, in 1919, Germany renounced all its rights and titles in favour of the Principal Allied and Associated Powers, more precisely in favour of His Britannic Majesty.[172] The Union of South Africa was to exercise the Mandate on behalf of His Britannic Majesty and was to have full powers of administration and legislation over this territory as an integral portion of the Union. This latter government was to administer this territory on behalf of the League of Nations, with the object of promoting the well-being and development of the inhabitants, this object being part of the 'sacred trust of civilization'. In interpreting the international obligations this administration entailed, the Court pointed out correctly, that the international obligations assumed by the Union of South Africa were of two kinds. One kind was directly related to the administration of the Territory and corresponded to the sacred trust of civilization referred to in article 22 of the Covenant of the League of Nations; the other related to the machinery for implementation and was closely linked to the

168 ICJ, *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, ICJ Reports 1950, p. 128.

169 *Ibidem*.

170 ICJ, *South West Africa Cases* (Ethiopia *v.* South Africa and Liberia *v.* South Africa), (*Second Phase*), Judgment of 18 July 1966, ICJ Reports 1966, p. 6.

171 See GA Res. 338 (IV) of 6 December 1949.

172 Article 119 of the Treaty of Versailles of 28 June 1919 reads: 'Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions.'

supervision and control of the League.[173] For the Court that group of obligations mentioned in Article 22 of the Covenant and articles 2 to 5 of the Mandate represented the very essence of the sacred trust of civilization and since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist.[174] The Court asserted that the right of the population to have their Territory administered in accordance with these obligations derived from the sacred trust of civilization and this had outlived the League of Nations.[175] The duty of the Mandatory Power being owed to the population of the Territory under administration had thus an existence of its own. This important finding implied the continuation of international obligations concerning good governance and its important corollary respect for human rights, despite changes which had taken place with the replacement of the League of Nations by the UN.

With regard to the second group of obligations, the Court considered whether those were to be exercised by the new international organization created by the Charter, as some doubts could arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new trusteeship system were neither expressly transferred to the UN, nor expressly assumed by that Organization.[176] The Court stated that the obligation incumbent upon a Mandatory State to accept international supervision and to submit reports was an important part of the Mandates System. Therefore, it could not be admitted that the obligation to submit to supervision had disappeared merely because the supervisory organ had ceased to exist when the UN had another international organ performing similar, though not identical, supervisory functions.[177] In support of its general considerations the Court referred to Article 80, paragraph 1, of the UN Charter, which purports to safeguard not only the rights of States, but also the rights of the peoples of mandated territories until trusteeship agreements were concluded. The Court noted that the competence of the GA to exercise such supervision and to receive and examine reports derived from the provisions of Article 10 of the Charter, which authorized the GA to discuss any questions on any matters within the scope of the Charter, and make recommendations to the Members of the UN. Finally, the Court noted that the resolution of the Assembly of the League of Nations on 18 April 1946 stated that the League's functions relating to mandated territories would come to an end, but did not put an end to the Mandates,

173 ICJ, *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, ICJ Reports 1950, p. 133.

174 *Ibid*em.

175 The Court noted that some of these obligations include the general obligation to promote to the utmost the material and moral well-being and the social progress of the inhabitants and particular obligations assumed related to the slave trade, forced labour, traffic in arms and ammunition, intoxicating spirits and beverages, military training and establishments, as well as obligations relating to freedom of conscience and the free exercise of worship, including special obligations with regard to missionaries.

176 *International Status of South-West Africa*, p. 136.

177 *Ibidem*.

thus implying that the supervisory functions exercised by the League would be taken over by the UN.

In the Court's view the Mandatory States of the League of Nations were subject to the international supervision of the UNGA, through the Trusteeship Council.[178] The implication was that the GA (replacing the Council of the League of Nations) was to supervise that the interests of the people of the territories under a Mandate were being effectively safeguarded. Among other things, the Court opined that petitions were to be transmitted by the Government of the Union of South Africa to the UNGA, which was legally entitled to deal with them. However, the Court clarified that the degree of supervision by the GA was not to exceed that which applied under the Mandates System. This advisory opinion is rather important for by providing the necessary legal basis for further action on the part of the UN organs and Member States it opened the way to the decolonization process of South West Africa with the aim of achieving, over time, the independence of that territory. Further, this advisory opinion provided the basic legal foundations for other findings which the Court was to make in the case law that followed on this issue.

2. *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa* (Advisory Opinion of 7 June 1955)

The GA submitted to the Court a few questions on the Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa.[179] In the view of the Court this gave it the task of establishing the true meaning of the following statement:

> 'The degree of supervision to be exercised by the General Assembly should not therefore exceed that which applied under the Mandates System, and should conform as far as possible to the procedure followed in this respect by the Council of the League of Nations.'[180]

Basically, the task of the Court was to grapple with the meaning to be given to the words 'the degree of supervision'. The Court held that these words related to the extent of the substantive supervision and not to the manner in which the collective will of the GA was expressed.[181] Thus, in the opinion of the Court, these words, if given their ordinary and natural meaning, were not to be interpreted as relating to procedural matters, but to the measure and means of supervision.[182] In the opinion of the Court the

178 The provisions on the Trusteeship Council are provided for under Chapter XIII of the UN Charter, Articles 86-91.

179 GA Res. 904 (IX) of 23 November 1954.

180 ICJ, *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa* (*Voting Procedures*), Advisory Opinion of 7 June 1955, ICJ Reports 1955, p. 72.

181 *Ibidem*.

182 *Ibidem*.

first part of the sentence meant that the GA should not adopt such methods of supervision or impose such conditions on the Mandatory which were inconsistent with the terms of the Mandate or with a proper degree of supervision measured by the standard and the methods applied by the Council of the League of Nations. The Court held that Rule F (a rule on the voting procedure to be followed by the GA in taking decisions on questions relating to reports and petitions concerning the Territory of South West Africa) could not be regarded as relevant to the 'degree of supervision', and thus it could not be considered as instituting a greater degree of supervision than that which was envisaged by the Court in its Opinion of July 1950.[183]

The connection between the degree of supervision, as the framework for steering the process of decolonization, and the right of peoples to self-determination is self-explanatory. Undoubtedly, the meaning given to the notion of 'degree of supervision' was of importance in making sure that the mandatory Power was discharging its duties properly *vis-à-vis* the inhabitants of the mandated territory. The carrying out by mandatory Powers of the duties flowing from that sacred trust of civilization was to be supervised by the GA on behalf of the whole international community. As the Court concluded the 'degree of supervision' was not to be diminished, despite the replacement of the Council of the League of Nations by the UNGA. From the perspective of international human rights law the degree of supervision to be exercised by the GA with regard to mandated territories represents the early clashes between the GA, representing the international community, and States, concerning existing human rights monitoring procedures. The contribution of the Court here, but also in the other advisory opinions, lies in the clarity which it created with regard to the position of the relevant actors in the process of the decolonization of South West Africa.

3. *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (Advisory Opinion of 1 June 1956)

In its effort to solve the continuing controversies between itself and South Africa, the mandatory Power, the GA asked the ICJ to give an advisory opinion on another question relating to South West Africa, namely:

> 'Is it consistent with the advisory opinion of the International Court of Justice of 11 July 1950 for the Committee on South West Africa, established by General Assembly resolution 749 A (VIII) of 28 November 1953, to grant oral hearings to petitioners on matters relating to the Territory of South West Africa?'[184]

First, the Court noted that because of the refusal by the Mandatory Power to co-operate, the Committee on South West Africa found itself handicapped in the examina-

183 *Ibid*., p. 72-3.
184 GA Res. 934 (X) of 3 December 1955.

tion of petitions.[185] With regard to the granting of oral hearings by the Committee the Court found that if as a result of the granting of oral hearings to petitioners in certain cases the Committee was put in a better position to judge the merits of petitions, this could not be presumed to add to the burden of the Mandatory.[186] The Court noted that under the compulsion of practical considerations the Committee provided by Rule XXVI of its Rules of Procedure an alternative procedure for the receipt and treatment of petitions.[187]

In conclusion the Court held that it would not be inconsistent with its Opinion of 11 July 1950 for the GA to authorize a procedure for the granting of oral hearings by the Committee on South West Africa to petitioners who had already submitted written petitions.[188] The caveat of the Court to this finding was that the GA was to be satisfied that such a *modus operandi* was necessary for the maintenance of effective international supervision of the administration of the Mandated Territory.[189] Indeed, the rights to accept petitions and to grant oral hearings when necessary to inhabitants of the Mandated Territory are basic tools for achieving an effective and meaningful international supervision. By acknowledging that the GA enjoyed both these rights the Court rendered a valuable contribution to the supervision of the human rights of the inhabitants of this territory in general and of their right to self-determination in particular.

### 4. *South West Africa Cases* (Ethiopia *v.* South Africa Liberia *v.* South Africa) (Preliminary Objections, Judgment of 21 December 1962)

On 4 November 1960, with the decolonization process getting underway, Ethiopia and Liberia, acting separately, brought a case against South Africa. These legal proceedings related to the continued existence of the Mandate for South West Africa and the duties and performance of South Africa as a Mandatory Power.[190] As expected, the Government of South Africa raised preliminary objections to the jurisdiction of the Court. Both Ethiopia and Liberia contended that the Union of South Africa had failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the territory of South West Africa, thus being in breach of its Mandate. Further, Ethiopia and Liberia asked to Court to adjudge and declare that South Africa in administering the Territory had practised *apartheid*; that South Africa had adopted and applied legislation, regulations, proclamations, and administrative decrees which were by their terms and in their application arbitrary, unreasonable, unjust and detrimental to human dignity; that South Africa had adopted and applied legislation,

185 ICJ, *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory opinion of 1 June 1956, ICJ Reports 1956, p.26.

186 *Ibid.*, p. 30.

187 *Ibid.*, p. 31.

188 *Ibid.*, p. 32.

189 *Ibidem*.

190 ICJ, *South West Africa Cases* (Ethiopia *v.* South Africa and Liberia *v.* South Africa), (*Preliminary Objections*), Judgment of 21 December 1962, ICJ Reports 1962, p. 321.

administrative regulations, and official actions which suppressed the rights and liberties of inhabitants of the Territory essential to their orderly evolution towards self-government; and so on.[191] For its part, South Africa contended that both Applicants did not have *locus standi* in these proceedings; one of the four preliminary objections being that no material interests of these States or of their nationals were involved or affected therein.[192]

Rejecting South Africa's position the Court held that the agreement between the Council of the League and the Union of South Africa was in fact and in law an international agreement having the character of a treaty or convention.[193] With regard to the contention that the Mandate in question was not registered in accordance with Article 18 of the Covenant and was thus not binding the Court clarified that this requirement of the aforementioned article was effective only after 10 January when the Covenant took effect, while the Mandate had earlier been conferred upon South Africa on 7-9 May 1919.[194] The Court recalled that in its 1950 advisory opinion it had been unanimous on the finding that Article 7 of the Mandate relating to the obligation of South Africa to submit to the compulsory jurisdiction of the Court was still 'in force'.[195] The Court rightly noted that the judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System, the essence of which consisted of two features: a Mandate conferred upon a Power as 'a sacred trust of civilization' and the 'securities for the performance of this trust'.[196] The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the 'sacred trust' toward the inhabitants of the territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuses or breaches of the Mandate.[197]

The Court noted that as neither the Council nor the League was entitled to appear before the Court the only effective recourse would be for a Member or Members of the League to invoke Article 7 and bring the dispute as one between them and the Mandatory to the Permanent Court for adjudication.[198] Thus, the right to bring the Mandatory Power before the Permanent Court had been specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure for ensuring protection by the Court. The Court held that the manifest scope and purport of the provisions of Article 7 indicated 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 Mandate's Territory, and toward the

191 *Ibid*., pp. 322-326.
192 *Ibid*., pp. 326-327.
193 *Ibid*., p. 330.
194 *Ibid*., p. 332.
195 *Ibid*., p. 334.
196 *Ibid*., p. 336.
197 *Ibidem*.
198 *Ibid*., p. 337.

League of Nations and its Members.[199] South Africa's fourth preliminary objection related to the lack of negotiations, which would have a bearing on the issue of whether there was a dispute. In fact, negotiations with South Africa were conducted on behalf of these States by the UN *ad hoc* Committee on South West Africa and by the UN Good Offices Committee.[200] As the deadlock which had been reached in the collective negotiations in the past still persisted it compelled the Court to reach a conclusion that no reasonable probability existed that further negotiations would lead to a settlement. In concluding, by eight votes to seven the Court found that it had jurisdiction to adjudicate upon the merits of the dispute.[201] The narrowness of the vote on upholding jurisdiction was an omen that the issue of the *locus standi* of the Applicants was still looming in the background.

5. *South West Africa Cases* (Ethiopia *v.* South Africa and Liberia *v.* South Africa) (Second Phase, Judgment of 18 July 1966)

The separate proceedings initiated by Ethiopia and Liberia were joined by an order of the Court. The contentions of the Applicants covered, *inter alia,* the following relevant issues:

a) whether the Mandate for South West Africa was still in force and, if so, whether the Mandatory's obligation to furnish annual reports on its administration to the Council of the League of Nations had become transformed into an obligation so to report to the UNGA;
b) whether the Respondent had, in accordance with the Mandate, promoted to the utmost the material and moral well-being and the social progress of the inhabitants of the territory, whether the Mandatory had contravened the prohibition in the Mandate of the 'military training of the natives' and the establishment of military or naval bases or the erection of fortifications in the territory.'[202]

It should be noted beforehand that South West Africa belonged to the category of 'C' mandates, where a 'C' mandatory was to administer the mandated territory 'as an integral portion of its own territory'.[203] In the view of the Court the question to be decided was whether any legal right or interest was vested in members of the League of Nations individually as regards the 'conduct' clauses of the mandates – i.e., whether the various Mandatory Powers had any direct obligation towards the other members of the League individually as regards the carrying out of the 'conduct' provisions of

199 *Ibid*., p. 343.
200 *Ibid*., p. 344-346. See also E. Lauterpacht, *International Law Reports*, Vol. 37, Cambridge University Press, 1968, p. 181.
201 *Ibid*., p. 347.
202 ICJ, *South West Africa Cases* (Ethiopia *v.* South Africa Liberia *v.* South Africa) Judgment of 18 July 1966 (*Second Phase*), ICJ Reports 1966, pp. 10-11.
203 See Article 22, paragraph 6, of the Covenant of the League of Nations.

the mandates.[204] If the answer was that the Applicants could not be regarded as possessing the legal right or interest claimed, then even if the various allegations of contraventions of the Mandate for South West Africa were established, the Applicants would still not be entitled to the pronouncements and declarations which, in their final submissions, they asked the Court to make.[205] The Court noted that as specified in Article 22 of the Covenant the 'best method of giving practical effect to [the] principle' that the 'well-being and development' of those peoples in former enemy colonies 'not yet able to stand by themselves' formed 'a sacred trust of civilization' was that 'the tutelage of such peoples should be entrusted to advanced nations... who are willing to accept it' and it specifically added that it was 'on behalf of the League' that 'this tutelage should be exercised by those nations as Mandatories'.[206] The Court was of the opinion that had individual members of the League possessed the rights which the Applicants claimed, the position of a mandatory caught between the different points of view of some 40 or 50 States would have been untenable.[207]

The other argument brought forward by the Applicants, namely that of 'necessity', in the view of the Court amounted to a plea that the latter should allow the equivalent of an *actio popularis,* or right of any member of a community to take legal action in vindication of a public interest.[208] According to the Court such a right was not known to international law as it stood at present: and the Court was unable to regard it as imported by 'the general principles of law' referred to in Article 38, paragraph 1 (c), of its Statute.[209] Although the concern of the Court with regard to this specific issue was well founded given the state of international law at that time, as Judge Tanaka rightly pointed out:

> 'in the present case, the protection of the acquired right of the Respondent is not the issue, but its obligations, because the main purpose of the mandate system are ethical and humanitarian. The Respondent has no right to behave in an inhuman way today as well as during these 40 years.'[210]

Thus, it would have been the Court's duty to explain the Respondent's obligations towards the inhabitants of the mandated territory.

The Applicants attempted to derive a legal right or interest in the conduct of the Mandate from the simple existence, or principle, of the 'sacred trust'.[211] In their view the sacred trust was a 'sacred trust of civilization' and hence all civilized nations had

204 *South West Africa Cases*, (*Second Phase*), p. 22, para. 14.
205 *Ibid*., p. 22, para. 15.
206 *Ibid*., p. 24, para. 20.
207 See pars 34-5, pp.29-30 and paras. 38-9, pp. 30-1.
208 *Ibid*., p. 47, para. 88.
209 *Ibidem*.
210 *Ibid*., Dissenting opinion of Judge Tanaka, p. 294.
211 *South West Africa Cases*, (*Second Phase*), p. 34, para. 51.

an interest in seeing that it was carried out.[212] Contending that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, together with considering the obligation of carrying out 'the sacred trust of civilization' as an interest vested in all civilized nations, can be seen as an early *erga omnes* claim. However, the Court held that in order that this interest take on a specifically legal character the sacred trust itself must be or become something more than a moral or humanitarian ideal.[213] In order to generate legal rights and obligations, it had to be given juridical expression and had to be clothed in legal form.[214] According to the Court the principle of the 'sacred trust' had no residual juridical content which could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the system as a whole.[215]

Anticipating the indignation of the international community, the Court noted that it might have been urged that it was entitled to 'fill in the gaps' in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes.[216] This principle was a highly controversial one and it could, in any event, have no application to circumstances in which the Court would have to go beyond what could reasonably be regarded as being a process of interpretation and would have to engage in a process of rectification or revision.[217] According to the Court rights could not be presumed to exist merely because it would seem desirable that they should; thus, the Court could not remedy a deficiency if, in order to do so, it had to exceed the bounds of normal judicial action.[218] However, the Court noted that, if asked, it could give a decision *ex aequo et bono*, in terms of paragraph 2 of Article 38.[219] Failing that, the Court held that its duty was plain: to apply the law as it found it, not to make it.[220] By the President's casting vote the Court found that the Applicant States could not be considered to have established any legal right or interest in the subject-matter of their claims and accordingly decided to reject them.[221]

The Court can be duly criticized for the abstract and rigid approach it adopted, which is better encapsulated in the Roman legal maxim *summum jus*, *summa injuria*.[222] The circumstances of the case, namely the defiance of the GA by South Africa concerning the South West Africa issue, the adoption of the Decolonization Declaration in 1960, and the disappointing state of affairs of which the GA remained seized

212 *Ibidem*.
213 *Ibidem*.
214 *Ibidem*.
215 *Ibid*., p. 35, para. 54.
216 *Ibid*., p. 48, para. 91.
217 *Ibidem*.
218 *Ibidem*.
219 *Ibid*., p. 48, para. 90.
220 *Ibidem*.
221 *Ibid*., p. 51, para. 99.
222 *Summum jus, summa injuria* – The highest right is the utmost injury. That is, law too rigidly interpreted produces the greatest injustice. In Black's Law Dictionary, 7th edition, West Group, 1999, p. 1693.

since 1949, certainly weighed against its judgment. The outcome of this case had a negative influence on the perception of the Court and ultimately in its workload, which was reduced to a minimum until the judgment in the *Nicaragua* case in 1986. However, the legal proceedings in this case served as a starting point for the development of a very important concept for the international law of human rights, namely that of *erga omnes* obligations. Against the background of this case it is easier to understand the significant change in the position of the Court in its famous dictum in the *Barcelona Traction* case. The reaction of the international community to this judgment served to remind the Court that finding a fine balance between the letter and the spirit of the law and safeguarding humanitarian considerations were part and parcel of the duties with which the international community had entrusted it.

### 6. *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)

Through resolution 2145 (XXI) of 27 October 1966 the UNGA decided that the Mandate over South West Africa was terminated and that South Africa had no other right to administer the Territory.[223] Subsequently, the SC adopted various resolutions, including resolution 276 (1970), declaring illegal the continued presence of South Africa in Namibia (formerly known as South West Africa). In resolution 276 the SC condemned the refusal of the government of South Africa to comply with the resolutions of the GA and the SC pertaining to Namibia. Further, the SC declared that the continued presence of the South African authorities in Namibia was illegal and consequently all actions taken by the said government on behalf of or concerning Namibia after the termination of the mandate were illegal and invalid.[224] Having found itself dealing with a rather recalcitrant State, the SC decided to establish an *ad hoc* Sub-Committee of the Council to study, in consultation with the Secretary-General, ways and means by which the relevant resolutions of the Council could be effectively implemented in accordance with the appropriate provisions of the Charter.[225]As part of these actions the SC asked the Court for an advisory opinion on the following question: 'What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?'[226]

A few preliminary objections put forward by South Africa, namely that the resolution of the SC was invalid as two permanent members had abstained,[227] that as a matter of judicial propriety it should decline to answer the question put before it, and that the

223 GA Res. 2145 (XXI) of 27 October 1966.
224 SC Res. 276 of 30 January 1970.
225 *Ibid*.
226 SC Res. 284 of 29 July 1970.
227 ICJ, *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, ICJ Reports 1971, p. 22, para. 21-2.

question was in reality contentious, were dismissed by the Court.[228] Referring to its advisory opinion of 1950 on the international status of South West Africa the Court recalled that in setting up the mandates system 'two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form 'a sacred trust of civilization''.[229] After making an analysis of the nature of the Mandate for South West Africa and its *raison d'être* the Court came to the conclusion that the ultimate objective of the sacred trust was self-determination and independence.[230] In the Court's opinion, the subsequent development of international law with regard to non-self-governing territories, as enshrined in the UN Charter, made the principle of self-determination applicable to all of them.[231] The above-mentioned findings of the Court remove any doubt as to the aim and scope that the principle of self-determination had achieved under international law. In coming to these findings the Court took into account the subsequent developments made after WWII with the adoption of the UN Charter, the Decolonization Declaration, and by way of customary law.

That necessitated a change in the interpretation of an international instrument. While in the South West Africa judgment of 18 July 1966 the Court had suggested that only the intentions that had existed at the time of the adoption of an international instrument were relevant,[232] here the Court took a different position:

> [a]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of 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. In this domain, as elsewhere the corpus *iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[233]

By acknowledging that in discharging its duty the Court was bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and the 'well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, and so was the concept of the 'sacred trust',[234] the ICJ clarified an important aspect of the right of peoples to self-determination. Besides, the Court adopted a progressive view of the interpretation of international law instruments. As the *South West Africa* cases

228 *Ibid*., pp. 21-27, paras. 19-41.
229 *Ibid*., p. 28, para. 45.
230 *Ibid.*, pp. 28-31, pars.45-53.
231 *Ibid*., p. 31, para. 52.
232 *South West Africa Cases*, (*Second Phase*), ICJ Reports 1966, p. 23, para. 16.
233 *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, ICJ Reports 1971, pp. 31-2, para. 53.
234 *Ibid*., p. 31, para. 53.

themselves show, considering the law as a living organism and not as a fossil creates the necessary preconditions for the Court to serve the needs of the human society properly. How else would the Court have concluded that 'the ultimate objective of the sacred trust was the self-determination and independence of the people concerned'?[235]

A few contentions were raised regarding the illegality of the termination of the Mandate by the GA through its resolution 2145 (XXI), claiming mainly that the GA had acted *ultra vires*. With regard to these contentions the Court observed:

(a) that, the silence of a treaty as to its termination cannot imply the exclusion of such a right, which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded;[236]
(b) that, the possibility of revocation in the event of gross violation of the mandate was subsequently confirmed by authorities on international law and members of the Permanent Mandates Commission who interpreted and applied the mandates system under the League of Nations;[237]
(c) that, the consent of the wrongdoer to such a form of termination cannot be required;[238]
(d) that, the United Nations, as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly;[239]
(e) that, the failure of South Africa to comply with the obligation to submit to supervision and to render reports, an essential part of the Mandate, cannot be disputed in the light of determinations made by this Court on more occasions than one;[240]
(f) that, it would not be correct to assume that, because the GA is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.[241]

Thus, the Court ruled that putting an end to the Mandate was not *ultra vires*. The legal consequences of the continued presence of South Africa in Namibia for South Africa and for other States were the next issue that the Court addressed.

In clarifying the legal effects of SC resolution 276 (1970) the Court held that a binding determination made by a competent organ of the UN to the effect that a situation is illegal could not remain without consequences.[242] South Africa, being responsible for having created and maintained that situation, bore the obligation to put

235 *Ibidem*.
236 *Ibid*., p. 47, para. 96.
237 *Ibid*., p. 48-9, para. 100.
238 *Ibid*., p. 49, para. 101.
239 *Ibid*., p. 49-50, para. 103.
240 *Ibid*., p. 50, para. 104.
241 *Ibid*., p. 50, para. 105.
242 *Ibid*., p. 54, para. 117.

an end to it and withdraw its administration from the Territory.[243] In the Court's opinion by occupying the Territory without title, South Africa incurred international responsibility arising from a continuing violation of an international obligation.[244] The latter also remained accountable for any violations of the rights of the people of Namibia, or of its obligations under international law towards other States in respect of the exercise of its powers in relation to the Territory.[245] The Court held that the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia were opposable to all States in the sense of barring *erga omnes* the legality of the situation that was maintained in violation of international law.[246] In clarifying the legal consequences for States the Court noted in general that the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation.[247] In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate could not be extended to such acts as the registration of births, deaths and marriages.[248] It is noteworthy that the Court exercised due care that its findings on the illegality of the situation would not adversely affect the people of Namibia.

The Government of South Africa had expressed the desire to supply the Court with further factual information concerning the purposes and objectives of its policy of separate development, contending that to establish a breach of its substantive international obligations under the Mandate it would be necessary to prove that South Africa had failed to exercise its powers with a view to promoting the well-being and progress of the inhabitants.[249] The Court found that no factual evidence was needed for the purpose of determining whether the policy of *apartheid* in Namibia was in conformity with the international obligations assumed by South Africa.[250] In the view of the Court it was undisputed that the official governmental policy pursued by South Africa in Namibia was to achieve a complete physical separation of races and ethnic groups.[251] This meant the enforcement of distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constituted a denial of fundamental human rights.[252] The Court viewed this policy of *apartheid* as a flagrant violation of the purposes and principles of the UN

243 *Ibid*., p. 54, para. 118.
244 *Ibidem*.
245 *Ibidem*.
246 *Ibid*., para. 126, p. 56.
247 *Ibid*., p. 56, para. 125.
248 *Ibidem*.
249 *Ibid*., pp. 56-7, para. 128.
250 *Ibid*., p. 57, para. 129.
251 *Ibid*., p. 57, para. 130.
252 *Ibid*., p. 57, para. 131.

Charter.[253] The implication of this wording is that any act or omission that constitutes a denial of fundamental human rights violates the purposes and principles of the UN Charter.

*7. Concluding Remarks*

Eventually, the process of the decolonization of Namibia ended on 21 March 1990 with the independence of that territory. It is noteworthy that this process generated numerous and lengthy legal proceedings before the ICJ which extended for a period of over three decades. The importance of the case law of the Court with regard to the development and interpretation of the right of the people of South West Africa to self-determination is manifold. First, through its advisory opinions delivered to the UN GA and SC, the Court clarified the aim and scope of the right of peoples to self-determination and of related issues. Second, by adding its powerful voice to the international condemnation of the policy of *apartheid* as practised by South Africa in Namibia the Court contributed to the protection of the human rights of the people of Namibia. It is noteworthy that the Court's condemnation of the practice of apartheid was based on considering this practice as an affront to the purposes and principles of the UN Charter. Third, and it is worth emphasizing, the findings of the Court served as a guide in the work of the political organs of the UN and the advancement of their decolonization and related human rights agenda. While it is not conclusive, it can be said that the case law of the Court had an important influence on the conclusion of the decolonization process of South West Africa and the attainment of independence by Namibia.

### 3.7.2 *Western Sahara* (Advisory Opinion of 16 October 1975)

*A) Background*

On 13 December 1974 the GA adopted resolution 3292 (XXIX) requesting the Court for an advisory opinion on the issue of Western Sahara. The GA reaffirmed the right of the population of the Spanish Sahara to self-determination in accordance with the Decolonization Declaration of 1960 and considered that the persistence of a colonial situation in Western Sahara jeopardized stability and harmony in the north-west African region.[254] The advisory opinion was necessary for the GA in any further steps it was to take on this issue in view of the conflicting territorial claims that the Kingdom of Morocco and Mauritania had towards this territory.

253 *Ibidem*. The Court held: 'Under the Charter of the United Nations, the former Mandatory has pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinctions as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.'.

254 GA Res. 3292 (XXIX) of 13 December 1974.

*B) Status of the Territory and the Decolonization of Western Sahara*

The GA's questions were:

> I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the Time of Colonization by Spain a Territory Belonging to No One (*terra nullius*)?
>
> If the answer to the first question is in the negative,
> II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?[255]

As the Court itself noted, the opinion was sought for a practical and contemporary purpose, namely, in order that the GA be in a better position to decide on the policy to be followed for the decolonization of Western Sahara.[256] In the Court's opinion the right of that population to self-determination constituted a basic assumption of the questions put before it.[257] The Decolonization Declaration contemplated three possibilities for the decolonization process of non-self-governing territories, namely (a) emergence as a sovereign independent State; (b) free association with an independent State; or (c) integration with an independent State. The validity of the principle of self-determination, defined as the need to have due regard to the freely expressed will of peoples, was, in the view of the Court, not affected by the fact that in certain cases the GA had dispensed with the requirement of consulting the inhabitants of a given territory.[258] The Court was of the opinion that the decolonization process envisaged by the GA was one which respected the right of the population of Western Sahara to determine their future political status by their own and freely expressed will.[259] Further, the Court acknowledged that the GA was left with a measure of discretion with regard to the forms and procedures by which the right to self-determination was to be realized.[260]

In considering the facts the Court found that the 'time of colonization by Spain' was to be considered the one which began in 1884, when Spain proclaimed its protectorate over the Rio de Oro.[261] As for the concept of *terra nullius* the Court decided that this legal concept was to be interpreted by reference to the law in force during that period.[262] In clarifying this concept the Court said:

> The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupa-

255 ICJ, *Western Sahara*, Advisory opinion of 16 October 1975, ICJ Reports 1975, p. 14, para. 1.
256 *Ibid*., p. 20, para. 20.
257 *Ibidem*.
258 *Ibid*., p. 33, para. 59.
259 *Ibid*., p. 36, para. 70.
260 *Ibid*., p. 36, para. 71.
261 *Ibid*., p. 38, para. 77.
262 *Ibid*., pp.38-9, para. 79.

> tion' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, it was a cardinal condition of a valid 'occupation' that the territory should be *terra nullius* – a territory belonging to no-one – at the time of the act alleged to constitute the occupation [footnote omitted]. In the view of the Court, therefore, a determination that Western Sahara was a '*terra nullius*' at the time of colonization by Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'.[263]

Referring to the State practice of that period, the Court concluded that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*.[264] In such a case sovereignty was not generally considered as effected through occupation, but through agreements concluded with local rulers.[265] On the basis of the furnished information the Court noted that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them and that Spain did not proceed on the basis that it was establishing its sovereignty over *terra nullius*.[266] Thus, the Court went on to answer the first question posed by the GA in the negative.[267]

Turning to the second question the Court noted first that unlike *'terra nullius'* the expression 'legal ties' did not have a precise meaning.[268] However, the Court understood it as referring to such 'legal ties' as may affect the policy to be followed in the decolonization of Western Sahara.[269] The view that legal ties that the GA had in mind concerned only the territory and not the people was rejected by the Court, since legal ties are normally established in relation to people.[270] Some of the special characteristics of this territory included the low and spasmodic rainfall, the nomadic and sparse population, and the vast area determined the way of life and social and political organization of the peoples inhabiting it.[271] Further, the Court noted that many tribes had their recognized burial grounds, which constituted a rallying point for themselves and for allied tribes.[272] Western Sahara's legal régime, including its legal relations with neighbouring countries could not be properly appreciated without reference to these special characteristics.[273] The Court held:

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263 *Ibid*., p. 39, para. 79.
264 *Ibid*., p. 39, para. 80.
265 *Ibidem*.
266 *Ibid*., p. 39, para. 81.
267 *Ibid*., pp. 39-40, paras. 82-3.
268 *Ibid*., p. 40, para. 84.
269 *Ibid*., p. 41, para. 85.
270 *Ibidem*.
271 *Ibid*., p. 41, para. 87.
272 *Ibidem*.
273 *Ibidem*.

> The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity.[274]

The Court went on to conclude that it had not found legal ties between Western Sahara and Morocco or Mauritania of such a nature that could affect the application of the Decolonization Declaration of 1960 in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the *free and genuine expression of the will of the peoples* of the Territory (emphasis added).[275] According to the Decolonization Declaration the subjection of peoples to alien subjugation, domination and exploitation constituted a denial of fundamental human rights, was contrary to the UN Charter and was an impediment to the promotion of world peace and co-operation.[276]

*C) Concluding Remarks*

The Court mentioned two important requirements for the application of the principle of self-determination, namely that the expression thereof be (a) *free*, *i.e.* be taken without outside interference and, (b) *genuine*, *i.e.* be the expressed will of the people of the territory concerned. That was in line with the position of the GA itself, as expressed in its numerous resolutions concerning Western Sahara. Through this advisory opinion the Court rendered helpful legal advice to the GA in discharging its functions with regard to the decolonization of the territory. However, the decolonization process took another turn when Morocco annexed two-thirds of Western Sahara in 1976 and the whole of it after Mauritania's withdrawal in 1979. A UN-brokered cease-fire, effective from September 1991, put a stop to the conflict between the Polisario Front (Popular Front for the Liberation of the Saguia el Hamra and Rio de Oro) and Morocco. Nevertheless, the attempts of the UN Mission for the Referendum in Western Sahara (MINURSO) to hold a referendum have failed and the parties have thus far rejected all brokered proposals. This is certainly an example where the advisory opinion of the Court, if applied in good faith, could have brought about a just,

274 *Ibid*., p. 68, para. 162.

275 *Ibidem*.

276 GA Res. 1514 (XV) of 14 December 1960 (the Decolonization Declaration) called for immediate steps to be taken in Trust and Non-Self-Governing Territories, or all other territories which had not yet attained independence to transfer all powers to the peoples of these territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

peaceful and lasting solution. Instead, its disregard has caused a long-standing conflict and the need to deploy UN troops and humanitarian aid agencies in that region so as to stop the loss of human lives and to alleviate human suffering.

### 3.7.3 *East Timor* (Portugal *v.* Australia, Judgment of 30 June 1995)

Portugal, the administering Power for the territory of East Timor, instituted proceedings against Australia on 22 February 1991 concerning 'certain activities of Australia with respect to East Timor'. The subject-matter of the dispute was an agreement entered into by Indonesia and Australia for the exploration of the continental shelf of the so-called 'Timor gap'. The importance of the principles discussed in this case was aptly described by Judge Shahabuddeen in his Separate Opinion:

> 'The case touches on important principles of contemporary international law – principles which have changed the shape of the international community, altered the composition of its leading institutions, affected their orientation, and influenced their outlook.'[277]

Portugal contended that Australia had, by its conduct, 'failed to observe…the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor]…and... *the right of the people of East Timor to self-determination and the related rights* (emphasis added)'.[278] As a consequence, Australia had to cease infringing the relevant international norms and it owed reparation to the people of East Timor and to Portugal.[279]

In its Application Portugal contended:

> 'In the United Nations context, and from the standpoint of United Nations law, East Timor was, from General Assembly resolution 1542 (XV) of 15 December 1960 onwards, classed as a *non-self governing* territory, its people having the right to self-determination'.[280]

The two main political movements in East Timor, namely Frente Revolucionaria de Timor–Leste Independente (FRETILIN) and the Anti-Communist Movement (MAC), had strong divergences which towards the end of 1975 led to a serious internal conflict. FRETILIN declared the independence of the territory as the 'Democratic Republic of East Timor' on 28 November 1975, while MAC declared integration with Indonesia on 30 November 1975. On 7 December 1975 Indonesian troops invaded the territory of East Timor.[281] SC resolution 384 of 22 December 1975 called upon all

277 ICJ, *East Timor* (Portugal *v.* Australia), ICJ Reports 1995, Separate Opinion of Judge Shahabuddeen, p. 119.
278 *East Timor*, Judgment, p. 92, para. 1.
279 *East Timor*, Application, para. 32.
280 *East Timor*, Application, para. 7.
281 *East Timor*, Application, paras. 5-9.

States to respect the territorial sovereignty of East Timor as well as the inalienable right of its people to self-determination in accordance with GA resolution 1514 (XV) and urged all States and other parties concerned to co-operate fully with the efforts of the UN to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the territory.[282]

### *A) Erga Omnes Character of the Right to Self-determination: A Sufficient Basis for Jurisdiction?*

In attempting to establish the Court's jurisdiction, Portugal contended that the rights which Australia had allegedly breached were rights *erga omnes*,[283] and that accordingly Portugal could individually require their respect 'regardless of whether or not another State (*i.e.*, Indonesia, GZ) had conducted itself in a similarly unlawful manner'.[284] In clarifying the nature of the right to self-determination the Court stated:

> In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, had an *erga omnes* character, was irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion, I.C.J. Reports 1971*, pp.31-32, paras. 53-53; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law.[285]

However, the Court held that the *erga omnes* character of a norm and the rule of consent to jurisdiction were two different things; whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which was not a party to the case.[286] The Court went as far as to assert: 'Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*'.[287] The Court's refusal to proceed on the merits in the absence of consent to jurisdiction, although the right in question is one which is *erga omnes*, is a reflection of the consensual nature of international law, and also of the concern of the Court not to be perceived as partisan, overstepping the jurisdictional boundaries set in its Statute.[288]

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282 *East Timor*, Application, para. 10.
283 See the *Barcelona Traction* case, *supra* section 3.5.
284 *East Timor*, Judgment, para. 29.
285 *Ibidem*.
286 *Ibidem*.
287 *Ibidem*.
288 In making this finding the Court relied on the precedent it set in the *Monetary Gold Removed from Rome* case (Judgment of 15 June 1954). In this case the Court held that it could not exercise jurisdiction in a case without the consent of the country that would have a direct interest in the case. See *East Timor*, Judgment, ICJ Reports 1995, p. 101, para. 26.

An important contention by Portugal was that as an Administering Power, thus as the repository of the rights of the people of East Timor, only it could negotiate and conclude treaties on behalf of the people of East Timor. According to Portugal, the principal matters on which its claims were based, namely the status of East Timor as a non-self-governing territory and its own capacity as an administering Power, had already been decided by the GA and the SC acting within their proper spheres of competence.[289] In Portugal's view, the Court would maybe need to interpret those decisions, but the latter constituted subjects which were considered as 'givens' and on the content of which there was no need to decide *de novo*.[290] However, the Court was not persuaded that the relevant resolutions could be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over East Timor, and where the latter was concerned to deal only with Portugal.[291]

The Court went on to note that, for the two Parties, the Territory of East Timor remained a non-self-governing territory and its people had the right to self-determination, and that the express reference to Portugal as the 'Administering Power' in a number of the above-mentioned resolutions was not at issue between them.[292] Curiously enough, the Court found, however, that it could not be inferred from the sole fact that a number of resolutions of the GA and the SC referred to Portugal as the Administering Power of East Timor that they intended to establish an obligation on third States to deal exclusively with Portugal as regards the continental shelf of East Timor.[293] The Court noted that there had been no resolutions on East Timor by the SC since 1976 and no resolutions by the GA since 1982. Furthermore, while a note of protest against the conclusion of the treaty between Australia and Indonesia on the Timor Gap of 11 December 1989 was circulated as an official document of the forty-fifth session of the GA, under the item 'Question of East Timor', and of the SC, no responsive action was undertaken either by the GA or by the SC.[294] Thus, without prejudice to the question whether the resolutions under discussion could be of a binding nature, the Court considered that, as a result, the resolutions of the GA and the SC could not be regarded as 'givens' which constituted a sufficient basis for determining the dispute between the Parties.[295]

289 *Ibid*., p. 103, para. 30.
290 *Ibid*., p. 103, para. 30.
291 *Ibidem*.
292 *Ibid*., p. 103, para. 31. Contrary to this finding of the Court Judge Vereshchetin in his Separate Opinion expressed his belief that 'nowadays the mere denomination of a State as administering Power may not be interpreted as automatically conferring upon that State general power to take action on behalf of the people concerned, irrespective of any concrete circumstances.', Separate Opinion of Judge Vereshchetin, ICJ Reports 1995, p. 138.
293 *Ibid*., p. 104, para. 32.
294 *Ibidem*.
295 *Ibidem*.

*B) Importance of State Consent for the Court*

The Court took the view that as a prerequisite for deciding on Portugal's contention that Australia had violated its obligation to respect Portugal's status as the Administering Power, East Timor's status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources, it would primarily and necessarily have to rule upon the lawfulness of Indonesia's conduct.[296]

> Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the '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' (*Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954*, p. 32).[297]

The Court accordingly found that it was not required to consider Australia's other preliminary objections and that it could not rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they brought into play.[298] Nevertheless, the Court recalled that in any event it had taken note in the Judgment that, for the two Parties, the Territory of East Timor remained a non-self-governing territory and its people had the right to self-determination.[299] The position of the Court can be criticized, for although its jurisdiction is based upon consent, when the application of an *erga omnes* right is at stake that would necessitate clarification from the Court. This is even more so, given that the case at hand was about clarifying the implications that the right to self-determination, an *erga omnes* right, had in this instance in the framework of the unfinished process of the decolonization of this territory. Therefore, it is interesting to discuss in detail the different approach taken by two of the judges of the Court with regard to this case.

*C) Judge Weeramantry's Approach to the Case*

Judges Weeramantry and Skubiszewski appended two interesting dissenting opinions to the judgment, which dwell in detail on the right to self-determination and its implications for the parties to the dispute. Judge Weeramantry agreed with the Court's emphasis on the importance of self-determination as 'one of the essential principles of contemporary international law'. He held that the rights of self-determination and permanent sovereignty over natural resources are rights *erga omnes* belonging to the people of East Timor, and therefore generate a corresponding duty upon all States,

296 *Ibid*., p. 104, para. 33.
297 *Ibid*., p. 105, para. 34.
298 *Ibid*., p. 105, para. 36.
299 *Ibid*., p. 105-6, para. 37.

including the Respondent, to recognize and respect those rights.[300] In his view the position and responsibilities of an administering Power which continues to be so recognized by the UN are not lost by the mere circumstance of a loss of physical control, as such a proposition would run contrary to the protective scheme embodied in the UN Charter for the care of non-self-governing territories. The act of being party to a treaty recognizing that East Timor (admittedly a non-self-governing territory and recognized as such by the UN) had been incorporated in another State, a treaty which deals with a valuable non-renewable resource of the people of East Timor for an initial period of forty years, without reference to them or their authorized representative, raised substantial doubts regarding the compatibility of these acts with the rights of the people of East Timor and the obligations of Australia.

In his extensive opinion Judge Weeramantry concluded that the right to self-determination constitutes a fundamental norm of contemporary international law, binding on all States.[301] Further, in his view, the right to permanent sovereignty over natural resources is a basic constituent of the right to self-determination. He noted that the rights to self-determination and permanent sovereignty over natural resources are recognized as rights *erga omnes* under well-established principles of international law and were recognized as such by the Respondent. According to him, an *erga omnes* right generates a corresponding duty in all States, a duty which, in the case of non-compliance or a breach, can be the subject of a claim for redress against the State so acting.[302] The duty thus generated in all States includes the duty to recognize and respect those rights. Implicit in such recognition and respect is the duty not to act in any manner that will in effect deny those rights or impair their exercise. The duty to recognize and respect those rights is an overarching general duty, binding upon all States, and is not restricted to particular or specific directions or prohibitions issued by the UN.[303] According to him the fact remained that Indonesia was at no time recognized by the UN as having any authority over the non-self-governing Territory of East Timor, or as having displaced the administering Power duly recognized by the GS and the SC. The Treaty entered into by Australia and Indonesia had no provision on conserving the rights of the people of East Timor, or providing for the eventuality that, after exercising their right to self-determination, the people of East Timor could choose to repudiate the Treaty. Judge Weeramantry stressed that neither the people of that Territory, nor their duly recognized administering Power, had been consulted with regard to the said Treaty. In his words, the Treaty was entered into by the Respondent (Australia) and another State (Indonesia) 'for the mutual benefit of their people in the

300 *Ibid*., Dissenting Opinion of Judge Weeramantry, ICJ Reports 1995, p. 223. For the conclusions of Judge Weeramantry see pp. 220-3; for his opinion on obligations stemming from the *erga omnes* concept see pp. 213-216.

301 *Ibid*., pp. 221-222.

302 *Ibidem*.

303 *Ibidem*.

development of the resources of the area' with no mention of any benefits for the people of East Timor from the valuable natural resources belonging to them'.[304]

In his view Australia's individual actions raised substantial doubts regarding their compatibility with:

*(a)* the rights of the people of East Timor to self-determination and permanent sovereignty over their natural resources;
*(b)* the Respondent's express acknowledgement of those rights;
*(c)* the Respondent's obligations, correlative to East Timor's rights, to recognize and respect those rights, and not to act in such a manner as to impair those rights;
*(d)* the Respondent's obligations under relevant resolutions of the GA and the SC.[305]

Judge Weeramantry held that the Court could have proceeded to determine the case on its merits without the need for any adjudication concerning Indonesia on the basis of:

(a) the Respondent's *individual* obligations under international law;
(b) the Respondent's *individual* actions; and
(c) the principle of a State's *individual* responsibility under international law for its *individual* actions.[306]

Thus, in his opinion the preliminary objections should have been overruled and the case should have proceeded to a final determination.

*D) Judge Skubiszewski's Approach to the Case*

In his Dissenting Opinion Judge *ad hoc* Skubiszewski regretted that the Court did not repeat some important findings made in the body of the judgment in its operative clause.[307] In summarizing what the other judges of the Court had said he noted:

> In the Opinion of Judge Bedjaoui, President of the Court, self-determination has, in the course of time, become 'a primary principle from which other principles governing international society follow' ('un principe primaire, d'où découlet les autres principes qui régissent la société internationale'). It is part of *jus cogens*; consequently, the 'international community could not remain indifferent to its respect' ('la communauté internationale ne pouvait pas rester indifférente à son respect'). States, both 'individually and collectively', have the duty to contribute to decolonization which has become a 'mater for all' ('une affaire de tous'). According to Judge Ranjeva '[t]he inalienability of the rights of peoples means that they have an imperative and absolute character that the whole international order must observe'. Judge Mbaye interprets self-determination in conjunction with 'the principle of

304 *Ibid*., pp. 221-222.
305 *Ibid*., p.222.
306 *Ibid*., p. 223 (emphasis in original).
307 Dissenting Opinion of Judge Skubiszewski, p. 266, para. 134.

> inviolability of borders'. That link additionally emphasizes the incompatibility of the forcible incorporation of a non-self-governing territory with the requirement of self-determination.[308]

In assessing the reaction of the UN to the East Timor issue Judge Skubiszewski noted:

> [I]n its resolutions (1975-1982) the General Assembly points to the Principles of the Charter and of the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)). Some of these principles specifically protect human rights. Each year the Assembly stated that it had examined the relevant chapter of the report of the Committee of Twenty-Four. Again, concern with human rights in the colonies has always been part of the work of that organ. In resolution 37/30 the Assembly took note of both the report by the Secretary-General and of resolution 1982/20 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The name of the Sub-Commission speaks for itself. Thus the human rights factor is also present, albeit indirectly, and is relevant to the evaluation of the East Timor situation. There is also a direct link: the 1993 resolution of the Commission on Human Rights on the violation of human rights and fundamental freedoms in East Timor (United Nations document E/CN.4/1993/L.81/Rev.1).[309]

Further, in his opinion, even if the Court found itself without jurisdiction to adjudicate on any issue relating to the Timor Gap Treaty, the Court could have dealt with the first submission of Portugal, *i.e.*, with the status of East Timor, the applicability to that territory of the principle of self-determination and some other basic principles of international law, and the position of Portugal as the administering Power. While Judge Skubiszewski concurred with the Court in both its rejection of the Australian objection that there was no dispute between the Parties[310] and in respect to the parts of the judgment where the Court referred to the status of the territory and to self-determination, he maintained that the Court should have elaborated on these matters and included the result of such elaboration in the operative clause. For Judge Skubiszewski by not doing so the Court adopted a narrow view of its function. In assessing different principles and considerations that played a role in the matter at hand he exclaimed:

> This Court administers justice within the bounds of the law. In the present case, on the one hand, we have insistence on national interests – legitimate, it is true – and on *Realpolitik*: we have been told that recognition of conquest was unavoidable. On the other had we have the defence of the principle of self-determination, the principle of the prohibition of military force, the protection of the human rights of the East Timorese people. And last but not least, the defence of the United Nations procedures for solving problems left over by West European, in this case Portuguese, colonization.[311]

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308 *Ibid*., p. 266, para. 135 (footnotes omitted).
309 *Ibid*., p. 232, para. 22.
310 Judgment, pp. 104-106, paras. 33-38.
311 Dissenting Opinion of Judge Skubiszewski, p. 275, para. 162.

Before making this assertion Judge Skubiszewski had already expressed his regret that the Judgment of the Court:

> [D]oes not recite as relevant the prohibition of force; non-recognition; the self-determination of peoples; the status of East Timor under United Nations law, including the rule that only the Organization can change that status; the position of Portugal as administering Power; the duty of States which enter in some arrangements with the Government in control of the Territory to consult, when these arrangements reach a certain level of political and legal importance with Portugal, with the representatives of the East Timorese people and with the United Nations. It is not only appropriate but also highly significant that the reasons for the Judgment affirm some of these principles.[312]

He concluded that the Court's function could not be reduced to legal correctness alone especially whenever the Court is confronted with certain basic elements of the constitution of the organization and with certain fundamental principles of international law. There is a real interest in maintaining and strengthening the Court's role in what Judge Sette Camara described as 'the institutionalization of the rule of law among nations'.[313] Indeed, just as the degree of the embedding of the rule of law in a domestic setting is an important element of a democratic State, the degree of the institutionalization of the rule of law among nations is an indicator of how democratic the international community of States actually is.

*E) Concluding Remarks*

It is regrettable that while acknowledging that 'Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable'[314] the Court did not go any further in setting out what exactly entailed that *erga omnes* character. Thus, the Court missed a splendid opportunity to clarify the scope of *erga omnes* obligations, a concept which the Court itself had brought into being in its dictum in the *Barcelona Traction* case. Had the Court decided not to shy away from this issue of crucial importance for the protection of fundamental human rights it would have helped to bridge the gap between what Bruno Simma has called the world of the 'ought' and the world of the 'is'.[315] In any case, the publicity given to the issue of East Timor simply by bringing it before the ICJ, coupled with the renewed efforts of the international community, brought about the UN-supervised popular referendum of 30 August 1999, where the

312 *Ibid*., p. 274, para. 157.
313 *Ibid*., p. 238, para. 43 (footnote omitted).
314 *Ibid*., p. 102, para. 29.
315 B. Simma, *Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes*?, in: Delbrück, J. (ed.), The Future of International Law Enforcement, New Scenarios- New Law?, Berlin, 1993, p. 126.

East Timorese people voted for their independence from Indonesia.[316] Thus, although the Court concluded that it had no jurisdiction to entertain the case,[317] it could be said that the legal proceedings before it had a positive impact on the solution of the problem of East Timor.[318]

### 3.7.4 *Legality of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004)

The right of the Palestinian people to self-determination was one of the issues that the Court clarified in this advisory opinion. Only this part is dealt with here, as other aspects of the advisory opinion are discussed in detail below. In a general explanation of the principle of self-determination the Court noted:

> [T]he principle of self-determination of peoples has been enshrined in the United Nations Charter and reaffirmed by the General Assembly in resolution 2625 (XXV) cited above, pursuant to which 'Every State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] ... of their right to self-determination.' Article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reaffirms the right of all peoples to self-determination, and lays upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.[319]

Emphasizing the importance of this fundamental right the Court referred to such important treaties as the UN Charter and the two International Covenants. After outlining the development of this right through its own jurisprudence the Court recalled its position that this right is nowadays a right *erga omnes*.[320]

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316 After the referendum of 30 August 1999 the transitional government was entrusted to the United Nations Transitional Administration of East Timor (UNTAET), which was established on 25 October 1999. UNTAET administered the territory until 20 May 2002 when East Timor became officially independent.

317 *East Timor*, ICJ Reports 1995, p. 106, para. 38.

318 *Rosenne's The World Court: What It Is and how It Works*, 6th edition by T.D. Gill, Martinus Nijhoff Publishers, 2003, p. 193.

319 ICJ*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*Wall*)*,* Advisory Opinion of 9 July 2004, ICJ Reports 2004, pp. 171-172, para. 88.

320 *Wall*, p. 172, para. 88. The relevant part reads: 'The Court would recall that in 1971 it emphasized that current developments in 'international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]'. The Court went on to state that 'These developments leave little doubt that the ultimate objective of the sacred trust' referred to in Article 22, paragraph 1, of the Covenant of the League of Nations 'was the self-determination.. of the peoples concerned' (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, paras. 52-53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 68, para. 162). The Court indeed made it clear that the right

With regard to the existence of a 'Palestinian people' the Court noted:

> As regards the principle of the right of peoples to self-determination, the Court observes that the existence of a 'Palestinian people' is no longer in issue. Such existence has moreover been recognized by Israel in the exchange of letters of 9 September 1993 between Mr. Yasser Arafat, President of the Palestine Liberation Organization (PLO) and Mr. Yitzhak Rabin, Israeli Prime Minister. In that correspondence, the President of the PLO recognized 'the right of the State of Israel to exist in peace and security' and made various other commitments. In reply, the Israeli Prime Minister informed him that, in the light of those commitments, 'the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people'. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip of 28 September 1995 also refers a number of times to the Palestinian people and its 'legitimate rights'. The Court considers that those rights include the right to self-determination, as the General Assembly has moreover recognized on a number of occasions.[321]

In this way, the Court noted e*n passant* some of the traditional elements of a State, namely a people and a government. Moreover, it put on record those basic but cornerstone commitments that the two parties involved in the conflict had made to each other.

*A) Route of the Wall and Its Effect on the Right of the Palestinians to Self-Determination*

The route taken for building the separation Wall was an important factor to which the Court gave serious consideration in reaching its findings. With regard to that route the Court noted:

> [T]he route of the wall as fixed by the Israeli Government includes within the 'Closed Area' some 80 per cent of the settlers living in the Occupied Palestinian Territory. Moreover, it is apparent from an examination of the map that the wall's sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).[322]

The Court went beyond expressing concern that the Wall would prejudge the future frontier between Israel and Palestine, when it considered that, in fact, the construction of the wall and its associated *régime* created a '*fait accompli*', which amounted to *de facto* annexation.[323] Recalling that, according to the report of the Secretary-General, more than 16 per cent of the territory of the West Bank would be incorporated between

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of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29).'.

321 *Ibid*., pp. 182-183, para. 118.

322 *Ibid*., p. 183, para. 119.

323 *Ibid*., p. 184, para. 121.

the Green Line and the Wall and that the route chosen for the wall gave expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the SC, the Court found that the construction, along with measures taken previously, severely impeded the exercise by the Palestinian people of their right to self-determination, and was therefore a breach of Israel's obligation to respect that right.[324] Indeed, this finding is a clear acknowledgement by the Court that the land-grab which would take place from the construction of the wall violated the right to self-determination of the Palestinian people.

*B) Obligations upon Israel and Other States Stemming from the Right to Self-Determination*

The right of the Palestinian people to self-determination was one of the *erga omnes* obligations which Israel had violated. According to the Court's observation:

> [T]he obligations violated by Israel include certain obligations *erga omnes*. As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature 'the concern of all States' and, 'In view of the importance of the rights involved, all States can be held to have a legal interest in their protection.' (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33.) The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.[325]

Furthermore, the Court emphasized the duty of every State to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples:

> As regards the first of these, the Court has already observed that in the *East Timor* case, it described as 'irreproachable' the assertion that 'the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character' (*I.C.J. Reports 1995*, p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV)…
> 'Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle.[326]

The recognition, on the one hand, of the Palestinians as a 'people' and of their right to self-determination as a right *erga omnes* coupled, on the other, with the duty incumbent upon Israel to respect the Palestinian people's right to self-determination

324 *Ibid*., p. 184, para. 122.
325 *Ibid*., p. 199, para. 155.
326 *Ibid*., p. 199, para. 156.

and the duty of every State to promote that right through joint and separate action form some of the highlights of this advisory opinion.

*C) Concluding Remarks*

Through its case law in the *South West Africa* cases, the *Western Sahara* case, the *East Timor* case, and the most recent case touching upon this issue, namely that on the *Wall*, the Court has contributed to interpreting and developing the right of people to self-determination and other related issues. An important contribution to this development is the finding of the Court that the right to self-determination is a right that has an *erga omnes* character. Although the Court has not yet set out in clear terms the obligations which this qualification entails it is submitted that the language employed by the Court suggests that such obligations would require the taking of active steps on the part of the violating State, but also on the part of every other State not only to put an end to a breach of this right but also to actively promote its fulfilment.

Through the findings in its extensive case law on the right of peoples to self-determination the Court provided necessary guidance to the UN organs in the long process of decolonization. Given that the right to self-determination is a basic right by virtue of which peoples can freely determine their political status and freely pursue their economic, social and cultural development, the legal contribution of the Court to the process of decolonization becomes all the more important. The couching of this right in clear legal terms, a process in which the Court has been largely involved, has contributed to making this right much more than a mere political aspiration. The substantial increase in the member States of the UN is one of the results of this long and arduous process. It is noteworthy that in some cases the mere fact of bringing the case before the Court served as a catalyst to the political solution that was reached at a later stage.

## 3.8 PROHIBITION OF GENOCIDE

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (the Genocide Convention) – one of the first international instruments in the field of human rights protection – has a twofold nature; it relates to both international human rights and humanitarian law. As provided for in Article 1 of the Genocide Convention the crime of genocide is punishable whether committed in time of peace or in time of war.[327] Several cases have been referred to the Court on the basis of this Convention

327 Article 1 of the Genocide Convention reads: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.'

thanks to the compromissory clause it contains.[328] In contrast to the majority of human rights instruments the insertion of this compromissory clause vested the ICJ with jurisdiction over issues related to the interpretation, application, or fulfilment of this Convention. Article 9 of this Conventions reads: 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'

Besides dovetailing international human rights and humanitarian law the Genocide Convention also provides for both State and individual responsibility for the crime of genocide. As Rosenne has noted, one major consequence of the Genocide Convention is that the principle of individual criminal responsibility under international law has become firmly embodied within the international legal system.[329] This Convention has provided the basis for defining genocide in the statutes of those international criminal courts and tribunals entrusted with the prosecution of the perpetrators of this crime. The international or internationalized judicial bodies have brought accountability to the fore, thereby enhancing the human rights protection system. Persons have been charged with and convicted of charges of genocide before the *ad hoc* tribunals, namely the ICTY and the ICTR. Further, the permanent criminal court, the ICC, is also vested with jurisdiction over the crime of genocide. However, our focus here lies with those cases where the Genocide Convention was invoked before the ICJ as a jurisdictional basis for adjudicating issues related to the protection of human rights in inter-State disputes and not its use by other courts or tribunals for determining individual criminal responsibility for the crime of genocide.

The first case concerning the Genocide Convention to come before the Court was the request by the GA for an advisory opinion regarding reservations to this convention. Although the advisory opinion of the Court was requested in order to clarify the more general issue of reservations to multilateral conventions,[330] it is submitted that the findings of the Court with regard to reservations to the Genocide Convention would be generally applicable with regard to reservations to other international human rights law instruments. The Court's findings in this advisory opinion would be later reflected upon in the work of the ILC, in the preparation of the Vienna Convention on the Law of Treaties of 1969,[331] especially in the section dealing with reservations to

328 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v*. Serbia and Montenegro, 1993-2007); *Legality of Use of Force* cases (Serbia and Montenegro *v*. 10 NATO countries, 1999-2004); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia *v*. Serbia and Montenegro, 1999-ongoing).

329 S. Rosenne, *The Perplexities of Modern International law: General Course on Public International Law*, Brill Academic Publishers, 2004, p. 190.

330 GA Res. 478 (V), Reservations to Multilateral Conventions, 16 November 1950.

331 See the section on Reservations at Part II, Section 2, of the Vienna Convention on the Law of Treaties, in *International Law Documents*, M.D. Evans (ed.), 6th edition, Oxford University Press, 2003, pp. 126-128.

treaties. An early attempt to bring a State before the Court on charges of genocide was the effort by some NGOs to bring Cambodia before the ICJ, which failed to materialize because of the chilling effects that the Cold War had on such issues. The first contentious case on the basis of the Genocide Convention was brought before the Court on 20 March 1993 by Bosnia and Herzegovina against the Former Republic of Yugoslavia (FRY), which later changed its name to Serbia and Montenegro. Croatia instituted a similar case on 2 July 1999 which is still pending.

Although our focus will remain on cases where the application of the Genocide Convention was the main issue before the Court, the *Nuclear Weapons* advisory opinion is also worth noting. During the judicial proceedings in the *Nuclear Weapons* case some States contended that the Genocide Convention was pertinent in answering the question of whether or not the threat or use of nuclear weapons is legal under international law.[332] The Court pointed out that the prohibition of genocide would be pertinent in this case if recourse to nuclear weapons entailed the element of intent, towards a group as such, required by the relevant provision of the Genocide Convention. In the Court's view, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.[333] Although the Genocide Convention was not deemed by the Court to create a general prohibition on the threat or use of nuclear weapons, by pointing out to the element of intent the Court seemed to imply that if such a genocidal intent were present the threat or use of nuclear weapons would be illegal. This finding is important as it puts another restriction on the threat or use of nuclear weapons based on the prohibition of genocide.

As already mentioned above, the Genocide Convention formed the basis for founding the Court's jurisdiction to adjudicate claims of gross violations of human rights committed in the troubled region of the former Yugoslavia when Bosnia and Herzegovina brought a case against Serbia and Montenegro in March 1993.[334] At the beginning of July 1999 Croatia also brought a similar case before the Court against the same Respondent.[335] The 1951 advisory opinion on *Reservations to the Genocide Convention* and the Court's Orders and judgment of 26 February 2007 in the contentious case *Application of the Genocide Convention* brought before the Court by Bosnia and Herzegovina are discussed in detail below.

332 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 26.

333 *Ibid*.

334 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Bosnia and Herzegovina *v*. Serbia and Montenegro), Application of 20 March 1993.

335 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, (Croatia *v*. Serbia and Montenegro), Application of 2 July 1999.

### 3.8.1 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion of 28 May 1951)

*A) Background*

Some concern was expressed in a report by the Secretary-General to the GA on 20 September 1950 with regard to the procedure to be followed for reservations entered by States in respect of these conventions and the principles necessary to be followed by him in the interests of both an efficient performance of his depositary functions and the maximum usefulness of multilateral conventions in the development of international law.[336] The GA, being fairly concerned by the fact that reservations to the Genocide Convention would obstruct the very aim of the sponsors of the Convention, asked the ICJ for an advisory opinion on the legal effects of reservations to this Convention.[337] Although reference to this advisory opinion is usually made for purposes of guidance on issues concerning the interpretation of treaty reservations in general,[338] the purpose of discussing this advisory opinion here is of another nature.

*B) Consequences of the Customary Nature of the Genocide Convention upon Reservations Thereto*

The Genocide Convention is a very important human rights treaty, thus it is submitted that the findings of the Court with regard to reservations to this Convention would maintain their validity also with regard to the main human rights treaties.[339] The Court held:

> The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpreta-

336 Report of the Secretary-General, Doc. A/1372, 20 September 1950, para. 3.

337 GA Resolution 478 (V), of 16 November 1950.

338 With regard to reservations to treaties at that time two different approaches were present, namely the European and the Pan-American Union approach. According to the first one, a State could not be a party to a treaty if reservations made with respect to it were not accepted by the other signatory States to the relevant convention. The Pan-American Union approach had the advantage of permitting a maximum number of States to become parties to a convention, although some of them could do so subject to reservations to certain parts of the relevant convention. For more details see the report of the Secretary-General, *supra* note 336.

339 In this author's view such treaties would include *inter alia* both Covenants (the ICCPR and the ICESCR of 1966), the Convention on the Elimination of All Forms of Racial Discrimination (CERD) of 1969, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984, and the Convention on the Rights of the Child (CRC) of 1989. However, it should be noted that the Court itself limited the application of its findings in this advisory opinion by stating that: 'The questions thus having a clearly defined object, the replies which the Court is called upon to give to them are necessarily and strictly limited to that Convention'. ICJ Reports 1951, p. 9.

> tion of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right to existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946).[340]

Drawing on the consequences of the special characteristics of the Genocide Convention with regard to the interpretation of the reservations to this Convention the Court found:

> 'The first consequence arising from this conception is that the principles underlying the Convention are recognized by civilized nations as binding on States even without any conventional obligation.'[341]

Firstly, the Court asserted the customary nature of the principles enshrined in the Convention. In the Court's view, due to this customary nature, the underlying principles would be binding on States despite conventional obligations, therefore also despite any reservations made. Although this latter submission might appear to be a little far-stretched, if the Court acknowledged that these principles were binding without conventional obligations at all, it is difficult to see why, if the above finding were pursued to its logical conclusion, it would not accept that reservations entered against these principles would be null and void.

Further, the Court emphasized that a second consequence of the origins and character of this Convention was both the universal character of the condemnation of genocide and of the co-operation required to liberate mankind from such an odious scourge, as foreseen in the Preamble to the Convention:

> The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope…The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the convention. *Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties* (emphasis added).[342]

340 ICJ, *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 23.
341 *Ibidem*.
342 *Ibidem*.

Here the Court's own words support the submission that its findings with regard to reservations would hold true for the main human rights treaties. Indeed, such international instruments are not made having in mind advantages or disadvantages of States, or the maintenance of a perfect contractual balance between rights and duties, but are adopted 'for a purely humanitarian and civilizing purpose'. A claim that another State is not abiding by its obligations under such a Convention would not exonerate a State from its own obligations under this Convention, whose primary aim is to provide protection to a national, ethnical, racial or religious group as such, and by virtue of this to the individuals who comprise this group.

It should also be noted that the Genocide Convention codified a paradigm change by attaching both State and individual responsibility to the crime of genocide. Thus, first it changed fundamentally the international responsibilities of a government toward its citizens, making acts or omissions directed towards their destruction a matter of international concern; and second, it established individual criminal responsibility for the perpetrators of such acts, regardless of their official status. Further, the Court's acknowledgement of the customary nature of the underlying principles of this Convention would make a defence based on *nullum crimen sine lege* with regard to this crime simply untenable. This important finding is in itself a reconfirmation of the legal basis of the Nuremberg Tribunal, as the evidence produced at the Nuremberg trial provided ample support for the concept of genocide, as developed further in the Genocide Convention. Thus, albeit implicitly, the Court provided from the beginning of its work an example of support and judicial courtesy, which is all the more necessary in today's elaborate net of international courts and tribunals.

Resorting to a teleological interpretation of the Convention the Court concluded:

> The object and purpose of the Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. …The object and purpose of the convention thus limit both the freedom of making reservations and that of objecting to them.[343]

While giving advice on the validity of reservations to this Convention the Court put the emphasis on the object and purpose of the Convention. This way of interpretation adopted by the Court was later codified in the third section of the Vienna Convention on the Law of Treaties of 1969 dealing with the interpretation of treaties.[344] By focusing on the object and purpose of the Convention for its interpretation, the Court paid attention to the very *raison d'être* of a human rights treaty, namely that of protecting the human rights of individuals or groups of individuals *vis-à-vis* the State.

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343 *Ibid*., p. 24.

344 Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties of 1969, in *International Law Documents*, *ed.* M.D. Evans, 6th edition, Oxford University Press, 2003, p. 129. This paragraph reads: '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.'.

The Court's finding below represents a major inroad on the principle of State sovereignty:

> It has nevertheless been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservations it chooses by virtue of its sovereignty. The Court cannot share this view. *It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and the purpose of the Convention* (emphasis added).[345]

While noting that a State cannot be bound without its consent in its treaty relations, the Court moved towards restricting that very sovereign prerogative based on the consensual nature of international law obligations.[346] Until then, placing any kind of restriction on the right to enter reservations to multilateral conventions would have been quite difficult. Clearly, the Court pointed at a need for balancing prerogatives of State sovereignty with the need to preserve the object and purpose of such an important Convention. Here the Court appears to be refuting the proposition that the sovereign prerogative of entering reservations to a multilateral convention could trump the very objective and purpose of this Convention. This finding of the Court bears witness to the importance of basic principles of the international law of human rights from an early stage of their development. That was to find expression continuously in the form of enhancing the protection of human rights and the increased attention at an international level towards human rights issues in general.

Through this advisory opinion the Court affirmed that the principles enshrined in the Genocide Convention are expressive of customary international law, binding even without any conventional obligations.[347] By virtue of that acknowledgment this human rights instrument was given a higher status and effect, if compared with other human rights treaties. Thus, the principles enshrined in the Genocide Convention can be said to be binding not only between the States parties to this treaty, but also for States which are not parties to it, or States that had become parties but had done so under certain reservations. Although the findings of the Court should not be taken out of context, it is submitted that by giving due consideration to the object and the purpose of the Genocide Convention, that is to the spirit of the law, along with other issues of

345 *Reservations to the Genocide Convention*, ICJ Reports 1951, p. 24.

346 The Court held: 'The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.' *Ibid.,* p. 24.

347 As the Court opined, 'The first consequence arising from this conception is that the principles underlying the Convention are recognized by civilized nations as binding on States even without any conventional obligation.' The International Law Commission in its study on the Formulation of the Nürnberg Principles listed the following as crimes under international law, under Principle VI, (c): 'Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.' This definition comes quite close to the more elaborate definition adopted in the Genocide Convention, whose principles, according to the Court, had achieved the status of customary international law.

a more procedural nature the Court indicated that human rights principles were an important part of the equation.

*C) Concluding Remarks*

Although made by the Court while clarifying issues related to reservations to the Genocide Convention, the findings discussed here are evidence of the Court's involvement in and its contribution to the enforcement of international human rights principles since the early beginnings of its work. It is beyond any doubt that the issue of reservations is a crucial one for many human rights treaties, which are ratified, but regrettably, on occasions, with reservations that go as far as to defeat the instrument's main purpose. Here the Court made a contribution to the international law of human rights by interpreting international law so as to give the widest possible effect to a Convention concerned with the protection of mankind from such a horrendous crime as genocide. Further, one of the consequences of the Court's opinion, which illustrates the advisory role of the Court within the UN, is that after its delivery the GA instructed the Secretary-General to ensure that his practice in relation to reservations to the Genocide Convention is in conformity with the advisory opinion of the Court.[348]

### 3.8.2 *Application of the Genocide Convention* (Bosnia-Herzegovina *v.* Serbia and Montenegro, 1993-2007)

Regrettably, the breaking up of the Socialist Federal Republic of Yugoslavia (SFRY) into the separate republics that comprised it was not a peaceful one. In a referendum in November 1991 the Bosnian Serbs voted in favour of remaining in a common state with Serbia and Montenegro and later, on 9 January 1992, the Bosnian Serb Assembly proclaimed what would become known as 'Republika Srpska'. Bosnia-Herzegovina itself declared its independence from Yugoslavia at the beginning of March 1992 and that was recognized by the EU on 6 April 1992. These political actions marked the beginning of a protracted and bloody military conflict, which continued until international pressure forced the parties to the conflict to sign the General Framework Agreement for Peace in Bosnia and Herzegovina in November 1995, also known as the Paris Protocol or the Dayton Peace Agreement.

It is noteworthy that events related to the break-up of Yugoslavia resulted in twelve cases submitted before the ICJ, where two of them were submitted respectively by Bosnia-Herzegovina in 1993 and by Croatia in 1999 against Serbia and Montenegro on the basis of the Genocide Convention. The other ten cases were submitted in 1999

348 UNGA Resolution 598 (VI), *Reservations to multilateral conventions*, 12 January 1952, p. 248. In this resolution the GA instructed the Secretary-General that with regard to future conventions concluded under the auspices of the UN, he was to act as a depositary without passing on the legal effect of reservations and merely to communicate the text of such reservations or objections to all States concerned leaving it to them to draw legal consequences from such communications.

by Serbia and Montenegro against NATO countries participating in the military operation Allied Force aimed at stopping the campaign of ethnic cleansing against Kosovar Albanians undertaken by Milosevic's regime in Kosovo. The above-mentioned case brought by Bosnia-Herzegovina against Serbia and Montenegro was the first contentious case brought before the World Court on the basis of the Genocide Convention. Below, the order of the Court on provisional measures of 13 September 1993, the judgment on preliminary objections of 11 July 1996, and that on the merits of 26 February 2007 will be discussed.

*A) Seizing the Court: Some Initial Steps*

On 20 March 1993 Bosnia and Herzegovina commenced legal proceedings against Yugoslavia (Serbia and Montenegro).[349] In the meantime war was being waged and horrendous atrocities were being committed in the territory of Bosnia-Herzegovina. It should also not be forgotten that as the conflict unfolded the SC adopted a considerable number of resolutions urging the parties to end the conflict and also imposed a weapons embargo and a no-fly zone over Bosnia-Herzegovina. In taking note of the issues with which the Court was confronted in this case, Judge Lauterpacht noted:

> 'In the present proceedings the Court is confronted by a case with a human dimension of a magnitude without precedent in its history. This case is not to be compared with litigation relating to maritime or territorial limits, nor with assertions of State responsibility for denials of justice, wrongful expropriation or the destruction of an aircraft. Even such cases as those relating to *South West Africa* and to *Military and Paramilitary Activities in and against Nicaragua*, though involving the fundamental human rights and security of many individuals, cannot be likened in scale to the deliberate infliction of death, injury and dreadful personal suffering that has marked and continues to mark the present conflict in Bosnia-Herzegovina.'[350]

Indeed, as Judge Lauterpacht stated, the human rights dimension of this case, expressed in a wide range of issues raised in the Application commencing the proceedings before the Court, is beyond doubt.

Bosnia-Herzegovina based its claims upon Article 9 of the Genocide Convention, which confers jurisdiction upon the ICJ for disputes between State members relating to the interpretation, application or fulfilment of this Convention. 'Genocide is the most evil crime a State or human being can inflict upon another State or human being',[351] Bosnia-Herzegovina stated, contending that the international crime of

349 It should be noted that after a referendum on the status of the Union of Serbia and Montenegro of 21 May 2006 the Parliament of Montenegro declared Montenegro's independence on 3 June 2006.

350 Order of 13 September 1993 on Further Requests for the Indication of Provisional Measures, Separate Opinion of Judge Lauterpacht, ICJ Reports 1993, p. 87, para. 2.

351 ICJ, *Application of the Genocide Convention* (Bosnia-Herzegovina *v.* Serbia and Montenegro), Application of Bosnia-Herzegovina, para. 1.

genocide had been inflicted upon its people by Yugoslavia (Serbia and Montenegro) and its agents and surrogates.[352] In the Applicant's view the term 'ethnic cleansing' as used in GA resolution 47/121 of 18 December 1992 was in fact a euphemism for acts of genocide within the meaning of the Genocide Convention.[353] This ethnic cleansing was carried out through killings, torture, rape, bodily and mental mistreatment, starvation, cruel and inhuman treatment and forced displacement. Noteworthy is Bosnia-Herzegovina's claim that the genocidal acts specified in its Application constituted gross violations of the UDHR of 1948.[354] In Bosnia-Herzegovina's view these fundamental human rights protected by the Universal Declaration are considered to be binding upon all States of the world community as a matter of customary international law and *jus cogens,* and in accordance with the requirements of the UN Charter Article I (3), Article 55, and Article 56.[355] In its submission Bosnia-Herzegovina claimed reparations by Yugoslavia (Serbia and Montenegro) for all the deaths, destruction, physical and mental injury, property damage and environmental harm that have been inflicted upon it and its People by Serbia and Montenegro and its agents and surrogates in violation of all the sources of international law…and in particular for grossly violating the Genocide Convention, the UN Charter, …the UDHR of 1948, and numerous other international treaties and agreements, principles of customary international law, …international criminal law, and *jus cogens* that were to be specified in further submissions.[356] As can be seen the basis of the claims raised by Bosnia-Herzegovina involved a considerable part of international human rights law.

In its Order of 8 April 1993 the Court ordered that Serbia and Montenegro should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent the commission of the crime of genocide.[357] Further in the *dispositif* the Court indicated that both parties should not take any action and should ensure that no action is taken which could aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult to find a solution.[358] In its Order of 13 September 1993 on Further Requests for the Indication of Provisional Measures the Court acknowledged that since the Order of 8 April 1993 was made, and despite that Order, and despite many resolutions of the UNSC, great suffering and loss of life had been sustained by the population of Bosnia-Herzegovina in circumstances which shock the conscience of mankind and flagrantly conflicted with moral law and the spirit and aims of the UN.[359] The Court noted that

352 *Ibid.*, para. 3.
353 *Ibid.*, para. 20.
354 *Ibid.*, para. 132.
355 *Ibid.*, para. 132.
356 *Ibid.*, par 134.
357 Order of 8 April 1993, ICJ Reports 1993, para. 52/A, (1).
358 Order of 8 April 1993, ICJ Reports 1993, para. 52/B.
359 Order of 13 September 1993 on Further Requests for the Indication of Provisional Measures, ICJ Reports 1993, para. 52.

the SC in Resolution 859 (1993) of 24 August 1993 recalled the principle of individual responsibility for the perpetration of war crimes and other violations of international humanitarian law;[360] and that the SC, by Resolutions 808 (1993) of 22 February 1993 and 827 (1993) of 25 May 1993, had established an international tribunal for the prosecution of persons responsible for serious violations of humanitarian law committed in the territory of the former Yugoslavia.[361] The Court found that while taking into account, *inter alia*, the replies of the two Parties to a question put to them at the hearings as to what steps had been taken by them 'to ensure compliance with the Court's Order of 8 April 1993', it was not satisfied that all that could have been done had in fact been done to prevent the commission of the crime of genocide in the territory of Bosnia-Herzegovina, and to ensure that no action was taken which could aggravate or extend the existing dispute or render it more difficult to find a solution.[362]

It is here necessary to quote in full paragraphs 58 and 59 of the Order, which read:

> 58. Whereas, as the Court has previously found,
>
> 'When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indication seriously into account...' (Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Judgment, I.C.J. Reports 1986, p. 144, para. 289);
>
> whereas this is particularly so in such a situation as now exists in Bosnia-Herzegovina where no reparation could efface the results of conduct which the Court may rule to have been contrary to international law;
>
> 59. Whereas the present perilous situation demands, not an indication of provisional measures additional to those indicated by the Court's Order of 8 April 1993, set out in paragraph 37 above, but immediate and effective implementation of those measures

As the Court rightly pointed out, what was needed was not the indication of additional provisional measures, but the *immediate and effective* implementation of the measures already indicated in its former Order of 8 April 1993 (emphasis added). Regrettably, despite the Court's repeated request for compliance with its provisional measures, serious violations of human rights in Bosnia continued to take place on a massive scale. Furthermore, the phlegmatic international response was an omen that the ability of the international community to prevent further such violations was, at least for the time being, limited and inadequate.

360 *Ibid.*, para. 55.
361 *Ibid.*, para. 56.
362 *Ibid.*, para. 57.

*B) Dispensing with the Preliminary Objections Phase*

The preliminary objections to the jurisdiction of the Court and the admissibility of the Application by Serbia and Montenegro were dispensed with by the Court through the judgment of 11 July 1996.[363] In its first contention regarding jurisdiction Yugoslavia claimed that, first, the conflict occurring in certain parts of the Applicant's territory was of a domestic nature, Yugoslavia was not party to it and did not exercise jurisdiction over that territory at the time in question; and second, that State responsibility, as referred to in the requests of Bosnia-Herzegovina, was excluded from the scope of application of Article IX.[364] The Court ruled that irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical.[365] Further, in the Court's view, given that the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*, the obligation which each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.[366] With regard to the issue of State responsibility arising under the Genocide Convention, another contentious issue, the Court observed that the reference in Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III' did not exclude any form of State responsibility.[367] The Court found that on the basis of Article IX of the Genocide Convention, it had jurisdiction to adjudicate upon the dispute.[368]

Although the Application instituting proceedings was submitted in March 1993, and the judgment on preliminary objections was delivered by the Court on July 1996, oral hearings on the merits of the case were only heard almost ten years later in 2006. From 27 February until 9 May 2006 several witnesses and expert witnesses testified before the Court. Besides the examination-in-chief, cross-examination and re-examination by the Parties concerned, members of the Court also took the opportunity to put some questions to the witnesses that were called. The range of issues covered during these oral hearings encompassed political, military, strategic and demographic matters covering all of the material period over which the conflict extended. Notably, the materials submitted by the parties to the scrutiny of the Court ran into many thousands of pages.

363 ICJ, *Application of the Genocide Convention* (Bosnia-Herzegovina *v.* Serbia and Montenegro), (*Preliminary Objections*), Judgment of 11 July 1996, ICJ Reports 1996, p. 595.
364 *Ibid*., para. 30.
365 *Ibid*., para. 31.
366 *Ibidem*.
367 *Ibid*., para. 32.
368 *Ibid*., para. 47(2).

### *C) Dealing with Some Aspects of the Crime of Genocide: Jurisdiction Construed Narrowly*

Having established its jurisdiction to hear the case on the basis on the principle of *res judicata*,[369] the Court moved on to rule on the merits. It observed that given its jurisdiction was based on Article IX of the Genocide Convention it had no power to rule on the alleged breaches of other obligations of international law not amounting to genocide, particularly those protecting human rights in armed conflict.[370] That remained so even if the alleged breaches were obligations under peremptory norms, or of obligations which protect essential humanitarian values which could be owed *erga omnes*.[371] Together with other statements of the Court on jurisdiction in other cases such as the *Armed Conflict* case (DRC *v.* Rwanda) this wording signals the constrained position which this judicial body has recently taken. That wording reminds us of a major limitation of the Court which has already been explained in the second chapter, namely that of the consensual nature of the jurisdiction of the Court.

The Court clarified *inter alia* the meaning of complicity in genocide according to the Genocide Convention under international law. Thus, the Court stated that 'complicity', in the sense of Article III, paragraph *(e)* of the Convention, includes the provision of means to enable or facilitate the commission of the crime. Further, it noted that although 'complicity' as such is not a notion which exists in the current terminology of the law of international responsibility, it is similar to a category found among the customary rules constituting the law of State responsibility, that of 'aid or assistance' furnished by one State for the commission of a wrongful act by another State.[372] Thus, the Court connected this concept to the customary rule enshrined in Article 16 of the ILC Articles on State Responsibility, which reads: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: *(a)* That State does so with knowledge of the circumstances of the internationally wrongful act; and *(b)* The act would be internationally wrongful if committed by that State.' The Court stated that it saw no reason to make any distinction of substance between 'complicity in genocide', within the meaning of Article III, paragraph *(e)*, of the Convention, and the 'aid or assistance' of a State in the commission of a wrongful act by another State within the meaning of the aforementioned Article 16 – setting aside the hypothesis of the issue of instructions or directions or the exercise of effective control, the effects of which, in the law of international responsibility, extend beyond complicity.[373]

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369 ICJ, *Application of the Genocide Convention* (*Bosnia-Herzegovina v. Serbia and Montenegro*, (*Merits*)), Judgment of 26 February 2007, paras. 80-141, available at: *http://www.icj-cij.org/docket/files/91/13685.pdf* (last accessed on 1 November 2007).

370 *Ibid.*, para. 142.

371 *Ibid*., para. 143.

372 *Ibid*., para. 419.

373 *Ibid*., para. 420.

Further, in explaining the link between the specific intent *(dolus specialis)* which characterizes the crime of genocide and the motives which inspire the actions of an accomplice (meaning a person providing aid or assistance to the direct perpetrators of the crime) the Court stated that there is no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide cannot be treated as complicity in genocide unless at least that organ or person acted knowingly, that is to say, in particular, was aware of the specific intent *(dolus specialis)* of the principal perpetrator.[374] In the Court's view, if that condition was not fulfilled that would be sufficient to exclude categorization as complicity. Thus, the meaning of 'complicity' as provided under the Genocide Convention was appropriately construed by the Court in accordance with the international law rules on State responsibility.

*D) State Obligations under the Genocide Convention*

The Court observed that the obligations which the Convention imposed upon the parties depended on the ordinary meaning of the terms of the Convention itself read in their context and in the light of its object and purpose. Thus, the undertaking under Article 1 to prevent the crime of genocide created obligations which are different from those contained in other articles, which was confirmed by the preparatory work of the Convention and the circumstances of its conclusion. Considering whether the Parties themselves were under the obligation not to commit genocide themselves since this was not expressly imposed by the terms of the Convention, the Court held that it would be paradoxical that States would be under an obligation to prevent but were not forbidden to commit such acts through their own organs or persons whose conduct is attributable to the State concerned under international law. Thus, in the Court's view, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.

Further, the Court observed that if a State is to be responsible because it has breached its obligation not to commit genocide it should be shown that genocide as defined in the Convention had been committed. The same would apply with regard to conspiracy under Article III paragraph (b), complicity under Article III, paragraph (e), and the obligation to prevent genocide. In the Court's view, the different procedures followed by and the powers available to the Court and to the courts and tribunals trying persons for criminal offences did not themselves indicate that there is a legal bar to the Court itself finding that genocide or other acts enumerated in Article III had been committed. Notably, the Court pointed out that the substantive obligations arising from Articles II and III were not on their face value limited by territory as they applied to a State wherever it could be acting or would be able to act in ways which are appropriate to meet the obligations in question. However, the obligation to prosecute imposed by Article VI was, by contrast, subject to an express territorial limit. As the Court noted, the trial of persons charged with genocide was to be carried out by a

374 *Ibid*., para. 421.

competent tribunal of the State in which the crimes were committed, or by an international penal tribunal with jurisdiction.

*E) Obligation to Prevent: Scope and Application*

Certainly, an interesting and important issue for international human rights is the Court's consideration of the obligation of a State to prevent genocide under the Genocide Convention. As the Court put it, the obligation for each contracting State to prevent genocide is both normative and compelling and, thus, is neither merged in the duty to punish, nor regarded as simply a component of that duty.[375] It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations for them to take such action as they deem appropriate.[376] First, the Court observed that the obligation to prevent was not a sole feature of the Genocide Convention but was included in several international law instruments, among which the most notable as far as human rights are concerned is the Convention against Torture of 1984.[377] Secondly, the Court held that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible.[378] In the Court's view, a State did not incur responsibility simply because the desired result had not been achieved; that would be the case if the State manifestly failed to take all measures to prevent genocide which were within its power and which might have contributed to preventing the genocide.[379]

Holding that the notion of 'due diligence', which calls for an assessment *in concreto*, was of critical importance, the Court clarified that capacity itself depended, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.[380] Further, the Court held that a State's capacity to influence was to be assessed by legal criteria, within the limits set by international law; i.e. depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.[381] In what could amount to a powerful reminder to all States to take their obligations under the Genocide Convention seriously, the Court pointed out that it was irrelevant

375 *Ibid*., para. 427.
376 *Ibid*em.
377 *Ibid*., par 429. However, out of caution the Court observed that its decision in this case did not 'purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts.'.
378 *Ibid*., para. 430.
379 *Ibid*em.
380 *Ibid*em.
381 *Ibid*em.

whether the State whose responsibility is at issue claimed, or even proved, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide, since the possibility remained that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.[382]

Another important clarification by the Court with regard to the obligation to prevent genocide concerned the temporal limits of this obligation. As the Court put it, a State's obligation to prevent, and the corresponding duty to act, arise at the very instant the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.[383] Thus, in the Court's words, from that moment onwards, if the State has means available to it that are likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.[384] Drawing a distinction between complicity in genocide and the obligation to prevent the Court clarified that complicity always required that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from a mere failure to adopt and implement suitable measures to prevent genocide from being committed.[385] Another distinction drawn between individual criminal responsibility and State responsibility with regard to the requirements for a finding of 'complicity in genocide' was the Court's finding that a State may be found to have violated its obligation to prevent even though it had no certainty, at the time when it should have acted, but failed to do so, that genocide was about to be committed or was under way; for it to incur responsibility on this basis it is enough that the State was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.[386]

With regard to the case at hand, the Court observed that in view of their undeniable influence and of the information voicing serious concern in their possession, the Yugoslav federal authorities should have made the best efforts within their power to try and prevent the tragic events then taking shape, whose scale, though it could not have been foreseen with certainty, might at least have been surmised.[387] Therefore, the Court concluded that the organs of the Respondent did nothing to prevent the Srebrenica massacres, claiming that they were powerless to do so, which hardly tallies with their known influence over the VRS.[388]

382 *Ibid*em.
383 *Ibid*., para. 431.
384 *Ibid*em.
385 *Ibid*., para. 432.
386 *Ibid*em.
387 *Ibid*., para. 438.
388 *Ibid*em.

*F) Intent to Commit Genocide, 'Ethnic Cleansing', and the Definition of a Group*

Clarifying the issue of intent and 'ethnic cleansing' the Court stated that the latter can only be a form of genocide within the meaning of the Convention if it corresponds to or falls within one of the categories of acts prohibited. It drew a distinction between genocide and ethnic cleansing when it pointed to the necessary specific intent (*dolus specialis*) for genocide, namely that of actions aimed at the destruction of the group as distinct from those aimed at removing a certain group from a region which is characteristic of ethnic cleansing. The essence of genocidal intent being to destroy the protected group as such in whole or in part, the Court stated that the group must have particular positive characteristics: national, ethnical, racial or religious and not a lack thereof. Thus, the Court concluded that the targeted group was to be defined positively, and not negatively, as the 'non-Serb' population. Further, the Court specified that first, for the purposes of Article II of the Genocide Convention, the intent should be to destroy at least a substantial part of the particular group (the part targeted should be significant enough to have an impact on the group as a whole), and second, genocide could be found to have been committed where the intent was to destroy the group within a limited geographical area.

*G) The Three Failures of the Respondent State: Failure to Prevent Genocide, Failure to Cooperate Fully with the ICTY, Failure to Comply with Provisional Measures*

The Court found that Serbia was neither responsible for committing genocide through its organs, or persons who engage its responsibility under customary international law, nor for conspiring, or inciting genocide or for being complicit in committing genocide. However, it found this State responsible for a violation of the obligation to prevent genocide under the Convention in respect of the genocide that occurred in Srebrenica in July 2005. Further, the Court found that by failing to transfer Ratko Mladic, indicted by the ICTY for genocide and complicity in genocide for trial and thus failing to fully cooperate with this Tribunal, Serbia had violated its obligations under the Genocide Convention. The third failure that the Court found was that Serbia had failed to comply with the provisional measures it had indicated in its orders of 8 April and 13 September 1993, inasmuch as it had failed to take all measures within its power to prevent the genocide in Srebrenica in July 1995. Interestingly, the Court decided to emphasize in the *dispositif* of the judgment the obligation of Serbia to immediately take effective steps to ensure full compliance with the Convention by punishing acts of genocide as proscribed under Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or of any of those other acts for trial by the ICTY, and to cooperate fully with that Tribunal.[389] Finally, the Court decided that its findings on Serbia's breaches of its obligations

389 Judgment, para. 471 (8). It should be noted that this was a unanimous decision of the sitting Judges of the Court, except for the Respondent's Judge *ad hoc* Kreca.

under the Convention constituted appropriate satisfaction and that the case was not one in which an order for payment of compensation or a direction for the provision of assurances and guarantees of non-repetition would be appropriate.[390]

*H) Concluding Remarks*

These cases are clear indications of the important contribution of the Court towards the interpretation and development of an important principle of the international law of human rights, namely that of the prohibition of genocide. In its advisory opinion on the reservations to the Genocide Convention the Court emphasized the humanitarian and civilizing nature of the principles underlying the Convention. Moreover, the Court stated that the principles underlying the Convention are recognized by civilized nations as binding on States even without any conventional obligation. Also, the provisional measures indicated by the Court in the *Application of the Genocide Convention* (Bosnia-Herzegovina *v.* Serbia and Montenegro) in order to try to put a stop to ongoing gross violations of human rights are evidence of the Court's willingness to assist to the maximum extent possible in the protection of human rights and human values. Furthermore, the Court's findings that 1) the obligations of the States parties to the Genocide Convention remain identical despite the nature of the conflict; 2) the obligation which each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention; and 3) the responsibility of a State for genocide or for any of the other acts enumerated in Article III did not exclude any form of State responsibility, are very important with regard to the Convention's scope of application. Moreover, the inclusion in the *dispositif* of the judgment of Serbia's obligation under the Genocide Convention to prosecute or extradite and the duty to cooperate with the ICTY are indeed rather remarkable contributions by the Court not only towards the full implementation of the Genocide Convention, but also towards supporting a proper functioning of another international judicial body entrusted by the international community with the prosecution of perpetrators of genocide in the former Yugoslavia.

## 3.9 RIGHT TO *ASYLUM*

The reason why the *Asylum* cases are discussed here is in fact quite simple. At the time when these cases were brought before the ICJ the world was divided into two major camps, each having its own ideology and approach with respect to human rights. The Cold War, although cold in appearance, had its hotspots with conflicts unfolding in different areas of the world, including Latin America. In this context, political asylum had different aspects; however, what we are here concerned with is the human rights aspect. Political asylum has been and still remains a very important human right, intrinsically linked to the enjoyment of freedom of speech and opinion, but also with

390 *Ibid*., para. 471 (9).

other fundamental human rights. Consequently, it seemed proper to include these cases in our analysis, as there is a genuine link with human rights, although they were dealt with by the Court in terms of obligations of States under the relevant treaties or agreements on asylum.

Asylum for our purposes here means offering sanctuary to those at risk and in danger, in compliance with States' obligations under international refugee law, diplomatic and consular law, human rights law and customary international law.[391] The right to grant political asylum is one in which States have a wide degree of discretion. However, States are bound by international legal standards not to expose a person to situations which would result in the violation of certain fundamental rights, including, in particular, the right to life, the right to be free from torture, cruel, inhuman or degrading treatment or punishment, the right not to be discriminated against as well as elements of the right to a fair trial. The *Asylum* cases arose out of the act of granting asylum to Mr Victor Raúl Haya de la Torre (henceforth Mr de la Torre), a Peruvian politician, by the Colombian ambassador in Lima (Peru). Colombia and Peru agreed to refer the dispute to the ICJ for a decision and it was Columbia that first filed its Application with the Registry of the Court.[392] The case is generally referred to as the *Haya de la Torre* (or the *Asylum*) case.

### 3.9.1 *Asylum Case* (Colombia *v.* Peru, Judgment of 20 November 1950)

*A) Background*

A military rebellion broke out and was suppressed in Peru on 3 October 1948. Criminal proceedings were initiated on charges of military rebellion against Mr de la Torre, the leader of the American People's Revolutionary Alliance party, for the instigation and direction of that failed rebellion.[393] The Military Junta, which had assumed power in Peru on 27 October through a *coup d'état*, issued a Decree on 4 November providing for Courts-Martial for summary procedures in cases of rebellion, sedition and rioting, fixing short time-limits and severe punishment without appeal.[394] While being sought by the Peruvian authorities, diplomatic asylum was granted to Mr de la Torre on 3 January 1949 by the Colombian ambassador in Lima.[395] Having granted him diplomatic asylum the Colombian ambassador requested safe conduct to enable Mr de la Torre, whom his Government qualified as a political offender, to leave the

391 See *inter alia* S. Kapferer, *Legal And Protection Policy*, RESEARCH SERIES, The Interface between Extradition and Asylum, United Nations High Commissioner for Refugees, 2003, p. V. Available at: *http://www.unhcr.org/protect/PROTECTION/3fe84fad4.pdf* (last accessed on 1 November 2007).

392 ICJ, *Colombian-Peruvian asylum case* (*Asylum* case, Columbia *v.* Peru), Judgment of 20 November 1950, ICJ Reports 1950, p. 268. The parties also agreed that the legal proceedings in this case were to be conducted in French.

393 *Ibid*., p. 272.

394 *Ibidem*.

395 *Ibidem*.

country.[396] The Government of Peru refused, claiming that Mr de la Torre had committed common crimes and was not entitled to enjoy the benefits of asylum.[397] The diplomatic correspondence which ensued ended with the signature, in Lima on 31 August 1949, of an Act by which the two Governments agreed to submit the case to the ICJ.[398] Being unable to reach a political agreement, and probably also in an effort to avoid an unnecessary showdown, the two Governments agreed that proceedings before the recognized jurisdiction of the ICJ could be instituted on the application of either of the Parties without this being regarded as an unfriendly act toward the other, or as an act likely to affect the good relations between the two countries.[399]

*B) Legal and Human Aspects of the Granting of Asylum*

Having considered the claims of the parties,[400] the Court concluded that Colombia, as the State granting asylum, was not competent to qualify the offence by a unilateral and definitive decision which was binding on Peru.[401] In its counterclaim Peru asked the Court to declare that diplomatic asylum had been granted to Mr de la Torre in violation of the Havana Convention, first, because he was accused not of a political offence but of a common crime and, secondly, because the urgency which was required under the Havana Convention in order to justify asylum was absent.[402] Given that the regularity of the granting of diplomatic asylum was in dispute, the Court went on to clarify, first, the meaning it attached to the words 'the grant of asylum'. It stated:

> The grant of asylum is not an instantaneous act which terminates with the admission, at a given moment, of a refugee to an embassy or legation. Any grant of asylum results in, and in consequence logically implies, a state of protection; the asylum is granted as long as the continued presence of the refugee in the embassy prolongs this protection. This view, which results from the very nature of the institution of asylum, is further confirmed by the attitude of the Parties during this case.[403]

First, the Court observed that the question of the surrender of the refugee was not part of the counterclaim; it was not raised either in the diplomatic correspondence submitted by the Parties or at any moment in the proceedings before the Court.[404] Thus, the counterclaim of Peru was based on two different grounds, corresponding respectively

396 *Ibid*., p. 273.
397 *Ibid*., pp. 280-2.
398 *Ibid*., p. 273.
399 *Ibid*., p. 268.
400 Ibid., pp. 273-8.
401 *Ibid*., p. 278.
402 *Ibid*., p. 280.
403 *Ibid*., p. 281.
404 *Ibidem*.

to Article I, paragraph I and Article 2, paragraph 2 of the Havana Convention.[405] Given that Peru failed to establish that military rebellion in itself constituted a common crime and the onus of proving that Mr de la Torre was accused or condemned of common crimes rested on Peru, the Court went on to dismiss this part of Peru's counterclaim.[406]

With regard to the second ground of the counterclaim, the Court first observed that the essential justification of asylum lay in the imminence or persistence of a danger to the person of the refugee.[407] The Parties did not dispute that asylum could be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population.[408] As three months had elapsed between the military rebellion and the time Mr de la Torre had sought refuge in the Colombian Embassy in Lima, the Court considered that, *prima facie*, such circumstances made it difficult to speak of any urgency.[409] However, the Government of Colombia justified the asylum on the danger posed by political justice by reason of the subordination of the Peruvian judicial authorities to the instructions of the Executive, and the urgent character of such a danger.[410] In examining whether, and if so, to what extent, a danger of this kind could serve as a basis for asylum, the Court stated:

> In principle, it is inconceivable that the Havana Convention could have intended the term 'urgent cases' to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country; nor can it be admitted that in referring to 'the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety', the Convention envisaged protection from the operation of regular legal proceedings.
>
> …
>
> In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims.[411]

With regard to the meaning of the word 'safety', as the specific effect of asylum granted to political offenders, the Court understood it to mean that the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law, but that could not be construed as protection against the regular application

405 Article 1(1) of the Havana Convention reads: 'It is not permissible for States to grant asylum in legations, warships, military camps, or military aircraft to persons accused of or condemned for common crimes or to deserters from the army or navy.' Article 2(2) reads: 'Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.' See AJIL, Vol. 22, No. 3 (Supplement), 1928, p. 158.

406 *Asylum* case, pp. 281-2.

407 *Ibid*., p. 282.

408 *Ibid*., p. 283.

409 *Ibidem*.

410 *Ibidem*.

411 *Ibid*., p. 284.

of the laws and against the jurisdiction of legally constituted tribunals.[412] In view of these considerations the Court rejected the argument that the Havana Convention was intended to afford a quite general protection of asylum to any person prosecuted for political offences, either in the course of revolutionary events, or in the more or less troubled times that follow, for the sole reason that it must be assumed that such events interfere with the administration of justice.[413]

Thus, the Court considered that at the time the asylum was granted, on 3 January 1949, there existed no danger constituting a case of urgency within the meaning of Article 2, paragraph 2, of the Havana Convention.[414] However, the Court stated that this finding in no way constituted a criticism of the Colombian ambassador.[415] According to the Court his subjective appreciation of the case was not a relevant factor in the decision of the Court concerning the validity of the asylum; the only important question which determined the decision of the Court was the objective existence of the facts.[416] In the *dispositif* of the judgment the Court went on to conclude that Colombia, as the country granting asylum, had no right to qualify the nature of the offence by a unilateral and definitive decision which was binding on Peru.[417] Further, the Court found that the granting of diplomatic asylum by the Colombian Government to Mr de la Torre was not in conformity with Article 2 paragraph 2 ('First') of that Convention.[418]

*C) Concluding Remarks*

It is noteworthy that the Court took pains to balance a few competing principles related to the institution of asylum, such as, on the one hand, the principle of non-intervention and the normal operation of domestic (criminal) justice and, on the other, that of the protection of the individual from the danger posed by political justice, intrinsically connected with due process. According to the Court the Havana Convention was not intended to protect a citizen who had plotted against the institutions of his country from regular legal proceedings.[419] As far as the Court was concerned, being accused of a political offence was not a sufficient ground in itself for granting asylum, but it emphasized that when arbitrary action substituted the rule of law, as would be the case if the administration of justice were corrupted by measures clearly prompted by political aims, asylum was to be granted.[420] In explaining the *raison d'être* of the Havana Convention the Court stated that it could not admit that the States signatory

412 *Ibidem*.
413 *Ibid*. p. 286.
414 *Ibid*. p. 287.
415 *Ibidem*.
416 *Ibidem*.
417 *Ibid*. p. 288.
418 *Ibidem*.
419 *Ibid*., p. 284.
420 *Ibidem*.

to the Havana Convention intended to substitute the practice of the Latin American republics, in which considerations of courtesy, good-neighbourliness and political expediency have always held a prominent place, with a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction.[421] Such a concept would come into conflict with one of the oldest traditions of Latin America, namely non-intervention. The precedents of the cases of asylum cited by the Government of Columbia, in the view of the Court, showed that asylum as practised in Latin America was an institution which to a very great extent owed its development to extra-legal factors.

### 3.9.2 *Haya De La Torre Case* (Colombia *v.* Peru, Judgment of 13 June 1951)

*A) Request to Surrender Mr de la Torre*

After the request for an interpretation presented by Colombia on the same day as the delivery of the judgment of 20 November 1950 was declared inadmissible,[422] the case of *Haya de la Torre* (Colombia *v.* Peru, with Cuba as an intervening Party) was again brought before the Court in 1951. The case stemmed from a request sent by the Peruvian Minister for Foreign affairs and Public Worship to the Chargé d'Affaires of Colombia at Lima to surrender Mr de la Torre.[423] Colombia refused to comply with this request as that would be contrary to the Havana Convention and the Judgment of the Court of 20 November 1950.[424] In its Application Colombia requested the Court to state in what manner the previous judgment of 20 November 1950 was to be executed and, furthermore, to declare that executing that judgment did not mean it was not bound to surrender Mr de la Torre.[425] For its part Peru also asked the Court to state in what manner Colombia was to execute the judgment. Peru further asked for a declaration that the asylum ought to have ceased immediately after the delivery of that judgment and that it had in any case to cease forthwith, in order that Peruvian justice, which had been suspended, could resume its normal course.[426] The Government of Cuba, availing itself of the right under Article 63 of the Statute of the Court, filed with the Court a Declaration of Intervention and a Memorandum thereto, where it expressed its views with regard to the interpretation of the Havana Convention and its general attitude towards asylum.[427] The Court decided to admit Cuba's request, despite Peru's contention, for as long as it dealt with a new question – different from those dealing with the authority of *res judicata* in the Judgment of 20 November 1950 – namely

421 *Ibid*., p. 285.
422 ICJ, *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum case* (Colombia *v.* Peru), Judgment of 27 November 1950, ICJ Reports 1950.
423 ICJ, *Haya de la Torre Case* (Colombia *v*. Peru), Judgment of 13 June 1951, ICJ Reports 1951, p. 77.
424 *Ibid*., p. 78.
425 *Ibid*., p. 75.
426 *Ibidem*.
427 *Ibid*. pp-76-77.

whether Colombia was under an obligation to surrender the refugee to the Peruvian authorities.[428]

In the Court's view, the principal submissions of the parties were designed to obtain a decision as to the manner in which the asylum was to be terminated.[429] The Court first observed that its judgment, in deciding on the regularity of the asylum, confined itself to defining the legal relations which the Havana Convention had established in regard to this matter between the parties; while not giving any directions to the parties, it only entailed the obligation for them to comply therewith.[430] However, the interrogative form in which the parties had formulated their submissions showed that they desired that the Court should make a choice among the various courses by which the asylum could be terminated.[431] According to the Court, these courses were conditioned by facts and possibilities which, to a very large extent, the parties alone were in a position to appreciate.[432] A choice among them could not be based on legal considerations, but only on grounds of practicability or of political expediency; therefore the Court held that it was not part of the Court's judicial function to make such a choice.[433]

*B) The Latin American Tradition Concerning Asylum Seekers*

The surrender of Mr de la Torre was a new question, which was only brought before the Court by the Application of 13 December 1950, and which was not decided by the Judgment of 20 November 1950.[434] According to the Havana Convention, diplomatic asylum, a provisional measure for the temporary protection of political offenders, even if regularly granted, could not be prolonged indefinitely, but was to be terminated as soon as possible.[435] However, as the Court noted, the Convention did not give a complete answer to the question of the manner in which an asylum could be terminated for cases in which the asylum had not been regularly granted and where the territorial State had not requested the departure of the refugee.[436] The Court held that to interpret this silence as imposing an obligation to surrender the refugee, if the asylum had been granted to him contrary to the provisions of Article 2 of the Convention, would be repugnant to the spirit which animated that Convention in conformity with the Latin American tradition with regard to asylum; a tradition in accordance with which political refugees should not be surrendered.[437] There was nothing in that

428 *Ibid*., p. 77.
429 *Ibidem*.
430 *Ibid*., p. 79.
431 *Ibidem*.
432 *Ibidem*.
433 *Ibidem*.
434 *Ibid*., p. 80.
435 *Ibidem*.
436 *Ibidem*.
437 *Ibid*., p. 81.

tradition to indicate that an exception should be made in the case of irregular asylum, because if it had been intended to abandon that tradition, an express provision to that effect would have been needed.[438] In the Court's view, the silence of the Convention implied that it was intended to leave the adjustment of the consequences of such situations to decisions inspired by considerations of convenience or simple political expediency.[439]

Referring to its Judgment of 20 November 1950 the Court re-emphasized that the safety that arises from asylum could not be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals.[440] According to the Court it would be an entirely different matter to say that there existed an obligation to surrender a person accused of a political offence because the asylum was irregular.[441] As the Court stated, such an obligation to render positive assistance to the local authorities in their prosecution of a political refugee would far exceed its findings and could not be recognized without an express provision to that effect in the Convention.[442] With regard to Mr de la Torre, the Court found that so far as the question of surrender was concerned the refugee was to be treated as a person accused of a political offence.[443] Finally, the Court arrived at the conclusion that the asylum had to cease, but that the Government of Colombia was under no obligation to bring this about by surrendering the refugee to the Peruvian authorities.[444] In the Court's view, there was no contradiction between these two findings, since surrender was not the only manner in which asylum could be terminated.[445]

The Court stated that it was unable to give any practical advice as to the courses that could be followed to terminate the asylum as, by doing so, it would depart from its judicial function.[446] Further, it added that it could be assumed that the Parties, now that their mutual legal relations were made clear, would be able to find a practical and satisfactory solution by seeking guidance from those considerations of courtesy and good-neighbourliness which, in matters of asylum, had always held a prominent place in relations between the Latin American republics.[447] Implicit in these words is the suggestion of the Court for the two countries to solve their dispute peacefully through negotiations.

438 *Ibidem*.
439 *Ibidem*. The Court concluded: 'The Havana Convention does not justify the view that the obligation incumbent on a State to terminate an asylum irregularly granted to a political offender imposes a duty upon that State to surrender the person to whom asylum has been granted'.
440 *Ibidem*.
441 *Ibidem*.
442 *Ibidem*.
443 *Ibid*., p. 82.
444 *Ibidem*.
445 *Ibidem*.
446 *Ibid*., p. 83.
447 *Ibidem*.

*C) Concluding Remarks*

Noteworthy is the Court's interpretation of the silence of the Convention on such an issue as the surrender of a political offender, where asylum has been irregularly granted, as a case where considerations of convenience or simple political expediency take over. However, the Court clarified that even if the granting of asylum were to be irregular according to the provisions of the Havana Convention, there was no obligation to surrender a person accused of a political offence. While interpreting the Havana Convention of 1928 in such a way as to give political offenders the maximum protection possible, the Court carefully avoided delving into the practicalities of achieving this result, leaving it for the States concerned to come to an acceptable solution.

Although both the former Judgment of 20 November 1950 and the present one were based on an interpretation of the Havana Convention, their importance transcends the Latin American context, given that the issue of diplomatic asylum concerned and is still important for other areas of the world. The Court's advice to find a practical and satisfactory solution by seeking guidance on considerations of courtesy and good-neighbourliness would certainly hold true in other cases, independent of which continent the litigating States belonged. If negotiations would prove to be unfruitful, instead of bringing a contentious case, a solution could be the *ex aequo et bono* procedure of the ICJ.[448] In this case the Court seems to hint at being asked through such a procedure when it declared its inability to give any practical advice as to the courses for terminating the asylum as, by doing so, it would depart from its judicial function.[449] The use of this procedure could possibly have enabled the Court to go outside the realm of the law for reaching its decision.

## 3.10 DIPLOMATIC PROTECTION

Whether diplomatic protection qualifies as a tool of human rights protection is a controversial issue. However, if seen as upholding the rights of an individual by its State of nationality the link to human rights becomes clear. The cases selected below are indeed cases where considerations of, on the one hand, diplomatic protection as a matter of comity and a requirement for the maintenance of peaceful relations between States and, on the other hand, of diplomatic protection as a matter of upholding the rights of individuals concerned to humane treatment supplement each other. It is a well-established principle of international law that it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic

448 Article 38(2) of the ICJ Statute.

449 A. Zimmermann *et al*. (*eds.*), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press: New York, 2006, pp. 731-734.

protection.[450] Because of this *sine qua non* condition the first case to be dealt with here is one which clarifies the extent of this bond between the State extending diplomatic protection and the individual concerned, namely the *Nottebohm Case*. The two other cases which will be dealt with here are the so-called *Tehran Hostages* case and the *Diallo* case.

### 3.10.1 *Nottebohm Case* (Liechtenstein *v.* Guatemala, Judgment of 6 April 1955, *Second Phase*)

The case brought before the ICJ by the Principality of Liechtenstein against Guatemala is widely referred to as the *Nottebohm* case. Having rejected the preliminary objection raised by Guatemala the Court proceeded to the second phase, namely that on the merits.[451] Liechtenstein contended that in arresting, detaining, expelling and refusing to readmit Mr Friedrich Nottebohm (Mr Nottebohm), a citizen of Liechtenstein, and in seizing and retaining his property without compensation, Guatemala acted in breach of its obligations under international law and consequently in a manner requiring the payment of reparation.[452] Interestingly, this request for reparation was divided into, on the one hand, special and general damages owed to the Government of Liechtenstein and, on the other, the restitution by Guatemala to Mr Nottebohm of all his property seized and retained with damages for the deterioration of that property.[453] Liechtenstein submitted that the naturalization of Mr Nottebohm on 20 October 1939 had been granted in accordance with its municipal law and was not contrary to international law, thus its claims on his behalf were admissible before the Court.[454] As for the exhaustion of domestic remedies Liechtenstein claimed that in any event Mr Nottebohm had exhausted all the local remedies in Guatemala which he was able or required to exhaust under the municipal law of that country and under international law.[455]

*A) The Nationality of Mr Nottebohm*

Guatemala argued that Liechtenstein's claims were inadmissible due to the absence of any prior diplomatic negotiations, or in the alternative at least in so far as it related to reparation for injury allegedly caused to the person of Friedrich Nottebohm.[456] Further,

450 PCIJ, *The Panevezys-Saldutiskis Railway Case* (Estonia *v*. Lithuania), Series A/B, No. 76, p. 16. The PCIJ stated that 'in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law'.

451 ICJ, *Nottebohm Case* (Liechtenstein *v*. Guatemala), Judgment (*Second Phase*), ICJ Reports 1955, pp. 4-27.

452 *Ibid*., pp. 6-7.

453 *Ibid*., p. 7.

454 *Ibidem*.

455 *Ibid*., p. 8.

456 *Ibid*., p. 11.

with regard to its nationality, Guatemala argued that Mr Nottebohm had not properly acquired Liechtenstein nationality; naturalization was not granted in accordance with the generally recognized principles with regard to nationality; in any case, on the ground that he appeared to have solicited Liechtenstein nationality fraudulently, with the sole object of acquiring the status of a neutral national before returning to Guatemala, and without any genuine intention to establish a durable link, excluding German nationality, between the Principality and himself.[457] With regard to the liquidation of his property Guatemala asked the Court to declare that it was not obliged to regard the naturalization of Mr Nottebohm in Liechtenstein as binding upon it, or as a bar to his treatment as an enemy national in the circumstances of the case.[458]

It should be noted that the right to a nationality is a very important human right. Article 15 of the Universal Declaration of Human Rights reads:

> *'1. Everyone has the right to a nationality.*
>
> *2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.'*

The enjoyment of a whole set of human rights, be they civil and political, or economic, social and cultural, accruing to individuals is connected with their nationality. It is the State of nationality that usually has a positive obligation to provide for the necessary conditions for the enjoyment of these rights. The notion of a State as a provider and/or protector is closely connected with nationality and diplomatic protection. This case is quite important due to the central role played by naturalization, as a process of acquiring a nationality, and the concept of effective nationality as determining factors for established citizenship, a prerequisite for a State's ability to exert diplomatic protection on behalf of an individual. Through its findings in this case the Court elucidated some of these issues.

*B) Nationality under International Law: Real and Effective Nationality*

Finding that the admissibility of the claims revolved around the nationality of the person for whose protection Liechtenstein had seized the Court, the latter decided that it was desirable to consider this issue at the outset.[459] That meant considering whether the nationality conferred on Mr Nottebohm by Liechtenstein by means of naturalization could be validly invoked against Guatemala.[460] Or, in other words, it had to be determined whether that unilateral act by Liechtenstein could be relied upon against

457 *Ibidem*.
458 *Ibid*., p. 12.
459 *Ibidem*.
460 *Ibid*., p. 17.

Guatemala with regard to the exercise of protection.[461] In laying out its view on nationality the Court stated:

> [N]ationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.[462]

The Court found that while it was for Liechtenstein to settle under its own legislation the rules relating to the acquisition of its nationality, it was international law which determined whether a State was entitled to exercise protection and whether third States were required to recognize the granting of nationality.[463] As the Court noted, international practice provided many examples of acts performed by States in the exercise of their domestic jurisdiction that did not necessarily or automatically have international effect.[464] A question would arise with regard to the right to exercise diplomatic protection when two States conferred their nationality on the same person. The Court stated that in such cases international arbitrators and courts of third countries had given their preference to the real and effective nationality, that which accorded with the facts; that based on stronger factual ties between the person concerned and one of the States whose nationality is involved.[465] A list of different factors which were taken into consideration, their importance varying from one case to the next, as the Court noted, included:

(a) the habitual residence of the individual concerned;
(b) the centre of his interests;
(c) his family ties;
(d) his participation in public life;
(e) attachment shown by him for a given country and inculcated in his children, and so on.[466]

The list of factors to be taken into account when evaluating the real and effective nationality of a person and the emphasis placed on a case by case approach constitute an important contribution by the Court in clarifying this concept.

461 *Ibid*., p. 20.
462 *Ibidem*.
463 *Ibid*., p. 20-21.
464 *Ibid*., p. 21.
465 *Ibid*., p. 22.
466 *Ibidem*.

The Court pointed out that the same tendency of relying on the real and effective nationality prevailed in the writings of publicists and in practice.[467] Furthermore, the Court was of the opinion that the practice of certain States, which refrained from exercising protection in favour of a naturalized person when the latter had in fact severed his links with what was no longer for him anything but his nominal country, manifested the view that, in order to be invoked against another State, nationality had to correspond with a factual situation.[468] So, the character thus recognized on the international level as pertaining to nationality was in no way inconsistent with the fact that international law left it to each State to lay down the rules governing the granting of its own nationality.[469] According to the Court, while, for practical considerations, the best way of making such rules accord with the varying demographic conditions in different countries was to leave the fixing of such rules to the competence of each State, a State could not claim that the rules it had laid down were entitled to recognition by another State unless the former had acted in conformity with this general aim of making the nationality granted accord with the individual's genuine connection with the State granting diplomatic protection.[470]

Defining nationality on the basis of State practice, arbitral and judicial decisions and the opinion of writers the Court stated that nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.[471] Conferred by a State, nationality only entitled that State to exercise protection if it constituted a translation into juridical terms of the individual's connection with that State.[472] Further, in the Court's view diplomatic protection and protection by means of international judicial proceedings constitute measures for defending the rights of the State.[473]

*C) Was the Naturalization of Mr Nottebohm Real and Effective?*

Having clarified the socio-legal notion of nationality in general and that of real and effective nationality in particular, the Court questioned whether it was possible to regard the nationality conferred upon Mr. Nottebohm as real and effective.[474] It noted that naturalization was not a matter to be taken lightly, for it could have far-reaching consequences and involve profound changes in the destiny of the individual who ob-

467 *Ibidem*. In accordance with article 38, paragraph 1/d of its Statute, the Court can apply judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for determining the rules of law in a certain case.

468 *Ibidem*.

469 *Ibid*., p. 23.

470 *Ibidem*. The Court noted that the requirement that such a concordance must exist was to be found in the studies which had been carried out in the course of the last thirty years upon the initiative and under the auspices of the League of Nations and the United Nations.

471 *Ibidem*.

472 *Ibidem*.

473 *Ibid*., p. 24.

474 *Ibidem*.

tained it.[475] According to the Court, in order to appraise its international effect it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, and the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him.[476] The Court asked whether at the time of his naturalization Nottebohm appeared to have been more closely linked by his tradition, his establishment, his interests, his activities, his family ties, or his intentions for the near future, to Liechtenstein than to any other State.[477]

Recalling the essential facts of the case the Court noted that Mr Nottebohm, a German national from the time of his birth, always retained his family and business connections with Germany and that there was nothing to indicate that his application for naturalization in Liechtenstein was motivated by any desire to dissociate himself from the Government of his country.[478] Further, he had been settled for 34 years in Guatemala, which was the centre of his interests and his business activities, until his removal as a result of war measures in 1943.[479] In contrast, his actual connections with Liechtenstein were extremely tenuous: no settled abode and no prolonged residence in that country at the time of his application for naturalization.[480] In the Court's view these facts clearly established, on the one hand, the absence of any bond of attachment with Liechtenstein and, on the other, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened.[481] Thus, naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the lifestyle of the person upon whom it was conferred in exceptional circumstances of speed and accommodation, as in both respects it was lacking in the *genuineness* requisite for an act of such importance (emphasis added), if it were to be entitled to be respected by a State in the position of Guatemala.[482] Consequently, it was granted without regard to the concept of nationality adopted in international relations.[483] The Court found that naturalization was requested not so much for the purpose of obtaining legal recognition of Nottebohm's membership of the population of Liechtenstein, but rather to enable him to substitute his status as a national of a belligerent State with that of a subject of a neutral State, therefore with the sole aim of falling within the protection of Liechtenstein but at the same time not becoming wedded to its traditions, its interests, its way of life or of assuming the obligations – other than fiscal obligations – and exercising the rights

475 *Ibidem*.
476 *Ibidem*.
477 *Ibidem*.
478 *Ibid*., p. 25.
479 *Ibidem*.
480 *Ibidem*.
481 *Ibid*., p. 26.
482 *Ibidem*.
483 *Ibidem*.

pertaining to the status thus acquired.[484] The Court concluded that Guatemala was under no obligation to recognize a nationality granted in such circumstances and Liechtenstein was not entitled to extend its protection to Nottebohm vis-à-vis Guatemala, thus holding Liechtenstein's claim to be inadmissible.[485]

*D) Concluding Remarks*

This decision is important for its clarifications of the concept of nationality acquired through naturalization, and the determining factors to be taken into account when deciding upon the real and effective nationality in case of double nationality. However, three Judges of the Court disagreed with the dismissal of the case.[486] Was it correct for the Court to assume that becoming wedded to the traditions, interests, and the way of life of a country is more important than fulfilling one's fiscal obligations? Given that traditions, interests, and a way of life are at their best rather difficult concepts to be measured, this assumption by the Court seems to rest on a high degree of subjectivity. This is not to say that the Court made an erroneous decision as to whether Mr Nottebohm was not genuine in seeking Liechtenstein nationality, but wanted to obtain it in order not to incur the sanctions imposed by the government of Guatemala in view of his connections with a belligerent State during the Second World War. Finally, the Court's contribution, besides shedding light on the issue of nationality, and the acquiring of nationality through the process of naturalization, is that it also clarified the close relationship between nationality and diplomatic protection. Apparently, in the Court's view, nationality acquired fraudulently barred a State from extending diplomatic protection to an individual.

### 3.10.2 *United States Diplomatic and Consular Staff in Tehran* (United States *v.* Iran, Order of 15 December 1979 for the Indication of Provisional Measures)

*A) Background*

At the beginning of November 1979 a group of radical students attacked the US embassy and took hostage everyone inside. These events unfolded with Ayatollah Khomeini's support in retaliation for the US agreeing to shelter the Shah of Iran. The United States filed an application with the ICJ on 29 November 1979 requesting the indication of provisional measures relating to the fact that staff of the American embassy in Tehran were being kept hostage. Although this case concerns the inviolability of diplomatic envoys, which is a distinct category of persons, the Order of the

484 *Ibidem*.

485 *Ibidem*.

486 See Dissenting Opinion of Judge Klaestad, pp. 28-33; Dissenting Opinion of Judge Read, pp. 34-49; and Dissenting Opinion of Judge *ad hoc* Guggenheim, pp. 50-65.

Court indicating provisional measures refers to the safeguarding of the right to life and health of these persons. Furthermore, besides diplomatic immunity, this category of persons enjoys the same general protection under international human rights law as every other individual human being.

*B) Provisional Measures: Dual Protection for Diplomatic Envoys*

This order is quite interesting due to the findings not only on the immunity of diplomatic envoys, but also at the level of the enjoyment of general human rights. In addressing the inviolability of diplomatic envoys the Court stated:

> [T]here is no more fundamental prerequisite for the conduct of relations between States than the *inviolability of diplomatic envoys* (emphasis added) and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; and whereas the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential, unqualified, and inherent in their representative character and their diplomatic function.[487]

Firstly, the Court pointed to the importance of the principle of the inviolability of diplomatic envoys and embassy premises as a precondition for the conduct of good and friendly relations between states. Then, the Court, turning to the personal situation of the US diplomatic staff being held as hostages in Tehran, held:

> 'Whereas continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm.'[488]

It appears that among other international instruments supporting the above finding the Court also relied on the provisions of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973, to which Iran and the United States were parties.[489] Although this Convention is not a general one, but is aimed at protecting persons enjoying a special status, the Court appeared to determine that this Convention confers individual human rights on them. Further, considering the circumstances of the case, in its judgment the Court held:

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487 ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America *v*. Iran), (*Request for the Indication of Provisional Measures*), Order of 15 December 1979, ICJ Reports 1979, p. 19, para. 38 (*Hostages* case).

488 *Ibid*., p. 20, para. 42.

489 *Ibid*., p. 20, para. 43. Article 2 of the aforementioned Convention lists the offences against internationally protected persons, while Article 13 (1) assigns jurisdiction to the ICJ in the case of disputes concerning its interpretation and application.

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraints in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.[490]

In its Order the Court unanimously indicated that the Iranian Government had to release immediately, without exception, all persons of United States nationality held in the US Embassy or in the Ministry of Foreign Affairs in Tehran, or held as hostages elsewhere, and afford full protection to all such persons, in accordance with the treaties in force between the two States and with general international law.[491] Further, the Court ordered that full protection, privileges and immunities be afforded to all the diplomatic and consular personnel of the US.[492] For the Court this immunity, including immunity from any form of criminal jurisdiction and freedom and facilities to leave the territory of Iran, accrued to them under the treaties in force between the two States and under general international law.[493]

*C) Concluding Remarks*

By recognizing the inviolability of diplomatic staff the Court made a twofold contribution to international law; first, it upheld the human rights of this category of persons, and, second, it clarified the importance of the inviolability of diplomatic envoys for the maintenance of friendly relations among States. To materially achieve this inviolability the Court stressed the right of diplomatic staff to immunity from any criminal proceedings and the possibility to leave the country. While these rights are directly aimed at facilitating the carrying out of their duties, by way of operation they do in fact protect, above all, these persons' right to life, which was under a direct threat in this case. Besides the protection accruing to diplomatic personnel under the relevant international conventions and customary international law, an important addition to this protection from a human rights perspective is the Court's reference to the general protection accruing to them under both the UN Charter and the UDHR. This finding supports the conclusion that both the UN Charter and the UDHR create obligations on the part of States for the protection of those individual human rights for which they provide.

490 *Hostages* case, Judgment of 24 May 1980, ICJ Reports 1980, p. 42, para. 91.

491 *Hostages* case, (*Request for the Indication of Provisional Measures*), Order of 15 December 1979, ICJ Reports 1979, p. 21, para. 47(A)(ii).

492 *Ibid*. para. 47(A)(iii).

493 *Ibidem*.

### 3.10.3 *Ahmadou Sadio Diallo Case* (Republic of Guinea *v.* Democratic Republic of the Congo, 1998– ongoing)

*A) Background*

This case was brought by Guinea against the Democratic Republic of the Congo (DRC) on behalf of Mr Diallo, a Guinean citizen, regarding his expulsion and the seizure of all of his property by the DRC. Guinea decided to resort to the ICJ after 'vain attempts to arrive at an out-of-court settlement'.[494] In a unilateral Application entitled 'Application with a view to diplomatic protection' which was received at the Registry of the Court on 28 December 1998, Guinea requested the Court to 'condemn the Democratic Republic of Congo for the grave breaches of international law perpetrated upon the person of a Guinean national', Mr Ahmadou Sadio Diallo.[495]

In its Application instituting proceedings Guinea described in detail how Mr Diallo, a Guinean businessman, was unlawfully imprisoned by the authorities of Congo, divested from his important investments, companies, bank accounts, movable and immovable properties, and then expelled on 2 February 1996. Guinea contended that this came as a result of his attempts to recover sums owed to him, more precisely to his companies, namely Africom-Zaïre and Africontainers-Zaïr, by Congo and by oil companies operating in that country. Using its right to institute proceedings before the Court as an exercise of diplomatic protection, Guinea made claims which were based upon international human rights instruments and general principles of international law conferring rights upon individuals. One of the relevant passages in the Application read:

> It is a general principle of law that every State has the right to require other States to comply with international law in respect of the person of any of its nationals.
> The State of Guinea is therefore entitled to institute proceedings against the Democratic Republic of the Congo, which has violated certain major principles of international law in respect of a Guinean national, namely: the principle that foreign nationals should be treated in accordance with a minimum standard of civilization, the obligation to respect the freedom and property of foreign nationals, the right of foreign nationals accused of an offence to a fair trial on adversarial principles by an impartial court.[496]

Thus, by using the instrument of diplomatic protection, Guinea alleged that the following international law violations had been committed against Mr Diallo:
(a) his right to be treated in accordance with a minimum standard of civilization;
(b) his right to freedom of property;
(c) his right to a fair trial on adversarial principles by an impartial court.

494 ICJ, *Ahmadou Sadio Diallo Case* (Republic of Guinea *v*. Democratic Republic of the Congo), Application of 23 December 1998, p. 3 (*Diallo* case).
495 *Ibidem*.
496 *Ibid*., p. 5.

This case is indeed remarkable from a human rights perspective. Claims such as the right of a foreign national to be tried according to fair trial standards, the obligation to respect the freedom and property of foreign nationals, and their treatment according to a minimum standard of civilization, which are fundamentally concerned with the rights of an individual, were brought forward for adjudication by a Court established to settle inter-State disputes.

*B) Diplomatic Protection of Mr Diallo's Rights as an Individual*

On 24 May 2007 the ICJ rendered its decision on the preliminary objections. As the Court noted, Guinea sought to exercise its diplomatic protection on behalf of Mr Diallo for the violation, alleged to have occurred at the time of his arrest, detention and expulsion, or to have derived therefrom, of three categories of rights: his individual personal rights, his direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire and the rights of those companies by 'substitution'.[497] Having established its jurisdiction to entertain the case,[498] the Court decided to address, first, the question of the admissibility of Guinea's application in so far as it concerned the protection of Mr Diallo's rights as an individual.[499] For the Court that meant ascertaining whether the Applicant had met the requirements for the exercise of diplomatic protection, that is to say whether Mr Diallo was a national of Guinea and whether he had exhausted the local remedies available in the DRC.[500] Given that it was not disputed by the DRC that the sole nationality of Mr Diallo was Guinean, the Court shifted its attention to the issue of the exhaustion of domestic remedies.[501] After recalling its finding in the *Interhandel* case that the exhaustion of domestic remedies was a well-established rule of customary international law, the Court stated that while in matters of diplomatic protection it was incumbent on the Applicant to prove that local remedies had indeed been exhausted or to establish that exceptional circumstances relieved the allegedly injured person of the obligation to exhaust available local remedies, it was for the Respondent to convince the Court that there were effective remedies in its domestic legal system that had not been exhausted.[502] As DRC did not prove the existence of *available* and *effective* remedies in its domestic legal system, the Court concluded that DRC's objection to admissibility based on the failure to exhaust local remedies could not be upheld in respect of that expulsion.[503]

497 ICJ, *Ahmadou Sadio Diallo Case* (Republic of Guinea *v.* Democratic Republic of the Congo), (*Preliminary Objections*), Judgment of 24 May 2007, para. 31.
498 *Ibid*., para. 32.
499 *Ibid*., paras. 33-48.
500 *Ibid*., para. 40.
501 *Ibid*., para. 41.
502 *Ibid*., paras. 42-44.
503 *Ibid*., para. 48.

*C) Diplomatic Protection of Mr Diallo's Rights as Associé*

Having found the Guinean Application admissible with regard to Mr Diallo's individual rights the Court turned to the question of the admissibility of Guinea's Application in so far as it concerned the protection of Mr Diallo's rights as an *associé* of the two companies Africom-Zaire and Africontainers-Zaire.[504] The two preliminary objections raised by DRC concerned, respectively, Guinea's standing, and the exhaustion of the local remedies available to Mr Diallo in the DRC to assert his rights as *associé*. In ascertaining Guinea's *locus standi* in this case,[505] the Court noted that a determination of a legal entity's (in our case of the two above-mentioned companies) independent legal personality mattered from an international point of view, as only the State of nationality would be able to exercise diplomatic protection on behalf of that legal entity (company) when its rights are injured by a wrongful act of another State.[506] The Court held:

> The exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of *associés* of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.[507]

The Court concluded that the objection of inadmissibility raised by the DRC due to Guinea's lack of standing to protect Mr Diallo could not be upheld in so far as it concerned the latter's direct rights as an *associé* of Africom-Zaire and Africontainers-Zaire.[508] As for the other objection raised by the DRC, namely non-exhaustion of domestic remedies by Mr Diallo, the Court noted that the alleged violation of Mr Diallo's direct rights as *associé* was dealt with by Guinea as a direct consequence of his expulsion given the circumstances in which that expulsion occurred.[509] Having already found that no effective remedies existed under Congolese law against the expulsion Order against Mr Diallo and observing that at no time had the DRC argued that remedies distinct from those in respect of Mr Diallo's expulsion existed in the Congolese legal system against the alleged violations of his direct rights as *associé*,

504 *Ibid*., para. 49.
505 See paras. 50-67.
506 *Ibid*., para. 61.
507 *Ibid*., para. 64.
508 *Ibid*., para. 67.
509 *Ibid*., para. 74.

which he should have exhausted, the Court concluded that this objection by the DRC could not be upheld.[510]

*D) Diplomatic Protection by 'Substitution': Status under Contemporary International Law*

Besides exercising diplomatic protection for Mr Diallo as an individual and as an *associé*, Guinea purported to exercise diplomatic protection with respect to Mr Diallo 'by substitution' for Africom-Zaire and Africontainers-Zaire and in defence of their rights.[511] The DRC raised two similar preliminary objections as to the above submission by Guinea asserting diplomatic protection for Mr Diallo as *associé*, namely the issue of Guinea's standing and the exhaustion of domestic remedies. The issue of Guinea's standing before the Court on behalf of these companies, which was dealt with first by the Court, is quite interesting.[512] The Court noted that, since its dictum in the *Barcelona Traction* case, it had not had an occasion to rule on whether, in international law, there was indeed an exception to the general rule 'that the right of diplomatic protection of a company belongs to its national State', which would allow for the protection of the shareholders by their own national State 'by substitution', and on the reach of any such exception.[513] In assessing the status of the theory of protection by 'substitution' under contemporary international law the Court stated:

> The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by 'substitution' would therefore appear to constitute the very last resort for the protection of foreign investments.[514]

Having carefully examined State practice and decisions of international courts and tribunals in respect of the diplomatic protection of *associés* and shareholders, the Court held that these did not reveal – at least at the present time – an exception in customary international law allowing for protection by substitution, as relied upon by Guinea.[515] On the basis of the facts before it the Court concluded that the companies Africom-Zaire and Africontainers-Zaire were not incorporated in such a way that they would fall within the scope of protection by substitution in the sense of Article 11, paragraph (b), of the ILC draft Articles on Diplomatic Protection referred to by Guinea.[516] Having

510 *Ibid*., paras. 74-75.
511 *Ibid*., para. 76.
512 See paras. 77-94.
513 *Ibid*., para. 87.
514 *Ibid*., para. 88.
515 *Ibid*., para. 89.
516 *Ibid*., para. 93. Article 11, paragraph (b) reads: 'A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless: (b) the corporation had, at the date of injury, the nationality of the State

concluded that Guinea was without standing the Court did not need to consider the other contention, namely the non-exhaustion of domestic remedies.[517] Thus, on the whole the Court found Guinea's Application admissible only in so far as it concerned the protection of Mr Diallo's rights as an individual and his direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire.[518]

*E) Concluding Remarks*

The *Diallo* case is remarkable for the wide range of human rights issues it encompasses. Surely, through its forthcoming judgment on the merits, the Court will have ample opportunity to contribute to the further development of international human rights rules and principles. The rights Guinea invoked on behalf of its national under diplomatic protection would fall under individual civil and political rights and under economic, social, and cultural rights. According to Guinea, the DRC violated the principle that foreign nationals should be treated in accordance with minimum standards of civilization.[519] That claim can be taken as a reference to Article 38(1)(c) of the ICJ Statute allowing the Court to apply, in resolving inter-State disputes, general principles of law recognized by civilized nations. It is noteworthy that Guinea claimed that in detaining Mr Diallo without trial or any form of charge the DRC had violated the UDHR of 1948.[520] Further, it contended that under the ICCPR no one may be arrested or detained unless proved guilty according to law by an impartial tribunal acting with due regard for the presumption of innocence and the rights of the defence.[521] According to Guinea, in depriving Mr Diallo of his property and investments by expelling him illegally Congo had violated his right to property, which Article 2 of the Declaration of the Rights of Man and Citizen of 1789 recognizes as a natural and imprescriptible right of all persons.[522] For the first time a State claimed before the ICJ that it had suffered moral injury as a result of the injustice and inhuman and degrading treatment inflicted upon its national.[523] The Court was requested to order the DRC to make an official public apology to Guinea for the numerous wrongs done to Mr Diallo and to compensate all of the damage, both material and moral, including not only losses suffered (*damnum emergens*) but also loss of profits (l*ucrum cessans*).[524] The claims raised in the Application evidence the fact that human rights,

alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there.'.

517 *Ibid*., para. 95.

518 *Ibid*., para. 98(3)*(a)*,and *(b)*.

519 *Diallo* case, Application, p. 29.

520 *Ibidem*.

521 *Ibidem*.

522 *Ibid*. pp. 29-31.

523 *Ibid*., p. 31.

524 *Ibid*., p. 37.

be they civil and political, or economic, social and cultural rights, fall in principle under the scrutiny of the Court.

### 3.11 CONSULAR RELATIONS DISPUTES

Several cases have been brought before the Court by States exercising their right to consular assistance as a specific form which diplomatic protection can take.[525] This fact is indicative of the central position that States can take and the important role they can play in protecting the human rights of their citizens not only within their own jurisdiction but also *vis-à-vis* other States. Three of the cases dealt with here were brought by different States against the US on the basis of the Optional Protocol to the Vienna Convention on Consular Relations of 24 April 1963 (Consular Relations Convention or Convention).[526] The jurisprudence of the Court on this issue has developed in the direction of suggesting that this Convention creates individual rights and thus provides direct protection for individuals. Hence this interpretation of the CRC can be said to constitute a novel development for human rights law. Indeed, the way the Court construed the obligations incumbent upon States *vis-à-vis* individuals by virtue of this Convention amounts to a strengthening of a procedural requirement which can come to bear on the right to fair criminal proceedings, namely that of being informed of the right to consular assistance. The fact that many of these cases were brought on behalf of persons who were on death row, pending execution, makes the Court's orders on provisional measures[527] and the following judgments on the merits all the more important and compelling from a humanitarian perspective.

By way of illustration, the Court's provisional measures in the *LaGrand* case requested the halting of the execution of Walter LaGrand until a judgment on the merits was issued. Although, ultimately, the execution of the *LaGrand* brothers was not halted, in its judgment on the merits the Court made an important finding by stating that provisional measures laid down by the Court in its Order[528] were legally

525 These cases were brought before the ICJ by States exercising their right to diplomatic protection under the Vienna Convention on Diplomatic Relations of 18 April 1961 and/or the Vienna Convention on Consular Relations of 24 April 1963. The list includes the *United States Diplomatic and Consular Staff in Tehran* case (1979-1981); the *Breard* case (April-November 1998); the *Diallo* case (December 1998-ongoing); the *LaGrand* case (1999-2001); the *Arrest Warrant* case (2000-2002); the *Avena and other Mexican Nationals* case (2003-2004); and the *Dominican Diplomatic Envoy* case (2006-ongoing).

526 Namely the *Breard* case (April-November 1998); the *LaGrand* case (1999-2001); and the *Avena and other Mexican Nationals* case (2003-2004).

527 See inter alia E. Rieter, *Interim Measures by the World Court to Suspend the Execution of an Individual: the Breard case*, Netherlands Quarterly of Human Rights (NQHR), Vol. 16, 1998, pp. 475-494; A. Duxbury, *Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Rights*, California Western International Law Journal (CWILJ), Vol. 31, 2000, pp. 141-176.

528 ICJ, *LaGrand* (Germany *v*. US), Order of 3 March 1999, ICJ Reports 1999. The relevant paragraph 29 (I) (a) reads: 'The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order'.

binding upon the Parties before the Court.[529] Indeed, provisional measures indicated by the Court can be an important tool for the protection of human rights if States take the necessary measures for implementing them.[530] While many of the diplomatic protection cases claim a breach by the respondent State of the right to consular assistance, the *Diallo* case, which is still in the Court's docket, is of a peculiar nature. In this case Guinea claimed that the Democratic Republic of Congo (DRC) had imprisoned, divested him of his investments and finally expelled Mr Diallo, who was its citizen.[531] Potentially this case can clarify a wide range of issues regarding extra-territorial protection of individual human rights of affected individuals by their State of nationality.

### 3.11.1 *Case Concerning the Vienna Convention on Consular Relations* (Paraguay *v.* United Stated, Application of 3 April 1998 and Order of 9 April 1998)

*A) Background*

The dispute brought before the Court by Paraguay concerned alleged violations of the Consular Relations Convention of 1963 with respect to the case of Mr Angel Francisco Breard, a Paraguayan national convicted of murder in Virginia, US. His execution was scheduled and was carried out on 14 April 1998. In its Application Paraguay stated that in 1992 the authorities in Virginia had arrested Mr Breard, who was consequently charged, tried and convicted of culpable homicide and finally sentenced to death by a court in Virginia in 1993. The legal process took place without having informed him of his rights under Article 36, subparagraph 1 (b), of the Consular Relations Convention at any stage. The rights enumerated in this Convention include the right to request that the relevant consular office of the State of which the person is a national be advised of his arrest and detention, and the right of the person detained to communicate with that office.

Article 36 of this Convention forms the basis for the claims put forward in this case and the following cases of *LaGrand* and *Avena and other Mexican Nationals*.[532]

529 *LaGrand* (Germany *v.* US), Judgment of 27 June 2001, ICJ Reports 2001, p. 516, para. 128 (5).

530 See section 2.7.1 *supra*.

531 ICJ, *Ahmadou Sadio Diallo* (Guinea *v.* Democratic Republic of Congo), Application of 28 December 1998. Guinea contended that Mr Diallo, who had been a resident of the Republic of Congo for 32 years, was imprisoned by the authorities of that State for two-and-a-half months and divested of his important investments, companies, bank accounts, movable and immovable property, then expelled on 2 February 1996. On the basis of diplomatic protection Guinea requested the Court to condemn the Democratic Republic of the Congo for the grave breaches of international law perpetrated upon the person of Guinean nationality.

532 Article 36 of the Consular Relations Convention reads: '1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State: (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers

Paraguay alleged that the authorities of the Commonwealth of Virginia also did not advise Paraguayan consular officers of Mr Breard's detention, and that those officers were only able to render assistance to him from 1996 onwards, when the Paraguayan Government learnt by its own means that Mr Breard was imprisoned in the US.[533] Further in its Application Paraguay contended that American Federal Courts denied Mr Breard the right to invoke the Convention. When Mr Breard was sentenced to death by the Virginia court, having exhausted all means of legal recourse available to him as of right, he petitioned the US Supreme Court for a *writ of certiorari*,[534] requesting it to exercise its discretionary power to review the decision delivered by the lower federal courts and to grant a stay of execution pending that review. In its Application Paraguay noted that it is quite rare for the Supreme Court to accede to such requests.[535] Paraguay stated, moreover, that, having brought proceedings itself before the federal courts of the US without success, it also filed such a petition in the Supreme Court, and that it furthermore engaged in diplomatic efforts with the US Government and sought the good offices of the Department of State.[536] In a letter of 3 June 1997 the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.[537] Given that the execution of Mr Breard was scheduled to take place on 14 April 1998, Paraguay initiated legal proceedings before the ICJ on 3 April, concurrently requesting the Court to give an indication of provisional measures.

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of the sending State; (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.'.

533 ICJ, *Case Concerning the Vienna Convention on Consular Relations* (Paraguay *v*. US), Application of 3 April 1998, paras. 5-15 (*Breard* case), available at: *http://www.icj-cij.org/docket/files/99/7183.pdf* (last accessed on 1 November 2007).

534 A *writ of certiorari* is an order issued by the Supreme Court directing a lower court to transmit the records for a case which it will hear on appeal. Certiorari is the general method in which most cases find their way to be docket of the U.S. Supreme Court since this Court has specific jurisdiction over a very limited range of disputes.

535 Indeed, the US Supreme Court receives approximately 7,500 petitions each year but only between 80 and 150 of them are granted due to the Supreme Court's limited resources. See Application, *supra* note 533, para. 15.

536 ICJ, Press Release 98/17*bis*, 9 April 1998.

537 *Breard* case, Application of 3 April 1998, para. 20.

*B) Paraguay's Effort to Save Mr Breard's Life*

Paraguay claimed that by violating its obligations under Article 36, subparagraph 1 (b), of the Convention, the US prevented Paraguay from exercising the consular assistance functions provided for in Articles 5 and 36 of the Convention and specifically for ensuring the protection of its interests and of those of its nationals in the US.[538] Further, Paraguay contended that due to the US authorities' failure to inform Mr Breard of his rights it was not able to contact Mr Breard or to offer him the necessary assistance, and that accordingly Mr Breard 'made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation' and that he 'did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay'.[539] Paraguay concluded from this that it was entitled to *restitutio in integrum*, that is the re-establishment of the situation that existed before the US failed to provide the notifications required under the Convention.[540]

In its urgent request for the indication of provisional measures Paraguay emphasized the importance and sanctity of an individual human life, which in its opinion was well established in international law.[541] To support its argument Paraguay quoted Article 6 of the ICCPR, according to which every human being has the inherent right to life and this right shall be protected by law.[542] Further on Paraguay stated:

> Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour.[543]

Thus, Paraguay requested that pending final judgment in this case, the Court should indicate to the Government of the US the measures which were necessary to ensure that Mr Breard would not be executed; that the US Government should report to the Court on the actions taken and the results of those actions; and that the US Government should ensure that no action is taken that might prejudice the rights of Paraguay with respect to any decision this Court may render on the merits of the case.[544] As the

538 *Ibid*., para. 25 (1).
539 See supra note 536 (ICJ, Press Release 98/17*bis*, 9 April 1998).
540 *Ibidem*.
541 *Breard* case, *Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Paraguay*, 3 April 1998, para. 6, available at: *http://www.icj-cij.org/docket/files/99/8570.pdf* (last accessed on 1 November 2007).
542 *Ibidem*.
543 *Ibid*., para. 7.
544 *Ibid*., para. 8.

execution of Breard was imminent Paraguay asked the Court to consider its request as a matter of the greatest urgency.[545]

Having established its *prima facie* jurisdiction,[546] the Court clarified that the purpose of the power to indicate provisional measures is to preserve the respective rights of the parties, pending a decision by the Court, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings.[547] The Court stated that preservation by such measures of the rights that might subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent, is only justified if there is urgency.[548] Noting that the execution of Mr Breard was already ordered for 14 April 1998 the Court found that such an execution would render it impossible for it to order the relief that Paraguay sought and thus cause irreparable harm to the rights which the Applicant claimed.[549] In order to dispel any doubts the Court observed that the issues before it did not concern the entitlement of the federal states within the US to resort to the death penalty for the most heinous crimes, as the function of the Court was to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal.[550]

On the basis of the above-mentioned considerations the Court found that the circumstances required it to indicate, as a matter of urgency, provisional measures in accordance with Article 41 of its Statute.[551] In addition to having addressed both Parties on 'the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects',[552] the Court in its Order of 9 April 1998 unanimously indicated:

> 'The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order.'[553]

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545 *Ibid*., para. 9.

546 As is customary for the Court, in order to indicate the requested provisional measures it had to satisfy itself of the fact that it had *prima facie* jurisdiction. Indeed, the Court found that a dispute existed as to whether the relief sought by Paraguay was a remedy available under the Vienna Convention on consular Relations, in particular in relation to Articles 5 and 36 thereof, which is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol. Article I of the aforesaid Optional Protocol, having been ratified by both Paraguay and the US, conferred jurisdiction upon the Court to settle the dispute between them.

547 *Breard* case, (*Provisional Measures*), Order of 9 April 1998, ICJ Reports 1998, p. 257, para. 35.

548 *Ibidem*.

549 *Ibid*., p. 257, para. 37.

550 *Ibid*., p. 257, para. 38.

551 *Ibid*., p. 257, para. 39.

552 ICJ, Press Release 98/13 of 3 April 1998. Letter of the Vice-President of the Court to the Parties dated 3 April 1998.

553 *Breard* case, (*Provisional Measures*), Order of 9 April 1998, ICJ Reports 1998, p. 258, para. 41.

Unfortunately, although clear in its request, this Order did not prevent the execution from taking place. It should be noted, however, that at that time the binding nature of the Orders of the Court was not beyond dispute. Through a letter of 2 November 1998 Paraguay informed the Court of its wish to discontinue the proceedings and asked for the case to be removed from the List.[554] At that point an out of Court settlement had been reached between the government of Paraguay and the US government.

*C) Concluding Remarks*

For the first time the ICJ indicated provisional measures aimed at suspending the execution of an individual. This case is illustrative of how the Court, an international judicial body created for settling State disputes, could, in the course of its activity, be involved in preserving an individual's right to life, a sacred and fundamental human right. Paraguay construed the procedural requirement under the Consular Relations Convention of being notified of the right to consular assistance as creating obligations not only between States but also between a State and a foreign citizen. In its view, the failure of the US authorities to notify Mr Breard of his right to consular assistance affected his ability to raise a proper defence, and thus from obtaining a fair trial. It should be noted that the Court did not construe its order on provisional measures in terms of preserving the human right to life, but rather according to concepts of general public international law, namely the prevention of irreparable prejudice being done to the rights which are subject to the dispute. However, the use of provisional measures to save lives enlarges the scope of the contribution which the Court can make in interpreting and developing international human rights rules and principles.

As Rieter notes, the bringing of a case before the ICJ 'is an indication of a growing willingness of States to match their own interests with the human rights interests of their citizens abroad'.[555] Whether this change in attitude is predicated in a range of factors such as the place of the right to life in the domestic legal system, the pressure from civil society, a genuine interest in the protection of a country's own citizens, or is just a means of pursuing political aims through legal proceedings (or a combination thereof), it is still important that States fulfil their obligation to protect their citizens. The *Breard* case served as a prelude to two other cases brought against the US regarding the same issue and based on the same Convention.[556]

554 *Breard* case, (*Discontinuance*) Order of 10 November 1998, ICJ Reports 1998, pp. 426-427.

555 E. Rieter, *Interim Measures by the World Court to Suspend the Execution of an Individual: the Breard case*, NQHR, Vol. 16, No. 4, 1998, p. 492.

556 For the sake of completeness diplomatic protection was invoked as a ground in two other cases, namely in the *United States Diplomatic and Consular Staff in Tehran* case (US *v*. Iran) which was removed from the Court's List in 1981 and in the *Ahmadou Sadio Diallo* case (Guinea *v*. Democratic Republic of the Congo) which is still pending before the Court and was discussed in more detail above.

### 3.11.2 *LaGrand* (Germany *v.* United States, Order on Provisional Measures of 3 March 1999 and Judgment of 27 June 2001)

*A) Background*

This case was brought before the ICJ by Germany on behalf of two of its nationals on the basis of the Consular Relations Convention's Optional Protocol. Karl and Walter LaGrand were tried and sentenced to death after an attempted bank robbery in Arizona, the US, where the bank manager had been murdered and another bank employee had been seriously injured.[557] Karl LaGrand was executed on 24 February 1999 despite all appeals for clemency and numerous diplomatic interventions by the German Government at the highest level to the US authorities, whereas Walter LaGrand was scheduled to be executed on 3 March 1999. As the Court noted, at the time the LaGrands were convicted and sentenced, the competent US authorities had failed to inform the LaGrands of their right to consular assistance provided under the Consular Relations Convention.[558] The US conceded that the competent authorities had failed to do so, even after becoming aware that the LaGrands were German nationals and not US nationals, and that by doing so it had violated its obligations under Article 36 of the Consular Relations Convention.[559] Both the Court's order on provisional measures and it judgment on the merits are relevant to our discussion.

*B) An In Extremis Order on Provisional Measures*

In its order on provisional measures the Court made use, for the first time, of Rule 75 of the Rules of the Court, which allows it to decide at any time to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.[560] The Court noted that whereas the sound administration of justice required that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time, the circumstances required it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules.[561] The judgment of the Court makes two rather important contributions to international human rights law. *First*, the Court explicitly acknowledged that the Consular Relations Convention of 1963 gave rise to individual rights. The s*econd* finding, which could potentially enhance the protection of human rights, is the Court's ruling that its Orders

557 For a detailed account of the facts of the case see ICJ, *LaGrand* (Germany *v*. US), Judgment of 27 June 2001, ICJ Reports 2001, pp. 474-480, paras. 13-34.

558 *Ibid*., pp. 475-476, para. 15.

559 *Ibidem*.

560 Rosenne, p. 1803.

561 *LaGrand*, (*Provisional Measures*), Order of 3 March 1999, ICJ Reports 1999, respectively pp. 14 and 15 and paras. 19 and 26.

indicating provisional measures are binding upon States. Both contributions are discussed separately below.

*C) Consular Relations Convention as a Source of Individual Rights*

It should be noted that the preamble to the Consular Relations Convention states that the purpose of the privileges and immunities is not to benefit individuals but to ensure the efficient performance of consular functions by consular posts on behalf of their respective States. At the same time Article 36 of this Convention provides for notification of the nearest consular post in case of the arrest or detention of a national of a sending State and of the right of this national to be informed of this right and the ensuing right to consular assistance. Thus, the general nature of this Convention as an inter-State agreement with the aim of developing friendly relations among the latter, on the one hand, and the incorporation therein of a right to consular assistance, on the other, have generated some confusion as to whether this Convention could indeed give rise to an individual right.

The language employed by the Court, however, leaves no doubt that the Consular Relations Convention does indeed create individual rights.[562] As the Court clearly stated:

> 'Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person.'[563]

Thus, both the substantive and the procedural aspect of the right to consular assistance were clarified. In the *dispositif* of the judgment the Court held that by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 *(b)*, of the Convention, and by thereby depriving Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the US had breached its obligations under Article 36, paragraph 1, towards both Germany and the LaGrand brothers.[564] Moreover, the Court found that by not permitting the review and reconsideration, in the light of the

562 See *inter alia* Sir R. Jennings, *The LaGrand case*, in The Law and Practice of International Courts and Tribunals 1, Kluwer Law International, 2002, pp. 13-54; T. Stephens, *The LaGrand Case (Federal Republic of Germany v United Sates of America), The right to Information on Consular Assistance under the Vienna Convention on Consular Relations: A Right for what Purpose?*, Melbourne Journal of International Law (MJIL), Vol. 3, 2002, pp. 143-164; M.D. Evans, *ed.*, M. Mennecke and C.J. Tams, *Decisions of International Tribunals: The International Court of Justice*, ICLQ, Vol. 51, No. 2, pp. 449-455; O. Spiermann, *The LaGrand Case and the Individual as a Subject of International Law*, AJPIL, Vol. 58, 2003, pp. 197-221; C.J. Tams, *Consular Assistance: Rights, Remedies and Responsibility: Comments on the ICJ's Judgment in the LaGrand Case*, EJIL, Vol. 13, No. 5, pp. 1257-1261, full text available at the journal's website *www.ejil.org*.

563 *LaGrand*, Judgment of 27 June 2001, ICJ Reports 2001, p. 494, para. 77.

564 *Ibid*., p. 515, para. 128(3).

rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in the above paragraph had been established, the US had breached its obligation under Article 36, paragraph 2, of the Convention towards both Germany and the LaGrand brothers.[565] In concluding, the Court pointed out that if in the future nationals of Germany would be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention being respected, the US, by means of its own choosing, should allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.[566] In the Court's view, the US undertaking to ensure the implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Convention was to be regarded as meeting Germany's request for a general assurance of non-repetition.[567]

As a matter of law, construing Article 36 of this Convention as creating individual rights is nothing more than a logical conclusion following from that article itself, based on a textual interpretation. However, the Court went a step further in that it not only acknowledged that the Convention creates individual rights, but it also indicated that there existed an obligation to remedy any violation of these rights. Whatever remedies may be available, as the Court left that open, individuals would be entitled to redress from injustices caused by a breach of Article 36 of this Convention. The implementation of this finding in practice seems to confer upon individuals a right to a *writ of certiorari* from the US Supreme Court when all other remedies would be exhausted. It is noteworthy that the Court construed the US obligations arising under the Consular Relations Convention as obligations towards Germany and the LaGrand brothers. Although this international instrument is not among those of a primarily humanitarian nature, the Court explicitly acknowledged in the *dispositif* of the judgment that the Consular Relations Convention gave rise to obligations of a State *vis-à-vis* an individual.

*D) Legal Nature of the Orders of the Court on Provisional Measures*

Another matter before the Court in this case was concerned with an issue which for a long time had remained an unsettled and controversial topic, namely that of the legal effect of the Orders of the Court indicating provisional measures. This legal uncertainty coupled with, among other things, Germany's tardiness in filing the request for provisional measures and the failure on the part of the governor of Arizona to comply with the Court's order proved to be fatal for Walter LaGrand. Germany filed its Application on 2 March 1999, as a matter of fact not many hours before the execution of Walter LaGrand was scheduled to take place. Because of the urgency created by these circumstances, Germany requested the Court to make an Order for the indication

565 *Ibid*., pp. 515-516, para. 128(4).
566 *Ibid*., p. 516, para. 128(7).
567 *Ibid*., p. 516, para. 128(6).

of provisional measures *proprio motu*, so without a previous hearing of the parties under Rule 75, paragraph 1 of the Rules of Court. The reasons which Germany gave for following such an unusual procedure, never employed by the Court until then, were explained in the following words:

> Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order the relief to which Germany is entitled in the case of Walter LaGrand, namely restoration of the *status quo ante*. Without the provisional measures requested, the United States will execute Walter LaGrand – as it did execute his brother Karl – before this Court can consider the merits of Germany's claims and Germany will be forever deprived of the opportunity to have this *status quo ante* restored in the event of a judgment in its favour.[568]

The Court's Order indicated that the US should take all measures at its disposal to ensure that Walter LaGrand would not be executed pending the final decision in these proceedings, and to inform the Court of all the measures which it had taken in implementation of this Order.[569] It is noteworthy that this order was unanimous.

However, Judge Oda, in a declaration, and President Schwebel, in a separate opinion, expressed some reservations concerning this Order. In articulating his concern about what the Court was being used for in this case Judge Oda stated:

> The Court cannot act as a court of criminal appeal and cannot be petitioned for writs of *habeas corpus*. The Court does not have jurisdiction to decide matters relating to capital punishment and its execution, and should not intervene in such matters. Whether capital punishment would be contrary to Article 6 of the 1966 International Covenant on Civil and Political Rights is not a matter to be determined by the International Court of Justice – at least in the present situation.[570]

This is rather interesting as Germany's contention was not that capital punishment was contrary to international law, but that the importance and sanctity of an individual human life are well established in international law. However, if pursued to its logical end, Germany's contention could easily be understood in the way put forward by Judge Oda. Further in his declaration he stated:

> If the Court intervenes *directly* in the fate of an individual, this would mean some departure from the function of the principal judicial organ of the United Nations, which is essentially a tribunal set up to settle inter-State disputes concerning the rights and duties of States. I fervently hope that this case will not set a precedent in the history of the Court.

568 *LaGrand*, (*Provisional Measures*), Order of 3 March 1999, ICJ Reports 1999, p. 12, para. 8.
569 *Ibid*., p. 16, para. 29(I)(a).
570 *Ibid*., Declaration of Judge Oda, ICJ Reports 1999, p. 18, para. 2.

> While I consider that the International Court of Justice should be utilized more frequently in the world, I cannot condone the use of the Court for such matters as the above under the pretext of the protection of human rights.[571]

Yet, as stated at the end of his declaration, he voted in favour of the Order solely for humanitarian reasons.[572] There seems to be a certain tension between his expressed views and his final position. His concern that the function of the Court had departed from that originally assigned to it, namely the settlement of inter-state disputes, is at first sight plausible. Indeed, in this case the Court concerned itself with the fate of an individual, but, however, the life of this individual was intrinsically related to the object of the dispute at hand. If irreparable harm had befallen Walter LaGrand – which at the end of the day resulted by virtue of his execution – without the Court acting upon Germany's request, it could be said that the ICJ had failed to protect the interests of Germany in the dispute until a ruling on the merits. The prevention of irreparable harm was the inherent reason for the indication of provisional measures in this case and indeed in other such cases brought before the Court.

Judge Schwebel, President of the Court at that time, pointed to the exceptional nature of the Order of the Court in view of its peculiar way of delivery without having heard the other party to the dispute and to the first time that Rule 75, paragraph 1, had been applied[573] and he also expressed his profound reservations as to the procedures followed by both the Applicant and the Court.[574] While Judge Schwebel's concern is rooted in the general principle of the fairness of legal proceedings, which in the normal course of events necessitates hearing both parties before taking a decision, the circumstances of the case made resorting to Rule 75 unavoidable. Indeed, independent of how this situation came about, the fact remained that expediency in taking a decision was needed here due to the danger of irreparable harm being so imminent.

Although the execution of Walter LaGrand was not halted, Germany continued the case to the merits. In its judgment on the merits the Court found that by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending its final decision in the case, the US had breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999.[575] This finding ended any remaining doubts as to the legal nature of the Orders of the Court indicating provisional measures by finally clarifying that such an Order is legally binding upon States. Such a finding is quite a bold assertion on the part of the Court, also in view of the existence of 'recalcitrant' States and the lack of enforcement measures by the Court, apart from a referral of non-compliant States to the SC.

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571 *Ibid*., pp. 19-20, para. 6.

572 *Ibid*., p. 20, para. 7.

573 Rule 75(1) reads: 'The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties.'

574 See the Separate Opinion of President Schwebel, (*Provisional Measures*), ICJ Reports 1999, pp. 21-22.

575 *LaGrand*, Judgment of 27 June 2001, ICJ Reports 2001, p. 516, para. 128(5).

*E) Concluding Remarks*

As mentioned above the importance of this case lies in two aspects: first, the Court acknowledged that the Consular Relations Convention creates individual rights and the incumbent obligation to remedy a violation of these rights; and, second, it was clarified that Orders of the Court on provisional measures are legally binding. The clarification of the binding nature of the Orders of the Court on provisional measures creates the possibility to make better use of the powers of the Court where irreparable harm to one of the parties could occur, including as in this case, violations of fundamental human rights. Fears that the Court's powers may be misused seem to be exaggerated as the record shows that the Court has exercised a high degree of caution when indicating provisional measures. In several cases the Court has indicated provisional measures aimed at giving some relief to hundreds of thousands of persons caught in situations of armed conflict or other deplorable situations calling for immediate protective measures. This can hardly qualify as misusing the powers of the Court. Indeed, using the indication of protective provisional measures in cases when gross human rights violations are occurring, or are about to occur, is a practice which the Court should embrace.

### 3.11.3 *Avena and other Mexican Nationals* (Mexico *v.* United States, Order on Provisional Measures of 5 February 2003 and Judgment of 31 March 2004)

*A) Background*

This was the third case brought before the Court against the US on the basis of the Optional Protocol to the Consular Relations Convention Concerning the Compulsory Settlement of Disputes.[576] Following the example of Paraguay and Germany, Mexico used its right of diplomatic protection on behalf of 52 Mexican citizens on death row in the US.[577] It claimed that the US had committed breaches of the Consular Relations Convention in relation to the treatment of a number of Mexican nationals who had been tried, convicted and sentenced to death in criminal proceedings in different states of the US between 1979 and the time when the Application was filed.[578] Three of these Mexican nationals were at risk of being executed in a matter of months or even weeks

576 Article 1 of this Protocol reads: 'Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.'

577 For a more detailed account of the facts of this case see ICJ, *Avena and Other Mexican Nationals*, (Mexico *v.* United States of America), Judgment of 31 March 2004, ICJ Reports 2004, pp. 24-28, paras. 15-21 (*Avena* case).

578 *Ibid.*, p. 24, para. 15.

when Mexico decided to bring the case before the Court.[579] Although the Court again acknowledged, as it had done in the *LaGrand* case,[580] that the sound administration of justice required that a request for the indication of provisional measures founded on Article 73 of the Rules of Court be submitted in good time, this was not deemed to prohibit the Court from indicating provisional measures.[581] In its Order on provisional measures the Court indicated that the US should take all necessary measures to ensure that these three persons were not executed pending judgment on the merits.[582] This order was complied with by the US.

*B) Preliminary Objections*

The US raised a considerable number of preliminary objections regarding both the jurisdiction and the admissibility of the case by the Court. As its first preliminary objection the US suggested that Mexico's invitation to the Court to make what the US regarded as 'far-reaching and unsustainable findings concerning the US criminal justice systems' would be an abuse of the Court's jurisdiction.[583] The second preliminary objection stated that the 'detaining, trying, convicting and sentencing' of Mexican nationals could not constitute breaches of Article 36, which merely lays down obligations of notification.[584] The third objection referred to the first of the submissions in the Mexican Memorial concerning remedies, with the US contending that the Court had no jurisdiction to review the appropriateness of sentences in criminal cases, and even less to determine guilt or innocence, for these were matters which only a court of criminal appeal could go into.[585] Fourthly, the US contended that 'the Court lacks jurisdiction to determine whether or not consular notification is a 'human right' or to declare fundamental requirements of substantive or procedural due process'.[586] This contention illustrates the importance that States attach to not being tagged by the Court as human rights violators, for that, besides the negative impact on the image of a State, would also trigger the duty to make reparations. As objections on the grounds of admissibility the US argued that Mexico sought to have this Court function as a court of criminal appeal; *second*, that local remedies had to have been exhausted before resorting to the ICJ.[587] The US put forward four objections to the Court's jurisdiction

579 For a complete list of names of the persons concerned see p. 24-25, para. 16. For facts concerning the legal processes regarding these 52 persons see pp. 26-28, paras. 19-21.
580 See *supra* section 3.11.2 B), p. 149 and footnote 561.
581 *Avena* case, (*Provisional Measures*), Order of 5 February 2003, ICJ Reports 2003, pp. 90-91, para. 54.
582 *Ibid*., pp. 91-92, para. 59(I)*(a)*.
583 *Avena* case, Judgment of 31 March 2004, ICJ Reports 2004, p. 30, para. 27.
584 *Ibid*., pp. 30-31, para. 29.
585 *Ibid*., pp. 32-3, paras. 31-2.
586 *Ibid*., p. 33, para. 35.
587 *Ibid*., pp. 34-5, paras. 37-9.

and five objections to the admissibility of this case, all of which were finally dismissed by the Court.[588]

In clarifying how the right of diplomatic protection needs to work in practice the Court noted:

> The Court would first observe that the individual rights of Mexican nationals under subparagraph 1 *(b)* of Article 36 of the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.[589]

This finding of the ICJ re-emphasizes the well-established principle of the exhaustion of domestic remedies, which is a basic working principle in international law in relation to the admissibility of claims arising from diplomatic protection. Indeed, it is the domestic legal system that has the primary duty to protect and redress, where necessary, the human rights of individuals. The topic of domestic remedies was selected as a proper topic for codification and progressive development by the ILC in 1996 at its forty-eighth session. Part Three of the draft articles on Diplomatic Protection referred to the GA by the ILC in 2006 is devoted to domestic remedies.[590] It seems that in drafting Articles 14 and 15 of this document the ILC made ample use of the practice of the ICJ.[591]

*C) Remedies for Breaches of the Consular Relations Convention*

The individual right of the affected Mexican citizens to proper legal representation and the issue of remedies for them were addressed by the Court in clear and detailed terms. Thus, the Court found that in relation to 34 Mexican nationals, the US had deprived Mexico of the right to arrange for legal representation in a timely fashion, thereby breaching the obligations incumbent upon it under Article 36, paragraph 1 *(c)*, of the Convention.[592] Further, the ICJ held that by not permitting a review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences of Mr César Roberto Fierro Reyna, Mr Roberto Moreno Ramos and Mr Osvaldo Torres Aguilera, after the violations under Article 36(1) *(b)* had been established in respect of those individuals, the US had breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention.[593]

588 *Ibid*., p. 71, para. 153(2) and (3).

589 *Ibid*., p. 35, para. 40.

590 See A/CN.4/561, 27 January 2006, pp. 37-40 and 40-46, ILC's Fifty-eighth Session, (Diplomatic Protection: Comments and observations received from Governments), available at: *http://untreaty.un.org/ilc/sessions/58/58docs.htm* (last accessed on 1 November 2007).

591 ILC, Report of the Fifty-eighth Session, A/61/10, 2006, pp. 70-86.

592 *Avena* case, Judgment of 31 March 2004, ICJ Reports 2004, p. 72, para. 153(7).

593 *Ibid*., p. 72, para. 153(8).

In addressing the issue of appropriate reparation in this case the Court found that it consisted of the obligation of the US to provide, by means of its own choosing, a review and reconsideration of the convictions and sentences of the Mexican nationals referred to in subparagraphs (4), (5), (6) and (7) of the *dispositif*.[594] In the Court's view the commitment of the US to ensure the implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 *(b)*, of the Convention met the Mexican request for guarantees and assurances of non-repetition.[595] However, the Court noted that if Mexican nationals would nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1 *(b)*, of the Convention having been respected, the US was to provide, by means of its own choosing, a review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention.[596] This last finding seems to be redundant in the face of the acknowledgement by the Court of the assurances given by the US as meeting Mexico's request for non-repetition. However, probably out of caution, the Court adopted the same language as it had employed in the *LaGrand* case.

It is noteworthy that in contrast to the *LaGrand* case, discussed above, the Court's findings in this case are not termed as breaches of obligations against the individuals concerned. Rather, they are worded simply in terms of breaches of Article 36 of the Convention. In this light it might be said that the Court took a step back from the standpoint it had adopted in the *LaGrand* case, where it had stated that the US had breached its obligations towards Germany and towards the LaGrand brothers. However, the Court's application of Article 36 of the Convention to the facts of the case appears to implicitly acknowledge that it creates individual rights for the persons involved, as a logical corollary of the right of diplomatic protection. Indeed, in subparagraphs 9 and 11 of the *dispositif* the Court addresses the obligations of the US towards the concerned Mexican nationals on death row. There the Court held that proper reparation for the breaches of the Consular Relations Convention would be the review and reconsideration of the convictions and sentences of the Mexican nationals concerned. It is rather interesting that the Court gave a general application to its findings on the application of the Consular Relations Convention. As the Court stated, 'the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States'.[597] In a monist legal system where such international judgments would

594 *Ibid*., p. 72, para. 153(9).
595 *Ibid*., p. 73, para. 153(10).
596 *Ibid*., p. 73, para. 153(11).
597 *Ibid*., p. 70, para. 151.

have direct effect this finding could have had an impact for other individuals finding themselves in the same position; but that is not the case for the US legal system.[598]

*D) Post-Judgment Phase: The Response of the US Authorities to the ICJ's Judgment*

The Court's judgment was met by a mixed response from the US authorities. On 28 February 2005 the US President issued an Executive Order determining that US state courts were to give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in the ICJ's decision.[599] On 7 March 2005 the US Secretary of State sent a letter to the SG informing him of the US's decision to withdraw from the Protocol to the Consular Relations Convention giving the ICJ jurisdiction to hear disputes over this Convention.[600] At the time of issuing the presidential memorandum the US Supreme Court was seized of the *Medellín* case. Two questions needing the Court's consideration were: first, whether a federal court was bound by the ICJ's ruling that US courts had to reconsider petitioner José Medellín's claim for relief under the Consular Relations Convention, without regard to procedural default doctrines; and second, whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment. The US Supreme Court decided to dismiss its writ of certiorari as improvidently granted on the ground that several threshold issues could independently preclude federal habeas relief and render advisory or academic the Court's consideration of the above-mentioned questions.[601] Although the Supreme Court decided to shy away from clarifying these two very interesting questions, the effect of the ICJ's decision was that relief was indeed granted to the Mexican nationals addressed in the ICJ's judgment. That relief, however, was based on an action coming from the executive branch of US authorities, as the US Supreme Court usually gives considerable weight to the understanding of treaty obligations of the executive branch.

*E) Concluding Remarks*

In the *Breard*, the *LaGrand*, and the *Avena* case the Court dealt with human rights which fall under civil and political rights, namely that of being informed, without

598 For the sake of clarity it should be noted that self-executing treaties are considered as domestic law in the US. Justice O'Connor's dissenting opinion in Medellín *v.* Dretke, *infra* footnote 601, sheds some interesting light on this issue. According to her, citing *Head Money* Cases, 112 U. S., at 598–599 'A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute'.

599 For more details see F.L. Kirgis, *President Bush's Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL Insights, March 2005 (Addendum).

600 Transnational Law Associates, *U.S. withdraws from Optional Protocol to Vienna Convention* International Law Update, March 2005, Vol. 11, pp. 47-48.

601 US Supreme Court, Medellín *v.* Dretke, 544 U.S., 2005.

delay, of one's rights upon detention; an important right which has a bearing on criminal legal proceedings and the good administration of justice. Through the cases discussed above the Court made a tangible contribution to interpreting and developing the institution of diplomatic protection and one of its corollaries, the individual right to consular assistance. The cumulative effect of *Breard*, *LaGrand*, and *Avena* induced the US to take the necessary measures for ensuring compliance with the Consular Relations Convention. However, as mentioned above, it also drove the US into withdrawing its recognition of the compulsory jurisdiction of the ICJ under the Optional Protocol to the Consular Relations Convention. As the Court observed, the individual rights of Mexican nationals under subparagraph 1*(b)* of Article 36 of the Consular Relations Convention should be asserted, at any rate in the first place, within the domestic legal system of the US. Only after local remedies had been exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection. The application of this procedure by States is in itself not a novelty.[602] However, using this procedure as a basis to claim respect for the right of an individual to be notified expediently about a right arising out of an international treaty, such as that of consular assistance, was to say the least not a matter of common practice.

Looking at the legal proceedings in these three cases one can easily notice a shift in the litigation strategy used by the parties to the proceedings, despite the similarity of the cases themselves. One can also discern a willingness on the part of the majority of the Judges of the Court to dispense with these cases as expediently as possible. At the same time, the human rights element which connects all these cases gave rise to some concern within the Court itself. In voicing his concern about this development a judge of the Court stated: 'I reiterate: it is extraordinary that the Court, in its Order of 3 March 1999, determined not the rights and duties of a State but the rights of an individual.'[603] For a Court instituted primarily to settle inter-State disputes it is not usual to address or to make direct reference to the rights of an individual, although accruing from an international treaty. However, the *Diplomatic Protection* cases show that the Court is human rights sensitive. This noticeable change in the position of what is perceived to be a generally conservative Court can be explained by the achieved prominence of human rights in international law, the public pressure on governments to bring such cases before an international forum, and the increased presence in the panel of Judges with a human rights background.

602 See *inter alia Ambatielos* (Greece *v*. United Kingdom) (1951-1953), *Nottebohm* (Liechtenstein *v*. Guatemala) (1951-1955), *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belgium *v*. Spain) (1962-1970) (Judgment of 5 February 1970), *Trial of Pakistani Prisoners of War* (Pakistan *v*. India) (1973) (removed from the list by an Order of 15 December 1973), *United States Diplomatic and Consular Staff in Tehran* (United States *v.* Iran) (Order of 15 December 1979), *Certain Property* (Liechtenstein *v*. Germany) (2001-2005), (Judgment of 10 February 2005).

603 ICJ, *LaGrand* (Germany *v*. United States of America), Dissenting Opinion of Judge Oda, ICJ Reports 2001, p. 540, para. 35.

## 3.12 Status and Treatment of Human Rights Rapporteurs

Several questions relating to the status and the protection of UN human rights rapporteurs were submitted to the Court for an advisory opinion.[604] Human rights rapporteurs fall under the broader concept of Experts on Missions for the UN and enjoy the immunities provided for under sections 22-23 of the Convention on the Privileges and Immunities of the UN of 1946 (the General Convention).[605] These cases arose out of the understandable concern of the UN for the fate of its own experts. Considering that maintaining international peace and security, promoting respect for human rights and fundamental freedoms, and acting as a centre for harmonizing the actions of nations in achieving these ends are among the main purposes of the UN, it is important to create the necessary preconditions for all UN agents working to achieve those ends, and for human rights rapporteurs in particular.[606] Without proper protection for the human rights rapporteurs, their lives, work, and mission, would at least be affected if not seriously jeopardized.

Through clarifying their status *vis-à-vis* the State where they are deployed on mission the Court rendered an important service to the protection of this category of persons, and by virtue of this, to a better functioning of the UN human rights protection system, and ultimately to a better protection of individuals under the framework of international human rights law. Two advisory opinions delivered by the ICJ concern specifically the treatment of UN rapporteurs and both of them were requested by the ECOSOC.[607] Another advisory opinion related to the ones above is the one on reparation for injuries suffered when in the service of the UN.[608] The two advisory opinions

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604 Human rights rapporteurs fall under the category of Experts on Missions for the UN and are divided into two main categories: country rapporteurs and thematic rapporteurs. For more information see *inter alia*: *http://www.unhchr.ch/html/menu2/xtraconv.htm* (last accessed on 1 November 2007).

605 See Article VI, Sections 22 and 23 of the Convention on the Privileges and Immunities of the UN of 1946.

606 Some of the thematic rapporteurs' mandates established under the special procedures of the Commission on Human Rights are: enforced disappearances (1980), extrajudicial, summary or arbitrary executions (1982), torture (1985), religious intolerance (1986), mercenaries (1987), sale of children, child prostitution and pornography (1990), arbitrary detention (1991), internally-displaced persons (1992), contemporary forms of racism and xenophobia (1993), freedom of opinion and expression (1993), children in armed conflict (1993), the independence of judges and lawyers (1994), violence against women (1994), toxic waste (1995), extreme poverty (1998), the right to development (1998), the right to education (1998), the rights of migrants (1999), the right to adequate housing (2000), the right to food (2000), human rights defenders (2000), structural adjustment policies and foreign debt (merged in 2000) and so on. For an update on their status see: *http://www.unhchr.ch/html/menu2/7/b/tm.htm* (last accessed on 1 November 2007).

607 These advisory opinions are: *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (*Mazilu* case) of 15 December 1989 and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (*Cumaraswamy* case) of 29 April 1999.

608 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports 1949, p. 174 (*Reparation for Injuries* case).

which are concerned with the protection to be afforded to persons falling under the category of human rights rapporteurs are discussed separately below. The advisory opinion on *Reparation for Injuries* is discussed only to the extent which is relevant to the discussion of the protection of human rights rapporteurs.

*A) Protection of UN Agents, Including Human Rights Rapporteurs*

The issue of the protection of UN agents, which is in fact a broader concept, was referred to the Court by the GA in 1948 and concerned reparations for injuries suffered in the service of the UN.[609] This advisory opinion is relevant with regard to the protection to be afforded to UN agents in general, which can be extended by analogy to human rights rapporteurs, albeit recourse to analogy in international law should only be had with reserve and circumspection. The Court acknowledged that the UN was endowed with the means of acting on behalf of its agents by, if necessary, bringing a claim against a State in case its agents would suffer injury on a UN mission. In itself this is largely comparable with the diplomatic protection that a State can exert on behalf of its citizens. In a preliminary observation the Court clarified that in its understanding an agent of UN was:

> '[A]ny person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping carry out, one of its functions – in short, any person through whom it acts'.[610]

The Court was asked to indicate whether the UN, as an Organization, had the capacity to bring an international claim with a view to obtaining the reparation due in respect of the damage caused, not to the Organization itself, but to the victim or to persons entitled through him. The question was whether the provisions of the Charter relating to the functions of the Organization implied that the latter was empowered to assure its agents of limited protection. In the Court's opinion, although not expressly provided for in the Charter, these powers – essential to the performance of the functions of the Organization – were conferred upon it by necessary implication as being essential to the performance of its duties.[611] The Court noted that, having regard to its purposes and functions, the Organization might need to entrust its agents with important missions to be performed in disturbed parts of the world, therefore in order both to ensure the efficient and independent performance of these missions and to afford effective support to its agents the Organization must provide them with adequate protection.[612] Indeed, only in this way would the agent be able to carry out his/her duties satisfactorily. The Court concluded that the capacity of the Organization to

609 *Ibidem*.
610 *Ibid*., p. 177.
611 *Ibid*., p. 182.
612 *Ibid*., p. 183.

exercise a measure of functional protection in respect of its agents arose by necessary intendment out of the Charter.[613] These clarifications are rather important in view of the fact that at that time the UN was at the beginning of its activities and the scope of protection it could afford and actions it could take on behalf of its agents were far from clear.

*B) Protection by the National State and by the UN*

Part of the questions referred to the Court was also the issue of reconciling action by the UN with such rights as may be possessed by the State of which the victim is a national. So, what would happen if a situation of possible competition between the rights of diplomatic protection, on the one hand, and functional protection, on the other, would occur? The Court declined to state which of these two categories of protection would have priority, but went on to emphasize the duty of Member States to render 'every assistance' to the UN, as foreseen under Article 2 of the UN Charter.[614] It added that the risk of competition between the Organization and the national State could be reduced or eliminated either by a general convention or by agreements entered into in each particular case, and it referred further to cases that had already arisen in which a practical solution had already been found.[615] Since the claim brought by the Organization was not based upon the nationality of the victim but rather upon his status as an agent of the Organization, it did not matter whether or not the State to which the claim was addressed regarded him as its own national.[616] In the view of the Court the legal situation was not modified by this fact.

*C) Concluding Remarks*

As the Court noted, an agent should know that *in the performance of his duties* (emphasis added) he is under the protection of the Organization, which is even more necessary when that agent is stateless.[617] The relevance of these findings of the Court would further uncover in the two advisory opinions asked later by ECOSOC. The first one concerned the applicability of Article VI, Section 22, of the General Convention and was brought before the Court in May 1989. A Romanian citizen, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, had been prevented by his own government from fulfilling his duties as Special Rapporteur. The other case was brought before the Court by ECOSOC in August 1998 and requested a clarification of the meaning of Section 30 of the General Convention, with respect to the immunity from legal process of Dato' Param Cumaras-

613 *Ibid*., p. 184.
614 *Ibid*., p. 185-6.
615 *Ibid*., p. 186.
616 *Ibidem*.
617 *Ibid*., p. 184.

wamy, a Malaysian citizen who was the Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers. A detailed examination of these two important advisory opinions is given below.

### 3.12.1 *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion of 15 December 1989)

*A) Background*

The resolution of ECOSOC submitting the case to the ICJ for an advisory opinion was entitled 'Status of Special Rapporteurs' and reads:

> The Economic and Social Council,
>
> *Having considered* resolution 1988/37 of 1 September 1988 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Commission on Human Rights resolution 1989/37 of 6 March 1989,
>
> 1. *Concludes* that a difference has arisen between the United Nations and the Government of Romania as to the applicability of the Convention on the Privileges and Immunities of the United Nations [General Assembly resolution 22 A (I)] to Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities;
>
> 2. *Requests,* on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I) of 11 December 1946, an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Mr. Dumitru Mazilu as Special Rapporteur of the Sub-Commission.[618]

The case arose out of difficulties encountered by Mr Dumitru Mazilu, a Romanian national, in carrying out his duties as a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare a report on the role of youth in the field of human rights.[619] The Commission on Human Rights had called upon the Sub-Commission on Prevention of Discrimination and Protection of Minorities to pay due attention to the role of youth in the field of human rights. For its part, in August 1985 the Sub-Commission had adopted a resolution requesting Mr

618 ECOSOC Res. 1989/75 of 24 May 1989.

619 See ICJ, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (*Mazilu* case), Advisory Opinion of 15 December 1989, ICJ Reports 1989, pp. 179-186, paras. 9-26.

Mazilu to 'prepare a report on human rights and youth analyzing the efforts and measures for securing the implementation and enjoyment by youth of human rights, particularly, the right to life, education and work' and requested the Secretary-General to provide him with all necessary assistance for the completion of his task.

The report on human rights and youth that had to be presented by Mr Mazilu in August 1987 (after having been postponed for a year) was not received and circulated until 10 July 1989. On 1 September 1989 the Sub-Commission adopted resolution 1989/45 entitled 'The report on human rights and youth prepared by Mr. Dumitru Mazilu' by which, noting that Mr Mazilu's report had been prepared in difficult circumstances and that the relevant information collected by the Secretary-General appeared not to have been delivered to him, it invited him to present the report in person to the Sub-Commission at its next session, and also requested the Secretary-General to continue to provide Mr Mazilu with all the assistance he might need in updating his report, including consultations with the then United Nations Centre for Human Rights.[620]

*B) Romania's Objections to the Delivery of an Advisory Opinion by the Court*

Having found that the request to the Court fulfilled the conditions of Article 96, paragraph 2 of the UN Charter,[621] the Court had to consider the contention of Romania concerning Section 30 of the General Convention.[622] This section of the Convention reads:

> All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Romania contended that because of its reservation the UN could not, without Romania's consent, submit a request for an advisory opinion in respect of its difference with

620 *Mazilu* case, p. 186, para. 26.

621 *Ibid*., p. 187, para. 28.

622 The reservation entered to Section 30 of the General Convention by Romania on 6 September 1956 reads: 'The Romanian People's Republic does not consider itself bound by the terms of section 30 of the Convention which provide for the compulsory jurisdiction of the International Court in differences arising out of the interpretation or application of the Convention; with respect to the competence of the International Court in such differences, the Romanian People's Republic takes the view that, for the purpose of the submission of any dispute whatsoever to the Court for a ruling, the consent of all the parties to the dispute is required in every individual case. This reservation is equally applicable to the provisions contained in the said section which stipulate that the advisory opinion of the International Court is to be accepted as decisive.' *Mazilu* case, p. 188, para. 29.

Romania.[623] Referring to its earlier jurisprudence, the Court recalled that the consent of States is not a condition precedent to its competence under Article 96 of the Charter to give an advisory opinion.[624] For the Court this reasoning was equally valid where it was suggested that a legal question was pending, not between two States, but between the UN and a Member State.[625] In the Court's view, Section 30 of the General Convention operated on a different plane and in a different context from that of Article 96 of the Charter as a reading of the provisions of that Section in their totality made it clear that their object was to provide a dispute settlement mechanism.[626] If the Court had been seized with a request for an advisory opinion made under Section 30, it would of course have had to consider any reservation, which a party to the dispute had made to that Section. The Court found that ECOSOC's request had not been made under Section 30 and accordingly it did not need to determine the effect of the Romanian reservation to that provision.[627]

### *C) Applicability of Article VI, Section 22, of the General Convention to Special Rapporteurs*

In order to determine the applicability of Article VI, Section 22, of the General Convention the Court had to clarify, first, the meaning of that text.[628] That article is entitled 'Experts on Missions for the United Nations' and is divided into two sections. Section 22 provides as follows:

> Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded:
>
> (a) immunity from personal arrest or detention and from seizure of their personal baggage;
>
> (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;
>
> (c) inviolability for all papers and documents;

623 *Ibid*., p. 188, para. 30.
624 *Ibid*., p.188-9, para. 31.
625 *Ibidem*, p. 189.
626 *Ibid*., p. 189, para. 32.
627 *Ibid*., p. 190, para. 34.
628 *Ibid*., p. 192, para. 40.

(d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23 adds:

Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

In view of the question put before it by ECOSOC the Court decided to examine the applicability of Section 22 *ratione* personae, *ratione* temporis, and *ratione loci*. That is, it would consider, first, what was meant by 'expert on missions' for the purposes of Section 22, and then the meaning to be attached to the expression 'experts on missions', and thereafter the meaning of the expression 'period of [the] missions', before considering the position of experts in their relations with the States of which they are nationals or on the territory of which they reside.[629]

The Court noted that the General Convention gave no definition of 'experts on missions'.[630] Through interpreting Section 22 the Court concluded that, firstly, officials of the Organization, even if chosen in consideration of their technical expertise in a particular field, were not included in the category of experts within the meaning of that provision; and, secondly, that only experts performing missions for the Organization were covered by this Section.[631] However, neither the Section itself, nor the *travaux préparatoires* provided any indication of the nature, duration or place of these missions.[632] For the Court the purpose of Section 22 was nevertheless evident, namely, to enable the United Nations to entrust missions to persons who do not have the status of an official of the Organization and to guarantee them 'such privileges and immunities as are necessary for the independent exercise of their functions'.[633] The Court noted that in practice, according to the information supplied by the Secretary-General, the UN had had occasion to entrust missions – increasingly varied in nature – to persons not having the status of UN officials.[634] Such persons were entrusted with

629 *Ibid*., p. 193, para. 44.
630 *Ibid*., p. 193, para. 45.
631 *Ibidem*.
632 *Ibid*., p. 193, paras. 45-6.
633 *Ibid*., p. 194, para. 47.
634 *Ibid*., p. 194, para. 48.

mediation, with preparing reports, preparing studies, conducting investigations or finding and establishing facts.[635]

*D) Immunities Extending to Persons Acting in a Personal Capacity on Behalf of the UN*

The Court noted that many committees, commissions or similar bodies whose members served, not as representatives of States, but in a personal capacity, had been set up within the Organization.[636] In all these cases, the practice of the UN showed that the persons so appointed, and in particular the members of these committees and commissions, had been regarded as experts on missions within the meaning of Section 22.[637] In summing up the Court took the view that Section 22 of the General Convention was applicable to persons (other than UN officials) to whom a mission had been entrusted by the Organization and who were therefore entitled to enjoy the privileges and immunities provided for in this Section with a view to the independent exercise of their functions; that during the whole period of such missions, experts enjoyed these functional privileges and immunities whether or not they travel; and that those privileges and immunities could be invoked as against the State of nationality or of residence, unless a reservation to Section 22 of the General Convention had been validly made by that State.[638]

Turning to the situation of the rapporteurs of the Sub-Commission the Court noted that this was a question which touched on the legal position of rapporteurs in general, a category of persons whom the UN and the specialized agencies found necessary to engage for the implementation of increasingly varied functions and thus one of importance for the whole UN system.[639] ECOSOC in resolution 1983/32 of 27 May 1983 had expressly 'recall[ed]... that members of the Sub-Commission are elected by the Commission... as experts in their individual capacity', and concluded that their alternates should therefore be elected and should serve on the same basis.[640] In the Court's opinion since their status was neither that of a representative of a Member State nor that of a UN official, and since they performed independently for the Sub-Commission functions contemplated in its remit, the members of the Sub-Commission were to be regarded as experts on missions within the meaning of Section 22.[641]

635 *Ibidem*.
636 *Ibidem*.
637 *Ibidem*.
638 *Ibid*., p. 195-6, para. 52.
639 *Ibid*., p. 196, para. 53.
640 *Ibid*., p. 196, para. 54.
641 *Ibidem*.

*E) Practice of the Sub-Commission of Human Rights*

Further, the Court noted that in accordance with the practice followed by many UN bodies, the Sub-Commission had from time to time appointed rapporteurs or special rapporteurs with the task of studying specific subjects; it also noted that, while these rapporteurs or special rapporteurs were normally selected from among members of the Sub-Commission, there had been cases in which special rapporteurs had been appointed from outside the Sub-Commission or had completed their report only after their membership of the Sub-Commission had expired.[642] In describing their work the Court said that the Sub-Commission entrusted rapporteurs or special rapporteurs with a research mission; their functions being diverse, they had to compile, analyse and check the existing documentation on the problem to be studied, prepare a report making appropriate recommendations, and finally present that report to the Sub-Commission.[643] Since their status was neither that of a representative of a Member State nor that of a UN official, and since they carried out such research independently on behalf of the UN, the Court concluded that they should be regarded as experts on missions within the meaning of Section 22, even in the event that they are not, or are no longer, members of the Sub-Commission.[644] Accordingly, they enjoyed in accordance with that Section the privileges and immunities necessary for the exercise of their functions, and in particular for the establishment of any contacts which could be useful for the preparation, the drafting and the presentation of their reports to the Sub-Commission.[645]

*F) Protection Accruing to Mr Mazilu on the Basis of the General Convention*

On the question of the applicability of Section 22 to Mr Mazilu the Court observed that Mr Mazilu had the status of a member of the Sub-Commission from 13 March 1984 to 29 August 1985; that from 29 August 1985 to 31 December 1987 he was both a member and a rapporteur of the Sub-Commission; and finally that, although since the last-mentioned date he had no longer been a member of the Sub-Commission, he had remained a special rapporteur.[646] The Court found that at no time during this period did he cease to have the status of an expert on mission within the meaning of Section 22, or to be entitled to enjoy for the exercise of his functions the privileges and immunities provided for therein.[647] Romania had expressed its doubts as to whether Mr Mazilu was capable of performing his task as a special rapporteur after becoming seriously ill in May 1987 and being subsequently placed on the retired list pursuant to decisions taken by competent medical practitioners, in accordance with the applicable Romanian

642 *Ibid*., p. 196-7, para. 55.
643 *Ibidem*, p. 197.
644 *Ibidem*.
645 *Ibidem*.
646 *Ibid*., p. 197, para. 57.
647 *Ibidem*.

legislation.[648] When a report by Mr Mazilu was circulated as a document of the Sub-Commission, Romania had called into question his 'intellectual capacity' to draft 'a report consistent with the requirements of the UN'.[649] However, Mr Mazilu himself had informed the UN that the state of his health did not prevent him from preparing his report or from going to Geneva.[650] The Court held that it was not for it to pronounce on the state of Mr Mazilu's health or on its consequences for the work he had done or was to do for the Sub-Commission, as first it was for the UN to decide whether in the circumstances it wished to retain Mr Mazilu as a special rapporteur and second to take note that decisions to that effect had been taken by the Sub-Commission.[651] The Court concluded that under these circumstances Mr Mazilu continued to have the status of special rapporteur and that as a consequence he was to be regarded as an expert on mission within the meaning of Section 22 of the General Convention and that that Section was accordingly applicable in the case of Mr Mazilu.[652] It is interesting to note that the Court reached this conclusion unanimously.[653]

Judge Oda stated that the final paragraph of the Court's Opinion could have been slightly expanded.[654] In his view instead of a simple affirmative answer the Court should have stated more explicitly: firstly, that a Special Rapporteur of the Sub-Commission falls within the category of 'Experts on Mission for the United Nations'; secondly, that Mr Mazilu was, at the time of the request for the opinion by the ECOSOC a Special Rapporteur of the Sub-Commission and that he still exercised that function; and, finally, that Mr Mazilu was, in the interest of the UN, entitled to receive from all parties to the General Convention, including his national State, all facilities within their power for the fulfilment of his mission.[655] For Judge Oda, in this way the Court would usefully have drawn attention to the necessity of allowing Mr Mazilu unimpeded communication with and access to the UN Centre for Human Rights.[656]

Judge Evensen recalled that the sole question put to the Court in the request by ECOSOC was 'the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities'.[657] However, in his opinion it seemed evident that the pressures complained of had caused concern and hardship not only to Mr Mazilu but also to his family.[658] Thus, the protection provided for in Article VI, Section 22, of the 1946 Convention could not only be confined to the 'expert Mazilu'

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648 *Ibid*., p. 198, para. 58.
649 *Ibidem*.
650 *Ibidem*.
651 *Ibid*., p. 198, para. 59.
652 *Ibid*., p. 198, para. 60.
653 It should be emphasized here that the Court reached this decision unanimously, p. 198, para. 61.
654 *Mazilu* case, Separate Opinion of Judge Oda, ICJ Reports 1989, p. 208-9, para. 24.
655 *Ibidem*.
656 *Ibidem*.
657 *Mazilu* case, Separate Opinion of Judge Evensen, ICJ Reports 1989, p. 210.
658 *Ibidem*.

but to a reasonable extent it could be applied to his family as well.[659] Judge Evensen held that the integrity of a person's family and family life is a basic human right protected by prevailing principles of international law that derived not only from conventional international law or customary international law but also from 'general principles of law recognized by civilized nations'.[660] In substantiating his finding he made reference to Article 16, paragraph 3 of the UDHR of 1948 where the integrity of family and family life was laid down as a basic human right and to Article 8, paragraph 1 of the ECHR of 1950 which provides for respect for private and family life, home and correspondence.[661] In Judge Evensen's opinion, respect for a person's family and family life should be considered as integral parts of the 'privileges and immunities' that are necessary for the independent exercise of the functions of United Nations experts under Article VI, Section 22, of the 1946 General Convention.[662]

Judge Shahabuddeen made an important finding regarding the issue of the state of health of Mr Mazilu which was also in dispute. In his opinion the decision as to whether a special rapporteur is in such a state of health so as to be incapable of functioning is one to be made by the Sub-Commission as the employer.[663] Judge Shahabuddeen held that the settled jurisprudence of the Court made it clear that a matter which would normally be within a State's domestic jurisdiction ceased to be exclusively so to the extent to which it had come to be also governed by any international obligations undertaken by the State.[664] By reason of their being parties to the Charter and committed to promoting its objectives, Member States by necessary implication conceded to the UN a right in good faith (not questioned in this case) to determine the capacity of such nationals, on grounds of ill-health or otherwise, to continue to carry out their functions.[665] The importance of this finding lies in that it provides the UN organ and the person concerned with the necessary protection against undesirable interferences.

*G) Concluding Remarks*

This advisory opinion is important in that it interpreted and developed the law on the privileges and immunities of special rapporteurs of the Sub-Commission as experts on missions. The Court's finding that the situation of special rapporteurs of the Sub-Commission touched upon the legal position of UN rapporteurs in general seems to

659 *Ibidem*. Judge Evensen referred to Article V, Section 18 (d) of the Convention which states that officials of the UN shall be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration.

660 *Ibid*., p. 210-1.

661 Article 16 (3) of the UDHR reads: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Article 8 (1) of the ECHR reads: 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

662 *Ibid*., p. 211.

663 *Mazilu* case, Separate Opinion of Judge Shahabuddeen, ICJ Reports 1989, p. 216.

664 *Ibidem*.

665 *Ibidem*.

suggest that privileges and immunities which the former would enjoy when on duty would extend by analogy to the latter as well. Furthermore, the Court acknowledged the status of experts on missions to members of committees, commissions or similar bodies which had been set up within the Organization, who are entrusted with mediation, preparing reports, preparing studies, conducting investigations or finding and establishing facts. As an illustration the Court noted *inter alia* the members of the HRCm, of the CmERD, of CmEDAW and so on. In the Court's opinion these experts would enjoy the privileges and immunities provided under Section 22 'during the period of their missions, including the time spent on journeys'. Indeed, creating the necessary conditions for these experts, special rapporteurs included, to carry on their duty unhindered is a requirement *sine qua non* for a proper functioning of the supervisory procedures under the relevant international human rights instruments. In concluding, this author notes his concurrence with the opinion of Judge Evensen, extending the protection accruing to the special rapporteurs under Article VI, Section 22 of the General Convention also to their family members.

### 3.12.2 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion of 29 April 1999)

*A) Background*

Mr Cumaraswamy's confrontation with Malaysian justice sprung from him being cited in the article 'Malaysian Justice on Trial' in the journal *International Commercial Litigation* following an interview he gave in November 1995 in his capacity as UN Special Rapporteur on the Independence of Judges and Lawyers.[666] Two commercial companies in Malaysia asserted that the said article contained defamatory words that had 'brought them into public scandal, odium and contempt' and each filed a suit against him for damages amounting to M$30 million (approximately US$12 million each), 'including exemplary damages for slander'.[667] On 15 January 1997 the Legal Counsel of the UN, in a *note verbale* addressed to the Permanent Representative of Malaysia to the UN, 'requested the competent Malaysian authorities to promptly advise the Malaysian courts of the Special Rapporteur's immunity from legal process' with respect to that particular complaint.[668] Cumaraswamy's application to the High Court of Kuala Lumpur to strike out the complaints on the ground that the words that were the subject of the suits had been spoken by him in the course of performing his mission for the UN as Special Rapporteur on the Independence of Judges and Lawyers,

666 D. Samuels, *Malaysian Justice on Trial*, International Commercial Litigation, Nov. 1995, at 10-13. The Special Rapporteur had commented that 'Complaints are rife that certain highly placed personalities in the business and corporate sectors are able to manipulate the Malaysian system of justice.' See also para. 13 of the advisory opinion, ICJ Reports 1999, p. 71.

667 ICJ, Advisory Opinion, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (*Cumaraswamy* case), ICJ Reports 1999, pp. 66-71, para. 10.

668 E/1998/94, Secretary-General's note, para. 6.

supported by a note from the Secretary-General of 7 March 1997, and to a certain extent by a certificate of the Foreign Affairs Minister of Malaysia filed on 12 March 1997,[669] was dismissed by the competent judge finding herself 'unable to hold that the Defendant is absolutely protected by the immunity he claims'.[670] Three other lawsuits were filed against the Special Rapporteur in the course of 1997 and failing an agreement on an out-of-court settlement between the Organization and the Government of Malaysia ECOSOC decided to ask the ICJ for an advisory opinion on this issue.[671]

*B) ECOSOC's Request for an Advisory Opinion*

The aforementioned request by ECOSOC on 5 August 1998 reads:

> The Economic and Social Council,
> …
> 1. Requests on a priority basis, pursuant to Article 96, paragraph 2, of the Charter of the United Nations and in accordance with General Assembly resolution 89 (I), an advisory opinion from the International Court of Justice on the legal question of the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, taking into account the circumstances set out in paragraphs 1 to 15 of the note by the Secretary-General, and on the legal obligations of Malaysia in this case;
>
> 2. Calls upon the Government of Malaysia to ensure that all judgements and proceedings in this matter in the Malaysian courts are stayed pending receipt of the advisory opinion of the International Court of Justice, which shall be accepted as decisive by the parties.[672]

The Court decided that the question it had to answer included not only the applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations in the case of Dato' Param Cumaraswamy as Special Rapporteur of the Commission on Human Rights on the independence of judges and lawyers, but, in the event of an affirmative answer to this question, it had to indicate the consequences of that finding in the circumstances of the case.[673] Recalling the *Mazilu* case the Court held that Special Rapporteurs appointed by the CHR, of which the Sub-Commission was a subsidiary organ, were entrusted with a mission by the UN and were therefore entitled to the privileges and immunities provided for in Article VI, Section 22 that

669 That certificate did not take into account the note of the Secretary-General of a few days earlier and did not indicate that in deciding whether particular words or acts of an expert fell within the scope of his mission, the determination could exclusively be made by the Secretary-General, and that such determination had conclusive effect and therefore had to be accepted as such by the court.

670 Secretary-General's note, para. 8.

671 For a detailed account of the facts of the case see paras. 1-21 of this advisory opinion.

672 *Cumaraswamy* case, p. 63-4, para. 1.

673 *Ibid*., p. 81, para. 39.

safeguarded the independent exercise of their functions.[674] As the Court observed Special Rapporteurs of the Commission are usually entrusted not only with a research mission but also with the task of monitoring human rights violations and reporting thereon.[675] According to CHR resolution 1994/41 the mandate of the Special Rapporteur consisted of the following tasks:

> *(a)* to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon;
>
> *(b)* to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations, including accommodations for the provision of advisory services or technical assistance when they are requested by the State concerned;
>
> *(c)* to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers.

Given that Mr Cumaraswamy's appointment as Special Rapporteur was confirmed by a letter of 21 April 1994 by the chairman of the CHR to the Assistant Secretary-General for Human Rights and extended for another period of three years by CHR resolution 1997/23 of 11 April 1997 the Court found that he should be regarded as an expert on mission within the meaning of Article VI, Section 22 of the General Convention.[676] This finding set the tone for the other findings of the Court.

*C) Immunity of Mr Cumaraswamy from Legal Proceedings in Malaysia*

The Court then turned to considering whether the immunity provided for in Section 22 *(b)* applied to Mr Cumaraswamy in the specific circumstances of the case; namely, whether the words used by him in an interview, as published in the article in *International Commercial Litigation* (November issue 1995), were spoken in the course of the performance of his mission, and whether he was therefore immune from legal process with respect to these words.[677] According to the Court the Secretary-General of the UN had a pivotal role to play in the process of determining whether a particular expert on mission is entitled, in the prevailing circumstances, to the immunity provided for in Section 22 *(b)*.[678] The Court went on to observe that the Secretary-General, as the chief administrative officer of the Organization, has the authority and the responsibility to exercise the necessary protection where required.[679] This authority had been recog-

674 *Ibid*., p. 83, para. 43.
675 *Ibidem*.
676 *Ibid*., pp. 83-84, paras. 44-5.
677 *Ibid*., p. 84, para. 47.
678 *Ibid.*, pp. 84-5, para. 50.
679 *Ibidem*.

nized by the Court as early as 1949 in the advisory opinion on *Reparation for Injuries*.[680] This implied that the note of the Secretary-General submitted to the High Court of Kuala Lumpur in March 1997 had conclusive effect and was to be regarded as such by that court.

Article VI, Section 23, of the General Convention provides that '[P]rivileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves.' In exercising protection for UN experts, the Secretary-General would not be doing more than protecting the very mission with which the expert was entrusted. According to the Court the Secretary-General had the *primary responsibility and authority* (emphasis added) to protect the interests of the Organization and its agents**,** including experts on mission.[681] Recalling its finding in *Reparation for Injuries* the Court stated: 'In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization…'[682] According to the Court, the determination whether an agent of the Organization has acted in the course of the performance of his mission depends upon the facts of a particular case.[683] The Court observed that in the present case the Secretary-General, or the Legal Counsel of the UN on his behalf, had on numerous occasions informed the Government of Malaysia that Mr Cumaraswamy had spoken the words quoted in the article in *International Commercial Litigation* in his capacity as Special Rapporteur of the Commission and that consequently he was entitled to immunity from 'every kind' of legal process.[684]

*D) Contact with the Media by UN Special Rapporteurs*

The written and oral pleadings on behalf of the UN reinforced the view of the Secretary-General that nowadays it has become standard practice of Special Rapporteurs of the Commission to have contact with the media.[685] The Court mentioned a letter by the High Commissioner for Human Rights dated 2 October 1998 where he stated that 'It is more common than not for Special Rapporteurs to speak to the press about matters pertaining to their investigations, thereby keeping the general public

680 That finding reads: 'Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.' *Reparation for Injuries,* Advisory Opinion*,* ICJ Reports 1949, p. 184.

681 *Cumaraswamy* case, p. 85, para. 51.

682 *Ibidem*, footnote omitted.

683 *Ibid*., p. 85, para. 52.

684 *Ibidem*.

685 *Ibid*., p. 85, para. 53.

informed of their work'.[686] After stating that it was not called upon in the present case to determine the aptness of the terms used by the Special Rapporteur or his assessment of the situation, the Court found that the Secretary-General correctly found that Mr Cumaraswamy, in speaking the words quoted in an article in the *International Commercial Litigation* journal, was acting in the course of the performance of his mission as Special Rapporteur of the Commission.[687] In concluding the Court stated that Article VI, Section 22 *(b)*, of the General Convention was applicable to him in the present case and afforded Mr Cumaraswamy immunity from legal process of every kind.[688]

*E) Legal Obligations for Malaysia vis-à-vis Mr Cumaraswamy and the UN under the General Convention and the UN Charter*

Having answered the first part of the question relating to the status of Mr Cumaraswamy in the affirmative, the Court turned to the second part which related to the legal obligations on the part of the government of Malaysia. First, the Court noted that the difference which had arisen between the UN and Malaysia originated in the Government of Malaysia not having informed the competent Malaysian judicial authorities of the Secretary-General's finding that Mr Cumaraswamy had spoken the words at issue in the course of the performance of his mission and was, therefore, entitled to immunity from legal process.[689] Thus, it was from the time of this omission that the question before the Court had to be answered.[690]

Given that the Secretary-General, as the chief administrative officer of the Organization, has the primary responsibility to safeguard the interests of the Organization, the Court held that it would be up to him to assess whether the agents of the Organization act within the scope of their functions, and, if this is so, to protect these agents, including experts on mission, by asserting their immunity.[691] According to the Court the Secretary-General has the authority and responsibility to inform the government of a member State of his finding and, where appropriate, to request it to act accordingly and, in particular, to request it to bring his finding to the knowledge of the local courts if acts of an agent have given or may give rise to court proceedings.[692] Thus, national courts should be immediately notified of any finding by the Secretary-General when seized of a case in which the immunity of a UN agent is in issue.[693] As the Court said, this finding of the Secretary-General, and its documentary expression, creates a presumption which can only be set aside for the most compelling reasons and

686 *Ibidem*.
687 *Ibid.*, p. 86, para. 56.
688 *Ibidem*.
689 *Ibid.*, pp. 86-7, para. 59.
690 *Ibidem*.
691 *Ibid*., p. 87, para. 60.
692 *Ibidem*.
693 *Ibid.*, p. 87, para. 61.

is thus to be given the greatest weight by national courts.[694] Furthermore, the governmental authorities of a party to the General Convention are as a result under an obligation to convey such information to the national courts concerned, since a proper application of the Convention by them is dependent on such information. Failure to comply with this obligation, among other things, could give rise to the institution of proceedings under Article VIII, Section 30, of the General Convention.[695] It is important that the Court set out clearly the duties and obligations upon the concerned actors with regard to the issue of the immunity of Special Rapporteurs.

The Court concluded that the Government of Malaysia had an obligation, under Article 105 of the Charter and under the General Convention, to inform its courts of the position taken by the Secretary-General.[696] The conduct of any organ of a State must be regarded as an act of that State.[697] In the Court's opinion this was a rule of a customary character reflected in Article 6 of the Draft Articles on State Responsibility adopted provisionally by the ILC on first reading.[698] Because of the failure on the one hand of the Malaysian Government to transmit the Secretary-General's finding to its competent courts, and on the other hand the failure of the Malaysian Minister for Foreign Affairs to refer to it in his own certificate, ultimately Malaysia failed to comply with its obligation.[699] It is worth emphasizing the importance of this finding of the Court, which, even before these Articles were finally adopted by the ILC, recognized the customary law status of Article 6 of the Draft Articles on State Responsibility, now Article 4 of the Articles on State Responsibility.[700]

According to Section 22 *(b)* of the General Convention experts on mission shall be accorded immunity from legal process of every kind in respect of words spoken or written and acts done by them in the course of the performance of their mission. With

694 *Ibidem*.

695 *Ibidem*.

696 *Ibid*., p. 87, para. 62.

697 This principle nowadays finds expression in Article 4, paragraph 1 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its Fifty-third Session in 2001.

698 *Cumaraswamy* case, p. 87, para. 62. Article 6 of the 1973 Draft, as quoted by the Court, reads: 'The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinated position in the organization of the State.', *Yearbook of the International Law Commission*, 1973, Vol. II, p. 193.

699 *Ibidem*.

700 Although worded slightly differently, these two Articles are nevertheless similar and serve the same aim, namely ensuring that States can be held accountable for the activity of their organs. Article 4 of the 2001 Draft Articles on State Responsibility reads:
'1. The conduct of any State organ shall be considered an act of State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

this in mind the Court held that questions of immunity are preliminary issues that must be expeditiously decided *in limine litis*.[701] According to the Court this was a generally recognized principle of procedural law, which Malaysia was under an obligation to respect.[702] The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur, thereby nullifying the essence of the immunity rule contained in Section 22 *(b)*.[703] Given that the conduct of an organ of a State – even an organ independent of the executive power – must be regarded as an act of that State, the Court found that Malaysia did not act in accordance with its obligations under international law.[704] Turning to the issue of costs taxed to Mr Cumaraswamy while the question of immunity was still unresolved, the Court clarified that immunity from legal process to which Mr Cumaraswamy was entitled entailed holding Mr Cumaraswamy financially not responsible for any costs imposed upon him by the Malaysian courts, in particular taxed costs.[705] According to Article VIII, Section 30 of the General Convention, the opinion given by the Court would be decisive for the parties to the dispute and Malaysia had already acknowledged its obligations under Section 30.[706]

In summarizing the Court noted that as Mr Cumaraswamy was an expert on mission entitled to immunity from legal process, the Government of Malaysia was obligated to communicate this advisory opinion to the competent Malaysian courts, in order that Malaysia's international obligations be given effect and Mr Cumaraswamy's immunity be respected.[707] Last but not least, the Court pointed to the distinction between the question of immunity from legal process from the issue of compensation for any damages incurred as a result of acts performed by the UN or by its agents acting in their official capacity.[708] The Court stated that the UN might be required to bear responsibility for the damage arising from such acts.[709] However, the Court clarified that claims against the UN shall not be dealt with by national courts but shall be settled in accordance with the appropriate modes of settlement that '[t]he UN shall make provisions for' pursuant to Section 29.[710]

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701 *Ibid.*, p. 88, para. 63.

702 *Ibidem*.

703 *Ibidem*.

704 *Ibidem*.

705 *Ibid.*, p. 88, para. 64.

706 Article VIII, Section 30, of the Immunities Convention reads: 'All differences arising out of the interpretation or application of the present convention shall be referred to the international Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'.

707 *Cumaraswamy* case, p. 88, para. 65.

708 *Ibid.*, p. 88, para. 66.

709 *Ibid*., p. 89, para. 66. On issues concerning the responsibility of international organizations see *inter alia* M. Hirsch, *The Responsibility of International Organizations towards Third Parties: Some Basic Principles*, Dordrecht: Martinus Nijhoff, 1995.

710 *Cumaraswamy* case, p. 89, para. 66.

In a concluding remark of a cautionary nature the Court called on all agents of the UN not to exceed the scope of their functions with these words: '[I]t need hardly be said that all agents of the UN, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the UN.'[711] This remark once again illustrates the constructive role of the Court within the Organization. Indeed, claims brought against the UN for damages incurred because of its agents exceeding their mandate would burden the already shaky budget of the Organization.

*F) Concluding Remarks*

Ensuring 'freedom from fear' for UN Special Rapporteurs, human rights rapporteurs, experts on mission, or UN agents in general, is indeed a helpful contribution of the Court to the good functioning of UN organs in general. That is a necessary requirement in their work towards achieving the aims and purposes of the Organization, where the protection and promotion of human rights figures prominently. Acknowledging the immunity of UN agents while on duty is a direct contribution to their safety and creates for them the possibility to carry out their work unimpeded. The Court itself has benefited from the work of the special rapporteurs in that the information provided from them has helped it to establish the facts in a certain situation. It is fairly well established under international law that everyone has the right to life, liberty and security;[712] however, the protection of human rights rapporteurs is further enhanced by virtue of the rights accruing to them by the relevant articles of the General Convention. These advisory opinions shed some light on this privileged position which is a natural consequence of the general protection afforded to UN agents on duty. Indeed, it can be reasonably expected that a specific human right or the human rights situation in a country would be better supervised and ultimately dealt with properly if UN human rights rapporteurs are able to carry out their work unimpeded. The findings of the Court as discussed above provide important and necessary legal support to this end.

## 3.13 Applicability of International Human Rights Instruments During Armed Conflict (or in Occupied Territories)

It should be noted beforehand that the application of international human rights treaties during armed conflicts or in occupied territories was a contentious issue until it was settled by the jurisprudence of the Court. The Court applied both international human rights and humanitarian law instruments to the complex issues raised by cases brought before it. Three cases are discussed under this section, namely the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 1996 (*Nuclear Weapons*

711 *Ibidem*.

712 Article 3 of the UDHR reads: 'Everyone has the right to life, liberty and the security of person.' This is further elaborated in Articles 6 and 9 of the ICCPR.

case), the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004 (*Wall* case) and the contentious case on *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo *v.* Uganda) of 2005 (*Armed Activities* case). In the *Nuclear Weapons* case the Court discussed the extent of the prohibitions flowing from international human rights instruments on the legality of the threat or use of nuclear weapons. The two other cases, namely the *Wall* and the *Armed Activities*, are relevant as they shed some light on the application of international human rights treaties in territories under occupation and the obligations incumbent upon the Occupying Power.

### 3.13.1 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996)

*A) Background*

The UNGA adopted resolution 49/75 K on 15 December 1994 requesting an advisory opinion from the Court on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?' In a letter dated 27 August 1993 the World Health Organization (WHO) had asked for an advisory opinion by the Court on a similar question, namely: 'In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?'[713] The Court found itself unable to give an advisory opinion on WHO's request;[714] however, it did give an advisory opinion on the request by the GA.

*B) The Right to Life and the Prohibition of Genocide as Factors Militating Against the Use of Nuclear Weapons*

In assessing the legality of the threat or use of nuclear weapons the Court gave ample consideration to the corpus of the applicable human rights law, as it itself had noted:

> In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law.[715]

713 World Health Assembly Resolution WHA46.40 dated 14 May 1993.

714 The Court found that the request for an advisory opinion submitted by the WHO did not relate to a question which arises 'within the scope of [the] activities' of that Organization as defined by its Constitution, or in accordance with Article 96, paragraph 2, of the Charter. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, pp. 74-84, paras. 18-32.

715 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 239, para. 23.

The right to life was one of the purported grounds on which the States opposed to the threat or use of nuclear weapons *per se*, participating in the advisory legal proceedings before the Court, tried to base the prohibition of the threat or use of nuclear weapons. In their submissions to the Court these States claimed that such use would violate the right to life as guaranteed in Article 6 of the ICCPR, as well as in certain regional instruments for the protection of human rights. The States not opposed *per se* to the threat or use of nuclear weapons under any circumstances contended that this Covenant did not make any mention of war situations or the use of weapons, but was directed towards the protection of human rights in peacetime. Therefore, in their view it was not envisaged by any of the Member States that the legality of nuclear weapons was to be regulated by these particular human rights instruments. In considering these opposing views the Court looked into the right to life as a human right protected under the ICCPR and the Genocide Convention.[716]

Article 6, paragraph 1, of the Covenant provides: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' The Court observed that the protection of the ICCPR does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.[717] It maintained that, in principle, the right not to be arbitrarily deprived of one's life also applies in hostilities. Nevertheless, in explaining the test of what would be an arbitrary deprivation of life the Court went on to state:

> [W]hether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[718]

Thus, the Court declined to rely on the terms of the Covenant for the purpose of finding whether its provisions imposed a prohibition on the threat or use of nuclear weapons. However, the Court's finding that the protection of the ICCPR does not cease in situations of armed conflict and that the right to life is not a derogable one, even in a time of national emergency, can be considered to be a strengthening of international human rights law. It should be noted that the Human Rights Committee (HRCm) had issued a General Comment on that very issue, *i.e.* nuclear weapons and the right to life.[719] Part of that General Comment reads:

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716 *Ibid*., pp. 239-240, paras. 24-26.

717 *Ibid*., p. 240, para. 25.

718 *Ibidem*.

719 General Comment 14 of the Human Rights Committee (HRC) adopted at its twenty-third session in 1984 is a comment on the nuclear weapons and the right to life. In that commentary the HRC described the production, testing and stockpiling of nuclear weapons as one of the greatest threats to the right to life and demanded that those activities as well as the use of nuclear weapons be banned and recognized as crimes against humanity (paragraphs 4 and 6 of the Commentary). The full text of this General Com-

> It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.
> …
> Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.[720]

This opinion by the HRCm, given from a human rights perspective, lends support to the Court's call in this advisory opinion for complete nuclear disarmament as the most appropriate means of solving any differences of opinion as to the legal status of weapons which are as deadly as nuclear weapons.[721]

States opposed *per se* to the use of nuclear weapons contended that the prohibition against genocide required a positive answer to the question of prohibition under international law of the threat or use of nuclear weapons.[722] These States contended that this was indeed a relevant rule of customary international law that the Court should apply. According to them, the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.[723] It should be noted here that the outlawing of genocide, through the adoption of the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, had already been acknowledged by the Court as giving rise to obligations *erga omnes*.[724] The Court pointed out that the prohibition of genocide would be pertinent in this case only if recourse to nuclear weapons did indeed entail the element of intent towards a group as such. As the Court stated, this is one of the basic requirements for the above-quoted article to apply. The Court concluded that it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.[725] Thus, an *a priori* prohibition on the threat or use of nuclear weapons could not be drawn from the terms of the Genocide Convention itself.

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ment is available at: *http://www2.ohchr.org/english/bodies/hrc/comments.htm* (last accessed on 1 November 2007).

720 CCPR, General Comment No. 14, *Nuclear weapons and the right to life*, Twenty-third Session, 1984, paras. 4-5.

721 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, pp. 263-5, paras. 98-103.

722 For a detailed discussion of the contribution of the Court to the interpretation and development of the principle of the prohibition of genocide see section 3.8 *supra*.

723 *Legality of the Threat or Use of Nuclear Weapons*, p. 240, para. 26.

724 See *Barcelona Traction*, (*Merits*), ICJ Reports 1970, p. 32, para. 34.

725 See *supra* note 724.

*C) Concluding Remarks*

The Court found that neither the right to life nor the prohibition of genocide would result in the threat or use of nuclear weapons being unlawful *per se* under international law. Nevertheless, with respect to the right to life the Court found that the application of the ICCPR, and especially Article 6 dealing with the right to life, does not cease in times of war. Moreover, the Court held that the right to life is not a derogable one and the right not to be arbitrarily deprived of one's life also applies in hostilities.[726] However, the Court clarified that the test of what is an arbitrary deprivation of life falls to be determined by the applicable *lex specialis,* namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[727] These findings of the Court contribute to emphasizing the importance of the right to life as provided in Article 6 of the ICCPR. With regard to the prohibition of genocide the Court was of the opinion that it would be pertinent in this case if recourse to nuclear weapons did indeed entail the element of intent towards a group as such, as required by the relevant provision of the Genocide Convention. Although arriving at such a conclusion would be possible only *ex post facto*, after examining the circumstances of the case, this finding by the Court could potentially serve as a deterrent for States. Despite criticism that has been raised with respect to other aspects of this advisory opinion, it should be acknowledged that the Court's findings are rather important for the interpretation given to the right to life as provided under the relevant instruments of the international law of human rights in case of the threat or use of nuclear weapons.

### 3.13.2 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004)

*A) Background*

The Israeli government started to build a separating barrier/wall in the Occupied Palestinian Territory (OPT) in June 2002. A sequence of events within the UN led finally to the adoption of resolution ES-10/14 of 8 December 2003.[728] The UNGA requested the Court for an advisory opinion on the following question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?[729]

726 *Ibid*., p. 240, para. 25.

727 *Ibidem*.

728 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, pp. 145-148, paras. 18-23 (*Wall* case).

729 GA Res. ES 10/14 adopted on 8 December 2003 during the Tenth Emergency Special Session.

The Advisory Opinion delivered by the Court on 9 July 2004 is quite exceptional for the wide range of human rights issues it addresses. Some of the main issues the Court addressed in its Advisory Opinion are the right to self-determination, the right to work, the right to health, the right to education and to an adequate standard of living, and the right to free movement. It is noteworthy that the Court decided to render an advisory opinion despite numerous requests asking it to use its discretionary power and refrain from pronouncing on the question submitted by the GA.[730]

*B) Applicability of International Human Rights Treaties to the OPT*

The Court noted the disagreement among the States which had made observations in the course of the proceedings as to whether international human rights treaties, of which Israel was a party to, were applicable in the OPT. The Court referred to Annex I to the report of the Secretary-General which reads:

> 4. Israel denies that the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both of which it has signed, are applicable to the occupied Palestinian territory. It asserts that humanitarian law is the protection granted in a conflict situation such as the one in the West Bank and Gaza Strip, whereas human rights treaties were intended for the protection of citizens from their own Government in times of peace.

Some of the States making statements and observations in the course of these proceedings had only made reference to the application of international humanitarian law, namely of the Fourth Geneva Convention of 1949.[731] However, others, independent as to whether they wanted the Court to deliver an advisory opinion or not, contended that both international humanitarian law and human rights law were applicable within the Occupied Palestinian Territory.[732]

The Court recalled that Israel was a party to both International Covenants and the Convention on the Rights of the Child (CRC).[733] In order to determine whether these texts were applicable in the Occupied Palestinian Territory, the Court decided to first address the issue of the relationship between international humanitarian law and

730 *Wall*, pp. 156-164, paras. 43-64.

731 See the written statements of Cyprus, Malta, Cuba, Senegal, and South Korea. Available at: *http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=1* (last accessed on 1 November 2007).

732 *Wall*, p. 177, para. 102. This view was adopted in the written statements of the League of Arab States, Egypt, Palestine, Jordan, Kuwait, Lebanon, Syria, Switzerland, Morocco, Indonesia, the Organization of the Islamic Conference, France, South Africa, Ireland, Namibia, Malaysia, and Sweden, whereas the European Union and Brazil did so implicitly.

733 *Wall*, p. 177, para. 103. The Court stated: 'On 3 October 1991 Israel ratified both the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 and the International Covenant on Civil and Political Rights of the same date, as well as the United Nations Convention on the Rights of the Child of 20 November 1989. It is a party to these three instruments.'

human rights law and then that of the applicability of human rights instruments outside national territory.[734] First, the Court made reference to its finding in the advisory opinion in the *Nuclear Weapons* case where it had dealt with the issue of the relationship between international human rights and humanitarian law.[735] In the Court's view the protection offered by human rights conventions continued in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the ICCPR.[736] The Court's finding that human rights conventions continue to apply in situations of armed conflict was quite important for it dispelled any remaining doubts regarding this issue.

In a succinct way – and for the first time – the Court clarified the issue of the relationship between international humanitarian law and human rights law with these words:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[737]

After having clarified the relationship between international humanitarian law and human rights law the Court turned to the territorial application of international human rights treaties.[738] Dealing with the scope of application of the ICCPR the Court first quoted Article 2, paragraph 1 of this Covenant, which reads:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

While noting that this provision could be interpreted as covering only individuals who were both present within a State's territory and subject to that State's jurisdiction, but also as covering both individuals present within a State's territory and those outside that territory but subject to that State's jurisdiction,[739] the Court held:

734 *Wall*, p. 177, para. 104.
735 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 240, para. 25.
736 *Wall*, p. 178, para. 106.
737 *Ibidem*.
738 *Ibid*., p. 178, para. 107. The Court stated: 'It remains to be determined whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.'
739 *Ibid*., p. 179, para. 108.

> The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[740]

Having found that States were bound to comply with the provisions of the ICCPR wherever they exercised their jurisdiction, the Court noted that the constant practice of the Human Rights Committee (HRCm) was consistent with its position.[741] By referring to the Committee's practice the Court rectified its previous overlooking of the position of the HRC on nuclear weapons and the right to life in the *Nuclear Weapons* Advisory Opinion.

The Court left no gap regarding the application of the Covenant when it emphasized that the drafters of the Covenant intended for the States to be bound by its provisions even when they exercised jurisdiction outside their territory.[742] Interpreting the *travaux préparatoires* of the Covenant regarding the rights accruing to individuals *vis-à-vis* the State the Court stated:

> The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.[743]

In this interpretation of the extent of the obligations incumbent upon States under the Covenant the Court takes due account of the main aim of the ICCPR, namely to provide for the maximum protection of human rights for individuals.

The Court then turned to the applicability of the ICCPR in the OTP. In its report to the HRCm in 1998 Israel had taken the position that 'the Covenant and similar instruments did not apply directly to the current situation in the occupied territories'.[744] However, in 2003 in the face of Israel's consistent position to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza...' the Committee had concluded:

> [I]n the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and

740 *Ibid*., p. 179, para. 109.
741 *Ibidem*.
742 *Ibidem*.
743 *Ibidem*.
744 *Ibid*., p. 179, para. 110.

> fall within the ambit of State responsibility of Israel under the principles of public international law (CCPR/CO/78/ISR, para. 11).[745]

Having noted the communications among Israel and the HRCm the Court concluded that the ICCPR is applicable in respect of acts carried out by a State in the exercise of its jurisdiction outside its own territory.[746] This finding by the Court clarifies the scope of the application of a main human rights instrument and effectively increases the level of protection accruing to individuals under its norms. Thus, States are bound to comply with the human rights standards set by the ICCPR even if they are exercising jurisdiction outside their own territory.

With regard to the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) the Court noted that while the ICESCR contained no provision on its scope of application this could be explained by the fact that this Covenant guaranteed rights which were essentially territorial.[747] However, the Court held that it was not to be excluded that it applied both to territories over which a State party enjoyed sovereignty and to those over which that State exercised territorial jurisdiction.[748] The Court recalled the opposing views with regard to the applicability of the ICESCR to the OPT taken by Israel and by the Committee on Economic, Social and Cultural Rights (CmESCR). According to Israel the Palestinian population within the same jurisdictional areas was excluded from both the reports to be submitted to the CmESCR and the protection of the Covenant.[749] In Israel's view this position was based on the well-established distinction between human rights and humanitarian law under international law, thus the Committee's mandate could not relate to events in the West Bank and the Gaza Strip, inasmuch as they were part and parcel of the context of armed conflict as distinct from a relationship of human rights.[750] In contrast, the Committee had reiterated its concern about Israel's position and reaffirmed 'its view that the State party's obligations under the Covenant apply to all territories and populations under its effective control'.[751]

Relying on its earlier finding, namely that human rights conventions continue to apply also in situations of armed conflict, the Court rejected Israel's view.[752] The Court observed that the territories occupied by Israel had for over 37 years been subject to its territorial jurisdiction as the Occupying Power. Therefore, in the exercise of the powers available to it on this basis, Israel was bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it was under an obligation not to raise any obstacle to the exercise of such rights in those fields

745 *Ibid*., p. 180, para. 110.
746 *Ibid*., p. 180, para. 111.
747 *Ibid*., p. 180, para. 112.
748 *Ibidem*.
749 See E/C.12/1/Add. 27, para. 8, as quoted by the Court.
750 *Wall*, p. 180, para. 112.
751 *Ibidem*.
752 *Ibid*., p. 181, para. 112.

where competence has been transferred to Palestinian authorities.[753] With regard to the Convention on the Rights of the Child (CRC) of 20 November 1989 the Court noted that this instrument contained an Article 2 according to which 'States Parties shall respect and ensure the rights set forth in the... Convention to each child within their jurisdiction....'. The Court concluded that this Convention was also applicable within the OTP.[754] By acknowledging the applicability of these three main international human rights treaties to the OPT the Court laid down the basis for other important findings that it was to make in this advisory opinion.

*C) Applicable Provisions of the ICCPR, the ICESCR, and the CRC*

Before examining the relevant provisions of the ICCPR, namely the right to liberty and security of the person, privacy, family life and correspondence, and freedom of movement, the Court observed that Article 4 of the Covenant allowed for derogations to be made, under various conditions, to certain provisions of that instrument.[755] The Court recalled that Israel made use of its right of derogation under this article by addressing a communication to the UN SG on 3 October 1991.[756] The Court noted that this derogation concerned only Article 9 of the ICCPR, which deals with the right to liberty and security of the person and lays down the rules applicable in cases of arrest or detention. The other Articles of the Covenant therefore remained applicable not only on Israeli territory, but also on the OPT.[757]

Those other Articles of the Covenant which the Court mentioned concerned the right to privacy and freedom of movement.[758] The Court found that restrictions on the freedom of movement had aggravated the life of the Palestinian people. Relying on a Report of 8 September 2003 by the Special Rapporteur of the Commission on Human

753 *Ibidem*.

754 *Ibid*., p. 181, para. 113.

755 *Ibid*., p. 187, para. 127.

756 *Ibidem*. That communication reads: 'Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens.These have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings. In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since. This situation constitutes a public emergency within the meaning of article 4 (1) of the Covenant. The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of the Covenant, Israel thereby derogates from its obligations under that provision.'

757 *Ibid*em.

758 *Ibid*., p. 188, para. 128. The Court quoted Article 17, paragraph 1, which reads as follows: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.' It also quoted Article 12, paragraph 1, which reads: 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.'.

Rights, the Court stated that such restrictions were most marked in urban areas, such as the Qalqiliya enclave or the City of Jerusalem and its suburbs. Further, the Court noted that they were aggravated by the fact that the access gates were few in number in certain sectors and opening hours appeared to be restricted and unpredictably applied.[759] In the Court's view, in addition to the general guarantees of freedom of movement under Article 12 of the ICCPR, account was also to be taken of specific guarantees of access to the Christian, Jewish and Islamic Holy Places. The Court gave a concise account of agreements on free access to the Holy Places.[760] Turning to the application of the ICESCR the Court noted that this instrument included a number of relevant provisions, namely: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right 'to be free from hunger' (Art. 11); the right to health (Art. 12); the right to education (Arts. 13 and 14).[761] Last but not least, the Court referred to similar provisions, namely Articles 16, 24, 27 and 28 of the CRC, as relevant to and applicable in the case at hand.[762]

In addressing the issue of agricultural production falling under the ICESCR, the Court stated that there had been serious repercussions in this regard, as attested by a number of sources.[763] The Court quoted a Report of 22 August 2003 by the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories stating that 'an estimated 100,000 dunums [approximately 10,000 hectares] of the West Bank's most fertile agricultural land, confiscated by the Israeli Occupation Forces, have been destroyed during the first phase of the wall construction, which involves the disappearance of vast amounts of property, notably private agricultural land and olive trees, wells, citrus groves and hothouses upon which tens of thousands of Palestinians rely for their survival'.[764] In considering how the Wall affected the right of the Palestinian people to their means of subsistence the Court quoted passages from reports prepared by different UN Rapporteurs such as the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967 and the Special Rapporteur on the Right to Food of the UN Commission on Human Rights.[765] Further,

759 *Ibid*., p. 190, para. 133.
760 *Ibid*., pp. 188-189, para. 129.
761 *Ibid*., p. 189, para. 130.
762 *Ibid*., p. 189, para. 131.
763 *Ibid*., p. 190, para. 133.
764 *Ibidem*.
765 *Ibidem*. The Court stated: 'Further, the Special Rapporteur on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that 'Much of the Palestinian land on the Israeli side of the Wall consists of fertile agricultural land and some of the most important water wells in the region' and adds that 'Many fruit and olive trees had been destroyed in the course of building the barrier.' (E/CN.4/2004/6, 8 September 2003, para. 9.) The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights states that construction of the wall 'cuts off Palestinians from their agricultural lands, wells and means of subsistence' (Report by the Special

the Court described other difficulties which the Palestinian people encountered due to the barrier concerning access to health services, educational establishments and primary sources of water as attested by a number of different information sources.[766]

The effects of such measures on the population of these areas were the closing of shops and businesses and the departing of people from their homes.[767] The Court concluded that the construction of the wall and its associated régime impeded the liberty of movement of the inhabitants of the Occupied Palestinian Territory, with the exception of Israeli citizens and those assimilated thereto, as guaranteed under Article 12, paragraph 1, of the ICCPR.[768] In the Court's view they also impeded the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the ICESCR and in the CRC.[769]

Referring to Article 17, which provides for the right to privacy of the family, home or correspondence, the Court noted that this provision did not contain any clauses

Rapporteur of the United Nations Commission on Human Rights, Jean Ziegler, 'The Right to Food', Addendum, Mission to the Occupied Palestinian Territories, E/CN.4/2004/10/Add.2, 31 October 2003, para. 49). In a recent survey conducted by the World Food Programme, it is stated that the situation has aggravated food insecurity in the region, which reportedly numbers 25,000 new beneficiaries of food aid (report of the Secretary-General, para. 25).'

766 *Ibidem*. The Court stated: 'Thus the report of the Secretary-General states generally that 'According to the Palestinian Central Bureau of Statistics, so far the Barrier has separated 30 localities from health services, 22 from schools, 8 from primary water sources and 3 from electricity networks.' (Report of the Secretary-General, para. 23.) The Special Rapporteur of the United Nations Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 states that 'Palestinians between the Wall and Green Line will effectively be cut off from their land and workplaces, schools, health clinics and other social services.' (E/CN.4/2004/6, 8 September 2003, para. 9.) In relation specifically to water resources, the Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights observes that 'By constructing the fence Israel will also effectively annex most of the western aquifer system (which provides 51 per cent of the West Bank's water resources).' (E/CN.4/2004/10/Add.2, 31 October 2003, para. 51.) Similarly, with regard to access to health services, it has been stated that, as a result of the enclosure of Qalqiliya, a United Nations hospital in that town has recorded a 40 per cent decrease in its caseload (report of the Secretary-General, para. 24).

767 *Ibid*., p. 191, para. 133. The Court stated: 'At Qalqiliya, according to reports furnished to the United Nations, some 600 shops or businesses have shut down, and 6,000 to 8,000 people have already left the region. The Special Rapporteur on the Right to Food of the United Nations Commission on Human Rights has also observed that 'With the fence/wall cutting communities off from their land and water without other means of subsistence, many of the Palestinians living in these areas will be forced to leave.' In this respect also the construction of the wall would effectively deprive a significant number of Palestinians of the 'freedom to choose [their] residence'. In addition, however, in the view of the Court, since a significant number of Palestinians have already been compelled by the construction of the wall and its associated régime to depart from certain areas, a process that will continue as more of the wall is built, that construction, coupled with the establishment of the Israeli settlements is tending to alter the demographic composition of the Occupied Palestinian Territory.'.

768 *Ibid*., pp. 191-2, para. 134.

769 *Ibid*., p. 192, para. 134.

qualifying the rights covered therein.[770] On the other hand, liberty of movement was subject to such restrictions as provided by law, which are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and consistent with the other rights recognized in the present Covenant.[771] The Court observed that the restrictions provided for under Article 12, paragraph 3 of the ICCPR were, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1.[772] In addition, the Court explained that it is not sufficient that such restrictions be directed towards the ends authorized; they must also be necessary for the attainment of those ends.[773] Referring to the position of the HRC the Court noted that such restrictions 'must conform to the principle of proportionality' and 'must be the least intrusive instrument amongst those which might achieve the desired result'.[774] On the basis of the information available to it, the Court found that these conditions were not met in the present instance.[775] Further, the Court concluded that the restrictions on the enjoyment by the Palestinians living in the territory occupied by Israel of their economic, social and cultural rights, resulting from Israel's construction of the wall, failed to meet a condition laid down by Article 4 of the ICESCR, namely that their implementation should be 'solely for the purpose of promoting the general welfare in a democratic society'.[776] The Court's interpretation of the condition laid down by Article 4 of the ICESCR represents a reinforcement of international human rights law in that it obliges the Occupying Power not to impose restrictions which are not in the general economic, social and cultural interest of the population forced to live under its jurisdiction.

*D) Legal Consequences for Israel Arising from Violations of International Law*

The Court concluded that the wall, along the route chosen, and its associated régime gravely infringed a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route could not be justified by military exigencies or by the requirements of national security or public order.[777] Accordingly, that constituted a breach by Israel of several of its obligations under the applicable international humanitarian law and human rights instruments.[778] Furthermore, Israel had to ensure freedom of access to the Holy Places that came under its

770 *Ibid*., p. 192-3, para. 136, The Court stated: 'The Court would note, moreover, that certain provisions of human rights conventions contain clauses qualifying the rights covered by those provisions. There is no clause of this kind in Article 17 of the International Covenant on Civil and Political Rights.'
771 *Ibidem*.
772 *Ibidem*.
773 *Ibidem*.
774 *Ibidem*. For more details see CCPR/C/21/Rev.1/Add.9, General Comment No. 27, *Freedom of Movement*, Sixty-seventh session, 1999.
775 *Ibidem*.
776 *Ibidem*.
777 *Ibid*., pp. 193-4, para. 137.
778 *Ibidem*.

control following the 1967 War.[779] The breaches mentioned above created the following illegal effects:

1) *Destruction and requisition of properties pertaining to individual or legal persons*
2) *Restrictions on the freedom of movement of inhabitants of the Occupied Palestinian Territory*
3) *Demographic changes in the Occupied Palestinian Territory*
4) *Impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living*

These issues were addressed in detail by the Court which made ample use of the information available before it as provided by the States participating in the proceedings and the dossier prepared by the Secretariat of the UN.

The Court noted that Israel was bound to comply with its obligation to respect the right of the Palestinian people to self-determination.[780] Further, it observed that Israel had to put an end to the construction of the wall as it was considered to be an internationally wrongful act.[781] Moreover, besides halting the construction of the wall, the Court found that Israel had to dismantle those parts of the structure situated in the OPT.[782] The Court also stated that all legislative and regulatory acts adopted with a view to its construction, and the establishment of its associated régime, were to be repealed or rendered ineffective, except in so far as such acts, by providing for compensation or other forms of reparation for the Palestinian population, would continue to be relevant for compliance by Israel.[783] The issue of reparations is discussed in more detail below.

*E) Legal Consequences for Other States and the UN*

The Court's decision which indicated not only the obligations incumbent upon Israel, but also those of other States and the UN was rather unprecedented, attracting the opposition of a few members of the Court itself.[784] However, such a course is understandable in light of the *erga omnes* nature of the right that the Court was clarifying,

779 *Ibid*., p. 197, para. 149.
780 *Ibidem*.
781 *Ibid*., p. 197, para. 150. Further, the Court stated: 'The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation (references omitted).
782 *Ibid*., pp. 197-8, para. 151.
783 *Ibidem*.
784 See p. 202, para. 163(3)(D), Judge Kooijmans and Judge Buergenthal voting against. For more details see the Separate Opinion of Judge Kooijmans, pp. 230-4, paras. 37-51 and the Declaration of Judge Buergenthal, pp. 240-5.

i.e. that of self-determination.[785] The Court construed the *erga omnes* character of the Palestinian people's right to self-determination and the obligations under the applicable provisions of international humanitarian law and human rights instruments as giving rise to the following obligations:

1) *The obligation for all States not to recognize the illegal situation resulting from the construction of the wall in the OPT, including in and around East Jerusalem, and not to render aid or assistance in maintaining the situation created by such construction*;

2) *The obligation for all States, while respecting the Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of their right to self-determination is brought to an end*;[786]

3) *The need for the United Nations, and especially the General Assembly and the Security Council, to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and its associated régime, taking due account of the Advisory Opinion.*[787]

The Court stated that it was of the view that the UN, and especially the GA and the SC, should consider what further action was required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.[788] It emphasized the urgent necessity for the UN as a whole to redouble its efforts to bring the Israeli-Palestinian conflict to a speedy conclusion, thereby establishing a just and lasting peace in the region.[789] Besides discharging its judicial function, in its final remarks the Court lent its support to the furthering of the purposes and principles of the UN Charter, which in their central part include cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without adverse distinctions.

The 'Roadmap', a document approved by the SC, in the Court's opinion represented the 'most recent of efforts to initiate negotiations' to reach a peaceful solution to this conflict.[790] Finally, the Court considered that it had a duty to draw the attention

785 For the sake of completeness it should be noted that Judge Higgins held that the *erga omnes* character has nothing to do with imposing substantive obligations on third parties to a case. See the Separate Opinion of Judge Higgins, p. 216, para. 37. Also Judge Kooijmans had difficulties in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States. See the Separate Opinion of Judge Kooijmans, at pp. 219-220 and p. 231, respectively paras. 1 and 40.

786 *Wall*, p. 200, para. 159.

787 *Ibid*., pp. 197-200, paras. 148-160.

788 *Ibid*., p. 200, para. 160.

789 *Ibid*., p. 200, para. 161.

790 *Ibid*., p. 201, para. 162.

of the GA, to which this Opinion was addressed, to the need for these efforts to be encouraged with a view to achieving, as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours,[791] with peace and security for all in the region. Notably, the Court advised that a new impetus be given to efforts to bring the parties to the table in order to negotiate a peaceful and long-standing settlement of their disputes. While this is not strictly speaking a judicial task, in contributing towards furthering international peace and security, as the UN's main aims, the Court has on several occasions used conciliatory tones and urged the conflicting parties to find a peaceful settlement to their disputes.

### *F) Reparations for Natural and Legal Persons: A Landmark in the Case law of the ICJ?*

The direct right to compensation for Palestinian natural and legal persons for damage arising from the building of the wall in the OTP in violation of international law obligations was one of the issues addressed by the ICJ in this advisory opinion.[792] Indeed, as the Court had stated in an earlier advisory opinion: 'the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end.'[793] Given that the building of the wall had entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court found that Israel had the obligation to make reparation for the damage caused to all the natural or legal persons concerned.[794] Recalling that the essential forms of reparation in customary law were laid down by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case, the Court went on to quote its predecessor:

> The essential principle contained in the actual notion of an illegal act a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[795]

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791 *Ibidem*.

792 *Wall*, pp. 197-8, paras. 151-153.

793 ICJ, *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, ICJ Reports 1971, p. 52, para. 111.

794 *Wall*, p. 198, para. 152.

795 *Ibidem*.

In detailing the items for restitution the Court stated that Israel was under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of constructing the wall in the OPT.[796] Further, in the event that such restitution would prove to be materially impossible, Israel had an obligation to compensate the persons in question for the damage suffered.[797] Finally, the Court considered that Israel also had an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons who had suffered any form of material damage as a result of the wall's construction.[798]

This is a landmark finding by the Court in that it acknowledged the right to reparations for natural and legal persons and the incumbent duty upon a State (Israel) to make such reparations for violations of its obligations under international human rights and humanitarian law.[799] While UN treaty-monitoring bodies and some regional human rights organs such as the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (I-ACtHR), and the African human rights organs have dealt extensively with the individual's right to reparation, the ICJ, an international judicial body for settling inter-State disputes, was breaking new ground. Until then it was the State who was the sole beneficiary of any compensation while individuals hardly, if ever, were specifically referred to in the Court's decisions. For the sake of completeness it should be noted that in traditional diplomatic protection cases individuals often received some form of compensation from their parent State, but this is beyond the realm of international law. As Zegveld notes, although at the international level more channels are available to victims to claim compensation, a general remedy does not exist.[800] Such a remedy on an international level is that foreseen under Articles 75 and 79 of the Statute of the International Criminal Court (ICC) adopted in 1998, which provide for reparations and the establishment of a Trust Fund for victims of violations of human rights and humanitarian law.

A step towards establishing a general remedy for victims of such violations is that set forth in the GA resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of December 2005.[801] As Prof. Theo van Boven acknowledges,[802] the widening of the scope of this instrument from reparations for gross violations of human rights to include also serious violations of international humanitarian law reflected the growing opinion, reaffirmed

796 *Ibid*., p. 198, para. 153.
797 *Ibidem*.
798 *Ibidem*.
799 *Ibid.*, pp. 197-8, paras. 149-153.
800 L. Zegveld, *Remedies for victims of violations of international humanitarian law*, IRRC, Geneva, Vol. 85, No. 851, 2003, p. 507.
801 GA Res. A/Res/60/147 of 16 December 2005.
802 Th. van Boven, Assessment of outcome, Workshop in International Human Rights Standard-Setting Processes, International Council on Human Rights Policy and International Committee of Jurists, Geneva 13-14 February 2005. Full text available at: *http://www.ichrp.org/paper_files/120_w_06.doc* (last accessed on 1 November 2007).

by the ICJ, that both branches of international law are complementary and partly overlapping. The finding of the Court that Israel was under an obligation to make reparation for the damage caused to all natural or legal persons affected by the construction of the wall is a tangible contribution by the Court towards the full implementation of human rights and humanitarian law.

*G) Concluding Remarks*

Many of the Court's findings in this advisory opinion represent important contributions towards developing and interpreting the international law of human rights rules and principles. Indeed, controversial areas of the law, such as the applicability of human rights treaties in occupied territories, or everywhere a State exercises jurisdiction, found a definite answer in this advisory opinion. The Court found that several provisions of the ICCPR, the ICESCR, and the CRC were applicable to the OPT. That removes any doubt as to the applicability of human rights norms in respect of acts carried out by an Occupying Power in the exercise of its jurisdiction outside its own territory. It is also noteworthy that in adopting this view the Court relied on the practice of the HRCm and the CmESCR.[803] Further, the finding of the Court that Israel was under an obligation to make reparation for the damage caused to all natural or legal persons affected by the construction of the wall is extremely important from a humanitarian perspective. While States have more than one venue available for adjudicating their claims for reparations, the same cannot be said for individuals. To a large extent this is due to the largely State-oriented nature of international law. However, provisions acknowledging a right to a remedy for victims of violations of international human rights law can be found in numerous international instruments, in particular article 8 of the UDHR, article 2 of the ICCPR, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and article 39 of the CRC. Yet, the implementation of these provisions has largely remained in a latent phase. It is also for this reason that the findings of the ICJ in this regard are ground-breaking and commendable.

Furthermore, the Court clarified that the right to free movement, to family life, to privacy, the right to property, the right to visit the religious sites situated in East Jerusalem and above all the right of the Palestinian people to self-determination create an obligation on the part of Israel to respect them. In the Court's view, the right of the Palestinian people to self-determination gives rise to the obligation *erga omnes* not to recognize the consequences flowing from the construction of the Wall and the associated regime. The Court also indicated the duty of UN organs to follow up on the Palestinian Israeli issue in order to bring about a peaceful solution to the problem. In implementing the Court's advisory opinion and also responding to GA Resolution ES 10/15 of 20 July 2004 the idea of establishing a register of damages incurred by

803 See p. 179, para. 109 and pp. 180-1, para. 112.

Palestinian natural or legal persons was put forward. Unfortunately, little progress has been made in this regard.[804] In concluding, this Advisory Opinion of the Court provides important insights into the applicability of international human rights law rules and principles. Further, it evidences the constructive role of the Court within the UN as one of its main organs and as its principal judicial organ.

### 3.13.3 *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda, Order on Provisional Measures of 1 July 2000 and Judgment of 19 December 2005)

*A) Background*

The dispute between the Democratic Republic of the Congo (DRC) and Uganda was brought before the Court on 23 June 1999. The DRC contended that the acts of armed aggression perpetrated by Uganda on the territory of the DRC were in flagrant violation of the UN Charter and the Charter of the Organization of African Unity (OAU). Several complex issues were brought before the Court; some for the first time. Although the DRC initially brought three cases before the ICJ, namely against Uganda, Burundi and Rwanda, only the case against Uganda is dealt with here. The case against Burundi was withdrawn by the DRC, while in the case against Rwanda the Court found that it did not have jurisdiction to hear the case.[805] The instruments of international human rights law relied upon by the parties were the ICCPR, the African Charter on Human and Peoples' Rights of 1981 and the CAT of 1984. Although these instruments do not include a compromissory clause, all States were notified of the proceedings in this case pursuant to Rule 43 of the Rules of the Court (RC).[806] Such a practice, besides offering guidance to the Court as to the *opinio juris*, is to be commended for it encourages States to express their views on important issues of international law.

804 For more details see Register of Damages, Item X of the Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the human rights situation in the Palestinian territories occupied since 1967, E/CN.4/2006/29, 17 January 2006.

805 See *Armed Activities on the Territory of the Congo* (DRC *v*. Burundi), Order of Discontinuance of 30 January 2001, ICJ Reports 2001, pp. 3-4 (*Armed Activities*) and *Armed Activities (New Application: 2002)* (DRC *v*. Rwanda), Judgment of 3 February 2006, ICJ Reports 2006, para. 128.

806 Rule 43(1) of the Rules of the Court reads: 'Whenever the construction of a convention to which States other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what directions shall be given to the Registrar in the matter.'

*B) Duty to Ensure Full Respect for Human Rights*

In its Order on Provisional Measures of 1 July 2000,[807] the Court indicated that both Parties had to take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law. Returning to this issue in its judgment the Court found that Uganda had not complied with the Order of the Court on provisional measures.[808] The jurisdiction of the Court was based on the declarations made by the two Parties accepting the Court's compulsory jurisdiction under Article 36, paragraph 2, of the Statute of the Court. Thus, the DRC faced no obstacles in raising its claims on grounds of violations of international human rights instruments.

*C) Human Rights Violations in the DRC*

In its memorial the DRC asked the Court to adjudge and declare that violations of both international human rights and humanitarian law had been committed by Uganda against DRC nationals and that reparation was due for the injury caused by these internationally wrongful acts.[809] In support of its claims the DRC cited various sources of evidence, including the 2004 report of the UN Mission in the DRC (MONUC) on human rights violations in Ituri, reports submitted by the Special Rapporteur of the UN Commission on Human Rights, and testimony gathered on the ground by a number of Congolese and international non-governmental organizations.[810] The DRC argued that the need to ensure full respect for fundamental rights in the territories occupied by the Ugandan army was similarly emphasized by the UN Commission on Human Rights.[811] Further, it argued that, by virtue of its actions, Uganda had violated provisions of the following human rights treaties: the ICCPR, the African Charter on Human and Peoples' Rights, the CAT, and the African Charter on the Rights and Welfare of the Child.[812] In more general terms, Uganda pointed to the unreliability of the evidence

807 *Armed Activities* (DRC *v*. Uganda), (*Provisional Measures*), Order of 1 July 2000, ICJ Reports 2000, p. 129, para. 47.

808 *Armed Activities* (DRC *v*. Uganda), Judgment of 19 December 2005, ICJ Reports 2005, para. 345 (7).

809 *Ibid*., para. 25(2) and 25(4)(a)-(e). Paragraph 25(2) reads: 'That the Republic of Uganda, by committing acts of violence against nationals of the Democratic Republic of the Congo, by killing and injuring them or despoiling them of their property, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
- the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law;
- the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural.

810 *Ibid*., para. 182.

811 *Ibid*., para. 189.

812 *Ibid*., para. 190.

adduced by the DRC, claiming that it did not distinguish between the various armies operating in eastern Congo during the relevant period.[813] Moreover, Uganda also maintained that the DRC relied on partisan sources of information, such as the *Association africaine des droits de l'homme* (ASADHO), which Uganda described as a pro-Congolese non-governmental organization.[814] Uganda further asserted that the 2004 MONUC report on human rights violations in Ituri, heavily relied on by the DRC to support its various claims in connection with the conflict in Ituri, 'is inappropriate as a form of assistance in any assessment accompanied by judicial rigour'.[815]

*D) Contentious Evidentiary Issues*

The Court noted that in considering the allegations brought forward by the DRC it would take into consideration evidence contained in certain UN documents to the extent that they were of probative value and were corroborated, if necessary, by other credible sources.[816] Basing itself on information found in the report of the Special Rapporteur of the Commission on Human Rights of 18 January 2000, in the Secretary-General's Third Report on MONUC, in SC resolution 1304 of 16 June 2000, in the report of the Special Rapporteur of the Commission on Human Rights of 1 February 2001, and in MONUC's special report on the events in Ituri, January 2002 – December 2003, the Court found the coincidence of reports from credible sources sufficient to convince it that massive human rights violations had been committed by the UPDF on the territory of the DRC.[817] Having examined the case file, the Court considered that it had credible evidence sufficient to conclude that UPDF troops had committed acts of killing, torture and other forms of inhumane treatment of the civilian population…and did not take measures to ensure respect for human rights [and international humanitarian law] in the occupied territories.[818] In considering the question as to whether acts and omissions of the UPDF and its officers and soldiers were attributable to Uganda, the Court found that the conduct of the UPDF as a whole was clearly attributable to Uganda, being the conduct of a State organ.[819] It is noteworthy that the Court used the information contained in the reports of the Special Rapporteur of the Commission on Human Rights, the reports of the Secretary-General on MONUC, MONUC's special report on the events in Ituri, and Human Rights Watch to substantiate many of the paragraphs of this judgment.

813 *Ibid*., para. 191.
814 *Ibidem*.
815 *Ibidem*.
816 *Ibid*., para. 205.
817 *Ibid*., pars 206-7.
818 *Ibid*., para. 211.
819 *Ibid*., para. 213.

*E) International Human Rights Instruments: Their Applicability and Legal Consequences for Their Violations*

The Court recalled that in the 2004 Advisory Opinion it had already found that the protection offered by the human rights conventions does not cease in case of armed conflict, save for derogations of the kind to be found in Article 4 of the ICCPR.[820] Further, it noted that international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories.[821] Having found that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration, the Court listed as applicable international human rights instruments the ICCPR, the African Charter on Human and Peoples' Rights, the CAT, the CRC, and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict.[822] Specifying the provisions which Uganda had violated the Court found that those were Articles 6, paragraphs 1, and 7 of the ICCPR,[823] Articles 4 and 5 of the African Charter on Human and Peoples' Rights,[824] Article 38, paragraphs 2 and 3 of the CRC and Articles 1, 2, 3, paragraphs 3, 4, 5 and 6 of the Optional Protocol of the CRC.[825] Basically, these articles cover the right to life, the prohibition of torture, cruel, inhuman or degrading treatment or punishment, and the specific protection provided for children in order to spare them from the scourges of war.

The Court concluded that Uganda was internationally responsible for violations of international human rights law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law in the occupied territory.[826] Besides having pronounced on the violations of international human rights law committed by Ugandan military forces on the territory of the DRC, the Court observed that the actions of the various parties in the complex conflict in the DRC had contributed to the immense suffering faced by the Congolese population.[827] Being painfully aware that many atrocities were committed in the course of the conflict, the Court stated that it was incumbent on all those involved in the conflict to support the

820 *Ibid*., para. 216.
821 *Ibidem*.
822 *Ibid*., para. 217.
823 Article 6, paragraph 1, reads: 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.' Article 7 reads: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'
824 Article 4 reads: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. Article 5 reads: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'
825 *Ibid*., para. 219.
826 *Ibid*., para. 220.
827 *Ibid*., para. 221.

peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.[828] Although the Court did not specifically name the parties involved in the complex conflict in the DRC, one could maybe easily guess, just by looking at the other cases the DRC filed with the Court. Another important point of this paragraph of the judgment is the Court's reminder to the parties involved in this conflict concerning their obligation to take active steps towards ensuring respect for human rights in the region.

The DRC asked the Court to adjudge and declare that Uganda was under an obligation to make reparation for all injury caused to the latter by the violation of the obligations imposed by international law; *inter alia* fundamental human rights violations and the plundering of natural resources, which had caused 'massive war damage'.[829] Upon examination of the case file, given the character of the internationally wrongful acts for which Uganda was found responsible, such as *inter alia* violations of international human rights law, looting, plundering and exploitation of the DRC's natural resources, the Court considered that those acts resulted in injury to the DRC and to persons on its territory and therefore Uganda had an obligation to make reparation accordingly.[830] Observing that it had found Uganda to be in violation of international human rights law committed by its armed forces in the DRC, the Court concluded that Uganda had not complied with its Order on provisional measures of 1 July 2000.[831] This is the first time that the Court found a State to be in violation of its Order on provisional measures for acts in violation of international human rights law committed by its armed forces in the territory of another State.

*F) Concluding Remarks*

Only some of the important findings the Court made in this judgment with regard to the applicability and the legal consequences of violations of provisions of international human rights law have been discussed here. The fact that the compulsory jurisdiction of the Court was accepted by both parties to the proceedings allowed for claims based on violations of international human rights instruments to be brought and adjudicated upon by the Court, despite the lack of compromissory clauses in them.[832] Given that in some instances the Court has found it necessary to indicate provisional measures, some concerns arise with regard to the credibility of the Court in cases of State non-

828 *Ibidem*.
829 *Ibid*., para. 252 and para. 258.
830 *Ibid*., para. 259.
831 *Ibid*., para. 264.
832 Besides Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and Article 29(1) of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 other important international human rights and human rights instruments such as the ICCPR, the ICESCR, and the Geneva Conventions of 1949 have no such compromissory clauses conferring jurisdiction upon the ICJ.

compliance with its Orders.[833] So far the Court has exercised a healthy degree of caution in indicating its provisional measures by resorting not only to binding norms of international law, but also to resolutions of the SC. Furthermore, as illustrated by this case, the Court had a possibility to evaluate State compliance with its Order on provisional measures at the merits stage of a case,[834] finding for the second time that a State had not complied with it. In spite of the complexity and sensitivity of the issues raised by the Parties to these proceedings, the Court succeeded in rendering a judgment which can be praised in its entirety for the contribution it made to the further development and interpretation of international human rights and humanitarian law rules and principles.

### 3.14 Individual Criminal Responsibility for Internationally Recognized Crimes

The ICJ has recently been seized with cases which raise interesting questions regarding the interplay between competing principles in international law, such as, on the one hand, individual criminal responsibility and universal jurisdiction and, on the other, immunity and exhaustion of domestic remedies. Cases such as the *Arrest Warrant*[835] and *Certain Criminal Proceedings in France*[836] have contributed towards clarifying the interplay between these principles. These judgments of the ICJ are likely to influence the development of international criminal law whose main aim is to provide justice through the punishment of perpetrators of gross violations of human rights and humanitarian law. Thus, this branch of international law has become an important element in the struggle for the international enforcement of human rights and humanitarian law. Of specific interest in both cases is the *modus operandi* of international law with a view to securing accountability for alleged perpetrators of internationally recognized crimes. Passing judgment upon cases which have a direct bearing on how and to what extent the principle of individual criminal responsibility for internationally recognized crimes is applied, such as the *Arrest Warrant* and the *Certain Criminal Proceedings in France* case is indicative of the possibility of the

833 C. Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, AJIL, Vol. 98, No. 3, 2004, on p. 460 concludes that 'The Court's compliance record is good, though not perfect'. For a detailed discussion of the issue of State compliance with ICJ decisions see *inter alia* C. Schulte, *Compliance with Decisions of the International Court of Justice*, Oxford University Press: New York, 2004, pp. 32-36 and pp. 89-91 and A. Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, EJIL, Vol. 6, No. 4, 1995, pp. 539-573.

834 The Court also took such a step in the *LaGrand* case (Germany *v*. US), Judgment of 27 June 2001, ICJ Reports 2001, pp. 506-8, paras. 111-116.

835 ICJ, *Case Concerning The Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo *v*. Belgium), Judgment of 14 February 2002, ICJ Reports 2002, p. 3 (*Arrest Warrant* case).

836 The *Certain Criminal Proceedings in France* case (Republic of the Congo *v*. France) commenced by an application of the Republic of the Congo on 11 April 2003 and is still pending before the ICJ.

Court to exert considerable influence on issues of crucial importance for upholding human rights values.

### 3.14.1 *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo *v.* Belgium, Judgment of 14 February 2002)

An arrest warrant was issued in April 2000 by an investigative judge in Brussels against Mr Abdulaye Yerodia Ndombasi (henceforth Mr Yerodia, as addressed by the Court), the Minister for Foreign Affairs of the Democratic Republic of Congo (henceforth Congo as addressed by the Court), on charges of perpetration of or co-perpetration in grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity, as crimes prohibited under Belgian criminal law.[837] That arrest warrant was passed by the Belgian National Central Bureau of Interpol to the Interpol General Secretariat on 12 September 2001, requesting the latter to issue a Red Notice in respect of Mr Yerodia, thus ensuring its international circulation.[838] Congo brought the case before the ICJ claiming that the immunity of its Foreign Affairs Minister had been violated and asserting that Belgium's 1993 Law, as amended in 1999, concerning the Punishment of Serious Violations of International Humanitarian Law contravened international law.[839] However, the fact that this contention was dropped at a later stage seems to suggest that the Belgian law, no matter how far-reaching, did not contravene international law.[840]

*A) Background*

This case was concerned essentially with the interaction between the principles of universal jurisdiction over internationally recognized crimes and that of immunity from criminal jurisdiction that accrues to an incumbent Minister for Foreign Affairs because of his or her position. The application of these two co-existing principles influences, at the same time, not only the level of protection of human rights values and the fight against impunity, but also the maintenance of friendly relations among States. Aware of the possible friction between these two important principles of international law, Judges Higgins, Kooijmans and Buergenthal went on to consider both of them in their joint separate opinion. As they stated:

837 *Arrest Warrant* case, ICJ Reports 2002, pp. 27-9, paras. 67-69.

838 *Ibid.*, p. 11, para. 20.

839 *Ibid.*, p. 19, para. 45.

840 This view seems to be supported by Judges Higgins, Kooijmans and Buergenthal. On p. 83, para. 65, of their Joint Separate Opinion they stated: 'It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of 'crimes against humanity' and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.'

> One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. *The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations* (emphasis added). This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it.[841]

It should be recalled that while this case was ongoing, individuals allegedly involved in the perpetration of acts of genocide, crimes against humanity and war crimes in the territory of the former Yugoslavia and Rwanda were being prosecuted by the *ad hoc* international criminal tribunals set up for this purpose by the SC under Chapter VII of the UN Charter, despite their official position as Heads of State or Government, or as high government officials.[842] Furthermore, the setting up of the ICC, endowed with complementary jurisdiction with regard to these crimes alongside the domestic courts, reflected *inter alia* the will of the international community to address permanently the issue of impunity. The changes in the national legislation of many States reflecting this overall trend, together with the charges brought over time against many senior state officials before Belgian, Spanish, or Swiss courts, are illustrative of the stir that universal jurisdiction had caused at a domestic level.[843] Below is a discussion of the views which the Court and members of the Court had with regard to the issue of universal jurisdiction.

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841 *Ibid*, Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, ICJ Reports 2002, p. 64, para. 5.

842 The International Military Tribunals (namely the Nürnberg and the Far East Tribunal) had already opened the way to the prosecution of persons on similar charges. Reference is made here to the *ad hoc* criminal tribunals for Yugoslavia and Rwanda which were established by the SC under Chapter VII of the UN Charter. The ICTY was established by resolution 827 of the SC (25 May 1993) and the ICTR was established by resolution 955 of the SC (8 November 1994). The *ratione materiae* jurisdiction of the ICTY includes grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, crimes against humanity, while the *ratione materiae* jurisdiction of the ICTR includes genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions, and of Additional Protocol II (AP II). Article 7 (2) of the ICTY Statute and Article 6 (2) of the ICTR Statute clarify that the official position does not relieve a person from responsibility, nor mitigates punishment. For a more detailed discussion of these two *ad hoc* international criminal tribunals see chapter 5 *infra*.

843 See *inter alia* A. Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, EJIL, Vol. 13, No. 4, 2002, pp. 859-862; S. Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium*, EJIL, Vol. 13, No. 4, 2002, pp. 877-895; S. de Smet, *The Immunity of Heads of States in US Courts after the Decision of the International Court of Justice*, Nordic Journal of International Law (NJIL), Vol. 72, No. 3, 2003, pp. 313-339.

*B) Some Views on Universal Jurisdiction from Within the Court*

This issue was addressed in the Court's judgment[844] in the separate opinions of President Guillame,[845] Judge Ranjeva,[846] Judge Koroma,[847] Judges Higgins, Kooijmans and Buergenthal,[848] Judge Rezek,[849] Judge Bula-Bula,[850] and in the dissenting opinions of Judge Al-Khasawneh[851] and Judge *ad hoc* van de Wyngaert.[852] It appears that

844 *Arrest Warrant*, pp. 24-6, paras. 59-61. Although the Court did not address the issue of universal jurisdiction as a result of applying the *non ultra petita* rule, these paragraphs offer an idea of its standpoint on this issue.

845 See Separate Opinion of President Guillame, pp. 43-5, paras. 15-17. In paragraph 16 of his opinion (pp. 43-4) he stated: 'Les Etats exercent avant tout leur compétence juridictionnelle pénale sur leur territoire. Dans le droit international classique, ils ne peuvent normalement connaître d'une infraction commise à l'étranger que si le délinquant ou, à la rigueur, la victime a leur nationalité ou si le crime porte atteinte à leur sûreté intérieure ou extérieure. Ils le peuvent en outre en cas de piraterie et dans les hypothèses de compétence universelle subsidiaire prévues par diverses conventions si l'auteur de l'infraction se trouve sur leur territoire. Mais en dehors de ces cas, le droit international n'admet pas la compétence universelle; il admet encore moins la competence universelle par défaut.'

846 See Declaration of Judge Ranjeva, pp. 55-8, paras. 5-12. In paragraph 12 of his declaration he stated: 'En conclusion, indépendamment de l'ardente obligation de render effective la nécessité de prévenir et de réprimer les crimes de droit international humanitaire pour favoriser l'avènement de la paix et de la sécurité internationale, et sans qu'il soit, pour autant, indispensable de réprouver la loi belge du 16 juin 1993 modifiée le 10 février 1999, il aurait été difficile, au regard du droit positif contemporain, de ne pas donner droit à la première conclusion initiale de la République démocratique du Congo.'

847 See Separate Opinion of Judge Koroma, pp. 60-2, paras. 5-11. In paragraph 9 of his opinion (pp. 61-2) he stated: '[t]he Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide.'

848 See Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 68-83, paras. 19-65. Their view is discussed in more detail below.

849 See Separate Opinion of Judge Rezek, pp. 92-4, paras. 5-10. In paragraph 10 of his opinion he stated: '[s]i la compétence de la justice belge pouvait être admise, l'immunité du ministre congolais des affaires étrangères aurait interdit l'engagement de l'action pénale ainsi que l'expédition par le juge, avec le soutien par le Gouvernement belge, du mandat d'arrêt international.'

850 See Separate Opinion of Judge *ad hoc* Bula-Bula, pp. 121-8, paras. 63-83. In paragraph 63 of his opinion he stated: 'Le principe d'une compétence dite universelle par une partie de la doctrine ne saurait être sérieusement contesté aux termes des dispositions genevoises pertinentes. Quelques réserves que je puisse avoir d'abord sur une terminologie peu heureuse au plan du droit international. Car, la summa divisio correcte, à mon sens, devrait retenir 1) la compétence territoriale, 2) la compétence personnelle, et 3) la compétence à raison de services publics.'

851 See Dissenting Opinion of Judge Al-Khasawneh, pp. 97-99, paras. 5-8. In paragraph 8 of his opinion (pp.98-9) he stated: 'While, admittedly, the readiness of States and municipal courts to admit of exceptions is still at a very nebulous stage of development, the situation is much more fluid than the Judgment suggests. I believe that the move towards greater personal accountability represents a higher norm than the rules on immunity and should prevail over the latter.'

852 See Dissenting Opinion of Judge *ad hoc* van de Wyngaert, pp. 163-177, paras. 40-67. In paragraph 67 of her opinion (pp. 66-7) she stated: 'Article 7 of Belgium's 1993/1999 Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. International law does not prohibit States from asserting prescriptive jurisdiction of this kind. On the contrary, international law permits and even encourages States to assert this form

besides the dissenting judges, all members of the Court rejected the notion of universal jurisdiction *in absentia*, as embedded in the Belgian law. Moreover, President Guillame cautioned that conferring jurisdiction upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found, would risk creating total judicial chaos.[853] In contrast, Judge *ad hoc* van de Wyngaert argued that international law not only does not prevent States from asserting universal jurisdiction for war crimes and crimes against humanity, but on the contrary, it encourages them to prosecute alleged perpetrators of such crimes. The judgment of the Court was silent on this issue.

### *C) Nature of the Immunity of a Foreign Affairs Minister and the Consequences of the Arrest Warrant*

In its judgment the Court firstly observed that in international law it is firmly established that, as is also the case for diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.[854] Further on, the Court pointed out that in customary international law the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but in order to ensure the effective performance of their functions on behalf of their respective States.[855] In order to determine the extent of these immunities the Court decided that it had to consider, first, the nature of the functions exercised by a Minister for Foreign Affairs. On a close examination of the nature of those functions the Court concluded that they are such that, throughout the duration of his or her office, a Minister for Foreign Affairs, when abroad, enjoys full immunity from criminal jurisdiction and inviolability.[856] The Court held that this immunity and inviolability protect the individual concerned against any act of authority of another State that would hinder him or her in the performance of his or her duties.[857] The

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of jurisdiction in order to ensure that suspects of war crimes and crimes against humanity do not find safe havens. It is not in conflict with the principle of complementarity in the Statute for an International Criminal Court.'

853 Separate Opinion of President Guillame, p. 43, para. 15.

854 Judgment, p. 21, para. 52.

855 *Ibid*., p. 21, para. 53.

856 *Ibid*., p. 22, para. 54.

857 Judges Higgins, Kooijmans and Buergenthal expressed their concern in view of a trend to conflate the issues of jurisdiction and immunities attached to a Minister for Foreign Affairs. In paragraph 71 of their Joint Separate Opinion (p. 84) they pointed out that, 'By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.'

approach of Judges Higgins, Kooijmans and Buergenthal was couched in more qualified terms. Thus, they stated:

> The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.[858]

In any case, besides the two dissenting opinions of respectively Judge Al Khasawneh and Judge *ad hoc* Van de Wyngaert, the general view of the Court was that Foreign Affairs Ministers enjoy immunity from criminal jurisdiction throughout the duration of their office.

Based on the terms of the arrest warrant the Court concluded that the issuing of the arrest warrant by the Belgian authorities on 11 April 2000 constituted an act intended to enable the arrest on Belgian territory of an incumbent Minister for Foreign Affairs on charges of war crimes and crimes against humanity. Consequently, the Court found itself bound to find that:

> [G]iven the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.[859]

The Court considered that its finding that the arrest warrant was unlawful under international law, and that its issue and circulation engaged Belgium's international responsibility, constituted a form of satisfaction which would make good the moral injury complained of by the Congo.[860]

*D) Was There a Change in the Nature of the Dispute?*

Belgium contended that, in the light of the new circumstances concerning Mr Yerodia, the case had assumed the character of an action of diplomatic protection but one in which the individual being protected had failed to exhaust local remedies, and that the Court accordingly lacked jurisdiction in the case and/or that the application was

858 Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, p. 84, para. 71.
859 Judgment, p. 29, para. 70.
860 *Ibid*., p. 31, para. 75.

inadmissible.[861] Because on 15 April 2001 Mr Yerodia ceased to be a member of the Congolese Government, Belgium maintained that two of the requests made by the Court in the Congo's final submissions concerned the legal effect of an arrest warrant issued against a private citizen of the Congo, and that these issues fell within the realm of an action of diplomatic protection.[862] Belgium added that the individual concerned had not exhausted all available remedies under Belgian law, a necessary condition before Congo could espouse the cause of one of its nationals in international proceedings.[863] While denying that this was an action for diplomatic protection, Congo maintained that it was bringing these proceedings in the name of the Congolese State, on account of the violation of the immunity of its Minister for Foreign Affairs.[864] Given that only when the Crown Prosecutor became seized of the case file and made submissions to the *Chambre du conseil* could the accused defend himself before the *Chambre* and seek to have the charge dismissed, Congo claimed that no domestic remedies were available in this case.[865] The Court noted that the Congo had never sought to invoke Mr Yerodia's personal rights before it.[866] In its view, despite the change in the professional situation of Mr Yerodia, the character of the dispute had not changed: the dispute still concerned the lawfulness of the arrest warrant issued on 11 April 2000 against a person who was at the time the Minister for Foreign Affairs of the Congo, and the question whether the rights of the Congo were violated by that warrant.[867] According to the Court, as the Congo was not acting in the context of protection for one of its nationals, Belgium could not rely upon the rules relating to the exhaustion of local remedies.[868] Thus, the Court rejected this contention by Belgium.

*E) Criticism of the Judgment*

A fair amount of criticism has been raised with regard to this judgment from some of the Judges as well as from different legal scholars.[869] For Judge Oda the issue of privileges accruing to a Minister for Foreign Affairs was not so clear under the law as:

861 *Ibid*., pp. 16-7, para. 37.
862 *Ibid*., p. 17, para. 38.
863 *Ibidem*.
864 *Ibid*., p. 17, para. 39.
865 *Ibidem*.
866 *Ibid*., p. 17, para. 40.
867 *Ibidem*.
868 *Ibidem*.
869 There were three Judges issuing Dissenting Opinions, namely Judge Oda, Judge Al-Khasawneh, Judge *ad hoc* Van den Wyngaert and six Judges who issued Separate Opinions, namely President Guillame, Judge Koroma, Judge Higgins, Judge Kooijmans, and Judge Buergenthal (the last three issued a Joint Separate Opinion), and Judge *ad hoc* Bula-Bula. There was also a Declaration issued by Judge Ranjeva. For scholarly articles on this case see *inter alia* K.R. Gray, *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), EJIL, Vol. 13. No. 3, 2002; A. Cassese, *When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, EJIL, Vol. 13, No. 4, 2002; S. Wirth, *Immunity for Core Crimes? The ICJ's Judgment*

> 'Neither the 1961 Vienna Convention on Diplomatic Relations nor any other convention spells out the privileges of Foreign Ministers and the answer may not be clear under customary international law.'[870]

Further in his dissenting opinion he questioned the need for passing judgment at all on this issue:

> The Court, after quoting several recent incidents in European countries, seems to conclude that Ministers for Foreign Affairs enjoy absolute immunity (Judgment, paras. 56-61). It may reasonably be asked whether it was necessary, or advisable, for the Court to commit itself on this issue, which remains a highly hypothetical question as Belgium has not exercised its criminal jurisdiction over Mr. Yerodia pursuant to the 1993 Belgian Law, as amended in 1999, and no third State has yet acted in pursuance of Belgium's assertion of universal jurisdiction.[871]

Even agreeing that the issuing and international circulation of the arrest warrant by the Belgian authorities failed to respect the immunity of Mr Yerodia, then the incumbent Minister for Foreign Affairs of the Congo,[872] Judge Oda was expressing a legitimate concern regarding the potential influence of this decision on the ongoing development of domestic criminal law regarding the prosecution of internationally recognized crimes.

Regrettably, the parties managed to water down the case to the issuing and international circulation of an arrest warrant. Although some of the Judges addressed the issue of universal jurisdiction in their opinions, it still remains an issue to be settled by the Court.[873] The restriction posed by the *non ultra petita* rule resulted in the Court abstaining from answering the thorny question of the possibility of prosecuting foreign senior State officials for internationally recognized crimes before domestic courts. However, the Court rightly emphasized that,

> [I]*mmunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well

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*in the Congo v. Belgium Case*, EJIL, Vol. 13, No. 4, 2002; M. Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?*, EJIL, Vol. 13, No.4, 2002, M. Frulli, *The ICJ Judgement on the Belgium v. Congo Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes*, German Law Journal (GLJ), No. 3, March 2002.

870 Dissenting Opinion of Judge Oda, p. 52, para. 14.

871 *Ibid*., pp. 52-3, para. 14.

872 By thirteen votes to three (Judge Oda, Judge Al-Khasawneh, and Judge *ad hoc* Van de Wyngaert voting against).

873 See the Separate Opinion of President Guillame, the Dissenting Opinions of Judge Al-Khasawneh and Judge *ad hoc* Van den Wyngaert, the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal.

> bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.'[874]

While this finding of the Court, namely that immunity from criminal jurisdiction and individual criminal responsibility are two separate concepts, is correct as far as it goes, it is arguable that the Court overlooked the recent developments in the field of international criminal law. There was growing consensus within the international community towards further limiting immunity while emphasizing accountability for internationally recognized crimes. Acknowledging this trend in their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal stated:

> The increasing recognition of the importance of ensuring that the perpetrators of serious international crimes do not go unpunished has had its impact on the immunities which high State dignitaries enjoyed under traditional customary law. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also given rise to a tendency, in the case of international crimes, to grant procedural immunity from jurisdiction only for as long as the suspected State official is in office.[875]

The establishment of the *ad hoc* tribunals for Yugoslavia and Rwanda and later that of the International Criminal Court was a clear indication of this trend. Looking at the statutes of these international judicial bodies one can find that immunity on the ground of official capacity is expressly waived giving priority to the prosecution of individuals charged with grave violations of international law.[876] Further, the impact of the establishment and practice of these international judicial bodies for such prosecutions on a national level was in the view of many given little weight by the Court.

Last, but not least, although the Court was right in finding that the character of the dispute had not changed, it seemingly failed to take account of the substantial change of circumstances in this case. According to this view, which was taken by a considerable number of judges,[877] this failure was the cause of the erroneous ruling of the Court that Belgium had to cancel the arrest warrant against Mr Yerodia by means of its own choosing and had to inform the authorities to whom that warrant was circulated.[878] Besides this ruling having no practical significance given that Mr Yerodia had ceased to be the Minister for Foreign Affairs, the Court seems to contradict itself. In paragraph 61 the Court had stated:

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874 Judgment, p. 25, para. 60.

875 Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, p. 85, para. 74.

876 Article 7 (2) of the ICTY Statute; Article 6 (2) of the ICTR Statute; Article 27 of the ICC Statute.

877 It should be noted that six judges of the Court voted against this ruling in the *dispositif*, namely Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; and *Judge* ad hoc Van den Wyngaert.

878 Judgment, p. 33, para. 78 (3).

> [A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[879]

With Mr Yerodia being no longer the Minister for Foreign Affairs of Congo, or even holding any position in the government for that matter, the Court should have stopped short of ordering the cancellation of the arrest warrant. In view of these changed circumstances an apology from Belgium would have represented a better remedy.[880]

*F) Does Immunity Mean Impunity?*

After asserting that immunity does not mean impunity the Court listed a few scenarios when a high-ranking State official, whether an incumbent or former Minister for Foreign Affairs, would be liable to prosecution:

> Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. *First*, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.[881]

As expected, the *first* scenario envisioned by the Court refers to the prosecution of a Minister for Foreign Affairs by his/her own country under the relevant rules of domestic law. A simple survey shows, however, that such persons are rarely, if at all, tried in their own countries due to political reasons and an inability or unwillingness to prosecute them. Thus, although a possibility, and as such rightly listed here by the Court, in practice this scenario has not proved to be enough to put an end to impunity. In explaining the next possible scenario the Court stated:

> Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.
> Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or

879 *Ibid*., p. 25, para. 61.

880 See Dissenting Opinion of Judge Oda, p. 53, para. 15 and the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, pp. 89-90, paras. 86-89.

881 Judgment, p. 25, para. 61.

> subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.[882]

The *second* scenario is based upon a State explicitly waiving the immunity of its Minister for Foreign Affairs, thus clearing the way for his or her prosecution before foreign domestic jurisdictions. Again, it is quite unlikely to contemplate this scenario as usually a State would be only too uncomfortable, if not extremely reluctant, to have its high-ranking State officials prosecuted in the courts of another State. This would mean *inter alia* relinquishing one's own domestic criminal jurisdiction, a basic feature of State sovereignty, in favour of another State, thereby implicitly accepting the lack of a functioning judiciary. This simply appears to be a step too far for any State.

According to the *third* scenario a Minister for Foreign Affairs would be liable to prosecution after leaving office. On a national level it should be observed that anticipating the possibility of facing criminal proceedings after leaving office such high-ranking officials have either granted themselves blanket amnesties or have requested guarantees of non-prosecution in exchange for stepping down from office.[883] Although, as practice shows, the legal validity of such amnesties or guarantees of non-prosecution is far from certain, as being in conflict with human rights, such instruments remain a cause for concern. In other cases knowledge of a vulnerability to prosecution after leaving office has proved to be an incentive for clinging to power, or for continuing to hold on to office, at least officially.

Lastly, the Court indicated its fourth possible scenario, under which a high-ranking State official could be subject to criminal proceedings: prosecution before international courts. It stated:

> Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[884]

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882 *Ibidem*.

883 For example, amnesties were given in certain countries in Latin America where during the mid 70s many people were killed or disappeared during Operation Condor. The countries involved were Argentina, Chile, Bolivia, Paraguay, and Uruguay. The 'terror archives' which were discovered in December 1992 by José Fernandez, a Paraguayan judge, counted 50,000 persons murdered, 30,000 'disappeared' and 400,000 people incarcerated. For more information on 'Operation Condor' see *inter alia* J. Dinges, *The Condor Years: How Pinochet and His Allies Brought Terrorism to Three Continents*, New Press, 2004; P. Kornbluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability (A National Security Archive Book)*, New Press, 2003; J.P McSherry, *Predatory States: Operation Condor and Covert War in Latin America*, Rowman & Littlefield Publishers, Inc., 2005.

884 Judgment, p. 25-6, para. 61.

In this last scenario the Court indicated the possibility of having such persons prosecuted before international criminal courts. As a matter of fact it is mainly because the first three scenarios discussed above have not succeeded in ending impunity that this other possibility has been envisioned and pursued. The end of the Cold War allowed for the necessary agreement within the international community on the need for the establishment of several such international and internationalized judicial bodies. While listing all the possible scenarios, it would have benefited clarity if the Court had drawn a clearer distinction from the beginning between the prosecution of these persons before domestic courts or before international criminal courts. Besides avoiding any possible confusion, such a clarification would have duly acknowledged the contribution of these international criminal judicial bodies in upholding humanitarian values and enforcing the provisions of international human rights instruments, thereby providing justice to the victims of crimes against humanity.

*G) Concluding Remarks*

This judgment of the Court is also amongst those which have given rise to extensive commentary.[885] It should be emphasized that by stating that 'immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility' the Court implied that committing war crimes or gross violations of human rights would lead to prosecution. This understanding has given rise to a practice where immunity from jurisdiction is only granted for as long as the suspected State official is in office. As the Court pointed out, once out of office, immunity from prosecution on counts of internationally recognized crimes such as genocide, war crimes, and crimes against humanity would cease to exist. While regretting that the Court ceded to the wishes of the Parties to the dispute not to address the issue of universal jurisdiction, it should be acknowledged that the findings of the Court contribute to a better clarity of international norms concerning the immunity of incumbent Ministers for Foreign Affairs.

By emphasizing that *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes committed, irrespective of their gravity, the Court upheld the principle of individual criminal responsibility for gross violations of human rights. As the Court explained, jurisdictional immunity may well bar prosecution for a certain period or for certain offences, but it does not exonerate the person to whom it applies from all criminal responsibility. Undoubtedly, the above-mentioned finding of the Court goes some of the way towards enhancing the deterrent effect attributed to the principle of individual criminal responsibility, thus contributing to a better level of human rights protection.

885 See *supra* note 869.

### 3.14.2 *Case Concerning Certain Criminal Proceedings in France* (The Republic of the Congo *v.* France, 9 December 2002 – ongoing)[886]

*A) Background*

The Republic of the Congo (the Congo) brought a case before the Court against France for legal proceedings commenced by the latter's legal authorities on charges of crimes against humanity and torture against *inter alia* the Congolese Minister of the Interior, Mr Pierre Oba, in connection with which a warrant was allegedly issued for the witness hearing of the President of the Congo, Mr Denis Sassou Nguesso.[887] At the time of filing its Application instituting proceedings, the Congo requested the indication of a provisional measure, namely the suspension of the proceedings being conducted by the Meaux investigating judge against several Congolese senior state officials.[888] This case is currently on the docket of the Court, therefore only the legal proceedings before the Court with regard to Congo's request for the indication of provisional measures will be dealt with here. Focusing on the pleadings of the Parties during the hearings on the provisional measures gives a clear indication of, on the one hand, the existing possibilities under French criminal law for prosecuting foreign high-ranking State officials and, on the other, of the limitations posed upon criminal prosecution by the customary rule of the immunity of foreign dignitaries.

*B) Criminal Proceedings in France against Congolese Senior State Officials*

Provisional measures were requested by the Congo regarding the investigation and prosecution undertaken by the Public Prosecutor of the Paris *Tribunal de grande instance*, the Public Prosecutor of the Meaux *Tribunal de grande instance* and the investigating judges of those courts about individuals having Congolese nationality, expressly naming H.E. Denis Sassou Nguesso, President of the Republic of the Congo, H.E. General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration, General Norbert Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard. The relief sought by the Congo was for the Court to declare that the French Republic should annul immediately the measures of investigation and prosecution of the aforementioned persons by the French judicial authorities. France accepted the jurisdiction of

886 The Republic of the Congo should not be mistaken with the Democratic Republic of the Congo, a country which has brought quite a few cases before the ICJ, such as the *Armed Activities* cases and the *Arrest Warrant* case. The two are neighboring countries.

887 ICJ Press Release 2002/37 of 9 December 2002 in the *Case Concerning Certain Criminal Proceedings in France* (The Republic of the Congo *v*. France), available at: *http://www.icj-cij.org/docket/ index. php?pr=60&code=cof&p1=3&p2=3&p3=6&case=129&k=d2* (last accessed on 1 November 2007).

888 ICJ, *Case Concerning Certain Criminal Proceedings in France* (The Republic of the Congo *v*. France), *Application and Request for the Indication of Provisional Measures of 11 April 2003* (Application), p. 12, available at: *http://www.icj-cij.org/docket/files/129/7066.pdf* (last accessed on 1 November 2007).

the Court by a letter of its Minister for Foreign Affairs of 8 April 2003, this being the first example of a respondent State accepting the jurisdiction of the Court through the operation of Article 38, paragraph 5, of the Rules of Court.[889]

The grounds on which Congo instituted proceedings before the Court were:

> First, the violation of the principle that a State may not, in breach of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations, exercise its authority on the territory of another State,
>
> the unilateral attribution to itself of universal jurisdiction in criminal matters
>
> and arrogation to itself of the power to prosecute and try the Minister of the Interior of a foreign State for crimes allegedly committed in connection with the exercise of his powers for the maintenance of public order in his country',
>
> and second, alleged violation of the criminal immunity of a foreign Head of State – an international customary rule recognized by the jurisprudence of the Court.[890]

On 5 December 2001 the International Federation of Human Rights Leagues, the Congolese Observatory of Human Rights and the *Ligue française pour la defense des droits de l'homme et du citoyen* had filed a complaint with the Public Prosecutor of the Paris *Tribunal de grande instance* 'for crimes against humanity and torture' allegedly committed in the Congo against Congolese citizens, expressly naming Mr Nguesso, Mr Oba, Mr Dabira, and Mr Adoua.[891] The Public Prosecutor of the Paris *Tribunal de grande instance* transmitted that complaint to the Public Prosecutor of the Meaux *Tribunal de grande instance*, who ordered a preliminary enquiry and then on 23 January 2002 issued a *réquisitoire*, *i.e.* an application for a judicial investigation of the alleged offences; the investigating judge of Meaux thereby initiated an investigation.[892]

The human rights NGOs argued in their complaint that the French courts had jurisdiction as regards crimes against humanity by virtue of a principle of international customary law providing for universal jurisdiction over such crimes, and as regards the crime of torture, on the basis of Articles 689-1 and 689-2 of the French Code of

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889 Article 38, paragraph 5 reads: 'When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case.'

890 Application, p. 1.

891 Official Records, Oral Proceedings of Congo, 28 April 2003, CR 2003/20 (translation), p. 8, available at: *http://www.icj-cij.org/docket/files/129/4117.pdf* (last accessed on 1 November 2007).

892 For a detailed explanation of the facts see Official Records, Oral Proceedings of France, 28 April 2003, CR 2003/21 (translation), pp. 13-16, available at: *http://www.icj-cij.org/docket/files/129/4113.pdf* (last accessed on 1 November 2007).

Criminal Procedure. The *Procureur de la République of the Tribunal de grande instance of Meaux*, in his *réquisitoire* of 23 January 2002, requested an investigation into both crimes against humanity and torture, without mentioning any jurisdictional basis other than Article 689-1 of that Code. The complaint was referred to the *Tribunal de grande instance* of Meaux based on the fact that General Norbert Dabira possessed a residence in the area of that court's jurisdiction. It should be noted at this point that the investigation was initiated against a non-identified person, not against any of the Congolese persons named in the complaint, thus this was a seizure *in rem* of the investigative judge.[893] The testimony of General Dabira was first taken on 23 May 2002 by judicial police officers who had taken him into custody, and then on 8 July 2002 by the investigating judge, as a *témoin assisté*, *i.e.* a legally represented witness.[894] Mr Ronny Abraham, legal counsel for France, explained that a *témoin assisté* in French criminal procedure is a person who is not merely a witness, but to some extent a suspect, and who therefore enjoys certain procedural rights such as assistance by counsel and access to the case file not conferred on ordinary witnesses.[895] On 16 September 2002 the investigating judge issued against General Dabira, who had by then returned to the Congo, a *mandat d'amener*, *i.e.* a warrant for immediate appearance, which, it was explained by France at the hearing, could be enforced against him should he return to France, but is not capable of being executed outside French territory.[896]

Congo claimed that when the President of the Congo, Mr Nguesso, was on a State visit to France, the investigating judge issued a *commission rogatoire*, *i.e.* a warrant, to judicial police officers instructing them to take testimony from him.[897] Nevertheless, Congo was not able to produce this document, and France informed the Court that in fact no *commission rogatoire* was issued against President Sassou Nguesso, but that the investigating judge sought to obtain evidence from him under Article 656 of the Code of Criminal Procedure, applicable where evidence is sought through diplomatic channels from a 'representative of a foreign power'.[898] As a matter of fact Congo had acknowledged in its Application that President Sassou Nguesso was never *mis en examen*, nor called as an assisted witness.[899] The parties were agreed that no acts of investigation had been taken in the French criminal proceedings against the other Congolese persons named in the Application,[900] namely Mr Oba, Minister of the

893 Official Records, Oral Proceedings of Congo, 29 April 2003, CR 2003/22 (translation), p. 5, available at: *http://www.icj-cij.org/docket/files/129/4109.pdf* (last accessed on 1 November 2007). See France's reply on this issue on CR 2003/23 (translation), p. 5, available at: *http://www.icj-cij.org/docket/files/129/4105.pdf* (last accessed on 1 November 2007).

894 Official Records, Oral Proceedings of France, CR 2003/21 (translation), pp. 14-15.

895 Official Records, Oral Proceedings of France, CR 2003/21 (translation), p. 9.

896 *Ibid.*, see also p. 15.

897 Official Records, Oral Proceedings of the Congo, CR 2003/21 (translation), p. 9.

898 Official Records, Oral Proceedings of France, CR 2003/21 (translation), p. 15.

899 Application, p. 9.

900 *Certain Criminal Proceedings* case (The Congo *v.* France), *Request for the Indication of a Provisional Measure*, Order of 17 June 2003, ICJ Reports 2003, p. 106, para. 17.

Interior, and General Blaise Adoua, Commander of the Presidential Guard, nor in particular had any application been made to question them as witnesses.

*C) Risk of Irreparable Prejudice*

The Court noted in its Order that the circumstances, which in Congo's view required the indication of measures requiring the suspension of the French proceedings, were set out in the Congo's request:

> The proceedings in question are perturbing the international relations of the Republic of the Congo as a result of the publicity accorded, in flagrant breach of French law governing the secrecy of criminal investigations, to the actions of the investigating judge, which impugn the honour and reputation of the Head of State, of the Minister of the Interior and of the Inspector-General of the Armed Forces and, in consequence, the international standing of the Congo. Furthermore, those proceedings are damaging to the traditional links of Franco-Congolese friendship. If these injurious proceedings were to continue, that damage would become irreparable.[901]

It was observed by the Court that at the hearings Congo re-emphasized the irreparable prejudice which in its contention would result from the continuation of the French criminal proceedings before the *Tribunal de grande instance* of Meaux, in the same terms as in the request; and that the Congo further stated that the prejudice which would result if no provisional measures were indicated would be the continuation and exacerbation of the prejudice already caused to the honour and reputation of the highest authorities of the Congo, and to internal peace in the Congo, to the international standing of the Congo and to Franco-Congolese friendly relations.[902]

The Court also singled out the rights which, according to Congo's Application, were subsequently to be adjudged to belong to the Congo in the present case. Those rights were, first, the right to require a State, in this case France, to abstain from exercising universal jurisdiction in criminal matters in a manner contrary to international law, and second, the right to respect by France for the immunities conferred by international law on, in particular, the Congolese Head of State.[903] The Court observed that the purpose of any provisional measures it could indicate in this case should be to preserve these claimed rights so that the irreparable prejudice claimed by the Congo would not be caused to those rights as such.[904] Further, the Court noted that in any event it had not been informed in what practical respect there had been any deterioration internally or in the international standing of the Congo, or in Franco-Congolese relations, since the institution of the French criminal proceedings, nor had any evidence been placed before the Court of any serious prejudice or threat of prejudice of

901 *Ibid*., p. 108, para. 26.
902 *Ibid*., p. 108, para. 27.
903 *Ibid*., p. 108, para. 28.
904 *Ibid*., p. 108, para. 29.

this nature.[905] As the Congo bore the burden of proof, the Court was looking for more than just assertions on the risk posed by the French criminal legal proceedings to the international standing of Congo or Franco-Congolese relations.

In the Court's view the first question before it was whether the criminal proceedings currently pending in France entailed a risk of irreparable prejudice to the right of the Congo to respect by France of the immunities of President Sassou Nguesso as Head of State, such as to require, as a matter of urgency, the indication of provisional measures.[906] Taking note of the statements made by the Parties as to the relevance of Article 656 of the French Code of Criminal Procedure,[907] and of a number of statements made by France as to respect in French criminal law for the immunities of Heads of State,[908] the ICJ then observed that at this stage that it was not called upon to determine the compatibility of the procedure so far followed in France with the rights claimed by the Congo, but only the risk or otherwise of the French criminal proceedings causing irreparable prejudice to such claimed rights.[909] On the information before it the Court found that, with regard to President Sassou Nguesso, there was at the present time no risk of irreparable prejudice, so as to justify the indication of provisional measures as a matter of urgency; and neither was it established that any such risk existed with regard to General Oba, the Minister of the Interior of the Republic of the Congo.[910]

In considering as a second question the existence of a risk of irreparable prejudice in relation to the claim of the Congo that the unilateral assumption by a State of universal jurisdiction in criminal matters constituted a violation of a principle of international law, the Court observed that in this respect the question before it was thus whether the proceedings before the *Tribunal de grande instance* of Meaux involved a threat of irreparable prejudice to the rights invoked by the Congo justifying, as a matter of urgency, the indication of provisional measures.[911] The Court noted that with regard to President Sassou Nguesso, the request for a written deposition made by the investigating judge on the basis of Article 656 of the French Code of Criminal Procedure was not transmitted to the person concerned by the French Ministry of Foreign Affairs; that, as regards General Oba and General Adoua, they had not been the subject of any procedural measures by the investigating judge; and that no measures of this

905 *Ibidem*.

906 *Ibid*., p. 109, para. 30.

907 This article reads in its relevant part: 'The written deposition of a representative of a foreign power shall be requested through the Minister for Foreign Affairs. If the request is agreed to, that deposition shall be received by the President of the court of appeal or by a judicial officer whom he will have delegated.'

908 See the explanations of the Counsel for France in the Official Records, Oral Proceedings of France, CR 2003/21 (translation), pp. 11-12, available at *http://www.icj-cij.org/docket/files/129/4113.pdf* (last accessed on 1 November 2007).

909 Order of 17 June 2003, *Request for the Indication of a Provisional Measure*, ICJ Reports 2003, p. 110, para. 34.

910 *Ibid.*, p. 110, para. 35.

911 *Ibid.*, pp. 110-111, para. 36.

nature were threatened against these three persons.[912] Therefore, the Court concluded that there was no urgent need for provisional measures to preserve the rights of the Congo in that respect.

As regards General Dabira, the Court noted that it was acknowledged by France that the criminal proceedings instituted before the *Tribunal de grande instance* of Meaux had an impact upon his own legal position, inasmuch as he possessed a residence in France, and was present in France and heard as an assisted witness, and in particular because, having returned to the Congo, he declined to respond to a summons from the investigating judge, who thereupon issued a *mandat d'amener* against him. Whereas the practical effect of a provisional measure of the kind requested would be to enable General Dabira to enter France without fear of any legal consequences, the Congo, in the Court's view, did not demonstrate the likelihood or even the possibility of any irreparable prejudice to the rights it claimed resulting from the procedural measures taken in relation to General Dabira.[913] The Court concluded that the circumstances, as they presented themselves to the Court, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures.[914] Only a joint separate opinion by Judge Koroma and Judge Vereshchetin and a dissenting opinion by the Congo's *ad hoc* Judge de Cara were appended to the Court's order.[915]

*D) Concluding Remarks*

Although along broad lines similar to the *Arrest Warrant* case the *Certain Criminal Proceedings* case differs from the former in at least two aspects. First, the cases differ in the number of the persons involved, and their official status, respectively one, the former Minister for Foreign Affairs in the former case and four persons ranking from Head of State to Commander of the Presidential Guard in the latter. Thus, the Court will have to consider what immunities, if any, would attach to a Minister of the Interior and high-ranking military officers. Second, the former case was about the issuing and international circulation of an arrest warrant, while the latter concerned the commencement of legal proceedings before French courts against incumbent Congolese senior State officials and an alleged warrant for a hearing of the Congolese President Ngues-

912 *Ibid.*, p. 111, para. 37.
913 *Ibid.*, p. 111, para. 38.
914 *Ibid.*, p. 111, para. 39.
915 In their Joint Separate Opinion Judges Koroma and Vereshchetin stated that in their view the Court appeared not to have given enough weight to the risk of irreparable harm which could occur in the Congo as a result of the continuation of the criminal proceedings; see paras. 4-8 of their opinion. In his lengthy dissenting opinion the Congo's Judge *ad hoc* de Cara argued about the necessity for the indication of provisional measures finishing with the following statement: 'A défaut d'engagement spécifique de la France sur la portée accordée à cet acte de poursuite, dans les circonstances présentes, la suspension des mesures procédurales françaises qui actuellement se limitent pour l'essentiel au réquisitoire du 23 janvier 2002 eut été de nature à éviter l'aggravation du différend en maintenant le statu quo sans altérer l'équilibre des droits respectifs des parties.'

so. Apparently, the stage reached in the legal proceedings in the two cases differs to a certain degree. That is also a factor that the Court would need to take into consideration when adjudicating the possible wrongfulness of the legal steps undertaken in France against the Congolese officials.

This case is a clear illustration of the competition between the principles of individual criminal responsibility and universal jurisdiction, on the one side, and the principle of immunity from criminal proceedings of a Head of State, on the other. It is noteworthy that the criminal case against the Congolese officials, which finished before the ICJ, stemmed from a complaint filed before the French legal authorities by a group of human rights NGOs on charges of crimes against humanity and torture. Such a development where human rights NGOs or victims themselves can bring cases before domestic courts against high-ranking officials of a foreign country for having allegedly committed crimes against humanity, war crimes, or torture is fairly recent.[916] That is due to the amendments made by numerous States to their national criminal law to give effect to the international obligations which they have taken upon themselves on the basis of international human rights instruments and more recently of those foreseen under the ICC Statute. The commencement of legal proceedings in France on such charges also bears witness to the importance of and the role that such NGOs and civil society in general can have in the protection and enforcement of human rights in general.

Given that the ICC operates on the principle of complementarity, it is primarily the responsibility of the national jurisdictions of the member States to prosecute domestically alleged perpetrators of the crime of genocide, crimes against humanity, and war crimes, as crimes enlisted under the ICC Statute.[917] However, it remains to be seen whether such cases, especially high-profile ones such as the one brought before the French courts, will be encouraged, accepted, or at least tolerated, as one of the means for national jurisdictions to fulfil their duty under the Rome Statute in particular or in enforcing the international law of human rights instruments in general. The Court's decision in this case is eagerly awaited, as this would be the second opportunity for the Court to clarify the relation between the principle of universal jurisdiction for internationally recognized crimes and that of immunity for foreign high-ranking States officials. The time-limits for receiving the Reply of the Congo and the Rejoinder by France have been postponed several times. The Rejoinder by France is expected on 11 August 2008.

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916 Oberlandesgericht Stuttgart, *Center for Constitutional Rights v. Rumsfeld et al*. (September 13, 2005). In November 2004 the Center for Constitutional Rights (the 'CCR') and four Iraqi nationals filed a complaint with the German Federal Prosecutor's Office against high-ranking United States civilian and military officials over alleged war crimes committed in Abu Ghraib prison and elsewhere in Iraq. See International Law in Brief, *Developments in international law, prepared by the Editorial Staff of International Legal Materials,* October 31, 2005, American Society of International Law (in file with author).

917 There is a fourth crime which falls under the jurisdiction of the ICC, namely the crime of aggression. However, a definition of this crime still has to be agreed upon by the Assembly States Parties to the ICC Statute. On this issue see respectively Articles 5, 121 and 123 of the ICC Statute.

## PART III APPRAISAL OF THE COURT'S CONTRIBUTION TO INTERNATIONAL HUMAN RIGHTS LAW

Even a quick glance at the case law of the Court reveals the variety of issues with clear implications for the development of international human rights law rules and principles it has dealt with. Nevertheless, assessing the contribution of the Court to the interpretation and development of these rules and principles is not an easy task. Human rights encompass an array of civil, political, economic, social, and cultural rights whose promotion and protection is considered as one of the fundamental aims of the UN, of which the ICJ is the principal judicial organ. The approach taken here is that of focusing on the case law of the ICJ either relating directly to human rights issues, or shedding light on important aspects related to such issues. Therefore, for example, although potentially cases related to the settlement of border disputes could have an important effect on the enjoyment of human rights and the maintenance of international peace and security, nevertheless, they have not been dealt with as distinctly different from genuine human rights-related disputes.

It is noteworthy, however, that the Court's clarification of what constitutes customary international law has evident relevance in the assessment of the possible achievement by certain human rights principles of the status of customary international law. In the *North Sea Continental Shelf* cases the ICJ held that for a rule to qualify as part of customary international law it has be supported by an extensive and virtually uniform state practice. This process should have occurred in such a way so as to show the involvement of a general recognition of a rule of law or legal obligation. Consequently, the recognition of many principles of human rights such as the prohibition of genocide, the prohibition of torture, the prohibition of slavery and of racial discrimination, as part of customary international law or even *jus cogens* is supported by this general finding of the Court. Further, the conclusion of the process of solidifying these principles of human rights into part of customary international law is also based on the strength of the civilizing power these principles embody; a strength stemming from the more general principle of elementary considerations of humanity.

While considering the relationship between customary and treaty law in the context of the sources of international law the Court stated: 'Even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.'[918] Therefore, human rights principles, which have achieved the status of customary international law such as the prohibition of torture, the prohibition of genocide, and so on are to be respected as part of the obligations which a State has under customary international law, besides the obligations undertaken by a State under the relevant international human rights instruments. This finding is very important for the system of the international protection of human rights, as the separate existence of customary and treaty law

918 *Nicaragua* case (*Merits*), ICJ Reports 1986, para. 178.

rules or principles ensure a double-layered obligation to respect these human rights. That enhances considerably the protection accruing to individuals under international law.

However, in spite of the abundance of human rights instruments which are widely ratified, the enforcement of these commonly agreed international human rights standards continues to be problematic. That is why in the Vienna Declaration and Programme of Action of 1993 reference was made to violations of human rights in disregard of standards contained in both international human rights instruments and international humanitarian law and about the lack of sufficient and effective remedies for the victims.[919] Further, deep concern was expressed about violations of human rights during armed conflicts affecting the civilian population, especially women, children, the elderly and the disabled. A call was made to States and all parties to armed conflicts strictly to observe international humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards for the protection of human rights, as laid down in international conventions.[920] These statements pointed clearly to the complementary application of these two branches of law with the aim of alleviating as much as possible the human suffering caused by armed conflict.

The World Conference on Human Rights also expressed its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continued to occur in different parts of the world. According to the adopted document, such violations and obstacles included torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and a lack of the rule of law.[921] Undoubtedly, the World Conference on Human Rights was a powerful call on the part of the international community for an effective application of human rights rules and principles by making use of both international human rights law and international humanitarian law instruments.

International law, this 'gentle civilizer of nations', as Koskenniemi has referred to it,[922] is divided into many branches, an important one of which is that of international human rights law. As Teson has pointed out, international law must be wed to notions of political legitimacy associated with consent, individual rights and human dignity.[923]

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919 A/CONF.157/23 of 12 July 1993.

920 A/CONF.157/23 of 12 July 1993.

921 Documents of this conference are available at: *http://www.ohchr.org/english/law/vienna.htm* (last accessed on 1 November 2007).

922 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2004.

923 F.R. Teson, *Le Peuple, C'est Moi! The World Court and Human Rights*, AJIL, Vol. 81, No. 1, 1987, p. 183.

The Court's judgments and advisory opinions which have contributed to the interpretation and development of the international law of human rights rules and principles encompass a period of over sixty years. As is the case with every human activity, this contribution does not represent an immaculate record, as the work of the Court has been subject to both praise and criticism. Two of the main obstacles standing in the way of the Court towards a greater contribution in developing and interpreting human rights rules and principles have been the lack of compromissory clauses in instruments of the international law of human rights accompanied by the lack of standing before the Court for individuals. Fortunately, the Court's jurisdiction *ratione materiae* is unlimited; thus, human rights violations being a breach of international law would obviously fall under the Court's jurisdiction. As shown by the Court's case law, despite these considerable obstacles, the Court has been able to progressively develop and interpret norms of the international law of human rights, hence contributing to an international legal order where human rights are given a prominent place.

That prominent place that international human rights law occupies is due to the entrenchment of the promotion and protection of human rights as part of the purposes and aims of the UN. The Court has referred to the weight and place in the international law of human rights of the human rights clauses of the UN Charter on two occasions.[924] In a remarkable passage the ICJ declared that conduct by a State, which violates the fundamental rights of individuals, is contrary to the principles of the Charter. In this way, the Court confirmed that respect for the human rights clauses of the Charter is an important substantive obligation among all other obligations undertaken by States under the UN Charter. In the *Hostages* case the Court asserted that wrongfully to deprive human beings of their freedom and to subject them to physical constraints in conditions of hardship is in itself manifestly incompatible with the principles of the UN Charter, as well as with the fundamental principles enunciated in the UDHR.[925] Further, in the advisory opinion on Namibia concerning the actions of South Africa the Court held that '…denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter'.[926] Certainly, these findings point to the obligations incumbent upon States under both the Charter and the UDHR to respect individuals' human rights.

The detailed analysis of the Court's case law undertaken in part II of this chapter allows us to draw the following conclusions:

1) The human rights clauses of the UN Charter contain binding legal obligations (*South West Africa Cases* and *Tehran Hostages* case);

924 Namely the *Hostages* case (US *v*. Iran), ICJ Reports 1980, p. 42, para. 91 and the Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, p. 57, para. 13.

925 *Hostages* case (US *v*. Iran), Judgment of 24 May 1980, ICJ Reports 1980, p. 42, para. 91.

926 ICJ, *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, ICJ Reports 1971, p. 57, para. 131.

2) The principles and rules of international law concerning the fundamental rights of human beings engender obligations *erga omnes* (*Barcelona Traction* case).

3) The right of peoples to self-determination is a right which has an *erga omnes* character under international law (*Western Sahara*, *East Timor*, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*).

4) Seemingly, not only international human rights treaties, but also other international instruments such as the Vienna Convention on Consular Relations create individual rights for natural persons, as recognized by the Court in the *LaGrand* case and in the *Avena and other Mexican Nationals* case.

5) The protection afforded to individuals under international human rights instruments does not cease in situations of armed conflict except for derogations of the kind to be found under Article 4 of the ICCPR (Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and *Armed Activities* case (DRC *v*. Uganda)).

6) The substantive obligations arising under Articles I (to prevent and punish genocide) and III of the Genocide Convention are not on their face value limited by territory and State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of this crime or an associated one (*Application of the Genocide Convention* (Bosnia and Herzegovina *v*. Serbia and Montenegro)).

7) Immunity does not mean impunity, therefore the perpetrators of gross violations of human rights can be held accountable either before domestic courts or before international courts (*Arrest Warrant* case (DRC *v*. Belgium))

Obviously, the Court's position, as expressed through its case law, is that fundamental human rights, as provided for in several international human rights instruments, are to be respected and promoted by all States for they have a civilizing and humanitarian character. This conclusion is reinforced by the fact that the Court itself introduced the concept of 'obligations *erga omnes*' in its judgment in the *Barcelona Traction* case, emphasizing the interest of the international community in ensuring respect for certain fundamental human rights.[927] The importance for the international law of human rights of these two concepts, namely 'elementary considerations of humanity' and 'obligations *erga omnes*,' cannot be overemphasized, for together they provide a basic, but solid foundation for the human rights protection system. It can be said that together these two concepts represent the essence of international human rights law.

927 *Barcelona Traction* case, (*Merits*), Judgment of 5 February 1970, ICJ Reports 1970, p. 32, para. 33.

The importance of international human rights law instruments and the work of their monitoring bodies in ensuring a better protection of human rights worldwide has been acknowledged and utilized by the Court in several of its judgments and advisory opinions. Its remarkably important findings with regard to the applicability of these instruments and the legal consequences of their application with regard to States, the UN and also the rights accruing to individuals are an important contribution by the Court to international human rights law. However, despite calls from civic society for a better use of such international instruments in order to bring the perpetrators of gross violations of human rights to justice there is also a fear, expressed even by members of the Court, of what is commonly referred to as a 'cacophony of voices'.[928] Far from a cacophony of voices, a proper application of these instruments would bring about an appropriate culture of respect for human rights.

Under the Court's case law it has been established not only that States should respect human rights, but also that States have an obligation under international law to ensure respect for human rights. Long ago the Court found that the physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.[929] In the *Barcelona Traction* case, the ICJ pointed out that enforcement mechanisms established by treaty are a solution for ensuring respect for human rights regardless of nationality.[930] The incorporation of human rights in international treaties is in itself a reflection of the growing awareness of the need to address social inequalities at a worldwide level. The formation of worldwide human rights networks and the media have brought several issues to the forefront, which need to be addressed at an international level such as those of the responsibility to protect and render assistance to victims of armed conflicts, early warnings for imminent natural disasters, child conscription, labour and other abuses, the rights of the disabled, the rights of indigenous people and so on. Through its case law the Court has rendered its contribution to strengthening this humanitarian movement and discourse. Further, it has on several occasions clarified that human rights rapporteurs while on duty enjoy immunity and that States are under a duty to assist them to the maximum extent possible and respect their immunity from judicial proceedings.

Quite a few cases have been brought before the Court on the basis of diplomatic protection. Besides acknowledging the protection accruing to individuals on the basis

928 See Separate Opinion of President Guillame, *Arrest Warrant* case, (DRC *v*. Belgium), ICJ Reports 2002, p. 43, para. 15. There he stated: 'International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. *To do this would, moreover, risk creating total judicial chaos* (emphasis added). It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'. Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.'.

929 ICJ, *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, ICJ Reports 1971, p. 54, para. 118.

930 *Barcelona Traction* case, (*Merits*), ICJ Reports 1970 p. 47, para. 91.

of the Vienna Conventions on Diplomatic and Consular Relations, a protection having a strong basis in customary law, the Court seems to have taken a broader view by referring to the other layer of the protection of diplomatic personnel which they enjoy as every other human being under the principles of the UN Charter and certain international human rights instruments, including the UDHR.[931] Cases relating to consular relations have been dealt with separately; while diplomatic protection is a right of a State, the right to consular assistance has a dual nature as it is a right of a State to assist its national, but also an individual right of the individual concerned to receive such assistance, creating obligations owed to both the State and the individual, as the Court has acknowledged. In the operative paragraph of the *LaGrand* case the Court stated that by not informing the LaGrand brothers about their rights under the Vienna Convention on Consular Relations, Article 36, paragraph 1 (b), the US had breached its obligations to Germany *and to the La Grand brothers* (emphasis added).[932] Thus, with regard to the right to consular assistance the Court has at one point acknowledged that the Vienna Convention on Consular Relations creates individual rights.

The system of international human rights protection experienced a new impetus as a result of the efforts of the international community to achieve accountability for internationally recognised crimes at both international and domestic level. Consequently, two cases arising from domestic criminal proceedings undertaken against senior state officials of the Democratic Republic of Congo and of the Republic of the Congo for crimes against humanity commenced respectively in Belgium and France have been brought before the Court.[933] To a large extent that is due to the tremendous development of international criminal law in the last couple of decades, culminating in the establishment of several international or hybrid judicial bodies in different parts of the world and most importantly in the establishment of a permanent international criminal court, the ICC. This development is expressed in the firm establishment of the principle of individual criminal responsibility and the emergence of the still controversial principle of universal jurisdiction. The position of the ICJ has been more in the denial of universal jurisdiction and criminal responsibility of senior state officials in foreign courts while on duty, while emphasizing that immunity does not mean impunity.[934] While there certainly are merits attached to the reserved and cautious position of the ICJ it is the opinion of the author that the Court should give more weight to the new developments in the law in this field. It remains to be seen what the Court will decide in the case of *Certain Legal Proceedings in France* which is still pending before it.

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931 *Tehran Hostages* case (US *v*. Iran), ICJ Reports 1980, p. 42, para. 91.

932 *LaGrand* case (Germany *v.* United States of America), Judgment of 27 June 2001, ICJ Reports 2001, para. 128.

933 *Arrest Warrant* case (DRC *v*. Belgium); *Certain Criminal Proceedings* case (The Republic of the Congo *v*. France).

934 *Arrest Warrant* case (DRC *v*. Belgium), ICJ Reports 2002, p. 25, para. 60.

Having no limitations over its subject-matter jurisdiction the ICJ offers a judicial forum where a great deal of interpretation and progressive development of different branches of international law can take place. The jurisprudence of the ICJ has proved helpful to the ILC in fulfilling its duty to promote the progressive development of international law and its codification. For example, Article 48, paragraph 1(b) of ARSIWA intends to give effect to the Court's statement in the *Barcelona Traction* case, where an essential distinction was drawn between obligations owed to particular States and those owed towards the international community as a whole: *erga omnes* obligations. In an era when respect for human rights commands requisite attention issues of human rights are increasingly more prone to come for consideration before the ICJ. Apart from States which can of course initiate a case basing their claims on international human rights instruments, they can also be brought before the Court by the UN organs that have a right to ask the Court for an advisory opinion on a legal question.

The jurisprudence of the Court in the field of international human rights law encompasses many important issues for international human rights law, starting with the internationalization of human rights; the coining of certain fundamental principles of international human rights law; the characterization of the right of peoples to self-determination as a right *erga omnes*;[935] the interpretation of the prohibition of genocide as including an obligation to prevent genocide;[936] the clarifications on the right to asylum, the diplomatic and consular relations cases;[937] the protection to be extended to human rights rapporteurs in order for them to be able to fulfil their duty when in the service of the UN;[938] the applicability of international human rights instruments in situations of armed conflict; clarifications on the issue of individual criminal responsibility for internationally recognized crimes; and although not discussed here, some important pronouncements on environmental issues.[939] Although not dealt with here, environmental issues are prone to come before the Court more often in the years to come, especially in the form of cases dealing with transborder environmental hazards

935 *South West Africa Cases*; *Western Sahara*; *East Timor*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

936 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina *v*. Serbia and Montenegro); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia *v*. Serbia and Montenegro); Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina *v*. Serbia and Montenegro), Preliminary Objections (Serbia and Montenegro *v*. Bosnia and Herzegovina).

937 *Case concerning the Vienna Convention on Consular Relations* (Paraguay *v*. United States of America); *Ahmadou Sadio Diallo* case (Republic of Guinea *v*. Democratic Republic of the Congo); *LaGrand* case (Germany *v*. United States of America); *Case Concerning Avena and other Mexican Nationals* (Mexico *v*. United States of America).

938 *Reparation for Injuries*; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion Of 15 December 1989); and the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion of 29 April 1999).

939 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, pp. 241-3, paras. 27-33.

or transborder pollution. Certainly, given that the quality of the environment affects our quality of life and because States are interdependent in preserving the environment from further deterioration, the right to a clean environment is likely to receive increased attention.

That famous pronouncement in the *Barcelona Traction* case on the *erga omnes* character of certain basic human rights was to lay the foundation both for a huge development in the field of human rights and for their central place in international relations.[940] It is a truism that the ICJ's contribution is also important in that it has read and interpreted international law instruments according to the dictates of human rights.

> It is self-evident that no system of law can depend for its operation or development on specific prohibitions *ipsissimis verbis*. Any developed system of law has, in addition to its specific commands and prohibitions, an array of general principles which from time to time are applied to specific items of conduct or events which have not been the subject of an express ruling before. The general principle is then applied to the specific situation and out of that particular application a rule of greater specificity emerges.[941]

By relying upon or coining concepts such as elementary considerations of humanity, sacred trust of civilization, and obligations *erga omnes*, the World Court has contributed in a larger sense to the creation of a worldwide common culture of respect for human rights and dignity. The underlying idea behind these concepts is that whenever human rights are violated our common humanity is targeted and thus every State has simultaneously the right and the duty to take action to address the wrongdoing. Further, as Ragazzi has pointed out, the Court has generally adopted a 'value-oriented' approach;[942] an approach which aims at giving certain fundamental human rights the maximum legal support.

Human rights are a rare and valuable intellectual and moral resource in the struggle to right the balance between society (and the state) and the individual.[943] The implementation of human rights principles is a struggle that is carried on in different forums and levels. The ICJ, although it does not represent a forum where individuals can claim their human rights, is, nevertheless, a judicial body that has offered and can offer its contribution in furthering the human rights cause through a twofold function:

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940 The Court in the *Barcelona Traction* case held that the obligations of a State towards the international community are obligations *erga omnes*. Such obligations derive, for example in contemporary international law, from… principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law…; others are conferred by international instruments of a universal or quasi-universal character a whole. See *Barcelona Traction*, Judgment of 5 February 1970, ICJ Reports 1970, para. 33.

941 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, ICJ Reports 1996, p. 493.

942 M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford University Press, 1997, p. 72.

943 J. Donnelly, *Human Rights, Individual Rights and Collective Rights*, in Human Rights in a Pluralist World: individuals and collectivities, Roosevelt Study Center Publications, Meckler, 1990, p. 49.

first, it can continue to interpret and thus develop international human rights rules and principles; and, second, by keeping the fabric of international law together it can ensure a better interaction between the different branches of international law in order to achieve an optimum protection of human rights within the framework of international law. It can be said that through its case law the ICJ has helped in the creation of an environment which is more conducive to the realization of the full enjoyment of human rights worldwide. Further, the increased involvement of the SC in putting a stop to human rights violations and the increased willingness of the international community towards addressing gross violations of human rights around the globe can lead to a further increase in the Court's involvement and thus its contribution to the interpretation and development of human rights rules and principles.

# CHAPTER 4
# THE ICJ'S CONTRIBUTION TO THE INTERPRETATION AND DEVELOPMENT OF RULES AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

## PART I BACKGROUND

*Cedant arma togae, concedat laurea laudi.*

*May arms yield to the toga (the gown of peace), may the glory of war give way to the glory of peaceful feats.*

(Cicero, *Poetica fragmenta*)

### 4.1 INTRODUCTION

The evaluation of the ICJ's role and contribution in interpreting and developing humanitarian law principles starts with an introduction to international humanitarian law and new developments in this field.[1] The convergence between international humanitarian law and international human rights law is considered as one of these developments. Part II provides a detailed examination of the relevant cases before the Court involving humanitarian law issues. Finally, in Part III an appraisal is given of the contribution of the Court to the interpretation and development of principles and rules of international humanitarian law. The analysis of the case law of the Court is confined to the most relevant cases where the Court's contribution to humanitarian law is rather direct and substantial while other less relevant cases are mentioned only in passing. This chapter focuses primarily on issues related to international humanitarian law, by and large leaving aside issues related to the use of force. However, only the issue of military intervention for humanitarian purposes has been singled out for

1 More generally on the contribution of the ICJ to international humanitarian law see *inter alia* J. Gardam, *The Contribution of the International Court of Justice to International Humanitarian Law*, LJIL, Vol. 14, 2001, pp. 349-365, V. Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, IRRC, Vol. 85, 2003, pp. 235-269; S. M. Schwebel, *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, NYUJILP, Vol. 27, 1995, pp. 731-759, F.O. Raimondo, *The International Court of Justice as a Guardian of the Unity of Humanitarian Law*, LJIL, Vol. 20, 2007, pp. 593-611, G. 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*, Netherlands Quarterly of Human Rights (NQHR), Vol. 25, 2007, pp. 117-139. On the Court's general contribution to international law see *inter alia* J.M. Ruda, *Some of the Contributions of the International Court of Justice to the Development of International Law*, NYUJILP, Vol. 24, 1991, pp. 35-68.

consideration as that is an issue of considerable relevance which the Court could help clarify.

For our purposes, the terms 'law of armed conflict' and 'international humanitarian law' are used interchangeably throughout the text. While terms such as 'laws of war' and 'law of armed conflict' have been in use for a long time, the term 'international humanitarian law' is of a more recent origin. This latter term was initially used with reference to the four Geneva Conventions of 1949 (GCs), but at the present time it is understood as referring to the whole body of law governing armed conflicts. The frequent use of the term 'international humanitarian law' is itself an indication of the influence exerted by the humanitarian movement on this body of law. The law governing the use of force and international humanitarian law, or to use the respective Latin terms the *jus ad (contra) bellum* and the *jus in bello*, are two separate bodies of law.[2] One can be easily misled to believe in the millennia-old existence of the terms of art *jus ad* (or *contra*) *bellum* and *jus in bello*, tricked by the sound of these Latin terms used, mostly by Western scholars, to describe the laws and customs of war.[3] Although both branches of the law relating to war can trace their origins back many centuries, these terms of art were created at the time of the League of Nations and entered common legal parlance after the Second World War.

Humanitarian law aims to protect persons and property that are or may be affected by hostilities during armed conflict by limiting the rights of the parties to a conflict to use methods and means of warfare of their choice through its rules on the conduct of hostilities. It should be noted that international humanitarian law rules and principles apply despite whether or not the use of force is in accordance with the rules governing the use of force and bind all parties to an armed conflict. The parties to a conflict must at all times distinguish between military and non-military targets and between combatants and non-combatants. Traditional manuals of humanitarian law cite the principles of military necessity, distinction, humanity, proportionality and chivalry as the basic principles of international humanitarian law.[4] The complementary tasks of preventing violations, putting a stop to them, repairing the harm done and punishing the culprits are essential for regulating the use of violence in armed conflicts.[5] States have a collective responsibility under Article 1 common to the Geneva Conventions of 1949 to respect and ensure respect for the Conventions in all circumstances.

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2 *Jus ad* (*contra*) *bellum* is concerned with the conditions under which a State may resort to war or the use of force in general and *jus in bello* governs the conduct of belligerents during war and in a wider picture comprises also the rights and obligations of neutral parties.

3 For more details see *inter alia* R. Kolb, *Origin of the twin terms jus ad bellum/jus in bello*, IRRC, No. 320, 1997, pp. 553-562. Alongside other publications in this field, the International Review of the Red Cross (IRRC), available at: *http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/review?OpenDocument* (last accessed on 1 November 2007) is an excellent source of literature for issues of international humanitarian law.

4 See *inter alia* L. Oppenheim, *International Law*, Vol. II, Disputes, War and Neutrality, 7th edition, Longmans and /green, 1952, pp. 226-227.

5 J. Stroun, *International criminal jurisdiction, international humanitarian law and humanitarian action*, IRRC, No. 321, 1997, pp. 623-633.

It is noteworthy to emphasize that humanity in warfare and concepts such as law and lawful conduct were rooted in the conscience and chivalry of the warring parties rather than in the form of any written legal obligation. Further, fully-fledged international judicial bodies endowed with the duty to punish individual misconduct, such as the recently established international criminal courts and tribunals, simply did not exist until the establishment of the Nuremberg and the Far East Tribunals at the end of WWII. It has been remarked that, from the caveman to biblical times, and for centuries thereafter, the winner in battle took from the loser not only his life, but also all his belongings, including women, children, domestic animals and personal property.[6] Yet, alongside this worrisome reality, it has also been asserted that 'restrictions on hostile activities are to be found in many cultures and typically originate in religious values and the development of military philosophies.'[7] Hence, the unfortunate dichotomy still subsists: combatants' conduct in the heat of the battle, on the one hand, and restraint and strict observance of moral or military philosophies and values and legal obligations, on the other, have been and sadly continue to be at odds.

The Lieber Code of 1863 was the first attempt at codifying pre-existing customary humanitarian rules aimed at giving protection to civilians and prisoners of war.[8] This first effort, which was continued in the years that followed, led the way to the adoption of a considerable number of international humanitarian law instruments.[9] The driving force behind the remarkable development of the legal framework of international humanitarian law was *inter alia* the fact that many countries realized the need to put restrictions on the means and methods of warfare. It is true that, albeit not always successfully, the 'international community has always sought to prevent armed conflict from degenerating into an orgy of killing where death and destruction are the only guidelines'.[10] In this regard, the most important change as far as humanitarian law is concerned is the fact that recourse to war is no longer a normal and legal means of regulating conflict.[11] That general prohibition has been given an explicit legal form in the UN Charter.

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6 H.S. Levie, *History of the law of war on land*, IRRC, No. 838, 2000, p. 339.

7 L. Doswald-Beck and S. Vité, *International Humanitarian Law and Human Rights Law*, IRRC, No. 293, 1993, pp. 94-119.

8 D. Schindler and J. Toman, *The Laws of Armed Conflict*, 4th edition, Martinus Nijhoff Publishers, 2004, pp. 3-20.

9 One can mention here the Hague Regulations of 1899 and 1907, the 1925 Prohibition of the Use of Poisonous Gas, the Geneva Conventions of 1949 and the Two Additional Protocols of 1977, the 1993 Convention on the Prohibition of the Development, Production, and Stockpiling of Chemical Weapons and on their Destruction, the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction and so on. For a comprehensive list and the texts of these international instruments see D. Schindler and J. Toman, *The Laws of Armed Conflict*, 4th edition, Martinus Nijhoff Publishers, 2004.

10 C. Tomuschat, *Human Rights: Between Idealism and Realism*, Oxford University Press, 2003, p. 242.

11 L. Doswald-Beck and S. Vité, *International Humanitarian Law and Human Rights Law*, IRRC, No. 293, 1993, pp. 94-119.

Chapter 4

When speaking about the development of international humanitarian law a formal distinction should be drawn between the 'Hague law' and the 'Geneva law'.[12] As Bugnion has put it:

> 'La distinction entre droit de Genève et droit de La Haye est une distinction essentiellement analytique à laquelle on ne saurait attribuer une portée juridique nettement définie; de nombreuses règles appartiennent aussi bien au droit de Genève qu'au droit de La Haye et ces deux courants normatifs se sont rejoints dans le cadre des Protocoles additionnels aux Conventions de Genève, qui ont mis à jour les règles du droit de la conduite des hostilités tout en réaffirmant et en complétant les dispositions des Conventions de Genève.'[13]

While the 'Hague law' sets the rules on the conduct of hostilities, the 'Geneva law' is comprised of rules aimed at the protection of persons *hors de combat*, prisoners of war, and civilians.[14]

> 'Ces différences, cependant, ne doivent pas occulter le fait que ces deux branches du droit se complètent réciproquement et sont largement interdépendantes. La protection de la personne humaine sur le champ de bataille ne se divise pas.'[15]

Indeed, as Bugnion states, it was in 1977, when the Additional Protocols (AP) to the Geneva Conventions were adopted, that the 'Hague law' and the 'Geneva law' converged into one comprehensive set of rules.

The core rules and principles of humanitarian law embody what the ICJ in the *Corfu Channel* case called 'elementary considerations of humanity'[16] and later in the *Nicaragua* case referred to as 'fundamental general principles of humanitarian law'.[17] These principles are the cornerstones of the protection of civilians during wartime; they are binding on the parties at war at all times and no derogation from them is permissible. While duly acknowledging those who respect the rights of their enemies out of ethical or moral conviction, it must be admitted that most individuals are largely motivated by fear of the punishment they may incur.[18] Regrettably, though, recent history has proven that there are circumstances where a fear of punishment is not a deterrent factor, especially in internal conflicts where the dehumanization of the

12 See *inter alia* F. Bugnion, *Droit de Genève et droit de la Haye*, IRRC, No. 844, 2001, pp. 901-922.
13 Bugnion, *supra* note 12, p. 921.
14 The Four Geneva Conventions of 12 August 1949 are: I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); II. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); III. Geneva Convention relative to the Treatment of Prisoners of War (GC III); IV. Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV).
15 Bugnion, *supra* note 12, p. 921.
16 *Corfu Channel* case, (*Merits*), ICJ Reports 1949, p. 22.
17 *Nicaragua* case, (*Merits*), ICJ Reports 1986, p. 113, para. 218.
18 J. Stroun, *International criminal jurisdiction, international humanitarian law and humanitarian action*, IRRC, No. 321, pp. 623-633.

adversary and the fight for survival of the group have unfortunately managed to override any feeling of humanity.

### 4.2 Applicability of the Geneva Conventions and Additional Protocols to International and Internal Armed Conflicts

While the Four Geneva Conventions (GCs) and the First Additional Protocol (AP I) apply to international armed conflicts, common Article 3 of the GCs and the Second Additional Protocol (AP II) apply to non-international armed conflicts. Thus, international humanitarian law applies different rules depending on whether the nature of an armed conflict is international or non-international. The fact that there are around 600 articles of the GC and the AP I that apply to international conflicts and common Article 3 of the GC and 28 articles of the AP II that apply to internal conflicts indicates, on the one hand, the international community's efforts to regulate primarily armed conflicts between States. On the other hand, this fact also bears witness to States' reluctance and resistance to having internal conflicts regulated by means of international instruments. Moreover, the international/non-international dichotomy in international humanitarian law has proved susceptible to incredible political manipulation, particularly when conflicts involve international and internal elements.[19] Meron points at the difficulties encountered by the ICTY in characterizing a conflict as international or non-international:

> 'The contradictory decisions rendered by the different ICTY chambers on the nature of the conflicts in the former Yugoslavia illustrate the difficulty of characterizing 'mixed' or 'internationalized' conflicts. There is no agreed-upon mechanism for definitely characterizing situations of violence.'[20]

Although there certainly are concerns underpinning States' unwillingness to adopt a single set of laws for international and internal armed conflicts, in the words of Moir based on the latest developments in international criminal law:

> '…we would appear to be moving tentatively towards the position whereby the legal distinction between international and non-international armed conflict is becoming outmoded. …What will matter as regards legal regulation will not be whether an armed conflict is international or internal, but simply whether an armed conflict *per se* exists or not.'[21]

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19 J.G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, IRRC, No. 850, 2003, p. 349.

20 T. Meron, *The Humanization of Humanitarian Law*, AJIL, Vol. 94, 2000, p. 261. It should be noted that Theodor Meron was elected to serve as Judge at the ICTY in 2001. For his biography visit: *http://www.un.org/icty/officials/meron-e.htm* (last accessed on 1 November 2007).

21 L. Moir, *The Law of Armed Conflict*, Cambridge University Press: London, 2000, pp. 51-52 and footnote 83.

However, for the time being the above-mentioned position is more of an expression of *de lege ferenda* as opposed to *de lege lata*.

Given that at present non-international or armed conflicts of a mixed nature occur most frequently, common Article 3 to the GCs is highly relevant for the protection of persons taking no active part in hostilities, in spite of the adoption of AP II. In fact, it has proven very difficult to strengthen the rules on internal conflicts due to staunch resistance on the part of many States fearful of an undesirable intrusion into the realm of State sovereignty. Evidently, many internal armed conflicts, despite their common occurrence, do not fall within the ambit of the present law due to the high threshold set in the AP II. As the idea which permeates the whole body of international humanitarian law is the protection of basic human rights for certain categories of persons or at the very least the alleviation of suffering for victims of armed conflicts, it is submitted that the distinction between international and non-international armed conflicts in that regard has to a large extent become obsolete. In this light, it can be asserted that AP II is merely an elaboration of Article 3 common to the GCs of 1949.

Here it is worth quoting Article 3,[22] which in the eyes of many scholars is a mini-treaty in itself:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) Taking of hostages;
> (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> 2. The wounded and sick shall be collected and cared for.

In order to regulate the use of force by the State within its own borders much effort has been put into drafting a comprehensive set of minimum humanitarian rules to be applied in instances of internal tension or strife.[23] In international law reference is

22 For a detailed discussion of Common Article 3 of the Geneva Conventions of 1949 see *inter alia* Moir, *supra*, note 21, pp. 30-88.

23 See *inter alia* D. Momtaz, *The minimum humanitarian rules applicable in periods of internal tension and strife*, IRRC, No. 324, 1998, pp. 455-462.

made to a state of necessity, while in national law reference is usually made to a state of emergency which is most often declared in cases of disruption to public order (relevant to our discussion), human catastrophes, and calamities. Since the government makes ample use of force in situations of disruption to public order, via its police or military forces, this can result in a weakening of the rule of law, which can cause human rights violations and widespread suffering among the population. Surely, there are certain requirements to be fulfilled in order for a government to invoke a state of emergency. Usually they are provided for in the respective national constitutional laws of States, or other laws. At an international level, according to article 25 of the International Law Commission (ILC) 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' of 2001, a state of necessity can be invoked by a State without incurring responsibility when this 'is the only way for the State to safeguard an essential interest against a grave and imminent peril.'[24]

In this situation, when the government resorts to the use of force against more or less organized groups to restore order, it is important to adhere at the very least to a minimum set of humanitarian rules which are provided for by common Article 3 of the GCs and AP II. Furthermore, there are a few guidelines adopted by specialists in international humanitarian law that can serve as a yardstick for governments which are caught up in a conflict with opposing forces.[25] As a matter of fact it was the desirability of filling the gap in the application of norms of international humanitarian law and human rights law to situations of internal turmoil which fall short of armed conflict that led to the adoption of such guidelines, one of which is also the Turku Declaration.[26] Among the standards incorporated in this declaration are core judicial or due process guarantees, limitations on the excessive use of force and on means and methods of combat, the prohibition of deportation, rules pertaining to administrative

24 International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001. The text of this article with the commentaries thereto are available at: *http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf* (last accessed on 1 November 2007).

25 One can mention *inter alia* the Paris Minimum Standards of Human Rights Norms in a State of Emergency and the Turku Declaration on Minimum Humanitarian Standards. See also General Comment 29 of the HRCm, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 10, note 6. For a detailed discussion of this and related issues see *inter alia* T. Meron, *Towards a humanitarian declaration on internal strife*, AJIL, Vol. 78, 1984, pp. 859-868; H.P. Gasser, *Humanitarian standards for internal strife*, IRRC, No. 294, 1993, p. 223; T. Meron and A. Rosas, *A Declaration of Minimum Humanitarian Standards*, AJIL, Vol. 85, 1991; A. Eide, A Rosas, and T. Meron, *Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards*, AJIL, Vol. 89, 1995; D. Momtaz, *The minimum humanitarian rules applicable in periods of internal tension and strife*, IRRC, No. 324, 1998, pp. 455-462.

26 The full text of this document is available at: *http://www1.umn.edu/humanrts/instree/1990b.htm* (last accessed on 1 November 2007). For a selected bibliography on this issue visit the website of the Human Rights Institute of the Åbo Academi University: *http://web.abo.fi/instut/imr* under Publications (last accessed on 1 November 2007).

or preventive detention and humane treatment, and guarantees of humanitarian assistance.[27]

Another interesting issue is that concerning the general application of international humanitarian law, namely the applicability of these rules to UN peace-enforcement forces.[28] These forces are empowered to use coercive measures to restore international peace and security in troubled regions. The UN is not a party to the international humanitarian law instruments, due to the legal implications this can have for the organization. Nevertheless, its troops are under an obligation to comply with the rules of humanitarian law. *First*, each State is responsible for the compliance of its troops with humanitarian law instruments. *Second*, there is a bulletin by the UN Secretary-General on the observance of international humanitarian law by UN forces.[29] Thus, although preferred, it is submitted that an advisory opinion by the ICJ on this issue would not be necessary as the applicability of this branch of law to such troops is not in dispute.

It should be noted that while the GCs are universally ratified[30] and also the two APs have a large number of ratifications,[31] some States have abstained from becoming parties to certain international humanitarian law instruments, or on occasions have disregarded them, especially in cases of internal conflict. However, the finding of the Court that many principles of international humanitarian law have already become part of customary international law means that even those States which have not ratified these instruments are not outside the reach of international law. Bringing States which violate their obligations under international humanitarian law before the Court should be considered not only as a way of improving respect for humanitarian law not only vis-à-vis the affected State, but also as fulfilling the *erga omnes* obligation which States have under common Article 1 of the Geneva Conventions of 1949 to ensure compliance with humanitarian law.[32] Article 1 places upon every High Contracting Party the obligation to ensure respect for international law, which implies also taking action with regard to any other High Contracting Party which does not respect this law. In view of the almost universal ratification of the GCs and the growing number of

27 Meron, *supra* note 20, p. 275.

28 U. Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-Keeping Forces*, IRRC, No. 294, 1993, pp. 227-240.

29 Secretary-General's Bulletin, ST/SGB/1999/13, 6 August 1999, available at: *http://www.un.org/peace/st_sgb_1999_13.pdf* (last accessed on 1 November 2007).

30 A list of the 194 States that are parties to the 1949 GCs is available at: *http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P* (last accessed on 1 November 2007). For an overview of the status of the ratification of international humanitarian law instruments in general visit: *http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf* (last accessed on 1 November 2007).

31 According to the ICRC Annual Report of 2006 AP I and AP II have respectively 167 and 163 ratifications.

32 For a discussion of measures available to States for fulfilling their obligation to ensure respect for international humanitarian law see *inter alia* U. Palwankar, *Measures available to States for fulfilling their obligation to ensure respect for international humanitarian law*, IRRC, No. 298, 1994, pp. 9-25.

States parties to their APs, as well as the transcendence of humanitarian principles and hence the *erga omnes* character of the obligation to respect them, all States have the right to ensure that any other State respects customary humanitarian law, and all States parties have the obligation to do so, under the strict terms of the Conventions and Protocol I, *vis-à-vis* any State party to these instruments.[33] It follows that taking action before the ICJ would be one way of fulfilling the obligation to respect and ensure respect for international humanitarian law norms as imposed by common Article 1 of the GCs, besides humanitarian diplomacy, which involves political means and is pursued in political forums.[34]

### 4.3 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

The ICJ laid out the criteria for establishing what amounts to customary international law in the *North Sea Continental Shelf* case. There the Court held:

> 'Not 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 need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.'[35]

Customary law, besides treaty law, is one of the main sources of international humanitarian law. Further, as the ICJ has noted, customary law must have equal force for all members of the international community and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.[36] Hence, a State is generally bound by customary international law whether or not it has expressed its consent to be bound, especially when the international custom at hand

33 Palwankar, *supra* note 32, pp. 9-25 and footnotes 2 and 3.

34 Common Article 1 to the 1949 GCs reads: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' With regard to ways of fulfilling such an obligation Palwankar, *supra* note 32, identifies four categories of legally permissible measures available to third parties, i.e. States which are not party to international or internal armed conflict, to ensure respect for international law in the event of a breach of that law, namely diplomatic pressure, coercive measures that States can take themselves, steps that can be taken in co-operation with international organizations and contribution to assistance action taken in conformity with international humanitarian law (contributions to humanitarian efforts).

35 ICJ, *North Sea Continental Shelf*, (Federal Republic of Germany *v*. Denmark, Federal Republic of Germany *v*. The Netherlands), Judgment, ICJ Reports 1969, p. 44, par.77; see also the *Nicaragua* case, (*Merits*), ICJ Reports 1986, pp. 97-8, para. 184.

36 ICJ, *North Sea Continental Shelf*, (Federal Republic of Germany *v*. Denmark, Federal Republic of Germany *v*. The Netherlands), Judgment, ICJ Reports 1969, pp. 38-39, para. 63.

is part of *jus cogens*. The ICRC has carried out a study on the customary rules of IHL applicable in international and non-international armed conflicts.[37] Customary international humanitarian law can serve as a link for the effective application of humanitarian law rules and principles regardless of whether the conflict is international or internal.[38] The ICRC study, which makes use of *inter alia* military manuals, statements by State representatives, and national and international case law, can and will serve as a very useful reference for the national and international tribunals in their work, and also as a tool for the dissemination of the rules of humanitarian law.[39]

The relation between the principle of the immunity of senior State officials, belonging to customary international law, and the principle of individual criminal responsibility, belonging to international criminal law, was an issue in the *Arrest Warrant* case.[40] It is submitted that individuals responsible for grave breaches of the Geneva Conventions should be prosecuted either at a national or at an international level. Moreover, as the developments in the field of international criminal law suggest, at least on an international level the perpetrators of such heinous crimes will be prosecuted despite their official status.[41] Contrary to the finding of the ICJ,[42] the mere abstention on the part of other States to instigate proceedings in respect of such individuals or to prosecute them, especially when they hold high office in the government, does not suggest *per se* that their immunity amounts to a norm of customary international law. In fact, this State reluctance and the paucity of cases might be due to a set of different factors such as comity, non-interference, the practical difficulties of proving a case in court when there is a lack of cooperation between States and so on. The opinion of the PCIJ expressed in the *Lotus* case appears to uphold this view:

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37 J-M. Henckaerts & L. Doswald-Beck, ICRC, *Customary International Humanitarian Law*, Cambridge University Press, 2005.

38 See *inter alia*, S. Boelaert-Suominen, *Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving towards a Uniform Enforcement Mechanism for All Armed Conflicts?*, Journal of Conflict and Security Law (JCSL), 2000, pp. 74-103.

39 See J-M. Henckaerts, *Study on customary rules of international humanitarian law: Purpose, coverage, and methodology*, IRRC, No. 835, 1999, pp. 660-8.

40 ICJ, *Arrest Warrant* case (DRC *v*. Belgium), ICJ Reports 2002, see *supra* section 3.14.1.

41 See Article 7 (2) of the ICTY Statute, Article 6 (2) of the ICTR Statute, Article 6 (2) of the Special Court for Sierra Leone, Article 27 of the ICC Statute. The latter article reads:
'1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, *official capacity as a Head of State or Government, a member of a Government or parliament,* an elected representative or a government official *shall in no case exempt a person from criminal responsibility under this Statute,* nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. *Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person* (emphasis added).' A considerable number of High State officials such as Slobodan Miloševic, the former President of the FRY, Hisène Habré, the former Head of State of Chad, Augusto Pinochet, the former President of Chile; Jean Kambanda, the former Prime Minister of Rwanda, and Charles Taylor, the former President of Liberia, have been brought before a court of law on charges of violations of human rights and humanitarian law.

42 ICJ, *Arrest Warrant* case, (DRC *v*. Belgium), ICJ Reports 2002, p. 24, para. 58.

> 'Even if the rarity of judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.'[43]

Thus, if for one reason or another some perpetrators of heinous crimes manage to escape justice this does not mean that political motives leading to impunity will always prevail.

> 'Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts. In this respect, the case law established by the ad hoc Tribunal for the former Yugoslavia has made an important contribution.'[44]

We shall return to the importance of customary international humanitarian law in the course of this chapter when dealing with specific cases. Further, that importance is also connected with another issue dealt with in the fifth chapter, namely the relation between the ICRC's Study on customary international humanitarian law and the most recent ICJ findings.

## 4.4 NEW DEVELOPMENTS IN INTERNATIONAL HUMANITARIAN LAW

In spite of the fact that international humanitarian law is one of the oldest branches of public international law, it has only enjoyed increasing attention in recent years, especially after the end of the Cold War. The outbreak or continuation of armed conflicts in different areas of the world and the enormous human suffering they caused resulted in renewed interest in international humanitarian law rules and principles. At present the UN is in charge of a large number of peace-keeping and peace-enforcing operations established for maintaining or restoring peace and security in different areas of the world.[45] Further, the establishment by the SC, under Chapter VII of the UN Charter, of the two *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, respectively *via* resolutions 827 (1993) and 955 (1994), was a first stepping-stone towards ensuring accountability for perpetrators of violations of international humani-

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43 PCIJ, *S.S Lotus*, (France *v*. Turkey), Series A, Nr. 10, 7 September 1927.

44 E. Greppi, *The Evolution of Individual Criminal Liability under International Law*, IRRC, No. 835, 1999, p. 541.

45 For an organizational chart of the UN Department of Peace-Keeping Operations visit: *http://www.un.org/Depts/dpko/dpko/info/page2.htm* (last accessed on 1 November 2007). For general information see the UN Peace-Keeping Fact Sheet at: *http://www.un.org/Depts/dpko/factsheet.pdf* (last accessed on 1 November 2007).

tarian law. These two international judicial bodies were entrusted with the application of international humanitarian law rules and principles as provided in their respective Statutes. Needless to say, providing justice for the many victims of the bloody conflicts in the former Yugoslavia and Rwanda has proved to be a daunting task. However, these first developments paved the way for the establishment of the ICC in 1998 by the Rome Statute. For the sake of completeness it should be noted that the setting up of the ICC was the result of a long political and legal process. The above-mentioned judicial bodies, together with a considerable number of other internationalized criminal courts, are in themselves a vehicle not only for the enforcement of international humanitarian law rules and principles, but also for their development and interpretation.

Besides legal scholars and practitioners, other players, factors and events have come to influence the application and development of international humanitarian law. After the terrorist attacks of 11 September 2001 and the resulting war on terrorism and the more recent events relating to the ousting of the Taliban regime in Afghanistan and the removal of Saddam Hussein's regime in Iraq, there have been some new developments with regard to both *jus ad bellum* and *jus in bello*.[46] By way of illustration it should be noted that after the overthrow of the Taliban regime many individuals were captured and detained on an American military base in Guantanamo Bay, Cuba. The questions which arise here are the following: what status do these individuals enjoy? Are they prisoners of war, or unlawful combatants? Does international humanitarian law apply at all in this case? It is submitted that according to international humanitarian law, namely according to the GC III, Articles 4 and 5, such persons shall enjoy the protection of the aforementioned Convention *until such time as their status has been determined by a competent tribunal* (emphasis added). Thus, 'once captured or detained, all persons taking no active/direct part in hostilities or who have ceased to take such a part come under the relevant provisions of international humanitarian law (i.e. Common Article 3 to the GCs, and AP II, in particular Article 4-6), as well as the relevant customary international law.'[47] In fact, in its decision of 28 June 2004, the US Supreme Court held that the foreign detainees held in Guantanamo Bay have the right to appear in court and that they are legally entitled to file petitions for writs of *habeas corpus* if they believe they are being held illegally.[48] It can be envisioned, at least theoretically, that such issues could finish before the World Court either through a contentious case brought by a State on behalf of its citizen/s or a request by a UN body for an advisory opinion on this issue.

Why are these developments important? Like all branches of international law, international humanitarian law has to adapt as well to the new conditions and needs

46 See D. Wippman and M. Evangelista, (eds.), *New Wars. New Laws? Applying the Laws of War in 21st Century Conflicts*, Transnational Publishers Inc., 2005.

47 K. Dörmann, *The legal situation of 'unlawful/unprivileged combatants'*, IRRC, Vol. 85, No. 849, 2003, p. 47.

48 See *Rasul et al. v. Bush*, 542 U.S. 466 (28 June 2004).

of human society. Yet, the basic principles and rules have to be upheld for they are long established and have proven to alleviate human suffering in time of conflict, if respected. Moreover, when making new rules it should be borne in mind that not only rules are important. Compliance is a key issue that needs to be properly addressed. Although the chivalry of medieval times cannot be resurrected, it would be a positive development if the parties in conflict took pride in the professionalism shown when behaving in accordance with humanitarian rules.

### 4.5 Relationship Between International Humanitarian Law and International Human Rights Law

Judging from the number of publications, this subject, namely the relationship between humanitarian law and human rights, has received increasing attention in recent years.[49] These two branches of law have developed separately for different reasons which are briefly discussed here. The Universal Declaration of Human Rights of 1948 completely bypasses the question of respect for human rights in armed conflicts, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions.[50] However, a trend has developed over time where these two branches of international law have increasingly come to be referred to and applied jointly. This trend can be traced back to the UN Human Rights Conference of Tehran in 1968, which not only encouraged the development of humanitarian law itself, but also marked the beginning of a growing use by UN organs or agents of international

49 See *inter alia* R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002; E. Greppi, 'Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza', La Comunità Internazionale, 1996, p. 473; R. Quentin-Baxter, 'Human rights and humanitarian law – confluence or conflict?', Australian Yearbook of International Law (AYbIL), Vol. 9, 1985, p. 94; A.H. Robertson, 'Humanitarian law and human rights', in C. Swinarski (ed.), Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet, CICR/Martinus Nijhoff, Genève/La Haye, 1984, p. 793; S. McBride, 'Human rights in armed conflict: The inter-relationship between the humanitarian laws and the law of human rights', Military Law and Law of War Review (MLLWR), Vol. 9, 1970, p. 373; T. Meron, *Convergence of International Humanitarian Law and Human Rights Law*, pp. 97-105; S. Ogata, *Human Rights, Humanitarian Law and Refugee Protection*, pp. 135-141, C. Sommaruga, *Humanitarian Law and Human Rights in the Legal Arsenal of the ICRC*, pp. 125-133; R. Abi-Saab, *Human Rights and Humanitarian Law in Internal Conflicts*, in Human Rights and Humanitarian Law: The quest for universality, D. Warner (ed.), Kluwer Law International, 1997, pp. 107-123; L. Doswald-Beck, *International Humanitarian Law and Human Rights Law*, IRRC, No. 293, pp. 94-119, 1993; R. Kolb, *The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, IRRC, No. 324, pp. 409-19, 1998; J. Dugard, *Bridging the gap between human rights and humanitarian law: The punishment of offenders*, IRRC, No. 324, pp. 445-453, 1998. H.G. Espiell, *Humanitarian Law and Human Rights*, in *Human Rights: Concepts and Standards*, J. Symonides (ed.), Ashgate: Dartmouth, UNESCO Publishing, 2000, pp. 345-359. A detailed bibliography is available at: *www.icrc.org/Web/Eng/ siteeng0.nsf/iwpList314/ 91FE901A010A2250C1256B66005C4C05* (last accessed on 1 November 2007).

50 D. Schindler, *The International Committee of the Red Cross and Human Rights*, IRRC, No. 208, 1979, p. 7.

humanitarian law rules and principles in their examination of the human rights situation in certain countries or in their thematic studies.[51] In 1977, maybe in an effort to correct this initial detachment, AP II, applicable in non-international conflicts, in its preamble points to the close relationship between international humanitarian law and human rights: '*Recalling*… that international instruments relating to human rights offer a basic protection to the human person' and '*Emphasizing* the need to ensure a better protection for the victims of …armed conflicts'. Moreover, Articles 4, 5, and 6 of AP II are phrased in human rights instruments language and indeed represent an incorporation of human rights in a humanitarian law instrument. To sum up, despite a certain divide in the onset of these two branches of law, the complementarity of international humanitarian law and human rights law has become widely accepted. Meron argues that a phenomenon of the 'humanization' of humanitarian law has occurred via a process driven to a large extent by the adoption of international human rights law principles and the commonly shared principle of humanity.[52]

It should be noted that while the concept of derogation, recognized and incorporated in many international human rights treaties, is not accepted in humanitarian law, the latter employs the concept of military necessity, which is, however, in contrast to the concept of derogations, in-built into modern international humanitarian law, and in certain situations, upon meeting certain thresholds, can override the normally applicable humanitarian rules.[53] Generally speaking, international human rights instruments are concerned with creating protection mechanisms, especially with regard to the right to life, the prohibition of slavery, the prohibition of torture, or inhuman and cruel treatment, and the non-retroactivity of criminal law rules. Unlike humanitarian law norms which generally cannot be derogated from, many of the rights enlisted in these instruments can be derogated from in a situation of emergency. However, it should be noted that albeit a number of human rights treaties permit derogations from certain rights in situations of public emergency, there are certain human rights that are never derogable. Suffice it to mention here the right to life,[54] the prohibition of torture or cruel, inhuman treatment,[55] and the prohibition of slavery.[56]

As briefly illustrated above, there are quite a few differences between human rights and humanitarian law. *First*, human rights treaties list a number of rights that can be claimed by individual persons against their own governmental authorities, while

51 L. Doswald-Beck and S. Vité, *International Humanitarian Law and Human Rights Law*, IRRC, No. 293, 1993, pp. 94-119.

52 See *inter alia* Meron, *supra* note 20, pp. 239-278.

53 This is a rather broad comparison. It should be noted here that neither derogation from certain human rights provisions, nor military necessity, give a free hand to undertake actions that would otherwise be impermissible, for they should be balanced against other humanitarian requirements enshrined in both international human rights and humanitarian law.

54 ICCPR, Article 6.

55 CAT, Article 4.

56 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.

humanitarian law treaties mainly list rules of behaviour pertaining to parties to a conflict in relation to the conduct of hostilities and in relation to the treatment of specific categories of persons who are *hors de combat*, or are in the power of the adversary Party. *Second*, whereas humanitarian law treaties are long, complex and quite detailed, human rights instruments are comparatively simpler. *Third*, human rights treaties, unlike those pertaining to humanitarian law which offer protection at an international level, are agreed upon and offer protection also at a regional level through regional human rights treaty arrangements. One can mention here the European Convention on Human Rights and Fundamental Freedoms, the Inter-American Human Rights Convention, the African Charter on Human and People's Rights and so on. This can be explained by the fact that while such regional arrangements for human rights protection are logical in view of the common history, culture, and at a large scale also by the level of the overall development in a given region, one cannot really see how such arrangements for the protection of human rights can function in the case of two States from different regions engaging in an armed conflict. *Fourth*, the phenomenon of dividing rights into generations, typical of human rights, where the first generation of rights comprises civil and political rights, the second generation comprises economic, social and cultural rights, and the third generation comprises the right to development, the right to a clean environment, the right to peace and so on, is alien to humanitarian law.

The major legal difference is that while humanitarian law is generally formulated as a series of duties upon States, human rights are generally formulated as a series of rights for individuals. This does have one very definite advantage from a purely legal point of view, in that humanitarian law is not subject to the kind of arguments that continue to plague the implementation of economic and social rights.[57] Although there are differences as to the scope of their application and the rationale of the existence of these branches of law, they are seen as complementary to each other, especially in situations of armed conflict, be it international or internal. Purists from both fields oppose the merger of these two fields of law, but in fact while the two bodies of law remain conceptually different in many regards, they are still applied in a complementary and cumulative manner.

There is a difference in their enforcement as well. Dugard has noted:

> 'The blurring of the distinction between international and non-international armed conflicts and the expansion of the definition of international crimes have led to the criminalization of human rights violations, particularly where they are committed in a systematic manner or on a large scale.'[58]

57 Doswald-Beck and Vité, *supra* note 51.

58 J. Dugard, *Bridging the Gap between Human Rights and Humanitarian Law: The Punishment of Offenders*, IRRC, No. 324, 1998, pp. 445-453.

For a variety of reasons not many cases of the prosecution of war crimes, crimes against humanity and other international crimes have been brought before national courts. Thus, the establishment of the *ad hoc* international criminal tribunals and the ICC has been a huge step forward in prosecuting the perpetrators of such crimes and potentially in deterring others from committing them. Besides, these developments at an international level have in turn triggered the adoption of national legislation penalizing such crimes. This has resulted in an increase in the amount of cases which have been brought before national courts.[59] Thus, the international prosecution of these crimes has had an effect on a domestic level.

It should be noted that while, on the one hand, violations of international humanitarian law are attributed to individuals and sanctions are prescribed against them, on the other hand they are also attributed to States and measures to stop, repress, and make reparations, albeit not often, are undertaken. While there are a few venues where a State can be brought to face such charges of violations of human rights and humanitarian law, our focus rests on the ICJ. Thus, these cases where States are brought before the ICJ on claims of violations of international human rights and humanitarian law are the subject of detailed discussion respectively in chapters three and four. However, it should be noted that bringing States before the ICJ on these charges is quite difficult because of the general lack of compromissory clauses in the respective international instruments and a constant reluctance on the part of States to accept the compulsory jurisdiction of the ICJ.

In spite of the differences between these two branches of law, some of which were set out above, they do in fact have a common basis. They are based on the principles of humanity, non-discrimination,[60] and human dignity. Their common aim is to ensure respect for human life and the well-being of individuals. Each condemns the practice of torture and cruel, inhuman or degrading treatment. Although limited, there have been references in human rights conventions, namely the Convention on the Rights of the Child, to humanitarian law provisions applicable to children. In this regard there are many overlaps of human rights and humanitarian law norms. Indeed, these two branches of law, part of public international law, although not the same, work in tandem to protect victims of armed conflicts. In the commentary to GC IV it is stated that a doctrine which 'is today only beginning to take shape' – Human Rights – could

59 Some of the most important cases brought before national courts are *inter alia* the *Pinochet* case before Swiss, Spanish, and Chilean courts, and also before the House of Lords in the UK; the *Ghadaffi* case before the Cour de Cassation in France; the *Yerodia Ndombasi* case and the *Ariel Sharon* case before Belgian courts; the Afghan generals case (*Habibullah Jalalzoy and Heshamuddin Hesam*), the van Aanrat case, the *Sebastien Nzapali* case and the Guus Kouwenhoven case before Dutch courts and so on.

60 With non-discrimination here is meant adverse discrimination, for international humanitarian law just like international human rights law makes distinctions between categories of persons in an effort to afford better protection to vulnerable groups.

one day broaden the scope of international humanitarian law and afford protection for all, irrespective of nationality.[61]

Although international human rights and humanitarian law aim to provide protection, the former for individuals in general and the latter for the different categories of protected persons, Meron has identified a few areas which give rise to significant problems with regard to grave abuses of human rights and humanitarian norms, namely:

1. where the threshold of the applicability of international humanitarian law is not reached;
2. where the state in question is not a party to the relevant treaty or instrument;
3. where derogation from the specified standards is invoked; and
4. where the actor is not a government, but some other group.[62]

While different issues related to these areas have come before the ICJ and have been clarified or at least touched upon by this Court, there are quite a few which remain to be clarified in the future.

The gap between international human rights and humanitarian law is diminishing and the ICJ has already stated that as regards the relationship between international humanitarian law and human rights law, there are three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; still others may be matters of both these branches of international law.[63] It is noteworthy to mention also the position of the ICTY and that of the I-ACmHR in this respect, as both these international bodies are involved in the application of rules and principles of these two branches of international law.[64] Thus, according to the ICTY:

> Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.'[65]

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61 Commentary to the Fourth Geneva Convention, ICRC, Geneva, 1958, p. 373.

62 T. Meron, *Convergence of International Humanitarian Law and Human Rights Law*, in Human Rights and Humanitarian Law: The Quest for Universality, D. Warner (ed.), Martinus Nijhoff Publishers, 1997, p. 97.

63 *Wall*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 178, para. 106.

64 For the position of the ECtHR and the ECmHR see *inter alia* A. Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, IRRC, No. 324, pp. 513-529.

65 ICTY, *Prosecutor v. Kunarac*, Case No. IT-96-23-T, Judgment of 22 February 2001, para. 467, available at: *http://www.un.org/icty/kunarac/trialc2/judgement/index.htm* (last accessed on 1 November 2007).

That position of the ICTY seems to pinpoint the complementary function of these two branches of law in the service of protecting human values. Indeed, the established common values that transcend the legalistic arguments and distinctions between these two branches of international law create a solid foundation for protecting the human rights enshrined in both international humanitarian law and human rights law rules and principles. Also the I-ACmHR has pronounced on the relationship between international human rights and humanitarian law. Thus, in the *Coard* case it stated:

First, while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an integral linkage between the law of human rights and humanitarian law because they share a 'common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,' and there may be a substantial overlap in the application of these bodies of law. Certain core guarantees apply in all circumstances, including situations of armed conflict, and this is reflected, *inter alia*, in the designation of certain protections pertaining to the person as peremptory norms (*jus cogens*) and obligations *erga omnes*, in a vast body of treaty law, in principles of customary international law, and in the doctrine and practice of international human rights bodies such as this Commission.[66]

Apparently, both the position of the I-ACmHR and that of the ICTY with regard to the application of international human rights and humanitarian law essentially converge with that of the ICJ. Although in the ICRC's *Avenir* Plan it was stated that 'the relationship between humanitarian law and human rights must be strengthened',[67] the ICRC has historically resisted an identification of humanitarian law with human rights, due to a belief that the former is less political and controversial. Thus, it is not yet clear how the relationship between humanitarian law and human rights law can be strengthened in view of the reluctance of leading organizations in the field to specify how this can be achieved. However, in a sense this is already being done by the international judicial and quasi-judicial organs which have been applying international human rights and humanitarian law in a complementary fashion.

## 4.6 MILITARY INTERVENTION FOR HUMANITARIAN PURPOSES

First of all, a clear distinction should be drawn between humanitarian action directed towards helping victims of armed conflict by humanitarian organizations and military intervention undertaken by individual States, groups of States, or security arrangement

66 I-ACmHR, *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99, 29 September 1999, para. 39, available at: *http://www1.umn.edu/humanrts/cases/us109-99.html* (last accessed on 1 November 2007). In their petition, filed with the Commission on 25 July 1991, the 17 individuals concerned alleged that the military action led by the armed forces of the US in Grenada in October 1983 violated a series of international norms regulating the use of force by States.

67 International Committee of the Red Cross – *Avenir Study* (Strategic content), Geneva, 12 December 1997, IRRC, No. 322, 1998, pp. 126-136.

organizations for the humanitarian purpose of putting a stop to ongoing gross human rights violations. The issue of humanitarian aid and that of military intervention authorised by the SC are left out, while the issue of military intervention for humanitarian purposes (or humanitarian intervention) in absence of a SC authorisation is dealt with here. The question of humanitarian intervention is mainly an issue of *jus ad bellum* in that it relates to the use of force and as such would fall outside the scope of this study, but given that it is undertaken in order to put a stop to gross violations of human rights and humanitarian law rules it is deemed relevant to be dealt with here. Of specific interest is the position taken by the Court on the issue of intervention in breach of State sovereignty and especially military intervention for humanitarian purposes. For our purposes, humanitarian intervention is the use of military force against a State or non-State actors in order to put a stop to large-scale and widespread violations of human rights or international humanitarian law (war crimes, crimes against humanity, genocide and genocidal practices) that shock the human conscience.[68] Two additional conditions should be met, namely that the victims of these violations are not nationals of the intervening State(s) and that there is no legal authorisation to intervene given by a competent organ.[69] The questions of what exactly the military forces are to do after the intervention, or whether the intervening powers have sufficient interest and commitment to secure the necessary changes in the political, economic and social order of the country, fall outside the scope of this study.

Owing to widespread atrocities witnessed in the last decade of the twentieth century in the region of the Great Lakes of Africa, in Rwanda, in the former Yugoslavia, and more recently in Darfur, the issue of humanitarian intervention has been thrust into the political and legal limelight.[70] Indeed, military means have been employed in several cases in countering threats or ongoing massive human rights violations. It has been asserted that while traditional state-centric approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defence thereof from any external intrusion, international humanitarian law requires some encroach-

68 The definition used here is similar with that used by Holzgrefe in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, J.L. Holzgrefe & R.O. Keohane (eds.), Cambridge University Press, 2003, p. 18.

69 The SC of the UN is the only competent organ to authorize a military intervention under Chapter VII, Article 42 of the UN Charter.

70 See *inter alia* O. Rams-Botham & T. Woodhouse, *Humanitarian Intervention in Contemporary Conflict*, Polity Press: Cambridge, 1996, F.R. Tesón, *Humanitarian Intervention*: *An Inquiry into Law and Morality*, 2nd edition, Irvington-on-Hudson: New York, 1997, Danish Institute of International Affairs, Copenhagen, *Humanitarian intervention: legal and political aspects*, 1999, S. Chesterman, *Just war or just peace? Humanitarian intervention and international law*, Oxford University Press, 2002, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, J.L. Holzgrefe & R.O. Keohane (eds.), Cambridge University Press, 2003, C.A.J. Coady, *The Ethics of Humanitarian Intervention*, US Institute of Peace, July 2002, AIV/ CAVV, *Humanitarian Intervention*, No. 13, April 2000, the report of the ICISS, *The Responsibility to Protect*, December 2001, available at: *http://www.iciss.ca/report-en.asp*, (last accessed on 1 November 2007).

ment on sovereignty.[71] Indeed, it appears that in light of certain military interventions undertaken in the last two decades, an insistence upon a traditional concept of non-intervention in domestic affairs, a corollary of the principle of state sovereignty, would be outdated, especially if seen from a humanitarian perspective. The sovereignty of states remains an important international value, but the prerogatives it entails have been limited and redefined in order to accommodate the newly recognized values of international human rights[72] and of international humanitarian law.

The issue of an intervention in breach of State sovereignty was first brought before the ICJ by Albania in the *Corfu Channel* case. The Albanian government claimed that minesweeping operations in its territorial sea by British warships without its permission was an intervention in breach of its sovereignty.[73] Further, in the *Nicaragua* case the US claimed that its actions in Nicaragua amounted to an action of collective self-defence, while the latter contended that the US intervention was only an unlawful use of force.[74] More recently, in the *Legality of Use of Force* cases, it was former Yugoslavia (Serbia and Montenegro) that contended that the use of force by the NATO countries instead of a humanitarian intervention was an illegal use of force.[75] The question arises whether humanitarian intervention against a State for crimes committed against its own population is legal, or at least justified?[76] It should be acknowledged that international law does not regulate the conflict between the use of force and fundamental humanitarian values *a priori* in a conclusive manner.[77] A middle road towards a more satisfactory solution is respecting the conditions set by the Commission on Intervention and State Sovereignty (CISS) in its report of December 2001.[78] Given the known difficulties of relying on the SC and GA for authorizing a humanitar-

71 B.S. Brown, *Nationality and Internationality in International Humanitarian Law*, Stanford Journal of International Law (SJIL), Vol. 34, 1998, p. 395.

72 *Ibidem*.

73 *Corfu Channel* case, (*Merits*), ICJ Reports 1949, p. 6, p. 12 and pp. 32-35.

74 *Nicaragua* case, (*Merits*), ICJ Reports 1986, paras. 23 and 257-259.

75 NATO's intervention in Yugoslavia was also opposed by Russia, India, and China on the ground that NATO breached the core principles of the United Nations Charter, namely those of sovereignty, non-intervention, and the non-use of force. .

76 The ICRC's position on humanitarian intervention is:
- International Humanitarian Law cannot serve as a basis for armed intervention in response to grave violations of its provisions; the use of force is governed by the United Nations Charter.
- It is not for the ICRC to pronounce on the legality or legitimacy of such intervention
- International humanitarian law applies when intervention forces are engaged in hostilities with one or more of the parties to the conflict.
- The ICRC seeks to promote the term 'armed intervention in response to grave violations of human rights and international humanitarian law'.

77 R. Kolb, *Note on Humanitarian Intervention*, IRRC, No. 849, 2003, p. 134.

78 International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Centre, Canada, December 2001. Available at: *http://www.iciss.ca/report-en.asp* (last accessed on 1 November 2007). See paras. 4.15 to 4.43 for the six criteria mentioned there. See *inter alia* N.J. Wheeler, *Legitimating Humanitarian Intervention: Principles and Procedures*, MJIL, Vol. 2, 200, pp. 550-567. He identifies six principles, namely Just Cause, Last Resort, Good over Harm, Proportionality, Right Intention, and Reasonable Prospect.

ian intervention, it has been argued that a solution can be for States to launch such an intervention, and then seek to legitimate their actions retrospectively at the UN.[79] A caution to such an idea using the words of the ICJ, albeit uttered in a different context, would be that 'Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself'.[80]

Answering the question of whether military intervention for humanitarian purposes in the absence of SC authorisation is permissible under international law means striking a balance between two sets of legal values which are important components of the UN Charter, namely that of State sovereignty, with its corollaries of territorial integrity and non-interference in a State's domestic affairs, and the obligation to respect and ensure respect for human rights and human dignity. The issue of military intervention for humanitarian reasons in the absence of a SC authorisation is a controversial issue still in the stage of development and in order to transform it into an accepted customary norm will require further consolidation. Whether a legal framework needs to be set up at this stage is at least controversial, as this would hinder an ongoing process of development. Despite the fact that humanity needs a moral, legal and political framework for judging the legitimacy of particular interventions that purport to be humanitarian, taking such interventions lightly might be equivalent to opening Pandora's box. Indeed, to systematically use armed intervention for humanitarian purposes would amount to an abdication by the international community of its true responsibilities: preventing conflict and promoting the basic values expressed in international humanitarian law.[81] International humanitarian intervention should only be one of several tools available to the international community to put an end to flagrant breaches of international human rights and humanitarian law. Humanitarian intervention is in itself often a cause of suffering, and even loss of life. It is a measure of last resort; to be considered only in extreme situations, and only after less drastic steps have been tried, and failed.[82] In the view of this author while, on one hand, not every human rights violation should give rise to a just cause for resorting to armed humanitarian intervention; on the other hand, gross human rights violations such as crimes against humanity and genocide can under certain circumstances be seen as just causes for triggering an armed humanitarian intervention.

Is the ICJ, from a humanitarianist's perspective, a *forum conveniens* to answer the question whether humanitarian intervention should be allowed? Indeed, it would be interesting to hear the Court's opinion on the legality of humanitarian intervention. In the *Nicaragua* case, the Court, in considering legal issues and facts related to the United States' intervention in Nicaragua, seemed to hint at a general requirement, i.e.

79 Wheeler, *supra* note 78, p. 562.
80 ICJ, *Corfu Channel* case, (*Merits*), ICJ Reports 1949, p. 35.
81 A. Ryniker, *The ICRC's position on 'humanitarian intervention'*, IRRC, Vol. 83, 2001, p. 532.
82 Meron, *supra* note 62, p. 103.

the conduct of the intervening State should be in conformity with the human rights it tries to protect. Going a step further would translate this requirement into the terms of the principles of necessity and proportionality, where the good would have to completely outweigh the harm done. Further, according to the Court, in such a case the right of collective self-defence cannot be invoked as a basis for the intervention.[83] Although the *Legality of the Use of Force* cases represent a missed opportunity to clarify this principle, the likelihood exists that such a possibility would present itself again before the ICJ.

83 ICJ, *Nicaragua* case, (*Merits*), ICJ Reports 1986, p. 135, para. 268. The Court stated: 'The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of United States, and cannot in any event be reconciled with the strategy of the respondent State, which is based on the right of collective self-defence.'.

## PART II CASE LAW ANALYSIS

The contribution of the Court to the interpretation and development of international humanitarian law rules and principles is illustrated through the analysis of a number of selected cases. In the process of selection only those cases where issues related to international humanitarian law were central were chosen to be dealt with in detail. Other cases have been dealt with only to the extent that they make a contribution to the interpretation and development of international humanitarian law rules and principles. The number of cases which are discussed in detail below is small, if compared to the number of cases dealt with in the previous chapter. However, despite the limited number of cases, the Court has been able to render an important contribution to international humanitarian law.

Through an analysis of the findings of the Court against the background of the international humanitarian law instruments, the writings of different publicists, and where possible also the position of different organizations working in this field, especially of the International Committee of the Red Cross (ICRC), this author has tried to identify the contribution of the Court in clarifying provisions, rules, or principles of humanitarian law, or in upholding and giving its judicial imprimatur to already settled concepts. The Court's habit of relying on and citing human rights and humanitarian law provisions alongside each other makes their separate discussion a rather difficult exercise. However, at the same time applying international human rights law and humanitarian law in tandem increases the weight and appeal of the decisions of the Court.

By way of an introduction it can be said that the Court's contribution to interpreting and developing international humanitarian law rules and principles in accordance with the evolving needs of the international community and humanitarian considerations has brought international humanitarian law into conformity with the changing emphasis of general international law.[84] Further, by *inter alia* clarifying the obligations incumbent upon States under international humanitarian law instruments and customary international humanitarian law the Court has strengthened the level of protection accruing to individuals under humanitarian law. The analysis of the case law of the Court is followed by a general appraisal of the Court's contribution.

### 4.7 *CORFU CHANNEL* CASE (UNITED KINGDOM *V.* ALBANIA, JUDGMENT OF 9 APRIL 1949, *MERITS*)

As mentioned in the previous chapter this case arose out of an incident that occurred on 22 October 1946 in the Albanian territorial waters of the Corfu Channel where two British warships, *HMS Saumarez* and *Volage*, struck mines and incurred heavy material damage and loss of human life. Three weeks later the Channel was swept

84 See *inter alia* J. Gardam, *The Contribution of the International Court of Justice to International Humanitarian Law*, LJIL, Vol. 14, 2001, pp. 349-365.

clean by British minesweepers. This incident, a signal that the Cold War hostilities could break out at anytime, was brought before the Court at the suggestion of the SC of the UN. Besides giving birth to the doctrine of *forum prorogatum*,[85] this case is relevant for other contributions it makes to clarifying international law principles.

*A) Elementary Considerations of Humanity*

The failure of the Albanian authorities to attempt to prevent the ships from entering the minefield was considered by the Court as a grave omission that involved the international responsibility of Albania. In the words of the Court:

> 'The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them.'[86]

As Albania and the United Kingdom were not at war, the Court proceeded to base State responsibility for this incident not on the Hague Convention VII,[87] but on a new concept such as that of 'elementary considerations of humanity'. This is a concept to which the Court would return also in later decisions. In this case the Court held:

Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: *elementary considerations of humanity* (emphasis added), even more exacting in peace than in war;…and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[88]

Apart for being the first case on the docket of the Court, this case is also the first one where the Court, after reaching the conclusion that a State is responsible for a breach of international law, enforced a duty upon that State to pay compensation to the affected State. So far this is the only case which has passed through all three phases possible in contentious legal proceedings before the Court.

*B) Concluding Remarks*

Through this case the Court seemed to signal from the beginning of its work that it would make use of all possible sources of international law listed in Article 38 of its Statute. Besides, the Court appeared to vest a loose concept such as that of *elementary considerations of humanity* with the status of a general principle of law recognized by civilized nations, as provided for by Article 38(c) of its Statute. Surely, from the

85 See *supra* section 2.6.3.2 .
86 *Corfu Channel* case, (*Merits*), ICJ Reports 1949, p. 22.
87 This Convention is considered to be part of customary international law.
88 See also *supra* section 3.6.1.

perspective of international humanitarian law, the Court provided an important contribution to increasing the level of protection for the individual under the framework of international law, through the coining of a new concept and its vesting with the status of a general principle of law. In this particular case the *elementary considerations of humanity* can be equated with the duty, following from common sense, of not knowingly allowing unnecessary harm to be done to others. As mentioned above, the Court has not only had recourse to this general principle in other cases, but has also given it substance by holding that rules of international humanitarian law, such as Common Article 3 to the GCs, are an expression of this principle.

### 4.8 *MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA* (NICARAGUA *V.* UNITED STATES, JUDGMENT OF 27 JUNE 1986, *MERITS*)

This was a controversial case on which much has been written; however, our perspective is rather different, since it focuses on the contribution of the ICJ through this case to the interpretation and development of international humanitarian law rules and principles.[89] The case was brought before the Court by Nicaragua contending that the United States was responsible for the military and paramilitary activities in and against

89 For a detailed discussion of this case see *inter alia*: W. Czaplinski, *Sources of International Law in the Nicaragua Case*, ICLQ, Vol. 38, 1989, pp. 151-166; P-M. Eisemann, *L'arret de la C.I.J. du 27 juin 1986 (fond) dans l'affaire des activites militaires et paramilitaires au Nicaragua et contre celui-ci*, AFDI, Vol. 32, 1986, pp. 153-191; T.D. Gill, *The Law of Armed Attack in the Context of the Nicaragua Case*, HYbIL, Vol. 1, 1988, pp. 30-58, *Litigation Strategy at the International Court. A Case Study of the Nicaragua v. United States Dispute*, Nijhoff, 1989; D.W. Greig, *Nicaragua and the United States: Confrontation over the Jurisdiction of the International Court*, BYbIL, Vol. 62, 1992, pp. 119-281, *The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States*, ICLQ, Vol. 15, 1966, pp. 325-368; K. Highet, *Evidence, the Court, and the Nicaragua Case*, AJIL, Vol. 81, 1987, pp. 1-56, *Reflections on Jurisprudence for the Third World: The World Court, the 'Big Case,' and the Future*, VJIL, Vol. 27, 1987, pp. 287-304, *You Can Run but You Can't Hide' - Reflections on the U.S. Position in the Nicaragua Case*, VJIL, Vol. 27, 1987, pp. 551-572; M.W. Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court of Justice*, AJIL, Vol. 81, 1987, pp. 144-6, *The Jurisprudence of the Court in the Nicaragua Decision*, ASIL Proceedings, Vol. 81, 1987, pp. 258-277; P.W. Kahn, *From Nuremberg to The Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, YJIL, Vol. 12, 1987, pp. 1-62; C. Lang, *L'affaire Nicaragual (sic) Etats-Unis devant la Cour internationale de Justice*, Paris: Libraire generale de Droit et de Jurisprudence, 1990,; R.St. J. Macdonald, *The Nicaragua Case: New Answers to Old Questions?*, CYbIL, Vol. 24, 1986, pp. 127-160; H.G. Maier, *ed*., *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, AJIL, Vol. 81, 1987, pp. 77-183, *Nicaragua v. the United States before the International Court of Justice*, WA, Vol. 148, 1985, pp. 1-70; P.M. Norton, *The Nicaragua Case: Political Questions before the International Court of Justice*, VJIL, Vol. 27, 1987, pp. 459-526; J.P. Rowles, *Nicaragua versus the United States: Issues of Law and Policy*, IL, Vol. 20, 1986, pp. 1245-1288; N.M Tama, *Nicaragua v. United States: The Power of the International Court of Justice to Indicate Interim Measures in Political Disputes*, DJIL, Vol. 4, 1985, pp. 65-87; R.F. Turner, *Peace and the World Court: A Comment on the Paramilitary Activities Case*, VJTL, Vol. 20, 1987, pp. 53-79.

Nicaragua.[90] Amongst others, Nicaragua asked the Court to adjudge and declare that the United States was in breach of its obligations under general and customary international law as it had used and was using force against Nicaragua.[91] The Court dismissed the contention that a judicial body is unable to deal with situations involving ongoing armed conflict. Quite boldly, the Court reaffirmed its position that there is no doctrine of separation of powers which would prevent it from hearing a case if the Security Council were seized of the same situation at the same time.[92] Furthermore, the Court went on to clarify that the Security Council had primary responsibility for the maintenance of international peace and security under the UN Charter, but not an exclusive responsibility.[93]

Indeed, what makes this case special is that it was concerned with issues related genuinely to the use of force and international humanitarian law. This represented quite a change in the docket of a Court which was mostly busy with disputes related to treaty interpretation and border delimitation. It is noteworthy that the factual findings of the Court were made upon indirect methods of proof, public knowledge supported by press reports and governmental publications that had not been officially challenged. The findings of the Court in the jurisdiction and admissibility phase caused great controversy and brought about the refusal of the US to be bound by the decision of the Court and the termination of US adherence to Article 36 (2) of the Statute of the Court, conferring compulsory jurisdiction upon the Court.[94] Nicaragua claimed for its part that the US was engaged in an unlawful use of armed force, or a breach of peace, or acts of aggression against Nicaragua. On the other hand, the US used all possible arguments to challenge the jurisdiction of the Court, although in the end to no avail.

*A) Applicability of the Geneva Conventions*

Turning to the obligation of the United States to apply and respect the Geneva Conventions of 1949 the Court held:

> The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.[95]

90 Nicaragua in its Application brought eight counts before the Court. *Nicaragua* case, (*Jurisdiction and Admissibility*), ICJ Reports 1984, p. 428 and 429, paras. 82 and 85.
91 ICJ, *Nicaragua* case, (*Jurisdiction and Admissibility*), ICJ Reports 1984, p. 434, para. 95.
92 *Ibid.*, p. 435.
93 *Ibidem*.
94 See *supra* section 2.6.3.1.
95 *Nicaragua* case, (Merits), ICJ Reports 1986, p. 114, para. 220.

The paragraph above is a reinforcement of the view of the Court that the Geneva Conventions are in some respects a development and in other respects no more than the expression of general principles of humanitarian law.[96] However, starting from this general finding the Court points to the obligation of a State to respect and even to ensure respect for the Geneva Conventions, within the terms of Article 1 of the Geneva Conventions. While there seems to be little disagreement with the Court's statement that the obligation incumbent upon a State for abiding by principles of international humanitarian law derives not only from the Conventions themselves, but also from the fact that the majority of these principles are part of customary international humanitarian law, there is more controversy concerning the course of the legal reasoning employed by the Court.[97] Although it was already agreed that for the most part the Geneva Conventions are considered representative of customary international law the Court out of caution and for the sake of clarity should have explained, first, the basis of such a claim and, second, it should also have explained what exactly the obligation of ensuring respect for the Geneva Conventions consists of. The Court unfortunately missed the opportunity to clarify these issues.

*B) Fundamental Principles of Customary International Humanitarian Law*

The *Nicaragua* judgment contains many interesting, and one can add at the time rather controversial, findings on international humanitarian law rules and principles. *First*, the ICJ clarified that the conduct of the United States could be judged 'according to the fundamental general principles of humanitarian law'.[98] By using these words the Court seems to confer upon the general principles of humanitarian law the status of customary international law. From that first assertion the Court moves a step further when international humanitarian law principles enshrined in the Geneva Conventions are acknowledged the status of customary international law, binding upon States even without ratification of the international instruments where these principles have been codified. As stated by the Court:

> '[i]n its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles'.[99]

Amongst the general principles of international humanitarian law figuring prominently as one of the pillars of this branch of law is the principle of humanity. In a remarkable

96 For the sake of completeness it should be said that Judges Jennings and Ago in their respective opinions expressed their doubts as to whether the Geneva Conventions are indeed an expression of general principles of humanitarian law. *Nicaragua* case, Separate Opinion of Judge Ago, ICJ Reports 1986, pp. 181-191 and Dissenting Opinion of Judge Jennings, ICJ Reports 1986, pp. 528-546.

97 As the Court itself noted, Nicaragua did not invoke the Geneva Conventions, *Nicaragua* case, (*Merits*), p. 113, para. 217.

98 Nicaragua case, (*Merits*), ICJ Reports 1986, p. 113, para. 218.

99 *Ibidem*.

passage, the Court went on to stress the importance of this principle in the following words:

> 'It is significant in this respect that, according to the terms of the Conventions the denunciation of one of them 'shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience' (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).'[100]

The principle of humanity has been enshrined *inter alia* in what scholars of international humanitarian law commonly refer to as the Martens clause; the formulation of which has remained largely identical to the one inserted initially on Martens' suggestion in the Preamble to the 1899 Hague Convention II containing the Regulations on the Laws and Customs of War on Land.[101] The reference to the Martens clause here serves a dual purpose: first, it lays down the legal basis of obligations borne by States which are not parties to the Geneva Conventions or that have denounced them; and secondly, building on the first, it emphasizes the importance that the principle of humanity, of a customary nature, has along with legal obligations *strictu sensu*. As Judge Kooijmans has put it, the Martens clause 'is the backbone of the *ius in bello* and keeps its value whenever and wherever States use military force.'[102]

Another important finding of the Court with regard to the application of humanitarian law is the one regarding common Article 3 to the Geneva Conventions. The Court makes an important contribution to international humanitarian law by qualifying this article as a *minimum yardstick* (emphasis added) to be respected in conflicts of both a non-international and an international character:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute *a minimum yardstick* (emphasis added), in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'.[103]

Having earlier implicitly acknowledged to this article the status of customary law the Court continued by laying down a set of basic rules with regard to the protection

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100 *Ibidem*.

101 See *inter alia* A. Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky*, EJIL, Vol. 11, No. 1, pp. 187-216. On Marten's life and his contribution see *inter alia* V.V. Pustogarov, *Fyodor Fyodorovich Martens (1845-1909) – a humanist of modern times*, IRRC, No. 312, 1996, pp. 300-314 .

102 P. Kooijmans, *Is There a Change in the Ius ad Bellum and, if so What Does it Mean for the Ius in Bello*, in L. van Sambeek and B. Tahzib-Lie, (eds.), Making the Voice of Humanity Heard, Martinus Nijhoff Publishers, 2004, p. 237.

103 *Nicaragua* case, (*Merits*), ICJ Reports 1986, p. 114, para. 218 .

afforded to persons taking no active part in hostilities. By affirming that the rules enshrined in common Article 3 constitute 'a minimum yardstick' to be respected in both non-international and international armed conflict, the Court implicitly accentuates the individual rights of protected persons against horrendous acts such as wilful killing, torture or inhuman treatment, or serious injury to body and to health.[104] In the words of common Article 3:

> …the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons: d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

This article is beyond any doubt the backbone of the protection of civilians and persons *hors de combat* since it prohibits at any time and in any place whatsoever violence to life, outrages upon personal dignity, and humiliating and degrading treatment, the passing of sentences and the carrying out of executions without previous judgment by a regularly constituted court.

The ICJ emphasized that 'the minimum rules applicable to international and to non-international conflicts are identical'.[105] This finding by the Court seems to blur to a certain extent the distinction between international or internal armed conflict. However, by setting the minimum rules applicable with regard to civilians and persons *hors de combat* the Court effectively enhanced the level of protection under humanitarian law for the categories of protected persons. Besides emphasizing the importance of this article, the Court's contribution extended to putting some flesh on the loose concept of elementary considerations of humanity. Thus, by making the rules enshrined in common Article 3 part of the concept of elementary considerations of humanity, the latter from a rather abstract concept becomes a concrete and measurable means of evaluating State compliance with international humanitarian law.

### *C) The Principle of Humanitarian Assistance*

The Court also embarked upon a clarification of the principle of humanitarian assistance, another contentious issue between the parties in the proceedings. Humanitarian assistance, for our purposes, can be defined as the provision of assistance in order to ensure the survival of those directly affected by armed conflict of an international or internal character.[106] In order to distinguish between what constituted humanitarian

104 See *inter alia* S. M. Schwebel, *The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law*, New York University Journal of International Law and Politics (NYUJILP), Vol. 27, 1995, pp. 736-7.

105 *Nicaragua* case, (*Merits*), ICJ Reports 1986, p. 114, para. 219.

106 C. Rottensteiner, *The Denial of Humanitarian Assistance as a Crime under International Law*, IRRC, No. 835, 1999, pp. 555-582.

assistance as opposed to intervention in the international affairs of a State, the Court relied on the characteristics of such assistance, as indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross:

> 'The Red Cross born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace among all peoples'
>
> and that
>
> 'It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.'[107]

After having provided the basis of the concept of humanitarian assistance the Court went on to spell out in clear terms its high legal and moral ground:

> 'There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way as contrary to international law'.[108]

Applying the findings already made to the circumstances of the case the Court held:

> In the view of the Court, if the provision of 'humanitarian assistance' is to escape condemnation as intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents.[109]

The above findings of the Court can be construed as making three important contributions to the principle of humanitarian assistance, a corollary of the principle of humanity, which is also included in the international humanitarian law instruments. *First*, and rightly so, the Court made reference to the Red Cross practices of providing humanitarian assistance to all persons affected by hostilities in order to prevent and alleviate human suffering. Indeed, over an extended period of time the International Committee of the Red Cross has proved to be an impartial player whose humanitarian assistance has reached a vast number of people in need worldwide. Thus, due tribute is paid by

107 *Nicaragua* case, (*Merits*), p. 125, para. 242.
108 *Nicaragua* case, (*Merits*), p. 124, para. 242.
109 *Ibid*., p. 125, para. 243.

the Court to the humanitarian ideals of the ICRC.[110] *Second*, the ICJ spelled out in clear terms what are the purposes of humanitarian assistance, namely the prevention and alleviation of human suffering and the protection of life and health of the human being. *Third*, the Court made it clear that for humanitarian assistance not to be considered as intervention in the internal affairs of a State, it should be given to all the parties in need without *discrimination* (emphasis added).

*D) State Responsibility for the Actions of Third Parties*

As one of its claims Nicaragua contended that as the rebel groups (*contras*) were organized, trained, financed and equipped by the US, the latter incurred State responsibility for the *contras*' actions. In other words, if an armed group fighting against a government can be considered as the *de facto* agent of a foreign State then under international humanitarian law the conduct of the fighting group can be attributed to that State. Article 8 of the 2001 ILC Rules on State Responsibility reads:

> 'The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.'

In this case the Court applied what is commonly referred to as the '*effective control*' test. In the view of the Court that meant assessing:

> [W]hether or not the relationship of the contras to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.[111]

As Crawford has rightly pointed out, it is a general principle that the conduct of private persons or entities is not attributable to the State under international law.[112] In fact, the degree of control, which must be exercised by the State in order for the conduct to be attributable to it, was a key issue in the case at hand. The Court went on to conclude:

> Despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf…all the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts

110 See section 5.8.2 *infra*.

111 *Nicaragua* case, (*Merits*), ICJ Reports 1986, p. 62, para. 109.

112 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 110.

> contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had *effective control* (emphasis added) of the military or paramilitary operations in the course of which the alleged violations were committed.[113]

Thus, the Court concluded that a general situation of dependence and support would be insufficient to justify attributing the conduct to the State. It is noteworthy that in its judgment in the *Tadić* case the Appeals Chamber of the ICTY, after scrutinizing the Nicaragua test, did not adopt it.[114] This shows that the possibility of different interpretations or even clashes between the existing international courts and tribunals is anything but theoretical.

With regard to the causal relationship between alleged breaches of international humanitarian law and State responsibility the Court held:

> '[i]t is established that the *contra* force has, at least at one period, been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multi-faceted support of the United States'.[115]

However, applying the effective control test, the Court found that although they were supported by and dependent upon the US, they were not so closely controlled by the US as to become in effect agents of the US government.[116] The support given by the US to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support constituted, in the view of the Court, a clear breach of the principle of non-intervention.[117] Further,

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113 *Nicaragua* case, (*Merits*), p. 62 and pp. 64-5, respectively paras. 109 and 115. See also the concurring opinion of Judge Ago, p. 189, para. 17.

114 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Judgment of 15 July 1999, paras. 115-145. Arguing that the Nicaragua test was not persuasive on the grounds that this test would not be consonant with the logic of the law of State responsibility and that this test would be at variance with judicial and State practice the Appeals Chamber arrived at the conclusion that, 'In the case at issue, given that the Bosnian Serb armed forces constituted a 'military organization', the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.' Contrary to this, while appreciating the general direction taken by the judgement of the Appeals Chamber, Judge Shahabuddeen was unconvinced about the necessity of challenging *Nicaragua*. See the Separate Opinion of Judge Shahabuddeen appended to this judgment. See *infra* section 5.4.1.1 for more details.

115 *Nicaragua* case, (*Merits*), p. 63, para. 111.

116 *Ibid*., pp. 53-65, paras. 92-116.

117 *Ibid*., p. 124, para. 242.

the Court also found that by reason of a failure to give notice of the mining of the Nicaraguan ports, the United States was in violation of customary international law.[118]

*E) Encouragement of Acts Contrary to General Principles of International Humanitarian Law*

Another contentious issue brought before the Court arose from the contents of the Manual 'Psychological Operations in Guerrilla Warfare' prepared by the US Central Intelligence Agency. The ICJ found that the advice given in this Manual to target judges, police officers and State Security officials after the local population had gathered to take part in the act and formulate accusations against the oppressor should be regarded as contrary to the prohibition in Article 3 of the GCs, with respect to non-combatants, of 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are regarded as indispensable by civilized people' and probably also of the prohibition of 'violence to life and person, in particular murders to all kinds'.[119] The Court stated:

> [A]t the relevant time those responsible for the issue of the manual were aware of, at the least, allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law; it was in fact even claimed by the CIA that the purpose of the manual was to 'moderate' such behaviour. *The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties* (emphasis added).[120]

Because the motives of the GCs are so essential for the maintenance of civilization and that the GCs are, in the view of the Court, in some respects a development, and in other respects no more than the expression, of general principles of international humanitarian law, the Court seems to assert the obligations arising from them more as a series of unilateral engagements solemnly contracted before the world. Although the Court did not mention neither Article 1 of the GCs nor other articles which would be contravened by the issuance of such a manual, such as Article 47 of the GC I, Article 48 of the GC II, Article 127 of GC III, and Article 144 of the GC IV which are concerned with the dissemination of the GCs. It nevertheless made its point by referring to the encouragement, by the publication and dissemination of this manual, to commit acts which are contrary to general principles of international humanitarian law.

118 *Ibid*., p. 129, para. 254.
119 *Ibid*., pp. 129-130, para. 255.
120 *Ibid*., p. 130, para. 256.

*F) Concluding Remarks*

Notwithstanding the considerable difficulties created by the withdrawal of the US from the judicial proceedings after the judgment of the Court on jurisdiction and admissibility,[121] the Court came forward with a judgment that can be praised in its entirety for the contribution it makes to interpreting and developing principles of international humanitarian law. A commentator has asserted that the judgment rendered, even if repudiated by the US Government, provides a valuable basis for public education on the international law of war and peace in the nuclear age.[122] Apart from making some interesting and important findings, the Court demonstrated that it would not bend to pressure, or shy away from pronouncing on controversial cases, but would apply the law to the best of its knowledge. While one can express regret that the fact-finding, which in this case was of crucial value, was certainly flawed by the non-appearance of the US, and certain facts that surfaced at a later stage proved that indeed Nicaragua did not go to the Court with clean hands,[123] the Court took pains to ensure that due account was taken of the interest of the non-appearing party. In sum, the Court's implicit findings with regard to the customary nature of the 1949 GCs, the application of common Article 3 to the GCs as a minimum yardstick in both international and internal armed conflicts, the clarifications with regard to humanitarian assistance, and last but not least the finding on State responsibility for the encouragement of acts contrary to general principles of international humanitarian law reflected in treaties, comprise some relevant contributions to the further development of international humanitarian law rules and principles.

## 4.9 *LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS* (ADVISORY OPINION OF 8 JULY 1996)

With the emergence and development of nuclear weapons mankind crossed a major threshold: for the first time it had weaponry which threatened its very survival.[124] The threat or use of nuclear weapons with the risk of a full-scale nuclear war loomed large during all of the Cold War period. Regrettably, nuclear weapons continue to constitute a potential threat to humankind's existence. The uneasiness regarding nuclear weapons commenced with a few cases brought before the Court in 1973 by Australia and New Zealand against France. At that time nuclear tests carried out by France in the South Seas were causing the deposit of nuclear fallout in the territories of the above-men-

121 See *Nicaragua* case, (*Jurisdiction and Admissibility*), Judgment of 26 November 1984, ICJ Reports 1984, pp. 392-443.

122 R. Falk, *The World Court's Achievement*, AJIL, Vol. 81, 1987, p. 108.

123 *Nicaragua* case, Dissenting Opinion of Judge Schwebel, ICJ Reports 1986, pp.268-272.

124 Y. Sandoz, *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, IRRC, No. 316, 1997, p. 6.

tioned countries.[125] Thus, there was growing concern among various States regarding security and environmental issues related to nuclear weapons. It was under these circumstances that a large group of non-nuclear and non-aligned countries took the initiative of asking the ICJ for an advisory opinion on the legality of the threat or use of nuclear weapons; first, through the World Health Organization and later through the UNGA.[126] The 28 written submissions and the oral hearings extending over a period of 11 days are indicative of the importance and the remarkable interest that States demonstrated concerning this advisory opinion.[127]

From the beginning the Court set out the methodology on the basis of which it was to make its findings:

> Certain States have however expressed the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write 'scenarios', to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.[128]

Although the Court stated that it did not consider it necessary to write scenarios, some criticism can and has been directed towards the Court for taking such a simplistic approach. The outright sidestepping of certain possible scenarios, such as that of the use of tactical, small-yield nuclear warheads against military targets in uninhabited or sparsely populated areas, is often referred to as one of the weaknesses of this advisory opinion.

It is noteworthy that for the first time the Court was faced with such a major problem, although it had already been evident in international relations for over half a century. In identifying the applicable law the Court held that both *jus ad bellum* and *jus in bello* were relevant in answering the question asked; however, our focus remains

125 *Nuclear Tests* case (Australia *v*. France), 1973-4; *Nuclear Tests* case (New Zealand *v*. France), 1973-4.

126 For the sake of completeness it should be said that this was the high point of a NGO initiative started in 1992 under the name 'World Court Project'. Original promoters of the campaign were the International Peace Bureau (IPB), International Physicians for the Prevention of Nuclear War (IPPNW) and the International Association of Lawyers Against Nuclear Arms (IALANA). They managed to persuade first the member States of the WHO and then the UNGA.

127 Namely the Democratic People's Republic of Korea, Japan, Finland, Samoa, San Marino, the Islamic Republic of Iran, Nauru, the Russian Federation, Ireland, Burundi, Egypt, India, the Netherlands, Sweden, Mexico, Malaysia, the United Kingdom, the United States of America, France, the Federal Republic of Germany, Lesotho, Bosnia and Herzegovina, New Zealand, Qatar, the Solomon Islands, Italy, Ecuador, and the Marshall Islands.

128 ICJ, *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 237, para. 15.

on issues related to the former branch of international law.[129] On 14 May 1993 the World Health Organization (WHO) Assembly had submitted a slightly more concrete question: 'In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?'[130] Resolution 49/75 K of December 15, 1994, adopted by the GA, posed the question in the following terms: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?' In its Opinion the Court rejected by thirteen votes to one submissions that it should not comply with the request to deliver an advisory opinion as requested by the UNGA, while it held by 11 votes to three that it could not answer the similar question posed before it by the WHO.[131] The Court's findings in the latter advisory opinion have given rise to different commentaries by various authors.[132]

This advisory opinion contains several findings which are relevant to international humanitarian law, such as those on the customary nature of a number of humanitarian law principles, their interpretation and interrelationship. Although the Court's opinion is rightly open to criticism regarding the simplistic and rather abstract approach it took in answering the question of the legality of the use of nuclear weapons, it is equally true that the Court went to great lengths both in pages and effort to clarify the application of relevant international law provisions in this area. If the text of the Opinion is read as a whole, as the Court itself suggested, one gains a strong impression that the judges made a remarkable effort to place as many restrictions as possible on the threat or use of nuclear weapons. In fact, the threat or use of nuclear weapons is a complex and sensitive issue that embroils law as well as political and military interests. Therefore, the judges were confronted with a sensitive and complex task. They took great care and displayed a great amount of responsibility in answering this question; a point that cannot be better illustrated than by the exceptional fact that all fourteen judges explained their personal views in individual opinions. This fact also bears witness to the compromissory nature of the advisory opinion itself.

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129 In paragraph 34 of this opinion the Court stated: '[t]he most directly relevant applicable law governing the question of which it was seised, is that relating to the *use of force enshrined in the United Nations Charter* and the *law applicable in armed conflict which regulates the conduct of hostilities*, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.' (emphasis added), ICJ Reports 1996, p. 243.

130 Resolution WHA 46.40 of 14 May 1993.

131 For the implications this decision might have on international organizations' ability to request an advisory opinion see *inter alia* V. Leary, *The WHO case: implications for specialised agencies*, in Chazournes and Sands, (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, 1999.

132 See *inter alia* L.B. de Chazournes, P.J. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, 1999; P.H.F. Bekker, *Advisory Opinions of the World Court on the Legality of Nuclear Weapons*, s.n, 2000; see also different articles on the IRRC, No. 316, 1997.

*A) The Applicability of International Humanitarian Law to the Use of Nuclear Weapons*

The Court started by pointing out that nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflicts had already come into existence.[133] However, the Court took the view that the principles and rules of humanitarian law would nevertheless apply to them. Referring to the humanitarian character of the relevant legal principles called into question the Court stated:

> However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.[134]

Thus, the ICJ emphasized that international humanitarian law principles and rules continue to apply despite technological advances in weaponry. It is noteworthy that the Court reached this conclusion based on the principle of humanity which permeates the entire law of armed conflict. This important holding by the ICJ stems, as a matter of fact, from the St. Petersburg's Declaration of 1868, which laid down the customary rule of the prohibition of certain weapons able to cause unnecessary suffering.[135] A more recent reference to this customary rule is to be found in Article 36 of the Additional Protocol I of 1977, which reads: 'In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.'

*B) Fundamental Principles of International Humanitarian Law*

The Court's evaluation of relevant principles of international humanitarian law started by pointing out the fundamental principles 'constituting the fabric of humanitarian law'.[136] According to the Court, the *first* principle 'is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between

133 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 259, para. 86.
134 *Ibidem*.
135 D. Schindler and J. Toman, *The Laws of Armed Conflict*, 4th edition, Martinus Nijhoff Publishers, 2004, pp. 91-93.
136 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 257, para. 78.

civilian and military targets'.[137] The *second* fundamental principle in the view of the Court is the prohibition on causing unnecessary suffering to combatants; thus, it is accordingly prohibited to use weapons which cause them such harm or needlessly aggravate their suffering. In the words of the Court, unnecessary suffering is harm that is greater than that which is unavoidable in achieving legitimate military objectives.[138] The recognition of the prohibition of weapons that cause unnecessary suffering or superfluous injury as a cardinal principle of international humanitarian law carries great importance as it contributes to preventing or at least to alleviating human suffering.

The Court stated that as a result of the application of the principle of the prohibition of unnecessary suffering States do not have unlimited freedom as to the choice of means in the weapons they use.[139] Also, it is quite important that the principle of distinction is established as a cardinal principle of humanitarian law, because many rules from those establishing combatant and non-combatant status on the prohibition of starving a civilian population stem from this principle. By identifying the principle of the prohibition of unnecessary suffering and that of a distinction between combatants and non-combatants as the cardinal principles contained in the texts constituting the fabric of humanitarian law the Court seems to confer upon these principle the status of customary international law. It is submitted that although the Court seems to avoid referring to these 'cardinal' or 'fundamental general' principles of international humanitarian law as customary international law, the nature of the obligations arising from them, as acknowledged by the Court, proves that in fact they are part of customary international law.

Judge Bedjaoui, in his declaration appended to the advisory opinion, went a step further by considering these cardinal principles to be expressive of *jus cogens*.[140] In a similar vein, Judge Guillame in his separate opinion stated that customary law imposed an absolute prohibition on the use of weapons that cannot distinguish between civilians and the military.[141] For a commentator, the Court equated the use of indiscriminate weapons with a deliberate attack on civilians.[142] Indeed, the wording used, namely that States must *never* make civilians the object of attack and must consequently *never* use

137 *Ibidem*.

138 *Ibidem*.

139 *Ibidem*.

140 *Legality of the Threat or Use of Nuclear Weapons*, Declaration of Judge Bedjaoui, ICJ Reports 1996, p. 273, para. 21. He stated: 'Il ne fait pas de doute pour moi que la plupart des principes et règles du droit humanitaire et, en tout cas, les deux principes interdisant l'un l'emploi des armes à effets indiscriminés et l'autre celui des armes causant des maux superflus, font partie du *jus cogens*'.

141 *Legality of the Threat or Use of Nuclear Weapons*, Separate Opinion of Judge Guillame, ICJ Reports 1996, p. 289, para. 5. He stated: 'Ainsi le droit coutumier humanitaire comporte une seule interdiction absolue: celle des armes dites 'aveugles' qui sont dans l'incapacité de distinguer entre cibles civiles et cibles militaires. Mais à l'évidence les armes nucléaires n'entrent pas nécessairement dans cette catégorie.'

142 L. Doswald-Beck, *International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons*, IRRC, No. 316, 1997, pp. 35-55.

weapons that are incapable of distinguishing between civilian and military targets (emphasis added), seems to support this view. This author agrees with Doswald-Beck who describes the manifold importance of such a statement.[143] *First*, by recognizing this rule enshrined in Article 35 of AP I and Article 13 of AP II as part of customary law all the States, even those who have not ratified these instruments, are bound to respect it. *Second*, the prohibition of deliberately attacking civilians under Article 13 of AP II would logically include the prohibition of using indiscriminate weapons. *Third*, and bolstering the application of Article 36 of AP I regulating the study, development, acquisition or adoption of a new weapon as well as the means or methods of warfare, if a weapon fails to meet the above-mentioned criteria its use would in principle be prohibited without the need for any special treaty or State practice (*opinio juris*) to that end.

The Court also held that although the proportionality principle may not in itself exclude the use of nuclear weapons in self-defence in all circumstances, at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.[144] Based on an evaluation of relevant principles of international humanitarian law the Court concluded that there were several rules and principles militating against the threat or use of nuclear weapons. Amongst them one can mention restrictions imposed out of considerations of environmental protection; restrictions imposed by the principle of a distinction between combatants and non-combatants; and restrictions imposed by the principle of neutrality and the basic principle of humanity enshrined in the Martens Clause.

*C) Restrictions Imposed by IHL Provisions on the Protection of the Environment*

- The specific characteristics attached to these weapons make them 'potentially catastrophic' because of their 'destructive power', which cannot be contained in either 'space or time'. Respect for the environment is one of the elements used to assess whether an action is in conformity with the principles of necessity and proportionality.[145] Moreover, these weapons have the potential to destroy all civilization and the entire ecosystem of the planet.[146]

- Because of their radiation, nuclear weapons have harmful effects on health, agriculture, natural resources and future generations: 'Ionizing radiation has the potential

143 *Ibidem*.
144 *Legality of the Threat or Use of Nuclear Weapons*, p. 245, para. 42.
145 *Ibid*., p. 242, para. 30.
146 *Ibid*., p. 243, para. 35.

> to damage the future environment, food and marine ecosystem, and to cause genetic effects and illness in future generations.[147]

The notion is generally accepted nowadays that environmental protection is a necessary condition for the promotion of peace and the enjoyment of human rights and sustainable development. In evaluating the restrictions imposed upon the use of nuclear weapons on the basis of environmental concerns the Court took into account several instruments adopted with the aim of protecting the environment from the dangers posed by human activity.[148] In addressing the claim brought by the non-allied States, falling broadly under the right to a clean environment, the Court recognized that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment.[149] The Court even went so far so as to give a definition of the environment in the following words:

> '…the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.'[150]

It is noteworthy that the Court found that the existence of the general obligation upon States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[151] Although this obligation is of a general nature and might not arise directly out of provisions of international humanitarian law, the Court referred to the prohibition of cross-border pollution caused by nuclear tests – part of military activities – in a given State; a position which the Court embraced in previous cases. While, as illustrated above, giving serious consideration to environmental issues, the Court maintained that the issue was not whether the treaties relating to the protection of the environment were or were not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict. Yet, the Court cautioned that States should take environmental considerations into account when assessing what was necessary and proportionate in pursuit of legitimate military objectives.[152] In the Court's view, respect for the environment was one of the elements that go towards assessing whether an action is in conformity with the principles of necessity and proportionality.[153]

To support this finding the Court referred to Principle 24 of the Rio Declaration, which reads:

147 Ibid. p. 244.
148 *Ibid*., pp. 241-3, paras. 28-33.
149 *Ibid*., p. 241, para. 29.
150 *Ibid*.
151 *Ibid*. p. 242.
152 *Ibid*. p. 242, para. 30.
153 *Ibidem*.

> 'Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'[154]

Furthermore, the Court noted that article 35(3), and article 55 of AP I provide additional protection for the environment. In the view of the Court, 'Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.'[155] Referring to the GA resolution of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict the Court stated that this resolution affirmed the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict. In a relevant part the resolution reads: '[d]estruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law'.[156] The recalling of this resolution by the Court is important for highlighting a few aspects. First, in adopting this view the GA referred to many provisions of international humanitarian law that are important for the protection of the environment.[157] Second, the GA appealed to all States that have not yet ratified these instruments to consider becoming parties to the relevant international conventions.[158] Third, besides strengthening that part of international humanitarian law concerned with safeguarding the environment, the Court strengthened its own standing by being seen as fulfilling its role as one of the main organs of the UN and the latter's principal judicial organ.

In concluding, the Court found that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and

154 *Ibidem*.

155 *Ibid*., p. 242, para. 31.

156 GA Res. 47/37, 1992, available at: *www.un.org/documents/ga/res/47/a47r037.htm* (last accessed on 1 November 2007).

157 To quote from this resolution: 'Recognizing also the importance of the provisions of international law applicable to the protection of the environment in times of armed conflict and, in particular, both the rules of universal applicability laid down in the Hague Convention respecting the Laws and Customs of War on Land, of 18 October 1907, with the Regulations annexed thereto, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and the applicable rules of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 1977, and of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, of 1976.'

158 *Legality of the Threat or Use of Nuclear Weapons*, p. 242, para. 32.

rules of the law applicable in armed conflict.[159] What the Court did in this Opinion is to clarify the importance of international obligations in the field of the protection of the environment. Although the Court concluded that this body of law could not be held to constitute a prohibition on the threat or use of nuclear weapons, it however found that taken together these norms imposed severe constraints on the States who had subscribed to them. By clarifying the interrelationship between international humanitarian law provisions aimed at protecting an acknowledged human right, that of a protected and clean environment, and the prohibition of the threat or use of nuclear weapons the Court contributed to clarity regarding this issue.

*D) Restrictions Imposed by the Principle of Distinction between Combatants and Non-Combatants*

- 'Methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited'. Yet, 'in view of the unique characteristics of nuclear weapons…the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.'[160]

The Court comes thereby just a step away from declaring that nuclear weapons, because of their unique characteristics, would fall foul of both cardinal principles of international humanitarian law, namely the principle of distinction and the principle of prohibition of causing unnecessary suffering to combatants. However, the Court considered that it did not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

*E Restrictions Imposed by the Neutrality Principle*

- The neutrality principle, which has a fundamental character similar to that of the humanitarian principles and rules, is applicable 'to all international armed conflict, whatever type of weapons might be used.[161]

Recalling a previous finding, the Court stressed that the principle of neutrality, an established part of customary international law, applied with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral State by the use of a weapon in a belligerent State.[162] The Court found that as in the case of the principles of humanitarian law applicable to armed conflict, international law left no

159 *Ibid*., p. 243, para. 33.
160 *Ibid*., p. 262, para. 95.
161 *Ibid*., p. 261, para. 89.
162 *Ibid*., p. 260, para. 88.

doubt that the principle of neutrality was applicable, subject to the relevant provisions of the UN Charter, to all international armed conflict, whatever type of weapons might be used.

*F) Restrictions Imposed by the General Principle of Humanity (the Martens Clause)*

- The Martens clause, whose continuing existence and applicability is not to be doubted, is an affirmation that the principles and rules of international humanitarian law apply to nuclear weapons.[163]

In the course of its Opinion, the Court indicated that the principles and rules of law applicable in armed conflict 'at the heart of which is the overriding consideration of humanity' make the conduct of armed hostilities subject to a number of strict requirements.[164] With regard to the Martens clause,[165] the ICJ found that this clause is part of customary international law.[166] In fact, apart from what the Court held in the Opinion itself,[167] there are a few State submissions and some dissenting opinions which give some interesting insights as to the meaning and scope of this clause. The Court stated first that the Martens clause 'has proved to be an effective means of addressing the rapid evolution of military technology'[168] and then quoted Article 1, paragraph 2, of the AP I of 1977 as the modern formulation of this clause:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[169]

While it is a debatable point whether such loosely framed concepts as 'principles of humanity' and 'dictates of public conscience' constitute any measurable law yardsticks, the Court was correct in affirming the importance of the Martens clause, at least

163 *Ibid*., p. 260, para. 87.
164 *Ibid.*, p. 262, para. 95.
165 The Martens Clause first found expression in the Hague Convention II with Respect to the Laws and the Customs of the War on Land, 1899. It was termed in the following words: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'
166 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 259, para. 84.
167 The Court referred to the Martens clause in three paragraphs, namely paras. 78, 84, and 87.
168 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 257, para. 78.
169 *Ibidem*.

as a provision of last resort to humanitarian values.[170] The weakness of this clause lies in the fact that it is subject to different legal interpretations. This is best seen in the written pleadings submitted to the Court, where States reach different conclusions in interpreting this clause. Thus, the UK submitted that while the clause makes clear that the absence of a specific treaty prohibition on the use of nuclear weapons does not in itself mean that these weapons are capable of lawful use, the clause itself does not establish their illegality. It concluded that 'it is …axiomatic that, in the absence of a prohibitive rule applicable to a particular state, the conduct of the state in question must be permissible…'[171] On the contrary, the Solomon Islands in a detailed written pleading argued that, 'a restrictive approach to interpretation is not a rule in international humanitarian law, which should always be interpreted to give the benefit of any doubt in favour to the protection of the victim. This is particularly reflected in the Martens Clause…'.[172] Russia went as far as to declare that as a complete code of the laws of war was formulated in 1949 and 1977, the Martens clause had become redundant.[173] This last assertion is difficult to understand for two reasons: first, the clause was meant from the start to complement for loopholes in international humanitarian law; and second, if the clause had indeed become redundant it would not have been included as a separate article in the AP I.

In his dissenting Opinion Judge Shahabuddeen went into considerable detail in discussing the role and the importance of this clause. At the outset he quoted the Nuremberg Tribunal in the case of Krupp:

> The Preamble [of Hague Convention No. IV of 1907] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.[174]

In his view, the Martens clause provided its own self-sufficient and conclusive authority for the proposition that there were already principles of international law in existence under which considerations of humanity could themselves exert legal force

170 T. Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, AJIL, Vol. 94, 2000, pp. 78-89.

171 The United Kingdom, Written Submission on the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p. 21, para. 3.3, available at: *http://www.icj-cij.org/docket/files/95/8802.pdf* (last accessed on 1 November 2007).

172 The Solomon Islands, Written Submission on the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, para. 3.73, p. 61, available at: *http://www.icj-cij.org/docket/files/95/8714.pdf* (last accessed on 1 November 2007).

173 The Russian Federation, Written Submission on the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p. 13, available at: *http://www.icj-cij.org/docket/files/95/8796.pdf* (last accessed on 1 November 2007).

174 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Shahabuddeen, ICJ Reports 1996, p. 407 and footnote 21.

to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, for him it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principles lay in the Clause itself.[175] He concluded:

> [O]n the basis of what the Court finds to be the state of the public conscience, it will be able to say whether the Martens Clause operates to prohibit the use of nuclear weapons in all circumstances. On the available material, it would be open to the Court to hold that the Clause operates to impose such a prohibition.[176]

This author sympathizes with the position adopted by Judge Shahabuddeen, because conduct in armed conflicts is not only judged according to treaties and custom but also according to other principles of international law referred to by the Clause.[177] Indeed, the fact that nuclear weapons have not been used since the 1945 bombing of Hiroshima and Nagasaki is also due to the stigma attached to the use of these weapons by the international court of public opinion. To summarize, in humanitarian law not all that is not expressly forbidden by treaty or customary obligations is allowed, because the principles of humanity and the dictates of public conscience are considered as lawful restraining factors.

In finding whether there was already a prohibition on the threat or use of nuclear weapons in customary international law the Court used its traditional approach of looking 'primarily in the actual practice and *opinio juris* of States'.[178] While the vast majority of States voted in favour of UNGA Resolution 1653, there were, however, a few votes against and some abstentions. This resolution stated in very clear terms:

> ...any use of nuclear weapons would:
> - be contrary to the spirit, letter and aims of UN, and as such a 'direct violation of the Charter of the United Nations';
> - be contrary to the 'rules of international law and to the laws of humanity', since it would exceed the scope of war and cause indiscriminate destruction to mankind and civilization; and
> - constitute the commission of a 'crime against mankind and civilization'.[179]

This text was to be repeated in approximately the same terms in subsequent UNGA resolutions.[180] The ICJ found that with the international community divided on this issue there was no *opinio juris* supporting the prohibition or authorization of the use of nuclear weapons. The Court can be praised for affirming that State practice as such

175 *Ibid*., p. 408.
176 *Ibid*., p. 411.
177 R. Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, IRRC, No. 317, 1997, p. 125.
178 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 253, para. 64.
179 GA Res. 1653, (XVI), 24 November 1961, para. 1 (a, b and d).
180 GA Res. 33/71 B, 1978; GA Res. 34/83 G, 1979; GA Res. 35/152 D, 1980; GA Res. 36/92 I, 1981; GA Res. 45/59 B, 1990; GA Res. 46/37 D, 1991.

and not plain rhetoric is the key factor in determining the existing *opinio juris*. Taking into account that the nuclear powers voted against or at best abstained in the adoption of these resolutions the position of the Court seems to be well-founded.

After having considered a plethora of international humanitarian law rules and principles relevant for finding in favour of the legality or the illegality of the threat or use of nuclear weapons the Court came to the operative paragraph of this Opinion. There the ICJ used rather confusing and ambiguous language, matching that of the oracle of Delphi, when it stated:

> It follows from the above-mentioned requirements that the threat or use of nuclear weapons would *generally* be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.[181]

How is one to wrestle with the meaning to be given to these words? Based on the previous findings of the Court, one gets a strong impression that the Court opined that the threat or use of nuclear weapons is in principle incompatible with the law of armed conflict. The Court tempered its conclusion (or its *non liquet*) by stating that it did not know whether this would still be so in the case of an extreme circumstance of self-defence when the survival of a State is at stake. Regrettably, the Court mixed concepts pertaining to different bodies of law in one paragraph, that of the *jus in bello* and of the *jus ad (contra) bellum*. Initially, it appears that the Court is acknowledging the unlawfulness of the threat or use of nuclear weapons based on principles of international humanitarian law, but then based on another body of law, namely *jus ad bellum*, it decided that it could not conclude whether the threat or use of nuclear weapons would be lawful or unlawful. Besides erroneously putting two rather distinguishable bodies of law side by side in one paragraph, the Court seems to be unable to come to a conclusion due to an argument which can be understood as '*Not kennt kein Gesetz*', i.e. 'Necessity knows no law'. Criticism can be raised at the Court for adopting such a position.

However, in the first paragraph the Court found that the threat or use of nuclear weapons would *generally* (emphasis added) be contrary to the rules of international law applicable in armed conflict, and particularly the principles and rules of humanitarian law.[182] This is almost the closest the Court comes to a conclusion that the threat or use of nuclear weapons is indeed unlawful. Actually, while this wording seems to be leading to a declaration of the illegality of the threat or use of nuclear weapons the

181 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 266, para. 105 (2) E (emphasis added).

182 *Ibidem*.

Court had tempered its findings against the threat or use of nuclear weapons by making the following points:

- The Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake;[183]

- 'An appreciable section of the international community' has adhered to the 'policy of deterrence';[184]

- When the treaties of Tlatelolco and Rarotonga were adopted, the States in possession of nuclear weapons reserved the right to use them in the event of aggression committed by a State with the assistance of a nuclear Power;[185]

- Those States entered similar reservations in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons.[186]

How is this ambiguous position to be interpreted? More specifically, how is one to interpret the word *generally* in the above-quoted paragraph 105 of the opinion? Are there conceivable circumstances during which the threat or use of nuclear weapons may be lawful and in conformity with international humanitarian law principles? This author agrees to a large extent with the analysis of Judge Higgins, who in her individual opinion criticizes the use of such ambiguous wording by stating:

> I do not consider it juridically meaningful to say that the use of nuclear weapons is 'generally contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law'. What does the term 'generally' mean? Is it a numerical allusion, or is it a reference to different types of nuclear weapons, or is it a suggestion that the rules of humanitarian law cannot be met save for exceptions? If so, where is the Court's analysis of these rules, properly understood, and their application to nuclear weapons? And what are any exceptions to be read into the term 'generally'? Are they to be linked to an exceptional ability to comply with humanitarian law? Or does the term 'generally', especially in the light of paragraph 96, suggest that if a use of nuclear weapons in extreme circumstances of self-defence were lawful, that might *of itself* exceptionally make such a use compatible with the humanitarian law? The phraseology of paragraph 2E of the *dispositif* raises all these questions and answers none of them.[187]

183 *Ibid*., p. 263, para. 96.
184 *Ibidem*.
185 *Ibidem*.
186 *Ibidem*.
187 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Higgins, ICJ Reports 1996, p. 589, para. 25.

It might be useful to add here a few passages from the individual opinions of the judges who voted in favour of the famous *non liquet* paragraph in the *dispositif* of this advisory opinion, expressing their reservations to the threat or use of nuclear weapons.[188] Thus, Judge Herczegh in his declaration stated:

> '[t]he fundamental principles of international humanitarian law, properly highlighted in the findings of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction and, among these, nuclear weapons.'[189]

Judge Fleischhauer stated:

> '[t]he nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict…the nuclear weapon cannot distinguish between civilian and military targets.'[190]

The President of the Court, Judge Bedjaoui, found:

> Nuclear weapons can be expected – in the present state of scientific development at least – to cause indiscriminate victims among combatants and non-combatants alike, as well as unnecessary suffering among both categories. *By its very nature the nuclear weapon, a blind weapon, therefore has a destabilizing effect on humanitarian law, the law of discrimination which regulates discernment in the use of weapons. Nuclear weapons, the ultimate evil, destabilize humanitarian law which is the law of the lesser evil. The existence of nuclear weapons is therefore a major challenge to the very existence of humanitarian law,* not to mention their long-term harmful effects on the human environment, in respecting which *the right to life* may be exercised.[191]

These above-quoted findings represent exactly what the non-aligned countries, many NGOs concerned mainly with health and environmental issues, and that part of public opinion that feared a nuclear war wanted the Court to say. For the sake of truth it should be said that, to a large extent, the Court did that in its Opinion. The Japanese government in its written submission had stated:

> 'The [Japanese] Government believes that, because of their immense power to cause destruction, the death of and injury to human beings, the use of nuclear weapons is clearly

188 Judges Herczegh, Fleischhauer and the President of the Court, Judge Bedjaoui, throwing the casting vote, were among those in favour of paragraph 105 (2) E.

189 *Legality of the Threat or Use of Nuclear Weapons*, Declaration of Judge Herczegh, ICJ Reports 1996, p. 275.

190 *Legality of the Threat or Use of Nuclear Weapons*, Separate Opinion of Judge Fleischhauer, ICJ Reports 1996, p. 306, para. 2.

191 *Legality of the Threat or Use of Nuclear Weapons*, Declaration of President Bedjaoui, ICJ Reports 1996, p. 272, para. 20, (emphasis in the original).

> contrary to the spirit of humanity that gives international law its philosophical foundation.'[192]

Indeed, the *raison d'être* of international humanitarian law is precisely to limit the destructive effects of armed conflict, regardless of who is waging the conflict and under what circumstances.[193]

The Court drew attention to the stark contrast in the position of States regarding the threat or use of nuclear weapons and pointed towards a needed process of demilitarization by stating:

> In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.[194]

In its effort to bridge the position of nuclear and non-nuclear powers through the process of nuclear disarmament the Court interpreted Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons as imposing upon the member States an obligation to negotiate in order to achieve nuclear disarmament. In the *dispositif* the Court unanimously held:

> 'There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'[195]

This is indeed an objective of vital importance to the whole of the international community.[196]

### *G) Concluding Remarks*

To sum up, despite some flaws, the Court's contribution to humanitarian law through this advisory opinion is of considerable value.[197] Although, regrettably, the Court did not see it necessary to pronounce on the *jus cogens* nature of most of the humanitarian

192 Government of Japan, Written Submission on the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p. 1, available at: *http://www.icj-cij.org/docket/files/95/8670.pdf* (last accessed on 1 November 2007).

193 M. Mohr, *Advisory Opinion of the International Court of Justice on the legality of the use of nuclear weapons under international law – A few thoughts on its strengths and weaknesses*, IRRC, No. 316, 1997.

194 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 263, para. 98.

195 *Ibid*., p. 267, para. 105 (2) F.

196 *Ibid*., p. 265, para. 103.

197 Meron, *supra* note 170.

law principles enshrined in the Hague Regulations and the GCs of 1949, it did describe them as 'intransgressible principles of international customary law'.[198] This is, at the very least, one of the elements of the opinion which will stand, together with the interpretation and development of two fundamental principles 'constituting the fabric of humanitarian law', namely the obligation to always distinguish between combatants and non-combatants and the prohibition on causing unnecessary suffering to combatants. Furthermore, the overall trend which this advisory opinion establishes goes in the direction of a strengthening of the anti-nuclear weapons camp. One could even envision that in view of increasing efforts by other countries to develop nuclear weapons, the anti-nuclear movement might get a new impetus and follow up on the suggestion of this advisory opinion to negotiate and achieve complete nuclear disarmament.

### 4.10 *LEGAL CONSEQUENCES OF THE CONSTRUCTION OF A WALL IN THE OCCUPIED PALESTINIAN TERRITORY* (ADVISORY OPINION OF 9 JULY 2004)

This advisory opinion has an abundance of findings relating to international humanitarian law which are discussed in detail below.[199] From a general perspective it is noteworthy that the Court decided to render an advisory opinion, despite requests included in written statements from the US, the EU, Israel, and other States asking it not to do so because of the alleged adverse impact that that would have on the ongoing peace process in the Middle East.[200] Through a resolution adopted on December 2003 the UNGA asked the ICJ for an advisory opinion, which came to be known as the *Palestinian Wall* case.[201] The question posed was:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

Although as a matter of fact this resolution was part of an effort by a group of States to persuade Israel to halt the construction of the wall in the Occupied Palestinian Territories, we are not concerned here with the political aspect of this issue. However, by way of introduction it should be noted that on 14 October 2003 the SC had voted on a draft resolution urging Israel to cease construction, which did not pass the US

198 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 257, para. 79.

199 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136 (*Wall* case).

200 See the written statements submitted to the Court, available at: *http://www.icj-cij.org/docket/ index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=1* (last accessed on 1 November 2007).

201 GA Resolution 10/14, UN GAOR, 10th Special Session, Supp. No. 1, UN Doc. A/Res/ES-10/14, 2003.

veto.[202] When the SC failed to pass a resolution, the UNGA adopted Resolution ES 10/13, which demanded:

> '[t]hat Israel stop and reverse the construction of the wall in the Palestinian Occupied territory, including in and around East Jerusalem, which is a departure from the Armistice Line of 1949, and is in contradiction to relevant provisions of international law'.[203]

The reasons advanced as to why the Court should not pass an advisory opinion on this question, but to use its discretion not to answer instead, were that the request for an advisory opinion was beyond the competence of the UNGA or the 10th Emergency Session; the request did not pose a legal question; the States concerned had to consent to the Court's jurisdiction; the issue was speculative and could not be decided without additional facts; and that, finally, the principles of judicial propriety and fairness would compel the Court not to answer the question.

While the question posed by the UNGA was a reaction to new developments, the idea of having the World Court clarify in an advisory opinion the applicability of GC IV to the Occupied Palestinian Territories was put forward much earlier.[204] In clarifying what was to be considered as occupied territory the Court resorted to customary international humanitarian law observing that 'under customary international law as reflected in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (the Hague Regulations of 1907), territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.'[205] Indeed, it is very important, not only from a legal point of view, to have a clear definition, based on proper criteria, of when a territory can be considered occupied. With this finding the Court contributed to the clarification of this concept under international humanitarian law. Further on in the same paragraph, the Court held that the areas between '[t]he Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of Occupying Power'.[206] These initial statements are very important for the subsequent findings as being an occupying power carries with it concomitant legal obligations under international humanitarian law. Amongst others, according to the laws on occupation the Occupying Power cannot assume more than administrative powers in an occupied territory.

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202 Guinea, Malaysia, Pakistan, and Syrian Arab Republic: Draft Resolution, UN SCOR, UN Doc. S/2003/980, 2003.

203 GA Resolution, A/RES/ES- 10/13, 2003.

204 T.A. van Baarda, *Is It Expedient to Let the World Court Clarify, in an Advisory Opinion, the Applicability of the Fourth Geneva Convention in the Occupied Territories?*, NQHR, 1992.

205 *Wall*, ICJ Reports 2004, p. 167, para. 78.

206 *Ibidem*.

*A) Applicability of the Hague Regulations of 1907 and of GC IV of 1949 to the OPT*

It is noteworthy that in order to answer the question posed by the General Assembly the Court decided that recourse had to be had to rules and principles, which can be found in the UN Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the UNGA and the SC.[207] The position of Israel was that GC IV was not applicable in the Occupied Palestinian Territory (OPT) because of the lack of recognition of the territory as a sovereign prior to its annexation by Jordan and Egypt, thus making it not a territory of a High Contracting Party as required by the Convention. Due to the fact that Palestine was never an independent State and thus had never ratified the GCs the reasoning of the Court is here of importance, especially with regard to the application of humanitarian law treaties. It is interesting in this respect that Switzerland, the depository State of the GCs of 1949, considered the Palestinian unilateral undertaking as valid, even though it 'was not – as a depositary – in a position to decide whether' 'the request [dated 14 June 1989] from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede' *inter alia* to the Fourth Geneva Convention 'can be considered as an instrument of accession'.[208]

The Court noted that according to the first paragraph of Article 2 of GC IV, that Convention is applicable when two conditions are fulfilled: that there exists an armed conflict (whether or not a state of war has been recognized); and that the conflict has arisen between two contracting parties.[209] In the Court's view, the object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph, by excluding therefrom those territories that do not fall under the sovereignty of one of the contracting parties, but is directed simply at clarifying that, even if occupation effected during the conflict met no armed resistance, the Convention is still applicable.[210] In support of its interpretation the Court cited the *travaux préparatoires* of the Convention, which reveal that the drafters of GC IV sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories, as shown by Article 47 of the Convention.[211] Besides relying on the direct interpretation of GC IV with regard to its applicability to the OPT, reference was made to different UNGA and SC resolutions, the Statements of 1999 and 2001 by the States parties to the 1949 GCs, the Israeli authorities' order No. 3 of 1967 and the Israeli Supreme Court judgment of 30 May 2004, and also to the ICRC position, which according to the Court, due to the 'special position with respect to execution of the Fourth Geneva Convention, must be 'recognized and respected at

207 *Ibid.*, p. 171, para. 86.
208 *Ibid*., p. 173, para. 91.
209 *Ibidem*.
210 *Ibidem*.
211 *Ibidem*.

all times' by the parties pursuant to Article 142 of the Convention'.[212] This finding is rather interesting not only from the perspective of the interpretation of the applicability of international humanitarian law instruments, but also in view of the variety of sources used by the Court to come to the conclusion that the Hague Regulations of 1907 and GC IV are applicable in the OPT.[213]

Having established the applicability of the law of occupation the Court went on to address the issue of Israeli settlements by taking into account the route of the Wall and the application of international humanitarian law to the Israeli settlements in the Occupied Palestinian Territories.

> As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.
> In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited.[214]

The Court went on to conclude that '…Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law'.[215]

Turning to the application of the Hague Regulations, the Court held that Section III of the Hague Regulations of 1907 dealing with military authority in occupied territory is relevant to this case.[216] The law on occupation has not been subject to interpretation by the Court in the past, thus the Court's findings are important here. In listing the relevant articles of the Hague Regulations of 1907 for the case at hand the Court stated:

> Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 43 imposes a duty on the occupant to 'take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country'. Article 46 adds that private property must be 'respected' and that it cannot 'be confiscated'. Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation.[217]

212 *Ibid*., pp. 175-6, para. 97.
213 Ibid., pp. 172-7, paras. 89-101.
214 *Ibid*., p. 184, para. 120.
215 *Ibid*. p. 185, p. 120.
216 *Ibid*., p. 185, para. 124.
217 *Ibidem*.

As is evident from the advisory opinion, the Court clarified which were the relevant provisions of the law on occupation and ascertained whether the construction of the wall and the acts of the Israeli authorities violated the duties of the Occupying Power towards the Palestinian people.[218]

In making a distinction between the provisions applicable during military operations leading to occupation and those that remain applicable throughout the period of occupation, the ICJ relied on and quoted Article 6 of the Fourth Geneva Convention, which reads:

> The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
> In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.
> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.
> Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.[219]

As the military operations leading to the occupation of the West Bank ended in 1967, the Court stated that only the Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory. These provisions are to be found in Section III of the Fourth Geneva Convention and include Articles 47, 49, 52, 53 and 59.[220] A detailed discussion of these provisions follows below.

*B) Applicable Provisions of GC IV*

It is worthwhile quoting these articles, just as the Court does, and to comment on their relevance to the case at hand and in general for the protection of individuals during armed conflict:

> According to Article 47:
> 'Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.'

218 See p. 189, para. 132.
219 *Ibid.*, p. 185, par.125.
220 *Ibid.*, p. 185, para. 126.

This article creates a basis for the protection of rights assigned to protected persons in occupied territories. It serves to safeguard the rights of these persons not to have detrimental changes to their rights by way of an agreement between the authorities of the occupied territory and the Occupying Power. This clarification is quite important because it means that any such agreement between a (puppet) government and the Occupying Power would be void of legal consequences from the beginning.

The Court also quoted Article 49, which is clearly germane to the situation in the OPT in that it deals with rules and principles which are applicable to the movement of the population from an occupied territory elsewhere:

> Article 49 reads as follows:
> 'Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
> Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
> The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
> The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
> The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
> The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.'

Article 49 is important for two reasons. *First*, it serves as legal protection for the population of the occupied territories against transfers or deportations which are not carried out on the ground of the security of this population or for imperative military reasons. Indeed, in a worldwide context, in recent conflicts the occupation of enemy territory has been accompanied with campaigns of ethnic cleansing. Such actions are in breach of international humanitarian law. *Second*, this article adds to the protection of the persons living in the occupied territories by placing upon the Occupying Power the obligation not to deport or transfer parts of its population into the territory it occupies. According to the Court's interpretation the exception of paragraph 2 based on 'the security of the population or imperative military reasons so demand' does not apply to paragraph 6 of the same article which prohibits the Occupying Power from

deporting or transferring parts of its own population into the territory it occupies.[221] Thus, Israeli practices of establishing settlements in the OPT were found to be in violation of the obligations arising from this article.[222]

The Court also made reference to Article 52 of GC IV.

> According to Article 52:
> 'No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.
> All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.'

This provision of GC IV is aimed at ensuring protection for workers, so that no pressure can be exercised against them, thereby making them vulnerable to the will of the Occupying Power. Thus, respect for this article creates the necessary conditions for workers to continue with their work as before and to support their families, despite the new realities created by the occupation. The Court found that the construction of the wall and the associated régime impeded the exercise of the right to work by the persons concerned.[223]
Further, amongst the applicable articles of GC IV the Court quoted Article 53:

> 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.'

In the present case the destruction and seizure of personal property that was along the route of the wall was still taking place as the construction of the wall was ongoing during the legal proceedings before the ICJ. The Court took this article into account in order to ensure that the right to property, a very important right, is not infringed by the occupying power so as to please its interests. Indeed, the Court considered that the military exigencies contemplated by these texts may be invoked in occupied territories even after the general ending of the military operations that led to their occupation; however, according to the material before it, the Court was not convinced that the destructions carried out contrary to the prohibition in Article 53 of GC IV were rendered absolutely necessary by military operations.[224]

221 *Ibid*., p. 192, para. 135.
222 See pp. 192 and 193-4, respectively paras. 135 and 137.
223 *Ibid*., pp. 191-2, para. 134.
224 *Ibid*., p. 192, para. 135.

Article 59 of GC IV was the last one quoted by the Court:

> Lastly, according to Article 59:
> 'If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.
> Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.
> All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.
> A Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict shall, however, have the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments are to be used for the relief of the needy population and are not to be used for the benefit of the Occupying Power.'[225]

The humanitarian purpose behind this article is not difficult to grasp. According to this article difficulties brought about by the mere existence of an occupation situation should not affect the civilian population, which is one of the categories of protected persons. In the case of inadequate supplies, foodstuffs, medical supplies, and clothing are to be provided under a relief scheme agreed and facilitated to the maximum extent possible by the Occupying Power. Furthermore, on the basis of this article such humanitarian relief provided by other States or by the main humanitarian organizations such as the International Committee of the Red Cross, the World Food Programme, and the UN Development Programme, amongst many others, should be given free passage, so as to reach the needy population.

All of the above-quoted articles have a common aim, namely to ensure necessary protection for the civilian population in situations of armed conflict. In her individual opinion Judge Higgins reminded us of their importance when stating:

> 'So far as the request of the Assembly envisages an opinion on humanitarian law, however, the obligations thereby imposed are (save for their own qualifying provisions) absolute. That is the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight 'with one hand behind their back' and act in accordance with international law. '[226]

Judge Higgins submitted that the interpretation of humanitarian law norms is independent of context so far as obligations of humanitarian law are concerned, unlike other aspects of international law. That position, to which this author adheres, is based on the usually absolute nature of the obligations imposed upon States and State-like actors under international humanitarian law.

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225 *Ibid*., p. 187, para. 126.

226 Separate Opinion of Judge Higgins, ICJ Reports 2004, p. 210, para. 14.

*C) Balancing Issues of Military Necessity, National Security and Public Order and Respect for Human Rights Obligations*

In applying the relevant law to the situation at hand, on the basis of information submitted to the Court, the ICJ found that the construction of the wall had led to the destruction or requisition of properties under conditions which contravened the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and Article 53 of GC IV.[227] According to the Court, although the applicable international humanitarian law contains provisions that allow for derogations in the case of military necessity, in the case at hand the requirements for allowing such a derogation had not been met:

> [t]he military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.[228]

Clearly, the standard of proof required by the Court is high, in order to meet the requirements for applying the principle of military necessity. According to this principle the Occupying Power would be allowed to undertake certain actions of a military nature given that the following requirements are met:

a) they are aimed at legitimate military objectives;
b) they result in less harm to civilians and civilian objectives than the concrete and direct military advantage anticipated; and
c) they are not strictly forbidden under the law of armed conflict.

Furthermore, the Court sets the example that whether certain actions are justified by military necessity can be adjudicated by a court of law on the basis of the facts in each case. In rather straightforward terms the Court concluded:

> 'The wall, along the route chosen, and its associated régime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order. The construction of such a wall accordingly constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.'[229]

Indeed, this finding is strongly worded in view of the arguments put forward by Israel, namely those relating to national security interests and the alleged attacks initiated in

227 *Wall*, p. 189, para. 132.
228 *Ibid.*, p. 192, para. 135.
229 *Ibid.*, pp. 193-4, para. 137.

the zones behind the Wall. Although the Court acknowledged Israel's national security concerns to some extent, it found that 'the construction of the wall being built by Israel, the Occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law'.[230] The Court found that neither military necessity nor the requirements of national security and public order could justify the measures taken by Israel in the case at hand.[231] The reasons the Court gave for coming to this finding are:

a) the route chosen;
b) neither military necessity nor the requirements of national security and public order could justify the measures taken by Israel in the face of the grave infringements of a number of rights of the Palestinian people.

While it is difficult to be completely objective in such a complex case, the route chosen for the wall was seemingly the determining reason for the Court to arrive at the above-quoted finding.

*D) Legal Consequences of the Construction of the Wall for Israel, other States, and the UN*

Another interesting feature of this advisory opinion is that the Court decided to indicate the legal consequences of the construction of the wall for Israel, other States, and the UN itself. Indeed, it is important that legal consequences are indicated concerning breaches of international humanitarian law and international law in general even in advisory opinions, for as long as such breaches trigger State responsibility.[232] With regard to these consequences for Israel the Court observed:

> 'Israel also has an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation.'[233]

As emphasized by the Court in several cases, breaches of international law entail the duty on the part of the violator to put an end to its wrongful acts.[234] However, the Court did not stop at that but indicated that reparation should take place for all damage

230 *Ibid*., p. 201, para. 163(3)(A).
231 *Ibid.*, p. 193, para. 137.
232 *Ibid*., p. 197, para. 147.
233 *Ibid*., p. 197, para. 150.
234 *Ibidem*.

incurred from the construction of the Wall by all natural or legal persons.[235] Keeping in mind that the Court settles disputes at an inter-State level, it is rather remarkable that it acknowledged the right to reparation directly to natural or legal persons. Recognizing the right to reparation for natural and legal persons for violations of international humanitarian law obligations is an important contribution by the Court to the interpretation and development of this branch of law.

In support of this finding the ICJ referred to the PCIJ's decision in the *Chorzów Factory* case. There ICJ's predecessor had stated:

> 'The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.'[236]

The Court suggests the existence of a *restitutio in integrum* obligation on the part of Israel for land, orchards, olive groves and other immovable property seized from any natural or legal person for the purpose of constructing the Wall in the Occupied Palestinian Territory.[237] In view of the strong opposition of Israel and a declaration on its part that there would be no changes at the route of the fence as a result of Palestinian, or UN demands, including those from the Court,[238] taking this position seems to be a rather bold move by the Court. This 'recalcitrant' State position is one taken by other States since the beginning of the activity of the Court, but the first with regard to advisory opinions.

What is striking in this part of the advisory opinion, even for one of the judges of the Court,[239] is the fact that the Court indicated the legal consequences of the construction of the Wall not only for Israel itself, but also for other States, and for the UN. In considering the legal consequences of the internationally wrongful acts flowing from Israel's construction of the Wall as regards other States the Court observed that the obligations violated by Israel included certain obligations *erga omnes*.[240] Further in the same paragraph it stated: 'The obligations *erga omnes* violated by Israel are…, and

235 *Ibid*., p. 198, para. 153.
236 PCIJ, *Factory at Chorzów,* (*Merits*), Series A, No. 17, 1928, p. 47.
237 *Wall*, p. 198, para. 153.
238 See Annex 19 to the Israeli Written Statement, available at: http://www.icj-cij.org/docket/files/131/1579.pdf (last accessed on 1 November 2007).
239 Separate Opinion of Judge Kooijmans, ICJ Reports 2004, pp. 230-4, paras. 37-51(VI. Legal Consequences).
240 *Wall*, p. 199, para. 155.

certain of its obligations under international humanitarian law.' With respect to existing obligations *erga omnes* under international humanitarian law the Court stated:

> With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it stated that 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'..., that they are 'to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law' (*I.C.J. Reports 1996 (I)*, p. 257, para. 79). In the Court's view, these rules incorporate obligations which are essentially of an *erga omnes* character.[241]

Considering the importance attached to the opinion of the Court – as a rule – the finding above has a significant impact as far as the application of the principles and rules of international humanitarian law is concerned. As authoritatively stated by the Court many rules and principles of humanitarian law constitute intransgressible principles of customary international law enjoying an *erga omnes* character. Thus, rules and principles of humanitarian law not only create obligations that are to be respected by the parties to a conflict vis-à-vis each other, but at the same time they also create obligations on the part of the said parties vis-à-vis the international community. This is based on the premise that every State has an interest that these rules and principles be upheld for they are fundamental to respect for the human being.

Further on in the opinion, the Court pointed to the obligation incumbent upon the States parties to the GCs to ensure that every State party complies with the obligations thereunder. It noted:

> 'The Court would also emphasize that Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.'[242]

This is a reminder for all States parties to the GCs, on the one hand to take active steps aimed at steering Israel into abiding by the obligations flowing under international humanitarian law and, on the other, not to recognize any illegal effects occurring from non-compliance with the aforementioned Conventions. At the same time, the same obligations arising under these international humanitarian law instruments are also incumbent upon the Palestinian Authority (PA) and the Palestinian military factions. Thus, the international community has the same duty of urging the PA and the military factions operating in the OPT to comply with their obligations under the GCs of 1949.

241 *Ibid*., p. 199, para. 157.
242 *Ibid*., pp. 199-200, para. 158.

In fact, the application of this finding transcends the Palestinian-Israeli conflict and applies to armed conflicts in general.

Given the character and the importance of the rights and obligations involved, the Court was of the view that all States were under an obligation not to recognize the illegal situation resulting from the construction of the Wall in the OPT, including in and around East Jerusalem. In addition, all the States parties to the GC IV of 1949 were under an obligation, while respecting the UN Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.[243] The obligation for all States parties to the GC IV to ensure compliance by Israel with international humanitarian law as embodied in that Convention was emphasized by the Court in the operative paragraph of the opinion.[244]

In a concluding statement, the Court lent its support to the purposes and principles laid down in the UN Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, and it emphasized the urgent necessity for the UN as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.[245] The Court emphasized that both Israel and Palestine were bound to observe the rules of international humanitarian law:

> Since 1947, the year when General Assembly resolution 181 (II) was adopted and the Mandate for Palestine was terminated, there has been a succession of armed conflicts, acts of indiscriminate violence and repressive measures on the former mandated territory. The Court would emphasize that both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life. Illegal actions and unilateral decisions have been taken on all sides, whereas, in the Court's view, this tragic situation can be brought to an end only through implementation in good faith of all relevant Security Council resolutions, in particular resolutions 242 (1967) and 338 (1973).[246]

It is only logical that the Court, as a vital part of the UN and indicating the legal consequences for the UN, drew the attention of the GA to taking further steps to achieve a solution to this long-standing crisis in the Middle East.[247]

243 *Ibid*., p. 200, para. 159.
244 *Ibid*., p. 202, para. 163(3)(D).
245 *Ibid*., p. 200, para. 161.
246 *Ibid.*, pp. 200-1, para. 162.
247 *Ibidem*.

*E) Concluding Remarks*

Criticism, albeit by a few judges of the Court, was expressed with regard to portions of this advisory opinion.[248] The opinion, although not formally binding, carries considerable legal weight due to the perception of the Court by many as a highly qualified body of the most renowned international lawyers. Besides, the high degree of consensus among the judges of the ICJ on all the findings in the *dispositif*, in comparison to some other advisory opinions delivered by the Court, adds to the legal authority to be attached to the conclusions and principles underlying the opinion.[249] The clarification by the World Court of the application of GC IV to the OPT and the implications of this for Israel, other States, and the UN itself, carry high judicial and practical values. Indeed, this advisory opinion can be seen as giving legal authorization to States, and one can go so far as to submit that it obliges them to take individual and collective action against Israel in order to have the latter dismantle the wall and its associated régime. Further, the acknowledgement of the Court that many rules and principles of humanitarian law constitute intransgressible principles of customary international law enjoying an *erga omnes* character is undoubtedly a significant contribution to the interpretation and development of international humanitarian law.

## 4.11 *ARMED ACTIVITIES IN THE TERRITORY OF THE CONGO* CASES

On 23 June 1999 the Democratic Republic of the Congo (DRC) filed with the Court an application against Rwanda, Burundi and Uganda for alleged violations of international human rights and humanitarian law committed by the respective armies of these States in the territory of the DRC. While the cases against Burundi and Rwanda were discontinued in 2001,[250] the case against Uganda was not. It should be noted that the case against Rwanda was brought anew before the Court on 28 May 2002 and was ruled upon by the Court on 3 February 2006.[251] While legal proceedings on these cases

248 *Wall*, Declaration of Judge Buergenthal, pp. 240-245; Separate Opinion of Judge Elaraby, pp. 246-259; Separate Opinion of Judge Koroma, pp. 204-206; Separate Opinion of Judge Higgins, pp. 207-218; Separate Opinion of Judge Kooijmans, pp. 219-234; and Separate Opinion of Judge Owada, pp. 260-271.

249 For the sake of completeness it should be clarified that Judge Buergenthal appended a declaration to the Advisory Opinion where he stated his dissention with the decision of the Court to hear the case and deliver an advisory opinion. In Judge Buergenthal's opinion the Court did not have at its disposal the requisite factual bases for its sweeping findings. Judge Kooijmans also voted against the part of the *dispositif* dealing with the legal consequences for States. In his opinion this went beyond the request as formulated by the General Assembly, which did not make it necessary for the Court to determine the obligations for States ensuing from the Court's findings. .

250 See respectively the Order of 30 January 2001, ICJ Reports 2001, p. 3 and the Order of 30 January 2001, ICJ Reports 2001, p. 6.

251 ICJ, *Armed Activities on the Territory of the Congo* (DRC *v.* Rwanda), (*Jurisdiction and Admissibility*), Judgment of 3 February 2006, available at: *http://www.icj-cij.org/docket/files/126/10435.pdf* (last accessed on 1 November 2007).

were taking place before the Court, armed clashes were still ongoing in the troubled area of the Great Lakes of Africa. Regrettably, the armed conflict between different armies and factions in the vast and rich territory of the DRC has resulted in untold human misery. As Judge Koroma has noted, the circumstances and consequences of this case involving the loss of between three and four million human lives and other suffering have made it one of the most tragic and compelling to come before this Court.[252] Given that, as mentioned above, the case against Burundi was discontinued at the request of the DRC and that the Court found that it did not have jurisdiction to entertain the case against Rwanda,[253] the focus here rests mainly on the case against Uganda.

### 4.11.1 *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo *v.* Uganda, 23 June 1999 – 19 December 2005)

In its application the DRC contended that the acts of armed aggression perpetrated by Uganda on its territory were in flagrant violation of the UN Charter and of the Charter of the Organization of African Unity (OAU). According to the DRC such armed aggression by Ugandan troops on Congolese territory had involved *inter alia* a violation of its sovereignty and territorial integrity, violations of international humanitarian law and massive human rights violations.[254] Our focus is on the Court's findings which are relevant to international humanitarian law. In this regard both the order on provisional measures and the judgment on the merits are dealt with.

*A) Order on Provisional Measures*

At the hearings forming part of the Court's proceedings with regard to the indication of provisional measures the DRC, citing the Court's jurisprudence, argued more particularly that the requirements of urgency and the risk of irreparable damage, conditions precedent for the indication of provisional measures, had been satisfied in the present case.[255] The DRC argued that 'in two recent cases, the life of *a single* individual justified the indication of measures intended to avert an irreparable event' and that '[*a*] *fortiori*, measures should be indicated as a matter of urgency in circum-

252 *Armed Activities* case, (DRC *v*. Uganda), Declaration of Judge Koroma of 19 December 2005, para. 1, available at: *http://www.icj-cij.org/docket/files/116/10459.pdf* (last accessed on 1 November 2007).

253 *Armed Activities* case, (DRC *v*. Uganda), Judgment of 19 December 2005. The Applicant invoked 11 bases of jurisdiction, but the Court concluded by fifteen votes to two that it did not have jurisdiction to entertain the case. In paragraph 125 of the judgment the Court stated that it deemed it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law *(jus cogens)* are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.

254 *Armed Activities* case, (DRC *v*. Uganda), Application of 23 June 1999, p. 5, available at: *http://www.icj-cij.org/docket/files/116/7151.pdf* (last accessed on 1 November 2007).

255 *Armed Activities* case, (DRC *v.* Uganda), (*Provisional Measures*), Order of 1 July 2000, ICJ Reports 2000, p. 117, para. 19.

stances where ... hundreds, if not thousands, of persons are being condemned to certain death ...'[256] Indeed, it is part of the Court's jurisprudence that the protection of an individual justifies the indication of provisional measures even where the risk occurs outside the context of an armed conflict[257] or pertains to the life of a single individual.[258] Among other claims, the DRC contended that Uganda was committing repeated violations of the GCs and AP I and II, in flagrant disregard of the elementary rules of international humanitarian law in conflict zones, and was also guilty of massive human rights violations in defiance of the most basic customary law.[259]

In its Order of 1 July 2000 the Court unanimously indicated the following provisional measures:

> '(1) Both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
> (2) Both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;
> (3) Both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.'[260]

While the speed with which the Court dispensed with the case was commendable, State compliance with the indicated provisional measures left much to be desired.[261] It is noteworthy that until then it was not clear whether provisional measures indicated by the Court were legally binding. However, on 1 July 2000 the Court added its authoritative legal findings to the gathering chorus of international opinion that the parties concerned were to respect the purposes and principles of the United Nations Charter and all obligations arising under international law.

In fulfilling its role within the UN, the Court made reference to SC Resolution 1304 (2000), as a reminder to the parties regarding the binding nature of this resolution

256 *Ibidem*.

257 *Hostages* case (United States of America *v*. Iran), (*Provisional Measures*), Order of 15 December 1979, ICJ Reports 1979, pp. 7-21.

258 *Breard* case (Paraguay *v*. United States of America), (*Provisional Measures*), Order of 9 April 1998, ICJ Reports 1998, pp. 248-258, *LaGrand* case (Germany *v*. United States of America), (*Provisional Measures*), Order of 3 March 1999, ICJ Reports 1999, pp. 9-17.

259 *Armed Activities* case (DRC *v*. Uganda), Application of 23 June 1999, p. 17.

260 *Armed Activities* case (DRC *v*. Uganda), (*Provisional Measures*), Order of 1 July 2000, ICJ Reports 2000, p. 129, para. 47.

261 *Armed Activities* case (DRC *v*. Uganda), Judgment of 19 December 2005, paras. 262-265, available at: *http://www.icj-cij.org/docket/files/116/10455.pdf* (last accessed on 1 November 2007).

adopted under Chapter VII of the UN Charter.[262] It is easy to discern in this Order the usual restraint of the Court not to trespass into the forbidden territory of the merits of the case. Indeed, the Court opted for a bare minimum approach to the provisional measures it chose to indicate and hoped that these would be a sufficient and meaningful contribution to the critical state of relations between Uganda and the DRC.[263] Although events continued to unfold in a rather regrettable manner, it should be noted that in its Order the Court drew the attention of the States concerned to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.

*B) Merits*

At the merits stage of the proceedings the DRC asked the Court to adjudge and declare:

> 'That the Republic of Uganda, by committing acts of violence against nationals of the Democratic Republic of the Congo, by killing and injuring them or despoiling them of their property, by failing to take adequate measures to prevent violations of human rights in the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:
>
> - the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law;
> - the principle of conventional and customary law imposing an obligation, at all times, to make a distinction in an armed conflict between civilian and military objectives;
> - the right of Congolese nationals to enjoy the most basic rights, both civil and political, as well as economic, social and cultural.'[264]

Two relevant issues for our purposes can be singled out from the judgment rendered by the Court on 16 December 2005, namely that of belligerent occupation and that of violations of international humanitarian law. These issues will be discussed in more detail below.

*1) The Issue of Belligerent Occupation*

According to the DRC the border regions of eastern Congo were attacked by Ugandan forces between 7 and 8 August 1998, and more areas fell under the control of Ugandan troops over the following months with their advance into Congolese territory, while

262 *Armed Activities* case (DRC *v*. Uganda), (*Provisional Measures*), Order of 1 July 2000, ICJ Reports 2000, pp. 123-126, para. 35.

263 D. Kritsiotis, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda): Provisional Measures*, ICLQ, 2001, pp. 669-670.

264 *Armed Activities* case (DRC *v*. Uganda), Judgment of 19 December 2005, para. 25.

the occupation of its territory ended with the withdrawal of the Ugandan army on 2 June 2003.[265] At the outset the Court observed that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.[266] In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying Power' within the meaning of the term as understood in the *jus in bello*, the Court had to examine whether there was sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.[267] That meant that the Court had to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.[268] In the event that this were true, in the view of the Court, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied.[269]

After perusing the evidence the Court concluded that Uganda was the occupying Power in the Ituri region at the relevant time.[270] As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC.[271] This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.[272] Having thus concluded that Uganda was an occupying Power in Ituri at the relevant time, the Court found that Uganda's responsibility was engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.[273] In concluding the Court noted that Uganda at all times had responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable

265 *Ibid*., para. 167.
266 *Ibid*., para. 172.
267 *Ibid*., para. 173.
268 *Ibidem*.
269 *Ibidem*.
270 *Ibid*., paras. 174-177.
271 *Ibid*., para. 178.
272 *Ibidem*.
273 *Ibid*., para. 179.

in the specific situation.[274] Interestingly, the Court emphasized that Uganda's responsibility for violations of international humanitarian law was engaged not only for actions attributable to it, but also for any lack of vigilance in preventing such violations. The Court's contribution here comes not only through promoting accountability, according to international humanitarian law and human rights standards, for acts committed by the Occupying Power's own forces, but also for acts committed in the territory under its control by other actors. Needless to say, this is in favour of the enhancement of the protection enjoyed by the civilian population in occupied territories.

*2) Violations of International Humanitarian Law*

Although the Court treated issues pertaining to international human rights law and humanitarian law side by side, our focus remains only on violations of international humanitarian law. Understandably, the contentions of the parties in the case regarding this issue were rather different.[275] In examining the allegations of the DRC with regard to the violations of international humanitarian law the Court took into consideration evidence contained in certain UN documents, to the extent that they were of probative value and were corroborated, wherever necessary, by other credible sources.[276] It is also interesting to note that the Court found that in order to rule on the DRC's claim, it was not necessary for the Court to make findings of fact with regard to each individual incident alleged.[277]

(a) Loss of Life to the Civilian Population, Acts of Torture and other Forms of Inhumane Treatment, and Destroyed Villages and Dwellings of Civilians

With regard to the claim that Ugandan armed forces caused loss of life to the civilian population, committed acts of torture and other forms of inhumane treatment, and destroyed villages and dwellings of civilians the Court based its findings on the reports of:

a. the Special Rapporteur of the Commission on Human Rights of 18 January 2000 (E/CN/4/2000/42, para. 112) referring to massacres carried out by Ugandan troops in Beni on 14 November 1999 and that of 1 February 2001 (E/CN/4/2001/40, paras. 112, 148-151) referring to several incidents of atrocities committed by Ugandan troops against the civilian population, including torture and killings;
b. the Third report on MONUC by the SG-UN (doc. S/2000/566 of 12 June 2000, para. 79) concluding that Rwandan and Ugandan armed forces 'should be held accountable for the loss of life and the property damage they inflicted on the civilian population of Kisangani';

274 *Ibid*., para. 180.
275 *Ibid*., paras. 181-195.
276 *Ibid*., para. 205.
277 *Ibidem*.

c. Security Council resolution 1304 (2000) of 16 June 2000 which deplored 'the loss of civilian lives, the threat to the civilian population and the damage to property inflicted by the forces of Uganda and Rwanda on the Congolese population'; and
d. MONUC's special report on the events in Ituri, January 2002-December 2003 (doc. S/2004/573 of 16 July 2004, paras. 19, 42-43, 62) containing much evidence of direct involvement by Ugandan troops, in the context of the Hema-Lendu ethnic conflict in Ituri, in the killings of civilians and the destruction of their houses.[278]

The Court found the coincidence of reports from credible sources sufficient to convince it that grave breaches of international humanitarian law had been committed by the Ugandan troops on the territory of the DRC.[279] The Court further found that there was sufficient evidence of a reliable quality to support the DRC's allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against other troops.[280] Based on MONUC's special report on the events in Ituri, on the shelling of houses the Court noted that indiscriminate shelling is in itself a grave violation of humanitarian law.[281] The Sixth report of the Secretary-General on MONUC (doc. S/2001/128 of 12 February 2001, para. 56) stating that 'UPDF troops stood by during the killings and failed to protect the civilians' was also quoted by the Court.[282] Further, it was found by the Court that there was convincing evidence of the training in UPDF training camps of child soldiers and of the UPDF's failure to prevent the recruitment of child soldiers in areas under its control.[283] Having examined the case file, the Court considered that it had credible evidence which was sufficient to conclude that UPDF troops had committed acts of killing, torture and other forms of inhumane treatment of the civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories.[284]

(b) Deliberate Policy of Terror against the Civilian Population

With regard to the claim by the DRC that Uganda carried out a deliberate policy of terror, confirmed in its view by the almost total impunity of the soldiers and officers responsible for the alleged atrocities committed on the territory of the DRC, the Court, in the absence of specific evidence supporting this claim, considered that this allega-

278 *Ibid*., para. 206.
279 *Ibid*., para. 207.
280 *Ibid*., para. 208.
281 *Ibidem*.
282 *Ibid*., para. 209.
283 *Ibid*., para. 210.
284 *Ibid*., para. 211.

tion had not been proven. The Court however emphasized that the civil war and foreign military intervention in the DRC created a general atmosphere of terror pervading the lives of the Congolese people.[285] This is the first time that the Court had made a finding concerning the protection provided to the civilian population under Article 51 (2) of AP I, which reads that civilians shall not be subject to attack and that acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited. In this respect it is also noteworthy that the Court reached this conclusion based on the existence of a civil war and the foreign military intervention.

(c) Uganda's Responsibility for Acts or Omissions of Its Armed Forces

With regard to the question whether acts and omissions of the UPDF and its officers and soldiers were attributable to Uganda, the Court found that the conduct of the UPDF as a whole was clearly attributable to Uganda, being the conduct of a State organ.[286] In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct was attributable to Uganda. Therefore, Uganda's contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances was found to be without merit.[287] Moreover, the Court deemed that it was irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority.[288] The Court noted that according to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of AP I, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.[289]

The Court found that the acts committed by the Ugandan armed forces (UPDF) and their officers and soldiers were in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power.[290] As the Court clarified, these obligations were binding upon the Parties as customary international law.[291] Besides the violation of the relevant provisions of the Hague Regulations concerning obligations of an occupying Power, Uganda was also found to be in violation of the following provisions of international humanitarian law, to which both Uganda and the DRC were parties:

285 *Ibid*., para. 212.
286 *Ibid*., para. 213.
287 *Ibidem*.
288 *Ibid*., para. 214.
289 *Ibidem*.
290 *Ibid*., para. 219.
291 *Ibidem*.

- Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;
- First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;
- Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
- Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.[292]

The ICJ found that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for international humanitarian law in Ituri district, had violated its obligations under international humanitarian law.[293] These findings were also reflected in the dispositif of the judgment.[294] It is important that the Court drew considerable attention to the protection provided under international humanitarian law for children, on the basis of the Convention on the Rights of the Child and its Optional Protocol. This is rather important in order to instil compliance with these instruments in a region where the phenomenon of child conscription is commonplace.

(d) Illegal Exploitation of Natural Resources

The DRC claimed that, by engaging in the illegal exploitation, plundering and looting of the DRC's natural resources, Uganda also violated its obligations as an occupying Power under the *jus in bello*.[295] In the view of the Court, whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present. As the Court noted, both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillaging.[296] The Court observed that the fact that Uganda was the occupying Power in Ituri district extended Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this

292 *Ibidem*.
293 *Ibid*., para. 345.
294 *Ibid*., para. 345(3).
295 *Ibid*., para. 229.
296 *Ibid*., para. 245.

district and not only members of the Ugandan military forces.[297] Taking into account the evidence before it the Court concluded that it was in possession of sufficient credible evidence to find that Uganda was internationally responsible for acts of looting, plundering and exploitation of the DRC's natural resources committed by members of the UPDF in the territory of the DRC, for violating its obligation of vigilance with regard to these acts and for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering and exploitation of natural resources in the occupied territory.[298] It was the first time that the Court had dealt with the issue of the prohibition of illegal exploitation, plundering and looting of natural resources as part of obligations imposed under international humanitarian law. Thus, by identifying the applicable law and applying it thereafter to the circumstances of this case the Court rendered an important contribution to the interpretation and development of international humanitarian law.

*3) Concluding Remarks*

Few cases like the one dealt with above have been brought before the ICJ. A plausible explanation might be that States are usually reluctant to bring such issues deemed to be of high concern and of utmost national importance before the World Court, unless they have compelling reasons to do so. Moreover, proceedings before the ICJ take on average a considerable amount of time, are costly, and no government would want to be seen or perceived as defeated within its State borders. Although this seems to be the general rule, there have been some cases where States have turned to the Court to indicate provisional measures in order to put a stop to an ongoing armed conflict or the presence of foreign armies within their territory.[299] It is noteworthy that such cases have usually involved inter-State conflicts, where the Applicant State was at a clear military disadvantage.

As Judge Koroma noted, in a nutshell, Uganda was found to be responsible for the illegal use of force, a violation of sovereignty and territorial integrity, military intervention, a violation of human rights and international humanitarian law, looting, plundering and exploitation of Congo's natural resources, causing injury to the Congo as well as to Congolese citizens.[300] The Court's finding of Uganda's international responsibility for acts of looting, plundering and exploitation of the DRC's natural resources in view of its failure to comply with obligations incumbent upon it under Article 43 of the Hague Regulations of 1907 is rather important for it clarifies the duty of an occupying Power to respect a people's permanent sovereignty over natural

297 *Ibid*., para. 248.

298 *Ibid*., para. 250.

299 The *Armed Activities* cases and the *Legality of Use of Force* cases are illustrative of this trend.

300 *Armed Activities* case (DRC *v*. Uganda), Declaration of Judge Koroma of 19 December 2005, para. 5, available at: *http://www.icj-cij.org/docket/files/116/10459.pdf* (last accessed on 1 November 2007).

resources also during an occupation. Further, the findings made with regard to the obligations which international humanitarian law instruments impose upon an occupying Power to respect and ensure respect for the rules and principles embedded therein strengthen the protection accruing to individuals under a situation of occupation. An important aspect of this judgment is the explicit condemnation by the Court of the conscription of child soldiers. This practice, which is contrary to international law, has terribly affected the lives of many children in the area of the Great Lakes of Africa. The Court's findings send a clear signal to governments and armed factions that conscripting child soldiers or engaging children in an armed conflict is a violation of international humanitarian law and of the relevant human rights instruments, namely the Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict.[301] Such findings are also a red flag for international courts and tribunals to bring the responsible persons to justice. In this light, the trial of Thomas Lubanga Dyilo before the ICC for conscripting child soldiers in the territory of the DRC, besides being a reflection of the seriousness of this crime, also shows the resolve of the international community to do what it can in order to put an end to this practice.

301 The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 25 May 2000 entered into force on 12 February 2002. For more information visit: *http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm* (last accessed on 1 November 2007).

## PART III APPRAISAL OF THE COURT'S CONTRIBUTION TO INTERNATIONAL HUMANITARIAN LAW

It should be noted that the scope of international humanitarian law has widened over time and its content has become increasingly influenced by human rights, peace and disarmament considerations, environmental protection considerations, and last but not least, by an urge on the part of the international community to ensure accountability for grave breaches of the Geneva Conventions and the laws and customs of war. The contribution of the Court to the interpretation and the development of international humanitarian law rules and principles, as discussed in detail above, has three inter-related aspects:

1) first and foremost, it clarifies and develops rules and principles of international humanitarian law applicable to the cases before it, through a legal process that has also been characterized as the 'humanization of international humanitarian law';
2) it integrates international humanitarian law concepts and principles within the wider framework of international law;
3) it contributes to maintaining the unity of international humanitarian law and its uniform application by international judicial bodies operating in this field.[302]

A question which arises is what is the role of international humanitarian law after the Cold War and the ensuing changes to the international world order? This author agrees wholeheartedly with Sandoz, who states that 'international humanitarian law will have to continue as a safety net, relying primarily on its principles, which must be defended as a matter of the highest priority and which, as they are universally recognized, are also essential to the building of a world order fit for our times'.[303] As the old Roman maxim *pacta sunt servanda* suggests, States are under a duty to fulfil their treaty obligations in good faith. The law on state responsibility has an important role to play: either as a reparatory counterpart or to address the systemic causes of individual criminality.[304] Given that at present all States are parties to the GCs and to a large extent also to the two APs to them, it is incumbent upon them, as the Court has indicated, to take a number of steps both at an international and at a national level in order to meet their obligations. Despite the Court's strong recommendation to ratify

302 See *inter alia* F.O. Raimondo, *The International Court of Justice as a Guardian of the Unity of Humanitarian Law*, LJIL, Vol. 20, 2007, pp. 593-611.

303 Y. Sandoz, *Prospects for Future Developments in International Humanitarian Law*, in L. van Sambeek and B. Tahzib-Lie, (eds.), Making the Voice of Humanity Heard, Martinus Nijhoff Publishers, 2004, p. 355.

304 A. Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, ICLQ, Vol. 52, 2003, p. 639. See *inter alia* S. Rosenne, *War Crimes and State Responsibility*, Israel Yearbook of International Law (IYbIL), 1995, p. 63; *State Responsibility and International Crimes: Further Reflections on Art 19 of the Draft Articles on State Responsibility*, NYUJILP, Vol. 30, 1998, pp. 145-166.

these important instruments of international humanitarian law, a number of countries have seen fit to abstain from doing so, or on occasion have disregarded them, especially in cases of internal conflicts.

As a result of a movement towards accountability for war crimes and crimes against humanity, criminal conduct during armed conflicts has come to be penalized by a considerable number of war crimes courts and tribunals established by the international community at the end of the twentieth and the beginning of the twenty-first century. Suffice it to mention here the ICTY, the ICTR, both established by the SC under chapter VII of the UN Charter, and the ICC established in Rome in 1998. Other developments in the field of international criminal law, which is intrinsically related to international humanitarian law, provide for the penalization of individuals for war crimes independent of whether the country from which they emanate is a party to international humanitarian agreements. However, one should not forget that the prosecution of the perpetrators of war crimes is but one component of the process of restoring peace after an armed conflict has taken place. While, on the one hand, it is submitted that the prosecution of the perpetrators of such horrendous crimes can help in ensuring a culture of compliance with the humanitarian law instruments in place at an individual level, on the other hand the ICJ is a desirable and good tool to enforce and promote respect for this branch of law at State level.

With the renewed importance and the ensuing rapid development of international humanitarian law in the last few decades,[305] the latter is no longer the reserved domain of the ICRC, humanitarian law scholars, and military lawyers, but an important field of study for students of law and for practitioners. It is noticeable that only a few cases concerned with issues of international humanitarian law have been brought before the ICJ. This can be partially explained by the fact that States are usually reluctant to bring such issues deemed to be of high concern and of the utmost national importance before the World Court. However, recently there have been a considerable number of cases where States have turned to the Court to indicate provisional measures in order to put a stop to a military intervention or to an ongoing armed conflict within their territory. For the sake of completeness it should be noted that these cases have involved the use of armed force between States, where the weaker party had recourse to the Court in order to find a remedy for the situation.[306] It is noteworthy that disregarding the Orders of the Court indicating provisional measures could have a boomerang effect for States who do not heed them. It remains to be seen whether the Court's finding of a State in violation of its Orders could potentially translate into having to pay a higher amount of reparations at the final stage of the legal proceedings before the Court, namely that of compensation for damages.

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305 Meron, *supra* note 20, uses the term 'humanization of humanitarian law' to refer to these changes that have occurred in the last few decades.

306 That was the case in the *Legality of the Use of Force* cases and the *Armed Activities in the Territory of the Congo* cases.

In the case *Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* brought by Bosnia-Herzegovina against Yugoslavia, the former invoked as an additional basis of jurisdiction:

> '[t]he Customary and Conventional International Laws of War and International Humanitarian Law, including but not limited to the Four Geneva Conventions of 1949, their First Additional Protocol of 1977, the Hague Regulations on Land Warfare of 1907, and the Nuremberg Charter, Judgment, and Principles'.[307]

In addressing this basis of jurisdiction the Court found that there was no provision relevant to its jurisdiction in any of the above-mentioned instruments.[308] The lack of compromissory clauses in the humanitarian law instruments conferring jurisdiction upon the Court makes the involvement of the Court with humanitarian law issues even more difficult. That means that on occasions, although there seems to be ample proof that war crimes were committed, which might even be acknowledged by the Court, this would be prevented from passing judgment on a State's responsibility for those acts or omissions.[309] How can one respond to this? Criticize the Court for not accepting jurisdiction to entertain a case on those grounds where undoubtedly breaches of the law of armed conflict (Geneva and Hague law) had occurred or praise the Court for the cautious approach and for not opening a Pandora's box as far as jurisdiction upholding and admissibility issues are concerned? This author is of the opinion that the position taken by the Court is more preferable if one is to take into account the effects such a wide interpretation of jurisdiction would have on the business and credibility of the Court in the long term. In view of the fact that none of the above-mentioned international humanitarian law instruments contain a compromissory clause, States cannot rely on them as a basis for founding the Court's jurisdiction. However, in cases where jurisdiction was founded on a bilateral agreement between the parties, *forum prorogatum*, or on their acknowledgement of the Court's compulsory jurisdiction, the latter can and has made quite an extensive use of international humanitarian law rules and principles in dealing with the merits of the case.

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307 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina *v*. Serbia and Montenegro), (*Preliminary Objections*), Judgment of 11 July 1996, ICJ Reports 1996, p. 620, para. 39.

308 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina *v*. Serbia and Montenegro), (*Provisional Measures*), Order of 13 September 1993, ICJ Reports 1993, p. 341, para. 33.

309 In paragraph 277 of its judgment of 26 February 2007 in the *Application of the Genocide Convention* case (Bosnia and Herzegovina v. Serbia and Montenegro) the Court stated that 'The killings outlined above may amount to war crimes and crimes against humanity, but the Court has no jurisdiction to determine whether this is so.' Further, in paragraph 319 of this judgment the Court stated: 'The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.'.

Although operating in a situation of general State reluctance to have recourse to judicial proceedings, resulting in but a few cases brought before it, the Court has proved capable of making use of these cases for elucidating some important principles of humanitarian law. The Court has *inter alia* identified and referred on several occasions to fundamental principles of humanitarian law, indeed the core part of the law of armed conflict, as 'elementary considerations of humanity'. As part of the general principles of international law, these fundamental principles of humanitarian law provide a minimum standard of rules of conduct in the context of armed conflict.[310] However, as elaborated in the analysis of the relevant case law above, there are shortcomings in certain findings of the Court. The reasons for that, it is submitted, are that the Court to a certain extent lacks the necessary expertise in this area, or it simply found itself between a rock and a hard place. Indeed, if one is to look upon the list of the Judges who have served in the Court, there are not many of them who specialize in this area of law or who have been significantly exposed to this branch of law.[311]

In the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, using an *a contrario* reasoning, the Court said that to assume that the principles and rules of humanitarian law are not applicable to nuclear weapons, because the latter were invented after most of the principles and rules of humanitarian law applicable in armed conflicts had come into existence, would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.[312] The underlying message which the Court sent with this finding is maybe a very simple but important one: despite technological advances in weaponry elementary considerations of humanity always apply so as to curtail their disastrous effects. This author agrees with Chetail, who states that 'Although we may regret the cautious and somewhat ambiguous position of the Court regarding the compatibility of the threat or use of nuclear weapons with international humanitarian law, the Court's case law as a whole has certainly helped to strengthen and clarify the normative basis of international humanitarian law by highlighting its relationships with general international law and by setting out the basic principles governing the conduct of hostilities and the protection of victims of war'.[313] The ICJ has held that fundamental rules of international humanitarian law embedded in multilateral treaties have a separate and independent existence, since they derive from the general principles of humanitarian law, to which the Conventions have merely given specific expression.[314] Further, the Court has clarified that these fundamental rules are to be observed by all States whether or not they have

310 *Nicaragua* case, (*Merits*), ICJ Reports 1986, pp. 113-114, paras. 218-219.

311 See Annex 3.

312 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 259, para. 86.

313 V. Chetail, *The contribution of the International Court of Justice to international humanitarian law*, IRRC, Vol. 85, No. 850, June 2003, pp. 267-8.

314 *Nicaragua* case, (*Merits*), Judgment of 27 June 1986, ICJ Reports 1986, p. 114, para. 220.

ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[315] As the Court has put it, a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' that they incorporate obligations which are essentially of an *erga omnes* character.[316] These findings in their entirety constitute a strengthening of international humanitarian law.

An increased number of cases have been brought before the Court for judicial settlement since the end of the Cold War. A quick glance at the list of cases pending before the Court reveals that currently there are several cases concerned with issues of international humanitarian law. It goes without saying that litigating a case before the ICJ – one of the peaceful ways of resolving conflicts provided for under Article 33 of the UN Charter – is a far better option compared to the sufferings and multifaceted pain brought about by an armed conflict. Yet, the willingness of States to have their disputes settled by the Court and their compliance with the Court's decision thereafter still remains to a large extent a matter of political willingness and calculations. A study relating to the compliance of States with decisions of the ICJ concludes that disputes involving land boundaries and a history of armed conflict received the lowest levels of compliance.[317] Further in this article it is asserted that 'An ICJ judgment may be the best possible resolution to such conflicts, even if compliance falls short'.[318] While it is difficult to solve complex and sensitive political problems only by means of a legal decision, decisions of the ICJ have paved the way to achieving a peaceful and long-standing solution.[319] From this perspective one can assert that the ICJ has been continuously engaged in fulfilling its role within the UN system of 'maintaining international peace and security' and 'achieving international co-operation in solving international problems'.[320] While in some instances the Court has found it necessary to venture into indicating minimum provisional measures one cannot be sure how this would affect the credibility of the Court on the whole in the case of State non-compliance with the Court's Orders. It should be noted, however, that on the whole State compliance with ICJ decisions is good, although still not as good as one would expect.[321]

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315 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 257, para. 79.

316 See the advisory opinion on the Wall, ICJ Reports 2004, p. 199, para. 157.

317 C. Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, AJIL, Vol. 98, 2004, p. 457.

318 *Ibid*., p. 461.

319 C. Schulte, *Compliance with Decisions of the International Court of Justice*, Oxford University Press, 2004, p. 413.

320 UN Charter, Article 1, paras. 1 and 3 .

321 C. Paulson, *Compliance with Final Judgments of the International Court of Justice since 1987*, AJIL, 2004. On p. 460 he concludes that, 'The Court's compliance record is good, though not perfect'. See also A. Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, EJIL, Vol. 6, No. 4, 1995, pp. 539-573. For a detailed elaboration of this topic see C. Schulte, *Compliance with Decisions of the International Court of Justice*, Oxford University Press, 2004.

It is almost a truism that the international community over time has come to be increasingly concerned with violations of international humanitarian law, which unfortunately have occurred and continue to occur on a worryingly large scale. While most States will endeavour to comply with rules of conduct of hostilities, not least because of the obligations they place upon the parties in a conflict rather than from considerations of reciprocity and fear of reprisals, some States will violate these provisions. It should be noted that while common Article 1 of the 1949 GCs imposes an obligation to respect and ensure respect for the GCs, it does not identify any specific course of action with regard to the obligation to ensure respect. In view of the universal ratification of the GCs and the growing number of States parties to their APs, as well as the transcendence of humanitarian principles and hence the *erga omnes* character of the obligation to respect them – an attribute which the Court has already emphasized – States have a duty under the strict terms of the GCs and AP I to ensure that each and every one of them respects the principles and rules of international humanitarian law.[322] Thus, the need for States to fulfil their obligation to ensure respect for the principles and rules of this branch of law through legal action, amongst other venues, has become a must. Indeed, in view of the *erga omnes* character of obligations arising under international humanitarian law norms any State can be deemed to have a legal interest in upholding the humanitarian values enshrined in these international humanitarian law instruments. As stated in the Final Declaration of the International Conference for the Protection of War Victims of 1993, States should make every effort:

> '[t]o ensure the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations.'[323]

States which do not abide by principles and rules of international humanitarian law should be reminded of their obligations and ultimately should be brought before the Court; not only as a matter of upholding the humanitarian values enshrined in humanitarian law instruments, but also as fulfilling the obligation States have under common Article 1 to the GCs of 1949 to ensure respect for these instruments of international humanitarian law.[324] It should be noted that the aforementioned obligation applies in the case of both international and internal armed conflicts. An example of the violation of common Article 1 to the GCs is the preparation and dissemination by the US of a manual encouraging the commission by the *contras* of acts contrary to general principles of humanitarian law.[325] Although the Court did not find the US responsible for this

322 See also Palwankar, *supra* note 32, footnotes omitted.

323 *Final Declaration of the International Conference for the Protection of War Victims*, IRRC, No. 296, 1993, p. 380, para. 11.

324 For a discussion on the wide range of measures available to States for fulfilling their obligation to ensure respect for international humanitarian law see *inter alia* Palwankar, *supra* note 32.

325 *Nicaragua* case, (*Merits*), ICJ Reports 1986, pp. 66-69, respectively paras. 118-122, and pp. 129-130, respectively paras. 254-256.

action on the ground of a violation of common Article 1 of the GCs but of common Article 3 of the GCs, it is submitted that the preparation and dissemination of the manual could logically be seen as a violation of Article 1.

The ICJ has on different occasions, and more recently in the *Legal Consequences of the Construction of a Wall in the OPT* opinion, shed light on the obligations of States arising from international humanitarian law instruments. The Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (ILC) in 2001 regulate issues relating to State responsibility for a breach of obligations under international humanitarian law.[326] Indeed, violations of international humanitarian law should create consequences not only for the individual perpetrators of such grave crimes, but also for the responsible States.[327] Respect for international humanitarian law norms should not be a hostage to political circumstances and convenience. In this respect, 'through the combined mechanisms of international humanitarian law and of the general rules on State responsibility, all other States are able and are obliged to act when violations occur.'[328] The above-mentioned Articles on State Responsibility also prescribe the extent of the obligations incumbent upon the State responsible for internationally wrongful acts. First, the responsible State would have to cease the unlawful conduct and afterwards it should make full reparation, which would include restitution, compensation, or satisfaction. Besides the ILC's Articles on State Responsibility, it is already well established that a breach of an international legal obligation under treaty or customary law, and arguably even general principles of law, creates the liability to make reparation. The PCIJ in the *Chorzow Factory* case stated that '[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In judgment no. 8 (1927) (PCIJ, Ser. A., No. 9, P. 21) … the Court had already said that reparation was the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.'[329]

The substance and development of international humanitarian law can be hampered by a refusal to ratify treaties or to consent to developing customary norms. However, possibilities for avoiding such obstacles within the UN are offered by means of GA resolutions, or advisory opinions of the Court. Given that GA resolutions are not legally binding and are generally the fruit of a wide compromise of a political body, a better way of emphasizing the importance of humanitarian law rules and principles

326 See *inter alia* M. Sassòli, *State responsibility for violations of international humanitarian law*, IRRC, No. 846, 2002, pp. 401-433.

327 Article 3 of the 1907 Hague Convention (IV) on respecting the Laws and Customs of War on Land reads: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.' This article can be invoked before a court to claim compensation for violations of the aforementioned Convention by an individual, or by a State on behalf of its citizens.

328 Sassòli, *supra* note 326, p. 433.

329 PCIJ, *Factory at Chorzow* (Germany *v*. Poland), Series A, No. 17, 1927, p. 47.

would be an advisory opinion of the Court on the questionable legal issues. Principles and rules of international humanitarian law place many restrictions on the methods and means of conducting hostilities, especially in order to protect vulnerable categories of persons, such as civilians and prisoners of war. However, there is still a lot of work to be done in disseminating humanitarian law and in creating a culture of compliance amongst the relevant actors. Sadly, we have witnessed that international humanitarian law instruments, proclamations, declarations, notices and guidelines have more than once failed to protect the civilian population and other categories of protected persons in the heat of recent conflicts. While the International Committee of the Red Cross (ICRC) is and will remain the traditional implementing mechanism of international humanitarian law, it is submitted that the ICJ can play a useful and supportive role in helping to achieve the noble aims the ICRC has set itself.

Dissemination of humanitarian law is of the utmost importance as, needless to say, in order to respect the law the persons involved in a conflict ought to know it. These articles are formulated in similar terms. Article 47 of GC I reads:

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.

However, without properly addressing the root causes of conflicts and developing efficient mechanisms, problems and human suffering will continue to persist in different parts of the globe. As Adam Roberts warns, one difficulty in obtaining respect for the law might derive from the very mode by which it is advocated. According to him, presenting a vision of the law as simply a creation of Geneva, imposed on a somewhat reluctant and sinful world, does not do justice to its ancient and diverse origins, nor to the fact that much of the law reflects the interests and ethics of States and their armed forces. Likewise, presenting the implementation of the law as resting entirely with the new UN criminal tribunals does not do justice to the variety of modes of implementation.[330] Indeed, law, no matter how important, is but one of the means of achieving protection for persons involved in armed conflict.

The development of international humanitarian law and the progress with regard to humanitarian action have come a long way since that turning point of Solferino, but unfortunately the reality in the field still continues to frustrate us. With tens of millions suffering as refugees or internally displaced persons, with tens of thousands being killed every year in international and internal wars, humanitarians and those who support them cannot in good conscience claim more than modest progress, especially when the new humanitarian crises have become even more difficult to solve than the

330 A. Roberts, *The role of humanitarian issues in international politics in the 1990s*, IRRC, No. 833, 1999, pp. 19-43.

old.[331] As Moorehead has put it, 'To humanize war, if that is not a contradiction, is our mission. Once we have voiced our undisguised rejection of war, we must take it as it is and unite our efforts to alleviate suffering'.[332] States in recent decades have come to support a culture of accountability for violations of international humanitarian law and, indeed, grave violations of international humanitarian law have given way to the prosecution of individuals who have committed such crimes. However, humanitarian principles and rules should be given much more than mere lip service, if they are to serve their purpose. They should be given universal application and followed strictly as they have been adopted in order to prevent, to the maximum extent, human bloodshed and suffering. While 'humanitarian law represents a beacon of hope, order and civility within the barbarity of violence and chaos',[333] only its worldwide promotion and strict enforcement can ensure that common sense, humanity and the sense of respecting long-established legal rules on the conduct of hostilities shall prevail in the minds of the persons engaged in hostilities.

Despite the authoritative commentary thereon, the interpretation of specific provisions of the GCs and other humanitarian law instruments still remains open to different understandings. For that reason, by interpreting them, the ICJ provides a valuable input, which potentially can contribute to more innocent lives being saved and structural progress being made in upholding humanitarian values. It is worth emphasizing the fact that the ICJ has revealed itself to be an important and useful instrument in interpreting and developing principles of international humanitarian law, namely by giving its judicial imprimatur to the following: reaffirming that common Article 3 of the GCs of 1949 provides only the minimum rules applicable to both international and internal armed conflicts; emphasizing the *erga omnes* character of obligations under international humanitarian law; acknowledging the customary nature of many principles of international humanitarian law; putting an end to the confusion with regard to the respective roles of humanitarian agencies, political bodies and the military; reminding States once again that they have a duty to comply with rules of international humanitarian law; recognizing the right to reparation of legal and natural persons in the event of violations of international humanitarian law; and so on.

For the apparent reason that its jurisdiction simply does not allow it to do so, the ICJ cannot go as far as to deal with penal aspects of individual criminal responsibility under international humanitarian law. However, albeit inherently curtailed in this regard, the Court has given and can still offer its contribution in interpreting and developing principles and rules of international humanitarian law, which can be used by international courts and tribunals that deal with individual criminal responsibility for grave breaches of the GCs and the laws and customs of war generally. Indeed, a

331 W.R. Smyser, *The Humanitarian Conscience: caring for others in the age of terror*, Palgrave Macmillan, 2003, p. 277.

332 C. Moorehead, *Dunant's Dream: War, Switzerland and the history of the Red Cross*, Harper Collins, 1998, p. 22.

333 D. Warner, *The politics of the political/humanitarian divide*, IRRC, No. 833, 1999, pp. 109-118.

finding of State responsibility might persuade or put due pressure on the State in question to prosecute individuals who have perpetrated internationally recognized crimes, or help direct the attention of the Prosecutor of the ICC to investigate the situation in that particular State. International law, of which the ICJ is an organ, may act precisely as an instrument through which particular grievances may be articulated as universal ones and in this way, like myth, construct a sense of universal humanity through the act of invoking it.[334]

334 M. Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, LJIL, No. 17, 2004, p. 246.

# CHAPTER 5
# THE ICJ, OTHER INTERNATIONAL COURTS AND TRIBUNALS, AND QUASI-JUDICIAL BODIES: UNDERSTANDING THE PIECES OF A PUZZLE

## PART I BACKGROUND

### 5.1 GENERAL INTRODUCTION

The topic of the interrelationship between the ICJ and other International Courts and Tribunals (ICTs) and International Quasi-Judicial Bodies (IQJBs) is rather important from the point of view of maintaining and improving the consistency, simplicity, and efficiency of the international system for protecting human values based on international human rights and humanitarian law instruments. The strengths and weaknesses of the ICJ, together with its contribution to the development of international human rights and humanitarian law rules and principles, will provide the basis for our evaluation of the said relationship between the ICJ and all these bodies operating in the fields of international human rights and humanitarian law. Evidently, the ICJ is not the only possible venue for addressing human rights and humanitarian law violations. At present there is a plurality of ICTs, hybrid courts, IQJBs and treaty-monitoring bodies which have been established and operate alongside the ICJ. Article 36(3) of the UN Charter provides that the SC should, as a general rule, recommend the referring of disputes to the ICJ. However, according to Article 95 of the Charter, members of the UN can entrust the resolution of their differences to other tribunals by virtue of existing or future agreements.

While the ICJ can decide upon State responsibility for violations of obligations under international human rights and humanitarian law instruments, other international bodies, judicial or quasi-judicial, play an important role as far as human rights and humanitarian law are concerned given that either individuals can bring claims before them, or because they have jurisdiction to prosecute individuals for violations of human rights and humanitarian law norms. Subsequently, one would necessarily need to take a broader look at other actors entrusted with the interpretation and the development of the principles and rules of human rights and humanitarian law found in different international instruments besides the ICJ. For this aim, an analysis of the case law of the ICJ and the selected ICTs and IQJBs in the field of human rights and humanitarian law, which is directly relevant or has a certain bearing on the work of other bodies, is undertaken in the following pages. That analysis shall be useful in drawing conclusions with regard to the risk of fragmentation of international law and recommendations with a view to improving the international system for the enforcement of international human rights and humanitarian law.

Chapter 5

As acknowledged in Article 33 of the UN Charter the peaceful settlement of disputes can be and should be sought through different ways which fall broadly into three categories: political; quasi-judicial; and judicial. Our focus here remains on judicial and quasi-judicial mechanisms in the field of human rights and humanitarian law and on the interaction between the ICJ and these bodies in particular. Aspects of the law and practice of the judicial bodies to be considered from a comparative/evaluative approach include those of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Court (ICC), the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (I-ACtHR). With regard to IQJBs only the Human Rights Committee (HRCm) and the International Committee of the Red Cross (ICRC) are dealt with here. The HRCm is the treaty-monitoring body of one of the most important international human rights treaties, namely the ICCPR. The ICRC is an independent, neutral organization, whose mission is not limited to only ensuring humanitarian protection and assistance for victims of war and armed violence, but has also been instrumental in the interpretation and development of principles and rules of international humanitarian law.[1] Although the ICRC's mandate and activity cannot be equated with that of an IQJB, the central role which this organisation fulfils in the field of humanitarian law necessitates its inclusion in this chapter. Despite this selection being arbitrary to some extent, this author believes that the considerable number of the ICTs and the key role of the chosen IQJBs allows for general conclusions to be drawn with regard to the main questions discussed here, namely: how do these international bodies interact and what is the position of the ICJ vis-à-vis other bodies operating in the fields of international human rights and humanitarian law?

The analysis of the relationship between the ICJ and the different ICTs and IQJBs will be followed by some concluding remarks. It is noteworthy that the number and the activity of international courts and tribunals have grown significantly in recent years. The establishment of these institutions has been driven to a large extent by the repeated calls for the perpetrators of gross violations of human rights and humanitarian law to be made accountable.[2] Moreover, the issue of remedies for victims of such crimes has been the subject of discussion during the establishment of the ICC and was included in its Statute.[3] In this respect the GA resolution entitled 'Basic Principles and

1 See *www.icrc.org* for more information on the ICRC.

2 On the issue of ICTs and international humanitarian law see a number of articles published in the IRRC, Vol. 88, No. 861, 2006, especially that by H.D.T. Gutierrez Posse, *The relationship between international humanitarian law and the international criminal tribunals*, pp. 65-86.

3 Article 75 of the ICC Statute entitled 'Reparations to victims' reads in paragraphs (1) and (6):
1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
…
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' could be useful to the ICC in the process of establishing such principles, as foreseen under Article 75(1) of the ICC Statute.[4] Although these ICTs have been operative for a limited time, their activity has resulted in an impressive body of case law and in the remarkable development of rules and principles of international criminal law, a branch of international law based on international human rights and humanitarian law. However, as pointed out in many scholarly articles, this process of 'proliferation' creates concerns with regard to jurisdictional or jurisprudential issues arising among these international judicial bodies in the course of their work.[5] Calls for legitimacy and accountability, of which judicial independence and professionalism form a large part, gain a certain urgency as international courts and tribunals are granted an increasingly important role in a situation of growing interdependency among States and increasing international regulation.

While the reasons for the creation of separate judicial organs and quasi-judicial bodies lie in the realms of international politics and practical necessities and differ in respect of each of these bodies, the synergy of their activity can considerably enhance compliance with human rights and humanitarian law norms. At the same time, jurisdictional clashes and differences in interpretation among them would undermine the international system for the protection of human rights. Thus, while on the one hand the 'proliferation' of these mechanisms on human rights protection enhances the possibilities of individuals to enjoy their rights, on the other hand such an increase brings about a risk of a jurisdictional clash and a challenge to their legitimacy and of

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Article 79 entitled 'Trust fund', reads in paragraphs (1) and (3):
1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

4 A/Res/60/147 adopted on 16 December 2005.

5 On the issue of the relationship between the ICJ and other ICTs and the 'proliferation' of the latter see *inter alia* S. Rosenne, *The Law and Practice of the International Court 1920-2005*, pp. 32-42 and 142-145; The Court and Other International Tribunals, in *Increasing the Effectiveness of the International Court of Justice*, C. Peck and R. Lee (eds.), Martinus Nijhoff Publishers: The Hague/ Boston/ London, 1997, pp. 280-323; C.P.R Romano, *The Proliferation of International Judicial Bodies: The Pieces of a Puzzle*, ILP, Vol. 31, 1999, pp. 709-751; Th. Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, LJIL, Vol. 14, 2001, pp. 267-275; K. Highet, P. Bekker, and R. Alford, *International Courts and Tribunals*, The International Lawyer, Vol. 31, No. 2, 1997, pp. 599-610; C. Tomuschat, Supervision by International Tribunals, in *Human Rights: Between Realism and Idealism*, Oxford University Press, 2003, pp. 191-215; J. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, ILP, Vol. 31, 1999, pp. 697-708, P-M Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, ILP, Vol. 31, 1999, pp. 791-807; M. Pinto, *Fragmentation or Unification among International Institutions: Human Rights Tribunals*, ILP, Vol. 31, 1999, pp. 833-842; G. Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, ILP, Vol. 31, 1999, pp. 919-933; A-M. Slaughter, *A Global Community of Courts*, HJIL, Vol. 44, No. 1, 2003, pp. 191-219.

the fragmentation of international law, a risk whose effects should not be underestimated. The question which then arises is: how can we preserve the unity of international legal thought, of the international legal order, and of the international judicial system, in the presence of a manifold diversity of international judicial and quasi-judicial bodies? Although it is clear that competition and even conflicting positions between the existing judicial and quasi-judicial bodies might not always be avoided and to a certain extent might even be warranted, it is of primary importance for these institutions to be open to jurisprudential interaction and comity as basic working principles for ensuring a proper correlation amongst them.

# PART II THE RELATIONSHIP BETWEEN THE ICJ AND OTHER INTERNATIONAL COURTS AND TRIBUNALS (ICTS)

## 5.2 A BRIEF SYNOPSIS OF INTERNATIONAL COURTS AND TRIBUNALS IN THE FIELDS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Thus far the focus of our study has been on examining the possibilities and limitations of the Court and its contribution to the interpretation and development of the international law of human rights and humanitarian law rules and principles. Our attention will now shift to the activity of other ICTs in the fields of international human rights and humanitarian law to the extent that that activity dovetails with that of the ICJ in these areas. Cases where the ICJ and the ICTs have used each other's findings, or were seized of the same dispute, shall be examined. It is noteworthy that being the principal judicial organ of the UN and one of the oldest standing international judicial bodies the Court exerts an influence which is not only limited to the international level, but also extends to domestic courts.[6] An indication of the wide scope of its powers was given by the Court in the *Avena and other Mexican Nationals* case where it stated:

> '[I]n order to ascertain whether there have been breaches of the Convention, the Court must be able to examine the actions of those courts in the light of international law. The Court is unable to uphold the contention of the United States that, as a matter of jurisdiction, it is debarred from enquiring into the conduct of criminal proceedings in United States courts.'[7]

However, our focus shall remain on the interaction between the ICJ and ICTs operating in the fields of international human rights and humanitarian law. The different ICTs which are dealt with in detail below have been established over time as the development of the international society and international law – and with it its need for justice – grew at the same time as a culture of human rights became increasingly entrenched in the international legal system.

For our purposes an international judicial body, such as the ICTs dealt with here, is an entity possessing the qualifications listed below:

a) it is a judicial body that either adjudicates disputes between two or more entities of which at least one is a State or an international organization, or exerts criminal jurisdiction over individuals;
b) it works according to predetermined rules of procedure and evidence;

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6 See *inter alia* J.J. Paust, *Domestic Influence of the International Court of Justice*, Denver Journal of International Law and Policy (DJILP), Vol. 26, No. 5, 1998, pp. 787-805. For a discussion of the other direction of this interaction see *inter alia* A. Nollkaemper, *The Role of Domestic Courts in the Case Law of the International Court of Justice*, CJIL, Vol. 5, No. 2, 2006, pp. 301-322.

7 ICJ, *Avena and other Mexican Nationals* case, (Mexico *v.* United States of America), Judgment of 31 March 2004, ICJ Reports 2004, p. 30, para. 28.

c) it is composed of independent judges;
d) its decisions are legally binding.[8]

The remarkable development of the international law of human rights and humanitarian law and with it the gradual change of the position of the individual under international law from that of an object to that of a participant, a bearer of rights and duties, necessarily created a need for the establishment of new institutions which would conform to those new realities. Such a development was probably unthinkable in 1945 when the ICJ was established as part of the UN. However, this evident progress in these branches of international law does not mean that older institutions like the ICJ have fallen into oblivion. The docket of the Court proves that this cannot be further from the truth. Given that States are entrusted with and bear primary responsibility for the protection and the promotion of the human rights of individuals under their respective jurisdictions, the position and the role of the ICJ as a judicial body created for settling inter-State disputes, or interpreting international instruments in this field, certainly remain highly relevant.

Here we shall embark upon an analysis of the judicial cross-fertilization between the ICJ and the selected ICTs and a comparison of their positions on certain important legal issues which have a bearing upon the interpretation and the development of international human rights and humanitarian law. Understandably, this endeavour is a modest effort aimed at describing and comparing certain aspects of the practice of these ICTs and at indicating wherever applicable how they can profit from each other's work. The examination of the interaction between the ICJ and other ICTs shall focus mainly on the jurisprudential dimension, i.e. that of jurisprudential cross-fertilization, while keeping in mind the specific institutional characteristics of these ICTs. While some ICTs only have an attributed jurisdiction derived directly from the consent of States, others were created by the UN SC based upon their implied consent. This and other factors related to the institutional dimension of these international judicial bodies are taken into account in our discussion.

## 5.3 Introduction to the Relationship between the ICJ and other International Courts and Tribunals (ICTs)

The mere fact that the ICJ is 'the principal judicial organ' of the UN does not mean that this *primus inter pares* position reserved for the ICJ under the UN Charter among the plethora of international courts and tribunals, subsequently established under the

8 This qualification is similar to that accompanying the Synoptic Chart for the Project on International Courts and Tribunals (PICT) by Cesare Romano, available at: *http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf* with the distinction that in this author's opinion for an international judicial body to qualify as such it does not need to be a permanent institution. Indeed, international judicial bodies have been established with a specific mandate for a limited period of time. Examples include the two *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda, the Special Court for Sierra Leone, the Special Panels for Serious Crimes for East Timor and so on.

Charter or under UN guidance, creates any formal legal hierarchy or an overall coherent regulation in this field. Indeed, Article 95 of the Charter states in rather unambiguous language that 'Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.' Thus, besides theoretically giving it institutional pre-eminence within the organisation and as a consequence in the area of international courts and tribunals established under the framework or guidance of the UN, the UN Charter leaves open the issue of any further regulation of the interrelationship between such international judicial bodies. This fact when seen in the light of the recent developments connected with the establishment of the *ad hoc* tribunals and the ICC, which seem somewhat hesitant to resort to the ICJ for an opinion,[9] shows that the relationship between the existing international courts and tribunals is a rather intricate topic. Additionally, the complexity of this issue coupled with the fairly hasty and patchwork approach adopted in setting up these judicial bodies seem to explain why this is a relatively under-explored topic.

Presently there exists an expanded and intricate net of international courts and tribunals. For our purposes the ICTs selected and dealt with here can be divided mainly into three groups. In the first group, established essentially for settling inter-State disputes, although entities other than States can resort to the Court, the obvious example is the ICJ. The second group is composed of regional human rights courts established for complementing and enhancing the system of human rights protection within a certain region. The courts pertaining to this group which will be dealt with are the ECtHR and the I-ACtHR. The AfCtHR has been omitted given that it is a recently established court which still has to generate its own case law.[10] The third group is composed of international criminal courts and tribunals established for punishing perpetrators of grave violations of human rights and humanitarian law in the aftermath or during the time when such violations were taking place in armed conflicts occurring in different areas of the world. The majority of this group's ICTs have jurisdiction over individuals suspected of having committed internationally recognized crimes, such as genocide, war crimes and crimes against humanity. The judicial bodies dealt with here falling within this group are the ICTY, the ICTR and the ICC. Unlike the ICJ, an international judicial body entrusted with settling mainly inter-State disputes, these other ICTs deal either with individual complaints of violations of certain human rights instruments, or are entrusted with the prosecution of individuals suspected of having committed grave violations of human rights and humanitarian law. Given the different

9 The ICTY declined to resort to the ICJ when the legality of its establishment was challenged in the *Tadić* case, see *Prosecutor v. Tadić*, Case No. IT-94-1-A, (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*), Appeals Chamber, 2 October 1995. On the interrelationship between the ICJ and the ICC see *infra* section 5.5.2.

10 On the issue of human rights in Africa in general and the AfCtHR in particular see F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press, 2007.

scope of their jurisdiction and the rationale behind the creation of each of these ICTs, their comparison and joint study is quite complex.

In spite of differences relating to their specific institutional characteristics, the different judicial functions and the role that these ICTs are expected to fulfil, there are certain common features and noticeable overlaps in their respective case law. For example, a common feature between the ICJ and the regional human rights courts such as the ECtHR, the I-ACtHR, and the recently established ACtHR is that also the latter three allow for the lodging of State complaints. However, it is the individual complaints procedure before the human rights courts mentioned above which represents a novel development, triggered and supported by the provisions of a classical international human rights law instrument such as the UDHR. Introducing individual complaint procedures demanded the creation of organs where individuals could have direct access, something which was not readily available through the ICJ, where only States have standing. Thus, by the time when such procedures were adopted it was understood that if the rights of individuals were to be effectively protected at an international or regional level, the latter were to be provided with the necessary forum for bringing forward their complaints.

State responsibility and individual criminal responsibility are often intrinsically related, for the State, itself being a legal fiction, operates through individuals who conceive and put into practice State policies.[11] When such policies give rise to grave violations of human rights and humanitarian law responsibility arises at State as well as at an individual level.[12] With regard to the relationship between the ICJ and the ICTs it should be noted beforehand that, for example, a finding of State responsibility can pave the way for the prosecution of the persons responsible for such State actions or omissions in violation of existing obligations under international human rights or humanitarian law instruments. Another way in which such ICTs can be brought into the picture is if the SC, acting within its powers under Chapter VII of the Charter, were to find that ongoing gross violations of human rights in a State amount to a threat or a breach of international peace and security. Consequently, the SC could decide either to refer the case to the ICC, as it did in the case of Darfur, or to establish an *ad hoc* tribunal, as in the case of the former Yugoslavia and Rwanda. Another possible venue is also the *proprio motu* power of the Office of the Prosecutor (OTP) of the ICC to start an investigation into the alleged violations and to commence legal proceedings against the responsible person(s) once such a finding has been made by the SC. Thus, a finding of State responsibility for gross human rights violations which could trigger action on the part of the ICC does not necessarily need to originate from a judicial

11 As acknowledged in the Nuremberg Tribunal: '[c]rimes against international law are committed by men, not by abstract entities ...', Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents*, Vol. 1, p. 223.

12 See *inter alia* A. Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, ICLQ, Vol. 52, 2003, pp. 615-640.

organ such as the ICJ, but can also be implied from a resolution of the SC adopted under Chapter VII of the UN Charter.

While, on the one hand, a finding of State responsibility could most likely lead to a finding of criminal responsibility for a plurality of persons, on the other hand, as the ICJ noted in the *Application of the Genocide Convention* case, State responsibility can arise under the Genocide Convention for committing genocide and complicity, without an individual being convicted of this crime or an associated one.[13] As the Court rightfully observed in this case, the duality of responsibility continues to be a constant feature of international law, as reflected in Article 25, paragraph 4, of the ICC Statute and Article 58 of the ILC Articles on State Responsibility.[14] Ultimately, this dual responsibility for grave violations of human rights and humanitarian law norms provides for a more coherent and effective human rights protection system. However, a gap still seems to remain with regard to the responsibility of third actors (non-State actors) for violations of human rights and humanitarian law. That is an issue which is receiving increased attention as non-State actors are quite important actors, sometimes exerting even more influence and power than States of considerable size.[15]

Contrary to the ICC, whose jurisdiction is complementary to that of domestic courts,[16] the ICTY and its sister tribunal, the ICTR, have been endowed with primary jurisdiction.[17] Further, the tribunals have a wide range of powers emanating from the fact that they were both established by the SC acting under Chapter VII of the UN Charter. Hence, both *ad hoc* tribunals have a closer correlation with the SC than the ICC. Indeed, the duty to render co-operation and judicial assistance to the ICTY under Article 29 of the ICTY Statute amounts to a legal obligation for all UN member States as determined by the SC under Articles 48 and 49 of Chapter VII of the Charter. As far as the enforcement of decisions is concerned the ICJ's correlation with the SC is comparable to that of the *ad hoc* tribunals to this latter body. Article 94(2) of the UN Charter provides: 'If any party to a case fails to perform the obligations incumbent

13 ICJ, *Application of the Genocide Convention*, (Bosnia-Herzegovina *v*. Serbia and Montenegro), Judgment of 26 February 2007, para. 182.

14 *Ibid*, para. 173.

15 See *inter alia* P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press: New York, 2005; A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford University Press: New York, 2006.

16 Article 1 of the ICC Statute reads: 'An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions.'

17 ICTY Statute, Article 9(2) reads: 'The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.'
ICTR Statute, Article 8(2) reads: 'The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.'

upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems it necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.' The ICC's correlation with the SC is embedded in Article 13(b) of its Statute on 'Exercise of jurisdiction' providing for referrals of a situation by the SC acting under Chapter VII of the UN Charter. Another way in which the SC can influence the activity of the ICC, provided under Article 16, is by requesting the ICC to defer an investigation or prosecution for a renewable period of 12 months by means of a Chapter VII resolution. Finally, the relationship between the ICC and the UN has been set out in the agreement entered into to that effect by both parties on 4 October 2004. Article 17 of this Agreement sets out the relationship between the ICC and the SC.[18] As can be easily discerned, despite their differences, all these international judicial bodies have a common feature: ultimately, if States fail to enforce their judgments they can rely on the potential measures that can be taken by the SC acting under Chapter VII of the Charter for supporting their judicial activity and the enforcement of their judgments.

In view of the fact that there are no guidelines for international judges regarding their relationship with other judicial organs and the treatment of each other's case law, besides the common sense-based principles of comity and open-mindedness, and no established hierarchy between the existing international judicial bodies, it becomes rather difficult to pin down the nature and scope of such a relationship.[19] An effort has

18 Article 17 entitled 'Cooperation between the Security Council of the United Nations and the Court' reads:
1. When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.
2. When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.
3. Where a matter has been referred to the Court by the Security Council and the Court makes a finding, pursuant to article 87, paragraph 5 (b) or paragraph 7, of the Statute, of a failure by a State to cooperate with the Court, the Court shall inform the Security Council or refer the matter to it, as the case may be, and the Registrar shall convey to the Security Council through the Secretary-General the decision of the Court, together with relevant information in the case. The Security Council, through the Secretary-General, shall inform the Court through the Registrar of action, if any, taken by it under the circumstances.

19 While such guidelines are lacking an important set of principles on the independence of international judges is provided under the Burgh House Principles on the Independence of the International Judiciary adopted by the Study Group of the International Law Association on the Practice and Procedure of

been made here to inquire into whether such a hierarchy exists, albeit a non-statutory one, and what principles should lead international judges when coming to their decisions while operating in the presence of a considerable number of international judicial bodies. While discussing the issue of the relationship between the ICJ and the ICTs operating in the fields of international human rights and humanitarian law is rather difficult, for a number of reasons, the author has tried to limit this discussion to certain common features and identified similarities in the case law of these judicial bodies. The interaction and relationship between the ICJ and these ICTs has been discussed from a narrative-comparative perspective, keeping in mind the interest of the international community in having a strong, reliable, and fair international judicial system based on a set of commonly agreed international law principles.

## 5.4 THE ICJ AND THE *AD HOC* TRIBUNALS (ICTY/ICTR)

The relationship between these three international judicial bodies raises a few interesting questions given that all three are part of and operate under the UN framework. That having been said, the scope of their jurisdiction and the nature of these judicial bodies are quite different. While the ICJ is a permanent court bestowed with jurisdiction to settle inter-State disputes, both the ICTY and the ICTR are *ad hoc* courts exerting jurisdiction over individuals suspected of having committed genocide, war crimes and crimes against humanity in the course of the ethnic conflicts which took place respectively in the former Yugoslavia and Rwanda. Despite the ICJ being the principal judicial organ of the UN, there is no formal hierarchy among these judicial bodies. Issues regarding their relationship have not only remained hypothetical, as in the course of their work these institutions have commented upon the case law of each other.[20] Thus, the so-called 'Nicaragua test' laid down by the ICJ in the *Nicaragua* case was subject to the scrutiny of the ICTY's Appeals Chamber in the *Tadić* case.[21] Next, in the recent *Application of the Genocide Convention* case, the ICJ was asked to rule on whether Serbia and Montenegro were responsible for genocide against Bosnian Muslims based mainly on evidence which had stemmed from legal proceedings before the ICTY. Certainly, that raised quite a few interesting questions, especially with respect to the probative value to be placed on such an extensive body of evidence coming from another court.

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International Courts and Tribunals, in association with the Project on International Courts and Tribunals (PICT) in June 2004, in *The Law and Practice of International Courts and Tribunals*, pp. 247-260, Koninklijke Brill NV, the Netherlands, 2005. Also available at: *www.pict-pcti.org* (last visited on 1 November 2007).

20 It should be mentioned here that Judge Mohammed Bennouna (Morocco) who served as a Judge at the ICTY from 1998-2001 was also elected to serve on the bench of the ICJ in 2006. Judge Shahabuddeen who served at the ICJ from 1988-1997 was elected as a Judge at the ICTY in 1997 and is presently a Judge at the Appeals Chamber (the situation as of 1 November 2007).

21 ICTY, *Prosecutor v Duško Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment of 15 July 1999. See the Separate Opinion of Judge Shahabuddeen on the issue of the use of the Nicaragua test.

It should be noted that the ICTY and the ICTR display considerable similarities, both having been set up by the SC acting under Chapter VII of the UN Charter. Further, both tribunals used to have a joint Prosecutor at the helm of the Office of the Prosecutor (OTP), and they share an Appeals Chamber of the same composition. The result of these similarities is that their practice is to a large extent unified. The relationship between the ICJ and these tribunals is discussed in the same section after some brief background information is provided on each of them.[22] A few highlights from the vast jurisprudence of these two *ad hoc* tribunals exposing their contribution to international human rights and humanitarian law shall be given below. Further, the selected case law is discussed from a descriptive/comparative perspective in order to expose the interaction between these international judicial bodies, indicating wherever applicable the difference in or the convergence of their respective opinions.

### 5.4.1 The ICTY in Brief[23]

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by SC resolution 827 of 25 May 1993. This resolution was passed in response to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, deemed by the SC to pose a threat to international peace and security.[24] In a previous resolution, the SC had already determined that it wanted to put an end to the crimes committed there and to bring the persons responsible to justice.[25] The tribunal has jurisdiction over grave breaches of the GCs of 1949, violations of the laws or customs of war, genocide and crimes against humanity committed in the territory of the former Yugoslavia since 1 January 1991.[26] In harmony with the purpose of its founding resolution, the mission of the ICTY is fourfold:

- to bring to justice persons allegedly responsible for serious violations of international humanitarian law;
- to render justice to the victims;
- to deter further crimes;

22 See *inter alia* H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals*, Oxford University Press, 2000, pp. 1143-1192.

23 An extended, although not completely up-to-date, bibliography on the ICTR is available at: *www.pict-pcti.org/courts/bibliographies/ICTY.doc* (last accessed on 1 November 2007). On ICTY's contribution to international humanitarian law see *inter alia* J-F. Quéguiner, *Dix ans après la création du Tribunal penal international pour l'ex-Yougoslavie: évaluation de l'apport de sa jurisprudence au droit international humanitaire*, IRRC, Vol. 85, No. 850, 2003, pp. 271-311.

24 For more information visit: *http://www.un.org/icty/glance/index.htm* under General Information (last accessed on 1 November 2007).

25 SC Resolution No. 808, 22 February 1993, On Establishment of an International Tribunal for the Former Yugoslavia.

26 ICTY Statute, Articles 2, 3, 4 and 5 on the subject-matter jurisdiction and Article 9 (1) on jurisdiction *ratione temporis*.

- to contribute to the restoration of peace by promoting reconciliation in the former Yugoslavia.

A fair amount of criticism has been directed towards this Tribunal for the numerous changes to its Rules of Procedure and Evidence (RPE) and more recently for the negative effect that the time pressure created by the implementation of the Completion Strategy[27] can possibly exert upon its work and legitimacy.[28] However, that issue goes beyond the scope of this section which is concerned *inter alia* with the relationship between the ICJ and the ICTY. While the ICTY Statute was annexed to the relevant SC Resolution it was left to the Judges to devise and adopt the RPE. Further, a whole range of legal issues were left open to interpretation, such as, for example, the scope of the rights of the accused as well as those of the victims and witnesses. Thus, as noted by Allain:

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27 See *inter alia* D. Raab, *Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and their Tribunals*, Journal of International Criminal Justice (JICL), Vol. 3, 2005, 82-102. Initially this Strategy called for the completion of all trials in the first instance by 2008 and that the Tribunal be closed down by 2010. However, those first estimates have been postponed. See *inter alia* S/2006/353 of 31 May 2006. Paragraph 53 of this document reads: 'The estimate of all trials finishing by the end of 2009 may still hold provided that the multi-accused trials run smoothly; the cases referred to the former Yugoslavia are not deferred back to the International Tribunal under Rule 11bis; the Prosecution's case is effectively limited in time in each trial; creative methods for efficient trial and appeals' management continue to be devised and implemented by the Judges; and the six remaining high level fugitives are transferred to the jurisdiction of the International Tribunal without delay. I note that, despite this ever-increasing tide of judicial activity, some of the factors affecting the Completion Strategy remain beyond the International Tribunal's control. As a consequence, the provision of an accurate estimate as to the conclusion of the International Tribunal's work remains more of an art than a science.' One year later, in paragraph 42 of S/2007/283 of 16 May 2007, the ICTY stated: 'The Tribunal has reached a point where its success in delivering justice to the victims of atrocities committed in the former Yugoslavia, its ability to fulfil its mandate, and the success of its Completion Strategy will largely depend on the removal of obstacles in Serbia to cooperate with the Tribunal. The international community has a moral duty to help Serbia and its leadership to make the right choice and take decisive action to bring all six remaining fugitives to The Hague. It should also stand firm and continue to defend fundamental principles of international justice. After the landmark judgement of the International Court of Justice in February this year, when Serbia was the first State to be found in violation of the Genocide Convention and ordered to deliver Ratko Mladic to The Hague, it would be inconceivable to end the Tribunal's mandate without Radovan Karadzic and Ratko Mladic, both accused of genocide in Srebrenica, being brought to justice before the Tribunal. The Council may wish to consider further action to encourage Serbia and other relevant countries to finally fulfil their international obligations under Chapter VII of the Charter.' For the Completion Strategy of the ICTR see *inter alia* S/2007/323 of 31 May 2007. According to an estimate presented in paragraph 60 of this document the ICTR could complete trials and judgments in the range of sixty-five to seventy persons by the end of 2008.

28 See *inter alia* J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, T.M.C. Asser Press, 2000, pp. 140-156. The Completion Strategy has been criticised as putting unrealistic demands on the ICTY in view of the amount of work to be done and the fact that quite a few high profile accused still remain at large. Amnesty International (AI) has also on several occasions appealed to the SC that the ICTY be given more time and support to accomplish its mission. See for example AI Public Statement of 11 December 2006, AI Index: EUR 05/006/2006.

> [t]he minimum guarantees provided to individuals indicted by the ICTY are standards that have been agreed upon by the UN General Assembly in 1966 [Article 14 of the International Covenant on Civil and Political Rights]. It is, therefore, left to the judges of the ICTY to fill the 30-years gap in the evolution of the law of the fair trial by fleshing out to the provisions of Article 21 of its Statute.[29]

The case law of the ICTY is quite vast and covers many issues of international human rights and humanitarian law. A total of 111 cases out of 161 were decided by the ICTY by 31 October 2007.[30] It should be noted that unlike the ICJ, the ICTY is a specialized fact-finding court that in the course of its proceedings hears extensive testimony from witnesses, expert witnesses, and occasionally also from the accused themselves.[31] The contribution of the ICTY in further interpreting and developing the rules and principles of international humanitarian law through its case law is certainly of considerable importance.

#### *5.4.1.1 The ICTY's First Encounter with the ICJ: Scrutinizing the Nicaragua Test*

In the *Tadic* case the Appeals Chamber of the ICTY scrutinized the ICJ's decision in the Nicaragua case in order to find whether the test adopted there would be applicable in finding whether the forces of the Yugoslav Army (JNA) were directly involved in supporting, financing and training the paramilitary forces of the Bosnian Serbs. In its view it was 'imperative to *specify* what *degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render interna-

29 J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, T.M.C. Asser Press, 2000, p. 142.

30 The 111th case decided by the Appeals Chamber on 31 October 2007 was namely *Prosecutor v. Zelenović*, Case No. IT-96-23/2.

31 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Appeals Chamber Judgment of 15 July 1999, para. 117. The Appeals Chamber held: 'The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the ILC Drafting Committee. Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.'

tional an armed conflict which is *prima facie* internal.'[32] Perusing the notion of control as developed by the ICJ in the *Nicaragua* case the Appeals Chamber considered the *effective control* test applied by the ICJ to be unconvincing, even for the purpose of establishing State responsibility.[33] Instead, the Appeals Chamber coined another test, namely the *overall control* test, going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations.[34] This new test has since been applied by the ICTY in its case law.

The Judge presiding over the Appeals Chamber, namely Judge Shahabuddeen, who had previously served as a judge in the ICJ,[35] was unclear about the necessity of challenging *Nicaragua*.[36] Indeed, *Nicaragua* and *Tadić* were two cases of a rather different nature, the former dealing with issues of State responsibility and the latter dealing with issues of individual criminal responsibility. Further, one should also keep in mind the different nature of these two international judicial bodies. Commenting on this case Sassòli and Olson have stated that 'one has the impression that the ICTY often rushes ahead to clarify every legal issue that it *can*, whereas other courts decide only the issues that they *must*, thereby building up their jurisprudence step by step and producing more careful and reliable results.[37] Parochialism about the functioning and legitimacy of the international legal order and international legal institutions is not befitting of a judicial organ of the stature of the ICTY. An accommodating and rather supportive position was adopted by the ICJ vis-à-vis the ICTY in its judgment on the *Application of the Genocide Convention* case dealt with below. Such an approach should indeed guide all ICTs in their activity.

#### *5.4.1.2 Other Cases of Interaction: ICTY*

Given the difficulty in including in our analysis all ICTY cases where mention was made of the ICJ only a selected number of cases where legal findings of the ICJ on international humanitarian law were used by the ICTY in supporting its own position are dealt with here. By way of illustrating the level of the permeation of the case law of the ICTY by that of the ICJ suffice it to point to the mention which was made of the ICJ Order on provisional measures of 8 April 1993 requesting the FRY to take all immediate measures within its power to prevent the commission of the crime of genocide in Bosnia and Herzegovina in indictments, decisions, and judgments of the

32 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Appeals Chamber Judgment of 15 July 1999, para. 97 (emphasis in original).
33 *Ibid*., paras. 99-145.
34 *Ibid*., para. 145.
35 Mohamed Shahabuddeen served on the bench of the ICJ for nine years during the period 1988-1997.
36 Separate Opinion of Judge Shahabuddeen, paras. 5 and 7-32; see also the Declaration of Judge Shahabuddeen in *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Chamber I, Judgment of 3 March 2000 in *Annotated Leading Cases of International Criminal Tribunals*, G. Sluiter and Andre Clip (eds.), Volume IV, Intersentia, 2002, pp. 657-667.
37 M. Sassòli and L.M. Olson, *Prosecutor v. Tadic (Judgement)*, AJIL, Vol. 94, No. 3, 2000, p. 578.

Tribunal. Further, some attention is devoted to efforts by certain accused to have the ICJ decide on the legality of the establishment of the ICTY. A case which stands out in terms of references to the case law of the ICJ dealing with humanitarian law issues is that of *Kupreškić*.[38] Namely, the issue of the absolute character of obligations imposed by fundamental rules of international humanitarian law and the prohibition of attacks on the civilian population are relevant for our purposes as they have been dealt with by both judicial bodies.

In considering the issue of the absolute character of obligations imposed by fundamental rules of international humanitarian law vis-à-vis the application of the *tu quoque* principle put forward by the Defence, the ICTY Trial Chamber made reference *inter alia* to the ICJ decision in the *Barcelona Traction* case. The Chamber stated:

> As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather – as was stated by the International Court of Justice in the *Barcelona Traction* case (which specifically referred to obligations concerning fundamental human rights) – they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations.[39]

Further, the Chamber stated that most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.[40] That goes somewhat further than the ICJ was ready to admit at one point, while at the same time building upon the latter's findings. Indeed, while the ICJ refrained from pronouncing on the issue of the *jus cogens* character of rules and principles of international humanitarian law enshrined in the GCs of 1949 for the Protection of War Victims, the Hague Convention (IV) and its Regulations of 1907, the Genocide Convention of 1948, and the Statute of the Nuremberg Tribunal in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*,[41] it noted, nevertheless, that the extensive codification of humanitarian law and the extent of the accession to the resulting treaties, as well as the fact that the denunciation clauses that existed in the codification instruments had never been used, had provided the international community with a corpus of treaty rules, the great majority of which had already become customary and which reflected the most universally recognized humanitarian

38 ICTY, *Prosecutor v. Kupreškić*, Case No. 95-16-T, Judgment of January 2000, paras. 519,521,524, 525, 534, and 740 (this last paragraph, which is not discussed here, deals with the application of the principle *iura novit curia* in international judicial proceedings).

39 ICTY, *Prosecutor v. Kupreškić*, Case No. 95-16-T, Judgment of January 2000, para. 519 and footnote 770.

40 *Ibid*., para. 520.

41 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 258, paras. 81 and 83.

principles.[42] In fact, that last part can be interpreted as coming very close to admitting the *jus cogens* nature of such rules and principles. Lastly, making reference to the Vienna Convention on the Law of Treaties of 1969 (VCLT), the Chamber noted that Article 60(5) of this Convention provides that such reciprocity, or in other words the principle *inadimplenti non est adimplendum*,[43] does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any form of reprisals against persons protected by such treaties. Thus, the ICTY effectively held that compliance with humanitarian law rules cannot be made dependant on a reciprocal or corresponding performance of such obligations by other States.

The Chamber relied extensively on the ICJ's precedents also in dealing with the issue of the prohibition of attacks on the civilian population. First, the Chamber noted that the protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law.[44] Further, it stated that it was a universally recognised principle, recently restated by the ICJ, that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.[45] Noting that attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians, the Chamber observed that the discretion left to belligerents had to be interpreted in accordance with the principle of 'elementary considerations of humanity' as emphasised by the ICJ in the *Corfu Channel*, *Nicaragua*, and *Legality of the Threat or Use of Nuclear Weapons* cases.[46] That is an important finding in that it provides at least a general rule of interpretation for deciding whether an attack, although directed against legitimate military targets, caused indiscriminate damage to civilians.

Besides the ongoing process of jurisprudential cross-fertilization, there is another aspect in the relationship between the ICJ and the ICTY, which is of an institutional character. Even after the *Tadić* Jurisdiction Decision there have been several challenges to the jurisdiction of the ICTY,[47] whereby an accused has requested the adjudication of his or her claims in that regard by the ICJ. For example, several motions have been filed by different accused standing trial before the ICTY challenging the *ratione personae* jurisdiction of the tribunal on the basis of the finding of the ICJ in the

42 *Ibid*., para. 82.

43 The Latin legal maxim for 'One has no need to respect one's obligation if the other party has not respected its own'.

44 *Kupreškić*, *supra* note 39, para. 521.

45 *Ibidem* and footnote 774.

46 *Ibid*., para. 524.

47 See ICTY, *Prosecutor v. Tadić*, Case No. IT0-94-1, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (*Tadić* Jurisdiction Decision), Appeals Chamber, 2 October 1995. In that appeal the accused had brought forward three claims, namely a) the illegal foundation of the International Tribunal; b) the wrongful primacy of the International Tribunal over national courts; c) the lack of jurisdiction *ratione materiae.*

*Legality of the Use of Force* cases that the former Republic of Yugoslavia (FRY) had not been a member of the UN until 2000.[48] Further, there were two requests filed with the Chamber, on 9 November 2004 and 19 November 2004 respectively, wherein an accused again challenged the lawfulness of the establishment of the tribunal on the grounds that the SC lacked the power to establish it, and requested the Trial Chamber to seek, through the UN SC or GA, an advisory opinion of the ICJ on the lawfulness of the establishment of the tribunal. Considering that in the *Tadić* Jurisdiction Decision the Appeals Chamber had determined that the jurisdiction of a judicial body to determine its own jurisdiction 'is a necessary component of the exercise of the judicial function' and that recourse to the ICJ is not necessary the Trial Chamber rejected these requests.[49]

After a few months the same accused challenged the Tribunal's jurisdiction *ratione personae* concerning nationals of the former FRY on the ground that the ICJ, in eight substantively identical judgements issued on 15 December 2004, had stated that the FRY was not a member of the UN when it came into existence on 27 April 1992 until it was granted membership of the UN on 1 November 2000. Further, he requested the Trial Chamber to seek, through the SC or the GA, an advisory opinion of the ICJ on the question whether the Tribunal may try nationals of the FRY (then Serbia and Montenegro) for alleged war crimes committed in the territory of the former Yugoslavia when the FRY was not a member of the UN. The Chamber decided that it had not been shown that the judgements of the ICJ issued on 15 December 2004 relied on by the Accused provided any basis for questioning the lawfulness of the jurisdiction of this Tribunal to try the Accused and further found that in the light of Article 6 of the Statute, which reads '[t]he International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute', the Tribunal's jurisdiction *ratione personae* is not limited to nationals of a certain State, irrespective of that State's membership of the UN.[50]

In another case the appellant requested the suspension of any decision by the ICTY on questions pending before the ICJ or a ruling that the Tribunal would not decide upon the same legal and factual questions as the ICJ and further requested that the

48 ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67, *Decision on the Accused's Requests for an Advisory Opinion of the International Court of Justice*, Trial Chamber II, 15 December 2004; ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67, *Decision on the Accused's Requests for a Ruling of the International Court of Justice Concerning the Tribunal's Jurisdiction over Nationals of the Federal Republic of Yugoslavia*, Trial Chamber II, 21 April 2005. In the latter decision the Trial Chamber noted that 'the Statute of the Tribunal ("Statute") does not foresee recourse to the International Court of Justice, and that in the *Tadic* Jurisdiction Decision, the Appeals Chamber of the Tribunal determined that the jurisdiction of a judicial body to determine its own jurisdiction "is a necessary component of the exercise of the judicial function"' (footnotes omitted).

49 ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67, *Decision on the Accused's Requests for an Advisory Opinion of the International Court of Justice*, Trial Chamber II, 15 December 2004.

50 ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67, *Decision on the Accused's Requests for a Ruling of the International Court of Justice Concerning the Tribunal's Jurisdiction over Nationals of the Federal Republic of Yugoslavia*, Trial Chamber II, 21 April 2005.

Trial Chamber obtain an advisory opinion from the ICJ.[51] Noting that it had a primary obligation to ensure that the accused has a fair *and* expeditious trial – a fundamental guarantee – as set out in Articles 20(1) and 21(4) of the Statute and embodied in the major international human rights instruments the Appeals Chamber considered that it was not necessary for it to await the rendering of an advisory opinion by the ICJ or the issuing of a decision by the UNGA before it decided on any legal or factual questions, even if these happen to be the same as questions raised in any pending case before the ICJ.[52] Bearing in mind the time it takes for the ICJ to render a decision one cannot but agree with the Appeals Chamber's concern and decision that a stay of the proceedings until the ICJ had rendered its judgment in the *Application of the Genocide Convention* case would deprive the appellant of his right to a fair and expeditious trial.[53] In hindsight, had the Appeals Chamber decided to stay the proceedings on 25 May 2001 it would have had to wait until 26 February 2007, when the final judgment on this case was rendered, thus not only seriously violating the accused's right to a fair and expeditious trial, but also undermining its own work.

#### *5.4.1.3 Weight of ICJ's Decisions for the ICTY on Matters of Law*

The issue as to whether the ICTY should follow a decision issued by the ICJ on a question of law was considered by the Appeals Chamber in the *Celebici* judgement. The appellants argued that the findings of the *Tadic* Appeal judgment which rejected the 'correct legal test' set out in *Nicaragua* were erroneous as the Tribunal was bound by the ICJ's precedent given that if the ICJ had determined an issue, the Tribunal would follow it, (1) because of the ICJ's position within the UN Charter, and (2) because of the value of precedent.[54] Further, in their view, even if the ICJ's decisions were not binding on the Tribunal, it was 'undesirable to have two courts (…) having conflicting decisions on the same issue'.[55] The Appeals Chamber held that:

> The Appeals Chamber agrees that 'so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. [ …] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern'. However, this Tribunal is an autonomous international judicial body, and although the ICJ is the 'principal judicial organ' within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will

51 ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-A, *Decision on Interlocutory Appeal by the Accused Zoran Zigic against the Decision of Trial Chamber I Dated 5 December 2000*, Appeals Chamber, 25 May 2001, paras. pars. 1-3.

52 *Ibid*., paras. 20-22.

53 *Ibid*., para. 19.

54 ICTY, *Prosecutor v. Delalic et al*., Case No. IT-96-21-A, Judgement of 20 February 2001, para. 21.

55 *Ibidem*.

> necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.[56]

In spite of the effort to craft a balanced general approach towards the practice of other international courts, one can discern a certain distance being taken by the ICTY from the ICJ.

However, in a later judgment, the ICTY, after stating that no legal basis existed for suggesting that the ICTY must defer to the ICJ so that the former would be legally bound by decisions of the latter, clarified its position by adding:

> Nonetheless, decisions of the International Court of Justice addressing general questions of international law are of the utmost significance and the International Tribunal will consider such decisions, giving due weight to their authority. However, the International Tribunal has its own competence. Thus, the International Tribunal would consider any decisions of the International Court of Justice, subject to its competence to make its own findings. As a result the International Tribunal may arrive at different conclusions, and differences in holdings may occur.[57]

This later addition seems to temper the earlier finding where, seemingly, no note was taken of the ICJ's important function as a leading organ of international law, while emphasizing the tribunal's independence. The above-quoted ICTY observation that differences in holdings may occur signals the potential risk of a possible fragmentation of international law.

#### *5.4.1.4 Application of the Genocide Convention* Case: The Long Awaited Judgment

The legal findings made in the *Genocide Convention* case permeate both the Court's contribution to the development and interpretation of international human rights and humanitarian law and the Court's correlation mainly with the ICTY, but they may be potentially relevant for other ICTs. Thus, they cover the main areas of this research, namely the Court's contribution to international human rights, its contribution to humanitarian law and the correlation between the ICJ and other ICTs; in this case the ICTY. While many interesting legal issues were discussed and adjudicated by the ICJ only three issues relevant to the correlation of the Court with the ICTY have been selected and have been dealt with here. First, the ICJ faced the issue of what weight should be attached to evidence which had been previously adduced and had been used in the ICTY proceedings and to the ICTY findings; evidence which for the most part is in the public domain. Secondly, the Court was called upon to (re)consider the test of State responsibility for acts of the Respondent's organs, or persons, or groups of persons under its direction and control. Thirdly, it is interesting to note the position that the ICJ took with regard to cooperation by the Respondent with the ICTY as part

56 *Ibid*., para. 24.
57 *Kvočka et al*., *supra* note 51, para. 18.

of the obligation to punish incumbent upon it under the Genocide Convention. This case not only sheds light on and clarifies some important questions, but also sets an example to be followed in terms of the approach to be taken by international judicial organs in general with regard to the practice of each other.

*5.4.1.5 The Weight Given by the ICJ to Evidence Originating from the ICTY*

The Court quoted extensively from the ICTY judgments, supporting and finding support on relevant findings of the latter, both on legal and factual matters. From the beginning the Court noted that this case does however have an unusual feature as many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY.[58] Being referred to extensive documentation arising from the Tribunal's processes, including indictments by the Prosecutor, various interlocutory decisions by judges and Trial Chambers, oral and written evidence, decisions of the Trial Chambers on guilt or innocence, sentencing decisions following a plea agreement and decisions of the Appeals Chamber, the Court, as expected, drew a distinction between these various stages in the ICTY processes. Commenting upon the phase of the legal proceedings before the ICTY leading to a judgment the Court stated:

> The processes of the Tribunal at the fifth stage, leading to a judgment of the Trial Chamber following the full hearing are to be contrasted with those earlier stages. The processes of the Tribunal leading to final findings are rigorous. Accused are presumed innocent until proved guilty beyond reasonable doubt. They are entitled to listed minimum guarantees (taken from the International Covenant on Civil and Political Rights), including the right to counsel, to examine witness against them, to obtain the examination of witness on their behalf, and not to be compelled to testify against themselves or to confess guilt. The Tribunal has powers to require Member States of the United Nations to co-operate with it, among other things, in the taking of testimony and the production of evidence. Accused are provided with extensive pre-trial disclosure including materials gathered by the prosecution and supporting the indictment, relevant witness statements and the pre-trial brief summarizing the evidence against them. The prosecutor is also to disclose exculpatory material to the accused and to make available in electronic form the collections of relevant material which the prosecution holds.[59]

That is a succinct description of the nature and the scope of the activity of the ICTY. The Court concluded that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial, unless, of course, they had been overturned on appeal.[60] Furthermore, in its view, any evaluation by the Tribunal based on

58 ICJ, *Application of the Genocide Convention* (Bosnia and Herzegovina *v*. Serbia and Montenegro), Judgment of 26 February 2007, para. 212.

59 *Ibid*., para. 220.

60 *Ibid*., para. 223.

the facts as found, for instance, about the existence of the required intent, was also entitled to due weight.[61] Thus, numerous ICTY findings with regard to legal issues concerning the question of intent to commit genocide,[62] that of intent and 'ethnic cleansing',[63] the definition of the protected group,[64] and so on were cited by the ICJ in its discussion of these issues. Suffice it to mention that in dealing with factual evidence providing proof of Article II (a) of the Genocide Convention on the killing of members of the protected group in Sarajevo,[65] Drina River Valley,[66] Prijedor,[67] Banja Luka,[68] the massacre at Srebrenica,[69] and Article II (b) on causing serious bodily or mental harm to members of the protected group,[70] in the Drina River Valley,[71] Prijedor,[72] Banja Luka,[73] and Brčko[74] the Court referred continuously to findings from the case law of the ICTY. With regard to Article II (b) of the Genocide Convention the Court concluded:

> Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and,

61 *Ibid*., para. 223.

62 *Ibid*., paras. 186-89. In paragraph 188 the Court quoting the ICTY judgment in *Kupreskić* (IT-95-16-T, Judgment, 14 January 2000, para. 636.) stated: 'the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide… Thus, it can be said that, from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution.' The Court concluded that specific intent (*dolus specialis*) required that the acts listed in Article II should not only be directed at a group as such, but also must be done with intent to destroy the group as such in whole or in part.

63 *Ibid*., para. 190. Quoting from the ICTY judgment in *Stakić* the Court noted: '[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.' (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) The Court noted that 'In fact, in the context of the Convention, the term 'ethnic cleansing' has no legal significance of its own.'

64 *Ibid*., paras. 191-201. In paragraph 195 the Court stated: 'The Court observes that the ICTY Appeals Chamber in the *Stakić* case (IT-97-24-A, Judgment, 22 March 2006, paras. 20-28) also came to the conclusion that the group must be defined positively, essentially for the same reasons as the Court has given.'

65 *Ibid*., paras. 245-49.

66 *Ibid*., paras. 250-56.

67 *Ibid*., paras. 257-269.

68 *Ibid*., paras. 270-77.

69 *Ibid*., paras. 278-297. In paragraph 297, endorsing the findings of the Appeals Chamber in the *Krstić* judgment, the Court concluded that 'the acts committed at Srebrenica falling within Article II *(a)* and *(b)* of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995.'

70 *Ibid*., paras. 298-304.

71 *Ibid*., pars.305-310.

72 *Ibid*., paras. 311-314.

73 *Ibid*., para. 315.

74 *Ibid*., paras. 317-318.

> in particular, in the detention camps. The requirements of the material element, as defined by Article II *(b)* of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.[75]

Seemingly, although the Court had previously said in its judgment that it did not have jurisdiction to pronounce on other crimes apart from genocide, it nevertheless hinted that the atrocities committed could amount to war crimes and crimes against humanity. That finding is in concordance with those made by the ICTY in its extensive case law. Another instance where the ICJ followed the practice of the ICTY was with regard to the question of a pattern of acts contended to provide evidence of an intent to commit genocide, a contention based on the Decision on Strategic Goals issued on 12 May 1992 by Momčilo Krajišnik, as the President of the National Assembly of Republika Srpska. The Court noted that in cases in which the Prosecutor had put the Strategic Goals at issue the ICTY had not characterized them as genocidal, thus it did not see the 1992 Strategic Goals as establishing specific genocidal intent.[76] It is noteworthy that on all of these occasions the ICJ endorsed the position of the ICTY.

#### *5.4.1.6 Revisiting the Test of State Responsibility: Nicaragua Reconfirmed*

It is noteworthy that the ICJ did not exchange its own test on the issue of State responsibility, namely that of *effective control*, for one with a lower threshold devised by the ICTY, namely that of *overall control*.[77] For ascertaining whether the respondent had incurred State responsibility on whatever basis, in connection with the massacres committed in the Srebrenica area during the period in question, the Court stated that it might be required to consider the following three issues:

1) To determine whether the acts of genocide could be attributed to the respondent under the rules of customary international law of State responsibility, i.e. to ascertain whether the acts were committed by persons or organs whose conduct is attributable, specifically in the case of the events at Srebrenica, to the respondent.
2) To ascertain whether acts of the kind referred to in Article III of the Convention, other than genocide itself, were committed by persons or organs whose conduct is attributable to the respondent under those same rules of State responsibility, i.e. the acts referred to in Article III, paragraphs *(b)* to *(e)*, one of these being complicity in genocide.

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75 *Ibid*., para. 319.

76 *Ibid*., para. 372. See generally paras. 370-376.

77 *Ibid*., paras. 379-383. For a critique of the ICJ's approach see A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, EJIL, Vol. 18, No. 4, 2007, pp. 649-668.

3) Finally, to rule on the issue of whether the respondent had complied with its twofold obligation deriving from Article I of the Convention to prevent and punish genocide.[78]

This approach, leading to a ruling by the Court on State compliance with the twofold obligation incumbent upon a State to prevent and punish the crime of genocide, allows for full effect to be given to the provisions of the Genocide Convention. Indeed, the importance of the function of the Court under the Genocide Convention rests ultimately on its possibility to rule on State compliance with the twofold obligation to prevent and to punish genocide. In accordance with the submissions from the parties the question of the attribution of State responsibility was divided into two parts by the ICJ and is accordingly dealt with in that same order below.

*A) The Question of Attributing the Srebrenica Genocide to the Respondent on the Basis of the Conduct of Its Organs*

In addressing the first issue the Court referred to Article 4 of the ILC Articles on State Responsibility, on the conduct of organs of a State, which it considered a rule of customary law. This article reads:

> '1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.'

For the Court, this rule called for a determination whether the acts of genocide committed in Srebrenica were perpetrated by 'persons or entities' having the status of organs of the Federal Republic of Yugoslavia (as the Respondent was known at the time) under its internal law, as then in force.[79] Quoting the ILC commentary the Court clarified that the expression 'State organ', as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organization of the State and act on its behalf.[80] On the basis of this rule and the evidence before it the Court concluded that neither Republika Srpska nor the VRS were *de jure* organs of the FRY, since none of them had the status of an organ of that State under its internal law.[81] Furthermore, the Court noted that in any event the act of an organ placed by a State at the disposal of another public

78 *Ibid*., para. 379.
79 *Ibid*., para. 386.
80 *Ibid*., para. 388.
81 *Ibid*., para. 386.

authority shall not be considered an act of that State if the organ was acting on behalf of the public authority at whose disposal it had been placed.[82] This approach of the Court follows that laid down by the ILC in Article 6 of its Articles on State Responsibility.[83] Indeed, the Court pointed to the customary nature of some of the rules on State responsibility as codified in the ILC Articles.

As expected, the issue of the attribution of State responsibility for the conduct of a State organ turns out to be a contentious one pitching against each other the legal approaches of *de jure* and *de facto*. Thus, the applicant argued that Republika Srpska and the VRS, as well as the paramilitary militias known as the 'Scorpions', the 'Red Berets', the 'Tigers' and the 'White Eagles' should be deemed, notwithstanding their apparent status, to have been '*de facto* organs' of the FRY, in particular at the time in question, so that all of their acts, and specifically the massacres at Srebrenica, must be considered to be attributable to the FRY, just as if they had been organs of that State under its internal law and that reality must prevail over appearances, while the respondent replied that these were not *de facto* its organs.[84] The Court started by noting that it had already addressed this question, and given an answer to it in principle, in its Judgment of 27 June 1986 in its *Military and Paramilitary Activities in and against Nicaragua* case. According to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument.[85] Then, in the Court's view, it would be appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.[86]

According to the Court, to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, indeed requiring proof of a particularly great degree of State control over them amounting to 'complete dependence'.[87] That test is different from that of the ICTY requiring 'overall control'.[88] Consequently, the threshold of control seems to have been set higher by the ICJ in its

82 *Ibid*., para. 389.

83 Article 6 of the ILC Articles on State Responsibility entitled 'Conduct of organs placed at the disposal of a State by another State' reads: 'The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.'

84 *Application of the Genocide Convention*, para. 390.

85 *Ibid*., para. 392.

86 *Ibid*., para. 392.

87 *Ibid*., para. 393.

88 ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Appeals Chamber Judgment of 15 July 1999, para. 145.

jurisprudence. On the basis of this test the Court stated that in spite of the very important support given by the Respondent to Republika Srpska, without which it could not have 'conduct[ed] its crucial or most significant military and paramilitary activities', that did not signify the total dependence of Republika Srpska upon the respondent.[89] The Court finally concluded that the acts of genocide at Srebrenica cannot be attributed to the respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the respondent's international responsibility.

*B) The Question of Attributing the Srebrenica Genocide to the Respondent on the Basis of Direction or Control*

The Court was asked in the alternative to determine whether the massacres at Srebrenica had been committed by persons who, though not having the status of organs of the respondent, nevertheless acted on its instructions or under its direction or control.[90] Thus, the Court had to determine whether the FRY organs originated the genocide by issuing instructions to the perpetrators or exercising direction or control, and whether, as a result, the conduct of organs of the respondent, having been the cause of the commission of acts in breach of its international obligations, constituted a violation of those obligations.[91] The applicable rule on this subject according to the Court was Article 8 of the ILC Articles on State Responsibility, on conduct directed or controlled by a State, which reads: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'[92] Referring to the *Nicaragua* case the Court explained the difference between the tests in the case of conduct by a State's own organs and in the case of direction and control of persons and groups in the following words:

> The test thus formulated differs in two respects from the test – described above – to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.[93]

89 *Application of the Genocide Convention*, para. 394.
90 *Ibid*., para. 396.
91 *Ibid*., para. 397.
92 *Ibid*., para. 398.
93 *Ibid*., para. 400.

Obviously, the test in the latter case is that of 'effective control'. Saying that this was the state of customary international law, as reflected in the ILC Articles on State Responsibility, the Court held that genocide will be considered as being attributable to a State if and to the extent that the physical acts constituting genocide and which were committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control.[94]

Turning to the core of the contentious issue regarding the proper test to be applied, the Court stated that after having given careful consideration to the Appeals Chamber Judgment in *Tadić* it could not subscribe to that view. The Court observed that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends to persons only.[95] Further, it noted that while it took the fullest account of the legal and factual findings made by the ICTY, the issue at hand addressed by the Appeals Chamber was not one which was indispensable for the exercise of its jurisdiction and not within the specific purview of its jurisdiction.[96] Finally, the Court went on to observe that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.[97]

Drawing a distinction between the two different issues, namely that of determining whether or not an armed conflict is international and that of determining a State's responsibility for a specific act committed in the course of the conflict the Court seemingly accepted that the 'overall control' test is applicable and suitable. However, in the Court's view the 'overall control' test is unsuitable as it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.[98] Thus, the Court reconfirmed its own *Nicaragua* test with regard to a finding of State responsibility, without undermining the ICTY's findings as far as these were not made above and beyond what was necessary for a finding of the conflict being of an international nature in the course of passing judgment over individual criminal responsibility.

94 *Ibid*., para. 401.

95 *Ibid*., para. 403.

96 In the course of explaining its position, the Court stated in paragraph 403: 'Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.'

97 *Ibid*., para. 406.

98 *Ibid*., para. 406.

#### *5.4.1.7 Obligation to Punish: Legal Consequences under the Genocide Convention for the Non-Cooperation of a State with the ICTY*

The Court clarified that 'It is perfectly possible for a State to incur responsibility at once for an act of genocide (or complicity in genocide, incitement to commit genocide, or any of the other acts enumerated in Article III) committed by a person or organ whose conduct is attributable to it, and for the breach by the State of its obligation to punish the perpetrator of the act: these are two distinct internationally wrongful acts attributable to the State, and both can be asserted against it as bases for its international responsibility.'[99] This finding serves as a prelude to a twofold issue, namely first the obligation to prevent and when that fails the obligation to punish the perpetrators of the crime of genocide. While the obligation to prevent genocide has been dealt with in the third chapter, as part of the Court's contribution to human rights, the obligation to punish under the Genocide Convention is dealt with here as part of a State's obligation to punish the perpetrators of genocide is that of cooperation with international criminal tribunals created for this purpose.

The Court dealt first with the obligation to prevent genocide[100] and, in turn, with that of punishing perpetrators of this crime.[101] However, as mentioned above our focus remains only on the issue of cooperation by the respondent with the ICTY as part of its obligations under the Genocide Convention. Thus, having found that the respondent was responsible for not having prevented genocide in Srebrenica the Court went on to consider what were the obligations incumbent upon the respondent in terms of punishing the perpetrators of those acts.[102] Given that these acts were not committed in the respondent's territory, because of the very terms of Article VI,[103] the respondent could not be charged with not having tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices.[104] The Court stated that it is certain that once such a court has been established, Article VI obliges the Contracting Parties 'which shall have accepted its jurisdiction' to co-operate with it, which implies that they will arrest persons accused of genocide who are in their territory – even if the crime of which they are accused was committed outside it – and, failing prosecution in the parties' own courts, that they will hand them over for trial by the competent international tribunal.[105] Admittedly, the obligation for States parties to co-operate with the 'international penal tribunal', following from

99 *Ibid*., para. 383.
100 *Ibid*., paras. 428-438.
101 *Ibid*., paras. 439-450.
102 *Ibid*., para. 431.
103 Article VI of the Genocide Convention reads: 'Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'
104 *Ibid*., para. 442.
105 *Ibid*., para. 443.

Articles V and VI of the Genocide Convention, is not exclusive to the ICTY, but extends to other ICTs established by the international community, notably to the other *ad hoc* tribunal, the ICTR, and the permanent ICC.

The two preliminary questions the Court needed to answer in determining whether the respondent had complied with its obligation to cooperate with the ICTY were: does the ICTY constitute an 'international penal tribunal' within the meaning of Article VI and must the respondent be regarded as having 'accepted the jurisdiction' of the tribunal within the meaning of that provision?[106] The Court answered the first question in the affirmative, as in its view the notion of an 'international penal tribunal' within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) with potentially universal scope and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III.[107] Further, the Court held that the nature of the legal instrument by which such a court is established is without importance in this respect.[108]

With regard to the second question the Court noted that the FRY was under an obligation to co-operate with the ICTY from 14 December 1995 at the latest, the date of the signing and entry into force of the Dayton Agreement between Bosnia and Herzegovina, Croatia and the FRY, as Annex 1A of that treaty, made binding on the parties by virtue of its Article II, provides that they must fully co-operate, notably with the ICTY.[109] The Court deemed that there was no need, for the purposes of assessing how the respondent had complied with its obligation under Article VI of the Convention, to distinguish between the period before and the period after its admission as a Member of the United Nations, at any event from 14 December 1995 onwards.[110] It was the contention of the respondent that the duty to co-operate had been complied with following the régime change in Belgrade in the year 2000; the Court responded that the conduct of the organs of the FRY before the régime change, however, engaged the respondent's international responsibility just as much as it does that of its State authorities from that date.[111]

The Court stated that it should attach certain weight to the plentiful and mutually corroborative information suggesting that General Mladić, indicted by the ICTY for genocide as one of those principally responsible for the Srebrenica massacres, was on the territory of the respondent at least on several occasions and for substantial periods during the last few years and is still there now, without the Serb authorities doing what they could and can reasonably do to ascertain exactly where he is living and to arrest him.[112] Further, the Court referred to the statements of the respondent's Minister for

106 *Ibid*., para. 444.
107 *Ibid*., para. 445.
108 *Ibidem*.
109 *Ibid*., para. 447.
110 *Ibidem*.
111 *Ibid*., para. 448.
112 *Ibidem*.

Foreign Affairs, whose authenticity and accuracy were not challenged by the latter, according to which the intelligence services of that State knew where Mladić was living in Serbia, but refrained from informing the authorities competent to order his arrest because certain members of those services had allegedly remained loyal to the fugitive.[113] The Court thus found that the respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and had failed in that duty.[114]

In the *dispositif* of the judgment the Court held that Serbia had violated its obligations under the Genocide Convention by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the ICTY, and thus having failed to co-operate fully with that Tribunal.[115] Furthermore, it decided that Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Genocide Convention to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the ICTY, and to co-operate fully with that Tribunal.[116] These rulings offer broad support to the work of the ICTY and are in line with the position taken by many international organs when faced with the fact that both Mladić and Karadžić still remain at large after the first indictment against them was confirmed by Judge Jorda on 25 July 1995.[117]

### 5.4.2 ICTR in Brief[118]

Recognizing that serious violations of humanitarian law had been committed in Rwanda, the SC, by resolution 955 of 8 November 1994, created the International Criminal Tribunal for Rwanda (ICTR). The purpose of this measure taken by the SC was to contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region. The temporal jurisdiction of the ICTR is limited to the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. In this respect the jurisdiction of the ICTR differs from that of the ICTY which has a start but no end date and has been interpreted by the ICTY as including events occurring from 1 January 1991 to as late as 2000 in the former Yugoslav Republic of Macedonia (FYROM).

113 *Ibidem*.
114 *Ibid*., para. 449.
115 *Ibid*., para. 471 (6).
116 *Ibid*., para. 471 (8).
117 More information on the case against Mladić and Karadžić is available at the Case Information Sheets on the ICTY website, under ICTY Cases and Judgments at: *http://www.un.org/icty/cases-e/index-e.htm* (last accessed on 1 November 2007).
118 An extended, although not completely up-to-date, bibliography on the ICTR is available at: *www.pict-pcti.org/courts/bibliographies/ICTR.doc* (last accessed on 1 November 2007).

The ICTR may also deal with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the territory of neighbouring States during the same period, *i.e.* in 1994. The preamble to the aforementioned resolution states that the SC is convinced that the prosecution of the perpetrators 'would contribute to the process of national reconciliation and to the restoration and maintenance of peace' and would contribute to 'ensuring that such violations…are halted and effectively redressed'.[119] Despite the ethos and the appeal to human values behind these words one is at a loss when trying to understand the deterrent effect of these trials, in the face of the reoccurring events in different parts of the world. So a question which arises when looking at the bumpy road that these two *ad hoc* tribunals have travelled along is whether this response to violations of human rights and humanitarian law is the proper one.

The events, which preceded the action by the SC in setting up the criminal tribunals, are an indication that the UN global security system is flawed and does not function properly. Actors who muster the means for intervening in order to prevent such atrocities from occurring often lack the will to do so for a myriad of legal, political and economic reasons. The terrible crimes that took place in the former Yugoslavia and Rwanda show that the international community has a lot to learn and to improve in order to provide a timely and effective response to prevent such atrocities. Indeed, an early warnings system that would trigger further common action aimed at providing effective protection for individuals under the framework of international human rights and humanitarian law should be put in place.

#### *5.4.2.1 Other Cases of Interaction: the ICTR*

Noting, on the one hand, that the Genocide Convention is undeniably considered as part of customary international law, as reflected in the advisory opinion issued in 1951 by the ICJ on reservations to the Genocide Convention, and as noted by the UN Secretary-General in his Report on the establishment of the ICTY,[120] and, on the other hand, that Rwanda had acceded, by legislative decree, to the Convention on Genocide on 12 February 1975, the Chamber concluded that the crime of genocide was punishable in Rwanda in 1994.[121] This finding was made initially in the *Akayesu* case and reiterated in later cases.[122] In the same judgment, based on the *Nottebohm* judgment of the ICJ, the Chamber held that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.[123] These examples show that in a similar vein as the

119 Preamble to SC Resolution 955 of 8 November 8 1994.
120 ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment of 6 December 1999, para. 46.
121 *Ibid*., para. 47.
122 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 495. See also *Prosecutor v. Musema*, Case No. ICTR-96-13, Judgment of 27 January 2000, paras. 151-3.
123 *Akayesu*, *supra* note 121, para. 512.

ICTY also the ICTR looked at the ICJ's case law in support of its findings. That is not surprising, given that in their work both tribunals face numerous legal questions where the case law of the ICJ could offer some guidance or support. However, the fact that several cases related to the armed conflict in the former Yugoslavia had been brought before the ICJ in contrast to none relating to the conflict in Rwanda, as the latter was an internal one, would explain why the practices of the ICTY and the ICJ have had a greater influence on each other.

Besides the general finding mentioned above there were two comparisons made to the ICJ which are of relevance.[124] First, an interesting issue which was raised in *Akayesu* related to the scope of that Tribunal's jurisdiction. In its appeal the prosecution alleged errors which did not affect the judgment as to Akayesu's culpability, but raised important matters of general significance to the Tribunal's jurisprudence.[125] Akayesu contended that were the Appeals Chamber to entertain the Prosecution's appeal that would amount to a complete departure from the provisions of the Statute, amounting to creating a new appellate jurisdiction devoid of a legal basis, vested with an 'advisory' jurisdiction over academic and general issues.[126] Recalling that the consideration of issues of general significance does not seek to create a new remedy or a possible advisory power, the Appeals Chamber stated that unlike the ICJ or certain municipal courts, it did not have advisory power.[127] However, the Appeals Chamber held that it could deem it necessary to pass judgment on issues of general importance if it found that their resolution is likely to contribute substantially to the development of the Tribunal's jurisprudence.[128] In its view, the exercise of such a power was not contingent upon the raising of grounds of appeal which fell strictly within the ambit of Article 24 of the Statute, but a power which remained within its discretion.[129] While this interpretation widened considerably the scope of the Appeals Chamber's jurisdiction, it tempered its finding by adding that the issues raised must be of interest to the legal practice of the Tribunal and must have a nexus with the case at hand.[130]

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124 Further, one should not fail to mention the Dissenting Opinion of Judge Shahabuddeen in the *Kanyabashi* case, Case No. ICTR-96-15-A, *Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber* I, 3 June 1999. In his opinion Judge Shahabuddeen referred on several occasions to the ICJ's case law. In a passage on page 7 of his opinion he stated: 'I think it is also possible to extract some support from the jurisprudence of the International Court of Justice for the proposition that an error in the composition of a judicial, or quasi-judicial, body goes to jurisdiction. The differences between that court and this Tribunal obviously counsel care in using the jurisprudence of the former; but, equally obviously, those differences do not prohibit recourse to that jurisprudence on relevant matters, more particularly having regard to the fact that both institutions are international judicial bodies.'

125 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-1-A, Judgment of 1 June 2001, paras. 14-15.

126 *Ibid*., para. 12.

127 *Ibid*., para. 23.

128 *Ibidem*.

129 *Ibidem*.

130 *Ibid*., para. 24.

Another example where the Rwandan tribunal referred to the example of the ICJ in order to support its own position revolved around the tribunal's power to amend its Rules of Procedure and Evidence (RPE). Replying to a prosecution motion for the joinder of cases under rules 2 and 48 of the ICTR's RPE the defence counsel referred to the process by which the Tribunal amends its Rules and, additionally, expressed concern about the Tribunal having the power to create and amend its Rules.[131] The Chamber held that this is not an unusual procedure as both the ICJ and the European Human Rights Commission (ECmHR) make their own rules.[132] Indeed, both these bodies have been given the freedom to devise and amend their own rules of procedure and evidence. Such a practice of *laissez-faire* in this respect on the part of the founders of these bodies is understandable and even warranted. Indeed, in having to cope with different or unforeseen situations courts or quasi-judicial bodies will have to revisit their rules in order to enable them to fulfil their mandate in the best possible way. Needless to say, any such changes should not negatively affect the rights of the participants in the legal proceedings.

### 5.4.3 Concluding Remarks

As seen from the examples discussed above the possibility that international judicial bodies comment or have to rely on each other's case law is not a theoretical one. The ICJ's ruling on the member States' obligation under the Genocide Convention to cooperate with 'international penal tribunals' highlights a problem which the two *ad hoc* tribunals have in common. That is their need and reliance on State cooperation for properly discharging their mandates. Similarly with the ICTY, all member States of the UN are requested to provide co-operation and judicial assistance to the ICTR under Article 28 of the Statute of the latter.[133] Further, it is noteworthy that the ICTR encounters the same problem as the ICTY, namely that of accused persons remaining at large. At present the ICTR's list of accused persons still at large contains eighteen names, which is three times more names than the same ICTY list.[134] The cooperation received by the ICTR from Rwanda, despite their cooperation agreement in 1999, has been marked by noticeable oscillations, while a non-cooperative attitude was displayed, at least initially, by many of the former Yugoslav Republics. That difference was largely dependant on the perception of the respective governments towards these *ad hoc* institutions as hostile or friendly. It should be mentioned that the ICTY has been quite keen in its efforts to be and to be seen as even-handed towards all parties in the armed conflicts which erupted upon the dissolution of Yugoslavia. Also the ICJ is dependant

131 ICTR, *Prosecutor v. Bagosora, Kabiligi, Ntabakuze, Nsengiyumva*, Cases. No. ICTR-96-7, ICTR-97-34, ICTR-97-30, ICTR-96-12, *Decision on the Prosecutor's Motion for Joinder*, 29 June 2000, para. 27.

132 *Ibid*., para. 113.

133 For more information see Fact Sheet No. 6 of the ICTR entitled 'International Co-operation with the Tribunal', available on ICTR's official website *www.ictr.org* under About the Tribunal, Facts Sheets (last accessed on 1 November 2007).

134 According to information taken from the respective official websites of these tribunals on 25 May 2007.

on State cooperation and compliance with its decisions. States' reluctance to cooperate with the ICJ has been expressed by their refusal to participate in the legal proceedings before the Court in a limited number of cases, thereby rendering the Court's work more difficult. However, notwithstanding a State's non-appearance, the Court has carried on with its legal proceedings towards delivering a judgment.

A notable contribution by the ICTY to the development of international humanitarian law consists of its finding that international humanitarian law norms apply to the category of protected persons regardless of their nationality.[135] Further, in stating that certain instruments of international humanitarian law had achieved customary law status the ICTY cited the case law of the ICJ.[136] It should also be recognised that the introduction of the crime of rape in both Statutes of the ICTY and ICTR, under crimes against humanity, is an achievement for international human rights law.[137] That is rather important given that systematic violence against women, such as mass rape and other forms of sexual violence, in the context of internal or international armed conflicts has not yet been included in the definitions of crimes under international humanitarian law. On the basis of the evidence before it, including expert testimony, the ICTR found in the *Akayesu* case that, indeed, widespread acts of genocide had taken place in Rwanda against the Tutsi minority, which had brought about the killing of more than half a million people in a timeframe of a few months.[138] On account of sexual violence the Trial Chamber found that there was 'sufficient credible evidence to establish beyond a reasonable doubt that during the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed … in the commune of Taba'.[139] It clarified that in order to qualify as sexual violence the acts had to be committed: a) as part of a widespread or systematic attack; b) against a civilian population; c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial or religious grounds.[140] The ICJ made reference to the legal findings of the ICTR and the ICTY with regard to rape and other acts of sexual violence

135 ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment of 29 July 2004, paras. 167-189. See the SIM Tribunals database under 'Nationality Requirement' (keyword search) at: *http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/(Keyword_All)?OpenView&Startkey=N&Count=150*.

136 In the *Strugar* case the Chamber stated: 'Both The Hague Convention (IV) of 1907 and The Hague Regulations are rules of international humanitarian law and they have become part of customary international law.' ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment of 31 January 2005, para. 227 and footnote 775.

137 Respectively Article 5 (g) and Article 3 (g).

138 ICTR, *Prosecutor v. Akayesy*, Case No. ICTR-96-4-T, Judgement of 2 September 1998, paras. 111-129.

139 *Ibid*., para. 449. In paragraph 598 the Trial Chamber defined rape as: 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.' In paragraph 597 that Chamber compared rape and torture in this wording: 'Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. '

140 For the ICTR's contribution to international law see *inter alia* L.J. van den Herik, *The Contribution of the Rwanda Tribunal to International Law*, Martinus Nijhoff Publishers: Leiden/Boston, 2006.

applying them to the case brought by Bosnia and Herzegovina.[141] As noted by the Court rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group.[142] This is an important clarification not only for the purposes of this Convention but also for those of international criminal law and the work of the judicial bodies operating in this field in general.

Another issue where reference was made to the ICJ's example is that of the binding force of its own previous decisions by the ICTY's Appeals Chamber. Considering the application of the principle of *stare decisis*,[143] in the *Aleksovski* case, the Appeals Chamber, referring to national and international courts and *inter alia* to the ICJ, found that a proper construction of the Statute, taking due account of its text and purpose, yielded the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.[144] The findings of the ICJ with respect to State responsibility and those of the *ad hoc* tribunals with regard to individual criminal responsibility under the terms of the Genocide Convention are complementary. Apart from the famous *Tadić* Appeals Chamber judgment as examined above the ICTY has dealt with several motions filed by the defence where interesting questions are raised with regard to the possibility of the ICJ ruling on the jurisdiction of the ICTY to try persons for crimes committed in the former Yugoslavia while the latter was not a member of the UN;[145] issues regarding the service of the judges of the ICTY who serve under the same terms and requirements as those of the ICJ and so on. Those motions brought by a defendant requesting a ruling by the ICJ on the ICTY's jurisdiction to try nationals of former Yugoslavia were denied mainly according to the argument that the ICTY could not change its prerogative to rule on its jurisdiction instead of that of the ICJ. Indeed, every international court has its own *compétence de la compétence* which it would not easily surrender, or even seem to surrender to another judicial body, not even to the principal judicial organ of the UN.

### 5.5 THE ICJ AND THE ICC

The fact that both the ICJ and the ICC are permanent judicial bodies entrusted with important judicial functions calls for a detailed analysis of the relationship between

141 *Application of the Genocide Convention*, para. 298-367.

142 *Ibid*., para. 300.

143 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber Judgment of 24 March 2000, paras. 92, 102, 103.

144 *Ibid*., para. 107.

145 The first defendant to challenge the jurisdiction of the ICTY was *Tadić*, see *Prosecutor v. Tadić*, Case No. IT-94-1-A, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeals Chamber, 2 October 1995. Quite interesting in this respect is also the separate opinion of Judge Sidhwa, paras. 27-31, who looking at the ICJ's position on the point of judicial review noted that 'without acting as a straight court of judicial review or appeal, the International Court of Justice, maintaining its proprieties and balances with coeval organs of equivalent power and independence, has found for itself a way to examine the matter.'

these two international courts.[146] Although their *ratione personae* jurisdictions differ, with the ICJ solving inter-State disputes and the ICC prosecuting persons for a number of internationally recognized crimes, the combination of their jurisdictions cover a large part, if not all entities having legal personality. Keeping in mind the interrelationship between State responsibility and individual criminal responsibility for violations of international human rights and humanitarian law norms, judicial cross-fertilization and close cooperation between these courts can significantly enhance the system of human rights protection. The legal basis for the relationship between the ICC and the ICJ, as the principal judicial organ of the UN, is composed of, *inter alia*, the rapport that the ICC has with the ICJ under its Statute and the Negotiated Relationship Agreement between the ICC and the UN entered into on 4 October 2004.[147] A direct relationship has been established between the ICC and the ICJ under Article 119(2) of the ICC Statute. This article reads:

> Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Evidently, failing agreement, the ICJ is bestowed with jurisdiction regarding the interpretation or application of the ICC Statute, while as Article 119(1) clarifies, issues concerning the judicial functions of the ICC understandably remain within the latter's domain. In view of the extra burden which the lack of a similar provision as Article 119(1) would put upon the ICC's activity and the perceived necessity of creating a coherent and integrated international legal system, such inclusion in the ICC Statute can be seen as ground-breaking. However, the relationship created by Article 119(2) is rather broad and leaves ample room for interpretation as to the way it can be

146 Maybe it is worth mentioning here that individuals who were to serve later as Judges of the ICJ participated in the UN Diplomatic Conference on the Establishment of an International Criminal Court held in Rome in 1998 or were part of the early efforts in drafting the ICC's Statute. Thus, Judge Hisashi Owada (a member of the ICJ since 2003) was the head of the Japanese Delegation to this conference, Judge Koroma (a member of the Court since 1994) was the former Chairman of the ILC Committee mandated to elaborate a Draft Statute for an International Criminal Court, while Judge Tomka (a member of the Court since 2003) was Vice-Chairman of the Preparatory Committee for the International Criminal Court (1998) and Alternate Head of the Delegation of Slovakia to the UN Diplomatic Conference on the Establishment of an International Criminal Court (1998). As an example of later involvement one should mention that Judge Rony Abraham (a member of the Court since 2005) was Chairman of the French delegation to the Assembly of States Parties to the Rome Statute of the International Criminal Court (2002, 2003, 2004).

147 The text of the Negotiated Relationship Agreement between the ICC and the UN (ICC/ASP/3/Res. 1) is available at: *http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf* (last accessed on 1 November 2007).

implemented.[148] Hence, the legal framework under which cooperation and coordination between these two institutions is to be arranged, which as noted above is composed of the Negotiated Relationship Agreement between the ICC and the UN and Article 119(2), needs further elaboration. It is noteworthy that the Agreement does not touch at all upon the issue of dispute settlement covered by Article 119(2). After providing a short introduction to the ICC the relationship between the ICJ and the ICC is discussed in more detail.

### 5.5.1 The ICC in Brief[149]

Since after the establishment of the International Military Tribunal of Nuremberg and that of the Far East there was considerable effort on the part of the international community to set up a permanent international criminal court.[150] The purpose was to have a judicial body that could prosecute serious crimes against humanity no matter who committed them and be able to try the perpetrators of gross violations of humanitarian law, such as those committed during international or internal military conflicts. This was made possible with the adoption of the Rome Statute of the International Criminal Court in 1998.[151] The ICC finally offers a real promise of combating impunity for the worst atrocities punishable under international law. Under Article 5 of the Statute it has jurisdiction with respect to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[152] It is noteworthy that since the Nuremberg Trials, the concepts of crimes against humanity and war crimes have undergone significant change reflecting the development of international law and the new situations encountered nowadays. War crimes are punishable in international and internal armed conflicts and it is accepted that crimes against humanity can also take place in peacetime.

When States realise they are setting a standard by which they themselves, or their leaders and military personnel, may be judged, they seem to take greater care and

148 See *inter alia* T. O'Neill, *Dispute Settlement under the Rome Statute of the International Criminal Court: Article 119 and the Possible Role of the International Court of Justice*, CJIL, Vol. 5, No. 1, pp. 67-78.

149 An extended, although not completely up-to-date, bibliography on the ICC is available at: *http://www.pict-pcti.org/courts/ICC.html*.

150 See *inter alia* W.A. Schabas, *An Introduction to the International Criminal Court*, 2nd edition., Cambridge University Press, 2004; M. Boot, *Genocide, Crimes against Humanity, War Crimes*: *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, School of Human Rights Research Series, Vol. 12, Intersentia, 2002; H.A.M. von Hebel, *et al.* (eds.), *Reflections on the International Criminal Court*, T.M.C. Asser Press, 1999.

151 Rome Statute of the International Criminal Court, in *International Criminal Law: A Collection of International and European Instruments*, Third Revised Edition, C. van de Wyngaert (ed.), Martinus Nijhoff Publishers, 2005, pp. 125-180; also available together with other relevant documents at: *http://www.icc-cpi.int/about/Official_Journal.html* (last accessed on 1 November 2007).

152 According to Article 5 (2) for the ICC to exercise jurisdiction in respect of the crime of aggression first a provision defining the crime and the conditions under which the court shall exercise jurisdiction will have to be adopted.

insist upon many safeguards.[153] [T]he *nullum crimen sine lege* principle, as formulated in the Rome Statute, serves to safeguard a state's sovereignty, because the Court only has jurisdiction over crimes insofar as they have been included in the Statute by the negotiating states.[154] By restricting the content and scope of the Court's jurisdiction *ratione materiae* the Statute fails to criminalize all gross human rights violations and violations of humanitarian law. Indeed, the content and scope of the subject-matter jurisdiction of the ICC might be narrower than what the *ad hoc* criminal Tribunals for Yugoslavia and Rwanda have been able to derive from their statutes. It should be noted, however, that besides the rather evident implementation of the principle of legality, the ICC provides for various rights of the accused aiming at insuring a fair trial and the non-retroactivity of the temporal jurisdiction of the court.[155]

The effect of the adoption of the Rome Statute on a national level is the enactment of national legislation, which would vest upon States universal jurisdiction over the crimes of genocide, war crimes, and crimes against humanity. Notwithstanding the fact that this Court is established to try perpetrators of the core crimes enlisted in its Statute, it is foreseeable that due to limitations it will generally prosecute the leaders, organisers and instigators of these grave crimes. This feature of the prosecutorial policy of the ICC, providing for an application of selective justice, is similar to that of the *ad hoc* tribunals. Although one could criticise this feature of international criminal justice in general, keeping in mind the limitations of the ICC and the usually large number of suspects in the investigated conflict areas, it would be too high a burden for any international criminal judicial body to prosecute every suspect. Further, it is also the complementary nature of the ICC which necessitates such an approach where the primary responsibility for such prosecution is vested on the domestic judicial organs of a State member of the ICC Statute.

After five years of its establishment the ICC is rather busy. There are four situations which have been brought to its attention, namely that in the Democratic Republic of the Congo (DRC),[156] the situation in Uganda, the situation in Sudan (Darfur), and the situation in the Central African Republic.[157] While it would certainly be naïve to expect that the establishment of the ICC will bring an end to the perpetration of grave international crimes, it can surely provide justice for the victims and enhance deterrence, redress and reconciliation in the affected areas.[158] In view of all the savagery

153 Schabas, *supra* note 150, p. 27.

154 Boot, *supra* note 150, p. 613.

155 Articles 22, 23, and 24 of the ICC Statute.

156 With regard to this situation it should be noted that there are already two individuals facing changes before the ICC, namely Thomas Lubanga Dyilo and Germain Katanga.

157 For more details on the activity of the ICC see *inter alia* the ICC Annual Report 2006-2007 submitted to the UN, A/62/314 of 31 August 2007.

158 See *inter alia* C. Flinterman, *The International Criminal Court: Obstacle or Contribution to an Effective System of Human Rights Protection*, in From Sovereign Impunity to International Accountability: The Search for Justice in a World of States, R. Thakur and P. Malcontent (eds.), United Nations University Press, 2004, pp. 264-272.

which accompanied humanity in the course of the twentieth century and those appalling human rights violations which, unfortunately, continue to unfold,[159] the establishment of this court and its potential with regard to the enforcement of human rights and humanitarian law comes as a great promise and achievement.

### 5.5.2 Relationship Between the ICC and the ICJ

As mentioned above, the possibility for these international judicial bodies to interact lies within the limits of Article 119(2) of the ICC Statute. That possibility has been described as 'unclear' and 'remote'.[160] The tension between those actors wanting the ICC to be the 'master of its own house'[161] and those seeing it in the larger framework of the international legal order brought about a compromise, which to date remains unclear and problematic.[162] Unfortunately, the Negotiated Relationship Agreement between the ICC and the UN failed to address this issue. Failing agreement between the States Parties concerned within the limited period of three months, the solution to the contentious issue passes into the hands of the Assembly of the States Parties to the ICC Statute. Two seemingly equal venues can be chosen by the Assembly: first, it can choose to serve as a mediator; or second, refer the dispute to the ICJ immediately or after it fails to mediate an agreement between the concerned parties.

Article 119(2) of the ICC Statute tries to provide for different means for a peaceful settlement of a dispute arising between States Parties to the ICC Statute, where referral to the ICJ is naturally only one of them. However, the ICJ is put at arm's length, as referral to it, although explicitly foreseen in the Statute, is further complicated by the addition of such a vague formulation as 'in conformity with the Statute of that Court'. There are two possibilities for the ICJ to be engaged: the contentious and the advisory procedure. Article 34(1) of the Statute of the ICJ foresees that only States can be parties in cases before the Court. Thus, the ICC Assembly can recommend the States Parties to submit their dispute to the ICJ by means of an agreement, or through means of *forum prorogatum*. That presupposes that these States are party to the ICJ's Statute, accept its jurisdiction, and are willing to solve their dispute through this Court. In light of the ICJ procedures and the time expectancy between the filing of the dispute and the decision on the merits the advisory procedure would represent a better choice if the

159 For a series of interesting essays on legal issues arising from these horrible events see *inter alia Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, L.C. Vohrah *et al*. (eds.), Kluwer Law International, 2003.

160 See *inter alia* A. Pellet, *Settlement of Disputes* in A. Cassese *et al*. (*eds*.), The Rome Statute of the International Criminal Court: A Commentary, Oxford University Press, Great Britain, 2002, pp. 1841-1848; R.S. Clark, Article 119 (Settlement of Disputes) in O. Triffterer (*ed*.), Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Badan-Baden: Nomos Verl.-Ges., 1999, pp. 1241-1250; R. Higgins, *The Relationship Between the International Criminal Court and the International Court of Justice*, in H.A.M. von Hebel *et al*. (*eds*.,) *Reflections on the International Criminal Court*, 1999, pp. 163-172; O'Neill, *supra* note 147.

161 Clark, *supra* note 160, p. 1246.

162 O'Neill, *supra* note 148, p. 78.

States concerned would be willing to consider this Court's advisory opinion as binding.

According to Article 65(1) of the ICJ Statute an advisory opinion can be requested from the ICJ on any legal question at the request of whatever body may be authorized by or in accordance with the UN Charter to make such a request. Unfortunately, the Negotiated Relationship Agreement between the ICC and the UN is silent on this issue. Nevertheless, it appears that implicitly the Secretariat of the Assembly of the States Parties has been vested with the possibility to request an advisory opinion by the ICJ. This teleological interpretation is based on the meaning to be given to Articles 1(2), 2(1) and 2(3), and 3. According to Article 1(2) of this Agreement the Secretariat of the Assembly of States Parties is considered to be part of the ICC. Further, the ICC's legal personality and legal capacity was recognized by the UN to the extent 'as may be necessary for the exercise of its functions and the fulfilment of its purposes'. Article 3 provides that with a view to facilitating the effective discharge of their respective responsibilities the UN and the ICC shall cooperate closely, whenever appropriate. In light of these articles, in discharging its duties on behalf of the Assembly of the States Parties as foreseen under Article 112(2) (g) and 112(3) (c) of the ICC Statute, the Secretariat of the Assembly of States Parties seems to have been implicitly invested with the power to ask for an advisory opinion from the ICJ.[163] However, it remains to be seen if and how the Assembly of States Parties shall choose to engage the ICJ and how the ICJ shall satisfy itself that it has jurisdiction to entertain a case on the interpretation or the application of the ICC Statute, or render an advisory opinion.

### 5.5.3 The *Thomas Lubanga Dyilo* case and the ICC's Reliance on a Previous Decision of the ICJ

The first case to come before the ICC was that against Thomas Lubanga Dyilo.[164] This case concerns the situation in the Democratic Republic of Congo (DRC). Mr Dyilo is alleged to have been involved in the commission of war crimes, namely, enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities.[165] The decision of 29 January 2007 by Pre-Trial Chamber I which confirmed the charges of war crimes against Thomas Lubanga Dyilo, the alleged leader of the Union des Patriotes Congolais pour la Reconciliation et la Paix (UPC) and the Commander-in-Chief of its military wing, the Forces Patriotiques pour la Libération du Congo (FPLC), is discussed below. A contentious issue in this case was that of the

163 Article 112(2) (g) reads: 'The Assembly shall: 'Perform any other function consistent with this Statute or the Rules of Procedure and Evidence' while Article 112(3) (c) reads: 'The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.'

164 ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04–01/06, Pre-Trial Chamber I, *Arrest Warrant*, 10 February 2006, available at: *http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf* (last accessed on 1 November 2007).

165 ICC Statute, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii).

characterisation of the armed conflict, with the prosecution contending that the alleged crimes were committed in the context of a conflict not of an international character, whereas the defence contended that consideration had to be given to the fact that during the relevant period, the Ituri region was under the control of Uganda, Rwanda, or MONUC.[166]

In considering this issue Pre-Trial Chamber I relied on the judgment rendered by the ICJ in the *Armed Activities* case (DRC *v.* Uganda).[167] Thus, the Chamber noted that in the judgment of 19 December 2005 in the *Armed Activities* case the ICJ had observed that, under customary international law, as reflected in Article 42 of the *Hague Regulations* of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised.[168] Further, for the purpose of determining whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an Occupying Power, the Chamber recalled the findings of the ICJ to the effect that Uganda established and exercised authority in Ituri as an Occupying Power.[169] After noting, first, that according to the ICJ 'the conduct of any organ of the State must be regarded as an act of that State'[170], the Pre-Trial Chamber quoted the finding of the ICJ in the *dispositif* of its judgment 'that the Republic of Uganda, by engaging in military activities against the Democratic Republic of the Congo on the latter's territory, by occupying Ituri and by actively extending military, logistic, economic, and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention'.[171]

The Pre-Trial Chamber considered that there was sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying Power, the armed conflict which occurred in Ituri could be characterised as an armed conflict of an international character from July 2002 to 2 June 2003, the date of the effective withdrawal of the Ugandan army.[172] It is not difficult to notice from this Chamber's line of argument the importance of the ICJ findings in the *Armed Activities* case with regard to the characterisation by the former of the conflict in Ituri as one of an international character. That also shows that even the work of international judicial bodies, like the ICJ and the ICC, although of a different nature, can be complementary and, ultimately, its synergy strengthens the international legal system of human rights protection.

166 ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04–01/06, *Decision on Confirmation of Charges*, 29 January 2007, pp. 74-75, p. 71, para. 200, available at: *http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf* (last accessed on 1 November 2007).

167 *Ibid*., pp. 74-75, paras. 212-217.

168 *Ibid*., para. 212.

169 *Ibid*., paras. 213-214.

170 *Ibid*., para. 216.

171 *Ibid*., para. 217.

172 *Ibid*., para. 220.

### 5.5.4 Concluding Remarks

A natural question is why the involvement of the ICJ would be needed at all, if the ICC can and should take care of its own affairs. Some issues which have been pointed out as likely falling under the category of disputes on the interpretation or application of the ICC Statute are *inter alia* disagreements as to whether a particular candidate for election as a judge has the necessary qualifications under Article 36 or upon their dismissal; similar disputes regarding the qualifications of potential prosecutors or registrars or their dismissal; questions of privileges and immunities; the failure of a State to cooperate with the ICC; claims to protection of national security information where a State and the Court have reached a deadlock; disagreements concerning the financing of the Court; disagreements concerning reservations entered with regard to the ICC Statute, and so on.[173] In particular, the issue of reservations to the ICC Statute could be one of those to be properly addressed by the ICJ. It would potentially benefit the work of the ICC if the ICJ were to rule on the above-mentioned issues as that, besides easing the former's workload, would also potentially remove any possible claims of partisanship on the part of the ICC. It is regrettable that the correlation between the ICJ and the ICC remains unclear despite the 2004 ICC-UN Agreement. Failure to properly clarify that relationship in this latter document was a missed opportunity not only for the ICC-ICJ relationship but also for the creation of a cohesive and integrated international judicial system. However, as the *Dyilo* case shows, it appears that the ICC will not refrain from making proper use of the ICJ findings in the course of its work.

## 5.6 THE ICJ AND THE ECTHR

Our focus will now shift to the relationship of a traditional dispute settlement mechanism, such as the ICJ, with a regional human rights court, such as the ECtHR. It is rather interesting to analyse that relationship, although it should be noted beforehand that these courts differ greatly not only concerning their respective jurisdictions *ratione loci*,[174] *ratione personae*,[175] and *ratione materiae*,[176] but also concerning other characteristics such as the number of judges, the resources available and the number of cases received and those dealt with per year. Thus, in light of these well-known differences our focus remains on the interaction between the two courts and to what extent they have referred and made use of each other's case law. While there are

173 See *inter alia* R.S. Clark, *supra* note 160; O'Neill, *supra* note 147, p. 72.

174 The ECtHR is only open to European countries which are members of the Council of Europe, as opposed to the ICJ that is open to all the member States of the UN (Article 93 of the UN Charter).

175 Whereas individuals, non-governmental organizations, groups of persons and States can be a party to a case before the ECtHR according to Articles 33 and 34 of the ECHR, only States can appear as parties in a case before the ICJ according to Article 34(1) of the ICJ Statute.

176 The subject-matter jurisdiction of the ECtHR comprises all of the human rights which are included in the ECHR and its Additional Protocols, while that of the ICJ is potentially unlimited.

numerous instances of the ECtHR looking for guidance at the ICJ's case law, which for that reason cannot be all dealt with, the ICJ itself has made reference to the ECtHR only once in its famous *Barcelona Traction* case. After a brief introduction to the ECtHR some selected cases where the ECtHR referred to the case law of the ICJ are discussed by way of illustrating the interaction between these two courts. Finally, the *Barcelona Traction* case is dealt with briefly.

### 5.6.1 The ECtHR in Brief

The European Court of Human Rights (ECtHR) is often referred to as the most effective and successful regional human rights court.[177] Apart from establishing a set of fundamental rights and freedoms, drafted in a similar wording as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) set up an enforcement mechanism. Initially there were three institutions entrusted with this duty, namely the European Commission of Human Rights (ECmHR or Commission) which was set up in 1954, the European Court of Human Rights (ECtHR) which was set up in 1959 and the Committee of Ministers of the Council of Europe, the latter organ being composed of the Ministers of Foreign Affairs of the member States or their representatives. Complaints, which could be brought against a State member by individual applicants (individuals, groups of individuals or non-governmental organisations) or another member State, were subject to a preliminary examination of admissibility by the Commission. After declaring an application admissible, the Commission placed itself at the parties' disposal with a view to brokering a friendly settlement. If no settlement was forthcoming, it drew up a report establishing the facts and expressing an opinion on the merits of the case. This report was transmitted to the Committee of Ministers.[178] However, this system was changed by Protocol 11 which abolished the Commission altogether and reorganized the work of the ECtHR.[179]

Since the Convention's entry into force in 1953 there have been 14 Protocols adopted with a view to improving the enforcement machinery, or adding new rights. Protocol Nos. 1, 4, 6, 7, 12 (this Protocol will enter into force when ratified by ten Contracting States) and 13 added further rights and liberties to those guaranteed by the

177 For a detailed study of the ECtHR see *inter alia* P. van Dijk, *et al* (eds.), *Theory and Practice of the European Convention on Human* Rights, Intersentia, 2006; Janis, Kay, and Bradley (eds.), *European Human Rights Law: Text and Materials*, Oxford University Press, 2000. For the ECtHR contribution to the development of international law see *inter alia* J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, 1989.

178 On the supervisory function of the Committee of Ministers see *inter alia* P. van Dijk, *et al* (eds.), *Theory and Practice of the European Convention on Human* Rights, Intersentia, 2006, pp. 291-323.

179 See *inter alia* V. Miller, *Protocol 11 and the New European Court of Human Rights*, Research Paper 98/109, 1998, available at: *http://www.parliament.uk/commons/lib/research/rp98/rp98-109.pdf* (last accessed on 1 November 2007).

Convention,[180] while Protocol No. 2 conferred on the Court the power to give advisory opinions, a function now governed by Articles 47-49 of the ECHR. Protocol No. 9 enabled individual applicants to bring their cases before the Court subject to ratification by the respondent State and acceptance by a screening panel. With Protocol 11 entering into force in 1998 the recognition of the right of individual petitions became compulsory.[181] The remaining Protocols concerned the organisation of and the procedure before the Convention institutions. It was the increasing caseload from the 1980s onwards that forced a change in the Convention's supervisory machinery, resulting in the adoption of Protocol No. 11 to the Convention. The aim was to simplify the structure with a view to shortening the length of proceedings while strengthening the judicial character of the system by making it fully compulsory and abolishing the Committee of Ministers' adjudicative role. A necessary development was that brought about by Protocol 14, open for signature from 2004 onwards, which amends and improves the control system of the Convention and this still has to enter into force.[182]

The ECtHR is composed of the same number of judges as that of member States to the ECHR (at present forty-seven) who serve in an individual capacity for a term of six years.[183] The Court's duty in the first place is to try and secure a friendly settlement between the parties on the basis of respect for the human rights defined in the Convention and the subsequent Protocols. Forty-seven States have ratified the ECHR,[184] giving about 800 million individuals on the European continent the possibility to bring individual claims against a member State under that treaty.[185] As the ECtHR itself has noted, the protection machinery established by the Convention is subsidiary to the national systems safeguarding human rights.[186] However, the caseload of the Court is still of such a volume that it makes it very difficult to keep the length of the proceed-

180 Protocol No. 1 guarantees individual property, adds the right to education, and calls on State parties to 'undertake to hold free elections'; Protocol No. 4 adds other rights and freedoms regarding the right to liberty of movement and the prohibition of collective expulsion of aliens; Protocol No. 6 seeks to abolish the death penalty; Protocol No. 7 adds further rights for aliens, fair trial requirements and equal rights for spouses.

181 See *Survey of Activities 2006*, Registry of the ECtHR, 2007, p.1, available at: *http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/Survey_2006.pdf* (last accessed on 1 November 2007).

182 For a summary of the changes brought about by this Protocol for a more effective operation of the ECHR see: *http://conventions.coe.int/Treaty/EN/Summaries/Html/194.htm* (last accessed on 1 November 2007).

183 For the ECtHR's current composition visit: *http://www.echr.coe.int/ECHR/EN/ Header/The+Court/The+Court/Composition+of+the+Plenary+Court* (last accessed on 1 November 2007).

184 For the latest information visit: *http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp* (last accessed on 1 November 2007).

185 See *Proceedings of the European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights*, Rome 3-4 November 2001. This fact was mentioned on numerous occasions by the participants at that conference, respectively in pp. 16, 31, 39, 67, 90, 93, 111, 146, 148, 151, 157, and 163.

186 ECtHR, *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Series A No. 24, p. 22, para. 48.

ings within reasonable limits. The time for handling cases is up to two or three years, which is quite long and is comparable with judicial proceedings before other international judicial bodies having jurisdiction over individuals. It can be said that while the ECtHR is a splendid example of an adjudicatory body providing a high level of human rights protection, it has fallen victim to its own success by the excessive caseload placed upon it. That shows that without a sound and effective domestic judicial system the work of the ECtHR and of any regional or international court or tribunal is prone to run into serious difficulties.

### 5.6.2 Case law of the ECtHR Relating to the ICJ

In view of the wide scope of legal issues that the ECtHR has to cope with in its activity only three important legal issues have been selected and are preliminarily dealt with before discussing two separate cases. First, the issue of the exhaustion of domestic remedies under the case law of the ECtHR shall be discussed in light of and in comparison with the relevant case law of the ICJ. A second point of interest is the position of the ECtHR on the issue of the applicability of human rights provisions outside national territory. Finally, the general position of the ECtHR concerning the interrelationship between the provisions of the ECHR and general principles of international law shall be given some attention.[187] For the most part, the cases taken to illustrate these issues include references to the case law of the ICJ.

In the *Akdivar and Others v. Turkey* case the respondent State referring to a number of leading judgments of international tribunals concerning the issue of exhaustion of domestic remedies, maintained that the exhaustion requirement applied unless the applicant could show that the remedy provided was manifestly ineffective or that there was no remedy at all. Thus, based on the ICJ's findings in the *Interhandel*[188] and *Ambatielos*[189] cases the Turkish government contended that the applicants had failed to provide any evidence that there were insurmountable obstacles to instigating proceedings before the Turkish courts.[190] The ECtHR maintained that the burden of proof was on the respondent State to prove that an effective judicial remedy was available.[191]

187 On the ECtHR's involvement in the application of international humanitarian law see *inter alia* A. Reidy, *The approach of the European Commission and Court of Human Rights to international humanitarian law*, IRRC, No. 324, 1998, pp. 513-529.

188 ICJ, *Interhandel* (Switzerland *v.* USA), (*Preliminary Objections*), Judgment of 21 March 1959, ICJ Reports 1959, p. 6.

189 ICJ, *Ambatielos*, (Greece *v.* United Kingdom), (*Preliminary Objections*), Judgment of 1 July 1952, ICJ Reports 1952, p. 28.

190 ECtHR, Judgment, *Akdivar and Others v. Turkey*, Case No. 99/1995/605/693, 30 August 1996, para. 58.

191 *Akdivar and Others v. Turkey*, see for the general principles paras. 65-69. In paragraph 68 the ECtHR stated: 'It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.'

In this case, however, the ECtHR did not find it necessary to decide whether there had been a violation of Article 13 on the right to an effective remedy.

The ICJ dealt extensively with the issue of exhaustion of domestic remedies in its recent decision in the *Diallo* case where Guinea brought a case against the Democratic Republic of the Congo (DRC) on behalf of Mr Diallo on the basis of the principle of diplomatic protection.[192] Guinea contended that Mr Diallo had been divested of his property, arrested, detained and finally expelled by the authorities of the DRC after efforts made by him to recover debts owed by both public and private partners to the companies Africom-Zaire and Africontainers-Zaire, of which he was an *associé*. The DRC tried to argue that the Court lacked jurisdiction through two preliminary objections: first, Guinea lacked standing because the rights it sought to protect belonged to the two above-mentioned companies not possessing Guinean nationality; and secondly, it argued that Guinea was precluded from exercising its diplomatic protection as neither Mr Diallo nor the companies had exhausted the remedies available in the Congolese legal system to obtain reparation for the injuries claimed by Guinea before the Court.[193] Guinea contended that it was exercising its diplomatic protection on behalf of Mr Diallo to protect three categories of rights: first, the individual personal rights of Mr Diallo;[194] second, his direct rights as an *associé* in his companies;[195] and third, the rights of those companies by 'substitution'.[196] The ICJ rejected the DRC's preliminary objections based on the principle of the exhaustion of domestic remedies in so far as it concerned the protection of Mr Diallo's rights as an individual and the protection of Mr Diallo's direct rights as an *associé* in Africom-Zaire and Africontainers-Zaire.[197] It is noteworthy that both the ICJ and the ECtHR maintain a similar position on the burden of proof in such cases, namely that it is for the applicant to prove that local remedies have indeed been exhausted or to establish that exceptional circumstances relieved the allegedly injured person of the obligation to exhaust available local remedies and for the respondent to convince the Court that there were effective remedies in its domestic legal system which were not exhausted.[198]

The second issue of interest dealt with by both courts is that of the applicability of human rights instruments outside national territory, also known as the extraterritorial application of human rights treaties. Although the jurisdiction of the ECtHR is restricted to the application of the ECHR, while that of the ICJ is potentially all-encom-

192 ICJ, *Case Concerning Ahmadou Sadio Diallo* (Guinea *v*. Democratic Republic of Congo), (*Preliminary Objections*), Judgment of 24 May 2007.

193 ICJ, *Case Concerning Ahmadou Sadio Diallo* (Guinea v. Democratic Republic of Congo), (Preliminary Objections), 24 May 2007, para. 32.

194 The ICJ dealt with this issue in paras. 34-48 of the judgment.

195 The ICJ dealt with this issue in paras. 49-75 of the judgment.

196 The ICJ dealt with this issue in paras. 76-94 of the judgment.

197 ICJ, *Case Concerning Ahmadou Sadio Diallo* (Guinea *v*. Democratic Republic of Congo), (*Preliminary Objections*), Judgment of 24 May 2007, para. 98(2)(a) and (b).

198 See the ICJ's *Diallo* case, *supra* note 197, para. 44 and the ECtHR's *Akdivar and Others v. Turkey*, *supra* note 190, para. 68.

passing, their positions on this issue can still be compared. The advisory opinion of the ICJ on the *Construction of a Wall* and a series of decisions taken by the ECtHR in relation to the Turkish presence in Northern Cyprus shall be used to illustrate the respective positions of these courts with respect to the extraterritorial application of the ECHR in the case of the ECtHR and human rights treaties in general in the case of the ICJ.[199] In the *Case of Cyprus v. Turkey* the ECtHR held that, by virtue of the fact that the Turkish army exercised 'effective overall control over that part of the island', Turkey's jurisdiction under Article 1 of the Convention extended to securing the entire range of substantive Convention rights in Northern Cyprus.[200]

Likewise, in its advisory opinion on the *Construction of a Wall* the ICJ observed that while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.[201] With regard to the applicability of the ICCPR the Court held that considering the object and purpose of the ICCPR, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.[202] Both courts seem to converge in their position on the issue of the extraterritorial application of certain human rights treaties, extending protection for human rights outside a State's territory under certain circumstances. A State's responsibility to secure the entire range of substantive rights set out in the relevant human rights treaties is strengthened further by the concurrent application of humanitarian law provisions when a State is the Occupying Power.

The third issue, namely that of the interrelationship between the provisions of the European Convention and relevant rules and principles of international law, was clarified by the Grand Chamber of the ECtHR in the famous *Bosphorus* case. This case arose out of the impounding of two leased aircraft of the Turkish airlines Bosphorus Hava Yollari by the Irish authorities.[203] That step was taken as part of an international sanctions regime applied against the FRY pursuant to SC Resolution 820 of 17 April 1993, providing that States should impound, *inter alia*, all aircraft in their territories 'in which a majority or controlling interest is held by a person or undertaking in or operating' from the FRY, which was made operative in the EU through EC Regulation 990/93 which entered into force on 28 April 1993. After providing a complete exposé

199 ECtHR, *Case of Cyprus v. Turkey*, Application No. 25781/94, Judgment of 10 May 2001, paras. 69-81 In paragraph 77 of this judgment the ECtHR stated: 'Having effective overall control over northern Cyprus, its responsibility [i.e. Turkey's] cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey's 'jurisdiction' must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.'

200 ECtHR, *Loizidou v Turkey* (23 March 1995 and 18 December 1996); *Cyprus v Turkey* (2002) 35 ECHR 30.

201 *Wall*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 179, para. 109.

202 *Wall*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, pp. 179-181, paras. 109-114.

203 ECtHR, Judgment, *Case of Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, Application No. 45036/98, 30 June 2005, paras. 16 and 64-65.

of the human rights dimension within the case law of the ECJ and the legal framework of the EC (now the EU),[204] the ECtHR concluded that the impugned act solely constituted compliance by Ireland with its legal obligations flowing from membership of the EC and impounding the aircraft did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention.[205]

In ruling on the issue of the interrelationship between the provisions of the European Convention and relevant rules and principles of international law the ECtHR stated:

> The Convention has to be interpreted in the light of any relevant rules and principles of international law applicable in relations between the Contracting Parties (Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 23 May 1969 and *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI), which principles include that of *pacta sunt servanda*. The Court has also long recognised the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organisations (the above-cited cases of *Waite and Kennedy*, at §§ 63 and 72 and *Al-Adsani*, § 54. See also Article 234 (now Article 307) of the EC Treaty).[206]

Such an approach takes into account the position of the ECHR within the broader framework of international law. It is also noteworthy that in this light the ECtHR rendered support to an interpretation of the provisions of the ECHR with a view to the better functioning of international organizations and the importance of international co-operation. Keeping in mind the case law of the ICJ with regard to the interpretation of treaties, such as *inter alia* the advisory opinion on *Reservations to the Genocide Convention* and the advisory opinions of the ICJ on the *Competence of the General Assembly for the Admission of a State into the United Nations* and on the *Reparations for Injuries* interpreting the UN Charter so as to ensure a proper functioning of the UN organs,[207] one can conclude that both courts have expressed a similar understanding when dealing with such issues.

### *A) Blečić v. Croatia*

A recent and quite relevant case for our discussion of the jurisprudential cross-fertilization between the ECtHR and the ICJ is that of *Blečić v. Croatia*. The applicant in this case had lost her flat in Zadar, Croatia, after the Municipality took legal action against her[208] on the ground that she had been absent from her flat for more than six months

204 *Ibid*., paras. 73-84.
205 *Ibid*., paras. 159-167.
206 *Ibid*., para. 150.
207 One cannot fail to mention the 2004 advisory opinion of the ICJ on the *Construction of a Wall*, which is quite relevant with regard to all the issues mentioned here, i.e. to treaty interpretation, the proper functioning of an international organization and the importance of international co-operation.
208 ECtHR, *Blečić v. Croatia*, Judgment of 8 March 2006, paras. 12-33.

without justified reasons. The relevant decisions of the Croatian highest courts challenged before the ECtHR were the ones issued by the Croatian Supreme Court on 15 February 1996 and that of the Croatian Constitutional Court issued on 8 November 1999. The latter judgment was issued after 5 November 1997, the point in time when Croatia ratified the ECHR. Thus, the issue of the *ratione temporis* jurisdiction of the ECtHR, i.e. the time when legal obligations under the ECHR had entered into force in respect of Croatia, was of crucial importance with regard to the admissibility of this case. In dealing *proprio motu* with the general issue of *ratione temporis* jurisdiction the ECtHR looked for guidance *inter alia* to the jurisprudence of the ICJ.[209] It is noteworthy that although Croatia had not raised a contention on this ground the ECtHR decided on its own motion to examine its *ratione temporis* jurisdiction.[210] The ICJ case quoted by the ECtHR was *Certain Property* (*Liechtenstein v. Germany*) where Germany had successfully raised a preliminary objection concerning the ICJ's lack of jurisdiction *ratione temporis*.[211]

The ECtHR concluded that since the fact constitutive of interference giving rise to the present application was the Supreme Court's judgment of 15 February 1996, an examination of the merits of this application would be contrary to the general rules of international law, as it would necessitate extending the Court's jurisdiction to a fact which, by reason of its date, was not subject thereto.[212] In order to establish its temporal jurisdiction it was essential in the ECtHR's view to identify, in each specific case, the exact time of the alleged interference, keeping in mind that from the ratification date onwards all of the State's acts and omissions were to conform to the Convention, but that at the same time the Convention did not impose any specific obligation on the Contracting States to provide redress for any wrongs or damage caused prior to that date.[213] This simple test can guide the practice of the different sections of the ECtHR and also warn potential complainants of a temporal bar to their complaint, thus potentially reducing its ever-growing caseload. The difference between the ICJ and the ECtHR is that while it is rather difficult to raise issues of admissibility before the ICJ after the preliminary objections stage, the ECtHR can dismiss a case on admissibility issues at '*any stage of the proceedings*' (emphasis added).[214] This difference can be

209 *Blečić v. Croatia*, para. 47.

210 *Blečić v. Croatia*, paras. 59-62.

211 ICJ, *Certain Property* (Liechtenstein *v*. Germany), Judgment of 10 February 2005, paras. 47-52. In its second preliminary objection of the six preliminary objections raised, Germany contended that all the relevant facts had occurred before the entry into force of the European Convention for the Peaceful Settlement of Disputes which in Liechtenstein's claim provided the basis for the jurisdiction of the ICJ.

212 *Blečić v. Croatia*, para. 92.

213 *Blečić v. Croatia*, paras. 77-82

214 *Blečić v. Croatia*, para. 65. The ECtHR recalled that 'the Grand Chamber is not precluded from deciding questions concerning the admissibility of an application under Article 35 § 4 of the Convention, since that provision enables the Court to dismiss applications it considers inadmissible 'at any stage of the proceedings'. Thus, even at the merits stage the Court may re-consider a decision to declare an application admissible if it concludes that it should have been declared inadmissible for one of the reasons given in the first three paragraphs of Article 35 of the Convention (see, *inter alia*, *Azinas*

explained by the different legal procedures employed by these courts, especially by the considerable time reserved for the examination of preliminary objections in cases argued before the ICJ.

*B) Banković and Others v. Belgium and 16 Other Contracting States*

The reason for selecting *Banković* is that the ECtHR in determining the scope of Article 1 of the Convention, at issue in this case, determined the very scope of the Contracting Parties' positive obligations and, as such, the scope and reach of the entire Convention system of human rights protection.[215] This case arose out of an air strike carried out by NATO forces against radio and television facilities in Belgrade on 23 April 1999 as part of a NATO operation aimed at forcing Serbia to put a halt to the ongoing armed conflict in Kosova. The claims by the applicants arose out of the deaths of relatives who were killed in this raid or in respect of injuries they sustained themselves. The claimants alleged that Articles 2 (the right to life), 10 (freedom of expression) and 13 (the right to an effective remedy) of the ECHR had been infringed by some 17 member States of NATO, who at the same time are also members of the ECHR.[216] In setting out the circumstances of the case the ECtHR took note of other ongoing judicial proceedings on related issues before the ICJ and the ICTY.[217] The relevant legal materials for deciding this case in view of the ECtHR included the Treaty of Washington of 1949, the Vienna Convention on the Law of Treaties, Article 1 of the ECHR, the American Declaration of the Rights and Duties of Man of 1948, the four Geneva Conventions of 1949, and the ICCPR of 1966 and its Protocol.[218]

The applicants submitted that their application was compatible *ratione loci* with the provisions of the Convention because the impugned acts of the respondent States, which were either in the FRY or on their own territories but producing effects in the FRY, brought them and their deceased relatives within the jurisdiction of those States.[219] Further, they suggested that the respondent States were severally liable for the strike despite its having been carried out by NATO forces, and that they had no effective remedies to exhaust.[220] On their part the NATO States contended that the application was incompatible *ratione personae* with the provisions of the Convention because the applicants did not fall within the jurisdiction of the respondent States

*v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III, and *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III).'

215 ECtHR, *Banković et al. v. Belgium and 16 Other Contracting States*, Application No. 52207/99, Decision of 12 December 2001, para. 65.

216 These States were Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom.

217 ECtHR, *Banković et al. v. Belgium and 16 Other Contracting States*, Application No. 52207/99, Decision of 12 December 2001, paras. 12-13.

218 *Ibid.*, paras. 14-27.

219 *Ibid.*, para. 30.

220 *Ibidem*.

within the meaning of Article 1 of the Convention.[221] These States also maintained that, in accordance with the '*Monetary Gold* principle' of the ICJ, the ECtHR could not decide the merits of the case as it would be determining the rights and obligations of the United States, of Canada and of NATO itself, none of whom were Contracting Parties to the Convention or, therefore, parties to the present application.[222] It is noteworthy that in their request to the ECtHR to admit the case and to find the respondent States responsible the applicants remarked that a failure to do so would leave them without a remedy given that the ICJ was not open to an application from individuals, the ICTY adjudicated on the responsibility of individuals for serious war crimes and the ICC had not yet been established.[223] With the parties disagreeing on its jurisdiction the ECtHR had first to decide on the admissibility of this case.
In setting out the applicable rules for interpreting the Convention the ECtHR stated:

> More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty (the above-cited Loizidou judgment (*merits*), at §§ 43 and 52). The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part (*Al-Adsani v. the United Kingdom*, [GC], no. 35763, § 60, to be reported in ECHR 2001).[224]

This position of the European Court comes as no surprise as it follows the position it had already taken in earlier cases. Given that the respondent States had contended that the precise meaning of 'jurisdiction' should be interpreted in accordance with the ordinary and well-established meaning of that term in public international law the Court having considered this concept stated:

> As to the 'ordinary meaning' of the relevant term in Article 1 of the Convention, the Court is satisfied that, from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a State's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.[225]

In making this finding the ECtHR was guided by and accepted the dominant view of international law on the notion of jurisdiction, as expressed in the writings of several

221 *Ibid.*, para. 31.
222 *Ibidem*.
223 *Banković*, para. 51.
224 *Banković*, para. 57.
225 *Ibid.*, para. 59.

eminent scholars and practitioners.[226] Further on the ECtHR stated that it was of the view 'that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case.'[227]

Considering the *travaux préparatoires* to the Convention, the ECtHR found that they clearly indicated that those who had drafted the Convention intended the concept of jurisdiction to be territorial.[228] The Court looked at the issue of extraterritorial acts recognized as constituting an exercise of jurisdiction.[229] After considering its own case law the ECtHR held:

> [i]n sum, the case law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.[230]

Clarifying further instances of the State-recognized extraterritorial exercise of jurisdiction the ECtHR stated:

> Additionally, the Court notes that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of that State. In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State.[231]

Indeed, these findings of the ECtHR are in agreement with the prevailing current public international law doctrine. The regional scope of the applicability of the Convention was emphasized by the ECtHR when it held that the Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States, but solely within their *espace juridique*.[232] Apart from clarifying the issue of *ratione loci* jurisdiction of the Convention, through these findings the ECtHR seemed to implicitly accept the respondent States' suggestion that international humanitarian law, the ICTY and, most recently, the ICC exist to regulate such State conduct in case of international military collective action.[233] Regrettably, the ECtHR

226 *Ibid.*, paras. 59-60.
227 *Ibid.*, para. 61.
228 *Ibid.*, para. 63.
229 *Ibid.*, paras. 67-73.
230 *Ibid.*, para. 71.
231 *Ibid.*, para. 73.
232 *Ibid.*, para. 80.
233 *Ibid.*, paras. 43 and 80.

left unanswered the question whether it was competent to consider the case given the principles established by the above-cited *Monetary Gold* judgment of the ICJ.

### 5.6.3 Case law of the ICJ Relating to the ECtHR

While reference to the case law of the ICJ has often been made by either the ECtHR or the parties before it, the ICJ has barely referred to the case law of the European Court.[234] There is only one instance where the ICJ has made reference to the human rights protection system established by the ECHR.[235] In the *Barcelona Traction* case the ICJ, in considering Belgian claims on behalf of Belgian shareholders' interests in a Canadian-based company, stated:

> However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality. It is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each State which is a party to the Convention to lodge a complaint against any other contracting State for violation of the Convention, irrespective of the nationality of the victim.[236]

Besides suggesting a *forum conveniens* for dealing with such a dispute, this finding by the Court can be taken to imply that generally remedies would have to be sought in a certain hierarchical order: first at the national level, then at the regional level, and finally at an international level. Undeniably, the principle of exhaustion of domestic remedies plays a rather important role in easing and keeping the caseload of human rights courts such as the ECtHR within reasonable limits. However, the same principle has been invoked on several occasions before the ICJ by respondent States contending in their preliminary objections that domestic or local remedies had not been ex-

234 It should be mentioned here that Judge Waldock (United Kingdom) was a member (1954) and the President of the ECmHR from 1955-1961 and in 1966 was elected as a Judge of the ECtHR, Vice-President and President of the ECtHR, Judge McNair (United Kingdom), a member of the ICJ from 1946-1955 was President of the ECtHR from 1959-1965, Judge Mosler (Germany), a member of the ICJ from 1976-1985 also served as a Judge of the ECtHR from 1959-1981, Judge Fitzmaurice (United Kingdom), a member of the ICJ from 1960-1973, also served as a Judge of the ECtHR from 1974-1980, Judge Jennings (United Kingdom), a member of the ICJ from 1982-1995 also served as a Judge *ad hoc* at the ECtHR, Judge Ferrari Bravo (Italy), a member of the ICJ from 1995-1997, was elected as a Judge of the ECtHR in 1998. Further, Judges Guillame (France), a member of the ICJ from 1987-2005, Abraham (France), a member of the ICJ from 2005, Evensen (Norway), a member of the ICJ from 1985-1994, Ferrari Bravo (Italy), a member of the ICJ from 1995-1997, represented their respective countries before the ECtHR. Judge Petrén (Sweden), a member of the ICJ from 1967-1976 was a member (1954) and President (1962-1967) of the ECmHR.

235 Here the author means the full Court, as there have been a few other instances where individual judges have made reference to the ECtHR's case law in their individual or joint opinions.

236 *Barcelona Traction*, ICJ Reports 1970, p. 47, para. 91.

hausted.[237] In the majority of the cases the Court dismissed objections raised on this ground. As pointed out above, a considerable difference between the ICJ and the ECtHR with regard to the admissibility of a claim on behalf of an individual is that while the former seems to suggest that the nationality of the victim would still be an important requirement for a State to be able to seize the Court, the ECtHR is a judicial forum where this nationality requirement is not a condition *sine qua non*. Similar to the ICJ there have been cases where a State has brought a complaint against another State on behalf of its citizen(s).[238] Further, there have been a limited number of inter-State applications in the framework of 'collective enforcement' where a State or a group of States have initiated proceedings against another State for violations of the ECHR.[239] In any case, the limited number of applications of this category in the face of reports of continuous human rights violations shows that the tool of 'collective enforcement' is not readily made use of by States for political reasons.

A rather important issue where the practice of the ECtHR has been cited with approval by one third of the judges of the ICJ in a joint separate opinion is that of reservations to multilateral treaties. It should be noted beforehand that the opinion of the ICJ on the issue of reservations to a multilateral treaty was first delivered in its 1951 *Interpretation of the Genocide Convention* advisory opinion. However, in their joint separate opinion of 3 February 2006 in the *Armed Activities* case some of the Judges of the Court briefly revisited this issue also touching upon *inter alia* the regional human rights courts' practice concerning State reservations to their establishing treaties. Noting the new developments in this field since that early advisory opinion, they stated:

> Both the European Court of Human Rights, and the Inter-American Court of Human Rights, have not followed the 'laissez faire' approach attributed to the International Court's Advisory Opinion of 1951; they have each themselves pronounced upon the compatibility of specific reservations to the European Convention on Human Rights and the American Convention on Human Rights, respectively. They have not thought that it was simply a matter of bilateral sets of obligations, left to individual assessment of the States parties to the Convention concerned.[240]

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237 Some examples of cases where the human rights of individuals are involved include *Barcelona Traction*, *Elettronica Sicula* (*ELSI*), *LaGrand*, *Avena and Other Mexican Nationals*, and *Ahmadou Sadio Diallo*.

238 *Ireland v. United Kingdom*, Application No. 5310/71, Judgment of 18 January 1978; *Denmark v. Turkey*, Application No. 34382/97, Judgment of 5 April 2000 (Friendly settlement); *Cyprus v. Turkey*, Application No. 25781/94, Judgment of 10 May 2001.

239 See *inter alia Theory and Practice of the European Convention on Human Rights*, P. van Dijk *et al*. (eds.), Kluwer Law International, 3rd edition, 1998, p. 41 and footnotes 122-4. The cases mentioned there are namely the applications of Denmark, Norway, Sweden and the Netherlands *v*. Greece of September 1967 and the joint application of Denmark, Norway and Sweden *v.* Greece of April 1970, and the application of France, Norway, Denmark, Sweden and the Netherlands *v*. Turkey of July 1982.

240 *Armed Activities* case (DRC *v*. Rwanda), Joint Separate Opinions of Judges Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma of 3 February 2006, para. 15, available at: *http://www.icj-cij.org/docket/files/126/10441.pdf* (last accessed on 1 November 2007).

Further, these five judges, including the President of the Court, concluded that Human Rights courts and tribunals have not regarded themselves as being precluded by this Court's 1951 Advisory Opinion from doing anything other than noting whether a particular State has objected to a reservation.[241] In their view, this development did not create a 'schism' between general international law as represented by the Court's 1951 Advisory Opinion, a 'deviation' therefrom by these various courts and tribunals.[242] These judges not only endorsed the practice of these human rights courts, but also went even further by stating that the practice of the International Court itself clearly reflected this trend for tribunals and courts themselves to pronounce on compatibility with object and purpose, when the need arises.[243] That endorsement by the ICJ is an important contribution to the practice and legitimacy of these courts.

Another reference to the case law of the ECtHR is that made in the joint declaration of Judges Shi and Koroma in the *Application of the Genocide Convention* case. Expressing their belief that the conclusion reached by the majority with regard to the obligation imposed upon a State by the Genocide Convention to prevent the crime of genocide would have been legally secure if anchored on the relevant SC resolutions, they put forward the *missed moment of opportunity to act* test as used by the ECtHR in its own case law.[244] Criticizing the formulations of the majority they pointed out that the SC had very clearly warned of the imminent and serious humanitarian risk posed by any advance of Bosnian Serb paramilitary units on Srebrenica and its surroundings.[245] Hence, in their view, finding a breach of the obligation to prevent required the identification of a clear *missed moment of opportunity to act*, which was underscored by the ECtHR in its interpretation of the positive obligation to protect human life contained in Article 2, paragraph 1, of the ECHR.[246] With regard to the relevant SC resolutions, they recalled that the SC, in resolution 819 of 16 April 1993, noted the provisional measures ordered by the Court in 1993, stating, *inter alia*, that the FRY should take all measures within its power to prevent the commission of the crime of genocide.[247] Notably, resolution 819 went on to condemn 'ethnic cleansing' and to express specific concern over the 'pattern of hostilities' by Bosnian Serb paramilitary units that by 'direct consequence' had led to an ongoing 'tragic humanitarian emergency' in Srebrenica.[248] In their view, the Council's decision with respect to treating 'Srebrenica and its surroundings' as a safe area, together with its specific concern about war crimes and the deteriorating humanitarian situation in Srebrenica, certainly

241 *Ibid*., para. 22.
242 *Ibidem*.
243 *Ibid*., para. 23.
244 ICJ, *Application of the Genocide Convention* (Bosnia-Herzegovina *v*. Serbia and Montenegro), Joint Declaration of Judges Shi and Koroma, 26 February 2007, para. 6.
245 *Ibidem*.
246 *Ibidem*. They quoted the case of *Osman v. United Kingdom*, Judgment of 28 October 1998, Reports 1998-VIII, p. 3159.
247 *Ibidem*.
248 *Ibidem*.

suggested some real opportunities for the Bosnian Serb leadership to have acted to try to prevent the genocide.[249] They held that a specific risk undeniably existed by 12 July when Srebrenica had fallen but the mass killings had not yet begun and the Security Council, acting under Chapter VII, passed resolution 1004 demanding that the Bosnian Serb forces cease their offensive and withdraw from the Srebrenica safe area immediately and that all parties respect the Agreement of 18 April 1993 (essentially implementing resolution 819).[250]

### 5.6.4 Concluding Remarks

Although the ICJ and the ECtHR are rather distinct judicial bodies in their judicial functions and the scope of their jurisdiction, it is not difficult to discern similarities in the way they have dealt with a number of legal issues pertaining more to the realm of public international law. It is noteworthy that there is a possibility for the same case to be brought before both of these courts. To this author's knowledge that has so far occurred once, namely in the so-called *Pieter van Laer* case. Prince Hans-Adam II of Liechtenstein brought a case against Germany before the ECtHR in 1998 in an effort to restore to his possession a painting by the seventeenth century Dutch painter Pieter van Laer and while that case was pending before the ECtHR Liechtenstein brought a case before the ICJ on his behalf in 2001.[251] It is interesting to note that the case was filed with the ICJ on 1 June 2001 while the judgment of the Grand Chamber of the ECtHR was delivered on 12 July 2001, thus within a short time span. While the ECtHR did not find a violation of the rights of Prince Hans-Adam II of Liechtenstein under Articles 6(1) or 14 of the ECHR, and Article 1 of Protocol 1 to this Convention, the ICJ had to uphold a preliminary objection by Germany that it lacked jurisdiction *ratione temporis* to entertain the case. The result of the proceedings before the ECtHR was noted by the ICJ in its judgment.[252] As this case shows, the possibility of these courts being seized of the same dispute, with the potential risk of conflicting decisions brought about by the growing possibility of forum-shopping is far from hypothetical.

Turning to the issue of judicial cross-fertilization it should be noted that while the ECtHR has on several occasions made reference to ICJ judgments and has come close to having to deal with ICJ findings such as the *Monetary Gold* principle, the opposite can be said for the ICJ. While that careful approach of the ICJ might be based on the understanding that any such reference might be seen as a sign of Eurocentrism, this author subscribes to the opinion expressed by Judge Shahabuddeen in the *Mazilu* case. There Judge Shahabuddeen stated that the judicial policy of hesitating to use citations

249 *Ibidem*.

250 *Ibidem*.

251 Respectively ECtHR, Judgment, *Case of Prince Hans-Adam II of Liechtenstein v. Germany*, Application No. 42527/98, 12 July 2001; and, ICJ, *Case Concerning Certain Property* (Liechtenstein *v.* Germany), (*Preliminary Objections*), Judgment of 10 February 2005.

252 ICJ, *Case Concerning Certain Property* (Liechtenstein *v.* Germany), (Preliminary Objections), ICJ Reports 2005, p. 15, para. 17.

from individuals or national courts, wise as it is, is not of such rigidity as in practice to disable the Court from benefiting from other experience, particularly where specific guidance is lacking.[253] He referred to the general approach taken in the majority opinion of the ECtHR in the *Golder* case in which that Court had to construe the meaning to be given to Article 6(1) of the ECHR.[254] Aptly, Judge Shahabuddeen drew a parallel between the application of Article 6(1) to mean that without the right to institute proceedings in court the right conferred by that provision to a fair, public and expeditious judicial procedure would be devoid of substance and the application of Article VI, Section 22 of the General Convention to enable an expert to leave any Member State for the purpose of carrying out his mission even his presence in that State was for a purpose entirely unconnected with the mission.[255] Thus, it could be useful for the ICJ to resort to the practice of the ECtHR and *vice versa*, whenever they find it fit for resolving the cases brought before them. That would probably prove easier for the ICJ if both parties to a case came from the European continent and accepted the jurisdiction of the ECtHR.

## 5.7 THE ICJ AND THE I-ACTHR

Another regional human rights court that has contributed to the protection of human rights and its development is the Inter-American Court of Human Rights (I-ACtHR).[256] The Ninth International Conference of American States held in Bogotá, Colombia, in 1948, in its Resolution XXXI entitled 'Inter-American Court to Protect the Rights of Man,' considered that the protection of these rights 'should be guaranteed by a juridical organ, inasmuch as no right is genuinely assured unless it is safeguarded by a competent court,' and that 'where internationally recognized rights are concerned, juridical protection, to be effective, should emanate from an international organ.'[257] However, it was only in 1978 that the American Convention on Human Rights (AmCHR) was adopted and the Inter-American Court itself was established in 1980 when its Statute entered into force. Together with the Inter-American Commission on Human Rights (I-ACmHR or Commission) they form the human rights protection system of the Organization of the American States (OAS). During its early years, the

253 *Mazilu* case, Separate Opinion of Judge Shahabuddeen, ICJ Reports 1989, p. 220.

254 Article 6 (1) of the ECHR reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…'.

255 *Mazilu* case, Separate Opinion of Judge Shahabuddeen, ICJ Reports 1989, p. 221.

256 For a detailed study see *inter alia*: Harris and Livingstone (eds.), *The Inter-American System of Human Rights*, Clarendon Press: Oxford, 1998; J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, 2003. See also: *http://www.pict-pcti.org/courts/IACHR.html* (last accessed on 1 November 2007).

257 See *inter alia* J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, 2003. For general information on this court visit: *http://www1.umn.edu/humanrts/iachr/general.htm* and *http://www.corteidh.or.cr/historia.cfm* (last accessed on 1 November 2007).

Court's prospects for improving the human rights of the people of the Americas appeared uninspiring.[258] Besides surrounding initial scepticism, the I-ACmHR did not forward any contentious cases to the Court until 1986.[259] That initially hindered the I-ACtHR from actively fulfilling its role within the human rights protection system of the OAS. Since then, however, the I-ACtHR has issued a large number of judgments and advisory opinions.

### 5.7.1 The I-ACtHR in Brief

Similar to the ICJ and the ECtHR[260], the I-ACtHR has both contentious and advisory jurisdiction.[261] As regards its contentious or adjudicatory jurisdiction, only the Commission and the States Parties to the American Convention on Human Rights (AmCHR) are empowered to submit cases concerning the interpretation and application of the Convention. However, the procedures before the Commission called for under Articles 48-50 of the Convention must have been previously exhausted. This screening procedure should reduce the workload of the I-ACtHR and clarify the legal positions and the issues outstanding between the parties before they reach that court. Similar procedures which were in force for the European system for protecting human rights were abolished with Protocol 11 which replaced the part-time ECtHR and the ECmHR with a full-time court. The number of judges of the ECtHR is equal to the number of States parties to the ECHR,[262] thus being a multiple of the number of judges serving in the I-ACtHR, which is fixed to seven.[263] Further, compared with the ECtHR, its sister court, the I-ACtHR, seems to be at a disadvantage in terms of funding. Additionally, in order for a case against a State Party to be brought before the Inter-American Court, the State party must recognize the jurisdiction of the Court. This may be done by a declaration accepting the Court's jurisdiction in all cases or on the basis

258 Pasqualucci, *supra* note 256, p. 7.

259 The first judgment of the I-ACtHR was rendered on 21 July 1989 in the *Velásquez Rodríguez* case. Judge Buergenthal, who from March 2000 has been serving on the bench of the ICJ, was the presiding judge. The full case is available at: *http://www.corteidh.or.cr/index-ingles.html* under the heading Jurisprudence, then Decisions and Judgments. This case which was brought before the Inter-American Commission on Human Rights on 7 October 1981 was referred to the I-ACtHR only on 24 April 1986. See I-ACtHR, *Case of Velásquez Rodríguez v. Honduras*, (*Preliminary Objections*), Judgment of 26 June 1987, para. 1.

260 Protocol 2 to the ECHR bestows the ECtHR with an advisory opinion function. That was used only once so far by the Committee of Ministers of the Council of Europe. Its request of 9 January 2002 for an advisory opinion concerning 'the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights' was denied by the Grand Chamber of the ECtHR on 2 June 2004. For more details see the *Decision on the Competence of the Court to Give an Advisory Opinion*, of 2 June 2004, available at: *http://www.echr.coe.int/eng/Press/2004/June/DecisionAdvisoryOpinionrequest.htm* (last accessed on 1 November 2007).

261 On the advisory practice of the I-ACtHR see Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, AJIL, Vol. 79, 1985, pp. 1-27.

262 Currently 47 (the situation as of 1 November 2007).

263 Statute of the I-ACtHR, Article 4.

of reciprocity for a limited time or for a particular case.[264] To date, 25 States have accepted the jurisdiction of the I-ACtHR and only one of them has withdrawn from the AmCHR (in 1998).[265]

As regards the advisory function of the Court, Article 64 of the Convention provides that any member State of the OAS may consult the Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American States.[266] The AmCHR allows States to ask for an advisory opinion by the I-ACtHR, unlike the UN Charter that does not provide for that opportunity before the ICJ for its member States.[267] Further, the possibility to request an advisory opinion has also been given to organs of the OAS concerning issues within their sphere of influence.[268] The Court may also, at the request of any member State of the Organization, issue an opinion on the compatibility of any of its domestic laws with the aforementioned international instruments.[269] This gives the I-ACtHR the formal features of a regional constitutional court and also the possibility to act as such. At the beginning of its work, due to the lack of contentious cases, advisory opinions were the principal vehicle through which the Court could contribute to the American system of human rights protection and to the development of international human rights in general.[270] Thus, until the end of 2006 the I-ACtHR had issued 19 advisory opinions.[271] Twelve of them revolved around the interpretation of the AmCHR, four on the interpretation of other treaties, and three on the compatibility of domestic laws and international human rights instruments.[272]

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264 AmCHR, Article 62.

265 To date, twenty-five American nations have ratified or have adopted the Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Surinam, Trinidad and Tobago, Uruguay and Venezuela. Trinidad and Tobago denounced the American Convention on Human Rights by a communication addressed to the General Secretary of the OAS on May 26, 1998.

266 For the scope of the advisory opinions of the I-ACtHR under Article 64 of the AmCHR see '*Other Treaties*' *Subject to the Consultative Jurisdiction of the Court* (*Art. 64 American Convention on Human Rights*), Advisory Opinion OC-1/82 (requested by Peru), 24 September 1982.

267 *Ibid*., para. 15.

268 AmCHR, Article 64(1).

269 AmCHR, Article 64(2).

270 On the nature and scope of this advisory function see inter alia I-ACtHR, *Right to Information on Consular Assistance within the Framework of the Guarantees of Legal Due Process*, OC-16/99, Advisory Opinion of 1 October 1999, para. 64 and footnotes 54-57. There this court stated: 'In exercising its jurisdiction over this matter, the Court is mindful of the permissive scope of its advisory function, unique in contemporary international law, which enables it 'to perform a service for all of the members of the inter-American system and is designed to assist them in fulfilling their international human rights obligations' and:
'… to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.'

271 I-ACtHR, Annual Report 2006, p. 71.

272 On the application of international humanitarian law by the I-ACtHR see *inter alia* F. Martin, *Application du droit international humanitaire par la Cour interaméricaine des droits de l'homme*, IRRC, Vol. 83, No. 844, 2001, pp. 1037-1066.

Part of the contribution of the Inter-American Court to international human rights law made through these advisory opinions include a clarification along the same lines as the ICJ in the advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* that it shall interpret the AmCHR 'within the framework of the entire legal system prevailing at the time of the interpretation';[273] underscoring the principle that an effective and functioning democracy is the essential form of government for the protection and enforcement of human rights;[274] holding that even in time of emergency there are certain underogable rights such as *habeas corpus*, which 'performs a vital role in ensuring that a person's life and physical integrity are respected…and in protecting him against torture or cruel, inhumane, or degrading punishment or treatment';[275] asserting along the same lines as the European Court of Justice that it has the power to order States to adopt laws or amend and repeal laws, which are in conflict with the American Convention,[276] and so on.

Although over time State compliance with the I-ACtHR's decisions has improved, especially with regard to pecuniary damages, the investigation, prosecution and punishment of individuals responsible for those human rights violations remains unsatisfactory, in spite of the relevant orders issued by the Court. However, one can notice the rectifying effect the judgments and advisory opinions of the Court have on government behaviour,[277] the reliance of national courts on the case law of the I-ACtHR, and the domestic implementation of provisional measures and orders in contentious cases before the Court.[278] The culture of compliance with the judgments and the provisional measures of the Court has improved largely due to the diligence of the Inter-American Court and its practice of monitoring and reporting State compliance with its judgments and the implementation of provisional measures to the OAS General Assembly. Further, that effect was strengthened by the political changes which took place in the Americas after the end of the Cold War and the establishment of fledgling democratic regimes.

Allain has noted that '[T]he development of the Inter-American Commission and the financing of the Inter-American Court, demonstrate that while international adjudication may appear strong on paper, it can be very ineffective in practice.[279] As examples of the activity of other ICTs show, the effectiveness of such international judicial bodies depends mainly on State co-operation and the resources made available

273 See *supra* note 270, para. 113.

274 I-ACtHR, *Word 'Laws' in Article 30 of the American Convention on Human Rights*, OC-6/86, Advisory Opinion of 9 May 1986, para. 32.

275 I-ACtHR, *Judicial Guarantees in States of Emergency (Articles 27 (2), 25 and 8 of the American Convention on Human Rights)*, OC-9/87, Advisory Opinion of 6 October 1987, para. 35.

276 I-ACtHR, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/84, Advisory Opinion of 19 January 1984, para. 56.

277 J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, 2003, p. 334.

278 *Ibid*., pp. 337-340.

279 J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, T.M.C. Asser Press, 2000, p. 104.

to them. Further, international judicial bodies in the field of human rights and humanitarian law cannot replace democratic local authorities and rectify the lack of the rule of law and democratic institutions. If one is to take into account the financial difficulties and the non-friendly, if not at times hostile attitude encountered by the I-ACtHR, then the Court should be commended for what it has achieved under such unbecoming circumstances for a human rights court. Notwithstanding the aforementioned difficulties this Court has managed to make a substantial contribution to human rights protection in the Americas. Furthermore, the judgments and opinions it has rendered have contributed a great deal to the development of international human rights law in general.

### 5.7.2 The Case Law and the Relationship between the I-ACtHR and the ICJ

On several occasions the I-ACtHR has made reference to the jurisprudence of the ICJ. In the *Bámaca Velásquez* case, which arose as a result of the disappearance and death of Mr Velásquez, a Guatemalan national, Judge Cançado Trindade referred, in his separate opinion, to the ICJ's advisory opinion on Western Sahara so as to bolster his conclusion that respect for the dead is due in the persons of the living *titulaires* of rights and duties.[280] The same judge held in the *Caesar v. Trinidad and Tobago* case:

> International supervisory organs in the domain of human rights protection have in recent years disclosed their awareness – and, on some occasions, their determination – to the effect of preserving the integrity of human rights treaties. It may be recalled that, inspired in the criterion sustained by the International Court of Justice in its Advisory Opinion of 1951 on the *Reservations to the Convention against Genocide*, the present system of reservations set forth in the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, Articles 19-23), in joining the formulation of reservations to the acquiescence or the objections thereto for the determination of their compatibility with the object and purpose of the treaties, is of a markedly voluntarist and contractualist character.[281]

In this case brought against Trinidad and Tobago, this country decided not to appear before the Court. In referring to the jurisprudence of the ICJ, the I-ACtHR stated that 'international jurisprudence has recognized that the absence of one of the parties at any stage of the case, does not affect the validity of the judgment'.[282]

However, the most interesting case which put to the test the interrelationship between the ICJ and the I-ACtHR is that related to the issue of consular assistance. On 9 December 1997 Mexico requested the I-ACtHR for an advisory opinion on the issue

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280 I-ACtHR, *Bámaca Velásquez v. Guatemala*, Sep. op. of Judge Cançado Trindade, Judgment of 25 November 2000, p. 3-4. In affirming the right of the Sahrawis to self-determination the ICJ had pointed to one of the elements inherent in the culture of the nomad tribes of the Western Sahara, and precisely the cult of the memory of the dead. See *Western Sahara*, ICJ reports 1975, p. 41, para. 87.

281 I-ACtHR, *Caesar v. Trinidad and Tobago*, Sep. Op. of Judge Cançado Trindade, Judgment of 11 March 2005, para. 21, footnotes omitted.

282 *Ibid*., paras. 37-39.

of minimum judicial guarantees and the requirement of due process when a court imposes the death sentence on foreign nationals and the host State has not informed them of their right to communicate with and seek assistance from the consular authorities of the State of which they are nationals.[283] Paraguay seized the ICJ concerning a dispute with the US on the issue of consular assistance on behalf of its citizen Mr Breard on 3 April 1998.[284] Thus, the I-ACtHR had not yet rendered its advisory opinion by the time that the ICJ was seized of this contentious case. In its letter of 4 May 1998 to the I-ACtHR Paraguay noted that it had a case against the US pending before the ICJ.[285] On the other hand, the US in its brief of 1 June 1998 after having noted the global nature of the Vienna Convention on Consular Relations contended that there could be no differing interpretations of the States' obligations on a regional basis. Further, the US noted that 'prudence, if not considerations of comity, should lead [the] Court [i.e. the I-ACtHR] to defer its consideration of the pending request until the International Court had rendered its decision interpreting the obligations of States party to the Vienna Convention on Consular Relations'.[286] Another interesting argument was that Mexico's request was an attempt to subject the US to the contentious jurisdiction of the I-ACtHR, although the US was neither a party to the AmCHR nor had it accepted this court's contentious jurisdiction.[287] In the presentation before the Inter-American Court the US contended that 'an advisory opinion would create confusion, be detrimental to the legal positions of the parties and could create the risk of inconsistency between the findings of the Inter-American Court and those of the principal judicial organ of the United Nations. Moreover, the Inter-American Court's interpretation of a treaty to which a vast number of States outside the hemisphere are party could create problems elsewhere in the world.'[288]

In its brief of 18 May 1999 the US notified the I-ACtHR that Paraguay had withdrawn its case before the ICJ and that a similar case with Germany was still pending before the latter court.[289] The I-ACtHR noted that it was mindful of the contentious cases pending before the International Court of Justice concerning a(n) (OAS Member) State's alleged violation of Article 36 of the Vienna Convention on Consular Relations (the *Breard* and *La Grand* cases).[290] The I-ACtHR decided *proprio motu* to consider whether, under the rules of the American Convention, the fact that a contentious case is pending before another international court can be a factor in a decision to admit or

283 See *supra* note 270, para. 1.
284 ICJ, *Vienna Convention on Consular Relations* (Paraguay *v.* United States of America), Application of 3 April 1998, available at: *http://www.icj-cij.org/docket/files/99/7183.pdf* (last accessed on 1 November 2007).
285 See *supra* note 270, para. 26.
286 *Ibidem*.
287 *Ibidem*.
288 *Ibid*. para. 27.
289 *Ibid*., para. 28.
290 *Ibid*., para. 54.

decline a request for an advisory opinion.[291] Referring to Article 31 of the Vienna Convention on the Law of Treaties the I-ACtHR stated that the object and purpose of the American Convention is the effective protection of human rights. Hence, when interpreting that Convention the Court must do this in such a way that the system for the protection of human rights has all its appropriate effects *(effet utile)*.[292] Recalling that it was an 'autonomous judicial institution',[293] the I-ACtHR concluded that the interpretation of the American Convention and any 'other treaties concerning the protection of human rights in the American States' provides all the member States of the OAS and the principal organs of the inter-American system for the protection of human rights with guidance on relevant legal questions of the kind raised in this request.[294] The conclusions reached by the ICJ in the *LaGrand* case were largely comparable to those reached by the I-ACtHR.[295] However, it should be noted for the sake of clarity that the findings of the I-ACtHR are rather detailed and far-reaching if compared with those of the ICJ.[296] That is understandable bearing in mind that the I-ACtHR was rendering an advisory opinion as a human rights court, while the ICJ was settling inter-State disputes. However, on the whole, this is an example of when two different courts operating separately have arrived at comparable conclusions, albeit without referring to each other's case law.

### 5.7.3 Concluding Remarks

It is noteworthy that during its 74th Regular Session in early 2007, the I-ACtHR decided to change the format of its judgments thereby reducing the length of judgments so as to make them more accessible to the public, without compromising the analysis of the evidence and the allegations of the parties or limiting the relevant considerations of fact and law. A similar concern about making the judicial decisions of the ICJ more accessible to the public was also raised by the late Sir Robert Jennings in one of his last writings.[297] Indeed, as judgments of these ICTs are playing an

291 *Ibid*., para. 57.
292 *Ibid*., para. 58.
293 *Ibid*., para. 61 and footnote 51.
294 *Ibid*., para. 65.
295 ICJ, *LaGrand* case, pp. 514-516, para. 128 and I-ACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* OC-16/99, Advisory Opinion of 1 October 1999, para. 141.
296 For example on para. 141(2) the I-ACtHR held unanimously that Article 36 of the Vienna Convention on Consular Relations *concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law. In contrast, on para. 128(3) and (4) the ICJ found that the US was in breach of its obligations to Germany and to the LaGrand brothers for a failure to respect Article 36(1) of the Vienna Convention on Consular Relations. No explicit mention of human rights is made by the ICJ.
297 R. Jennings, General Introduction in *The Statute of the International Court of Justice: A Commentary*, A. Zimmermann *et al*. (eds.), Oxford University Press, Great Britain, 2006, p. 36, para. 136. See also *supra* note 270, para. 26.

increasingly important role in the domestic judicial sphere and in order to increase their appeal and usefulness it is necessary that they be made more accessible to the public. Thus they will not be the domain of only a limited number of specialists in the fields of international human rights and humanitarian law. The ICJ could probably benefit from the experience which shall be developed by the I-ACtHR in this regard. In any event such initiatives are indicative of a growing tendency towards increasing the level of communication between these international judicial bodies and the public at large by making their work more accessible and useful to a wider public.

While the I-ACtHR, like the ECtHR, has referred to the case law of the ICJ on several occasions, the opposite can be said of the ICJ, which has refrained from making any reference to the case law of the I-ACtHR. Besides other factors related to these courts different jurisdictions and the different ways cases are argued before them, the ICJ might also want to avoid any possible criticism of regional bias. The interrelationship between the I-ACtHR and the ICJ has been put to the test, though, unlike that with the other regional human rights court, the ECtHR. Thus, at the same time that the ICJ was seized of the *Breard* and *LaGrand* cases, the I-ACtHR was asked by Mexico to deliver an advisory opinion on the issue of consular assistance. Despite the request from the US not to render such an advisory opinion while contentious cases were pending before the ICJ, asserting its autonomy and its duty under the AmCHR, the I-ACtHR did decide to render this advisory opinion. With 162 judgments issued, 85 cases solved, 71 provisional measures indicated, and 19 advisory opinions in the limited time frame of 1979 to 2006 the balance sheet of the I-ACtHR seems rather impressive. However, as illustrated by the practice of both regional human rights courts, the American and the European, a regional human rights protection system cannot be effective without strengthening national systems for the promotion and protection of human rights and a strong commitment on the part of member States to the respective Conventions.

## 5.8 General Remarks

So far we have been exploring the relationship between the ICJ and a number of ICTs by looking at the judicial cross-fertilization which has taken place so far and, where applicable, any existing institutional relationship. The cases dealt with above show that despite there being no formal regulation as to the position of different international judicial bodies within the international legal system, the decisions of the ICJ essentially enjoy a privileged status in the case law of the ICTs. Noting this tendency, Judge Higgins, while addressing the GA in her capacity as President of the ICJ, stated:

> The authoritative nature of ICJ judgments is widely acknowledged. It has been gratifying for the International Court to see that these newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ with respect to questions of international law and procedure. Just in the past five years, the judgments and advisory opinions of the ICJ have been expressly cited with approval by the International Tribunal for the Law of the Sea, the European Court of Human Rights, the

> European Court of Justice, the United Nations Commission on Human Rights, the Inter-American Commission on Human Rights, the International Centre for Settlement of Investment Disputes, the International Criminal Tribunal for the former Yugoslavia, and arbitral bodies including the Eritrea-Ethiopia Claims Commission. The International Court, for its part, has been following the work of these other international bodies closely.[298]

Indeed, the ICTs on their own initiative have acknowledged the importance of the decisions of the ICJ by relying upon them in their own case law. Further, the initial fear concerning the possible risks regarding the fragmentation of international law, which the establishment of these international or hybrid judicial bodies would bring about, has been substituted with a certain optimism and understanding that this phenomenon will be more beneficial than detrimental to the international legal system and ultimately to the international rule of law.

Fears of the fragmentation of international law were downplayed by both Higgins and Pocar, the respective presidents of the ICJ and the ICTY.[299] Thus, Higgins noted that the so-called 'fragmentation of international law' is best avoided by regular dialogue between courts and exchanges of information. In her view, some differences of perception between the ICJ and the ICTY on the issue of the control test were readily understandable and hardly constituted a drama.[300] On his part, Pocar noted that the resulting debates concerning substantive case law only served to ensure a more robust development of these areas of law through the contribution of the institutions themselves as well as of interested learned commentators. Further, he stated that it was in any event too soon to draw any final conclusion on the negative consequences that such 'fragmentation' could entail.

Close cooperation between different international judicial bodies operating in the fields of international human rights and humanitarian law is rather important as, ultimately, any fragmentation in this respect could have negative consequences for the international level of protection accruing to individuals around the globe. The creation of detailed programmes of cooperation between the ICJ and other international judicial bodies is an important step towards preventing, or at least minimizing the unwarranted effects of such a phenomenon. In contrast, the joint efforts and the consistent practice of these international judicial bodies can significantly enhance the effectiveness of the international system of human rights protection.

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298 Speech by H.E. Judge R. Higgins, President of the ICJ, to the GA of the UN, 26 October 2006, available at: *http://www.icj-cij.org/court/index.php?pr=1874&pt=3&p1=1&p2=3&p3=1* (last accessed on 1 November 2007).

299 See respectively the Speech by H.E. Judge R. Higgins, President of the ICJ, at the Meeting of Legal Advisers of the Ministries of Foreign Affairs, 29 October 2007, available at: *http://www.icj-cij.org/presscom/files/7/14097.pdf* (last accessed on 1 November 2007) and the Address by Tribunal President Fausto Pocar at the Meeting of Legal Advisers of the Ministries of Foreign Affairs, 29 October 2007, available at: *http://www.un.org/icty/pressreal/2007/pr1194e-annex.htm* (last accessed on 1 November 2007).

300 For the control test controversy see above sections 5.4.1.1 and 5.4.1.6 and the speech by Judge Higgins, *supra* note 299.

Chapter 5

# PART III RELATIONSHIP BETWEEN THE ICJ AND THE INTERNATIONAL QUASI-JUDICIAL BODIES (IQJBS)

## 5.9 THE ICJ AND THE INTERNATIONAL QUASI-JUDICIAL BODIES (IQJBS)

Besides the Charter-based bodies, the 'special procedures' and the various ICTs, another important constitutive element of the international system of human rights protection is undoubtedly the in-built monitoring system contained in the main international human rights treaties. Because of the peculiar role of the treaty-monitoring bodies within this protection system, which extends further than just monitoring but stops short of being genuinely judicial, they shall be referred to as quasi-judicial bodies (IQJBs). Not all issues related to respect for international human rights and humanitarian law, or the lack thereof, come before the ICJ or other ICTs, as judicial settlement is usually a means of last resort. Thus, in assessing the system of human rights protection and the ICJ's place therein, it is both befitting and necessary that besides the ICTs one also includes the IQJBs operating in the fields of international human rights and humanitarian law. The existence of these non-judicial dispute-resolving mechanisms is as important on an international level as it is on a domestic level, not only for adding more venues for individuals to bring their complaints, but also for a potential lessening of the caseload of the ICTs.

The list of IQJBs operating in the field of the protection and promotion of international human rights and humanitarian law is rather extensive and one can list here besides the seven main international treaty-monitoring bodies also some important regional ones, such as the European Commission on Human Rights (ECmHR, now defunct), the Inter-American Commission on Human Rights (I-ACmHR) and the African Commission on Human Rights (AfCmHR). In order to limit the number of institutions selected for the purpose of this analysis only the Human Rights Committee (HRCm) – the treaty-monitoring body of the ICCPR – and the International Committee of the Red Cross (ICRC) are dealt with. However, it should be noted beforehand that the ICRC has more the features of a mediating-type body and is not a body of a quasi-judicial nature. In any case, these two bodies are widely considered as representative in their respective fields of activity: the first on international human rights law and the second on international humanitarian law. Furthermore, choosing these two bodies is also in line with the focus of this study as in its case law the ICJ has referred *inter alia* to the respective practice and position of these two bodies in deciding on certain legal issues. Thus, the ICJ being the main focus of our study, this other link is another reason why these two bodies were selected among the considerable number of IQJBs.

While international instruments in the field of human rights tend to be open and to a certain extent vague, in practice this level of abstraction has been mitigated by decades of international human rights practice, governing treaty body jurisprudence and general comments that assist in elucidating the full meaning of various treaty

provisions.[301] This invaluable work that has been done over decades, part of the *acquis communautaire internationale*, could and has indeed been used by the ICJ and other ICTs in the course of their work. The possibilities for cross-fertilization and a clear view of the role that each of them has to play as part of a complex international system of human rights protection are the considerations upon which this section is based.

### 5.9.1 The ICJ and the Human Rights Committee (HRCm)

Given the importance of both the ICJ and the HRCm with regard to promoting and ensuring respect for human rights it is only proper to devote some attention to their relationship. Despite their different nature and their specific roles, they have occasionally made reference to each other's practice and position on matters of law. Before dealing concretely with the relationship between the ICJ and the HRCm, a brief overview of the UN system of human rights promotion and protection is given. That is necessary to create a better understanding of the place of the HRCm within this system, especially in view of the latest changes to this system.

*A) Brief Overview of the UN System of Human Rights Promotion and Protection*

The UN Charter imposes upon the UN as an organization and upon its member States the duty to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.[302] The UN system for the promotion and protection of human rights is mainly organized in two types of organs: the Charter-based organs, including the Commission on Human Rights (CHR), whose function was recently taken over by the Human Rights Council (HRCn),[303] and the treaty-monitoring organs, or bodies established under the international human rights treaties.[304] Before turning to the HRCm, which is a treaty-monitoring body, it should be noted briefly that the activity of the Charter-based bodies in the area of human rights was largely based on the CHR, which was created by the Economic and Social Council (ECOSOC) under Article 68 of the UN Charter. The Commission's work took three distinct forms: standard-setting, promotional activities, monitoring and enforcement, with each predominating for a time.[305] The work of the Commission is based on

301 Report of the Roundtable of the International Committee of Jurists on the Draft Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights, 2001, Geneva, Switzerland, p. 4, available at: *http://www.icj.org/IMG/pdf/doc-55.pdf* (last accessed on 1 November 2007).

302 See Articles 1(3), 55 and 56 of the UN Charter.

303 On 27 March 2006 the Commission on Human Rights held its sixty-second and last session. This body was replaced by the Human Rights Council (HRCn) created under GA resolution A/Res/60/251 of 15 March 2006.

304 For more information visit: *http://www.ohchr.org/english/bodies/index.htm* (last accessed on 1 November 2007).

305 D.J. Harris, *Cases and Materials on International Law*, 5th edition, Sweet & Maxwell, 1998, p. 628.

resolutions 1235[306] and 1503[307] of the ECOSOC. The public procedure of investigating allegations of human rights violations under resolution 1235 has been complemented by the confidential procedure established under resolution 1503.

A large part of the CHR's work consisted of addressing either specific country situations or thematic issues in all parts of the world. Furthermore, not having legally binding sanctions available, its powers were limited to persuasion, public criticism, or attempts at isolating the offending state. While the work of the Commission has distinguished value with regard to standard-setting, monitoring and enforcement of human rights norms, the underlying political considerations which influenced its work seriously damaged its reputation and led to its demise. Besides the 1235 and 1503 procedures, other procedures devised by the CHR are the 'special procedures' which were assumed by its successor, the HRCn. These 'special procedures' are the mechanisms adopted to address either specific country situations or thematic issues in all parts of the world.[308] At present there are 28 thematic and 13 country-specific mandates.[309] A special procedure is either an individual person, usually called a special rapporteur, or a working group of five individuals established by the UN to monitor key human rights situations, to submit reports on these situations, to communicate with the relevant authorities to protect the rights of the victims, and to activate the world community to address pressing human rights concerns.[310] These 'special procedures' are indeed an important mechanism for the promotion and protection of human rights and the ICJ has clarified on several occasions the rights and duties of individuals entrusted with such missions.

In order to increase the effectiveness of the international protection and promotion of human rights in the Vienna Conference on Human Rights held in 1993 the post of UN High Commissioner for Human Rights was established. His/her responsibilities are generally phrased and include the following:

a) To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;

b) To carry out the tasks assigned to him/her by the competent bodies of the United Nations system in the field of human rights and to make recommendations to them with a view to improving the promotion and protection of all human rights;

306 E.S.C.O.R., 42nd Sess., Supp.1, 1967.

307 E.S.C.O.R., 48th Sess., Sup. 1A, 1970.

308 For more information visit: *http://www.ohchr.org/english/bodies/chr/special/index.htm* (last accessed on 1 November 2007)

309 On the issue of thematic procedures see *inter alia* J. Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: in Search of a Sense of Community*, School of Human Rights Research Series, Vol. 21, Intersentia, 2006..

310 See the Statement of Vitit Muntarbhorn, Chairperson of the Coordination Committee of Special Procedures, Human Rights Council, Second Session, Geneva, 26 September 2006, available at: *http://www.ohchr.org/english/bodies/chr/special/index.htm* (last accessed on 1 November 2007).

c) To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world, as reflected in the Vienna Declaration and Programme of Action.

The establishment of this Office was necessary for strengthening and streamlining the work of the UN agencies in the field of human rights.[311] That seems to be even more necessary in view of the fragmentation of the UN system for protecting human rights.

*B) The ICJ and the Human Rights Committee (HRCm)*

The HRCm is one of the seven main human rights treaty-monitoring bodies.[312] In addition to the reporting procedure of States with regard to the implementation of the ICCPR and the inter-State complaints procedure provided for in the ICCPR,[313] the First Optional Protocol to the ICCPR gives the Committee the right to examine individual complaints.[314] Besides evaluating State reports and dealing with individual complaints, in the course of its duty the Committee has issued a large number of General Comments.[315] The interaction between the ICJ and the HRCm is marked by a shifting attitude by the ICJ from possibly deliberate omission towards consideration and endorsement of the position of the HRCm in its judgments or advisory opinions. For the first time the Court was requested to pass judgment on whether the protection of the right to life as provided for under the ICCPR could be seen as prohibiting the threat or use of nuclear weapons.[316] In that advisory opinion the ICJ omitted any reference to a General Comment issued by the HRCm on nuclear weapons and the right to life.[317] Without going into whether the HRCm was acting within the purview of its mandate in issuing this general comment and the legal force it carries, one cannot but commend

311 For more information visit: *http://www.ohchr.org/english/about/index.htm* (last accessed on 1 November 2007).

312 The HRCm operates alongside a number of other treaty-monitoring bodies, namely: CmESCR, CmERD, CmEDAW, CmAT, CmRC, CmMW.

313 Respectively Articles 40 and 41 of the ICCPR.

314 The First Optional Protocol to the ICCPR was adopted by GA Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976.

315 Until now the Committee has issued 31 General Comments on different human rights issues. For the full text of these comments visit: *http://www.ohchr.org/english/bodies/hrc/comments.htm* (last accessed on 1 November 2007).

316 ICJ, *Legality* of *the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 240, para. 25. There the Court stated: '[t]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.'

317 HRCm, General Comment 14, *Nuclear Weapons and the Right to Life*, CCPR 09/11/84, 1984.

the course of action taken by the ICJ in making some of the important points brought up by the HRCm, albeit without endorsing the latter's proposal that the production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

It is noteworthy that over time the ICJ has adopted a more open approach towards the work of the HRCm. Thus, in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the Court in coming to its finding that human rights instruments in general and the ICCPR in particular were applicable in the Occupied Palestinian Territory (OPT), as a territory where Israel exercised jurisdiction, found support *inter alia* also in the practice of the HRCm.[318] This approach of the Court where due attention is paid to the activity of the HRCm whenever issues related to the interpretation of the ICCPR are under consideration is commendable and should be followed. The HRCm has also made use of concepts formulated by the ICJ. Thus, in General Comment 31 on 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' in 2004, the HRCm, based upon the concept of *erga omnes* obligations, emphasized that 'to draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.'[319] Further, the HRCm applied the 'object and purpose test' as laid down by the ICJ in the advisory opinion in the *Reservations to the Genocide Convention* to conclude in its General Comment 24 that *inter alia* 'a State could not make a reservation to article 2, paragraph 3, of the Covenant, indicating that it intends to provide no remedies for human rights violations' and that 'a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty'.[320]

However, it should be noted here that while some of these General Comments as explained above have been based on established case law of the ICJ or principles which have become part of customary international law some of these comments break new ground. An exemplary case is General Comment 26 on the continuity of obliga-

318 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 179, para. 109. The Court stated: 'The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos* v. *Uruguay;* case No. 56/79, *Lilian Celiherti de Cusariego* v. *Uruguay).* It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106181, *Montero* v. *Uruguay).* The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument.'

319 HRCm, *CCPR/C/21/Rev.1/Add.13. (General Comments*), General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004.

320 HRCm, *CCPR/C/21/Rev.1/Add.6*, General Comment 24, *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 1994.

tions, where the HRCm on the basis of the fact that the ICCPR does not contain any provision about its termination, denunciation, or withdrawal, concluded on the basis of applicable rules of customary law as reflected in the Vienna Convention on the Law of the Treaties that 'international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it'.[321]

*C) Concluding Remarks*

The relationship between the ICJ and the HRCm is one of cross-fertilization. Thus, the ICJ has made reference to the HRCm's position with regard to the applicability of the ICCPR in the Occupied Palestinian Territory, while the HRCm has sought support for its position on certain legal issues in the case law and position adopted by the ICJ. It should also be mentioned that certain members of the ICJ have also been members of the HRCm, or have a human rights background.[322] An example of an important issue directly related to the enjoyment of protection for individuals under this Convention which the ICJ and more extensively the HRCm have touched upon has been the application of Article 4 of the ICCPR providing for derogations under the Convention. For the ICJ the protection offered by human rights conventions does not cease in the 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.[323] In its General Comment on the issue of derogations during emergency situations the HRCm stated:

> During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances.[324]

In order to prevent any misinterpretations or lessening of the level of protection for individuals accruing to them under rules of international humanitarian law the HRCm added:

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321 HRCm, *CCPR/C/21/Rev.1/Add.8/Rev.1*, General Comment 26, *Continuity of Obligations*, 1997.

322 Judge Rosalyn Higgins served in the HRCm from 1984-1995. Judge Thomas Buergenthal was a member of the HRCm from 1995-1999. Others, such as Judge Kooijmans and Judge Awn Shawkat Al-Khasawneh, have been Special Rapporteurs of the Commission on Human Rights respectively on the question of torture and on the human rights dimensions of forcible population transfer. Judge Simma has been a member of the ECOSOC (1987-1996).

323 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 178, para. 106.

324 HRCm, CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3.

> Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.[325]

Finding support in rules of international humanitarian law the HRCm stated that 'As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations.'[326] Obviously, the HRCm took great care not to diminish the general level of protection for human rights while making ample use of the rules of international humanitarian law.

The interaction between the ICJ and the HRCm assists the further development of the international human rights protection system. While it remains to be seen how cooperation and the streamlining of the work of the main treaty-monitoring bodies, of the Charter-based Human Rights Council, and that of the UN High Commissioner for Human Rights shall be improved in view of the proposed UN reforms which are underway, depending on the level of reorganization the interaction between the HRCm and the ICJ could also be reinvented to a certain extent. To that end, it should be made possible for the HRCm to ask the ICJ for an advisory opinion, either directly, or through another UN organ, on a certain issue they would be considering while working on a General Comment. That approach is conducive to keeping the fabric of international law together instead of developing different standards that could have a disruptive effect for the international legal order.

### 5.9.2 The ICJ and the International Committee of the Red Cross (ICRC)

While the jurisdiction of the ICJ encompasses *inter alia* also the application of international human rights instruments, the ICRC's work and mission focuses on international human rights law. Hence, the central role that the ICRC plays with regard to international humanitarian law calls for a closer look at the relationship between the ICJ and the ICRC. The brief overview of the activity and the mission of the ICRC is followed by a detailed discussion of the case law of the ICJ referring to the work of the ICRC. Part of our analysis is also the ICRC Study and the effect of the ICJ on this study and vice versa. Some remarks will conclude our analysis of the relationship between the ICJ and the ICRC.

325 *Ibid*., para. 9.
326 *Ibid*., para. 16.

### *A) Brief Overview of the ICRC*

Founded in 1863 the ICRC developed over the years into the leading body of international humanitarian law which is entrusted under the Geneva Conventions (GCs) and their Additional Protocols with the humanitarian functions of rendering protection and assistance to the victims of armed conflicts.[327] In accordance with the mandate conferred upon it by the international community, the ICRC strives to promote compliance with IHL and to contribute to its development.[328] The fundamental principles of the ICRC, shared among all the members of the Red Cross and Red Crescent Movement, are those of humanity, impartiality, neutrality, independence, voluntary service, unity and universality.[329] Part of the contribution of the ICRC to promoting and ensuring respect for IHL are its activities in promoting the universality of IHL instruments and their national implementation. With the accession of Montenegro and Nauru to the 1949 GCs the number of member States rose to 194 thus marking the first time in modern history that an international treaty has achieved universal acceptance.[330]

The primary aim of the ICRC's activities is to promote IHL, to stress the relevance of its provisions in contemporary armed conflicts, and to explain its own specific role in the field of IHL.[331] Through its expert meetings the ICRC has tried to explore a number of delicate legal issues which are in need of further clarification such as that of direct participation in hostilities, air and missile warfare, private military and security companies and so on.[332] Furthermore, the ICRC also contributed to the deliberations of the UN Human Rights Council (and earlier to those of the UN Commission on Human Rights) and participated in the negotiations which led to the adoption of the UN Convention for the Protection of All Persons from Enforced Disappearances.[333] Another important contribution by the ICRC is its efforts towards clarifying the interplay between IHL and human rights law in protecting victims of violence. Although the ICRC is not a quasi-judicial body, in view of its central role with regard to the promotion and the development of international humanitarian law it is proper to include it in this research. Another important reason for including it is the relationship between the ICJ and the ICRC in light of the ICJ's decisions which refer to the work of the latter and the ICRC's Study on Customary International Humanitarian Law (ICRC Study) which finds support in the case law of the ICJ. Certainly, the important contribution of the ICRC to interpreting and developing IHL

327 See *inter alia* F. Bugnion, *The International Committee of the Red Cross and the Protection of war victims*, ICRC &MacMillan, 2003.

328 ICRC, Annual Report 2006, p. 38. On the ICRC mandate, structure and history see *http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/icrc?OpenDocument* (last accessed on 1 November 2007).

329 See *inter alia*: *The Fundamental Principles of the Red Cross and Red Crescent*, ICRC, Geneva, 1996, 2nd edition.

330 *Ibid*., p. 39.

331 *Ibid*., p. 39.

332 For more details see the ICRC Annual Report 2006, pp. 39-40.

333 GA Resolution 61/177 of 20 December 2007 (adopted without a vote).

could not go unnoticed by the ICJ and *vice versa*. The relationship between the ICJ and the ICRC is explored below by looking at the relevant ICJ case law and the ICRC Study on Customary International Humanitarian Law.

*B) Case law of the ICJ Relating to the ICRC*

Bearing in mind the central role with which the ICRC has been entrusted by the international community as far as IHL is concerned, it is not surprising that in its case law the ICJ has devoted appropriate attention to the position of the ICRC on different IHL issues with which the Court was faced. The aid provided to the *contras* by the US was a contentious issue between the parties in the *Nicaragua* case, with Nicaragua contending that this aid constituted a breach of the principle of non-intervention and the US contending that this was nothing more than humanitarian aid.[334] In determining whether aid could be qualified as 'humanitarian assistance' the Court stated that the characteristics of such aid to be qualified as such were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross.[335] Reference to this event and the Court's reliance on the principles enunciated by the Red Cross therein, permeated in their entirety by the principle of humanity, besides the Court's awareness of the ICRC's work, also shows the high regard of the Court for the ICRC's conclusions.

More recently, in considering whether GC IV was applicable in the Occupied Palestinian Territory (OPT) the Court observed that the ICRC, whose special position with respect to the execution of the Fourth Geneva Convention must be 'recognized and respected at al1 times' by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention.[336] Further, it made reference to a declaration of 5 December 2001 by the ICRC, where the latter had stated that 'the ICRC has always affirmed the *de jure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem'.[337] This statement of the Court is rather important in that it emphasizes the special position of the ICRC with respect to the execution of one of the main instruments of international humanitarian law, and understandably of the other GCs. Thus, again, the position of the ICRC on the applicability of GC IV in the OPT was utilised by the Court in supporting its own finding in this case.

334 *Nicaragua* case, (*Merits*), ICJ Reports 1986, pp. 57-58, paras. 97-98 and pp. 124-125, paras. 242-243.

335 *Ibid*., pp. 124-5, para. 242. In paragraph 243 (p. 125) the Court summarized its position, strongly based on the principles of the Red Cross, as follows:
a) humanitarian assistance should be aimed at preventing and alleviating human suffering;
b) at protecting life and health and respect for human life; and
c) be given without discrimination to all in need.

336 *Wall*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, pp. 175-6, para. 97.

337 *Ibidem*.

### *C) The ICJ and the ICRC Study*

An interesting possibility of interaction between the ICRC and the ICJ has arisen in view of the ICRC study on customary international humanitarian law.[338] To start with, the approach taken by the ICRC in determining whether a certain rule had evolved into becoming part of customary international (humanitarian) law followed the standard set by the ICJ in a number of cases, and especially in the *North Sea Continental Shelf* cases.[339] Further, this study cited the case law of the ICJ in supporting its conclusion expressed in Rule 1, namely the principle of a distinction between civilians and combatants.[340] The case law of the ICJ was cited in support of Rule 7 on the distinction between civilian objects and military objectives;[341] on Rule 12 on indiscriminate attacks;[342] on Rule 14 dealing with proportionality in attack the study cited the submissions made by States to the ICJ and the position taken by the latter acknowledging the applicability of the principle of proportionality and stating that 'respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality';[343] Rules 43-45 on the protection of the natural environment;[344] and so on. The findings of the ICJ were also used in support of Rule 70 stating that 'The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited'.[345] Indeed, in the *Nuclear Weapons* advisory opinion the Court, while acknowledging the prohibition of causing unnecessary suffering on combatants as one of the cardinal principles of international humanitarian law, held that in the application of this principle States do not have unlimited freedom of choice of means in the weapons they use.[346] Further, also Rule 72 on the prohibition of the use of poison or poisoned weapons found support in a finding of the Court reaffirming the customary character of this prohibition.[347]

As expected, the prohibition on murdering civilians and persons *hors de combat* was identified by the ICRC study as being of a customary character.[348] Support for this conclusion was found in numerous military manuals, domestic legislation, interna-

338 J-M. Henckaerts & L. Doswald-Beck, ICRC, *Customary International Humanitarian Law*, Cambridge University Press, 2005.
339 Henckaerts & Doswald-Beck, p. xxxii, footnote omitted.
340 Henckaerts & Doswald-Beck, pp. 5-8.
341 Henckaerts & Doswald-Beck, p. 26 and 28.
342 Henckaerts & Doswald-Beck, p. 42.
343 Henckaerts & Doswald-Beck, p. 48, footnote omitted.
344 Henckaerts & Doswald-Beck, pp. 144-154. Reference was made there to the *Nuclear Weapons* case, the *Nuclear Weapons (WHO)* case and the *Nuclear Tests* case.
345 Henckaerts & Doswald-Beck, Chapter 20 'General Principles on the Use of Weapons', pp. 237-250
346 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 257, para. 78.
347 Henckaerts & Doswald-Beck, pp. 251-254 and paras. 54-55 of the advisory opinion on *Nuclear Weapons*, *supra* note 345, p. 248.
348 Henckaerts & Doswald-Beck, Rule 89, pp. 311-314.

tional instruments, and domestic and international case law. Certainly, the practice of the ICJ and State submissions to this Court in this regard were cited in the study. Moreover, attention was devoted to the same prohibition under international human rights instruments, where a somewhat different terminology is used, namely 'arbitrary deprivation of the right to life'.[349] In considering what would constitute an arbitrary deprivation of the right to life the ICJ has clarified that 'the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities'.[350] Thus, the assessment of whether a violation of the right to life has occurred during the conducting of hostilities would need to be based on principles and rules of international humanitarian law.

Surprisingly, this study offers no clarification as to what constitutes humanitarian aid (relief) in that part of the study dealing with access to humanitarian relief.[351] That is an issue which the ICJ clarified in the *Nicaragua* case by drawing on the principles declared at the Twentieth International Conference of the ICRC itself.[352] Another instance where no reference was made to the case law of the ICJ is with regard to the prohibition of slavery as a norm with a customary character. In its famous *dictum* in the *Barcelona Traction* case the Court found that protection from slavery as a principle concerning basic rights of the human person engendered obligations *erga omnes*.[353] That finding of the Court can be construed as supportive of the customary character of the principle of the prohibition of slavery. As one would expect, criticism has been raised in connection with the methodology and other aspects of the study.[354] However, in view of the fact that there are a plethora of international humanitarian law instruments, some of which are not widely ratified, the ICRC study provides a long list of customary rules binding upon States even in the absence of treaty obligations. That surely enhances the protection accruing to individuals under international humanitarian law, while at the same time creating a body of rules which could be used in the prosecution of perpetrators of war crimes. At the very least, this study offers a significant and substantial platform for further discussion and development of international humanitarian law rules.

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349 *Ibid*., pp. 313-314.

350 ICJ *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 240, para. 25.

351 Henckaerts & Doswald-Beck, pp. 193-202. Chapter 17 entitled 'Starvation and Access to Humanitarian Relief'. This issue could have been discussed under Rule 55, *Right of the civilian population to receive humanitarian relief*, pp 199-200 where coincidentally reference is made to the Nicaraguan Military Manual and to an international conference of the Red Cross, namely the 26th.

352 See *supra*, note 291-292, *Nicaragua* case.

353 *Barcelona Traction*, (*Merits*), ICJ Reports 1970, p. 32, paras. 33-34.

354 See *inter alia* L. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law*, Duke Journal of Comparative and International Law (DJCIL), Vol. 17, No. 1, 2006, pp. 223-252; of specific interest is also the US Initial Reaction to the ICRC Study, available at: http://www.defenselink.mil/home/pdf/Customary_International_Humanitiarian_Law.pdf (last accessed 1 November 2007).

Given that the ICRC study was completed in 2004 the subsequent judgments of the ICJ, especially the one in the *Armed Activities* case and the recent one on the *Application of the Genocide Convention*, as well as the advisory opinion on the *Legal Consequences of the Building of a Wall in the Occupied Palestinian Territory* could not be taken into consideration. The findings by the Court provide further support for some of the conclusions of this study. That would at least partially address certain concerns raised as to whether the authors of this study have proffered sufficient facts and evidence to support these rules. Accordingly, Rule 51 prohibiting destruction and seizure of property in occupied territory except where destruction or seizure of such property is required by imperative military necessity finds support in this advisory opinion. Another Rule which has been identified as being of a customary nature is Rule 130 stating that 'States may not deport or transfer parts of their own civilian population into a territory they occupy.'[355] Rules 136 and 137 of the Study, respectively on the prohibition on the recruitment of children in armed forces or armed groups and the prohibition on the participation of children in hostilities find support in the ICJ's case on *Armed Activities*. There the Court found the DRC to be in breach of Article 38, paragraphs 2 and 3, of the CRC.[356]

Rules 149 and 150 of this Study on the issues of State responsibility and reparations for violations of international humanitarian law seem to find ample support in the Court's recent case law.[357] Thus, in the advisory opinion on the *Wall* the Court, having found the State of Israel responsible for breaches of international humanitarian law,[358] held that it was under an obligation to make reparation for the damage caused to all the natural or legal persons affected by the construction of the wall in the Occupied

355 Henckaerts & Doswald-Beck, pp. 462-463; *Wall*, paras. 135 and 137.

356 Article 38(2) and (3) of the CRC read:
(2) State Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
(3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are the oldest.
For the relevant findings of the Court see *Armed Activities* (*DRC v. Uganda*), Judgment of 19 December 2005, paras. 210-211, 217 and 219

357 Henckaerts & Doswald-Beck, pp. 530-550. Here both the advisory opinion on the *Wall* and the *Armed Activities* case are relevant. Rule 149 reads: 'A State is Responsible for violations of international humanitarian law attributable to it, including:
(a) violations committed by its organs, including its armed forces;
(b) violations committed by persons or entities it empowered to exercise elements of governmental authority;
(c) violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and
(d) violations committed by private persons or groups which it acknowledges and adopts as its own conduct.'
Rule 150 reads: 'A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.'

358 *Wall*, Advisory Opinion of 9 July 2004, paras. 123-126, 149-153, 155, and 157-158.

Palestinian Territory.[359] Further, in the *Armed Activities* case, Uganda was not only found to be responsible for violations of international humanitarian law by its armed forces, but also, as expected, was found to be under the ensuing obligation to make reparations for the injury caused.[360] The obligation to make full reparation is a general obligation for a State found to be responsible for the commission of an internationally wrongful act. That general principle was laid down by the predecessor of the ICJ, the PCIJ, in its *Chorzów Factory* case. In its commentary to Article 33 of the then Draft Articles on State Responsibility the ILC stated that when an obligation of reparation exists towards a State, the reparation does not necessarily accrue to that State's benefit.[361] In the same vein the ICRC Study also points at an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State.[362] The findings of the Court in the above-mentioned cases render support for these identified rules on State responsibility and reparations. The judgment of the ICJ on the *Application of the Genocide Convention* case seems to lend support to the conclusion of this Study on Rule 158 stating that 'States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.'[363] Along these lines, Serbia was found to be in breach of similar obligations flowing from the Genocide Convention.[364] Admittedly, a similar

359 *Ibid*., Article 152 reads: 'given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia,* entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to al1 the natural or legal persons concerned.'

360 *Armed Activities* case (DRC *v*. Uganda), Judgment of 19 December 2005, paras. 213-214, 219 and 345(3). On the issue of reparations see paragraph 345(5) and (6) of the judgment. It is noteworthy to quote here paragraph 219 of the judgment: '[t]he Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF (see paragraphs 206-211 above) are in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law.'

361 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2003, p. 209. The ILC stated that 'a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.' Reference was made by the ILC to the ICJ's finding in the *LaGrand* case.

362 Henckaerts & Doswald-Beck, p. 541.

363 Henckaerts & Doswald-Beck, pp. 607-610.

364 *Application of the Genocide Convention*, Judgment of 26 February 2007), para. 471(8). In the *dispositif* the Court stated: 'Serbia shall immediately take effective steps to ensure full compliance with its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide as defined by Article II of the Convention, or any of the other acts proscribed by Article III of the Convention, and to transfer individuals accused of genocide or any of those other acts for trial by the International Criminal Tribunal for the former Yugoslavia, and to co-operate fully with that Tribunal.'

obligation as that incumbent upon States with regard to the Genocide Convention has been undertaken by States parties to the Geneva Conventions.

An update of this study at a later stage would necessarily have to incorporate the relevant case law of the ICJ wherever it serves to further substantiate its conclusions. From the examples mentioned above it can be concluded that the ICJ and the ICRC not only are aware of each other's work, but also use their respective practice and work in substantiating their respective positions on different issues of international humanitarian law. Further, the decision of the ICRC not to engage itself in answering the question of the legality of the threat or use of nuclear weapons which was brought before the ICJ, the latter being the principal judicial organ of the UN, shows the necessary comity and deference based on a sound understanding of the respective roles these international bodies have to play in the field of international humanitarian law.[365]

*D) Concluding Remarks*

The interaction between the ICJ and the ICRC has covered different issues of international humanitarian law and has taken different forms. To that extent it has been beneficial to the work of these bodies themselves and ultimately to the further interpretation and development of international humanitarian law rules and principles. Indeed, for the ICJ to discuss issues of humanitarian law without making reference to the work of the ICRC would be like staging Hamlet without the prince.[366] Conversely, a study on the customary nature of certain international humanitarian law principles like that undertaken by the ICRC would be seriously flawed if it were not based *inter alia* on the case law of the ICJ. That central role in promoting compliance with international humanitarian law and in contributing to its further development, with which the ICRC has been vested, has often been given the judicial imprimatur of the ICJ. In this respect it can be said that the roles and the contribution of these two international bodies to the interpretation and development of international humanitarian law are complementary.

365 Henckaerts & Doswald-Beck, p. 255.

366 I should acknowledge the borrowing of this expression from Judge Koroma during a meeting at the Peace Palace on 29 June 2007.

# PART IV RELATIONSHIP BETWEEN THE ICJ AND INTERNATIONAL COURTS AND TRIBUNALS, AS WELL AS QUASI-JUDICIAL BODIES IN THE FIELDS OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

## 5.10 APPRAISAL AND RECOMMENDATIONS

Although its conceptual roots reach far back in history, the process of the 'proliferation' of international courts and tribunals is a fairly recent phenomenon which has mainly taken place in the last two decades. The establishment of the main human rights monitoring bodies, on the other hand, is a longer process, starting in 1965 with the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[367] Despite expressed suspicions and scepticism with regard to this process of the multiplication of international judicial bodies, the late Sir Jennings gave a rather succinct explanation of this process:

> [B]y and large, these institutions exist because they fulfil a need that can only be served internationally. They are symptoms of the ever-growing importance and complexity of the interdependent aspects of the society of States. They bear witness to the extent to which, especially in quite recent years, international law and regulation have encroached upon what used to be regarded as purely domestic aspects of the day-to-day work and responsibilities of governments.[368]

Thus, the international community's search for accountability for internationally organized crimes, favoured by a different political environment after the end of the Cold War, provided a fertile ground for the establishment of a considerable number of ICTs. Each of these ICTs was entrusted with a specific mission explicitly articulated in its establishing document. Grasping the combination of the inherent institutional limitations and the objective difficulties to international justice is crucial in evaluating the performance of these tribunals and continuing efforts to more fully assure justice for atrocities.[369] While the majority of these ICTs are limited in their subject-matter and geography, the ICJ, with its wide jurisdiction, provides a useful but unfortunately underutilised vehicle to pursue the aims of international justice at an inter-State level. That is even more so, taking into account that the concept of international justice does not limit itself to the prosecution of perpetrators of internationally organized crimes,

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367 For a complete chronology of events related to the UN see: *http://www.unhchr.ch/chrono.htm* (last accessed on 1 November 2007).

368 R.Y. Jennings, *The Progress of International Law* in Selected Writings of Sir Robert Jennings, Brill Academic Publishers, 1998, p. 287.

369 R. Dicker and E. Keppler, *Beyond The Hague: The Challenges of International Justice*, Human Rights Watch, World Report 2004, available at: *http://hrw.org/wr2k4/download/10.pdf* (last accessed on 1 November 2007).

but necessarily extends to the maintenance of peace and security through the peaceful settlement of international disputes and the notion of good governance.

Apart from the numerous ICTs an important component of the international (and regional) system of human rights promotion and protection is obviously the main IQJBs. It should be noted that although the activity and role of the international civic society in this equation has not been discussed here, that does not mean that their contribution to the human rights cause is insignificant, on the contrary. However, with the ICJ as the focus of our study, attention has only been devoted to those international institutions whose output, albeit in different forms, ranges from legally binding to quasi-binding for States.[370] Although only the HRCm and the ICRC have been discussed above because of their specific link with the ICJ, other treaty bodies have been crucial in promoting and protecting specific human rights falling under their supervision. While a proper functioning of the international system of human rights protection necessitates an increased level of awareness and cooperation between the ICTs and IQJBs, that is not entirely free from difficulties. Such a difficulty can be posed *inter alia* by the principle of neutrality employed by many important humanitarian organizations, such as the ICRC. The humanitarian organizations are thus in an uncomfortable position: on the one hand, they want the international community to show more firmness in ensuring respect for international humanitarian law, but, on the other, they are obliged to keep a certain distance from international courts in order to preserve their ability to work in the field while a conflict is going on.[371] Notwithstanding that even the sharing of simple information could potentially have an adverse impact on the work of these humanitarian organizations during ongoing conflicts, other possible venues to pursue such cooperation, from confidential disclosures to the prosecuting organs of an ICT in order to help the investigation to the *in camera* review by the international judges can and should be explored further.

### *A) The Complementarity of ICTs and the Domestic Judicial System*

It is obvious that the international system of human rights protection has made considerable progress in the last decades, despite some setbacks. Thus, the establishment of several ICTs has added an important element to the enforcement of international human rights and humanitarian law. As Judges Higgins, Kooijmans and Buergenthal have noted,[372] the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly-established international criminal tribunals, treaty obligations and national courts, all

370 The quasi-binding character of the output of these international bodies refers to what is considered as soft law represented by such instruments as practice directions, guidelines, recommendations, general comments and so on.

371 J. Stroun, *International criminal jurisdiction, international humanitarian law and humanitarian action*, IRRC, No. 321, 1997, pp. 623-633.

372 ICJ, *Arrest Warrant* case (DRC *v.* Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports 2002, p. 78, para. 51.

have their part to play. These ICJ judges rejected the suggestion that the battle against impunity has been handed over to international treaties and tribunals, with national courts having no competence in such matters.[373] *Inter alia*, the establishment of the ICC under the Rome Statute in 1998 on the basis of the principle of complementarity provides ample support for their conclusion. Observing the developments in the field of international criminal law these judges pointed out that the importance of punishing the perpetrators of international crimes has not only led to the establishment of new international tribunals and treaty systems in which new competences are attributed to national courts, but also to the recognition of other, non-territorially-based grounds of national jurisdiction.[374] That and other developments of international and domestic criminal law point to a process of the gradual development of the notion of universal jurisdiction over internationally recognized crimes.[375] In its broadest sense the application of this notion warrants the prosecution of perpetrators of internationally organized crimes regardless of not having a link to the forum State. While the ICJ declined to answer the question of the application of this principle, a lengthy dissenting opinion on this issue was provided by the Belgian Judge *ad hoc*.[376]

Even though in a short time several ICTs have been set up, in view of their capabilities and expenses, leaving other important considerations aside, national courts are better placed to bear the burden of ensuring respect for norms of human rights and humanitarian law. Certainly, ICTs should take over whenever there is a situation where law and order is not present, or is unable or does not allow national courts to prosecute the perpetrators of internationally recognized crimes. Poorly or non-functioning national courts can pose serious problems for ICTs, which can only prosecute high-profile perpetrators. As a remedy, programmes where the national judiciary has been trained in order to be able to deal with such cases have often been part of the activity of these ICTs. Further, another favourable factor for domestic prosecutions is that trials held closer to the scene of the crime could better serve the affected community for purposes of reconciliation, but also of deterrence. The importance of good functioning domestic courts for the international human rights protection system can be illustrated by the example of the backlog of cases before the regional human rights courts. Had these cases been handled properly within the domestic system there would not have been any need to spend a lot of time, money and human effort to try these cases at an international level and for individuals to wait too long for their rights to be vindicated. It is therefore of the utmost importance that the domestic courts understand and properly apply the human rights standards set by the international and regional human

373 *Ibid*. pp. 78-9, para. 51.

374 *Ibid.*, p. 85, para. 73.

375 See *inter alia* M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, School of Human Rights Research Series No. 19, Intersentia: Antwerp, 2005.

376 See *Arrest Warrant* case, Dissenting Opinion of Judge Van de Wyngaert, ICJ Reports 2002, pp. 137-187.

rights instruments. In this regard better cooperation and communication between these two layers of human rights protection is still to be established.

### *B) Complementarity of ICTs and IQJBs within the International System of Human Rights Protection*

Has a unified international judicial order come of age? What has now become an often asked question would certainly have been at the limits of legal imagination a few decades ago. As Abi-Saab has observed, for such a structure to emerge, a catalyst and a pivot around which such a structure can be formed is needed.[377] He suggested that in the present-day international legal order only the ICJ could play this role – provided that the Court accepted that it should play the part and integrate it as an essential part of its judicial policy.[378] The recent ruling of the ICJ in the *Application of the Genocide Convention* case seems to lend support to this view. In this case the Court perused substantial evidence emanating from the legal proceedings before the ICTY and adopted the findings of the Trial and Appeals Chamber of the ICTY with regard *inter alia* to the establishment of specific intent (*dolus specialis*) for targeting a protected group within the meaning of the Genocide Convention with regard to the massacre of Srebrenica in Bosnia-Herzegovina.[379] Contrary to the ICTY practice though, the Court used its own test of 'effective control', as set out in the *Nicaragua* case, to find that the acts of those who had committed genocide at Srebrenica could not be attributed to Serbia and Montenegro under the rules of the international law on State responsibility.[380] Further, the Court found that the respondent had violated its obligations under the Genocide Convention by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the ICTY, and thus having failed to co-operate fully with that Tribunal and ordered it to transfer individuals accused of genocide or any of those other acts for trial by the ICTY.[381] The above-mentioned findings show that the Court is mindful of its position and responsibility within the UN

377 G. Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, ILP, Vol. 31, 1999, p. 929.

378 *Ibidem*.

379 ICJ, *Application of the Genocide Convention* (Bosnia-Herzegovina *v.* Serbia and Montenegro), Judgment of 26 February 2007, paras. 278-297 and 319. In paragraph 319 the Court held: 'Having carefully examined the evidence presented before it, and taken note of that presented to the ICTY, the Court considers that it has been established by fully conclusive evidence that members of the protected group were systematically victims of massive mistreatment, beatings, rape and torture causing serious bodily and mental harm, during the conflict and, in particular, in the detention camps. The requirements of the material element, as defined by Article II *(b)* of the Convention are thus fulfilled. The Court finds, however, on the basis of the evidence before it, that it has not been conclusively established that those atrocities, although they too may amount to war crimes and crimes against humanity, were committed with the specific intent *(dolus specialis)* to destroy the protected group, in whole or in part, required for a finding that genocide has been perpetrated.'

380 *Ibid*., para. 396-407.

381 *Ibid*., para. 471(6) and (8).

institutional system. This judgment as whole illustrates the Court's central role within the UN system as its principal judicial organ.

What about the position of the Court vis-à-vis other ICTs outside the UN system, where *inter alia* an international court such as the ICC features prominently? On this interesting issue Abi-Saab states:

> The ICJ has to play this central role and act as a higher court in a legal order that does not provide for formal hierarchy (except within the UN institutional system, where the ICJ is the principal judicial organ), a part that must then be earned as a *primus inter pares*, followed not out of legal compulsion, but through recognition of and deference to its intrinsic authority and the quality of its legal reasoning and findings.[382]

It is noteworthy that although the ICJ, the ECtHR, and the I-ACtHR have markedly different natures, they have nevertheless come to the same conclusion with regard to the territorial scope of applicability of human rights treaties.[383] The practice of the different ICTs shows that on the whole the risk of the fragmentation of international law is not high, although it does lurk in the background. In all likelihood, on general legal matters the positions of different ICTs shall to a large extent converge, provided that the ICJ is regarded as the ultimate guardian of international law. Additionally, the practice of looking at other international courts' case law on similar issues for guidance, direct communication between the judges, and a sense of comity, could significantly reduce the risk of the fragmentation of international law.

Increasing attention has been devoted to the issue of reparations due to individuals for violations of their rights as acknowledged under international human rights and humanitarian law instruments. The ICJ,[384] the ICC,[385] the ECtHR,[386] the ACtHR[387] and the I-ACtHR[388] have the power under their respective Statutes to provide for reparations to be made in case of violations of such rights. As the authoritative ILC commentary states, the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.[389] The position adopted by all these courts as discussed above follows the PCIJ finding in the *Chorzów Factory* case, according to which the State has the obligation to put an end to the breach and make

382 G. Abi-Saab, *supra* note 376, p. 929.

383 Henckaerts & Doswald-Beck, pp. 305-306. The ECtHR in 1995 in the cases *Loizidou v. Turkey*, 1995 and *Banković v. 17 NATO countries*, 2001; the IACtHR in the case *Alejandre and Others v. Cuba*, 1999 citing *Loizidou*; the ICJ in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004.

384 ICJ Statute, Article 36(3).

385 ICC Statute, Article 75 (Reparations to victims), 79 (Trust fund), and 109 (Enforcement of fines and forfeiture measures).

386 ECtHR Statute, Article 41 (Just satisfaction).

387 ACtHR Statute, Article 27.

388 I-ACtHR Statute, Article 63(1).

389 Crawford, *supra* note 360, p. 209.

reparation in such a way as to restore, as far as possible, the situation existing before the breach, also known as *restitutio in integrum*.

The duality of State responsibility and individual criminal responsibility is a principle of international law enshrined in both international human rights and humanitarian law instruments.[390] That legal truism was further clarified by the ICJ in its judgment in the *Application of the Genocide Convention* case where the Court observed that a duality of responsibility continues to be a constant feature of international law making and it referred to Article 25, paragraph 4, of the ICC Statute, which read: 'No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'[391] Further, the Court affirmed that parties to the Genocide Convention were bound by the obligation under this Convention not to commit, through their organs or persons or groups whose conduct would be attributable to them, genocide and the other acts enumerated in Article III, otherwise they would incur international State responsibility.[392] The clarification of the interplay between State responsibility and individual criminal responsibility with regard to the Genocide Convention is another stepping-stone laid down by the ICJ in the further development of international law.

It is noteworthy that the respondent in this case argued that the condition *sine qua non* for establishing State responsibility would be the prior establishment, according to the rules of criminal law, of the individual responsibility of a perpetrator engaging the State's responsibility.[393] In addressing this issue the Court initially stated that 'The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide or the other acts enumerated in Article III have been committed.'[394] That finding points to the different rationale behind the establishment and the existence of the different international judicial bodies, namely the ICJ settling inter-State disputes and the ICTs for prosecuting individuals for breaches of international human rights and humanitarian law norms. Furthermore, the Court seems to imply that this *ratione personae* difference means that the work of these international judicial bodies is complementary and not exclusive. Thus, legal proceedings on related issues could be taking place at the same time before different international judicial bodies. Given that there would be several circumstances under which no legal recourse would be available to address violations of this Convention were the Respondent's view to be adopted, the Court concluded that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.[395] However, the Court

390 See *inter alia* Article 3 of the Genocide Convention; GC III, Article 12, Commentary, pp. 128-131 and GC IV, Article 29, Commentary, pp. 209-213 .

391 ICJ, *Application of the Genocide Convention*, Judgment of 26 February 2007, para. 173.

392 *Ibid*., para. 179.

393 *Ibid*., para. 180.

394 *Ibid*., para. 181.

395 *Ibid*., para. 182.

hinted at the difference between State responsibility and individual criminal responsibility as understood and applied by the ICJ and the other ICTs when it stated that 'The idea of holding the same State responsible by attributing to it acts of 'genocide' (Art. III, para. *(a)*), 'attempt to commit genocide' (Art. III, para. *(d)*), and 'complicity in genocide' (Art. III, para. *(e)*), in relation to the same actions, must be rejected as untenable both logically and legally.'[396] Seemingly, the practice of cumulative convictions applicable with regard to crimes committed by individuals according to the requirements set out by the Appeals Chamber of the *ad hoc* tribunals does not apply in the case of States.

### *C) Concluding Remarks*

It is self-evident that the number and role of international courts and tribunals has grown significantly in recent years. The intensification of the trend of globalisation and the attendant increase in the density of international relationships, and the institutions that govern them, has directed attention more closely than ever on the structure and function of those institutions. While the reasons for the creation of separate judicial organs and quasi-judicial bodies lie in the realms of politics and practical necessities and differ in respect of each of these bodies, the concern for legitimacy and accountability, of which judicial independence is a large part, gains particular importance as international courts and tribunals are accorded an increasingly important role in a climate of eroding sovereignty and increasing international regulation. Albeit the proliferation of these mechanisms on human rights protection on the one hand enhances the possibilities of individuals to enjoy their rights, on the other hand this phenomenon brings about a serious risk of a jurisdictional clash and a challenge to their legitimacy. Although it is clear that conflicts between these judicial and quasi-judicial bodies cannot always be avoided it would be of the utmost importance for the good functioning of these institutions to be open to jurisprudential interaction and comity.

In their entirety these international judicial and quasi-judicial bodies are entrusted with a joint mission, namely that of providing a forum where justice can be done and seen to have been done. Amongst them they provide for a variety of procedures and outcomes which are both binding and non-binding, which have been put in place to promote and ensure respect for international human rights and humanitarian law norms.[397] Thus, by working in tandem they can finally provide for a coherent and better system for the protection of human rights and humanitarian law norms under the general framework of international law. The ICJ's protection of legal rights flowing from international human rights and humanitarian law instruments owed both to States and to individuals through the mechanism of State complaints is complemented by the

396 *Ibid*, para. 380.

397 For more information visit: *http://www.globalpolicy.org/wldcourt/index.htm* (last accessed on 1 November 2007).

operation of the ICTs and the IQJBs. Suffice it to mention here the ICTY's interpretation of humanitarian law with regard to 'protected persons' in accordance with substantial relations and not strictly in accordance with formal bonds of nationality.[398] In the face of the complexities of inter-ethnic armed conflicts the protection on the basis of nationality seems to fall short of providing the necessary protection for individuals and serve the object and purpose of the adoption of such human rights instruments, namely that of ensuring respect for human life and dignity. This dual-layer protection of rights, in view of the possible invocation of State responsibility or individual criminal responsibility, or both, seems to provide the necessary and long-awaited mechanisms for a better implementation of human rights and humanitarian law.

The ICJ goes a step further in its assertion of the obligations incumbent upon States under relevant international human rights and humanitarian law. In the recent *Application of the Genocide Convention* case the Court re-emphasized:

> As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them (e.g. case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).[399]

It is important that the ICJ draws a distinction between the existence of legal obligations arising under relevant instruments of international human rights and humanitarian law and their enforcement through judicial organs. Rights, and especially individual rights, do exist in spite of the possibilities created to enforce them in a court of law or another organ of a judicial nature. The mere fact that an instrument of human rights or humanitarian law does not provide for its own judicial organ cannot be interpreted as the obligations created under it are not binding. As the ICJ itself stated in a land-

398 ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment of 15 July 1999, paras. 163-169. In paragraph 166 the Appeals Chamber stated: 'This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.'

399 ICJ, *Application of the Genocide Convention*, Judgment of 26 February 2007, para. 148.

mark advisory opinion, 'The contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être*' of these instruments 'manifestly adopted for a purely humanitarian and civilizing purpose'.[400] As noted by Judge Koroma, the observance of treaty obligations (in good faith) is not only moral, but serves another important role in maintaining peace and security between neighbouring States and in preventing military conflicts between them.[401] Thus, respect for human rights and humanitarian law serves both the individual and the community.

It is the high ideals which have inspired these instruments that provide, by virtue of the expressed common will of the States parties to them, the foundation and measure of all their provisions, for even in a domestic system it is not the presence of courts or of legal enforcement agencies alone which forces compliance with the law. Thus, besides the legal and moral high ground on which the decisions of the ICTs rest, and for the legal obligation on the part of States to comply with those decisions,[402] it is also their own self-interest which steers States into compliance with these obligations. For their part these international courts and tribunals should regard each other's work as part of a whole rather than the only solution to the problems related to violations of international human rights and humanitarian law. Punishing those who violate international human rights and humanitarian law upholds not only the credibility of these two branches of international law, but also demonstrates the international community's determination to have this law applied.

Although international law can never be a panacea as, besides inherent limitations, law is only one aspect of complex inter-State relations, always transforming and developing, it nevertheless remains an essential aspect of international intercourse. It represents the only viable mechanism through which an international community of States can coexist and develop peacefully. In this light, the establishment of international courts and tribunals to apply the established international human rights standards finally gives the human rights instruments the importance and place they deserve in the international legal system. While many of these ICTs have been entrusted with the prosecution of individuals for committing international crimes, the ICJ, as an organ of international law, provides an important binding element of this system for promoting and ensuring respect for international human rights and humanitarian law instruments at an inter-State level.

400 ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 23.

401 ICJ, *Armed Activities* case (DRC *v*. Uganda), Declaration of Judge Koroma, 19 December 2005, para. 14.

402 Member States of the AmCHR, the ECHR and the UN Charter have undertaken to comply with the decisions of the respective courts established by them, namely the I-ACtHR (Article 68 of the AmCHR), the ECtHR (Article 46(1) of the ECHR), and the ICJ (Article 94(1) of the UN Charter ).

# CHAPTER 6
# CONCLUSIONS AND RECOMMENDATIONS

## 6.1 DECADES OF INVOLVEMENT AND EVOLVEMENT OF THE INTERNATIONAL COURT OF JUSTICE

Practice-related and other changes have taken place within the ICJ during the over six decades of its existence. These changes reflect the Court's responsiveness to the changing needs of the international community in the face of a continuing political and economic process of globalization and interdependence. Indeed, an international court of the stature of the ICJ could not have thrived and maintained its leading role in the field of international dispute settlement had it not been mindful of those changes and of its place in the grand scheme of the international legal order. By means of its remarkable legal findings this Court has been able to either introduce new concepts into international law or to give more flesh to and emphasize the legal value and applicability of existing ones. From these fundamental precepts which are often evoked in international human rights and humanitarian law suffice it to mention concepts such as 'elementary considerations of humanity', 'sacred trust of civilization', 'obligations *erga omnes*' and 'dictates of public conscience', which now form part of the common legal heritage of humankind. It is such concepts which have reduced the content of State sovereignty to the extent that nowadays no State can credibly claim that treatment of individuals within its jurisdiction is a matter solely of domestic jurisdiction. This dual process of institutional involvement and evolvement has permeated and characterized the existence of this important international judicial body. While remaining closely involved in that multi-dimensional process of social change and reconstruction which took place after WWII within the framework of the UN, the ICJ also transformed into a real World Court, as the number of States composing the international community increased over time.

Through its considerable case law the Court has helped clarify a whole range of issues that lie at the very heart of the structure and organisation of international human rights and humanitarian law such as the prohibition of genocide, the right of peoples to self-determination, illegal exploitation of natural resources, humanitarian assistance, military necessity, and so on. However, there are still several significant issues which remain to be answered in the future. An interesting question in this regard is: Who is entitled to act and what exactly are the legal responsibilities of other States when a State is perpetrating crimes against humanity and genocide against its own citizens?

Some recurring questions which will probably receive an answer within the framework of UN reform are: Should the principal UN bodies themselves, namely the SC, the GA and the Secretary-General, be given the right to institute proceedings against a State before the ICJ in case of serious violations of the international law of human rights or grave breaches of humanitarian law? Should international organizations be given standing before the ICJ? The answer to such important questions could add up to and define the Court's future contribution to a better understanding and thus to a better enforcement of international human rights and humanitarian law rules and principles. It should be kept in mind that the ICJ, however, due to its inherited features and limitations, is not and cannot become a suitable forum where individuals can directly vindicate their human rights.

The Court's role in establishing or encouraging and furthering processes of peace-building alongside other actors within the UN is an important contribution to international peace and security and hence to the enjoyment of human rights and freedoms by individuals. Acknowledgement and encouragement of this role for the ICJ figured prominently in the 1993 UN Resolution entitled 'An Agenda for Peace'.[1] Suffice it to mention here by way of an example the judicial settlement of sometimes bitter border disputes by the ICJ which otherwise would have cost many human lives and other resources. Although border or maritime delimitation disputes fall outside the scope of this research, the solving of these disputes through legal proceedings before the Court contributes significantly to the maintenance of peace and security, as one of the main aims of the UN.[2] However, besides cases of this kind, which as mentioned have been omitted here, other cases which have been discussed in detail above illustrate the efforts made by the ICJ to advance peace and respect for civilian life and property during armed conflicts. That role and the importance the Court itself attaches to achieving this aim cannot be better illustrated than by the fact that customarily the ICJ has called upon the parties to a conflict not to take any steps that would aggravate the conflict or cause harm to civilians. Certainly, the contribution of the Court to international peace and security and the protection of civilian life and property through its legal findings cannot replace the willingness of the States concerned to implement the decisions of the Court in good faith.

One of the crucial aspects of any oral legal proceeding before a court of law and of oral proceedings before the ICJ in particular, is the fact that both parties are guaranteed a fair and impartial hearing, regardless of their status in the international community, according to the principle of equality between sovereign States. That element increases the legitimacy and authority of the Court and explains to some extent why, by and large, States generally have a satisfactory record of compliance with ICJ

1 GA Resolution A/RES/47/120 B, *An Agenda for Peace*, Section III 'Use of the International Court of Justice in the Peaceful Settlement of Disputes' 20 September 1993 (Annex 1).

2 See *inter alia* O.J. Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, New York: Carnegie Endowment for International Peace, 1951.

decisions.[3] Further, the Court's decisions are quite thorough not only in their discussion of the contentious issues between the parties, but also of the other aspects of a case. Indeed, as Judge Kooijmans has pointed out, a judgment which is not seen as logical and fair in its historical, political and social dimensions runs the risk of being one compliance with which will be difficult for the parties.[4] The legitimacy and the authority that the ICJ commands coupled with the principle of *pacta sunt servanda* seem to play an important role in the enforcement of the decisions rendered by this international court. It should be noted that the contribution of the ICJ in clarifying and developing international human rights and humanitarian law rules and principles goes well beyond the settlement of an existing dispute between two parties. Thus, besides nurturing and reinforcing the rule of law at an international level, the Court's legal findings have been largely used by the ILC in fulfilling its own mission of the codification and progressive development of international law.

It should be borne in mind that disputes should be ripe before they reach the ICJ. That presupposes that other peaceful means of settlement and possible domestic remedies should have been exhausted and should have fallen short of providing a satisfactory remedy for the parties. Further, it would be unrealistic and unfair to pretend that only by making and having available a vehicle for the solution of different disputes such as the ICJ the organized international community of States has fulfilled its joint mission of achieving a peaceful and just environment where individuals can fully enjoy their rights and freedoms. That is barely a start. As Jennings put it long ago, 'The only mechanism by which a viable international society of States can be reached is through effective submission to a developing international law', despite that 'International law can never be a panacea, for law is only one aspect of the immensely complex as well as immensely urgent problem that faces our civilization today'.[5] It is incumbent upon States to live up to their obligations under international human rights and humanitarian law and to step up their efforts in respecting and ensuring respect for human rights and humanitarian law norms. In this respect the legal findings of the ICJ while interpreting and developing international human rights and humanitarian law rules and principles offer useful guidance as to what State obligations are in this respect. Albeit its jurisdiction is not compulsory, being a permanent Court and the number of cases that are in its docket show *prima facie* its constructive role and the trust that the international community has placed in this international judicial body.

In keeping with the structure of this research the final assessment of the Court's contribution to the interpretation and development of human rights and humanitarian law is followed by a few words on the Court's central position in the plurality of

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3 For a detailed discussion see *inter alia* M. Schulte, *Compliance with Decisions of the ICJ*, Oxford University Press, November 2004.

4 *Armed Activities* case (DRC *v*. Uganda), Separate Opinion of Judge Kooijmans of 19 December 2005, para. 4, available at: *http://www.icj-cij.org/docket/files/116/10463.pdf* (last accessed on 1 November 2007).

5 R.Y. Jennings, *The Progress of International Law* (1958), in Collected Writings of Sir Robert Jennings, Kluwer Law International, 1998, p. 296.

international and regional courts and quasi-judicial bodies in the fields of international human rights and humanitarian law. Further, recommendations regarding ways to increase the use and appeal of the ICJ through structural reform and increased judicial cooperation with the other ICTs shall be followed by some final remarks.

### 6.1.1 The Court's Contribution to the Interpretation and Development of International Human Rights and Humanitarian Law Rules and Principles

Assessing the contribution of the Court to the interpretation and the development of international human rights and humanitarian law rules and principles is not an easy and straightforward task. That difficulty increases when faced with the risk of being seen either as overcritical or as overindulgent vis-à-vis the Court. However, that is a risk worth taking for it is important from both a theoretical and practical perspective that the role and the contribution of the Court to human rights and humanitarian law is understood and in turn made use of. As mentioned at the end of chapter three, human rights encompass an array of civil, political, economic, social, and cultural rights, the promotion and protection of which is regarded as one of the fundamental aims of the UN, of which the ICJ is the principal judicial organ. The coining, evolvement and the ensuing recognition of many principles of human rights such as the prohibition of genocide, the prohibition of torture, inhuman and degrading treatment and the prohibition of slavery, as part of customary international law or even *ius cogens* find ample support in the practice of the Court. Through its case law the Court has been able to wed international law to humanitarian demands for protection and respect for individual human rights and human life and dignity. The considerable number of cases, already discussed in earlier chapters, and the wide range of issues dealt with by the Court bear witness to the Court's role in and contribution to the interpretation and development of international human rights and humanitarian law rules and principles.

As mentioned above the jurisprudence of the Court in the field of international human rights law encompasses many important issues of international human rights law. Having embraced the idea of the internationalization of human rights the Court has dealt with interpreting and developing a considerable number of important human rights issues which include *inter alia*:

a) the coining of certain fundamental principles of international human rights law of general application;
b) the characterization of the right of peoples to self-determination as a right *erga omnes*;[6]

6 See *supra* section 3.7 and the following cases: *South-West Africa Cases*; *Western Sahara*; *East Timor*; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

c) the interpretation of the prohibition of genocide as including a State's obligation to prevent genocide;[7]
d) legal findings on the right to asylum and the diplomatic and consular relations cases, which clarify and strengthen the position of individuals;[8]
e) clarifications on the legal protection to be awarded to human rights' rapporteurs in order for them to be able to fulfil their duty when in the service of the UN;[9]
f) the applicability of international human rights instruments in situations of armed conflict and its extent;
g) the interaction between the law on diplomatic immunities and the principle of individual criminal responsibility for internationally recognized crimes and so on.

The Court's legal findings concerning the above-mentioned issues have contributed to the further clarification and improvement of the necessary international legal framework for the protection of individual or collective human rights.

The contribution rendered by the ICJ in interpreting and developing international humanitarian law rules and principles is also quite considerable. Therefore, although elaborated in detail above, it is necessary to restate once more some of the most remarkable pronouncements of the Court in this field. In a landmark ruling the ICJ has found that fundamental rules of international humanitarian law embedded in multilateral treaties have a separate and independent existence, since they derive from the general principles of humanitarian law, to which the Conventions have merely given specific expression.[10] The Court has clarified that these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[11] This finding of the Court reinforces the protection for the categories of protected persons under international humanitarian law by emphasizing the dual, yet independent nature of State obligations arising from international humanitarian law treaties or customary international humanitarian law.

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7 See the following cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v*. Serbia and Montenegro); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia *v*. Serbia and Montenegro); *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *v*. Serbia and Montenegro), (*Preliminary Objections*).

8 See the following cases: *Case concerning the Vienna Convention on Consular Relations* (Paraguay *v*. United States of America); *Ahmadou Sadio Diallo* (Republic of Guinea *v*. Democratic Republic of the Congo); *LaGrand*, (Germany *v*. United States of America); *Case Concerning Avena and Other Mexican Nationals*, (Mexico *v*. United States of America).

9 See the following cases: *Reparation for Injuries*; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion of 15 December 1989); and *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion of 29 April 1999).

10 *Nicaragua* case (Nicaragua *v*. US), (*Merits*), ICJ Reports 1986, p. 114, para. 220.

11 *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 257, para. 79.

Another important legal finding was that made in the advisory opinion on the *Wall*, where the Court clarified that the protection accruing to individuals under human rights conventions does not cease in the case of armed conflict, save through the effect of provisions on derogations of the kind to be found in Article 4 of the ICCPR.[12] That demonstrates the complementary nature of international human rights and humanitarian law in situations of armed conflict, based on the principle of humanity and respect for human life and dignity, which permeates both these branches of international law. Indeed, the gradual process of the 'humanization of the law of war', as Meron has put it, is to a large extent driven by human rights and principles of humanity.[13] The Court has made an important contribution to interpreting and developing international humanitarian law rules and principles by *inter alia*:

a) emphasizing the *erga omnes* character of obligations under international humanitarian law;
b) acknowledging the customary nature of many principles of international humanitarian law;
c) pointing out that States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives;
d) recognizing the right to reparation of natural and legal persons in the event of violations of international human rights and humanitarian law;
e) reminding States of their duty to respect and ensure respect for an important instrument of international humanitarian law such as GC IV;
f) determining that a failure by an Occupying Power to take measures to respect and ensure respect for human rights and international humanitarian law would be tantamount to a violation of obligations under both these branches of law, and so on.

From the above we can conclude that the Court's activity touching upon the areas of human rights and humanitarian law has extended in the following directions:

1. The Court has either helped to interpret and develop certain grey areas of international human rights and humanitarian law or simply given its judicial imprimatur to some settled issues falling under these fields of international law;

2. It has urged States involved in a dispute to ensure compliance with human rights and humanitarian law treaties/instruments and to refrain from any steps which would aggravate the situation;

12 *Wall*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 178, para. 106.
13 T. Meron, *The Humanization of International Law*, Hague Academy of International Law Monographs, Vol. 3, Martinus Nijhoff Publishers: Leiden/Boston, 2006, p. 1.

3. Its case law has provided some guidance and its institutional features have served as an example in setting up other international judicial bodies in the fields of international human rights and humanitarian law;

4. Its case law has even forced changes at the domestic level in order to bring State practice into conformity with international obligations arising from international agreements.

5. Its activity has contributed to creating and enforcing the rule of law at an international level. That is in itself a contribution to the enjoyment of individual human rights as the rule of law, accountability, and the enjoyment of human rights as a whole are intrinsically connected.

Although serving a different category of clients, namely States and the UN organs and specialized agencies, the Court seems not to have lost sight of the fact that individuals are the final recipients of the rights accruing to them under international instruments of a humanitarian character. The larger picture, which the Court has helped and sought to emphasize, even by calling upon disputing parties to abide by their obligations under international human rights and humanitarian law when it did not have jurisdiction to rule on the merits, is that each set of rules and principles pertaining to international human rights and humanitarian law carries significant moral and legal weight in the world. That weight extends far beyond the limited number of cases which make it to the Court and the even more limited ones which make reference to them.

### 6.1.2 Position of the Court *vis-à-vis* other ICTs

Since the establishment of the ICJ as the principal judicial organ of the UN, the needs of the international community accompanied by great leaps in international law have triggered the establishment of several international judicial bodies in the fields of international human rights and humanitarian law. The often referred to 'proliferation' of ICTs, a process of the last two decades, gives rise to some concern regarding the possible further fragmentation of international law and different judicial interpretations by these judicial bodies for similar issues. By now these ICTs form a real network of judicial bodies entrusted with jurisdiction over persons. These new accountability mechanisms were created for bringing to justice the perpetrators of gross human rights violations in conflict-torn areas. Pointing to the leading role that the ICJ should play amid a plethora of ICTs Jennings noted that, '*Ad hoc* tribunals can settle particular disputes; but the function of the established 'principal judicial organ of the United Nations' must include not only the settlement of disputes but also the scientific development of general international law…There is therefore nothing strange in the

ICJ fulfilling a similar function for the international community.'[14] With so many actors involved in interpreting and developing international law voices of concern about possible conflicts and the fragmentation of international law have been raised and ways of tackling such a problem have been suggested.[15] However, many have also acknowledged the positive developments that the practice of these judicial bodies could bring about.[16]

Besides developing international law, a process which is in fact further enriched through the practice of these ICTs, the ICJ can play another important function; namely, it can serve as a primary organ of international law whose mission besides settling inter-State disputes would also extend to that of keeping the fabric of international law together. Being the principal judicial body of the UN and the only international judicial body endowed with general jurisdiction, and in view of the State-centred organization of the international community, it seems that the ICJ is well-placed to play that role.

### 6.1.3 Improving the Work of the Court: The Need for Change

A few reforms are necessary for the Court to continue its activity in rendering its legal services to the international community. The fact that the docket of the Court is fuller than ever coupled with the ever-present need for effectiveness and timely delivery of decisions make these reforms even more urgent. Many scholars, diplomats and even Judges of the Court have entertained the idea of reforming the Court in one way or another.[17] However, it is not my intention to revisit those proposals in any detail.[18] Rather, my goal is to try to advance further the understanding of a pressing need for undertaking certain essential reforms of the ICJ, as part of the larger reform of the UN. Such reforms should be aimed at improving the work and standing of the Court and consequently reinvigorating its possible contribution to developing and interpreting

14 Sir R. Jennings, *The Role of the International Court of Justice in the Development of International Environmental Protection Law*, Review of European Community and International Environmental Law (RECIEL), Vol. 1, 1992, p. 242.

15 See *inter alia* the Address of President Schwebel to the UN General Assembly on 27 October 1998 and the three Speeches by President Guillame to the UN General Assembly delivered respectively on 26 October 2000, 31 October 2001 and 29 October 2002 (on file with the author).

16 See *supra* section 5.8.

17 See *inter alia* H. Lauterpacht, *The Revision of the Statute of the International Court of Justice*, *The Law and Practice of International Courts and Tribunals* 1, Kluwer Law International, 2002, pp. 55–128; ABILA Committee on Intergovernmental Settlement of disputes, *Reforming the United Nations: What About The International Court of Justice*, CJIL, Vol. 5, No. 1, 2006, pp. 39-65; L. Bingbin, *Reform of the International Court of Justice – A Jurisdictional Perspective*, Perspectives, Vol. 5, No. 2, 2004.

18 See *inter alia* H. Lauterpacht, *The Revision of the Statute of the International Court of Justice*, *The Law and Practice of International Courts and Tribunals* 1, Kluwer Law International, 2002, pp. 55–128; ABILA Committee on Intergovernmental Settlement of Disputes, *Reforming the United Nations: What About The International Court of Justice*, Chinese Journal of International Law, Vol. 5, No. 1, 2006, pp. 39-65; L. Bingbin, *Reform of the International Court of Justice – A Jurisdictional Perspective*, Perspectives, Vol. 5, No. 2, 2004.

human rights and humanitarian law, whose promotion and respect are in the focus of the UN itself. Given that peace and security and development and human rights are the pillars of the UN system, reforming the ICJ in order to continue to meet the demand for judicial guidance has become necessary. From all the possible improvements our focus rests on two important components. First, there should be some action towards improvements affecting the structure and composition of the Court and the creation of an International Bar. Secondly, there should be action taken towards increasing access to the Court for States, other international judicial bodies, and the Human Rights Council. Ways in which that can be achieved are explored below.

The reforms proposed here are aimed at improving the Court's internal efficiency in dealing with its day-to-day work and, second, at making the Court more accessible to States, other international judicial bodies, and the Human Rights Council as the main human rights organ of the UN. Making the ICJ more accessible to existing ICTs implies that a certain initial move towards solidification of the hierarchy between the different judicial organs of the international legal order has come of age. Reforms already undertaken with respect to increasing the efficiency of the Court include the revision of the Court's Rules and the promulgation of Practice Directions. During its lifetime the ICJ has amended its Rules of Court on only a few occasions;[19] unlike the ICTY, for example, that has made use of this possibility about 33 times. The most recent changes have been made with a view to further streamlining the cumbersome legal procedures of the Court. Further, the Court is in a phase of deciding whether its procedures will be mainly written or oral. This means that in the near future the Rules of Court might again be changed to reflect this decision. Further, the Court on 30 July 2004 issued its Practice Directions, which is a document which sets a few requirements for parties bringing cases before the Court. These decisions were made taking into account the considerable caseload in the docket of the Court and the budgetary constraints this Court faces. Besides any possible further amendment of its procedural rules, there is a need for change in the structure and composition of the Court. This issue and that of improving access to the Court are followed by a brief look at two issues: the Secretary-General's Trust Fund and that of an International Bar for the ICJ.

#### *6.1.3.1 Structural and Compositional Changes at the ICJ*

The reforms described below are aimed at enhancing the capability of the Court to deal with an increasing caseload and increasing its perceived legitimacy. Most of the changes proposed here are also elaborated in detail in a resolution of the ABILA (American Branch of the International Law Association) Committee on Intergovernmental Settlement of Disputes created by ILA's American Branch in the autumn of

19 The first amendment to the Rules of Court adopted on 6 May 1946 took place on 10 May 1978. Further amendments were made on 14 April 1978, 5 December 2000, 14 April 2005, and 29 September 2005.

2001.[20] However, the recommendations put forward here differ in some respects from those of this committee. Keeping in mind that most of the places at the Court, which are 15 in total, are already reserved for the five permanent members of the SC and others to some larger and/or highly industrialized countries, there is a need to enlarge the Court. Such an enlargement does not necessarily have to follow *a la lettera* the enlargement of the SC, if this were to occur. The number of judges of the Court should be increased to 18.[21] This small increase ensures that more States are represented at the Court without creating insurmountable difficulties for the latter's process of deliberations. This number allows for the possibility of the Court to be divided into two Chambers and have a case go to the full Court only if that is requested by both Parties. In case the Parties would disagree it should be for the Court to decide. Having their case heard by a Chamber composed of at least half of the Court's members should in the end prove to be satisfactory for States which wish to appear before a full Court. If in a contentious case one adds to a Chamber composed of nine permanent ICJ judges another two *ad hoc* judges that would not create problems for the deliberation process, while still having a large number of judges sitting on the bench. Indeed, the creation of two standing Chambers, which can be chaired respectively by the President and the Vice President of the Court, would increase significantly the processing capability of the ICJ; thus, allowing it to cope better with a growing number of cases in its docket.

Further, the mandate of the Judges should be kept at nine years without the possibility for re-election. This would ensure that no pressure or considerations of re-election could come to bear upon them. This author fully endorses the proposals of the ABILA Committee for introducing age-limits for ICJ judges and for increasing the number of female ICJ Judges.[22] The workload and a full day of sitting in Court are quite tiring for elderly judges, thus States should not nominate for election individuals who at the time of election are older than 70. That age-limit seems to better reflect a balance between life expectancy and retirement. Further, another change is long overdue, i.e. increasing women's representation in the World Court. From a total of 95 former and current ICJ judges the only woman who has been a permanent Member of the Court so far is Rosalyn Higgins, currently the President of the Court. Only two women have served as *ad hoc* judges for the ICJ, namely Suzanne Bastid and Christine

20 ABILA (American Branch of the International Law Association) Committee on Intergovernmental Settlement of Disputes, *Reforming the United Nations: What About The International Court of Justice*, CJIL, Vol. 5, No. 1, 2006, pp. 39-65.

21 This requires a change to Article 3(1) of the ICJ's Statute, which reads: 'The Court shall consist of fifteen members, no two of whom may be nationals of the same State.'

22 See *supra* note 20, p. 64.

van den Wyngaert.[23] States should start keeping a gender balance in the list of persons they propose to be elected as Members of the Court.

*6.1.3.2 Making the ICJ a Focal Point of the International Legal Order*

In order for the Court to continue to play an important role in the field of international dispute settlement and serve as a pillar for the solidification of the judicial branch of the international legal order another set of reforms should be undertaken. Those steps should be aimed especially at providing access to the Court for ICTs and the Human Rights Council. That means giving them the possibility to ask for advisory opinions from the Court on a question of international law pertinent to their function. This could be done very simply through a resolution of the GA or when that is not possible through an agreement between the relevant ICT and the UN. Also the Human Rights Council should be given that possibility as the UN body responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.[24] The Human Rights Council has the following powers which are very important for the promotion and protection of human rights worldwide:

a) to address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon;
b) to promote the effective coordination and the mainstreaming of human rights within the United Nations system;[25] and
c) to make recommendations to the General Assembly for the further development of international law in the field of human rights.[26]

Special attention with regard to ensuring access to the advisory jurisdiction of the ICJ should be given to the ICC as a permanent international court with jurisdiction over persons for internationally recognized crimes and the Human Rights Council as the UN hub for human rights. Access to the advisory jurisdiction of the Court does not mean that these organs are obliged to make use of it. It is upon these organs to decide whether they want to make use of this service of the Court. As the Court continues to prove itself as a reliable and constructive international judicial organ, the mutual trust of these organs operating in the fields of international human rights and humanitarian law could grow, leading to an increased cooperation and synergy of these organs. That

23 Suzanne Bastid was Judge *ad hoc* for Tunisia in the *Application for Revision and Interpretation of the Judgment of 24 February 1982* in the Case concerning the *Continental Shelf* (Tunisia *v*. Libyan Arab Jamahiriya), ICJ Reports 1985, p. 194, para. 4; and Christine van den Wyngaert was Judge *ad hoc* for Belgium in the *Arrest Warrant* case (Democratic Republic of Belgium *v*. Congo), ICJ Reports 2002, p. 6, para. 3.

24 GA Res. A/60/251 adopted on 15 March 2006.

25 *Ibid*., point 3 of the Resolution.

26 *Ibid*., point 5(c) of the Resolution.

would significantly benefit the development of human rights and the promotion and protection of the human rights of individuals. As Judge Higgins has noted, 'In carefully balancing continuity and change, the Court will remain the lighthouse beacon in our ever expanding system of international law.'[27]

### 6.1.4 The Secretary-General's Trust Fund

Although access to the Court is free, submitting a dispute involves various costs for States: fees for agents, counsel, advocates and experts; preparation and reproduction of pleadings, annexes and maps; expenses in connection with oral hearings; and in certain cases the costs arising from the implementation of a judgment (for example, for the demarcation of a boundary fixed by the Court).[28] Some States do not have the necessary means to meet these costs. Although the Secretary-General's Trust Fund is a good effort in addressing this problem there are a few concerns regarding access to the Fund and the amounts disbursed by richer States to this Fund. The Fund's Statute allows it to be used only in cases submitted by special agreement. That restricts considerably the possibility for a State to resort to this Fund in case of disagreement regarding bringing the dispute before the ICJ. It seems desirable that for the Fund to serve its aim this requirement should be lifted. Also the procedural steps for being able to draw from this Fund should be simplified. Otherwise, again the Fund will not be able to fulfil its aim. Last, but not least, the Fund should have sufficient resources. Thus, as Judge Guillame appealed, States able to do so should increase the resources available to the Fund.[29] Simplifying the procedures, lifting the requirement of a special agreement between disputing States, and making resources available to the Fund will enhance access to the Court for poorer States, making the ICJ a real World Court.

### 6.1.5 An International Bar for the ICJ?

The legal counsel who routinely appear before the ICJ form a group of specialists which was initially fairly limited, but which has had a tendency to expand in recent years as the docket of the Court has grown. From 1946 to 1996 about 160 persons appeared as counsel before the Court, some 20 of them in several cases. Lawyers' fees normally constitute the chief expense of a State appearing before the ICJ. In order to contribute towards the reduction of such costs, the 1978 Rules provide that 'the number of counsel and advocates to be heard on behalf of each party shall be settled

27 Report of the International Court of Justice [1 August 2005-31 July 2006], United Nations Publications, p. 46. For more on this issue read the speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the solemn sitting on the occasion of the sixtieth anniversary of the inaugural sitting of the Court, held on 12 April 2006, available at the Court's website at: *http://www.icj-cij.org/court/ index.php?pr=1004&pt=3&p1=1&p2=3&p3=1&PHPSESSID=5c407* (last accessed on 1 November 2007).

28 See the Speech by the President of the ICJ, Judge Guillame, to the UNGA on 22 October 2002.

29 *Ibidem*.

by the Court'. While generally there are quite strict rules in place for the ICTs regarding who could act as legal counsel that is not the case for lawyers who appear before the ICJ. While generally the quality of legal counsel appearing before the ICJ is quite high, some concern has been expressed that in the absence of any rules that could change, thus putting the Court in difficulty, as well as the Party concerned. In order to avoid this some formal rules could be adopted, preferably by the Registry of the Court, following generally the requirements for legal counsel put in place by other ICTs.

## 6.2 SOME FINAL REMARKS

The noble mission of the promotion and protection of human rights is carried out by a large number of actors, which includes international courts and tribunals, quasi-judicial mechanisms, human rights activists and NGOs at an international, regional and national level. As acknowledged in Article 1 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms everyone is a custodian of human rights.[30] While in order to succeed in ensuring full compliance with these internationally agreed standards a joint effort is needed, some custodians have more responsibilities than others. It goes without saying that one important custodian, at least as far as the obligation to respect and ensure respect for human rights and humanitarian law on the part of States is concerned, is the ICJ. A question which arises here is how one can judge the importance that the international community attaches to a certain institution and its mission. Certainly, one of the indications of that importance is the budget made available to that institution. Thus, if one looks at the budget of the ICJ and that of existing ICTs one would conclude that the ICJ has at its disposal quite limited resources for the amount of work that it is supposed and expected to carry out in the service of the international community. Continuing to dispense justice in a timely and effective way while maintaining the high standard of its decisions cannot be further sustained by the Court without an increase in the means made available to it. A simple comparison among institutions of the same kind may suffice when judging the resources available to the judges of the ICJ. While many judges of other ICTs have at their disposal a number of assistants ranging from 3 to 10, the 15 Judges of the ICJ share amongst themselves only a limited number of 5 assistants. How much longer should the Court wait until some of those elementary needs such as that mentioned above are fulfilled?

Only during the last decade about 60 States have appeared before the ICJ, either by being involved in contentious proceedings, or by participating in the written and oral proceedings related to the rendering of an advisory opinion.[31] The fact that almost one third of all the States in the world have appeared before the Court within a limited time period of 10 years bears witness to the renewed importance and interest that

30 GA Res. 53/144 of 9 December 1998.

31 See *supra* note 27.

States have taken concerning this international judicial body. However, the acceptance of the compulsory jurisdiction of the Court is still quite low, with only 65 States which are parties to the Statute of the Court accepting its compulsory jurisdiction, including only one permanent member of the SC.[32] It should be noted for the sake of completeness that the majority of the States have appeared before the Court in judicial proceedings related to the Court's delivery of the recent advisory opinion on the *Legal Consequences of the Construction of a Wall*. That shows the importance that generally many States attribute to issues of international peace of security where the solution of the Israeli-Palestinian conflict figures prominently. Further, it illustrates also the genuine interest of States to express their legal positions, thus contributing to the interpretation and development of international human rights and humanitarian law rules and principles.

The worldwide geographical spread of cases that have come before the Court illustrates and substantiates the 'World Court' tag which the ICJ bears. By way of illustration, the cross-fertilization of two different approaches to the interpretation of reservations to treaties, which is reflected in an early advisory opinion delivered by the Court,[33] bears witness to the fact that the Court in fulfilling its task as an organ of international law takes due account of the world's different legal traditions. Further, the range of issues which these cases bring before the Court, besides the usual border disputes and issues of cross-border pollution, has come to include quite a few cases which have been concerned rather directly with the fate of individuals. Examples of the latter include the special rapporteurs' cases, the immunities of senior state officials' cases, the consular assistance dispute cases and so on. The nature of the cases brought before the Court has also changed to a large extent. These cases are no longer only about treaty interpretation, but a large number of them involve an extensive process of fact-finding. For a Court used to settle disputes based usually on the interpretation of law rather than on fact-finding this calls for the adoption of a certain range of measures which would enable the Court to dispense justice in a proper and efficient way. This development brought the Court to the first *in situ* visit in the *Gabčíkovo-Nagymaros Project* case in 50 years of its history.[34] Further, a number of cases where the use of force was involved have led to extended oral hearings by the Court of testimonies of witnesses called by both Parties to the dispute. For example, in the *Genocide* case many witnesses were brought before the Court by the Parties to this dispute. Moreover, documents, issues, and facts adjudicated upon or in the phase of adjudication before the ICTY were brought before the Court for the latter to put as much weight as it would see proper on them. This brought to the fore the question of

32 That member of the SC is the United Kingdom of Great Britain and Northern Ireland, accepting the compulsory jurisdiction on 5 July 2004. For more details on this issue see: *http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3* (last accessed on 1 November 2007).

33 *Reservations to the Convention on Genocide*, ICJ Reports 1951, pp. 24-26.

34 See ICJ Press Release 1997/7 at: *http://www.icj-cij.org/presscom/index.php?p1=6&p2=1* (last accessed on 1 November 2007).

how the Court is to evaluate this evidence. The Court endorsed many of the findings made by the ICTY, weighing the evidence according to the phases of the legal proceedings before the ICTY; obviously, putting more weight on evidence coming from cases which had been through both trial and appeal proceedings leading to a final judgment.

There is a novel development in the case law of the ICJ which is noteworthy. While holding that because of a lack of jurisdiction it was precluded by its Statute from taking any position on the merits of the claims made by the DRC, the Court pointed out that as it had stated on numerous previous occasions, there was a fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law.[35] As the Court put it, 'Whether or not States have accepted the jurisdiction of the Court, they are required to fulfil their obligations under the United Nations Charter and the other rules of international law, including international humanitarian and human rights law, and they remain responsible for acts attributable to them which are contrary to international law.'[36] Calling on the parties to a conflict to abide by their obligations under international human rights and humanitarian law is something the Court can and indeed should do, regardless of whether or not it has jurisdiction to hear a case.[37] That moral and legal duty stems from the Court's function as an organ of international law and as one of the main organs of the UN whose main pillars are the maintenance of peace and security and the protection and promotion of human rights.

The Court's contribution also stretches in another direction, namely that of developing and interpreting rules and principles in the area of State reparations for international wrongs in general and for violations of international human rights and humanitarian law in particular. Although the Court does not provide direct access to justice to individuals,[38] it has nevertheless ultimately offered them substantive redress. An exemplary case in this respect is the advisory opinion on the *Legal Consequences of the Construction of a Wall* where the Court recognized the right to reparation of legal and natural persons for damages incurred by the construction of an illegal wall in the Occupied Palestinian Territory in breach of international human rights and humanitarian law obligations.[39] In view of the above-mentioned finding the role of the Court as an important remedy for human rights and humanitarian law violations should not be overlooked. That role is also illustrated by the *Armed Activities* cases, in one of which the Court reserved for itself the right to decide about the reparations due by Uganda

35 *Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo *v*. Rwanda), (*Jurisdiction and Admissibility*), Judgment of 3 February 2006, ICJ Reports 2006, para. 127.

36 *Ibidem*.

37 For a detailed discussion of this issue see *inter alia* J. D'Aspremont, *The Recommendations by the International Court of Justice*, ICLQ, Vol. 56, 2007, pp. 185-198.

38 However, a State can always take up the case of one or more of its citizens, and an increasing number of States have done so in recent years.

39 *Wall*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 198, paras. 152-153.

to the Democratic Republic of the Congo for violations of international human rights and humanitarian law.[40]

Besides such inter-State cases brought before the ICJ, as Shelton points out, there are four other procedural postures for bringing forward claims for violations of international human rights (and humanitarian law), namely: (1) a claim brought directly by the victims against the responsible State in an international forum, provided local remedies have been exhausted; (2) a claim brought by the victims against the responsible State in national judicial or administrative bodies; (3) a claim brought by the victims against the individual perpetrators in an international forum; and (4) a claim brought by the victims against the individual perpetrators in a national forum.[41] As victims of violations of international humanitarian law can hardly claim compensation through national courts on the basis of Article 3 of the 1907 Hague Convention IV or other provisions,[42] finding a remedy at the international level is a necessary strengthening of protection for individuals. It is an accomplishment in this regard that the ICC through its articles 75 and 79 of the Statute provides an opportunity for reparations for victims of human rights and humanitarian law violations. Thus, in their entirety the ICJ, the regional human rights courts and the international criminal courts compose that supranational layer of remedies where claims of violations of international human rights and humanitarian law can also be brought.

It is noteworthy that suggestions that humanitarian considerations are sufficient in themselves to generate legal rights and obligations and that the Court can and should proceed accordingly were rejected by the Court.[43] As the Court has stated, moral principles would be taken into account by it only in so far as they were given sufficient expression in legal form.[44] In the Court's view, although humanitarian considerations may constitute the inspirational basis for rules of law…such considerations do not, however, in themselves amount to rules of law.[45] That position illustrates the fact that this is a Court of law, pointing out another limitation of the Court. However, this same Court also gave expression to the concept of 'elementary considerations of humanity' in its first ever case and further made reference to it in other cases. Could it be that the Court has been contradicting itself? That seems not to be the case, for the Court tried to draw a distinction between the concept of 'humanitarian considerations' based on moral grounds, when used for the purpose of bringing forward an *actio popularis*,[46]

40 *Armed Activities* case (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, para. 345(3)-(6).

41 D. Shelton, *Remedies in International Human Rights Law*, 2nd edition, Oxford University Press: United States, 2006, p. 230.

42 L. Zegfeld, *Remedies for victims of violations of international humanitarian law*, IRRC, Vol. 85, No. 851, 2003, p. 507.

43 *South-West Africa Cases* (Ethiopia *v.* South Africa, Liberia *v.* South Africa), (*Second Phase*), Judgment of 18 July 1966, ICJ Reports 1966, p. 34, para. 49.

44 *Ibidem*.

45 *Ibid*., p. 34, para. 50.

46 See *supra* section 2.4.1.

unknown and unaccepted at that time under international law, and that of 'elementary considerations of humanity' which is also of a moral nature, but is embedded and expressed in existing legal rules and principles. By adopting this position the Court seems to be suggesting simply that the process of changing values of the international community should take place within an established legal framework and legal boundaries in order for it to be taken into account.

Legal principles expounded upon or referred to by the Court in an *obiter dicta* sense may in the appropriate circumstances constitute stepping-stones for the development of further norms or the application of existing norms in other areas.[47] Besides, new norms may arise as a result of views expressed by the Court, provided the necessary requirements are in place.[48] The ICJ does not have limitations to its subject-matter jurisdiction. Therefore it offers a judicial forum where significant interpretation and progressive development of international human rights and humanitarian law rules and principles can take place. Due to the considerable importance and attention that the protection of individuals enjoys nowadays, gross violations of human rights and serious violations of humanitarian law are increasingly prone to fall under the scrutiny of the ICJ. Indeed, the docket of the Court already contains a number of important cases concerned with issues of international human rights and humanitarian law, which are still to be settled. Apart from States which are entitled to bring a case before the Court, such issues can be brought before the Court by the UN organs and specialised agencies, which have the right to ask the Court for an advisory opinion. Arguing in Court, as one of the means of peaceful settlement of international disputes, can surely prevent the resulting human suffering arising from resorting to the use of force or other possible sanctions! Moreover, decisions of the ICJ can and often have paved the way for the achievement of a just and long-lasting solution. Taking this into account it can be asserted that the ICJ has also been fulfilling a special role within the UN system, namely that of 'maintaining international peace and security' and 'achieving international co-operation in solving international problems'.[49]

The Court's judgments and advisory opinions which have contributed to the interpretation and development of the international law of human rights rules and principles stretch over a period of over sixty years. Understandably, this contribution does not represent an immaculate record, and the work of the Court has been subject to both praise and criticism. Some obvious obstacles standing in the way of the Court towards making a better contribution to the development and interpretation of international human rights and humanitarian law rules and principles have been the lack of standing before the Court for individuals, the general lack of compromissory clauses in instruments of both these branches of law, and the adoption of a litigation strategy by the States appearing before the Court which tends to gloss over human rights issues.

47 M.N. Shaw, *The International Court of Justice: a practical perspective*, ICLQ, Vol. 46, October 1997, p. 833.

48 *Ibidem*.

49 UN Charter, Article 1, paras. 1 and 3.

Furthermore, also the perception of the Court as a conservative institution, a limited clientele composed of 192 States which are rather jealous of their sovereignty, and to a certain extent the very consensual nature of international law and of the jurisdiction of the Court have proved to be an obstacle to the potential contribution the Court could make to these two branches of public international law. However, as discussed above, despite the fact that the Court has been able to progressively develop and interpret rules and principles of international human rights and humanitarian law, thus contributing to an international legal order where the protection of the individual is given the important place it deserves, confidence, mutual trust, commitment to international law and to peaceful means of settling disputes, together with well-understood self-interest are the only bases on which a human international order can be built.[50] The position of the Court at the apex of dispute settlement mechanisms and its composition give it both the authority and the balanced judgments which are informed by a variety of cultural and legal perspectives. This fine combination and the Court's record so far provide sufficient reason to hope that the ICJ shall continue to render a useful contribution to the interpretation and development of international human rights and humanitarian law rules and principles.

50 See speech Delivered by the President of the Portuguese Republic at the ICJ on 30 October 1997, ICJ Press Release 97/14.

# SAMENVATTING

Als men wil beschrijven welke rol een belangrijk internationaal gerechtelijk orgaan als het Internationaal Gerechtshof speelt (hierna IG, Wereldhof of Hof) en wil analyseren welke bijdrage het Hof levert aan de interpretatie en ontwikkeling van de internationale mensenrechten en humanitaire rechtsregels en -principes, kunnen daarvoor verschillende methoden worden gebruikt vanuit verschillende perspectieven. Wetenschappers, beroepsuitoefenaars, verschillende organisaties en instellingen, en ook rechters van het Hof zelf gebruiken ieder hun eigen methoden op basis van hun eigen belangen en betrokkenheid bij en kennis van het Hof. Ondanks de grote hoeveelheid literatuur die bestaat over de werkzaamheden die het IG in de zestig jaar van zijn bestaan heeft uitgevoerd, bestaat er nog geen systematisch en gedetailleerd onderzoek (monografie of proefschrift) over de bijdrage en de rol van het Wereldhof in deze twee takken van het internationaal recht. Het boek dat voor u ligt, is bedoeld om dit gat te dichten. Het is vooral gericht op rechtenstudenten, wetenschappers en mensen die werken in het internationaal recht. Het kan bovendien tot steun zijn voor mensenrechtenactivisten en leken met een algemene interesse en kennis betreffende het internationaal recht, om een beter beeld te krijgen van de bijdrage die het IG levert aan internationale mensenrechten en humanitair recht. 'Interpreteren' betekent hier het juridische proces waarmee het IG helderheid schept ten aanzien van de doelstelling, reikwijdte en toepassing van specifieke internationale mensenrechten en humanitaire rechtsregels en -principes. 'Ontwikkelen' staat niet alleen voor de bijdrage van het Hof aan de interpretatie en toepassing van bestaande regels van het internationaal recht, maar ook voor de innovatieve begrippen, principes en benadering die het Hof in zijn internationale rechtspraktijk toepast bij werkzaamheden op het gebied van internationaal recht, in zaken waarin een nauw verband bestaat met mensenrechten en kwesties van het humanitair recht.

Dit onderzoek is gebaseerd op uitvoerige literatuur die ingaat op de institutionele kenmerken van het Hof en behandelt logischerwijs waar mogelijk ook de beperktere literatuur die ingaat op de bijdrage van het Hof aan internationale mensenrechten en humanitair recht. Zoals verwacht mag worden, bestaat het grootste deel van dit onderzoek uit een gedetailleerde analyse van de relevante jurisprudentie van het Hof ter illustratie van zijn bijdrage aan de interpretatie en de ontwikkeling van internationale mensenrechten en humanitaire rechtsregels en -principes. De uitspraken van het Hof zijn geselecteerd op basis van de mate van relevantie voor het lopende proces van interpretatie en ontwikkeling van internationale mensenrechten en humanitaire rechtsregels en -principes. Deze keuze is vrij eenvoudig wanneer het Hof de toepassing behandelt van relevante bepalingen van een rechtsmiddel van mensenrechten of van

het humanitair recht in een bepaalde situatie. De keuze wordt echter moeilijker wanneer mensenrechten of kwesties van humanitaire rechtsaard in een zijdelings verband staan met het voornaamste twistpunt in een zaak. De uitspraken van het Hof zijn bestudeerd zowel in gedrukte vorm in de jaarlijkse publicatie van het Hof zelf, getiteld 'Reports of Judgments, Advisory Opinions and Orders' (ICJ Reports), als in elektronische vorm via de vernieuwde officiële website van het Hof. Door de recente aanpassingen aan de officiële website van het Hof is het mogelijk al het juridische materiaal dat te maken heeft met een bepaalde zaak online te raadplegen. Dit materiaal kan bovendien met zoekfuncties worden doorzocht. Ik wil hierbij graag vermelden dat de samenvattingen van de vonnissen en adviezen van het Hof bijzonder nuttig zijn, niet alleen voor dit onderzoek, maar ook voor het algemeen publiek dat geïnteresseerd is in het werk van deze belangrijke internationale rechtbank.

Naast een studie van de institutionele kenmerken van het IG en zijn jurisprudentie omvat dit proefschrift ook een studie van de institutionele relatie tussen het IG en andere internationale rechtbanken en tribunalen en internationale quasi-judiciële organen, waar van toepassing (ICT's: 'international courts and tribunals'; en IQJB's: 'international quasi-judicial bodies'). Er is nader gekeken naar jurisprudentie en praktijk van de ICT's en IQJB's waarin een verband bestaat met de jurisprudentie van het IG. Dat is gedaan door gebruik te maken van de bestaande databases over de jurisprudentie van deze ICT's en IQJB's. De regionale rechtbanken voor de mensenrechten hebben ieder hun eigen databases voor jurisprudentie. Voor de jurisprudentie van het Internationaal Straftribunaal voor het voormalige Joegoslavië (ICTY), het Internationaal Straftribunaal voor Rwanda (ICTR) en de Commissie voor de Mensenrechten is, naast de jurisprudentie die beschikbaar is op hun eigen officiële website, uitgebreid gebruik gemaakt van de database van het Nederlands Studie- en Informatiecentrum Mensenrechten (SIM). Daarnaast is ook gebruik gemaakt van officiële publicaties en andere algemene informatie van de websites van deze internationale organen. Zoektermen zoals 'International Court of Justice' en 'International Law' zijn gebruikt in de Booleaanse zoekfunctie binnen deze databases om zo van deze gerechtelijke organen jurisprudentie te vinden waarin naar het IG wordt verwezen. Ook de relevante jurisprudentie van het IG is doorzocht naar mogelijke verwijzingen naar de betreffende ICT's and IQJB's. De zaken die hierbij naar voren kwamen, zijn doorgenomen en worden waar relevant tot in aanzienlijk detail besproken.

Dit veelomvattende literatuuronderzoek is in principe voldoende om antwoord te vinden op de onderzoeksvragen en om adequate conclusies te trekken. Naast de literatuur over het Hof is ook de nodige aandacht besteed aan materiaal dat is opgesteld binnen het Hof, zoals de jaarlijkse speeches door de Presidenten van het Hof, uitgesproken voor de Algemene Vergadering (AV) van de Verenigde Naties (VN), en de jaarrapporten van het Hof, met name waar het gaat om zaken die te maken hebben met de bijdrage en positie van het Hof met betrekking tot de toepassing en ontwikkeling van internationaal recht en het verhogen van de effectiviteit van het Hof. Het onderzoek omvat relevante literatuur die te vinden is via zoekacties binnen verschillende bronnen, zoals de bibliotheek van het Vredespaleis, de PiCarta database, de biblio-

theek van het Departement Rechtsgeleerdheid van de Universiteit Utrecht, en verschillende juridische databases die via deze bibliotheek toegankelijk zijn. Materiaal is ook verzameld tijdens lezingen, workshops en conferenties en dergelijke over het werk van het IG en door onderdelen van het onderzoek te bespreken met andere wetenschappers. In meer praktische zin heeft de auteur ook persoonlijk enkele procedures van het IG gevolgd en heeft hij onderdeel uitgemaakt van enkele juridische teams van de verdediging bij het Joegoslavië-tribunaal. 'Last but not least' heeft de auteur in een ontmoeting met Rechter Koroma, eind juni 2007, van binnenuit een kijkje gekregen op het werk van het Hof, hoewel interviews met rechters aan het Hof over het algemeen geen deel uitmaakten van de methodologie van dit onderzoek.

Voor dit onderzoek is een analyse nodig van de institutionele kenmerken van het IG die invloed hebben op de (mogelijk voortdurende) bijdrage van het Hof aan de interpretatie en ontwikkeling van internationale mensenrechten en humanitaire rechtsregels en -principes. Dit zou resulteren in grotere helderheid met betrekking tot de mogelijkheden en beperkingen van het IG in dit opzicht. Hoofdstuk 2 begint daarom met een bespreking van de plaats die het IG inneemt in het geheel van internationale organisaties voor conflictoplossing. Vervolgens geeft dit hoofdstuk een kort overzicht van de wetgeving die door het Hof wordt toegepast in zijn rol op het gebied van conflicten en advisering. Om de rol van het IG te begrijpen als onderdeel van het internationale rechtssysteem is het bovendien nodig te kijken naar de positie van het Hof in het systeem van de VN en de verhouding tussen het Hof en twee van de belangrijkste organen van de VN: de Veiligheidsraad en de Algemene Vergadering.

De betekenis van precedenten, kwesties met betrekking tot bewijsvoering, en gerechtelijke gevolgtrekkingen die verband houden met de internationale rechtspraktijk van het Hof worden besproken omdat zij terdege van invloed zijn op de bijdrage van het Hof op het gebied van internationale mensenrechten en humanitair recht. Ook het onderwerp van de *locus standi* voor het IG en, zeer belangrijk, de competentie van het Hof en welke vorm deze aanneemt, mogen niet ontbreken in de bespreking van de mogelijkheden en beperkingen van het Hof op het gebied van internationale mensenrechten en humanitair recht. Verder staan voorlopige bezwaren automatisch in verband met competentie en wordt dat onderwerp dus ook besproken in dit hoofdstuk. Door het Hof ingestelde voorlopige voorzieningen worden uitgebreid besproken, niet alleen in hoofdstuk 2 maar ook in andere delen van het boek, omdat deze een belangrijk middel vormen in de bescherming van mensenrechten. Naast het beslechten van conflicten tussen staten omvat de functie van het Hof ook het adviseren over juridische kwesties die naar het Hof worden verwezen door de belangrijkste organen van de VN en zijn gespecialiseerde organisaties. De voordelen en nadelen van adviezen, en de discretionaire bevoegdheid van het Hof en dergelijke worden daarom ook kort behandeld. De mogelijkheid om een *actio popularis* te starten bij het Hof is ook een interessant onderwerp, met name tegen het licht van de Artikelen over Staatsaansprakelijkheid die in 2001 zijn aangenomen door de Commissie voor Internationaal Recht.

Zaken die verband houden met de door het Hof toe te passen wetgeving, zoals *locus standi*, competentie, voorlopige bezwaren, voorlopige voorzieningen en adviezen, worden besproken om een helder overzicht te verschaffen van de mogelijkheden en beperkingen van de bijdrage die het Hof kan leveren en de rol die het Hof kan spelen in de interpretatie en ontwikkeling van internationale mensenrechten en humanitaire rechtsregels en -principes. Na deze bespreking van enkele van de belangrijkste kenmerken van het Hof worden conclusies gepresenteerd over de rol van het Hof in de internationale arena en de mogelijke bijdrage die het kan blijven leveren aan de verdere interpretatie en ontwikkeling van internationale mensenrechten en humanitair recht.

Hoofdstuk 3 behandelt de bijdrage van het IG aan de interpretatie en ontwikkeling van internationale mensenrechten, rechtsregels en -principes. Dit hoofdstuk bestaat uit drie delen. In deel 1 wordt een kort overzicht gegeven van de ontwikkeling van de wetgeving op het gebied van mensenrechten. Het geheel aan wetgeving op het gebied van mensenrechten heeft in de afgelopen decennia uiteraard een aanzienlijke groei doorgemaakt. Hoewel wetenschappers deze ontwikkeling vooral hebben besproken door mensenrechten te verdelen in drie generaties, bestaat er algemene consensus dat deze drie generaties in wezenlijk verband met elkaar staan. Het belang van mensenrechten in internationale relaties en dialoog, en de *jus cogens* status die bepaalde mensenrechten hebben verworven, zijn voornamelijk gebaseerd op het feit dat de bevordering en de bescherming van mensenrechten voor de VN een van de belangrijkste doelstellingen is, die ook is vastgelegd in de artikelen van het VN Handvest. Dit hoofdstuk bespreekt eerst de processen waarin normen en handhaving van mensenrechten op internationaal niveau worden bepaald, en gaat daarna in op de rol van het IG en zijn invloed op de ontwikkeling van deze tak van het internationaal recht.

Het tweede deel van hoofdstuk 3 behandelt de jurisprudentie van het IG wat betreft specifieke kwesties op het gebied van wetgeving in de mensenrechten. Een gedetailleerde analyse van deze zaken verduidelijkt de bijdrage van het Hof aan de interpretatie en ontwikkeling van regels en principes van de mensenrechten, zoals de internationalisering van bescherming van mensenrechten, het creëren en verhelderen van fundamentele principes van mensenrechten, het verbod op genocide, het toepassen van mensenrechtenverdragen tijdens gewapende conflicten of in bezette gebieden, en individuele criminele verantwoordelijkheid voor internationaal erkende misdaden. Twee aspecten die meteen opvallen, ook bij een slechts oppervlakkige lezing van de jurisprudentie van het Hof, zijn de volgende: ten eerste, de mensenrechtenbepalingen in het VN Handvest die juridisch bindende verplichtingen omvatten; ten tweede, de principes en regels van het internationaal recht in verband met de fundamentele rechten van de mens die *erga omnes* verplichtingen met zich mee brengen. Zoals uiteengezet in het dictum van de beroemde uitspraak van het Hof in de zaak *Barcelona Traction*, gaat het bij *erga omnes* verplichtingen om de afdwingbaarheid van normen uit het internationaal recht, waarvan schending niet alleen beschouwd wordt als misdaad tegen de staat die direct door de betreffende overtreding getroffen wordt,

maar ook als misdaad tegen alle leden van de internationale gemeenschap. Deze verplichtingen gelden voor een groot aantal verschillende kwesties, misschien zelfs met inbegrip van het hele gamma aan internationaal erkende mensenrechten. In zijn dictum heeft het Hof zelf een lijst gegeven waarin agressie en genocide buiten de wet worden gesteld en de basisrechten van ieder mens, waaronder bescherming tegen slavernij en rassendiscriminatie, als voorbeeld worden gegeven van rechten die *erga omnes* verplichtingen met zich mee brengen. Er kan dus zelfs met een snelle blik op de jurisprudentie van het Hof worden geconcludeerd dat het Hof altijd van mening is geweest dat alle staten de fundamentele mensenrechten dienen te respecteren.

Zaken worden samengesteld op basis van de specifieke mensenrechtenkwesties waarop zij betrekking hebben en waaraan zij bijdragen. Conflicten die in dit hoofdstuk worden geanalyseerd omvatten de volgende zaken: *Corfu Channel* (1947-1949), *South West Africa Cases* (1960-1966), *Barcelona Traction* (1958-1961 en 1962-1970), *Asylum* (1949-1951), *Nottebohm* (1951-1955), *Hostages* (1979-1980), *Diallo* (1998-heden), *East Timor* (1991-1995), *Application of the Genocide Convention* (*Bosnia-Herzegovina* v. *Serbia and Montenegro*, 1993-2007), *Vienna Convention on Consular Relations* (1998), *LaGrand* (1999-2001), *Avena* (*Mexico* v. *United States*, 2003-2004), *Arrest Warrant* (2000-2002), *Certain Criminal Proceedings* (2003-heden), en *Armed Activities* (1999-2006). De adviezen die worden besproken zijn onder andere *Interpretation of Peace Treaties* (1949-1950), *Reservations to the Genocide Convention* (1950-1951), *Western Sahara* (1974-1975), *Legality of Threat or Use of Nuclear Weapons* (1993-1996), *Mazilu* (1989), *Cumaraswamy* (1998-1999), en *Wall* (2003-2004). Zoals verwacht wordt in dit hoofdstuk de meeste aandacht besteed aan uitgebreid onderzoek naar de door het Hof behandelde zaken die gaan om mensenrechten. Deel 3 van dit hoofdstuk is een algemene bespreking van de bijdrage van het Hof aan het interpreteren en ontwikkelen van internationale regelgeving en principes op het gebied van mensenrechten. Hierbij wordt vermeld dat er in een aantal zaken een overlap bestaat tussen internationale mensenrechten en humanitair recht, en dat deze zaken derhalve zowel in hoofdstuk 3 als in hoofdstuk 4 worden besproken omdat zij voor beide rechtsgebieden relevant zijn.

Ook hoofdstuk 4 bestaat uit drie delen. Volgens dezelfde structuur als in hoofdstuk 3 wordt in deel 1 de achtergrond beschreven, als voorbereiding op de gedetailleerde analyse van de jurisprudentie van het Hof. Eerst wordt achtereenvolgens de toepasselijkheid besproken van de Geneefse Conventies (GC's) en hun Aanvullende Protocollen (AP's) op internationale en interne gewapende conflicten, van het gangbare internationale humanitaire recht, en van nieuwe ontwikkelingen in internationaal humanitair recht. Daarna wordt de aandacht gericht op de relatie tussen het internationaal humanitair recht en internationale mensenrechten. Hoewel zowel internationale mensenrechtenwetgeving als internationaal humanitair recht streeft naar bescherming van leven, gezondheid en waardigheid van mensen, zijn er verschillen tussen de twee rechtsgebieden, met betrekking tot de reikwijdte en de situatie waarin zij functioneren. Internationaal humanitair recht geldt in tijden van gewapend conflict, nationaal of

internationaal, terwijl internationale mensenrechtenwetgeving altijd geldt, dus zowel in vredestijd als in tijden van gewapend conflict. De doctrine van militaire interventie met humanitair oogmerk zoals die in de laatste jaren is ontwikkeld, opgevat en toegepast, wordt ook besproken als onderdeel van de achtergrond bij dit hoofdstuk. De auteur heeft bovendien geprobeerd de positie van het Hof in dit onderwerp toe te lichten, op grond van de uitspraken van het Hof in de *Corfu Channel* zaak en later in de *Nicaragua* zaak.

Het tweede deel van hoofdstuk 4 bestaat uit een studie van de relevante zaken die door het Hof behandeld zijn en verband hebben met humanitair recht. Dat is het grootste deel van dit hoofdstuk. Een lijst van zaken die worden besproken omvat bijvoorbeeld *Corfu Channel* (1947-1949), *Legality of Threat or Use of Nuclear Weapons* (1993-1996), *Nicaragua* (1984-1991), *Armed Activities* (1999-2006), en *Wall* (2003-2004). Het derde deel van dit hoofdstuk is een algemene bespreking van de bijdrage van het Hof aan het interpreteren en ontwikkelen van internationale humanitaire rechtsregels en -principes.

Hoofdstuk 5 bestaat uit vier delen. Het eerste deel behandelt de noodzaak om in te gaan op de algemene verhouding tussen het IG en andere ICT's en IQJB's die actief zijn op het gebied van internationale mensenrechten en humanitair recht, om een beter beeld te krijgen van het bestaande internationale rechtssysteem. Er bestaat een groot aantal ICT's en IQJB's, en daarom wordt slechts een beperkt aantal daarvan besproken in respectievelijk deel 2 en deel 3 van dit hoofdstuk. In deel 2 ligt de nadruk op de interactie en relatie tussen het IG en rechtbanken voor de mensenrechten en tribunalen voor strafrecht die actief zijn in internationale mensenrechten en humanitair recht, waarbij geen aandacht wordt besteed aan speciale rechtbanken die zijn ingesteld voor het behandelen van economische kwesties of andere bijzondere kwesties, omdat die buiten het domein van dit onderzoek vallen. Het is belangrijk van tevoren in het achterhoofd te houden dat het Hof, hoewel het als een afzonderlijke internationale gerechtelijke instelling opereert, zijn functie uitvoert binnen het grotere geheel van vreedzame oplossing van conflicten zoals voorzien in het VN Handvest. Het onderzoek van de relatie tussen het IG en de ICT's behelst het *ad hoc* straftribunaal voor Joegoslavië en dat voor Rwanda (ICTY en ICTR), het Internationaal Strafhof, het Europees Hof voor de Rechten van de Mens (EHRM), en het Inter-Amerikaans Hof voor de Mensenrechten (I-AHM). Deze selectie, hoe beperkt ook, wordt gezien als representatief voor de belangrijkste ICT's op het gebied van internationale mensenrechten en humanitair recht.

Zoals Gill vermeldt, wordt de rol die het Hof speelt in de ontwikkeling en verheldering van het recht – op zichzelf een subfunctie van zijn belangrijkste taak: recht spreken in conflicten tussen staten – dus voor een groot deel beïnvloed door de wijze waarop staten de toegang tot het Hof hebben bepaald, de wijze waarop zij de procedure voeren, en de inhoud van hun argumenten, bewijs en producties. Er wordt daarom de nodige aandacht besteed aan de manier waarop staten gebruik hebben gemaakt van de juridische procedures bij het Hof en de mate waarin zij argumenten naar voren

hebben gebracht op basis van internationale mensenrechten en humanitaire rechtsregels en -principes, die zijn vastgelegd in de respectievelijke internationale verdragen die van kracht zijn. Factoren die mogelijk geleid hebben tot een toenemende betrokkenheid van het Hof bij kwesties op het gebied van mensenrechten en humanitair recht worden hier ook genoemd, omdat zij een verklaring zouden kunnen vormen voor de 'ups and downs' in de bijdrage van het Hof en de rol die het heeft gespeeld sinds zijn oprichting in 1946.

Het derde deel van hoofdstuk 5 behandelt de relatie tussen het IG en de IQJB's. Na een kort overzicht van het VN-systeem voor de bevordering en bescherming van mensenrechten komen de relatie en interactie aan bod tussen het IG en de Commissie voor de Mensenrechten, het controlerend orgaan van het internationaal Verdrag inzake Burgerlijke en Politieke Rechten van 1966. Naast de Commissie voor de Mensenrechten wordt hier een ander internationaal orgaan besproken: het Internationale Comité van het Rode Kruis (het Rode Kruis). Hoewel het Internationale Comité van het Rode Kruis geen quasi-judicieel orgaan is, wordt de relatie daarvan met het IG besproken omdat het Comité zeer belangrijk is binnen het internationaal humanitair recht en het IG daarnaar verwijst in zijn jurisprudentie. Hoewel er slechts twee internationale organen worden besproken, zijn deze zeker representatief voor belangrijke en bekende internationale organen, respectievelijk voor internationale mensenrechtenwetgeving en internationaal humanitair recht.

Deel 4 van dit hoofdstuk omvat een algemene bespreking van en aanbevelingen over de relatie tussen het IG en ICT's en tussen het IG en IQJB's op het gebied van internationale mensenrechten en humanitair recht. Dit vierde deel omvat ook een behandeling van de aanvullende rol van ICT's richting nationale rechtbanken ter bevordering van een betere en degelijke bescherming van individuele mensenrechten. Daarnaast wordt ook de wederzijds aanvullende rol van ICT's en IQJB's besproken binnen het internationale systeem ter bescherming van mensenrechten. Door goed samen te werken kunnen deze onderdelen van het internationale rechtssysteem – het IG, de ICT's en de IQJB's – de bescherming van individuele mensenrechten samen tot een hoger niveau brengen.

In hoofdstuk 6 komen alle kwesties die in eerdere hoofdstukken zijn besproken samen, met de nadruk op de bijdrage van het IG aan het interpreteren en ontwikkelen van internationale mensenrechten en humanitaire rechtsregels en -principes, en de positie van het IG en de relatie tussen het IG en de ICT's en IQJB's die op dit gebied actief zijn. De bijdrage en rol van het IG in dit verband komen voort uit een proces van betrokkenheid en geleidelijke ontwikkeling. Het aantal zaken dat bij het Hof aanhangig wordt gemaakt op het gebied van internationale mensenrechten en humanitaire rechten is al een *prima facie* illustratie van deze bijdrage en het potentieel van het Hof op het gebied van internationale mensenrechten en kwesties van humanitair recht. Ondanks de verschillen tussen rechtbanken voor de mensenrechten en internationale straftribunalen enerzijds en een traditioneel gerechtelijke instantie voor het beslechten van interstatelijke conflicten zoals het IG anderzijds, is het belangrijk niet uit het oog

te verliezen dat er een verband bestaat tussen internationale mensenrechten, humanitair recht en algemeen internationaal recht. Specifieker gesteld: het IG is geen rechtbank voor de mensenrechten, maar het speelt desalniettemin een belangrijke rol, en kan in de komende jaren een steeds belangrijkere rol spelen, in de ontwikkeling van de mensenrechten en van humanitair recht.

De snelle ontwikkeling van mensenrechtenwetgeving en humanitair recht in de afgelopen decennia blijkt uit een groei in het aantal zaken voor het IG waarin vragen worden gesteld bij belangrijke kwesties op het gebied van mensenrechten en humanitair recht. Dit komt enerzijds voort uit een algemene toename van het aantal zaken bij de IG en anderzijds uit de groeiende prominente rol die mensenrechtenwetgeving en humanitair recht de laatste jaren spelen binnen de ruimere context van internationale juridische conflicten. Hoofdstuk 6 geeft enkele aanbevelingen over manieren om het beroep dat wordt gedaan op het Wereldhof te intensiveren middels structurele hervorming en sterkere juridische samenwerking. In het kader van deze aanbevelingen, gericht op verbetering van de efficiëntie van het Hof middels kleine veranderingen in het Statuut van het Hof en gericht op verlaging van de kosten, worden onder meer de volgende vragen besproken: zouden de voornaamste organen van de VN, zoals de Veiligheidsraad en de Algemene Vergadering, het recht moeten krijgen om bij het IG procedures te starten tegen een staat, als er sprake is van schending van internationale mensenrechtenwetgeving en mensenrechtenverdragen? Zouden ICT's en IQJB's expliciet toegang moeten krijgen tot de adviserende functie van het Hof om de structuur van het internationaal recht intact te houden? Zou het aantal rechters bij het Hof moeten worden uitgebreid? Ook de positie van het Hof zelf binnen de pluraliteit van ICT's en IQJB's binnen het bestaande internationale rechtssysteem krijgt enige aandacht. Ten slotte volgen er enkele afsluitende opmerkingen over de bijdrage van het Hof aan het interpreteren en ontwikkelen van mensenrechten en humanitaire rechtsregels en -principes.

Het standpunt van het Hof is uiteraard, zoals in zijn jurisprudentie naar voren komt, dat fundamentele mensenrechten, zoals vastgelegd in de verschillende internationale mensenrechteninstrumenten, dienen te worden gerespecteerd en bevorderd door alle staten omdat ze een civiliserend en humanitair karakter hebben. Deze conclusie wordt versterkt door het feit dat het Hof zelf het concept '*erga omnes* verplichtingen' heeft geïntroduceerd in zijn uitspraak in de *Barcelona Traction* zaak, waarbij nadruk wordt gelegd op het belang dat de internationale gemeenschap heeft bij het borgen van respect voor bepaalde fundamentele mensenrechten. Het belang voor de internationale mensenrechtenwetgeving van deze twee concepten – 'elementaire humaniteitsbeginselen' en '*erga omnes* verplichtingen' – is onschatbaar groot: samen verschaffen ze een weliswaar basaal, maar stevig fundament voor het beschermingssysteem voor de internationale mensenrechten. Er kan zelfs worden gesteld dat deze twee concepten samen de essentie van de internationale mensenrechtenwetgeving vormen.

Het belang van internationale mensenrechteninstrumenten en het werk van hun controlerende organen voor het verbeteren van de bescherming van mensenrechten wereldwijd is door het Hof erkend en genoemd in verscheidene van zijn uitspraken en

adviezen. Met zijn bijzonder belangrijke bevindingen met betrekking tot de toepasbaarheid van deze instrumenten en de juridische gevolgen van hun toepassing met betrekking tot staten en de VN, en ook de rechten die toekomen aan individuen, levert het Hof een belangrijke bijdrage aan de internationale mensenrechtenwetgeving. Ondanks de roep vanuit de burgermaatschappij om een beter gebruik van deze internationale instrumenten teneinde daders van grove schendingen van de mensenrechten te berechten, bestaat er ook een angst, zelfs door leden van het Hof verwoord, voor wat genoemd wordt een 'veelheid aan meningen' (*cacophony of voices*). De juiste toepassing van deze instrumenten zou echter, verre van een 'veelheid aan meningen', resulteren in een verbeterde en sterke cultuur waarin respect bestaat voor de rechten van de mens.

Binnen de jurisprudentie van het Hof is het niet alleen vastgesteld dat staten de mensenrechten dienen te respecteren, maar ook dat staten onder internationaal recht verplicht zijn om het respect voor mensenrechten te waarborgen. Het Hof heeft lang geleden verklaard dat de fysieke controle over een gebied, en niet soevereiniteit of de rechtmatigheid van eigendom, de basis vormt van aansprakelijkheid van een staat voor handelingen die andere staten treffen. In de *Barcelona Traction* zaak wees het Hof erop dat mechanismen voor het afdwingen van rechten die per verdrag zijn vastgesteld de oplossing vormen voor het waarborgen van respect voor rechten van de mens, ongeacht nationaliteit. Het opnemen van mensenrechten in internationale verdragen geeft op zichzelf weer dat er een groeiend besef bestaat dat sociale ongelijkheid op internationaal niveau moet worden aangepakt. Binnen zijn jurisprudentie heeft het Hof zijn bijdrage geleverd aan het versterken van deze humanitaire beweging. Deze bijdrage omvat onder andere de uitspraken van het Hof dat mensenrechtenrapporteurs tijdens het uitoefenen van hun taak immuniteit genieten met betrekking tot gerechtelijke procedures en dat staten de plicht hebben hun maximale steun te bieden en hun immuniteit te respecteren.

De jurisprudentie van het Hof op het gebied van internationale mensenrechtenwetgeving omvat een groot aantal belangrijke kwesties voor de internationale mensenrechtenwetgeving: de internationalisering van mensenrechten; het definiëren van bepaalde fundamentele principes in de internationale mensenrechtenwetgeving; het omschrijven van het recht van volkeren op zelfbeschikking als *erga omnes* recht; het interpreteren van het verbod op genocide alsook de plicht om genocide te voorkomen; het verhelderen van het recht op asiel, de zaken aangaande diplomatieke en consulaire relaties; de bescherming die dient te worden verleend aan mensenrechtenrapporteurs om hen in staat te stellen hun taak uit te voeren wanneer zij in dienst zijn van de VN; de toepasbaarheid van internationale mensenrechteninstrumenten in situaties van gewapend conflict; en een aantal verhelderende verklaringen over de kwestie van individuele strafrechtelijke verantwoordelijkheid voor internationaal erkende misdaden.

De beroemde uitspraak in de *Barcelona Traction* zaak over het *erga omnes* karakter van bepaalde mensenrechten heeft de basis gelegd voor een enorme ontwikkeling op

het gebied van mensenrechten en ervoor gezorgd dat deze in internationale relaties van primair belang werden. Het is bijna een gemeenplaats om te stellen dat de bijdrage van het IG ook ligt in zijn lezing en interpretatie van internationale rechtsinstrumenten volgens de voorschriften van de mensenrechten. Zoals rechter Weeramantry verklaart in het advies in *Legality of the Threat or Use of Nuclear Weapons*:

> Het spreekt voor zich dat geen enkel rechtssysteem voor zijn functioneren of ontwikkeling alleen kan vertrouwen op specifieke verboden *ipsissimis verbis*. Ieder welontwikkeld rechtssysteem heeft, naast zijn specifieke vereisten en verboden, een scala aan algemene principes die van tijd tot tijd worden toegepast op specifieke voorbeelden van gedrag of gebeurtenissen die nog geen onderwerp zijn geweest van een expliciete uitspraak. Het algemene principe wordt dan toegepast op die specifieke situatie en uit die toepassing volgt een specifiekere regel.

Door te vertrouwen op concepten of concepten te definiëren, zoals de elementaire humaniteitsbeginselen, het 'heilig verbond van de beschaving', en *erga omnes* verplichtingen, heeft het Wereldhof in uitgebreidere zin bijgedragen aan het tot stand brengen van een wereldwijde gemeenschappelijke cultuur waarin respect bestaat voor mensenrechten en waardigheid. Het onderliggende idee achter deze concepten is dat altijd wanneer mensenrechten worden geschonden onze gemeenschappelijke humaniteit onder vuur ligt en dus iedere staat tegelijk het recht en de plicht heeft om actie te ondernemen en de overtreder erop aan te spreken. Bovendien houdt het Hof, zoals Ragazzi aangeeft, in het algemeen een 'waarde-georienteerde' benadering aan: deze benadering is gericht op het verschaffen van maximale juridische ondersteuning aan bepaalde fundamentele mensenrechten.

Hoewel het Hof opereert in een omgeving waarin staten in het algemeen terughoudend zijn wat betreft gerechtelijke procedures, waardoor slechts een beperkt aantal zaken aanhangig wordt gemaakt, is het Hof er toch in geslaagd om via deze zaken enkele belangrijke regels en principes van het humanitair recht te verhelderen. Het Hof heeft onder andere bij verschillende gelegenheden verwezen naar fundamentele principes van humanitair recht – de kern van de wetgeving betreffende gewapende conflicten – en deze geïdentificeerd als 'elementaire humaniteitsbeginselen'. Als onderdeel van de algemene principes van internationaal recht verschaffen deze fundamentele principes van het humanitair recht een minimum norm voor gedragsregels in de context van gewapende conflicten. In de analyses van de relevante jurisprudentie, zoals hierboven beschreven, blijken er echter enige tekortkomingen te zitten in bepaalde uitspraken van het Hof. Deze tekortkomingen worden merendeels veroorzaakt door het feit dat het Hof in zekere zin de nodige expertise mist op dit gebied, soms gecombineerd met het moeilijke en gecompliceerde karakter van de vragen die het Hof worden gesteld. Als men kijkt naar de lijst van rechters die bij het Hof werken of hebben gewerkt, zijn er niet veel die gespecialiseerd zijn in dit rechtsgebied of aanzienlijke ervaring hebben met deze tak van recht.

Het is opvallend dat het Hof, in het advies over *Legality of Threat or Use of Nuclear Weapons*, in een redenering *a contrario* verklaarde dat, indien wordt aangenomen dat de principes en regels van het humanitair recht niet van toepassing zijn op nucleaire wapens omdat deze pas werden uitgevonden nadat het merendeel van de principes en regels van humanitair recht die gelden in gewapende conflicten al was ontstaan, dit niet te rijmen is met het intrinsiek humanitaire karakter van de juridische principes in kwestie dat eigen is aan het gehele recht betreffende gewapend conflict en geldt voor alle vormen van oorlogsvoering, die van het verleden, het heden en de toekomst. De onderliggende boodschap van het Hof met deze uitspraak was misschien een heel eenvoudige, maar zeker ook een heel belangrijke: ondanks technologische vooruitgang in wapentuig blijven elementaire humanitaire overwegingen altijd van toepassing om de rampzalige effecten daarvan in te perken. De auteur is het eens met Chetail, die het volgende verklaart: 'Hoewel we het voorzichtige en enigszins dubbelzinnige standpunt van het Hof kunnen betreuren met betrekking tot de dreiging of het gebruik van nucleaire wapens en het rijmen daarvan met het internationaal humanitair recht, heeft de jurisprudentie van het Hof als geheel zeker bijgedragen aan versterking en verheldering van de normatieve basis van het internationaal humanitair recht, door de aandacht te leggen op de verbanden daarvan met het algemeen internationaal recht en door de basisprincipes uiteen te zetten die gelden bij vijandigheden en de bescherming van oorlogsslachtoffers'. Het IG heeft gesteld dat fundamentele regels van het internationaal humanitair recht die onderdeel vormen van multilaterale verdragen een afzonderlijke en onafhankelijke groep vormen, aangezien deze zijn gebaseerd op de algemene principes van het humanitair recht, die de Conventies slechts specifiek hebben gedefinieerd. Het Hof heeft bovendien duidelijk gemaakt dat deze fundamentele regels door alle staten dienen te worden nageleefd, of zij de conventies waarin deze staan nu wel of niet hebben geratificeerd, omdat deze regels principes zijn binnen het internationaal gewoonterecht die niet mogen worden overtreden.

Het is bijna vanzelfsprekend dat in de loop van de tijd de internationale gemeenschap zich in toenemende mate bezighoudt met schendingen van het internationaal humanitair recht, die helaas op zorgbarend grote schaal voorkomen. De noodzaak voor staten om te voldoen aan hun verplichting om, onder andere, langs juridische weg, het respect te waarborgen voor de principes en regels van deze tak van recht is derhalve een dwingende noodzaak geworden. Het Hof heeft bijvoorbeeld het *erga omnes* karakter erkend van verplichtingen die ontstaan volgens de normen van het internationaal humanitair recht. Iedere staat kan derhalve worden geacht een juridisch belang te hebben bij het naleven van humanitaire waarden die zijn vastgelegd in internationale instrumenten voor humanitair recht. Zoals verwoord in de Slotverklaring van de Internationale Conventie inzake de Bescherming van Oorlogsslachtoffers van 1993 dienen staten zich maximaal in te spannen

> 'teneinde zorg te dragen voor de effectiviteit van het internationaal humanitair recht en resoluut actie te ondernemen, overeenkomstig dat recht, tegen staten die verantwoordelijk

zijn voor schendingen van internationaal humanitair recht, met het doel een einde te maken aan dergelijke schendingen.'

Derhalve geldt het inschakelen van het Wereldhof als een van de mogelijke manieren om te voldoen aan de in Artikel 1 van de Geneefse Conventies opgelegde verplichtingen, dit naast humanitaire diplomatie, waarbij het gaat om politieke middelen en dat wat binnen internationale politieke forums wordt nagestreefd. Het dient hier vermeld te worden dat de voormelde verplichting geldt in zowel internationale als interne gewapende conflicten.

Het belang en de ontwikkeling van internationaal humanitair recht kunnen worden gehinderd door te weigeren verdragen te ratificeren of mee te gaan in de ontwikkeling van gewoonteregels ('customary norms'). Er bestaan echter mogelijkheden om deze barrières te vermijden binnen de VN, middels resoluties van de Algemene Vergadering, of adviezen van het Hof. Gezien het feit dat resoluties van de Algemene Vergadering niet bindend zijn en in het algemeen voortkomen uit een breed compromis van een politiek orgaan, is advies van het Hof over een twijfelachtige juridische kwestie een betere manier om nadruk te leggen op het belang van humanitaire rechtsregels en -principes. Principes en regels in internationaal humanitair recht leggen grote beperkingen op aan methoden van oorlogsvoering, met name om de kwetsbare groepen te beschermen, bijvoorbeeld burgers en krijgsgevangenen. Er moet echter nog veel werk worden verzet om humanitair recht te verspreiden en een cultuur te creëren waarin de relevante spelers zich aan de regels houden. We hebben helaas gezien dat in 'het heetst van de gewapende strijd' wetgeving, proclamaties, verklaringen, kennisgevingen en verdragen binnen het humanitair recht meer dan eens niet succesvol zijn gebleken in het beschermen van burgerbevolking en andere categorieën van beschermde personen. Hoewel het Rode Kruis traditioneel het uitvoerende orgaan is van het international humanitair recht, is er gesuggereerd dat het IG een nuttige en ondersteunende rol kan spelen voor het Rode Kruis om zijn humanitaire doelstellingen te helpen bereiken.

Ondanks het feit dat er gezaghebbende commentaren over zijn geschreven, worden bepaalde bepalingen in de Geneefse Conventies en andere humanitaire rechtsinstrumenten nog verschillend geïnterpreteerd. Daarom levert het IG waardevolle input door deze bepalingen te interpreteren, wat kan bijdragen aan het redden van meer onschuldige mensenlevens en structurele vooruitgang in het hooghouden van humanitaire waarden. Het is van belang te benadrukken dat het IG heeft aangetoond dat het een belangrijk en nuttig instrument vormt bij het interpreteren en ontwikkelen van principes van internationaal humanitair recht. Het Hof heeft namelijk bijvoorbeeld zijn officiële fiat gegeven aan de volgende elementen: herbevestiging dat Gemeenschappelijk Artikel 3 van de Geneefse Conventies alleen de minimale regels stelt die gelden voor zowel internationale als interne gewapende conflicten; benadrukken van het *erga omnes* karakter van verplichtingen onder internationaal humanitair recht; erkenning dat veel principes binnen het internationaal humanitair recht gewoonteregels vormen; het definitief beëindigen van de verwarring over de respectievelijke rollen van huma-

nitaire agentschappen, politieke organen en het leger; het nu en dan herinneren van staten aan het feit dat zij de plicht hebben te voldoen aan regels van het internationaal humanitair recht; erkenning van het recht van juridische en natuurlijke personen op schadeloosstelling bij schendingen van het internationaal humanitair recht; et cetera.

Het is duidelijk dat het aantal internationale rechtbanken en tribunalen en de rol die zij spelen in de afgelopen jaren flink zijn gegroeid. Doordat de globalisering is toegenomen, en ook de daarbij behorende stijgende dichtheid van internationale verhoudingen en de instellingen die deze verhoudingen bepalen, is er meer nadruk dan ooit komen te liggen op de structuur en functie van die instellingen. Hoewel de redenen voor het opzetten van afzonderlijke judiciële organen en quasi-judiciële organen in de politiek liggen en de praktische benodigdheden voor ieder orgaan nogal verschillen, wordt de zorg om rechtmatigheid en verantwoordelijkheid, waarvan gerechtelijke onafhankelijkheid een groot deel uitmaakt, steeds belangrijker. Dit is omdat internationale rechtbanken en tribunalen een steeds grotere rol toebedeeld krijgen binnen een klimaat van afbrokkelende soevereiniteit en toenemende internationale regulering. De uitbreiding van deze mechanismen voor de bescherming van de mensenrechten vergroot aan de ene kant de mogelijkheden voor individuen om gebruik te maken van hun rechten, en aan de andere kant speelt er door dit fenomeen een groot risico op een botsing tussen rechtsbevoegdheden en komen er vragen bij hun legitimiteit. Hoewel het duidelijk is dat botsingen tussen deze judiciële en quasi-judiciële organen niet altijd kunnen worden vermeden, is het voor het goede functioneren van deze instellingen zeer belangrijk om open te staan voor justitiële interactie en respectvol samenleven.

Deze internationale judiciële en quasi-judiciële organen hebben een gezamenlijke missie: het verschaffen van een platform waar recht wordt gepleegd. Samen zorgen ze voor een verscheidenheid aan procedures en resultaten die zowel bindend als niet-bindend kunnen zijn; deze worden in het leven geroepen om het respect voor internationale mensenrechten en humanitaire rechtsnormen te bevorderen. Door goed samen te werken kunnen ze dus uiteindelijk zorgen voor een coherent en beter systeem voor de bescherming van mensenrechten en humanitaire rechtsnormen binnen het algemene internationale rechtssysteem. De bescherming die het IG biedt aan wettelijke rechten die voortvloeien uit internationale mensenrechten en humanitaire rechtsinstrumenten waarop staten en individuen recht hebben (via klachten ingediend door de staat) wordt aangevuld door de werkzaamheden van de ICT's en de IQJB's. Een goed voorbeeld is de interpretatie door het ICTY, in de *Tadić* zaak in het humanitair recht, van de term 'beschermde personen' overeenkomstig wezenlijke relaties en niet alleen overeenkomstig formele banden op basis van nationaliteit. Bij de complexe aspecten van interetnische gewapende conflicten lijkt het erop dat de bescherming op basis van nationaliteit tekortschiet in het verschaffen van de noodzakelijke bescherming aan individuen en dat de doelstellingen van dergelijke instrumenten in de mensenrechten niet voldoende worden ondersteund; het waarborgen van respect voor menselijk leven en waardigheid. Deze dubbele laag in de bescherming van rechten (mogelijk beroep op staatsverantwoordelijkheid of op individuele criminele verantwoordelijkheid, of op beide) lijkt te

zorgen voor de langverwachte en noodzakelijke mechanismen voor betere invoering van mensenrechten en humanitair recht.

Shaw beschrijft terecht dat juridische principes die door een rechter worden uiteengezet of vermeld bij wijze van *obiter dicta* onder de juiste omstandigheden opstapjes kunnen vormen voor de ontwikkeling van verdere normen of toepassing van bestaande normen in andere gebieden. Ook kunnen nieuwe normen ontstaan naar aanleiding van door het Hof gepresenteerde opvattingen, op voorwaarde dat wordt voldaan aan de noodzakelijke vereisten. Voor het IG geldt geen beperking wat betreft de bevoegdheid over bepaalde onderwerpen. Het biedt daarmee een gerechtelijk forum waar belangrijke en vernieuwende ontwikkelingen kunnen plaatsvinden op het gebied van internationale mensenrechten en humanitaire rechtsregels en -principes. Omdat aan de bescherming van individuen tegenwoordig veel belang wordt gehecht en er veel aandacht aan wordt besteed, worden grove schendingen van mensenrechten en ernstige overtredingen van humanitair recht steeds vaker voor het IG gebracht. Bij het Hof staat een aantal belangrijke zaken op de rol in verband met kwesties op het gebied van internationale mensenrechten en humanitair recht, die momenteel hangende zijn. Niet alleen staten hebben het recht een zaak voor het Hof te brengen, ook VN-organen en gespecialiseerde agentschappen kunnen dergelijke kwesties aan het Hof voorleggen; zij hebben het recht om het Hof om een advies te vragen. Het staat uiteraard vast dat argumenteren voor een Hof minder menselijk lijden veroorzaakt dan terug te vallen op gebruik van geweld of andere sancties. Bovendien kunnen uitspraken van het IG resulteren in een rechtvaardige en duurzame oplossing, en is dat ook vaak gebeurd. Dit in acht nemende kan worden gesteld dat het IG ook binnen het VN-systeem een bijzondere rol speelt: de rol van 'het in stand houden van internationale vrede en veiligheid' en 'het tot stand brengen van internationale samenwerking bij het oplossen van internationale problemen'.

De uitspraken en adviezen van het Hof die hebben bijgedragen aan de interpretatie en ontwikkeling van de regels en principes van de internationale mensenrechtenwetgeving zijn tot stand gekomen in een periode van ruim zestig jaar. Deze bijdragen vormen uiteraard geen onbesproken geheel, en het werk van het Hof heeft zowel lof als kritiek ontvangen. Het Hof ondervindt duidelijke barrières op zijn pad. In het streven naar een betere bijdrage aan de ontwikkeling en interpretatie van internationale mensenrechten en humanitaire rechtsregels en -principes zijn er obstakels: er staan te weinig individuen terecht voor het Hof, er is een algemeen gebrek aan compromissoire clausules in de instrumenten van deze beide takken van recht en wanneer staten voor het Hof verschijnen, volgen zij vaak een procedeerstrategie die voorbij gaat aan mensenrechtenkwesties. Bovendien wordt het Hof als een conservatieve instelling beschouwd, heeft het een beperkt 'klantenbestand' van 194 staten, die alle zeer waakzaam zijn wat betreft hun soevereiniteit, en hebben het internationaal recht en de bevoegdheid van het Hof in zekere mate een zeer consensusgericht karakter, wat alles bij elkaar een barrière vormt voor de bijdrage die het Hof zou kunnen leveren aan deze twee takken van internationaal publiekrecht. Desondanks is het Hof, zoals hierboven

beschreven, erin geslaagd de regels en principes van de internationale mensenrechten en humanitair recht verder te ontwikkelen en te interpreteren, en zo bij te dragen aan een internationale rechtsorde waarin de bescherming van het individu het belang krijgt dat zij verdient. Zoals de president van Portugal sprak tijdens een bezoek aan het IG: 'Overtuiging, wederzijds vertrouwen, en betrokkenheid bij internationaal recht en bij middelen waarmee conflicten vreedzaam kunnen worden opgelost, in combinatie met goed begrip van de eigen belangen, vormen samen de enig juiste basis waarop een menselijke internationale orde kan worden gebouwd'. De positie van het Hof aan het hoofd van de mechanismen voor conflictoplossing en de samenstelling van het Hof creëren samen de bevoegdheid en de welafgewogen uitspraken die onder andere gebaseerd zijn op een verscheidenheid aan culturele en wettelijke perspectieven. Deze goede combinatie en de staat van dienst van het Hof tot nu toe zijn reden om te hopen dat het IG een nuttige bijdrage zal blijven leveren aan de interpretatie en ontwikkeling van internationale mensenrechten en humanitaire rechtsregels en -principes.

# ANNEX 1

**A/47/277 - S/24111**
**17 June 1992**

**An Agenda for Peace**
**Preventive diplomacy,**
**peacemaking and peace-keeping**

**Report of the Secretary-General**
**pursuant to the statement**
**adopted by the Summit Meeting of**
**the Security Council on 31 January 1992**

**…….**

## The World Court

38. The docket of the International Court of Justice has grown fuller but it remains an under-used resource for the peaceful adjudication of disputes. Greater reliance on the Court would be an important contribution to United Nations peacemaking. In this connection, I call attention to the power of the Security Council under Articles 36 and 37 of the Charter to recommend to Member States the submission of a dispute to the International Court of Justice, arbitration or other dispute-settlement mechanisms. I recommend that the Secretary-General be authorized, pursuant to Article 96, paragraph 2, of the Charter, to take advantage of the advisory competence of the Court and that other United Nations organs that already enjoy such authorization turn to the Court more frequently for advisory opinions.

39. I recommend the following steps to reinforce the role of the International Court of Justice:

(a) All Member States should accept the general jurisdiction of the International Court under Article 36 of its Statute, without any reservation, before the end of the United Nations Decade of International Law in the year 2000. In instances where domestic structures prevent this, States should agree bilaterally or multilaterally to a comprehensive list of matters they are willing to submit to the Court and should withdraw their reservations to its jurisdiction in the dispute settlement clauses of multilateral treaties;

(b) When submission of a dispute to the full Court is not practical, the Chambers jurisdiction should be used;

(c) States should support the Trust Fund established to assist countries unable to afford the cost involved in bringing a dispute to the Court, and such countries should take full advantage of the Fund in order to resolve their disputes.

# ANNEX 2

*General Assembly Resolution A/RES/60/1*

*http://www.un.org/summit2005/documents.html*

**2005 World Summit Outcome**

**Pacific settlement of disputes**

73. We emphasize the obligation of States to settle their disputes by peaceful means in accordance with Chapter VI of the Charter, including, when appropriate, by the use of the International Court of Justice. All States should act in accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

74. We stress the importance of prevention of armed conflict in accordance with the purposes and principles of the Charter and solemnly renew our commitment to promote a culture of prevention of armed conflict as a means of effectively addressing the interconnected security and development challenges faced by peoples throughout the world, as well as to strengthen the capacity of the United Nations for the prevention of armed conflict.

75. We further stress the importance of a coherent and integrated approach to the prevention of armed conflicts and the settlement of disputes and the need for the Security Council, the General Assembly, the Economic and Social Council and the Secretary-General to coordinate their activities within their respective Charter mandates.

76 Recognizing the important role of the good offices of the Secretary-General, including in the mediation of disputes, we support the Secretary-General's efforts to strengthen his capacity in this area.

# ANNEX 3

## Judges Serving in an International Human Rights or Humanitarian Law Body or Function[1]

| Name: | National of: | Time in Service with the Court: | Served and/or Participated in: | Time(frame): |
|---|---|---|---|---|
| 1. Andrés Aguilar-Mawdsley | Venezuela | 1991-1995 | Member of the I-ACmHR<br>Member of the UN CHR<br>Member of ECOSOC | 1962<br>1968-1972<br>1988 |
| 2. Thomas Buergenthal | United States of America | 2000-ongoing | Member, Vice President and President of the I-ACtHR<br>Member of the HRCm | 1979-1991<br><br>1995-1999 |
| 3. Kenneth Keith | New Zealand | 2006-ongoing | President and member of the International Humanitarian Fact-Finding Commission under AP I of the GCs | 2002-2006<br>1991-2006 |
| 4. Rosalyn Higgins | United Kingdom of Great Britain and Northern Ireland | 1995-ongoing | Member of the HRCm | 1985-1995 |

1 In compiling this list the author has made extensive use of the following sources: A. Eyffinger, *The International Court of Justice 1946-1996*, Kluwer Law International: The Hague/London/Boston, 1996, pp. 258-339, the website of the Court and other internet resources. While this list includes only Judges that have served in human rights or humanitarian law bodies, or that have published monographs and other important scholarly works in these fields, the number of Judges exposed to these two branches of law is certainly higher due to their activity on an international level as members of the ILC or as participants in important human rights and humanitarian law conferences. Any shortcomings regarding this list remain the sole responsibility of the author.

Annex 3

| **Name:** | **National of:** | **Time in Service with the Court:** | **Served and/or Participated in:** | **Time(frame):** |
|---|---|---|---|---|
| 5. Pieter Kooijmans | The Netherlands | 1997-2006 | Special Rapporteur of the Commission on Human Rights on the Question of Torture<br>Head of The Netherlands Delegation to the UN HRC<br>Head of the UN HRC | 1985-1993<br>1982-1984<br>1984 |
| 6. Awn Shawkat Al-Khasawneh | Jordan | 2000-ongoing | Special Rapporteur of the CHR on the Human Rights Dimensions of Forcible Population Transfer<br>Member and later Chairman of the UN Sub-Commission on the Prevention of Discri-mination and Protection of Minorities.<br>Chairman of the Jordanian National Group on the Implementation of Inter-national Humanitarian Law | 1992-1997<br>1984-1993<br>1998-2006 |
| 7. Bruno Simma | Germany | 2003-ongoing | Member of ECOSOC<br>Expert for the Human Dimension Mechanism of the OSCE and for Conflict Prevention Activities of the Secretary-General of the United Nations | 1987-1996 |
| 8. Abdul G. Koroma | Sierra Leone | 1994-ongoing | Awarded the International Institute of Humanitarian Law Prize for the Promotion, Dis-semination and Teaching of International Humanitarian Law | 2005 |
| 9. Abdallh Fikri El-Khani | Syria | 1981-1985 | Member and Chairman of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities | 1978-1981 |

| **Name:** | **National of:** | **Time in Service with the Court:** | **Served and/or Participated in:** | **Time(frame):** |
|---|---|---|---|---|
| 10. Rony Abraham | France | 2005-ongoing | Member and Chairman of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights | 1986-1998 |
| 11. Leonid Skotnikov | Russia | 2006-ongoing | Head of the Russian delegation to important conferences of conventions related to IHL such as the Conventional Weapons Convention and the Bacteriological (biological) Weapons Convention<br>Acting Head of the Russian delegation to the Fifty-eight, Fifty-ninth, Sixtieth and Sixty-first Sessions of the UN CHR | 2001-2003<br><br>2002-2005 |
| 12. Géza Herzegh | Hungary | 1993-2003 | Monograph *Development of International Humanitarian Law* | 1984 |
| 13. Louis Ignacio-Pinto | Benin | 1970-1979 | Rapporteur of the UN CHR | 1964 |
| 14. Vladimir Koretsky | USSR (Ukraine) | 1961-1970 | Soviet Union Representative to the UN CHR<br>Rapporteur to the Drafting Committee of the Universal Declaration of Human Rights | 1949-1952<br><br>1947 |
| 15. Manfred Lachs | Poland | 1967-1993 | Monograph *War Crimes*<br>Served on the UN War Crimes Commission at the close of WWII and was part of the Prosecution in the Nuremberg Trials | 1945<br>1945-1949 |
| 16. Hersch Lauerpacht | United Kingdom | 1955-1960 | Monographs:<br>*International Law and Human Rights*;<br>*The Development of International Law by the International Court* | <br>1950<br><br>1958 |

Annex 3

| **Name:** | **National of:** | **Time in Service with the Court:** | **Served and/or Participated in:** | **Time(frame):** |
|---|---|---|---|---|
| 17. Kéba M'baye | Senegal | 1982-1991 | Member of the UN CHR<br>General Rapporteur of OAU upon adoption of the African Charter on Human and People's Rights | 1974, 1978<br>1981 |
| 18. Platon Morozov | USSR (Russia) | 1970-1985 | USSR Representative to the UN CHR<br>Part of the USSR team at the International Tribunal for the Far East | 1951-1968<br>1946-1948 |
| 19. Ni Zhengyu | China | 1985-1994 | Chief Consultant of the Chinese Prosecution team at the International Tribunal for the Far East | 1946-1948 |
| 20. Nikolai Tarassov | USSR (Russia) | 1985-1994 | USSR Representative at the UN CHR<br>Member of the CmERD | 1968-1972<br>1970-1972 |
| 21. Christo-pher Weera-mantry | Sri Lanka | 1991-2000 | Monographs:<br>*Human Rights in Japan*;<br>*Apartheid: The Closing Phases?*;<br>*The Slumbering Sentinels: Law and Human Rights in the Wake of Technology* | <br>1979<br>1980<br>1983 |

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