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The International Court of Justice

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Chapter One

The International Court of Justice

Sean D. Murphy

A. Overview

The International Court of Justice ("ICJ" or "Court") is a highly respected and authoritative judicial tribunal, lying at the center of the U.N. system, with an influence that extends well beyond the legal relations of the Parties that appear before it. At the same time, important constraints on its jurisdiction preclude the Court from resolving most disputes between States.

1. Essential Information

The core instruments creating the ICJ are the U.N. Charter (especially Article 7(1) and Chapter XIV) and the ICJ Statute. The U.N. Charter provides that the ICJ shall be the "principal judicial organ" of the United Nations and that all UN Member States are ipso facto parties to the ICJ Statute. As such, all 192 Member States of the United Nations are Members of the ICJ Statute and thus capable of appearing before the Court in either contentious

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2 For information relating to the work of the International Court of Justice, see Yearbook of the International Court of Justice (1947-); International Court of Justice, http://www.icj-cij.org (last visited Feb. 27, 2011).
5 U.N. Charter Arts. 92, 93(1).
cases or advisory proceedings. States that are not U.N. members (such as Switzerland until 2002) are able to adhere to the Court’s Statute if they so choose.\(^6\) Yet the ICJ Statute allows only States to participate in contentious cases,\(^7\) thus precluding contentious cases brought by or against international organizations, non-governmental organizations, transnational corporations, or individuals.

The ICJ Statute is based on the Statute of its predecessor, the Permanent Court of International Justice ("PCIJ"),\(^8\) which was formed in the aftermath of World War I in conjunction with the League of Nations ("the League"). Whereas the "political" League was based in Geneva, the "judicial" PCIJ was placed at a distance in the historically neutral country of the Netherlands, taking up residence in The Hague at the Peace Palace alongside the Permanent Court of Arbitration.\(^9\) Principally operating from 1922 to 1939, the PCIJ issued some twenty-seven advisory opinions and thirty-two judgments on a variety of matters, many concerning disputes arising under the post-World War I peace treaties and boundary disputes.\(^10\)

Important defects in the PCIJ, however, were corrected with the ICJ. For example, membership in the League did not automatically entail membership in the Statute of the PCIJ, which was a disconnect that was thought to have weakened the PCIJ. At the same time, considerable continuity was maintained between the two institutions. In addition to remaining in The Hague, the ICJ operates under a Statute that is almost verbatim the Statute of its predecessor, and hence a variety of procedural decisions of the PCIJ remain of direct importance for the ICJ today. Moreover, as the first global judicial court, the PCIJ began the judicial process of clarifying and codifying core elements of substantive international law and thus generated a stream of "first impression" findings that continue to be cited and built upon today by the ICJ. Together, these two institutions and their jurisprudence are often referred to informally as the "World Court."

The ICJ consists of fifteen highly regarded jurists from across the globe, elected for nine-year, renewable terms by the U.N. General Assembly and U.N. Security Council.\(^11\) To promote a separation between the judges and

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\(^4\) PCIJ Statute Art. 35(2).
\(^7\) PCIJ Statute Art. 35(1).
\(^8\) Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 379 (hereinafter: PCIJ Statute).
\(^11\) ICJ Statute Arts. 3–4, 13.
governments, candidates are not nominated directly by governments. Instead, potential judges are nominated by "national groups" formed in accordance with the procedures of the Permanent Court of Arbitration. Hence, each State establishes a national group of four persons who are to be of "recognized competence in international law" and of "high moral character." The national group, in turn, decides whether to nominate a person for the ICJ and, if so, whom.13

From the slate of nominees, five judges of the ICJ are elected every three years for nine-year terms,14 thus allowing continuity of membership even amidst change. The ICJ Statute provides that persons are to be elected based on their independence, character, and expertise, and not their nationality.15 Once elected, judges take no instructions from governments. Further, they are precluded from participating in cases in which they were previously involved, which can have the effect of preventing some judges from sitting in some cases involving their own States. A judge, however, is not prevented from sitting in a case involving the State of his or her nationality simply due to that connection.16 The relatively lengthy term of each judge is thought to help further insulate him or her from deciding cases with an eye to reelection. Moreover, the judges are paid international civil servants; they cannot be recalled or dismissed by the governments of their nationalities. In the event of the resignation or death of a judge, the U.N. General Assembly and U.N. Security Council hold a special election to fulfill the remaining term of the vacancy.17

While the judges are independent from governments, nationality and regional representation remain relevant when composing the Court. The Statute provides that no two judges may be of the same nationality and that the judges are to be selected so that the "principal legal systems of the world" are represented.18 Though not required by the U.N. Charter or the ICJ Statute, a "gentlemen's agreement" of the U.N. membership has resulted in seats on the Court being allocated so that a specific number of judges are elected from each of the principal regions of the world: three judges from African States; three judges from Asian States; two judges from East European States; two judges from Latin American and Caribbean States; and five judges from

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12 Id. Art. 2.
13 Id. Arts. 4–5; see also Lori Damrosch, "The Election of Thomas Buergenthal to the International Court of Justice," 94 Am. J. Int’l L. 579 (2000).
14 ICJ Statute Art. 13.
15 Id. Art. 2.
16 Id. Arts. 17(2), 31(1).
17 Id. Art. 14.
18 Id. Arts. 3(1), 9.
the Western European “and other” States. Further, while the permanent members of the Security Council do not have a “veto” with respect to the election of ICJ judges because only a majority of nine affirmative votes is required from any combination of Council members, the five permanent members are in a position to influence strongly the process. Further, it is generally accepted that having a judge on the Court of the nationality of the five permanent members is valuable in buttressing the authority and credibility of the Court, such that it is no surprise that a judge of each permanent member is represented on the Court.

Perhaps the most striking indication of the continuing relevance of nationality is the ability for a State that has no judge of its nationality sitting on the Court to appoint an ad hoc judge to sit in a contentious case, who can be of the State’s nationality or some other nationality. The presence of such party-appointed adjudicators presumably helps draw States into the Court’s jurisdiction because, in some sense, it allows the perspective of the State to be well represented during the Court’s deliberations. At the same time, given the size of the Court, one or two ad hoc judges are not in a position to dictate the outcome of the Court’s judgment; indeed, the vote of one ad hoc judge in many instances simply offsets that of the other. This element of the Court’s procedure at times has been criticized as diminishing the Court’s overall independence from the Parties who appear before it.

As discussed below, the exact law to be applied by the Court in any particular case may be limited by the scope of the Court’s jurisdiction in that case. As a general matter, however, Article 38(1) of the Statute provides that the Court is to decide disputes “in accordance with international law” by applying four sources: (a) treaties; (b) customary international law; (c) general principles of law; and (d) judicial decisions and the teachings of the “most highly qualified publicists of the various nations.” Article 38(1) has had an influence well beyond the Court itself, as the classic starting point of any international law analysis entails consideration of these four sources.

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20 ICJ Statute Art. 10. A judge from each of the permanent members has been on the Court since its inception, with the exception of a gap between 1967 and 1985 when there was no Chinese judge. See Bruno Simma ed., The Charter of the United Nations: A Commentary, op. cit., p. 1161. The ICJ judges of U.S. nationality to date have been: Green Hackworth (1946–61); Philip Jessup (1961–70); Hardy Cross Dillard (1970–79); Richard Baxter (1979–80); Stephen Schwebel (1981–2000); Thomas Buergenthal (2000–10); and Joan Donoghue (2010–present).
21 ICJ Statute Art. 31(1)–(3).
22 Id. Art. 38(1).
2. **Jurisdiction**

States cannot be sued before the ICJ without their consent. Joining the United Nations and thereby *ipso facto* becoming a party to the ICJ’s Statute does not automatically expose a State to the Court’s jurisdiction.\(^{23}\) Adhering to the ICJ’s Statute simply opens the door for a State to sue or be sued before the Court, but it does not allow the State to go through that door. Instead, some further form of consent to the ICJ’s jurisdiction must exist. This requirement of further state consent is why most of the 192 U.N. Member States have never appeared before the Court in a contentious case and why the Court is regarded as an important, but not dominant, player in the field of international dispute resolution.

There are three means by which a State can express consent to the jurisdiction of the Court. States can accept the Court’s jurisdiction on an *ad hoc* basis for the adjudication of an existing dispute.\(^{24}\) For example, in July 2010, Burkina Faso and Niger jointly submitted a frontier dispute to the Court for the purpose of determining their mutual boundary in a particular sector.\(^{25}\) While such a dispute is "contentious" in the sense that there are differing views between the two States as to the relevant facts or law, both States agree *ab initio* to bring the dispute to the Court for resolution.

Alternatively, States can accept the Court’s jurisdiction by concluding a bilateral or multilateral treaty that provides for future jurisdiction over certain issues in the event that a dispute arises.\(^{26}\) This form of jurisdiction is limited not just by the need to find a relevant treaty, but also by the terms of jurisdiction set forth in that treaty. The relevant treaty might provide for broad jurisdiction, such as the 1948 American Treaty on Pacific Settlement ("Pact of Bogotá"), which provides in Article XXXI: "Parties declare that they recognize, in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them...."\(^{27}\) For example, Costa Rica invoked this

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\(^{24}\) [ICJ Statute Art. 36(1)].


\(^{26}\) [ICJ Statute Art. 36(1)]. Treaties pre-dating the existence of the ICJ that provide for jurisdiction of the PCIJ are also regarded, under the ICJ Statute, as triggering ICJ jurisdiction. *Id.* Art. 37.

provision in November 2010 to seize the Court of jurisdiction in a dispute against Nicaragua, which concerned an alleged incursion into and occupation of Costa Rican territory by Nicaragua.28

But the treaty invoked might provide for much narrower jurisdiction, limited only to the specific subject matter of the treaty itself. For example, the Convention Against Genocide sets forth various obligations of States with respect to preventing and punishing genocide. Article IX provides that disputes between parties arising under the convention shall be submitted to the ICJ at the request of one of the parties.29 Other types of disputes unrelated to the Convention cannot be submitted to the Court. The effect of such limited jurisdiction is that disputes can sometimes be presented to the Court in a rather skewed fashion. For instance, when Georgia sought to sue Russia for an alleged incursion by Russia into Georgia’s territory in 2008, the only treaty available to which both States were a Party that provided for the Court’s jurisdiction was the Convention on the Elimination of All Forms of Racial Discrimination.30 Consequently, Georgia’s case was entirely cast in terms of whether Russia’s conduct constituted racial discrimination within the meaning of the Convention, not in terms of whether it constituted an unlawful use of force or intervention in Georgia.31

Since this form of jurisdiction is predicated on the presence of a treaty obligation accepting the Court’s jurisdiction, it is critical to assess whether a State, in joining a multilateral treaty, filed a reservation limiting or rejecting the provision that provides for the Court’s jurisdiction. Thus, when the United States ratified the Convention Against Genocide in 1988, it included a reservation stating that, before any dispute could be submitted to the Court under Article IX, “the specific consent of the United States is required in each case.”32 Consequently, when the Federal Republic of Yugoslavia (Serbia & Montenegro) sought to sue the United States under the Convention Against Genocide for acts associated with NATO’s bombing campaign

against Serbia in 1999, the ICJ found that there was no jurisdiction and dismissed the case.\textsuperscript{33}

The third way in which jurisdiction may arise is under the "optional clause" or "compulsory jurisdiction." Here, the State Parties to the ICJ Statute may make a unilateral declaration that "they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes..." involving issues of law or fact governed by rules of international law.\textsuperscript{34} Most States have not accepted this "compulsory jurisdiction" of the Court. Of the 192 Member States of the United Nations, only 66 have accepted the Court's compulsory jurisdiction as of early 2011.\textsuperscript{35} Moreover, many of those acceptances contain conditions, limitations, or reservations that significantly limit the State's consent. The only Permanent Member of the Security Council that currently accepts the Court's compulsory jurisdiction is the United Kingdom and, even there, the acceptance is conditioned by several significant reservations that make it difficult to sue the United Kingdom before the Court.\textsuperscript{36}

Nevertheless, cases are regularly filed before the Court invoking this compulsory jurisdiction. For example, in June 2010, Australia sued Japan claiming that Japan's continued pursuit of a large-scale whaling program violated Japan's obligations under the International Convention for the Regulation of Whaling.\textsuperscript{37} The Convention, however, does not provide for the Court's jurisdiction. Thus, Australia invoked the declarations accepting the Court's compulsory jurisdiction made by Australia in 2002 and Japan in 2007, and then called upon the Court to determine if the Convention had been violated.\textsuperscript{38}

Even if the Court finds that it has jurisdiction over a claim, the Court might regard a claim as inadmissible, (although the exact distinction between the two concepts is not always clear). Thus, in certain cases, the Court has relied upon a rule of customary international law known as the "local remedies rule." Before a State may espouse a claim on behalf of its national, it must show that the national has exhausted all available legal remedies in the courts and administrative agencies of the State against which the claim

\textsuperscript{34} ICJ Statute Art. 36(2); see J.G. Merrills, "The Optional Clause Revisited," 64 Brit. Y.B. Int'l L. 197 (1993).
\textsuperscript{36} See id.
is brought; failure to do so will make the claim inadmissible.\textsuperscript{39} The rule is designed to permit a State to remedy a wrong at the national level before it is transformed into a dispute on the international plane, where it might unnecessarily disrupt relations between States. Moreover, it provides the Court with an opportunity to decline to pass upon a dispute that might place it in direct conflict with the tendency of some States toward strong constitutional autonomy. Other forms of admissibility issues can arise, such as in the context of the standing of a State to bring a case\textsuperscript{40} or mootness of the issue presented in the case.\textsuperscript{41}

Separate from the Court’s jurisdiction over contentious cases between two States, the Court also has jurisdiction to issue advisory opinions on legal questions.\textsuperscript{42} The advisory jurisdiction of the ICJ may only be invoked by U.N. organs and by the specialized agencies of the United Nations who have been authorized to do so.\textsuperscript{43} Although advisory opinions are non-binding, they do have some juridical authority. Among other things, they can legitimate certain conduct of States and organizations, and they invariably have significance for a legal system in which judicial precedents are scarce.\textsuperscript{44}

3. Procedural Overview

The key instrument with respect to the procedure of the Court, other than Chapter III of the ICJ Statute, are the Rules of Court (especially Part III), which were adopted in 1978 and thereafter amended on occasion.\textsuperscript{45} Written and oral pleadings are submitted to the Court in either English or French, after which the Court privately deliberates and issues its decision. Controversial cases are often heard in phases, with separate decisions issued on:

1. requests for provisional (or interim) measures of protection;\textsuperscript{46}

2. requests

\footnotesize{\textsuperscript{39} See Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Mar. 21).}

\footnotesize{\textsuperscript{40} See South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).}

\footnotesize{\textsuperscript{41} See Nuclear Tests (Austral v. Fr.: N.Z. v. Fr.), 1974 I.C.J. 253 (Dec. 20).}

\footnotesize{\textsuperscript{42} See Mahasen Mohammad Aljaghoub, The Advisory Function of the International Court of Justice 1946–2005 (Heidelberg: Springer, 2006).}

\footnotesize{\textsuperscript{43} U.N. Charter Art. 96.}


\footnotesize{\textsuperscript{46} ICJ Statute Art. 41.}
for intervention by third-party States; challenges to the Court’s jurisdiction or the admissibility of the claim; (4) the merits of the claim; and (5) the proper damages if liability is found.

A contentious case commences with the filing of an Application to the Court, specifying the nature of the dispute, the basis of the Court’s jurisdiction, the alleged violations, and the remedy sought. If provisional measures of protection are sought, an expedited hearing and order will take place for disposition of that particular request, but normally the case proceeds with greater deliberation. In such an expedited proceeding, and without prejudging the outcome on the merits, the Court will consider whether there appears to be prima facie jurisdiction and a danger of irreparable damage due to ongoing conduct. Otherwise, after a meeting of the Parties with the President of the Court, a schedule is set for the filing of a Memorial and Counter-Memorial, which may also be followed by a second round of written pleadings in the form of a Reply and Rejoinder. If a Respondent State seeks to challenge the Court’s jurisdiction over the dispute, its objection must be filed within three months after the filing of the Memorial. Further, if the Respondent wishes to file a counter-claim against the Applicant, it may do so along with its Counter-Memorial, so long as the counter-claim is directly connected with the subject matter of the claim and is within the Court’s jurisdiction.

The written pleadings are not made public until the date of the oral hearing, which is open to the public. At the oral hearing, there is typically a first round of presentations by the Applicant and the Respondent, followed by a second round. The judges of the Court rarely ask questions; when they do, it often occurs at the end of the oral proceeding, with a request that the Parties respond in writing within a short time period. The failure of a Party to appear before the Court for the written or oral proceedings does not prevent the Court from proceeding with the case. The Court, however, must still determine that the claim before it is well founded in fact and law because default judgments are not issued.

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66 Id. Arts. 62–63.
67 Rules of Court Arts. 38, 41.
68 Id. Arts. 73–74.
70 Rules of Court Arts. 44–45, 49.
71 Id. Art. 79.
72 Id. Art. 80.
73 ICJ Statute Art. 53.
ICJ Statute Article 26 allows the Court to establish a chamber of judges to decide a case,\textsuperscript{55} which the Court typically is inclined to do if two States appearing before it request such a chamber and identify the judges they wish appointed to the chamber. Moreover, the chamber can consist of any combination of judges; unlike the PCIJ Statute, there is no requirement that the chamber represent "the principal legal systems of the world."\textsuperscript{56} For instance, in \textit{Gulf of Maine}, Canada and the United States informed the Court that they desired a chamber consisting of five ICJ judges identified by the Parties.\textsuperscript{57} Some special rules apply in the context of chamber proceedings, but most procedures remain the same and chamber judgments are regarded as judgments of the Court as a whole.\textsuperscript{58}

Judgments issued by the ICJ in contentious cases are final, without further appeal, and binding on the parties.\textsuperscript{59} At the same time, if the meaning of the judgment is unclear, a Party may request an interpretation from the Court.\textsuperscript{60} Further, if an important fact unknown at the time of the proceedings comes to light, a Party may request a revision of the judgment.\textsuperscript{61} In addition to the judgment reached by the majority (with the President casting a second vote if necessary to break a tie),\textsuperscript{62} each judge may issue a concurring or dissenting opinion or declaration.\textsuperscript{63}

Once the judgment is issued, each U.N. Member State "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."\textsuperscript{64} Yet in crafting the U.N. Charter and the ICJ Statute, States elected not to include any provisions expressly addressing the legal effect of ICJ judgments within national legal systems, such as whether they provide a basis for private rights of action in national courts. Rather, the recourse envisaged by the U.N. Charter is for the victorious party to appeal non-compliance to the U.N. Security Council, "which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."\textsuperscript{65} To date, in only one case has the Applicant State,
Nicaragua, requested that the Security Council take action to enforce the judgment when the Respondent State, the United States, lost on the merits. Exercising its prerogative as a permanent member of the Council, the United States vetoed the proposed resolution.66

In advisory opinion proceedings, all U.N. Member States are invited to make written and oral submissions. Some special rules of the ICJ Statute and Rules of Court apply with respect to advisory proceedings, but the Court is also guided in those proceedings by the procedural rules set for contentious cases.67

B. Review of the Case Law

In addition to the actual texts of the Court’s decisions68 and the pleadings before it made by States,69 various descriptive and analytical digests exist to assist in researching the Court’s decisions,70 as well as analyses in books and periodicals.71 Since the case law of the ICJ is far too extensive to summarize in full in this chapter, the following is a review of some of the most significant decisions of the Court in selected areas of international law.

68 The Court publishes its decisions in volumes entitled Reports of Judgments, Advisory Opinions and Orders (1947–).
69 The Court publishes the pleadings and submissions of States and other materials in Pleadings, Oral Arguments and Documents (1948–).
1. Sources of International Law

a. Customary International Law

In S.S. "Lotus,"72 the PCIJ was asked to decide whether Turkey could exercise national jurisdiction over a French national for negligent conduct that occurred on a French vessel, which resulted in a collision on the high seas that harmed a Turkish vessel and nationals. In determining whether any rule of customary international law prohibited Turkey's exercise of national jurisdiction, the Court considered the nature and scope of state practice on the issue, findings of international and national tribunals, and the writings of publicists. This approach has influenced subsequent judicial analyses of whether a norm of customary international law exists. Further, the Court articulated a particular perspective when assessing the lawfulness of state practice—now commonly referred to as the "Lotus principle"—in which a State's conduct is presumed lawful unless a prohibition against the conduct can be found in international law. According to the Court:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.73

73 Id. at 18; see also Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 151, 168 (July 20) (finding that the purposes of the United Nations "are broad indeed, but neither they nor the powers conferred to effectuate them are unlimited. Save as they have entrusted the Organization with the attainment of these common ends, the Member States retain their freedom of action"); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 269 (June 27) ("If in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception."); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 52 (July 8) ("State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition."); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ¶ 56 (July 22, 2010), available at www.icj-cij.org/docket/files/141/15987.pdf (proceeding on the basis that, in relation to the legality of a specific act under international law, it is not necessary to demonstrate a permissive rule so long as there is no prohibition).
The relationship of treaties to customary international law was at issue in *North Sea Continental Shelf*, where Denmark and Germany urged the Court to find a customary international law rule requiring the use of an equidistance line for delimitation of the continental shelf between adjacent States when those States could not otherwise agree upon delimitation. Denmark and Germany in part argued that Article 6 of the 1958 Convention on the Continental Shelf had helped generate a rule of customary international law binding upon Germany, even though Germany had not ratified or acceded to the Convention. While accepting that a treaty provision can help create a norm of customary law, the Court rejected the argument in that instance by an analysis that focused on whether the relevant treaty provision had a "fundamentally norm-creating character," the length of time the treaty provision was in force, the number of States adhering to the treaty, state practice since enactment of the treaty by both Parties and non-Parties, and whether that practice evinced a belief that the relevant norm was legally-compelled.

The Court returned to this issue in *Military and Paramilitary Activities, this time in the context of whether Article 2(4) of the Charter – prohibiting transnational uses of force – had generated not just a treaty obligation upon U.N. Member States, but also an obligation under customary international law. One problem in reaching such a finding was the fact that there had been numerous incidents of transboundary uses of force in the post-Charter era, which arguably defeated any consistent state practice establishing a customary norm. The Court, however, found that the customary norm did exist. In a finding highly relevant for the theory of customary international law, the Court stated:

It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

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74 *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3 (Feb. 20).
76 *North Sea Continental Shelf*, op. cit., §§ 70–81.
77 *Military and Paramilitary Activities in and Against Nicaragua*, op. cit., § 186.
The Court has recognized, however, that as a customary norm emerges, it is possible for any particular State to opt out of the norm, so long as it unambiguously and persistently objects to the new norm while it is emerging and thereafter. In Anglo-Norwegian Fisheries, the Court found that a customary rule limiting the drawing of a baseline across a bay to ten miles had not emerged, but went on to say that, even if such a norm had emerged, Norway would not be bound "inasmuch as she has always opposed any attempt to apply it to the Norwegian coast." 78 At the same time, the Court has maintained that certain norms of international law are so fundamental in nature that no State may derogate from them, as either a persistent objector or by means of a new treaty obligation. In Military and Paramilitary Activities, the Court referred to the view with apparent approval that Article 2(4) of the U.N. Charter "constitutes a conspicuous example of a rule in international law having the character of jus cogens," 79 and, in Armed Activities in the Territory of the Congo, the Court found that the prohibition on genocide was a norm having jus cogens character, though that alone was not a basis for establishing the Court’s jurisdiction over an alleged violation. 80

b. Treaty Law
The World Court has interpreted many treaties over the course of its existence. In its recent holdings, the Court has helped solidify key legal standards set forth in the Vienna Convention on the Law of Treaties, 81 even in circumstances where that treaty was not directly binding upon the Parties with respect to the treaty at hand. On the important issue of how treaties should be interpreted, the Court stated in Genocide Convention, brought by Bosnia-Herzegovina, that

what obligations the Convention imposes upon the parties to it depends on the ordinary meaning of the terms of the Convention read in their context and in the light of its object and purpose. To confirm the meaning resulting from that process or to remove ambiguity or obscurity or a manifestly absurd or unreasonable result, the supplementary means of interpretation to which recourse may be had include the preparatory work of the Convention and the circumstances of its conclusion. Those propositions, reflected in Articles 31 and

78 Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18); see also Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277-78 (Nov. 20).
79 Military and Paramilitary Activities in and Against Nicaragua, op. cit., ¶ 190.
32 of the Vienna Convention on the Law of Treaties, are well recognized as part of customary international law...

A particularly interesting case concerning the circumstances under which a State may avoid a treaty obligation is Gabčíkovo-Nagymaros Project. In that case, the Court rejected Hungary’s “changed circumstances” (sometimes referred to as rebus sic stantibus or force majeure) argument that a treaty concluded during the Cold War between two communist governments—Hungary and Czechoslovakia—for the building of a hydroelectric project along the Danube River had been radically transformed by the fall of communism in Eastern Europe, the rise of environmentalism, and the alleged diminishing economic viability of the venture, thereby allowing Hungary to terminate the treaty. According to the Court, the prevailing national political situation and economic systems of the Parties when the treaty was concluded were not closely linked to the object and purpose of the treaty, the economic viability of this particular project had not been radically transformed, and new developments in environmental knowledge or environmental law were foreseeable when the treaty was concluded.

The Court also rejected Hungary’s argument that it was impossible to complete the project as contemplated in the treaty, given that an essential object was to do this through joint exploitation in an environmentally sound manner. According to the Court, the treaty contemplated mechanisms for altering the project through negotiation if there were environmental issues, and any difficulty with joint exploitation was attributable to Hungary’s own conduct in trying to withdraw from the project. As such, the Court accepted the availability of an “impossibility” argument, but only in extreme circumstances.

c. Other Sources
Given the existence of numerous international organizations, the Court at times has been called upon to consider the normative value of resolutions adopted by organs of international organizations. In the Nuclear Weapons advisory opinion, the Court was urged by some States to find a prohibition on the use or threat to use nuclear weapons within a series of U.N. General Assembly resolutions. The Court acknowledged that

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83 Gabčíkovo-Nagymaros Project (Hung./Slov.), 1997 I.C.J. 7 (Sep. 25).
84 Id. § 104.
85 Id. §§ 102-03.
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.  

In that instance, however, the Court viewed the relevant resolutions as not establishing the existence of a norm prohibiting nuclear weapons; the resolutions in question were too equivocal and, when adopted, had garnered substantial numbers of negative votes or abstentions. Ultimately, relying upon principles emanating from treaties on the law of war, the Court found that the use of nuclear weapons, as a general matter, would be unlawful, but in certain extreme circumstances involving the very survival of a State, such use might be lawful.

2. Subjects of International Law

In the course of its decisions, the Court has made important pronouncements relevant to the various "subjects" of international law, including States, international organizations, and persons. For example, in its advisory opinion on Kosovo’s declaration of independence, the Court was asked to opine on whether that declaration was unlawful, given Kosovo’s status as a province of Serbia, which opposed Kosovo’s independence. To a certain extent, placement of the matter before the Court was viewed as a test as to whether a new State had been formed. Staying within the narrow confines of the question placed before it, the Court did not directly pass upon Kosovo’s statehood, nor upon whether other States might recognize that statehood. Instead, the Court simply concluded that the declaration of independence issued by Kosovo’s leaders violated neither general international law nor the specific regime set up by the Security Council for international administration of Kosovo after the 1998–99 crisis.

With respect to international organizations, the Court issued a landmark ruling in its 1949 advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations. Coming early in the life of the United

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86 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, op. cit., ¶ 70.
87 Id. ¶¶ 71–73.
88 Id. ¶¶ 95–97.
89 See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, op. cit.
Nations, and with implications for all U.N. specialized agencies and arguably all international organizations, the opinion tackles whether the United Nations has sufficient "personality" separate from its Member States so as to allow it to pursue a diplomatic claim. Based upon an analysis of the U.N. Charter, including the powers and status conferred upon its organs, the opinion found that sufficient personality existed to support pursuit of a diplomatic claim both for direct injury to the organization and injury to persons in the employ of the organization because the latter type of claim was not only efficient, but also helped protect the integrity of the United Nations. Moreover, the opinion found that such a claim could be brought not just against a U.N. Member State, but even against a non-U.N. Member State, because "fifty States, representing the vast majority of the members of the international community [in 1945], had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims." That finding, which solidified the legal status of international organizations as subjects of international law, arguably helped pave the way for the human rights movement by vividly demonstrating that States were no longer the sole possessor of rights and obligations on the international plane.

3. Rules on State Responsibility

Especially in two of its cases – Military and Paramilitary Activities brought by Nicaragua and Genocide Convention brought by Bosnia-Herzegovina – the Court has significantly confirmed and clarified the standards for attributing conduct to a State. In Genocide Convention, the Court asserted that conduct perpetrated by persons or entities having the status of "organs" of a government under its internal law are acts attributable to that government's State. Persons or entities that are not state organs may nevertheless be equated with state organs "provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument." If the persons or entities are neither a state organ nor acting in complete dependence on the State, their conduct may nevertheless be attributed to the State if it can be shown that they

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91 Id. at 185.
93 Id. § 392 (quoting Military and Paramilitary Activities in and against Nicaragua, op. cit., § 110).
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.94

Even if the conduct was not attributable to the State at the time it was undertaken, it can become so if the government thereafter expresses approval of or endorses the conduct.95

Normally, breaches of international law occur as between the two States directly involved in the underlying conduct, such as harm by one State to the national of another. However, in Barcelona Traction, the Court adopted the concept of obligations *erga omnes*, meaning obligations owed by a State towards the international community as a whole. For those obligations, all States have an interest in whether the obligation is upheld. According to the Court, "[s]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."96

This concept of *erga omnes* obligations has not led to widespread advancement of claims by States; indeed, the Court itself seemed to disfavor the idea that all States could pursue claims based on such obligations when it dismissed cases brought by Ethiopia and Liberia against South Africa for abuse of its international mandate in South West Africa.97 Nevertheless, this concept has helped reinforce the idea that certain international obligations are especially important and that the broad community of States has an interest in and can speak to whether those obligations are being transgressed.

4. Privileges and Immunities in National Systems

In *Arrest Warrant of 11 April 2000*,98 the Court considered the legality of the issuance of a Belgian arrest warrant against the Republic of the Congo's Minister of Foreign Affairs for alleged war crimes and crimes against humanity, pursuant to a Belgian criminal law statute that allowed for "universal

94 Id., § 400 (quoting Military and Paramilitary Activities in and against Nicaragua, op. cit., § 115).
97 See South West Africa, op. cit., § 88 (finding that the concept of actio popularis was "not known to international law as it stands at present").
jurisdiction,” or jurisdiction in circumstances where Belgium’s direct interests or nationals were not involved. The Court declined to pass upon the permissibility of such a statute and instead focused on the immunity of an incumbent Foreign Minister from criminal jurisdiction. Since no relevant treaties spoke to the matter, the Court’s judgment turned upon customary international law, thus creating a precedent of relevance for all other comparable circumstances. The Court found that under customary international law, state officials are entitled to immunity from national jurisdiction when they travel abroad – including from charges of war crimes or crimes against humanity – so as to allow for the effective performance of their functions on behalf of States. At the same time, the Court noted that “[j]urisdictional immunity may well bar prosecution for a certain period or for certain offenses; it cannot exonerate the person to whom it applies from all criminal responsibility,” thus potentially leaving open the door to prosecution after the official leaves office.

On several occasions, the Court has also addressed the protections accorded under the Vienna Conventions on diplomatic and consular immunities, thereby confirming their core provisions. In its 1980 judgment in U.S. Diplomatic and Consular Staff in Tehran, the Court unequivocally condemned the seizure by Iran of U.S. diplomatic and consular staff, ordered their release, and ordered the restoration of the U.S. embassy and consulate premises, property, archives, and documents.

In a series of decisions against the United States, the Court upheld the right of an alien to be notified of the right to contact his or her consulate about the alien’s detention. Moreover, the Court maintained that a failure to provide such notification required U.S. courts to review and reconsider convictions of aliens on death row as a remedy, so as to see whether the lack of notification was prejudicial. Although U.S. courts did not uniformly

99 Three judges issued a separate opinion that the exercise of universal jurisdiction by States is nearing the status of customary law given an international consensus that those who commit international crimes should not have impunity. Id. ¶¶ 51-52 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).
100 Id. ¶ 53.
101 Id. ¶ 60.
103 United States Diplomatic and Consular Staff in Tehran, op. cit., ¶ 95.
105 See LaGrand, op. cit., ¶ 125.
provide such review and reconsideration, the Court’s decisions prompted the U.S. Government to embark on a widespread campaign to educate state and local police officials in the United States as to the obligation to provide such notification to aliens when they are detained.

5. Injury to Aliens and Human Rights

The Court has firmly established in international law certain procedural rules relating to the protection of foreign nationals or their investments in host States, such as the continuous nationality rule or rules on protection of shareholders in corporations. For example, as previously noted, the Court has reaffirmed the "rule that local remedies must first be exhausted before international proceedings may be instituted." Yet the Court has helped refine the rule, such as by clarifying that there might be exceptional circumstances that relieve the injured party from exhausting local remedies (e.g., where they effectively have been pursued by the bankruptcy trustee of an expropriated subsidiary). The burden of showing that local remedies exist, however, falls upon the host State. Even then,

while the local remedies that must be exhausted include all remedies of a legal nature, judicial redress as well as redress before administrative bodies, administrative remedies can only be taken into consideration for purposes of the local remedies rule if they are aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings.

As for substantive law, the Court has addressed traditional standards of protection, such as the national treatment standard and minimum standards of protection, arising under either customary international law or treaty law. Further, more contemporary standards arising under human rights law have featured in several of the Court’s decisions. In the advisory opinion on Legal Consequences of the Construction of a Wall, the Court found that the construction of a barrier by Israel that enclosed parts of the West Bank posed...
a serious risk of altering the demographic composition of "occupied Palestinian territory." As such, it both impeded "the exercise by the Palestinian people of its right to self-determination" and constituted a violation of Article 12(1), protecting freedom of movement and choice of residence, and Article 17(1), protecting privacy, family and home, of the International Covenant on Civil and Political Rights ("ICCPR"). Among the important findings of the Court in this advisory opinion was that the ICCPR applies not just to a State's conduct within its own territory, but also "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory." In the Ahmadou Sadio Diallo, the Court concluded that an alien's expulsion violated his rights under ICCPR Article 13, but the Court also passed upon human rights standards within a regional human rights treaty, in that instance, Article 12(4) of the African Charter on Human and Peoples' Rights. Both the global and regional standards only allow expulsion pursuant to a decision taken in accordance with the law. Further, the Court found that the alien's arrest and detention prior to expulsion violated ICCPR Article 9 and African Charter Article 6, both of which protect the liberty and security of a person. In doing so, the Court is helping to harmonize global and regional human rights systems.

6. Use of Force

The ICJ has issued several decisions of significance on the topic of transnational uses of force. Perhaps the most famous is Military and Paramilitary Activities, brought by Nicaragua against the United States in the mid-1980s, in which the Court made several important findings with respect to the right of self-defense. Among other things, the Court concluded that certain types of conduct – the laying of mines in Nicaraguan internal or territorial waters or attacks on Nicaraguan ports, oil installations, and a naval base – constitute

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113 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 122, 134 (July 9).
114 Id. ¶¶ 128, 134.
116 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, op. cit., ¶ 111.
118 Ahmadou Sadio Diallo, Judgment, op. cit., ¶¶ 75–85.
a violation of the international prohibition on the use of force as reflected in U.N. Charter Article 2(4).\textsuperscript{119}

While sometimes use of force can be justified in self-defense, contemporary international law as reflected in U.N. Charter Article 51 requires that the State be responding to an "armed attack" that is imputable to the State against which force is being used.\textsuperscript{120} In this case, allegations that Nicaragua was sending armed bands, groups, or irregulars across a border against El Salvador, or providing weapons or logistical support to such groups, did not qualify as an "armed attack" because that conduct did not involve acts of armed force of such gravity that they amounted to an armed attack.\textsuperscript{121} Nor was there sufficient evidence that the support was imputable to Nicaragua. Even if an armed attack by Nicaragua did exist, for the United States to engage in collective self-defense in support of El Salvador or any other State in the region, there must be a contemporaneous request for such assistance from the victim State, which the Court concluded did not exist on the facts of the case.\textsuperscript{122} Furthermore, if truly acting in collective self-defense, a State is obligated under Article 51 to notify the U.N. Security Council that it is doing so, a step not taken by the United States in this case.\textsuperscript{123}

Even if all those hurdles were overcome, the Court stressed that any U.S. act of self-defense must satisfy the requirements of necessity and proportionality. Here, the U.S. conduct was not necessary because El Salvador had already successfully repulsed the rebel offensive at the time the United States acted and was not proportionate because the relevant conduct (e.g., mining of ports and attacks on oil installations) did not correlate to Nicaragua’s aid to El Salvador rebels.\textsuperscript{124} The Court returned to the issue of necessity and proportionality in \textit{Oil Platforms} when assessing the legality of U.S. attacks in 1987–88 upon three Iranian offshore oil platforms in the Persian Gulf. While the United States convinced the Court that the relevant provision of the underlying bilateral treaty could not have been violated by the conduct,\textsuperscript{125} the Court proceeded to engage in an extensive analysis of why the U.S. attacks on the oil platforms violated international law on the use of force, including the necessity and proportionality principles.\textsuperscript{126}

\textsuperscript{119} Military and Paramilitary Activities in and Against Nicaragua, op. cit., §§ 228, 237–38.
\textsuperscript{120} Id. ¶ 195.
\textsuperscript{121} Id. §§ 230–31.
\textsuperscript{122} Id. §§ 233–34.
\textsuperscript{123} Id. §§ 235–36.
\textsuperscript{124} Id. ¶ 237.
\textsuperscript{125} Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, §§ 98–99 (Nov. 6).
7. Land and Maritime Boundary Disputes

One of the most important roles played by the Court has been to authoritatively delimit land and maritime boundaries placed before it by two States. The significance of such decisions lies less in the precedential value of any given decision and more in the pragmatic value of resolving a border dispute that, in many instances, has led or could lead to armed conflict. For example, a disputed area rich in minerals existed along the border of Libya and Chad, including the Auouzou Strip. While Chad maintained that the area was part of its territory, Libya occupied and administered the area. The dispute ultimately led to armed conflict between the two States in 1986–87. Thereafter, the two States agreed to submit the matter to the Court, which in 1994 found that the territory fell within Chad, resulting in a Libyan withdrawal of its forces.127

In the realm of maritime disputes, two early decisions – North Sea Continental Shelf128 and Continental Shelf between Libya and Tunisia129 – relied on “equitable principles” to divide a shelf where there was no interruption in the natural prolongation of the coasts. While the Court indicated that such principles required certain approaches, e.g., that a delimitation should not refashion nature or that special circumstances could be taken into account,130 the decisions provided little guidance as to what was meant by “equitable principles” and how they might be applied in other cases. In Gulf of Maine, a chamber of the Court indicated that it was “unrewarding, especially in a new and still unconsolidated field like that involving the quite recent extension of the claims of States to areas which were until yesterday zones of the high seas, to look to general international law to provide a ready-made set of rules that can be used for solving any delimitation problems that arise.”131 In that spirit, some decisions of the Court with respect to relatively smooth coastlines have largely applied an “equidistance line,” the line that connects all points at an equal distance from the baselines of both the nations, while others have taken account of unusual coastlines so as to use a different method, such as an angle-bisector approach.132

127 See Territorial Dispute (Libya/ Chad), 1994 I.C.J. 6 (Feb. 3).
128 North Sea Continental Shelf, op. cit.
129 Continental Shelf (Tunisia/Libya), 1982 I.C.J. 18 (Feb. 24).
130 See, e.g., North Sea Continental Shelf, op. cit., § 91.
131 Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit., § 111.
8. Law of the Sea and Environmental Law

Separate from its maritime boundary dispute cases, the Court has addressed important issues on the law of the sea, with its decisions both influencing and being influenced by efforts at treaty codification since the early 1950s. For example, in Corfu Channel in 1949, the Court asserted that “States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent.”

This finding strongly influenced codification of the concepts of “innocent passage” through the territorial sea and “transit passage” through straits. In Anglo-Norwegian Fisheries in 1951, the Court accepted Norway’s method of drawing straight baselines connecting its coastal islands, rocks and reefs, using language that directly influenced the text of the 1958 and 1982 Law of the Sea Conventions.

In the 1974 Fisheries Jurisdiction cases brought by the United Kingdom and Germany against Iceland, the Court rejected Iceland’s unilateral claim to a preferential fishing zone extending fifty nautical miles from its baselines, but equally rejected the applicant States’ contention that no such preferential rights could exist outside the territorial sea. With an eye to the ongoing negotiations of the 1982 Law of the Sea Convention, the Court accepted that the law of the sea was evolving so as to allow preferential fishing rights for coastal States extending beyond their territorial sea, which in turn helped usher in the concept of the exclusive economic zone in the 1982 Convention. Even before entry into force of the convention, the Court would declare that it was “incontestable that … the exclusive economic zone … is shown by the practice of States to have become a part of customary law.”

Though not actually a case involving environmental law, the Court’s decision in Corfu Channel foreshadowed the emergence of the field of international environmental treaties. In Corfu Channel, the Court stated that Albania’s obligation to notify others of the presence of mines in Albanian water arose in part from “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

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136 Continental Shelf (Libya/Malta), 1985 I.C.J. 13, ¶ 34 (June 3).
137 Corfu Channel, op. cit., at 22.
finding was echoed in later "soft law" instruments,\textsuperscript{138} which in turn helped spawn treaty regimes on transboundary pollution.\textsuperscript{139} The Court also issued an oft-cited statement about the importance of the global environment in the Nuclear Weapons advisory opinion, by recognizing

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.\textsuperscript{140}

In that opinion, however, the Court declined to apply such norms to the issue of the legality of the possession or use of nuclear weapons, finding that the "most directly relevant applicable law governing the question of which it is seised" was the law on use of force and on war, with its various treaties addressing the use of weaponry and the protection of civilians in time of war.\textsuperscript{141}

\section*{C. Conclusion}

The International Court of Justice (as was the case for its predecessor, the Permanent Court of International Justice) is not at the apex of an appellate system of international courts, nor does it have wide-ranging jurisdiction over all disputes arising among States. Nevertheless, as the judicial wing of the United Nations, the Court stands as the most authoritative Court for the interpretation of general rules of international law, with its decisions regularly cited by other global, regional, and national courts. Further, despite its limited jurisdiction, the Court has addressed numerous important disputes among States and issued advisory opinions that have greatly shaped and influenced the development of international law.


\textsuperscript{140} Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, op. cit., § 29.

\textsuperscript{141} Id. § 34.