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Contemporary Principles and Perspectives

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through arbitral tribunals and mixed claims commissions. As discussed in Chapter 7, a state may bring an international claim for injury to its nationals caused by an internationally wrongful act of another state. Such a claim is discretionary, as is the transfer to the national of any compensation obtained from the responsible state.[40] There exist two special procedural rules that operate as a precondition to the admissibility of claims for diplomatic protection. This is the subject of the ILC's Draft Articles on Diplomatic Protection (2006) ('Draft Articles').[41] Like the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, which are without prejudice to questions of admissibility of claims,[42] the Draft Articles are only authoritative insofar as they correctly restate customary law. The first requirement is that there should be a bond of nationality between the state and the injured person,[43] or corporation.[44] The second requirement is that the national must take the case to the highest court of the responsible state before a claim for diplomatic protection is available; this is known as the 'exhaustion of local remedies' requirement.[45]

Mavromattis Palestine Concession case (*Greece v United Kingdom*) (Jurisdiction) (1924) PCIJ (Ser. A) No. 2; *Barcelona Traction, Light and Power Co. Ltd* (*Belgium v Spain*) [1970] ICJ Rep 3. Note also *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, which concerned the right of an international organization (the United Nations) to make a claim for diplomatic protection.

[40] See, e.g., the *Barcelona Traction* case, above note 39, [79]; 'Draft Articles on Diplomatic Protection, with Commentaries (2006)', Report of the ILC, 58th sess., UN Doc. A/61/10 (2006), 13, Art. 19; ILC Commentary to Draft Article 19, [3]. ('Draft Articles' and 'ILC Commentary to the Draft Articles').

[41] Draft Articles, above note 40, 13.

[42] Draft Articles, ibid., Art. 44; ILC Commentary to the Draft Articles, ibid., 44, [1].

[43] See *Flegenheimer Claim* (*United States v Italy*) (1958) 25 ILR 91, 150; *Nationality Decrees Issued in Tunis and Morocco* (*French Zone*) (Advisory Opinion) [1923] PCIJ (Ser. B) No. 4, 24; Draft Articles, above note 40, Art. 4; ILC Commentary to the Draft Articles, above note 40, 4, [2]. Note, however, *Nottebohm* case (*Liechtenstein v Guatemala*) (*Second Phase*) [1955] ICJ Rep 4, proposing a test of 'genuine connection', which has not been adopted in subsequent cases: *Flegenheimer Claim*, 150; *Dallal v Iran* (1983) 3 Iran-US Cl Trib Rep 157; ILC Commentary to Draft Article 4, [5].

[44] See generally the *Barcelona Traction* case, above note 39; *Elettronica Sicula SpA* case [1989] ICJ Rep 15.

[45] See, e.g., Draft Articles, above note 40, Art. 14; *Ambatelios Claim (Greece v United Kingdom)* (1956) 12 RIAA 83, 118–19; *Interhandel* case (*Switzerland v United States*) [1959] ICJ Rep 6. Note, however, in certain circumstances – where, for example, there is no undue delay or reasonable possibility of redress – this rule may be avoided: Draft Articles, above note 40, Art. 15(a)–(b); ILC Commentary to Article 15, [5]–[6]. See also the grounds in Article 15(c)–(e). But see the *Interhandel*

9.4 INTERNATIONAL TRIBUNALS (BINDING)

A growing number of disputes in international law are being resolved by formal tribunals. This trend has been brought about, at least in part, by an increasingly vast range of options available to the parties. These tribunals have enjoyed increasing success in recent years, and there is a growing willingness for states and non-state actors to have recourse to these bodies as a result of mounting recognition of the competence of these bodies in resolving disputes. Therefore, the regularity with which these dispute resolution methods are being included in modern international agreements has also increased considerably. In many instances, this increased use of specialized tribunals has given rise to more effective and efficient resolution of disputes. In particular, specialist tribunals can assist in encouraging compliance with international law through the compulsory jurisdiction they often enjoy[46] and supporting the ICJ in the ever increasing international case workload.[47] However, this trend also poses new challenges and risks, including the risk of a loss of uniformity and consistency of jurisprudence,[48] and a potential overlapping of jurisdiction which allows states and parties to 'shop' for the tribunal most likely to arrive at a favourable outcome for them.[49]

The following jurisdictions exemplify the diverse range of *sui generis* international tribunals dealing with a range of disciplines within the international legal regime.

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case, where the ICJ stayed its proceedings when the United States Supreme Court readmitted the Swiss company's case after a delay of almost a decade.

[46] See, e.g., Jonathan Charney, 'The Impact of the International Legal System on the Growth of International Courts and Tribunals' (1999) 31 *Journal of International Law and Politics* 697, 704.

[47] Brownlie, for example, comments on the 'constraints resulting from budgetary stringencies imposed by the United Nations that the ICJ is forced to contend with': Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2008, 7th edn), 486, 694.

[48] For example, in the decision of *Prosecutor v Tadić* (Appeals Chamber Judgment) IT-94-1-A (15 July 1999), [137], the International Criminal Tribunal for the former Yugoslavia established a test of 'overall' control in attributing the military conduct to a state, a departure from the standard of 'effective' control as established in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*) (Merits) [1986] ICJ Rep 14, 61, 62.

[49] See, e.g., *MOX Plant Arbitration* (*Ireland v United Kingdom*) (2003) 42 ILM 1118. See also Yuval Shany, 'The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures' (2004) 17 *Leiden Journal of International Law*, 815.

9.4.1 WTO Appellate Body

The establishment of the Appellate Body of the World Trade Organization (WTO) in 1995 is perhaps the most remarkable and effective development in international dispute resolution.[50] It has a binding and compulsory jurisdiction over its 153 members.[51] The Appellate Body is made up of seven permanent members[52] broadly representing the range of WTO membership.[53] Each appeal is heard by three members, who may then elect to uphold, modify or reverse the legal findings of the panel which was set up to resolve the particular dispute.[54] Appeals can only be initiated by parties to a dispute[55] and have to be based on points of law; there is no scope for the Appellate Body to consider new issues or to re-examine evidence.[56] Once the Appellate Body Reports are adopted by the Dispute Settlement Body (DSB), the parties are compelled to accept the findings. The ability of the Appellate Body to mandate compliance with the WTO agreement makes it one of the most powerful means of dispute resolution in the world, significantly developing the area of international trade law.[57]

9.4.2 International Tribunal for the Law of the Sea

The ITLOS is a permanent intergovernmental organization established by Annex VI of the United Nations Convention on the Law of the Sea (UNCLOS).[58] It consists of 21 independent members 'of recognized competence in the field of the law of the sea'.[59] ITLOS only has the power to resolve disputes between states, which includes the European Community.[60] Since its commencement in 1996, 15 cases have been sub-

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[50] See also the discussion concerning international trade law in Chapter 1, section 1.5.2; Chapter 3, section 3.3.

[51] Accurate as at 16 June 2011.

[52] 'Understanding on Rules and Procedure Governing the Settlement of Disputes', 1869 UNTS 401; 33 ILM 1226 (1994), Art. 17(1).

[53] Ibid., Art. 17(3).

[54] Ibid., Art. 17(13).

[55] Ibid., Art. 17(4).

[56] Ibid., Art. 17(6).

[57] Robert Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) 8 *Minnesota Journal of Global Trade* 1, 27.

[58] United Nations Convention on the Law of the Sea, 1833 UNTS 3, Annex VI, ('UNCLOS'). See also discussion regarding the international law of the sea in Chapter 1, section 1.5.1.

[59] UNCLOS, Art. 2(1).

[60] The European Community is a single member of ITLOS. It is an 'international organization' within the meaning of UNCLOS, Art. 305(f) and Annex IX,

mitted to ITLOS for its review. This number is fewer than was anticipated at the time of its establishment, and is reflective of the fact that states have been hesitant in resorting to ITLOS for the more contentious issues concerning the law of the sea.[61]

9.4.3 International Criminal Court

The International Criminal Court (ICC) was created by the Rome Statute of the International Criminal Court ('Rome Statute'), which came into effect on 1 July 2002, and is the world's first permanent international criminal court.[62] It complements, and will soon supersede, a wide range of modern international and hybrid war crimes tribunals, the most important of which is the International Criminal Tribunal for the former Yugoslavia (ICTY).[63] The ICC has jurisdiction to prosecute some of the most serious crimes of international concern, including genocide, crimes against humanity and war crimes,[64] as well as the crime of aggression after 2016.[65] Its jurisdiction is complementary to that of national courts, which means that the Court will act only when states themselves are unwilling or unable to investigate or prosecute.[66] The ICC may exercise its jurisdiction on referral by a State Party or by the Security Council,[67] or through the prosecutor initiating an investigation '*proprio motu* on the basis of information' on crimes within the ICC's jurisdiction.[68] In the Court's brief history, the Prosecutor has opened investigations into six situations, including, most recently, the investigation into the alleged criminal acts in Libya.[69] Through its

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Art. 1; it represents the states who have transferred competence to it over matters governed by the UNCLOS.

[61] Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford: Hart, 2010) 459.

[62] See also discussion about international criminal law in Chapter 1, section 1.5.6.

[63] See, e.g., the ICTY, ICTR, SCSL, ECCC and STL.

[64] Rome Statute of the International Criminal Court, UN Doc. A/CONF 183/9; 37 ILM 1002 (1998), Art. 5.

[65] As a result of an agreement reached by States Parties to the Rome Statute in 2010 in Kampala: for a detailed discussion, see Claus Kreβ, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 *Journal of International Criminal Justice* 1179.

[66] Rome Statute, above note 64, Art. 1.

[67] Ibid., Art. 13.

[68] Ibid., Art. 15(1).

[69] The investigation into Libya was referred by the Security Council on 26 February 2011, with the investigation announced on 3 March 2011.

investigations, it has issued 14 arrest warrants and nine summonses to date.[70]

9.4.4 Human Rights Mechanisms

International mechanisms are often used for the monitoring of human rights treaties. These mechanisms can be divided into three major categories: (1) periodic reporting by governments, (2) international complaints, and (3) inquiry procedures.[71] As a general rule of international law, redress through human rights mechanisms is normally available only where domestic avenues have been exhausted. Although the establishment of such mechanisms has been an important means of developing the content of human rights, enforcing these rights and providing redress to victims, these mechanisms have not always been effective. For example, states often fail to report, or do so belatedly or inadequately, and it is also common for states to append wide reservations to treaty obligations.[72]

While most human rights mechanisms, particularly reporting mechanisms, are not binding forms of dispute resolution, there are binding human rights jurisdictions that act as powerful and effective regional regimes. The most successful of these is the European Court of Human Rights.[73] The principal reason for the success of the European Court is the compulsory jurisdiction it exercises over the 47 signatories to the European Convention on Human Rights,[74] combined with the practically binding impact of its judgments. Compliance is then ensured by the Committee of Ministers of the Council of Europe, a political body. The importance of the Court also lies in the wealth of jurisprudence it provides on international human rights norms, which are analogous to the ICCPR and other regional human rights instruments. In this way, the jurisprudence of the Court impacts globally on human rights norms and is referred

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[70] As at 16 June 2011.

[71] Martin Scheinin, 'International Mechanisms and Procedures for Monitoring', in Catarina Krause and Martin Scheinin (eds), *International Protection of Human Rights: A Textbook* (Turku, Finland: Åbo Akademi University Institute for Human Rights, 2009).

[72] See discussion in Chapter 2, section 2.2.1.4.

[73] See Diego Rodriguez-Pinzon and Claudia Martin, 'The Inter-American Human Rights System: Selected Examples of its Supervisory Work', in S. Joseph and A. McBeth (eds), *Research Handbook in International Human Rights Law* (Cheltenham, UK; Northampton, MA: Edward Elgar Publishing, 2010), 353.

[74] Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 262 ('ECHR').

to broadly by national and other international courts and tribunals as authoritative.

9.5 INTERNATIONAL COURT OF JUSTICE

The International Court of Justice, commonly known as the 'World Court', is the principal judicial organ of the United Nations. It was created in 1945, succeeding the Permanent Court of International Justice.[75] Chapter 5 of this book examines the history of the Court, and provides an overview of its functions. This section will consider more deeply the role played by the ICJ.

9.5.1 Procedure and Practice: Admissibility and Organization

Article 92 of the UN Charter provides that the ICJ is 'the principal judicial organ of the United Nations', while Article 93(1) states that all members of the UN are parties to the Statute of the International Court of Justice.[76] The ICJ can be engaged in a dispute by the operation of Articles 35(1) and 36(1) of the UN Charter. Article 35(1) provides a means for a Member of the United Nations to bring a dispute before the General Assembly or Security Council. Article 36(1) then provides a means for the Security Council to 'recommend appropriate procedures or methods of adjustment',[77] including referral to the International Court of Justice.[78]

The Statute of the ICJ sets out the organization of the court.[79] Article 2 sets out the requirements for appointment to the Court, stating:

> The Court shall be composed of 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.[80]

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[75] On the history of the creation of the ICJ, see Brownlie, above note 47, 677–8.

[76] Charter of the United Nations, Art. 93(1). Note also that Art. 35(2) provides a method for states which are not Members of the United Nations to bring matters to the attention of the Security Council or General Assembly.

[77] Charter of the United Nations, Art. 36(1).

[78] Ibid., Art. 36(3).

[79] Statute of the International Court of Justice, Arts 2–33.

[80] Ibid., Art. 2.

The Court consists of 15 members, with a maximum of two from any one state.[81] Judges are elected through a process whereby states nominate suitable candidates, and a simultaneous vote is held by the General Assembly and Security Council.[82] In voting, electors are asked to bear in mind that those seeking to be elected should not only be qualified, but should represent 'the main forms of civilization and . . . principal legal systems of the world'.[83] Like most of the UN courts, the ICJ system of electing judges has attracted criticism for being unduly political.[84]

Members of the Court are elected for a period of nine years, with the possibility of re-election.[85] Decisions of the court are based on a majority of judges. An interesting mechanism provided for by Article 31 of the Statute – described by Brownlie as a 'further concession to the political conditions of the Court's existence'[86] – allows states who are before the Court in a dispute each to choose a judge of their own nationality to sit on the Court.[87] While this mechanism often produces partisan voting, it can also produce important and highly regarded opinions.[88]

9.5.2 Role and Jurisdiction

9.5.2.1 Applicable law and general jurisdiction

In determining the relevant law that applies to a dispute, the chief provision to which the ICJ has recourse is Article 38(1).[89] This provides for the now universally accepted and recognized sources of international law.[90]

The general jurisdiction of the court is set out in Article 36(1):

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[81] Ibid., Art. 3.

[82] Ibid., Arts 4–12.

[83] Ibid., Art. 9.

[84] Brownlie, above note 47, 678–80.

[85] Statute of the International Court of Justice, Art. 13.

[86] Brownlie, above note 47, 680. See also Hersch Lauterpacht, *The Function of Law in the International Community* (New York; London: Garland, 1973) 215 ff; Shaw, above note 14, 1060–61.

[87] Statute of the International Court of Justice, Art. 31.

[88] See, e.g., the Separate Opinion of the Belgian ad hoc Judge, Christine van den Wyngaert, in *Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v Belgium*) [2002] ICJ Rep 3, who produced one of the few coherent and well reasoned opinions of the Court in that case.

[89] Statute of the International Court of Justice, Art. 38(1).

[90] For a detailed consideration of Article 38, and the lack of a *stare decisis* principle existing at international law, see Chapter 2, sections 2.2 and 2.2.4.2.1 respectively.

> The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.[91]

This general jurisdiction is extended by 'transferred jurisdiction', provided under Articles 6(5) and 37, which allows for agreements made granting jurisdiction to the PCIJ to carry over automatically to the ICJ.[92]

9.5.2.2 Preliminary considerations

For a case to be brought before the ICJ, Article 36(2) of the Court's Statute requires it to be a legal dispute.[93] If there is a question in a case as to whether or not the Court has jurisdiction, two principles must be considered. The first is the *compétence de la compétence* principle, whereby Article 36(6) of the ICJ Statute provides that, in a dispute regarding the jurisdiction of the Court to hear a case, 'the matter shall be settled by the decision of the Court'. There are a number of objections a state may bring regarding jurisdiction, one of the most prominent being that local remedies have not been exhausted.[94] Other objections include that the matter is solely within the realm of domestic law, that there has been no consent to the court's jurisdiction, that there exists no concrete dispute,[95] or that the matter raises an inherently political issue. However, the fact that a matter is political will not in itself prevent the court from exercising jurisdiction, provided there is a legal issue to be determined.[96]

Provided there is a valid legal issue for consideration, the Court will not decline jurisdiction because of the presence of political factors (how could it really be otherwise?).[97] Furthermore, the mere fact that the Security Council is currently aware of, or is considering, the matter will not permit the Court to decline jurisdiction.[98] Nonetheless, the Court's

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[91] Statute of the International Court of Justice, Art. 36. Note also Art. 34(1) which provides that '[o]nly states may be parties in cases before the Court'.

[92] Ibid., Arts 36(5) and 37.

[93] *Nuclear Tests* cases [1974] ICJ Rep 253, 270–71.

[94] See, e.g., the *Interhandel* case, above note 45, 26–9, in which this argument was successfully made. See also the *Panevezys-Saldutiskis Railway* case (*Estonia v Lithuania*) (1939) PCIJ (Ser. A/B) No. 76, 4, 19–22; *Avena and Other Mexican Nationals* (*Mexico v US*) [2004] ICJ Rep 12, [38]–[40].

[95] *Northern Cameroons* (*Cameroons v UK*) [1963] ICJ Rep 15, 33–4, 37–8; *Nuclear Tests* cases, above note 93, 270–71.

[96] *Tehran Hostages* case (*United States v Iran*) [1980] ICJ Rep 3, 20.

[97] Ibid., although note *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

[98] Ibid., 21. See also *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*) (Jurisdiction) [1984] ICJ Rep 392, 431–4.

history suggests that, even though it is often prepared to hear matters that are inherently entangled in complex international politics, its rulings have sometimes suggested a preoccupation with the political ramifications of rendering certain rulings on strictly *legal* grounds. The *Nuclear Weapons* Advisory Opinion is a stark example.[99]

There is also a mechanism, provided by Article 62 of the ICJ Statute, to allow third parties to intervene where the party has 'an interest of a legal nature which may be affected by the decision in the case'.[100]

9.5.2.3 Contentious jurisdiction

It is one thing for all members of the UN to be made party to the ICJ. It is another thing to say that a state is subject to the jurisdiction of the court without that state's consent.[101] This would represent what states have viewed as an impermissible step into the realm of state sovereignty and, for that reason, Article 36(1) stipulates that, prior to any party being made subject to a judicial determination, the parties must refer their case to the ICJ for determination.[102] This may be achieved in a number of ways.

9.5.2.3.1 Special agreements States may refer a matter to the ICJ through a special agreement or *compromis*, consenting to its jurisdiction on an ad hoc basis. Instead of merely asking the Court to advise on the specific dispute between the two states, the special agreement allows states to ask the Court to set out the relevant principles of international law governing the conflict. This provides a degree of clarity and certainty with respect to a particular area of law, which may up to that point have been murky, and helps to reduce future conflicts premised upon similar issues. An example of this is the *North Sea Continental Shelf* cases, in which a dispute arose between Germany and the Netherlands as to where the boundary for a shared continental shelf in the North Sea should be drawn. A special agreement between Germany and the Netherlands enabled the Court to resolve the dispute, as well as declaring the broader principles applica-

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[99] *Nuclear Weapons* (Advisory Opinion), above note 97, [20]. For a detailed discussion of this case and its implications, see Chapter 8, section 8.5.2.

[100] Statute of the International Court of Justice, Art. 62; Rules and Procedures of the International Court of Justice 1978, Arts 81 and 82. Note that Honduras and Costa Rica applied to the ICJ for permission to intervene in *Territorial and Maritime Dispute* (*Nicaragua v Columbia*) (Preliminary Objections) 13 December 2007 on 16 June 2010 and 26 June 2010 respectively.

[101] See, Brownlie, above note 47, 681–2.

[102] Statute of the International Court of Justice, Art. 36(1).

ble to the delimitation of a common continental shelf between adjacent states.[103]

Special agreements are often used in the event of territorial disputes as, for example, in the *Minquiers and Ecrehos* case,[104] which involved a dispute between France and the UK over the sovereignty of a number of islands in the English Channel, and in a dispute between Malaysia, Singapore and Indonesia relating to the island of Pedra Branca.[105]

9.5.2.3.2 Forum prorogatum Where a state makes a unilateral application to the Court, under certain circumstances the Court may determine that the respondent state has subsequently consented.[106] The consent may be given expressly or inferred from conduct, the crucial indicia being that the consent is genuine. Where jurisdiction is gained on this basis, it is known as prorogated jurisdiction (*forum prorogatum*). An early example of this can be seen in the PCIJ decision of the *Rights of Minorities in Upper Silesia* case,[107] in which Poland, whilst not having expressly consented, opted to argue the merits of the case before the Court. The act of bringing this argument was seen to accept implicitly the Court's jurisdiction to determine the case.[108]

One of the advantages of utilizing prorogated jurisdiction is that making a unilateral application to the ICJ provides an opportunity to convince the Court to adopt interim measures of protection, before more closely examining whether or not the respondent state had in fact consented to its jurisdiction.[109] In more recent times, however, the use of prorogated jurisdiction has suffered a decline, partly as a result of Rule 38(5) of the Rules of Court, which explicitly requires the consent of the respondent state before an application to the court is considered effective.

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[103] *Corfu Channel* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, was settled in a similar way.

[104] *Minquiers and Ecrehos* [1953] ICJ Rep 47.

[105] *Sovereignty over Pedra Branca/Lulau Batu Puteh* (*Malaysia v Singapore*) Special Agreement, 24 July 2003; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia v Malaysia*) (Merits) [2002] ICJ Rep 4.

[106] See Brownlie, above note 47, 689; Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens and Sons, 1958) 103.

[107] *Rights of Minorities in Upper Silesia* (*Germany v Poland*) (1928) PCIJ (Ser. A) No. 15, 24–5.

[108] See also *Mavromattis Palestine Concessions* (*Greece v Great Britain*) (Merits) (1925) PCIJ (Ser. A) No. 5, 27.

[109] See, e.g., *Anglo-Iranian Oil Co.* case (*UK v Iran*) (Preliminary Objection) [1952] ICJ Rep 93.

9.5.2.3.3 Treaties providing jurisdiction Treaties will at times make reference to the ICJ, providing for its use in the event of a dispute over certain terms of the treaty.[110] Where this is the case, Article 36(1) of the ICJ Statute empowers the ICJ to assert jurisdiction, allowing for jurisdiction over 'all matters specially provided for . . . in treaties and conventions in force'.[111] A classic example of this can be seen in the *Nicaragua* decision.[112] In this instance, the Court asserted jurisdiction on the basis of the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States, notwithstanding the US's strong objections.

9.5.2.3.4 Optional clause The ICJ Statute, through Article 36(2), provides an optional method for states to recognize the jurisdiction of the ICJ:

> The states parties to the present Statute may at any time declare 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 concerning:
> a. the interpretation of a treaty;
> b. any question of international law;
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

This declaration may be unconditional or on 'condition of reciprocity' on the part of one or more states, for a specified time. The jurisdiction is accepted through the act of depositing the unilateral declaration with the Secretary-General. Upon doing this, the state binds itself to accept jurisdiction in relation to any other declarant, to the extent to which the declarations coincide. The result of this process was referred to by the Court in the *Nicaragua* case as creating a 'series of bilateral engagements'[113] and, in determining the 'extent to which the two Declarations coincide in conferring [jurisdiction]',[114] the ICJ will look to the substance of this bilateral relationship. The inclusion in Article 36(2) of the phrase 'in relation to

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[110] Note that treaties that made reference to the PCIJ will still allow the ICJ to find jurisdiction, through the mechanism of the Statute of the International Court of Justice, Art. 37. This Article was successfully used to grant jurisdiction to the ICJ in the *South West Africa* cases, which made reference to the PCIJ.

[111] Statute of the International Court of Justice, Art. 3.

[112] *Nicaragua* case, above note 48.

[113] *Nicaragua* case, above note 48, 418. See also *Nuclear Tests* cases, above note 93, 267.

[114] *Anglo-Iranian Oil Co.* case, above note 109.

any other state accepting the same obligation' is known as the reciprocity principle. This means that where there is a commonality between two declarations, this can provide a basis for jurisdiction,[115] although on a practical level the court has experienced some difficulty in applying this principle.[116]

For Article 36(2) to be engaged there must be a 'legal dispute'. This has seldom been a substantial issue before the Court, although it did become an issue in the recent *Territorial and Maritime Dispute* in 2007.[117] This case involved a sovereignty dispute between Nicaragua and Colombia over maritime boundaries and islands in the Caribbean Sea. The Court held that, as a 1928 treaty had already resolved the question of sovereignty, there was no legal dispute for the court to rule on, and thus the attempted use of Article 36(2) failed.[118]

9.5.3 Terminating a Declaration

There are a number of reasons why a state may wish to terminate an optional clause and there are a number of judicial views as to how this can be achieved. One view expressed by the ICJ in the 1957 *Rites of Passage* case was for the Court to accept the right of states to terminate or vary their voluntary declarations of consent by simple notification, without the requirement of a notice period.[119] A termination of an optional clause was rejected in the *Nicaragua* case, where Nicaragua made an application to the Court three days after the US withdrew its application of consent. The Court found that in determining whether a termination is valid, the principle of good faith will play a significant role. Because the US had inserted, in its declaration, a six-month notice clause for termination, the Court held that the US was bound by that indication. In a recent example of the successful termination of an optional clause, Australia withdrew its open-ended acceptance of consent to the Court in anticipation of proceedings to be brought by East Timor.[120]

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115 See Brownlie, above note 47, 686.
116 See, e.g., *Interhandel* case, above note 45.
117 *Territorial and Maritime Dispute*, above note 100.
118 Ibid.
119 See also *Fisheries Jurisdiction* case, above note 7.
120 See Gillian Triggs, 'Australia Withdraws Maritime Disputes from the Compulsory Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea' (2002) 17 *International Journal of Marine and Coastal Law* 42.

9.5.4 Provisional Measures

Article 41 of the ICJ Statute gives the Court the power to 'indicate . . . any provisional measures which ought to be taken to preserve the respective rights of either party', a procedure akin to the domestic remedy of an injunction. Article 41 also allows the court to act expeditiously so as to prevent irreparable injury to a dispute. These measures are binding upon the relevant state.[121]

The Court will grant provisional measures only where clear evidence of irreparable prejudice has been provided. An example of a case in which provisional measures were granted is in the *Genocide Convention* cases.[122] Bosnia and Herzegovina brought an action before the Court alleging breaches of the Convention on the Prevention and Punishment of the Crime of Genocide, and requested provisional measures to be provided by the court in order to prevent the crime of genocide being committed. The Court granted the request, relying upon Article 9 of the Genocide Convention for jurisdiction, and ordered Yugoslavia to 'take all measures within its power to prevent commission of the crime of genocide'. It is worth considering, however, that the ICJ's decision failed to bring any practical change, evidenced by the massacre of Srebrenica in 1995, undertaken by Yugoslavia in breach of the ICJ's directive.

On the other hand, there have been instances where the court has not found that an irreparable prejudice would result from failing to grant provisional measures.[123] In the 2009 case of *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*) (currently pending before the ICJ), a request was made to have the former President of Chad extradited to Belgium in light of a forthcoming war crimes trial. Pending the outcome of this extradition, Belgium requested that the President immediately be transferred to Belgium. The Court chose not to prescribe provisional measures, finding that there was no 'real and imminent risk that irreparable prejudice' would result to Belgium in its efforts to ensure the trial of the President because of Senegal's assurances that it would continue to monitor and control the President, thus ensuring his presence at trial.

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[121] *LaGrand* (*Germany v United States of America*) (Merits) [2001] ICJ Rep 466.

[122] *Genocide Convention* cases (*Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*) (Provisional Measures) [1993] ICJ Rep 3.

[123] See, e.g., *Case concerning Passage through the Great Belt* (*Finland v Denmark*) (Provisional Measures) [1991] ICJ Rep 12; *Certain Criminal Proceedings in France* (*Republic of Congo v France*) (Provisional Measures) ICJ (pending).

9.5.5 Remedies and Enforcement

The most common remedy sought by states is a declaratory judgment in favour of the applicant, stating that the respondent has breached international law. This may be combined with a reparation request for the various losses suffered. This can include direct damage to the state itself, as well as to citizens and property.[124] Once a remedy has been determined, the question then turns to enforcement.

Article 59 of the ICJ provides that a decision of the court 'has no binding force except between the parties and in respect of that particular case'. This Article, therefore, indicates that the decision in a particular case is binding on the parties involved in the dispute alone, in line with the absence of *stare decisis*.[125] In practice, however, decisions and Advisory Opinions which advance the jurisprudence of international law are referenced and used in support of subsequent decisions both by the court and other international tribunals.

With regard to the parties to a specific case, Article 94 of the UN Charter provides that all Members of the UN undertake to comply with any decision of the ICJ to which they are a party and, if a state fails to comply with this decision, recourse may be had to the Security Council which may make recommendations or decide upon measures to be taken to give effect to the judgment.[126] In practice, the Security Council has refrained from enforcing ICJ decisions, and is unlikely to do so for political reasons.[127]

The record of state compliance with decisions of the ICJ has been mixed. There have been examples of states respecting and complying with the orders of the court, including the *Territorial Dispute* case where measures imposed by the court in relation to a border dispute between Libya and Chad were complied with.[128] On the other hand, there are a number of cases where states have refused to comply with the decision of the Court – for example, the *Corfu Channel* case, where an order to pay remedies was

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[124] See, e.g., the *I'm Alone* case, above note 29, 1609, and *Rainbow Warrior* case (*France v New Zealand*) 74 ILR 241, 274; 82 ILR 499, 575. Brownlie, 'Remedies in the International Court of Justice', in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (Cambridge: Cambridge University Press, 1996) 557.

[125] See Chapter 2, section 2.2.4.1.1.

[126] Charter of the United Nations, Art. 94.

[127] Triggs, above note 18, 720.

[128] *Territorial Dispute* (*Libya v Chad*) [1994] ICJ Rep 6.

ignored by Albania,[129] and the *Tehran Hostages* case, where Iran ignored the Court's order to free the hostages.[130]

The compliance rate is substantially lower with regard to provisional measures.[131]As Advisory Opinions merely provide clarity to an area of law, they are not binding on any one state, although obviously if a state does not comply with clear statements of law made – such as those made in the *Israeli Wall* case to remove the wall and compensate the affected Palestinians[132] – this can result in a breach of international law giving rise to a subsequent application by another state.

9.5.6 Advisory Opinions

Under Article 65(1) the ICJ is granted the power to give an Advisory Opinion on 'any legal question at the request of whatever body may be authorized or in accordance with the Charter of the United Nations to make such a request'. Under Article 96 of the UN Charter, the General Assembly and Security Council may request an Advisory Opinion. The General Assembly also has the power to authorize other organs and specialized agencies to do so. The purpose of an Advisory Opinion is to provide guidance on the legal principles governing a particular area of law. They have proved to be a powerful method for the ICJ to articulate and develop various areas of international law, with 24 opinions being given since 1946. In more recent times, the ICJ has reaffirmed its willingness to provide Advisory Opinions.[133]

An Advisory Opinion is, as the name suggests, not binding upon any of the parties, but its importance cannot be denied. Advisory Opinions are available or have been requested, amongst other things, in relation to the legality of the threat or use of nuclear weapons,[134] self-determination[135]

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[129] See, e.g., the *Corfu Channel* case, above note 103.

[130] *Tehran Hostages* case (*US v Iran*) [1980] ICJ Rep 3. See also *Fisheries Jurisdiction* case, above note 7; *Nicaragua v USA*, above note 48, where the orders made by the Court were ignored.

[131] See, e.g., *LaGrand* (*Germany v US)* (Provisional Measures) [1999] ICJ Rep 9.

[132] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

[133] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) 22 July 2010, ICJ General List No. 141.

[134] *Nuclear Weapons* (Advisory Opinion), above note 97.

[135] *Namibia* (*Legal Consequences*) (Advisory Opinion) [1971] ICJ Rep 31.

and self-defence.[136] The ICJ and the PCIJ before it have shown a willingness to grant requests for an Advisory Opinion – with a substantive exception being the *Eastern Carelia* case.[137] The Court has noted that it would require 'compelling reasons' to convince it not to provide an Advisory Opinion.[138] It may decline to give an opinion unless 'the questions put to it are relevant and have a practical and contemporary effect and, consequently, are not devoid of object or purpose'.[139]

One common argument made for the ICJ to reject a request to provide an Advisory Opinion is that the issue has significant political implications. However, Article 65 of the ICJ statute clearly provides that the Court can deal with 'any legal question' in an Advisory Opinion. Therefore, even if the request is political, so long as it involves a legal question or component, a contentious political context will not act as a bar to the Court's willingness to consider the case, a recent example being the *Israeli Wall* case.[140] Whilst political grounds are not sufficient to decline a request to provide an Advisory Opinion, it was noted in the *Western Sahara* case that the court still retained discretion to decline to provide an Advisory Opinion, based on the 'permissive character of Article 65'.[141]

9.6 CONCLUSIONS

The resolution of disputes by international bodies has seen immense growth in recent times. With the docket of the ICJ consistently full, and the growing role that *sui generis* international tribunals are playing within the international system, a number of observations can be made.

It is clear that the ICJ increasingly shares space with a range of specialized tribunals, regulating a range of behaviour and interests within international law. Some of these tribunals are more binding, and have a more general reach and significance, than others. Perhaps the most striking example is the International Criminal Court, which clearly enjoys global relevance and support; another example is the European Court of Human Rights. While this fragmentation of the international dispute

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136 *Nuclear Weapons* (Advisory Opinion), above note 97; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 132.

137 *Status of Eastern Carelia* (Advisory Opinion) (1923) PCIJ (Ser. B) No. 5.

138 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 2.

139 Ibid., 37.

140 *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, above note 132.

141 *Western Sahara* case, above note 138, 21.

resolution system has the potential to dilute or confuse decision-making in international law, it also indicates a greater acceptance by states and other subjects that the resolution of disputes by peaceful means is both available, and appropriate. Furthermore, fears as to substantial inconsistent standards of law arising from the fragmentation of the international dispute resolution system have so far been confined to a handful of cases.

Regardless of the enhanced role of *sui generis* tribunals, it is clear that the ICJ has been and will remain the benchmark for a juridical international law. The key issues in international law continue to be determined by the ICJ, and the advancement of international law is equally in the hands of the court. This status may, however, be called into question if the Court is not careful to maintain the highest standards of decision-making, and to strike a balance between legal conservatism and the progression of international law in, and a keen understanding of, its delicate political context.

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