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The Institutional Context of the International Court of Justice

Tom Ginsburg*

For Carlos Esposito and Kate Parlett, eds.,

Cambridge Companion to the International Court of Justice

Institutional analysis is an approach drawn from the social sciences that examines the ways in which an organization's internal structures and external environment shape outcomes. There are many different kinds of institutionalism, but all have in common an emphasis on examining structures, as opposed to, say, the particular individuals who inhabit institutions, or the role of ideology at a macro level.¹ Institutional analysis has been productively applied to courts and invites two related inquiries: what is the court's institutional design, and what is its institutional environment?

Applying this approach to the International Court of Justice ("ICJ" or "Court") requires identification of the relevant actors that shape the Court's operating environment, as well as the ways in which they interact with the ICJ. It also requires examination of formal and informal rules, both inside and outside the ICJ, that frame these interactions. The attractiveness of any particular judicial institution, including the ICJ, will depend on the quality of the service it provides and the other options available. The former is in part a product of its institutional design while the latter is part of the institutional environment.

The formal institutional structures of the ICJ flow from the United Nations Charter ("Charter") and the Statute of the Court ("Statute").² These documents establish the Court and its

* Leo Spitz Professor of International Law, University of Chicago Law School. Thanks to Marie Beudels and Arunima Bhattacharjee for research assistance.

¹ James G. March and Johan P. Olsen, *Rediscovering Institutions* (New York: Free Press, 1989); Paul J. Dimaggio and Walter W. Powell (eds.), *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991); Cornell W. Clayton and Howard Gillman (eds.), *Supreme Court Decision-Making: New Institutional Approaches* (Chicago: University of Chicago Press, 1999); Douglass C. North, *Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 1990).

² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <https://www.refworld.org/docid/3ae6b3930.html> [accessed 17 March 2020]; United Nations, *Statute of*

relationships with other bodies. Neither has ever been amended, though there has been some informal evolution of the structures over time.

A good place to start is the statement in Article 94 of the Charter, repeated in Article 1 of the Statute, that the ICJ is the “principal judicial organ of the United Nations.” This tells us, first of all, that the ICJ is a *court*. This point may seem so obvious as to not even bear mentioning, but courts have their own institutional characteristics and distinctive modes of operating. As a judicial organ, the Court’s job is to adjudicate, as well as to provide authoritative interpretations of law, including under Articles 65-68 of the Statute, which allow for advisory opinions.

Second, the ICJ is an *international* court. Its primary jurisdiction is over states and their disputes. This means that states will play an important role in determining the ICJ’s workload and effectiveness.³ States decide whether to file cases, whether to comply with decisions, and whether to act in accordance with the rules pronounced by the Court. In this sense, states are both a primary audience for the court but also its clients.

Third, the Court is an organ of the United Nations (“UN”). This tells us that the UN and its organs form a major part of the ICJ’s institutional environment. The UN is not the only organization with which the Court interacts, but it plays an important role in selecting judges, providing funding, bringing requests for advisory opinions, and, potentially, in enforcing decisions. The relationship with the machinery of the UN conditions the performance and possibilities of the ICJ.

This Chapter will examine each of these points in turn. One of the themes that emerges from the analysis in each area is the gap between the formal institutional structures and the actual operation of the Court. The formal rules matter a good deal, but they do not explain everything about the way the Court works. In this sense, the Court has had to adapt to its environment.

the International Court of Justice, 18 April 1946, available at:
<https://www.refworld.org/docid/3deb4b9c0.html> [accessed 17 March 2020]

³ Yuval Shany, *Assessing the Effectiveness of International Courts* (New York: Oxford University Press, 2014); Joan E. Donoghue, ‘The Effectiveness of the International Court of Justice’ (2014) *108 American Society of International Law Proceedings* 114-118 .

The ICJ as a Court: Adjudication, Consent, and Lawmaking

As institutions, courts have distinctive features and qualities, driven by what Shapiro calls their “social functions.”⁴ These functions include, most obviously, the resolution of conflict, but also social control—the application of a set of norms to parties—and the making of law. Beyond these, Giladi and Shany identify other goals of the ICJ, including regime support for the UN, for example through exercise of the advisory jurisdiction over internal matters; regime legitimation; and the compliance of states with primary international legal norms, in the shadow of dispute resolution.⁵ One cannot, Shany emphasizes, measure effectiveness of a court simply by looking at the cases that come before it: one must also consider cases that do not arise because of the court’s clarification of norms.⁶

We focus on dispute resolution and lawmaking as the core functions. It is worth noting that the former is squarely rooted in the Charter and Statute, the latter is not at all.

A. Dispute Resolution

When two parties, be they individuals, companies or states, have disputes they will turn to a third party to help resolve the problem. As Shapiro points out, a court is only one among many types of third parties that disputants might turn to. On the international plane, states have an array of options to fulfill their obligation under Article 33 of the Charter to seek peaceful resolution of disputes. These include arbitration (either ad-hoc or through the Permanent Court of International Arbitration), mediation by regional organizations or individual leaders, use of good offices, and others. Any court, including the ICJ, thus “competes” for business with other modes of dispute resolution. The fact that there are other options for dispute resolution means that only a subset of disputes will ever be brought before any court for formal resolution.⁷

A critical feature of the ICJ’s institutional design is the importance of consent to jurisdiction. When parties consent to the jurisdiction of a court, they are more likely to find its actions

⁴ Martin Shapiro, *Courts* (Chicago: University of Chicago Press, 1981).

⁵ Ronen Giladi and Yuval Shany, ‘The International Court of Justice’, in Yuval Shany, *Assessing the Effectiveness of International Courts* (New York: Oxford University Press, 2014)

⁶ Shany, Chapter Three; see also Theresa Squatrito, Oran R. Young, Andreas Føllesdal, and Geir Ulfstein, ‘A Framework for Evaluating the Performance of International Courts and Tribunals’, in Theresa Squatrito, Oran R. Young, Andreas Føllesdal, and Geir Ulfstein (eds.), *The Performance of International Courts and Tribunals* (Cambridge: Cambridge University Press, 2018).

⁷ William Felstiner, Richard Abel and Austin Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...’ (1981) 15 *Law and Society Review* 631-654.

legitimate and obey its orders. In contrast, when one of the parties does not want to be before the court (as occurs in, say, criminal law) compliance must be coerced. The distinctive feature of the international environment is that the ICJ has no direct means of coercing parties to participate in its proceedings or comply with its judgments. It is true that Article 33 of the Charter allows the Security Council to call upon parties to settle disputes by particular means, so that it could, as per Article 36(3) of the Charter, recommend that parties go before the Court. However, this tool has only been used once by the Security Council, in April 1947, when it recommended that Albania and the UK refer their dispute on the Corfu Channel to the Court.⁸

This means that most cases before the ICJ come before it as result of state decisions taken under Article 36(1) of the Statute, which provides for contentious jurisdiction over cases where the parties have agreed in a treaty or a special agreement to bring the dispute to the ICJ.⁹ As of this writing, 18 decided cases have come to the Court through special agreement/compromis, 15 of which have concerned disputes over territory or maritime delimitation. Such disputes are of the type in which the Court excels, in part because once decided, the states have an incentive to comply rather than escalate the dispute.¹⁰

The so-called “Optional Clause” of Article 36(2) of the Statute is another way in which contentious cases can come before the Court. Through this provision, states can agree to recognize the jurisdiction of the Court for, *inter alia*, “any question of international law”, which provides a kind of general jurisdiction among states. This sets up international adjudication as a sort of “club good” among states that wish to be subject to general jurisdiction without specific consent through a treaty or special agreement, although in practice states often formulate reservations to Article 36(2) declarations so that jurisdiction may be somewhat limited. Seventy-four states have accepted this jurisdiction in some form as of this writing.

⁸ S.C. Res. 22 (9 April, 1947)

⁹ Statute, Art. 36.1 (“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.”)

¹⁰ See Tom Ginsburg and Richard McAdams, ‘Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution’ (2004) 45 *William and Mary Law Review* 1229-1339. I can find only one such dispute in which compliance was not immediate, the case *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) Judgment*, *I.C.J. reports 2008*, p. 12. The decision requested the creation of a Joint technical Committee to implement its decision. Malaysia claimed that the Committee had reached an impasse in 2013 due to interpretation problem of the decision. It thus filled a request for interpretation on June 30, 2017 which the parties agreed to discontinue. See <https://www.icj-cij.org/en/case/170> [last accessed Mar. 19, 2020].

Commentators claim that the Optional Clause is in decline, and cases brought under it tend to provoke preliminary objections to jurisdiction.¹¹

Sometimes consent over jurisdiction may be fictive, taking the route of a long-dormant treaty clause that the current government wishes to resist. In such cases, the respondent state will file preliminary objections to jurisdiction, which has occurred in nearly half of the contentious cases outside of special agreements.¹² States might be less likely to comply when they lose a case in which they have filed preliminary objections.¹³

The centrality of consent for the exercise of its core institutional function of dispute resolution contrasts with the position of many courts in national systems, and poses distinctive challenges to the ICJ. Some institutional features, such as the inclusion of judges ad-hoc under Article 31 of the Statute, seem designed to soften the blow of being brought before the Court?, and are closer to the practice of arbitral institutions than a national court. The ICJ's "courtiness" is thus incomplete because it depends heavily on the consent of the parties to proceed, and the Court itself is not shy about reminding us of the importance of consent.¹⁴

This need to secure the parties' consent has implications for the Court's jurisprudence. All courts use mediatory techniques to maintain their legitimacy, but the ICJ eschews these in its procedure, and some scholars argue that it would be illegitimate for it to utilize them.¹⁵ States have never asked the Court to use its power under Article 38(2) of the Statute to decide cases *ex aequo et bono*.¹⁶ But while the Court does not use mediatory *procedures*, it tends to issue

¹¹ On the alleged decline of the Optional Clause, see Eric A. Posner, 'The Decline of the International Court of Justice' in Stefan Voigt, Dieter Schmidtchen and Max Albert (eds.) *International Conflict Resolution* (Tubingen: Mohr Siebeck, 2006); see also Shany, note 3 above, at 170-171.

¹² 51 out of 107 cases at this writing.

¹³ Ginsburg and McAdams, note 10 above.

¹⁴ *Armed Activities on the Territory of the Congo 2002 DRC-Rwanda (Jurisdiction and Admissibility [2006]* ICJ Rep 6 para 88

¹⁵ Nienke Grossman, 'Solomonic Judgments and the Legitimacy of the International Court of Justice' in, Nienke Grossman et al. (eds.) *Legitimacy and International Courts* (New York: Cambridge University Press 2014), p. 43-61.

¹⁶ Shai Dothan, 'Ex Aequo et Bono: The Uses of a Road not Taken', in Achilles Skordas (ed.), *Research Handbook On The International Court Of Justice* (Cheltenham, UK: Elgar Publishing, forthcoming 2019).

decisions that are minimalist, cautious, and “Solomonic” in nature.¹⁷ This internal feature of the Court is arguably attributable to its weak institutional culture position.

B. Lawmaking

Besides resolving disputes, another major social function of courts is lawmaking.¹⁸ Scholars of courts as institutions tend to assume that this is an inevitable part of the judicial function, in that prior law often runs out. This is especially true of international law, in which norms are produced in a decentralized process and not always perfectly clear. This means there is a good deal of need for courts to interpret and fill in the gaps, and thus make law.

The ICJ makes law in the course of both its contentious and advisory jurisdiction, though neither function is formally recognized. Article 59 of the Statute explicitly states that a “decision of the Court has no binding force except between the parties and in respect of that particular case.” But many commentators accept that the Court’s pronouncements about rules or principles are treated as authoritative statements of the law.¹⁹ And judges, too, will sometimes admit that the Court has a role in developing the law.²⁰ Thus, the ICJ plays a lawmaking role as a functional matter. Furthermore, by virtue of its status as the “World Court”, the ICJ has a certain authority in its pronouncements of law. As d’Aspremont writes in this volume, the ICJ is the “master of the sources” with uncontested authority.²¹

Scholars have traced the ICJ’s impact on many areas of law, and one theme is that the ICJ’s impact varies with its caseload and the presence of other bodies which also contribute to the normative development of the law. In subject areas where there is a profusion of specialized

¹⁷ Grossman, note 15 above.

¹⁸ A third major function is social control: helping to govern a population by imposing norms onto individuals on behalf of the society. Criminal law, administrative justice and other fields are examples. See Shapiro, note 4 above. These have few analogies at the ICJ.

¹⁹ James Crawford, *Brownlie’s principles of public international law*, 9th ed. (Oxford: Oxford University Press, 2019), 40 (“In theory the Court applies the law and does not make it [...] Yet a decision, especially if unanimous or almost unanimous, may play a catalytic role in the development of the law.”) For a critical view, see Mark A. Weisburd, *Failings of the International Court of Justice* (New York: Oxford University Press, 2016).

²⁰ Robert Y Jennings, ‘The Internal Judicial Practice of the International Court of Justice’ (1988) 59 *British Yearbook of International Law* 31-47, at 34 (ICJ is “crucially, intimately and inescapably concerned with the development and shaping of international law.”)

²¹ Jean d’Aspremont, ‘The International Court of Justice as the Master of the Sources’, this volume.

bodies and alternative adjudicative fora, such as human rights or international criminal law, the Court has had relatively little impact. In areas where there are few competitors, such as territorial boundaries, the Court's impact on the law is greater.²² For example, one area in which the Court is competing for business with other tribunals is the law of the sea, in which the 1982 Convention on the Law of the Sea ("UNCLOS") allows states several options for dispute resolution, including the International Tribunal for the Law of the Sea ("ITLOS") as well as the ICJ.²³ The ITLOS, which has primary jurisdiction over cases of prompt release, has had more impact on the law in that area, while the ICJ has shaped the law of maritime delimitation, as well as fisheries.

The Court also carries on implicit dialogues with the International Law Commission, the organ of the UN charged with the development of international law. As Crawford notes, the two have been quite complementary in the development of international law.²⁴

The procedures of the ICJ facilitate its lawmaking role to some extent. Garoupa and Ginsburg argue that courts whose primary role is social control tend not to have separate opinions.²⁵ But courts that are engaged in lawmaking do tend to allow separate opinions, because the content of law is something on which reasonable minds can and do disagree. The practice of the ICJ of having an unsigned opinion for the Court and signed separate opinions reflects this structure to some extent, and separate opinions are filed in virtually every contentious case.²⁶

In sum, the ICJ is most decidedly a *court*. In its ritual structures and formality, the ICJ exudes "courtiness." The judges wear robes and sit in a magnificent hall in the Peace Palace in the

²² Christian J. Tams, 'The ICJ as a "Law-Formative Agency": Summary and Synthesis', in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (New York: Oxford University Press 2013) p. 377, 394-95.

²³ *United Nations Convention on the Law of the Sea*, Art. 287.

²⁴ James Crawford, 'The International Court of Justice and the Law of State Responsibility', in Christian Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (New York: Oxford University press, 2014) p. 71-86, at 74.

²⁵ Nuno Garoupa and Tom Ginsburg, *Judicial Reputation* (Chicago: University of Chicago Press, 2015) p. 180-83.

²⁶ See Rules of the International Court of Justice, Art. 95.2 (allowing separate opinions).

Hague.²⁷ They follow judicial rather than arbitral or mediatory procedures.²⁸ Yet when compared with national courts, the ICJ lacks certain powers of coercion and this has affected both the institutional structure as well as the jurisprudence of the Court. One might view the informal aspects of the institution—the grand procedures and the projection of authority—as compensating for the structural weakness of the Court.

The *International Court*: Relations with States

States are a major part of the institutional environment of the Court, and the Statute provides that “[o]nly states may be parties in cases before the Court.”²⁹ This means that the ICJ depends on states to bring it business; if states ignore it, the Court will have no role. State decisions to refer cases to the Court, in turn, depend on some perception of its effectiveness *from the perspective of states*. The literature on the effectiveness of international courts examines the overall ability of a court to achieve its goals.³⁰ But the goals of a court may be different from those of states. A court might seek to maximize its impact or reputation, and decisions provide a critical vehicle for doing so.³¹ States, however, might sometimes refer cases to court without any genuine intention of resolving the dispute or complying with any judgment. For example, they might want to publicize their disputes internationally, or shift blame to other parties to avoid domestic criticism.

Even setting aside such issues, states will have an interest in the quality of the judicial decision, as well as the probability of compliance with decisions. Compliance with international judicial decisions is a topic of major analysis by scholars. After reviewing various definitions, Huneeus says that “compliance occurs when a state or other actor subject to the court carries out the actions required by a ruling of the court, or refrains from carrying out actions prohibited by said

²⁷ Peter Tzeng, ‘Judge Bhandari’s Re-election to the International Court of Justice’ (2019) 31 *National Law School of India Review* 98-110.

²⁸ Handbook of the International Court of Justice, available at (<https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf>)

²⁹ Art. 34.2.

³⁰ Shany, note 3 above.

³¹ Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (New-York: Cambridge University Press, 2015).

ruling.”³² She argues that various factors will determine compliance, including those associated with the court regime, features of the state, and features of the dispute.

Existing studies of the ICJ tend to find relatively high levels of compliance with judgments, even though measurement issues make statistics tricky.³³ Data on file with this author suggests that out of 63 judgments and decisions which one can easily assess, some 49 (77%) resulted in state behavior partly or wholly consistent with the operative part of the decision. Other scholars assert that there has been no case of full defiance of the ICJ since the *Nicaragua* decision.³⁴ Shany argues that compliance is not a particularly good metric in the ICJ context, and that his broader concept of effectiveness is a better one.³⁵ But if the ICJ is viewed not as trying to maximize regime goals of peace and stability, but instead as providing a service to states, compliance *is* relevant.

In sum, states are the primary clients of the Court. The Court has done relatively little to address the grand purposes of peaceful resolution of disputes outlined in the Charter. But it has provided a modest service to states, particularly in resolving disputes regarding borders and diplomatic immunities. It has helped states coordinate their behavior in relatively low-stakes matters. While it is difficult to tell in the abstract whether the usage of the Court has been high or low, it is worth noting that filings to the Court have increased in recent years. Twenty-six distinct contentious cases and requests for interpretation were filed in the 2010s, the most of

³² Huneus, ‘Compliance with Judgments and Decisions’, in Cesare P. R. Romane, Karen Alter and Yuval Shany (eds.), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2013), pp. 427-463.; see also Diana Kapiszewski and Matthew Taylor, ‘Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings’, *Law & Social Inquiry*, Vol. 38, No. 4 (Fall 2013), pp. 803-835.

³³ Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press, 2004); Colter Paulson, ‘Compliance with Final Judgments of the International Court of Justice Since 1987’ (2004) 98 *American Journal of International Law* 434-61; Aloysius P. Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2007) 18 *European Journal of International Law* 815-52; Heather L. Jones, ‘Why Comply: An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua’ (2012) 12 *Chicago-Kent Journal of International and Comparative Law* 57-100 ; Ginsburg and McAdams, note 10 above.

³⁴ Llamzon, note 33 above; Jones, note 33 above.

³⁵ Shany, note 3 above, at 134.

any decade.³⁶ The Court seems to have found a place to operate within its institutional environment.

The United Nations and its Organs

The Court must also interact with various UN organs as part of its institutional design. As a formal matter, the Court is composed by the General Assembly and the Security Council, which elects its judges in accordance with Article 10 of the Statute. The Secretary-General receives a list of nominations from national groups of the Permanent Court of Arbitration, ensures eligibility, and presents the list to the General Assembly and Security Council.³⁷ The electors, according to Article 9 of the Statute, are to consider the collective diversity of the Court, ensuring that “the main forms of civilization and the principal legal systems of the world” are represented. The voting rule is an absolute majority in each body, proceeding independently, with no special privilege for the permanent members of the Security Council. There have been two informal norms that condition the selection of members: first, there has been by custom a certain distribution among the five regional groups in the UN system, and second, there was a norm that each permanent member would have a judge on the Court. Both norms were recently broken in 2017, when the Indian judge Dalveer Bhandari was elected over the British judge Sir Christopher Greenwood.³⁸ This meant that the Asia-Pacific Group now had four judges on the Court, while the Western Europe and Others Group had four as well, an adjustment of the prior configuration.

In keeping with its special role under the Charter with regard to the budget, salaries for the members of the Court and registrar, along with the budget, are set by the General Assembly.³⁹ Similar to a rule set in many national constitutions, the Statute provides that salaries of judges

³⁶ This statistic aggregates cases arising out of common fact patterns filed in the same year, but includes requests for interpretation opened later.

³⁷ Statute, Arts 5-7.

³⁸ The norm was also violated between 1967 and 1985 when there was no Chinese judge, due to the credentials contest between the People’s Republic of China and the Republic of China. Tzeng. Tzeng notes that the mechanism designed to break deadlocks between the General Assembly and the Security Council, a joint conference laid out in Article 12 of the Statute, was not utilized and never has been. That clause allows judges who have been successfully elected to choose the remaining candidates to fill the vacancies.

³⁹ Statute, Art 32

may not be decreased during their terms of office.⁴⁰ This is designed to ensure independence of the members from pressures.

Under the Charter, the Security Council has the role of ensuring the pacific settlement of disputes, and in doing so, is to “take into consideration that legal disputes should as a general rule be referred by the parties” to the Court.⁴¹ The Statute also provides for provisional measures, which are to be notified to the parties and to the Security Council.⁴² Article 94 of the Charter provides that each member of the UN agrees to comply with decisions of the Court “in any case to which it is a party.” Furthermore, Article 94 (2) of the Charter allows states to go to the Security Council in the event of non-compliance with judgements. The Security Council can then make recommendations or “decide upon measures to be taken to give effect to the judgment.”⁴³ Since decisions are binding under Article 25 of the Statute, this is formidable power indeed. But despite occasional calls,⁴⁴ the Security Council has never employed its power under Article 94(2).⁴⁵ Again, we observe a gap between paper and practice.

The General Assembly or Security Council can by right seek advisory opinions from the Court, and to date 27 have been issued. Other UN organs are also welcomed to seek such opinions in their areas of competence. While many of these are framed as internal questions of the organization, they obviously have profound consequences for the operation of international law: admission to UN membership, for example, requires defining the characteristics of statehood, and decisions about the powers of UN bodies will have a general impact on the law of international organizations.

The scope of advisory opinions has arguably broadened in recent years in a more political direction, with opinions like the *Nuclear Weapons Advisory Opinion*, the *Wall Advisory Opinion*,

⁴⁰ Id.

⁴¹ Statute, Art 36

⁴² Statute, Art 41.

⁴³ Charter, Art 94.2.

⁴⁴ E.g. on 22 January 2002, Honduras sent a letter to the President of the Security Council, requesting its intervention to ensure the judgement of the ICJ of 11 September 1992 in the case concerning *Land, Island, and Maritime frontier dispute (Honduras, El Salvador)*.

⁴⁵ Aloysius P. Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’ (2007) 18 *European Journal of International Law* 815-52 at 847.

and the *Kosovo Advisory Opinion*.⁴⁶ Many of these advisory opinions in fact concern bilateral conflict among states, and have distributive consequences among them. At least two of these recent decisions—those related to nuclear weapons and Kosovo—are notable for their caution and somewhat Solomonic character, but others involving great powers are bolder in their effect. In particular, the 2019 opinion on the *Legal Consequences of the Separation of the Chagos Islands from Mauritius* marked a frontal challenge to the legacies of colonialism and decolonization, demanding that the British government to give up its claim to Diego Garcia, a militarized atoll in the Indian Ocean.⁴⁷

Another set of cases concern the internal operations of the UN.⁴⁸ Sloan and Hernandez note that, as the principal judicial organ, the Court is implicitly and sometimes explicitly called on to deal with boundary disputes over authority within the organization. Yet the Court has assumed a generally deferential attitude toward the other UN organs.⁴⁹ In the decision on *Conditions of Admission*, the Court held that member states could not add conditions to those listed in Article 4(1) of the Charter in voting for admission of a member state. This strengthened the General Assembly and Security Council relative to member states. It has also considered whether the General Assembly had the power to ignore awards made by an employment tribunal it establishes.⁵⁰

The Court's famous decision in *Reparation for Injuries* adopted the view that the Court had an inherent power to interpret the Charter, and that the Charter granted certain implied powers to the organization, even if not explicitly set out in the text. Sought by the General Assembly, this Advisory Opinion gave the organization international legal personality and the ability to pursue

⁴⁶ Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion of 22 July 2010); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion of 9 July 2004); Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion of 8 July 1996).

⁴⁷ Legal Consequences of the Separation of the Chagos Islands from Mauritius (Advisory Opinion, 25 February 2019).

⁴⁸ James Sloan and Gleider I Hernandez, 'The Role of the International Court of Justice in the Development of the Institutional Law of the United Nations', in Christian Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* (New York: Oxford University press, 2014) pp. 198-233.

⁴⁹ *Id.* at 199

⁵⁰ Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion of 13 July 1954).

claims for damages to itself and its agents. Notably the Opinion found that the ability to pursue claims extended to claims against all states, not simply those which were signatories to the Charter. This was a formidable and important Opinion.

Relations between two political organs—the General Assembly and the Security Council—were implicated in some advisory opinions. *Certain Expenses* provides one example.⁵¹ *Certain Expenses* concerned two peacekeeping missions, one in the Suez and the other in the Congo. The first of these was established by the General Assembly, while the second had been the subject of a General Assembly resolution, seemingly infringing on the power of the Security Council over matters of peace and security. The Court found that the General Assembly's exercise of competence in this area did not infringe on that of the Security Council, reading the powers to be overlapping and mutually compatible.

Despite these cases, which in some sense examine whether powers are being exercised *ultra vires*, the Court has never claimed the power to review acts of the Security Council for conformity with the Charter. Yet at the same time, the Court has occasionally engaged out of necessity in interpretation of Security Council resolutions.⁵² The Court has denied that this involves the practice of judicial review, or the ultimate and exclusive power to interpret the Charter.⁵³ In the *Kosovo* Advisory Opinion the Court had to look to the context of Security Council Resolution 1244 to examine whether it determined the final status of the territory. That Resolution had guaranteed the territorial integrity of the Federal Republic of Yugoslavia, but in a cautious opinion, the Court found sufficient ambiguity to decide that it could not declare that the Kosovo declaration of independence was illegal.⁵⁴

In the *Lockerbie* case, Libya claimed that the request for extradition by the United States and the United Kingdom of the bombing suspects violated its rights under the Montreal Convention for the Suppression of Unlawful Acts against Civil Aviation.⁵⁵ As the Court was preparing to

⁵¹ *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion of 20 July 1962).

⁵² *Kosovo Advisory Opinion*, note 46 above.

⁵³ *Certain Expenses*, note 51 above, at 168.

⁵⁴ *Kosovo Advisory Opinion*, note 46 above.

⁵⁵ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*.

decide on provisional measures, the two states engineered the passage of a Security Council resolution under Chapter VII calling on Libya to give up the suspects. The Court then dismissed the request for provisional measures as moot. But as Sloan and Hernandez note, five years later the Court declined to find that the Security Council resolutions superseded the rights under the Montreal Convention, suggesting that this was an issue for the merits phase, which ultimately did not proceed.

In these matters, the ICJ has played its role as the principal judicial organ of the UN, but there has been some evolution in the types of cases brought before it. The organs have both shaped the composition and powers of the Court, and in the case of the General Assembly in particular also served as a client for the Court, bringing requests for advisory opinions.

Conclusion

The ICJ has been deeply shaped by its institutional environment, both formal and informal, as it has sought to provide adjudicative services and contribute to the development of the law. Its performance has been subject to praise and criticism. But however much scholars criticize the Court's jurisprudence, it is helpful to understand that the ICJ is profoundly limited by its institutional design and the nature of the international system. Without coercive powers, and dependent on state consent for cases, the "principal judicial organ of the United Nations" was destined to play a limited role from the outset in a world in which states were not actively seeking to adjudicate disputes. It is noteworthy then, that its most important contributions have been in the development of the law, a task not formally assigned to the Court at all. This illustrates the utility of taking a broad institutional perspective to understand how courts operate.

Recommended Reading

Dothan, Shai. 2014. *Reputation and Judicial Tactics: A Theory of National and International Courts*. New York: Cambridge University Press.

Giladi, Ronen and Yuval Shany. 2014 'The International Court of Justice', in Yuval Shany, *Assessing the Effectiveness of International Courts*. New York: Oxford University Press, 2014.

Kolb, Robert. 2014. *The International Court of Justice*. Oxford: Hart Publishing.

Schulte, Constanze. 2004. *Compliance with the Decisions of the International Court of Justice*. Oxford: Oxford University Press.

Tams, Christian and James Sloan, eds. 2014. *The Development of International Law by the International Court of Justice*. New York: Oxford University Press.

Fundamental Questions

1. What are the institutional functions of the International Court of Justice and whose interests are they addressed to?
2. Is compliance with decisions the most important indicator of a judicial institutions success?
3. Does an organization like the United Nations *need* a court?
4. Does the designation of the International Court of Justice at the “principal judicial organ” matter? Could other courts handle some of its caseload?
5. What institutional reforms to the International Court would make it more effective as an institution?