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Bios

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The ICJ and 'progressive causes'

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Abstract

This chapter considers the International Court of Justice's record when approaching 'progressive causes'. It investigates how the Court has responded when faced with contentious and advisory proceedings involving divisive issues of international concern and assesses how its handling of proceedings involving such causes has evolved over time. It addresses three questions: (i) how we ought to understand 'progress' and 'progressiveness' in the context of international adjudication; (ii) how international courts and tribunals can be said to contribute to the pursuit of progress; and (iii) the extent to which the Court can be considered an 'agent' of progress. In addressing this latter question, the chapter considers the Court's practice on four topics of global concern: discrimination; self-determination and decolonisation; nuclear disarmament; and environmental protection. It concludes that the Court ought to be understood as a cautiously (and often reluctantly) progressive institution.

I. Introduction

In this chapter we consider whether the International Court of Justice ('ICJ' or 'the Court') has developed its judicial policy so as to embrace 'progressive causes'. We investigate how the Court responds when faced with proceedings involving divisive issues of interest to the international community as a whole and how such causes reach the Court. We assess whether the Court's handling of proceedings involving such causes has evolved over time and whether the Court should be viewed as a 'progressive' or a 'conservative' institution (and whether such categorisation is helpful).

We consider these questions with reference to the Court's practice in both contentious and advisory proceedings. In section II, we examine the difficult notion of 'progress' and problems inherent in labelling certain causes as 'progressive'; we also consider briefly how international adjudicative bodies might be seen to contribute to the pursuit of progress. In section III, we reflect

upon the Court as an 'agent' of progress, by referring to its practice on four topics of global concern (discrimination, self-determination and decolonisation, nuclear disarmament, and environmental protection). While the emerging picture is complex, we identify two main trends. The first trend is the use of 'technical' questions to allow or block questions reaching merits determination, what we call 'blocking technicalities'. The second trend is that of cautious, economical development when addressing substantive questions relating to 'progressive causes'. In section IV, we argue that over time the Court has consistently revealed itself to be cautiously (and reluctantly) progressive. In practical terms, this stance has developed due to the consensual nature of the Court's jurisdiction and genuine concerns about 'shoehorning' and 'repackaging' disputes to fit into available jurisdictional bases. The Court's practice suggests it is mindful of the need to permit states (the international legal order's primary legislators) appropriate space to develop political, diplomatic, and legal solutions to global challenges. Equally importantly, we highlight that the Court's caution can also be traced to internal institutional realities, especially the diversity of its judges and the collegiate drafting and adoption of decisions. While the Court's cautiously and reluctantly progressive approach remains warranted and promotes important values within the UN system and international legal order more broadly, it also hides within it, almost inescapably, the quintessence of conservatism: the maintenance of the *status quo*.

II. The notion of 'progress' and 'progressive causes'

Due to the fraught nature of the concept of 'progress', our first major hurdle is to define what constitutes a 'progressive cause'. Whether a cause is considered 'progressive', and whether actions promote or restrict 'progress', are inherently subjective questions. How someone answers will inevitably reveal a lot about their political views. Progressiveness is generally associated with the left, whereas conservatism is the main ideological bulwark of the right. But 'progressive causes' seek to alter the *status quo* in favour of underrepresented interests and communities, while conservatism aims at maintaining it and hence the privileges of the established ruling classes at any given time. Thus, the distinction between left and right does not fully or necessarily map onto the distinction between progressive and conservative causes — it only does so to the extent that the left is engaged in a struggle to overthrow or reshape the *status quo*. What happens if and when the left achieves this is another question.

A related difficulty stems from the contestability of the idea that human history can be thought about in terms of 'progress' at all. The idea of 'progress' implies the movement from one (less desirable) state to another (more desirable) one. The notion that history should be understood as directional was popular amongst 18th Century European theorists like Montesquieu, Condorcet, Rousseau, and Kant who considered that human experience was a linear progression of epistemic and material development toward some future ideal state.[1] Such ideas were influential on Hegel's linear-progressive theory of history.[2] Hegel, in turn, heavily influenced Marx and Engels,[3] particularly Marx's theory of historical materialism. The latter is seen by some as an 'inversion' of Hegelian idealism, but with history still advancing towards a Goal: instead of the liberation of

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1 For an overview of this narrative, see Margaret Meek Lange, 'Progress', in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Springer 2011), available at <https://plato.stanford.edu/archives/spr2011/entries/progress/> accessed 24 January 2018; See, also, Francis Fukuyama, 'The End of History?' (1989) 16 The National Interest 3–18, who famously suggested that we had reached such a point with the collapse of the USSR.

2 See, e.g., Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (1824, Dover 1956); idem, *Lectures on the Philosophy of World History*, (1857, as translated by Hugh Barr Nisbet, Cambridge University Press 1975).

3 Karl Marx and Friedrich Engels, *The Communist Manifesto*, (1848, Penguin Classics 2014); idem, *The German Ideology* (1845–49, 3d edn, Progress Publishers 1970).

'Geist', the liberation of actual human beings.[4] Whatever the merits of such an assessment, and Althusser begs to differ as to whether we are dealing with an inversion here,[5] such linear theories of history have been challenged in general. For example, Nietzsche's conception of the individual as essentially selfish, erratic and irrational erodes the view that history can be understood in linear-progressive terms.[6] Similarly, Foucault's claim that historical writing is essentially indistinguishable from fiction and his focus on the role of chance, contingency and discontinuity (discontinuities, even) similarly challenge linear-progressive narratives.[7] Considering the Court's activities through the lens of 'progress' thus comes with significant conceptual baggage.

If we accept, *arguendo*, that human history can properly be understood in terms of the pursuit of progress or (at least) that certain causes can be considered 'progressive', further questions arise when identifying examples. Where are we progressing *from*, and where *to*? How do we distinguish 'progressive' from 'conservative', or 'regressive', or 'reactionary' causes? History is replete with examples of conservative — even oppressive and illiberal — actors and agendas employing the notion of 'progress' or co-opting 'progressive' sentiments. In this respect we may point to European powers' use of the very ideas of progress and civilisation to justify their colonial projects,[8] the 'progress' narrative underpinning the United States' westward expansion and subjugation of indigenous populations during the 19th century,[9] Bismarck's co-option of the egalitarian, democratic sentiments behind the 1848 revolutions and the Frankfurt Assembly during Prussian-led German unification,[10] the defence of the Cultural Revolution as necessary to eliminate societal factors 'limiting the progress of the revolution',[11] or even the use of liberal democratic ideals in justifying the 2003 invasion of Iraq.[12]

Opinions may thus reasonably differ as to which of the nearly 170 contentious and advisory proceedings brought before the Court since 1948 concern 'progressive causes'. We may agree, for example, that the elimination of discrimination, self-determination, nuclear disarmament and environmental protection are 'progressive causes'; they aim to liberate human beings from the constraints they impose on each other (sometimes in the guise of nature) or to liberate nature from the constraints imposed on it by human beings. But what about proceedings concerning the prohibition on the use of force? Does the overarching aim of conserving existing territorial

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4 See schematically but representatively, Peter Singer, *Marx: A Very Short Introduction* (1980, Oxford University Press 2000) 54–56.

5 See his essay 'Contradiction and Overdetermination' in Louis Althusser, *For Marx* (1969, as translated by Ben Brewster, Verso 2005) 87, esp. 107 ff.

6 For a summary of Nietzsche's views on human nature, see Robert G. Morrison, *Nietzsche and Buddhism: A Study in Nihilism and Ironic Affinities* (Oxford University Press 1999) 64–94.

7 See, illustratively, Michael Foucault, *The Order of Things: Archaeology of the Human Sciences* (Routledge 2001); cf. idem, 'Politics and the Study of Discourse' in Graham Burchell, Colin Gordon, et al. (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press 1991) 53.

8 See, illustratively, Camila Boisen, 'The Changing Moral Justification of Empire: From the Right to Colonise to the Obligation to Civilise' (2013) 39 History of European Ideas 335–353.

9 And the closely-linked notion of 'manifest destiny': see Michael Golay, *The tide of empire: America's march to the Pacific* (Wiley 2003) 273 ff.

10 See, e.g., Otto Pflanze, 'Bismarck and German Nationalism' (1955) 60 American Historical Review 548–566, 549–551.

11 A phrase attributed to Vice-Chairman Lin Biao in a speech to Red Guard members on 18 August 1966: see Roderich MacFarquhar and Michael Schoenhals, *Mao's last revolution* (Harvard University Press 2006) 106-107; Also, more generally, Lucian W. Pye, 'Reassessing the Cultural Revolution' (1986) China Quarterly 597–612.

12 See Maria Ryan, 'Bush's "Useful Idiots": 9/11, the Liberal Hawks and the Co-option of the "War on Terror"' (2011) 45(4) Journal of American Studies 667–693.

divisions preclude these being considered 'progressive'? Likewise, does international humanitarian law's aim of preserving human dignity during armed conflict — but also therefore legally protecting violence — preclude it constituting a 'progressive cause'? What about land and maritime boundary disputes? How such disputes are settled can have significant socio-economic and cultural consequences for affected communities.

A useful (if broad) way of thinking about 'progressive causes' — and the approach we adopt in the remainder of this chapter — is to think about them as projects related to globally-significant societal and ecological challenges which require a break from the *status quo* to appropriately address, but upon which states hold (sometimes wildly) divergent views. For example, states may generally agree that environmental protection is an important aim, but differ about its importance compared to economic development. Similarly, they might largely accept that anthropogenic climate change is occurring and constitutes a significant challenge, but may hold divergent views on the appropriate steps to be taken and on how the cost and burdens of mitigation should be spread. Likewise, states may have publicly committed to nuclear non-proliferation, yet disagree on whether the possession of nuclear weapons should be prohibited.

In this chapter, we focus on the Court's practice in respect of four topics which have been brought before it in contentious and advisory proceedings: (i) discrimination; (ii) self-determination and decolonisation; (iii) nuclear disarmament; and (iv) environmental protection (including the protection of animals). While these are by no means the only topics to have reached the Court worthy of being labelled 'progressive causes', the fact that the Court has had repeated opportunities to engage with each makes them of particular interest.

Finally, we must consider how an adjudicative body like the ICJ displays 'progressive' or 'conservative' tendencies. One way of judging if a court or tribunal is 'progressive' is by whether it tends to *lead* or to *follow* legislative and political development. How likely is a judicial body to break from the status quo and to develop the law in new directions? Is it willing to make substantive pronouncements on the content and operation of the law when significant divisions persist? Is it willing to deepen (i.e. by further elaborating upon the operation of rules) or to broaden law's operation (i.e. by identifying issues previously thought to be unregulated as being captured by a rule) or to modify earlier approaches to the interpretation and application of a rule (i.e. through so-called 'evolutionary' interpretation)? In this context, we may compare the ICJ with other international courts and tribunals like the Court of Justice of the European Union, the European Court of Human Rights or the Inter-American Court of Human Rights — which have all been portrayed as progressive (or as 'activist') because of perceptions that their interpretative exercises are often driven more by teleological and functional, than by textual, concerns.[13] However, we must again stress the inherent subjectivity of 'progress', particularly when one attempts to map this onto judicial 'activism': judicial activism can be seen as progressive, or as conservative or regressive, depending on the circumstances, one's standpoint, and the direction in which a decision leads.

[13] In the huge corpus of literature on these institutions, see, e.g., the various contributions to Mark Dawson, Bruno De Witte, et al. (eds), *Judicial Activism at the European Court of Justice* (Elgar 2013); Alastair Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5(1) HRLR 57–79; Susanne K. Schmidt and Micahel Blauberger, 'The European Court of Justice and its Political Impact' (2017) 40 West European Politics 907–918; and James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2017) 102 AJIL 768–827.

III. The Court as an 'agent' of progress

The Court, like any court or tribunal, is an inherently 'reactive' institution.[14] It cannot pursue 'progressive' (or any) causes *proprio motu*. It may only give its views on a topic when its contentious or advisory jurisdiction is properly seised and must stay within the temporal, material, and procedural limits of its jurisdiction. As other contributions to the present volume explore,[15] the undisputed core of the Court's functions is to settle disputes brought before it according to the relevant existing law, and, through rendering advisory opinions, to assist other UN organs and specialised agencies to fulfil their functions.[16] Its role within the UN system, its general jurisdiction, and the legacy of the Permanent Court mean that ICJ decisions are afforded special weight.[17] Much has been written on whether the Court's role includes the progressive development (or even 'creation') of international law.[18] The Court often pronounces on the existence, content, and application of rules of law in a manner that has repercussions beyond particular proceedings, an aspect of its competences it famously defended in its *Nuclear Weapons* Opinion when it remarked that in fulfilling its judicial functions it merely 'states the existing law and does not legislate', but that when it states and applies the law, it 'necessarily has to specify its scope and sometimes note its general trend'.[19] It suffices to say that the line between a general pronouncement on the state of existing law or an identification of a general trend and the creation of 'new' law is often a 'fine' one.[20] In the final analysis, the Court, like any court, 'makes law for the specific case',[21] and the accumulation of such instances of micro-law-making have an effect on the development of the law, even if

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14 Franklin Berman, 'The International Court of Justice as an 'Agent' of Legal Development?' in Christian J. Tams and James Sloan (eds), *The development of international law by the International Court of Justice* (Oxford University Press 2013) 7–21, esp. 10–11.

15 See: Chapters X (Nolte) and Y (Hernández) in the present volume.

16 This role is clearly expressed inter alia in Art. 36, 38, 59, and 65 of the Court's Statute.

17 Christian J. Tams, 'The ICJ as a 'Law-Formative Agency'' in Tams and Sloan (n 14) 377–396 esp. 379–381.

18 See, especially, Alain Pellet, 'Shaping the Future of International Law: The Role of the World Court in Law-Making' in Mahnoush H. Arsanjani, et al. (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2010) 1065–1083; Gleider I. Hernández, *The International Court of Justice and the Judicial Function* (Oxford University Press 2014) esp. 85 ff; Niels Petersen, 'Lawmaking by the International Court of Justice-Factors of Success' (2011) 12 German LJ 1295; Pierre-Marie Dupuy, 'Competition among International Tribunals and the Authority of the International Court of Justice' in Ulrich Fastenrath, et al. (eds), *From Bilateralism to Community Interest* (Oxford University Press 2011); Thomas Buergenthal, 'International Law as Law at the International Court of Justice: Lawmaking by the ICJ and Other International Tribunals' (2009) 103 ASIL Proc 397–406; Jörg Kammerhofer and André de Hoogh, 'All Things to All People? The International Court of Justice and its Commentators' (2007) 18 EJIL 971–984; Pieter Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy' (2007) 56(4) ICLQ 741–753, 742; Edward McWhinney, 'The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy' (2006) 5 Chinese JIL 3–13; Hugh Thirlway, 'Judicial Activism and the International Court of Justice ' in Nisuke Andō, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber amicorum Judge Shigeru Oda* (Kluwer Law International 2002) 75–105; Georges Abi-Saab, 'The International Court as a world court' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice* (Cambridge University Press 1996) 3–16 esp. 12–16.

19 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (ICJ Reports 1996) 226, 237 para. 18 (hereinafter as '*Nuclear Weapons AO*'). The Court was responding to several participants' arguments that any pronouncement on the legality of the use of nuclear weapons would amount to judicial legislation.

20 Christian J. Tams, 'The Development of International Law by the International Court of Justice' Gaetano Morelli Lecture Series (La Sapienza – University of Rome, 21–22 May 2015) 4–5 available at <https://www.scienzegiuridiche.uniroma1.it/sites/default/files/varie/GML/2015/GML_2015-Tams.pdf> accessed 11 February 2019; cf. Iain G. M. Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 8 EJIL 264, 278 with further references to Lauterpacht's work.

21 Hans Kelsen, *Reine Rechtslehre* (2d edn, Franz Deuticke 1960) 272 ff.; idem, *The Law of the United Nations* (Praeger 1950) 295.

such development involves a number of other actors.[22] The fact that the Court has at least *some* role in the development of international law takes on special significance in our consideration of progressive causes. But should the Court engage in 'development' or 'explanation' or 'pronouncement' only when strictly necessary to determine the issues before it, or whenever an opportunity arises on a legally-significant question? Should the Court take available opportunities to clarify (and thereby develop) the law when faced with issues of high global significance or to use its special place within the UN system and the authority of its decisions to assist in overcoming political and diplomatic deadlock?[23]

Before we analyse the Court's practice, it is necessary to make two further observations, relating to the inherently consensual nature of the Court's jurisdiction. First, states can (and do) restrict the type and number of 'progressive causes' that reach the Court. Many of the legal instruments that are relevant to such causes — whether that be, for example, the principal international human rights instruments, or treaties concerning environmental protection — do not contain compromissory clauses.[24] Only 73 of 193 UN Members (roughly 38 per cent) have made Article 36(2) declarations, and many of those contain significant temporal, material, or procedural limitations. With the notable exception of the Pact of Bogotá,[25] it is also increasingly rare for states to refer disputes to the Court through general dispute settlement treaties. The limited number and scope of jurisdictional avenues leads, inevitably, to the 'shoehorning' or 'repackaging' of disputes, in order to have them 'fit' into existing jurisdictional provisions.[26] Something similar occurs in advisory proceedings when the questions posed to the Court bear closely on a concrete dispute between two or more states.[27] Policing such shoehorning or repackaging is an important issue of judicial policy intrinsically linked to the Court's approach to 'progressive causes'. Second, states invariably have domestic political and diplomatic agendas motivating their choice to commence contentious proceedings or to campaign to seek an advisory opinion (especially when 'progressive causes' are involved), including to bypass stalled diplomatic efforts, to put additional pressure on reticent states, or to raise the state's profile by advertising its avowed commitment to the cause in a public forum. The ultimate aim may not always be 'success' on the merits. While the Court cannot concern itself with such motives, our understanding of its practice is aided by an awareness that

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22 Vaughan Lowe and Antonios Tzanakopoulos, 'The Development of the Law of the Sea by the International Court of Justice' in Tams and Sloan (n 14) 177–193, 179–188.

23 For some, the answer to these latter questions is clearly 'yes'. In the context of a potential request for an advisory opinion concerning states' obligations in respect of climate change, Sands has argued that the Court has the power to contribute 'to a change of consciousness' and 'in turn catalyse new and needed actions: by states, by international organisations, by the private sector, by non-government organisations […] and by individuals' and to provide a 'clear statement' 'as to what is or is not required by the law, or as to what the scientific evidence [on climate change] does or does not require' which could usefully contribute 'to change in attitudes and behaviour'; see Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 JEnvL 19–35, 26 for a more detailed analysis.

24 Notable exceptions in the area of human rights and discrimination include Article IX Genocide Convention and Article 22 CERD. In respect of multilateral environmental agreements, disputes arising under the Helsinki Convention (through Art. 26) and the Convention on Biodiversity (through Art. 27) may be referred to the ICJ by mutual agreement; such provisions are superfluous, as any dispute can always be referred to the ICJ by such mutual (special) agreement.

25 American Treaty on Pacific Settlement (adopted 30 April 1948, entered into force 6 May 1949) 30 UNTS 83; Article XXXI of the Pact has been invoked to seise the Court in a significant number of disputes. Article 1 of the European Convention for the peaceful settlement of disputes (adopted 29 April 1957, entered into force 30 April 1958) 320 UNTS 243 has not been invoked to anywhere near the same degree.

26 For the terms and an analysis, see: Antonios Tzanakopoulos, 'Resolving Disputes Over the South China Sea Under the Compulsory Dispute Settlement System of the UN Convention on the Law of the Sea' (2017) 14 Soochow Law Journal 119–145, section III.1.

27 See further below, text to nn 147, 177–178.

they inevitably exist.

i. Enabling and blocking (through) 'technicalities'

All proceedings before the ICJ must overcome 'technical' hurdles before reaching merits determination. These stem from the rules on jurisdiction, admissibility, and, in advisory proceedings, propriety (in fact equivalent to admissibility in contentious proceedings). Sometimes the Court has made determinations on such issues which have 'enabled' later proceedings or future action related to 'progressive causes'. For example, the Court's reference to *erga omnes* obligations in *Barcelona Traction* contributed to the establishment of the relevant rule of standing and ultimately facilitated the proceedings concerning the Convention Against Torture in *Belgium v. Senegal*.[28] The Court's interpretation of Article 17(2) UN Charter and broad approach to the General Assembly's competences in *Certain Expenses* have facilitated all subsequent UN peacekeeping operations.[29] Likewise, the Court's self-avowedly 'flexible' findings in the cases brought by Bosnia and Croatia against Serbia, regarding seisin, access to the Court, and *res judicata* permitted claims that Serbia had violated the Genocide Convention to proceed to the merits.[30]

However, as we examine further, the Court has often 'blocked' proceedings involving 'progressive causes' from reaching substantive determination on technical grounds. Moreover, it has done so when its prior case law and the circumstances arguably allowed it to proceed to the merits. We can see this trend in the Court's practice in respect of proceedings concerning all four of the 'progressive causes' we consider in this chapter. While it is possible to point to examples of 'technical blocking' in advisory proceedings,[31] the clearest examples of 'blocking' occur in

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28 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) (ICJ Reports 2012) 422; Judge Gaja, writing extra-curially, remarked that those parts of the judgment concerning *erga omnes* obligations were probably drafted by Judge Lachs and were likely intended 'to send a signal to the international community that it was ready to take a different approach from the one followed in the *South West Africa* cases'; cf. Giorgio Gaja, 'Barcelona Traction, Light and Power Company (Belgium v. Spain) (1970)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Hart 2017) 307–324, 309–310; see also Christian J. Tams and Antonios Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 LJIL 781–800.

29 *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) (ICJ Reports 1962) 151, esp. 158, 179.

30 The Court emphasised the need for flexibility when, given Serbia became a UN member in November 2000 and had succeeded to the SFRY's obligations under the Genocide Convention in 1992, a fresh application would cure any jurisdictional defects: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Preliminary Objections) (Judgment) (ICJ Reports 2008) 412, 428 ff. paras. 57–92, esp. 442 paras. 88–91; cf. the seemingly opposite conclusion reached in: *Legality of Use of Force (Serbia and Montenegro v. Belgium)* (Preliminary Objections) (Judgment) (ICJ Reports 2004) 279, 298 ff. paras. 46–91, when the Court held that Serbia's claims were barred because it was not a party to the Court's Statute at the time of its application (April 1999); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* (Preliminary Objections) (Judgment) (ICJ Reports 1996) 595, 610 ff. paras. 17 ff.

31 For example the Court's finding that the World Health Organization's request for an advisory opinion concerned topics outside its competences, or its interpretation of the question posed in the *Kosovo* proceedings as requiring it only to consider whether Kosovo's declaration was prohibited by a rule of international law: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) (ICJ Reports 1996) 66, esp. 76 para. 21, and 78 ff. paras. 25–26; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) (ICJ Reports 2010) 403, 478 (Declaration of Judge Simma), 523 (Separate opinion of Judge Cançado Trindade), 618 (Separate opinion of Judge Yusuf); see also Alex Mills, 'The Kosovo Advisory Opinion: If you don't have anything constructive to say ...?' (2011) 70 CLJ 1–4; Daniel Müller, 'The Question Question' in Marco Milanovic and Michael Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford University Press 2015) 118–133.

contentious proceedings.

a. Discrimination

A significant example of the Court engaging in 'technical blocking' can be seen in the Court's response to Georgia's August 2008 application initiating contentious proceedings against Russia, following Russia's military intervention in support of separatist forces in South Ossetia and Abkhazia. Georgia's application invoked the Court's contentious jurisdiction through Article 22 CERD, which provides that '[a]ny dispute' between CERD parties relating 'to [its] interpretation or application […] which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the [ICJ] for decision, unless the disputants agree to another mode of settlement'. The 'procedures expressly provided for' include the inter-state complaints mechanism under Articles 11–13 CERD, through which a state party may communicate to the Committee on the Elimination of Racial Discrimination its view that another party is not giving effect to its obligations.

Georgia alleged, inter alia, that Russia was responsible for acts performed by its organs and by non-state forces under its direction and control comprising 'attacks against, and mass-expulsion of' ethnic Georgians and other ethnic groups in the South Ossetia and Abkhazia regions, which constituted racial discrimination under Article 1 CERD,[32] and that Russia had thus breached its obligations under Articles 2, 3, 4, 5 and 6 CERD. Georgia invited the Court to grapple both with the definition of racial discrimination under Article 1 CERD — including which groups are entitled to be considered a 'race' — and whether certain conduct during the hostilities was racially motivated. Russia objected to the Court's jurisdiction inter alia because there was no dispute between the parties concerning the interpretation or application of CERD and because Georgia had neither engaged Russia in negotiations nor fulfilled Article 22 CERD's procedural requirements.[33]

While the Court considered that a dispute existed, it held that this had only arisen in August 2008, because the parties' communications prior to that time did not relate to Russia's CERD obligations.[34] It followed that Georgia had not fulfilled Article 22's negotiation requirement.[35] The Court rejected Georgia's arguments that its objections and efforts to negotiate with Russia during the first weeks of August 2008 had satisfied its duty to negotiate,[36] and noted that Georgia had not shown it had attempted to engage in the procedures 'expressly provided for' in the Convention.[37] The Court therefore upheld Russia's objection and declined to exercise jurisdiction as Article 22 CERD's 'preconditions' had not been satisfied.[38] While veering toward a strict approach, the

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32 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)* (Application Instituting Proceedings of Georgia) (12 August 2008) 4 paras. 2–3.

33 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)* (Preliminary Objections of Russia) (1 December 2009), esp. 238 f. para. 7.1.

34 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)* (Preliminary Objections) (Judgment) (ICJ Reports 2011) 70, esp. 120 paras. 113–114.

35 Ibid., esp. 139 para. 181.

36 Ibid., 136 ff. para. 172 ff., 139 f. para. 182.

37 Ibid., 140 para. 183.

38 According to the ordinary meaning of Art. 22's terms confirmed (or at least not upset) by the *travaux préparatoires:* ibid., 123 ff. paras. 129–148.

Court's reasoning is consistent with (at least) a portion of its (and the PCIJ's) prior reasoning.[39] Two disputes pending before the Court — *Ukraine v. Russia* and *Qatar v. United Arab Emirates* — invoke Article 22 CERD to establish jurisdiction. Both (but especially *Ukraine v. Russia*) concern events sharing certain similarities with those at issue in *Georgia v. Russia.*[40] In its Preliminary Objections judgment in *Ukraine v. Russia*, the Court confirmed that Article 22 provides for alternative means of settling disputes. The Court held that a party need not attempt to negotiate prior to bringing a situation to the attention of the CERD Committee.[41] Importantly, it also held that — provided negotiations are attempted in good faith and have proved unsuccessful — a dispute need not be brought to the Committee's attention prior to bringing ICJ proceedings.[42] The Court considered that Ukraine had made adequate attempts to negotiate, thus clearing the path for merits determination.[43]

b. Self-determination and decolonisation

Following WWI, the German colony of the Cameroons was divided between France and the United Kingdom. The United Kingdom administered the British Cameroons under a League of Nations Mandate (from 1922) and then as a Trust Territory (from 1946), as two entities, Northern Cameroons and Southern Cameroons, both connected for administrative purposes to the colony of Nigeria. The remainder, the French-administered Trust Territory of French Cameroons (now Cameroon), gained independence and UN membership in 1960. In March 1959, the General Assembly recommended separate plebiscites be held in the Northern and Southern Cameroons on whether their populations wished to join (newly-independent) Cameroon or Nigeria.[44] The Southern

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39 See, e.g., *Mavrommatis Palestine Concessions* (Judgment) (1924) PCIJ Reports Series A, No. 2, 13; *Railway Traffic between Lithuania and Poland* (Advisory Opinion) (1931) PCIJ Reports Series A/B, No. 42, 116; *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) (Judgment) (ICJ Reports 1962) 319, 345–346; *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)* (Judgment) (ICJ Reports 1969) 3, 47 para. 87; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) (ICJ Reports 1980) 3, 27 para. 51; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) (ICJ Reports 1988) 12, 27 para. 34, 33 f. para. 55; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) (Judgment) (ICJ Reports 2006) 6, 40 f. para. 91, 43 para. 100; and *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* (Judgment) (ICJ Reports 2010) 14, 68 para 150; but cf. *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)* (Preliminary Objections) (Judgment) (ICJ Reports 2011) 70, 142, 148 ff. paras. 23-34 (Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja).

40 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates).*

41 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Preliminary Objections) (Judgment) (not yet reported) available at: <https://www.icj-cij.org/files/case-related/166/166-20191108-JUD-01-00-EN.pdf> accessed 25 November 2019, 40–41, paras. 110–113

42 Ibid., 39–44, esp. para. 121.

43 Ibid., 42–43, paras. 116–121. Given Qatar has transmitted an Art. 11 communication to the CERD Committee, the Court's logic appears also to clear the way for the *Qatar v. United Arab Emirates* proceedings. See Office of the High Commissioner for Human Rights, 'CERD information note on inter-state communications' (30 August 2018) available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23566&LangID=E> accessed 1 February 2019.

44 'The Future of the Trust Territory of the Cameroons under United Kingdom Administration', UNGA Res 1350 (XIII) (13 March 1959) UN Doc A/Res/1350 (XIII), paras. 1–4.

Cameroons voted to join Cameroon and were subsequently incorporated. In February 1961, the people of Northern Cameroons voted to join Nigeria. In April 1961, the General Assembly endorsed the outcomes and terminated the United Kingdom's Trusteeship Agreement following the incorporation of the territories.[45] In May 1961, Cameroon instituted contentious proceedings against the United Kingdom, claiming that it had failed to administer the Territory in accordance with the Trusteeship Agreement, inter alia by failing to administer it as a single unit and by stifling the emergence of independent political parties and institutions necessary for self-government by administering Northern Cameroons as if it were part of Nigeria, contributing to the population's decision to join Nigeria.[46]

The Court considered that, assuming Cameroon had a procedural right to bring a claim, such would have disappeared when the Trusteeship Agreement was terminated (two days after its application).[47] In the Court's view, Cameroon's application could 'have only an academic interest' since a Trusteeship no longer existed and 'no determination reached by the Court could be given effect to by the former Administering Authority'.[48] The Court stressed that, while it had the power to issue a declaratory judgment, it ought not when doing so 'would be inconsistent with its judicial function'.[49] The Court further suggested that while the political ramifications of a judgment or the potential political uses it might be used for, were not relevant considerations, it was significant that neither party could act in a manner which would 'constitute a compliance with the Court's judgment or a defiance thereof'.[50] By protecting its contentious jurisdiction against the incursion of seemingly hypothetical or abstract questions in this manner — thus distinguishing between its advisory and contentious jurisdictions[51] — the Court declined to give more concrete content to the obligations of administering states under the Trusteeship system, especially those relating to the duty to facilitate self-government.

Less than three years later, the Court again concluded that a technical issue prevented it from determining the merits of a dispute concerning self-determination and decolonisation. The Court's choice to opt for this approach has meant its 1966 judgment in *South West Africa* remains amongst its most controversial decisions.[52] South West Africa (Namibia) was colonised by Germany in 1884 and remained under colonial rule until 1919. In 1920 the League of Nations declared it a Class C Mandate Territory, with the Union of South Africa (a British Dominion) as Mandatory. After the League's dissolution, and following South Africa's failure to register South West Africa as a Trust Territory after 1946 and its insistence that the mandate had expired and South West Africa was an integral part of its territory, the General Assembly sought and received three Advisory Opinions concerning the application of the Mandate and Trust regimes and the applicability of General

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45 *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)* (Preliminary Objections) (Judgment) (ICJ Reports 1939) 15, 21–24 (hereinafter *'Northern Cameroons'*); see: UNGA res 1608 (XV) (21 April 1961) UN Doc A/RES/1608 (XV).

46 *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)* (Application Instituting Proceedings of Cameroon [30 May 1961]) (1963) (ICJ Pleadings, Oral Arguments, Documents) 19.

47 Ibid., 36.

48 Ibid., 35.

49 Ibid., 37.

50 Ibid., 37–38.

51 Ibid., 30.

52 Abi-Saab (n 18) 5, refers to the Court's decision as the 'disaster of 1966'; see also John Dugard, '1966 and All That. The South West Africa Judgment Revisited in the East Timor Case' (1996) 8 African JICL 549, who calls the decision 'a disaster for the Court'.

Assembly procedures to the former Mandate territory.[53]

In contentious proceedings commenced in 1960, Ethiopia and Liberia argued that South Africa's governance of South West Africa remained subject to obligations under the Mandate and under Article 22 Covenant, which it had breached. The applicants contended that South Africa had, inter alia, 'failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory', had — through its practice of apartheid — 'distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory', had 'adopted and applied legislation, regulations, proclamations, and administrative decrees' which were 'arbitrary, unreasonable, unjust and detrimental to human dignity', and had 'suppress[ed] the rights and liberties of inhabitants of the Territory essential to their orderly evolution toward self-government'.[54] The application was motivated by several divergent goals, including a desire to secure a decision which gave binding force to the determinations the Court had made in its earlier Advisory Opinions. More importantly, it was motivated by a wish to put pressure on South Africa to abandon apartheid. Particularly after the UNGA's adoption of the Colonial Declaration in December 1960, some also saw it as a chance to progress Namibia's independence claim.[55]

The Court rejected South Africa's preliminary objections and determined — albeit by the finest of margins, 8 votes to 7 — that the Mandate was a treaty in force between the parties and that, further, there was a dispute between them as to its interpretation and application.[56] However, on its own motion, at the Merits phase the Court found it necessary to determine whether Ethiopia and Liberia had standing as holders of a 'legal right or interest regarding the subject-matter of their claim', a question it considered 'appertained to the merits of the case but which had an antecedent character'.[57] The Court considered that it was required to determine whether the Mandate instrument or the Covenant gave rise to a legal right for League members to require a Mandatory to perform its duties.[58] In the now (in)famous *dicta*, it considered they did not, but rather such rights were 'vested exclusively in the League, and [were] exercised through its competent organs'.[59] This question split the Court, and the deadlock was only broken by President Spender's casting vote. The Court's reasoning, though undoubtedly strict, was based on a plausible reading of the Mandate and Article 22 Covenant, the procedures that pertained under the League, and the underlying circumstances of the claim. However, despite the Court stressing that Article 53 of its Statute permitted it to determine the appropriate legal issues *proprio motu,* its decision to re-open the technical issue of standing and its subsequent reasoning are rather jarring when considered against the bifurcation of proceedings, South Africa's arguments on the merits, and its finding at the Preliminary Objections phase that a legal dispute existed between the parties.

The backlash generated by the Court's handling of these issues and its failure to engage with

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53 *International Status of South West Africa* (Advisory Opinion) (ICJ Reports 1950) 128; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa* (Advisory Opinion) (ICJ Reports 1955) 67; *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (Advisory Opinion) (ICJ Reports 1956) 23.

54 *South West Africa (Liberia v. South Africa), Second Phase* (Judgment) (ICJ Reports 1966) 6, 10–11 (hereinafter '*South West Africa*').

55 Rosalyn Higgins, *Themes and Theories* (Oxford University Press 2009) 780–781.

56 *South West Africa (Liberia v. South Africa)* (Preliminary Objections) (Judgment) (ICJ Reports 1962) 319, esp. 328, 342–347.

57 *South West Africa*, 18 para. 4.

58 Ibid., 24 paras. 19–32.

59 Ibid., 28 f. para. 33.

the substance of the claim in *South West Africa* left an indelible mark. In the years immediately following it, the Court's judgment was presented as confirmation of many newly-independent and developing states' views that the Court 'was basically of a pro-Western disposition, and that […] it would be applying a law which was formed without their participation and which frequently runs against their interests'.[60] For some, the Court's failure to bring South Africa to account for its racist policies or to contribute to ending colonialism reinforced the idea that international law and adjudication were ineffective, or worse, perpetuated power imbalance.[61] The Court was more-or-less starved of proceedings following its judgment as states within and beyond the African region effectively boycotted it.[62] No African states participated in contentious proceedings before the Court until 1978.[63] As we explore further, we can trace the impact of *South West Africa* on the Court's subsequent formation of judicial policy, especially when it is faced with 'progressive causes'.

The Court once again declined to proceed to merits determination — in circumstances where it was arguably open to it to do so — in the *East Timor* case. Following Portugal's effective withdrawal, in 1975 Indonesia occupied East Timor and subsequently incorporated it into its national territory.[64] In 1978, Australia recognised *de facto* Indonesia's incorporation of East Timor, inter alia by entering into negotiations concerning the delimitation of the continental shelf in the Timor Sea.[65] Absent a final delimitation agreement, in 1989 Indonesia and Australia agreed upon provisional arrangements for the joint exploration and exploitation of non-living resources.[66] In its application in 1991, Portugal alleged that by entering into the 1989 agreement, Australia had 'infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources', had 'infringed the rights of Portugal as the administering Power', and had 'contravened Security Council resolutions 384 and 389' (recognising the East Timorese people's right to self-determination and calling on Indonesia to withdraw).[67] Australia objected to the Court exercising jurisdiction inter alia on the basis that the application required the Court to rule on the rights and obligations of a non-party: Indonesia.[68]

The Court considered Portugal's claim rested on the assumption that it was only entitled to enter into treaties in respect of the non-self-governing territory of East Timor,[69] and concluded that it would be necessary to determine 'why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so'.[70] In these circumstances, the 'very subject-matter' of the Court's decision would concern the legality of Indonesia's occupation of East

60 Higgins (n 55) 776–777.

61 Ibid., 773–774.

62 Makane Moïse Mbengue, 'African perspectives on inter-state litigation' in N. Klein (ed), *Litigating International Law Disputes* (Cambridge University Press 2014) 166–189, 184; see also Cesare P. R. Romano, 'International Justice and Developing Countries: A Quantitative Analysis' (2002) 1 LPICT 367, 379–385.

63 When Tunisia and Libya agreed to commence proceedings; see *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) Special Agreement* (1 December 1978).

64 *East Timor (Portugal v. Australia)* (Judgment) (ICJ Reports 1995) 90, 96 paras. 13–14 (hereinafter '*East Timor*').

65 Ibid., 97 para. 17.

66 Ibid., 98 para. 18.

67 Ibid., 98 para. 19.

68 Ibid., 99 para. 20; for its part, Portugal argued that Australia's responsibility could be determined without 'passing upon the rights of Indonesia': ibid., 101 para. 25.

69 Ibid., 101 para. 27.

70 Ibid., 102 para. 28.

Timor and its capacity to 'enter into treaties on behalf of East Timor relating to the resources of its continental shelf' — determinations it could not make absent Indonesia's consent.[71] While the Court readily accepted Portugal's ancillary argument that the principle of self-determination 'has an *erga omnes* character', this fact did not, in the Court's view, affect the application of the *Monetary Gold* principle.[72] The Court's approach must be compared to its determination — only three years earlier — in *Nauru* that the absence of third parties did not prevent it ruling on the merits of Nauru's claim.[73] It was open to the Court to follow its reasoning in *Nauru* and to draw parallels between Indonesia's position and Yugoslavia's position in *Corfu Channel*.[74] However, it instead chose to resuscitate and to adapt the strict(er) *Monetary Gold* approach.[75] This choice may be explained by that fact that whereas *Nauru* concerned a narrower range of (nevertheless significant) issues, *East Timor* concerned fundamental questions of sovereign title over territory and Portugal's claim required the Court to elaborate upon status and operation of the principle of self-determination to a degree of specificity it had not previously attempted.

c. Nuclear disarmament

The most recent example of the Court preventing a divisive issue reaching merits determination on technical grounds occurred in the proceedings brought by the Marshall Islands concerning nine (allegedly, in part) nuclear-armed states' compliance with disarmament obligations under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons ('NPT'),[76] arguably also reflecting customary international law. Whereas the Court could not hear the applications against China, North Korea, France, Israel, Russia, and the United States due to these states' non-acceptance of the Court's jurisdiction, the applications against India, Pakistan, and the United Kingdom invoked those states' Article 36(2) declarations.[77] Despite the fact that India and Pakistan are not parties to the NPT, a central feature of the Marshall Islands' claim was that the obligations in Article VI NPT 'to pursue negotiations in good faith [and] to nuclear disarmament [...]' reflected customary international law, and that the relevant states had failed in fulfilling these obligations.[78] The applications thus attempted to procure a judgment attaching binding force to the Court's pronouncements in *Nuclear Weapons*.[79] The respondent states retorted inter alia that no dispute existed between the parties 'with respect to an alleged failure to pursue negotiations in good faith towards nuclear disarmament' on the application date.[80]

The Court noted there was no general obligation for states to engage in negotiations prior to

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71 Ibid.; the Court cited its decision in *Monetary Gold Removed from Rome in 1943* (Preliminary Question) (Judgment) (ICJ Reports 1954) 19, at 32.

72 *East Timor* (n 62), 102 para. 29.

73 See *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections) (Judgment) (ICJ Reports 1992) 240, esp. 261 f. para. 55.

74 Christine Chinkin, 'The East Timor Case (Portugal v. Australia)' (1996) 45 ICLQ 712–725, 718.

75 Ibid.

76 (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161.

77 Given the three judgments issued are almost identical, here we focus on the India proceedings.

78 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (Application Instituting Proceedings of the Marshall Islands [24 April 2014]) 12 paras. 11, 13–14.

79 *Nuclear Weapons AO* (n 19), 263 ff. paras. 98–103.

80 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)* (Jurisdiction and Admissibility) (Judgment) (ICJ Reports 2016) 255, 268 f. para. 30 (hereinafter '*Marshall Islands v. India*').

the seisin of the Court and that no notice of an intention to file is required to establish the existence of a dispute.[81] However, it also considered that mutual exchanges of statements and documents or the parties' inconsistent conduct on legally relevant issues are probative when determining whether states hold opposing views on the performance of international obligations.[82] Such evidence must show, the Court considered, 'that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant' on the application date.[83] The Court further held that an application could not *itself* evidence the existence of a dispute.[84] It considered that the Marshall Islands had not raised its concerns in bilateral exchanges,[85] and that two statements the Marshall Islands made in multilateral fora lacked specificity and were not addressed to the respondents. It concluded that it could not 'be said that [these were] aware, or could not have been unaware, that the Marshall Islands was making an allegation that [the respondents were] in breach of [their] obligations'.[86] Further, the respondents' conduct 'in maintaining and upgrading [their] nuclear arsenal' alone was not deemed sufficient to establish a dispute, because the Marshall Islands had not made it known that it considered such activities breached the respondents' obligations.[87] It is notable that although the Court approached the three claims as if they were more-or-less identical, its Members reached different conclusions in respect of the three applications. Whereas the India and Pakistan judgments were adopted by nine votes to seven and ten votes to six respectively, the Court's decision in the United Kingdom proceedings was carried only by President Abraham's casting vote,[88] as had been the case in *South West Africa* and, notably, also on paragraph 105(2)(E) of the dispositif in the *Nuclear Weapons* AO.[89]

The Court's strict approach — foreshadowed in *Georgia v. Russia*[90] — is unsurprising. Alongside the highly-divisive subject matter, problematic substantive questions lurked within the Marshall Islands' claim. While the Court confirmed in *Bolivia v. Chile* that nothing precludes a State from assuming an obligation to negotiate, such obligations must be traced, like any other legal commitment, to acts capable of binding the state — in other words to an established source of

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81 Both may, however, be required by the parties' Article 36(2) declarations: ibid., 270 para. 35.

82 Ibid., 270 f. para. 36–38.

83 Ibid., 271 para. 37–38.

84 Ibid., 272 para. 40.

85 Ibid., 273 para. 44; the Court reached the same conclusion concerning the Marshall Islands' exchanges with both Pakistan and the United Kingdom.

86 Ibid., 275 para. 48; see also 274 f. paras. 46–47, and 275 para. 50.

87 Ibid., 276 para. 52.

88 Given it did not address the respondents' other objections, it remains an open question whether the Court would have been able to consider the claims' merits. The absence of other nuclear-armed States to the proceedings has been raised as another potential barrier; cf. *Marshall Islands v. India* (n 78), 300 ff. (Separate Opinion of Judge Tomka).

89 See further below, text to (n 191). The solution seems to have been for the Marshall Islands to have commenced fresh proceedings immediately, as then it would have been difficult for the Court to declare that the respondent states were unaware of the Marshall Islands' position: see *Marshall Islands v. India* (n 78), 479 (Declaration of Judge Gaja). The United Kingdom, however, had removed the possibility of fresh proceedings by amending its Article 36(2) declaration in February 2017; cf. Written Statement by Minister of State for Foreign and Commonwealth Affairs, 'Amendments to the UK's Optional Clause Declaration to the International Court of Justice' (23 February 2017) HCWS489 available at <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-02-23/HCWS489> accessed 31 January 2019; and 'Declarations recognizing the jurisdiction of the Court as compulsory: United Kingdom of Great Britain and Northern Ireland' (22 February 2017) available at <https://www.icj-cij.org/en/declarations/gb> accessed 31 January 2019.

90 See above, text to n 32.

international law or obligation.[91] The Marshall Islands' claim required the Court to determine whether obligations to negotiate toward disarmament, like that in Article VI NPT, have attained customary status. Whereas in *Bolivia v. Chile* the Court's finding that no such obligation existed shielded it from having to flesh out the operation of obligations to negotiate and the consequences that flow from their breach, the Marshall Islands' claim left far less room for manoeuvre, especially considering the Court's finding in *Nuclear Weapons* that Article VI NPT entails an obligation to 'achieve a precise result', and does not merely require certain conduct.[92]

d. Environmental protection

The *Nuclear Tests* cases between Australia and New Zealand and France concerning states' obligations in respect of environmental harm provide a final notable example of the Court 'blocking' merits determination on technical grounds. Between 1966 and 1972 (and again in 1973 and 1974, after the Court ordered France halt such tests)[93] France carried out numerous 'atmospheric tests of nuclear devices' in the Mururoa atoll in French Polynesia.[94] Australia alleged that these tests resulted in nuclear fallout reaching its territory.[95] In May 1973, Australia and New Zealand filed parallel applications seeking a declaration that further tests would not be 'consistent with applicable rules of international law'.[96]

The Court considered that it was not bound by the terms in which the applicant presented its claim, but had a duty to address its true object — which, for the Court, was 'to prevent further tests',[97] and that given this, it was 'bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings'.[98] The Court considered that France had 'made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests' through unconditional and consistent statements by senior officials,[99] and that these were both capable of creating binding legal obligations,[100] and had done so.[101] The Court considered that given France's statements, 'the objective of the Applicant ha[d] in effect been accomplished',[102] and the dispute had 'disappeared' because the applicant's claim no longer had 'any object'.[103] The Court therefore declined to determine the legal issues underlying the claim, as doing so would be 'devoid of purpose'.[104] While the result was undoubtedly that the Court did not have to give its views on two highly-divisive questions (the state of customary international law

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91 See *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Judgment of 1 October 2018 [not yet reported]), esp. 32 f. paras. 91–93.

92 *Nuclear Weapons AO* (n 19), 263 f. para. 99.

93 *Nuclear Tests (Australia v. France)* (Order of 22 June 1973) (ICJ Reports 1973) 99, 106.

94 *Nuclear Tests (Australia v. France)* (Judgment) (ICJ Reports 1974) 253, 258 para. 17 (hereinafter *'Nuclear Tests'*).

95 Ibid., 258 para. 18.

96 Ibid., 256 para. 11; France did not participate in the proceedings.

97 Ibid., 263 para. 31.

98 Ibid.

99 Ibid., 267 para. 41.

100 Ibid., 267 f. paras. 42–46; citing: *Temple of Preah Vihear (Cambodia v. Thailand)* (Preliminary Objections) (Judgment) (ICJ Reports 1961) 17, 32.

101 *Nuclear Tests*, 268 ff. paras 48–51.

102 Ibid., 270 para. 52.

103 Ibid., 271 para. 56.

104 Ibid., 271 para. 58, citing *Northern Cameroons* (n 43), 38.

relating to the environment and states' obligations in respect of nuclear disarmament), the Court's approach was made possible by the claim's prospective framing: had the application asked for a determination of the legality of France's prior tests, 'mootness' would not have blocked merits determination.

ii. Cautious engagement with substantive issues

Despite its tendency to block proceedings involving 'progressive causes' from reaching merits determination on technical grounds, the Court's practice also reveals that it is willing to engage in substantive development when confronted with highly-significant but highly-divisive topics once it has decided to proceed to the merits. While particularly true in advisory proceedings, we also see this trend in contentious cases. However, the Court tends to do so cautiously (even cryptically), or 'reluctantly', and is more willing to confirm progress already made and to favour incremental development, rather than forge ahead.

a. Discrimination

While this may soon change,[105] the Court has not yet directly turned its attention to questions relating to discrimination. However, in four proceedings — one advisory and three contentious — the Court has engaged with issues related to human rights where the beneficiaries were targeted based on their national, ethnic, or cultural identity.

In *Construction of a Wall*,[106] the Court clarified that the ICCPR, the ICESCR and the CRC[107] all apply extra-territorially, in areas subject to states' jurisdiction.[108] Further, the Court determined that Israel's construction and operation of a wall impeded the Occupied Territory's inhabitants' liberty of movement contrary to Article 12(1) ICCPR,[109] and also the exercise of the rights 'to work, to health, to education and to an adequate standard of living' recognised in the ICESCR and the CRC.[110] Further, the Court recognised the measures' discriminatory nature, as 'Israeli citizens and those assimilated thereto' were not subjected to the same restrictions.[111] The Court's 2010 judgment in the *Diallo* proceedings — concerning inter alia the Democratic Republic of the Congo's (DRC) arrest, detention and expulsion of Ahmadou Sadio Diallo in 1995, a Guinean national who had lived and operated businesses in the DRC since 1967 — similarly concerned circumstances in which the beneficiary of rights was targeted on the basis of nationality.[112] The Court ultimately held that the DRC had violated its obligations under Articles 13 ICCPR and 12(4) African Charter (that

105 Considering the currently pending proceedings concerning the CERD; see text to nn 32, 278.

106 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) (ICJ Reports 2004) 136 (hereinafter '*Wall*').

107 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

108 *Wall*, 180 paras. 111–113.

109 Ibid., 191 f. para. 134.

110 Ibid..

111 Ibid.

112 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* (Merits) (Judgment) (ICJ Reports 2010) 639. Diallo's arrest and expulsion followed his attempts to recover debts owed to his companies by Congolese public institutions and private companies; see ibid., esp. 650 f. paras. 15–19.

expulsions be made 'in accordance with law'), and under Articles 9 ICCPR and 6 African Charter (prohibiting arbitrary detention).[113]

Given that genocide necessarily involves discrimination based on nationality, ethnicity, race, or religious belief,[114] the Court's decisions in *Bosnia Genocide*[115] and *Croatia v. Serbia*,[116] represent its most significant contributions in this area. In defining genocide in *Bosnia Genocide*, the Court held that Article II requires that a group be defined in positive, not negative, terms.[117] Further, the Court confirmed that genocide is composed of two constituent elements: (i) the commission of an act listed in Article II paragraphs (a)–(e); and (ii) the existence of a 'specific intent' 'to destroy, in whole or in part, ... [the protected] group, as such'.[118] While the Court held that individuals and towns were targeted on ethnic, cultural, and religious grounds,[119] of the numerous allegations of genocide in Bosnia's claim it found in all but one instance — the massacres at Srebrenica — that the prohibited acts were not carried out with the requisite 'special intent'.[120] Further, in the case of Srebrenica, the Court held that Serbia was not directly responsible for, or complicit in, the commission of genocide, but rather had failed to prevent genocide and to prosecute those responsible.[121] Due to the absence of a causal link between these failures and the commission of the Srebrenica massacres, the Court found that Serbia was not required to provide compensation.[122] The Court followed a substantively similar approach in *Croatia v. Serbia*, reiterating the two constituent elements of genocide,[123] and concluding that — both in respect of Croatia's and Serbia's allegations — while relevant acts had been committed, it had not been shown that these acts were performed with the requisite intent.[124]

While the Court's approach to the definition of genocide did not attempt to stretch the clear (and narrow) wording of Article II, in *Bosnia Genocide* it adopted a rather progressive interpretation concerning the duty of prevention. The Court declared that 'for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide'.[125] Rather, the Court considered that the duty requires states to take action aimed at 'restraining in any degree',[126] and that it will have

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113 Ibid., 665 ff. paras. 70–74 and 669 f. paras. 80–85.

114 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 Art. II.

115 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) (ICJ Reports 2007) 43 (hereinafter '*Bosnia Genocide*').

116 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Judgment) (ICJ Reports 2015) 3 (hereinafter '*Croatia v Serbia*').

117 *Bosnia Genocide*, 125 f. para. 196.

118 Ibid., 121 paras. 186–187.

119 See, e.g., ibid., 140 f. para. 238; 154 para. 276.

120 Ibid., 166 para. 297; in this respect, the Court confirmed the ICTY's conclusions; see *Prosecutor v. Krstić*, (Judgment) ICTY Case No. IT-98-33-T (2 August 2001) 193 ff. paras. 551–599; and *Prosecutor v. Krstić* (Appeals Judgment) ICTY Case No. IT-98-33-A (19 April 2004) 2 ff. paras. 6–22.

121 *Bosnia Genocide*, 219 ff. paras. 425–449. In doing so, the Court confirmed that the 'effective control' standard of attribution elaborated in *Nicaragua* and reflected in Art. 8 ARSIWA (rather than the *Tadić* 'overall control' standard) reflects customary international law.

122 Ibid., 233 f. paras. 461–462.

123 See *Croatia v. Serbia*, 62 ff. paras. 132–148; and 67 ff. paras. 149–166.

124 See ibid., 128 f. paras. 441–442; and 153 paras. 522–523.

125 *Bosnia Genocide*, 225 para. 438.

126 Ibid., 113 para. 165.

failed to do so if 'it had the means to do so and […] it manifestly refrained from using them'.[127] The Court's analysis reveals this duty has an extra-territorial character.[128] Further, the Court declared that both states and individuals can be responsible for committing genocide.[129] Finally, in institutional terms, the judgments in *Bosnia Genocide* and *Croatia v. Serbia* can also be seen as progressive due to the Court's willingness to engage expressly and in depth with the detailed case law of the ICTY.[130]

b. Self-determination and decolonisation

Particularly following *South West Africa*, the Court has shown itself willing to address substantive questions related to the right to self-determination and the process of decolonisation when these are presented in a request for an advisory opinion, even when such questions directly bear upon concrete disputes. The Court's 1971 opinion in *Namibia* is an illustrative example.[131] In July 1970, the Security Council passed a resolution requesting that the Court give its views on 'the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)'.[132] Inter alia, resolution 276, passed in January 1970, condemned South Africa's refusal to comply with the Security Council's and General Assembly's earlier resolutions concerning Namibia, declared that South Africa's continued presence in the territory was illegal and that all acts performed after the Mandate's termination were invalid, and called upon UN members to refrain from acting in manner which recognised South Africa's occupation.[133] The Court rejected South Africa's argument that the request 'relate[d] to an existing dispute between South Africa and other States',[134] because the terms and circumstances of the Council's request sought 'legal advice from the Court on the consequences and implications of [its and the General Assembly's] decisions'.[135]

The Court confirmed that the Mandate had survived the disappearance of the League of Nations, that the General Assembly had assumed the League Council's supervisory powers, and that it implicitly had the power to terminate them;[136] the Assembly had done so validly in October 1966 through resolution 2145(XXI).[137] The Court further considered that Security Council resolutions are binding under Article 25 UN Charter whenever such an intention is evident from the circumstances of their adoption, especially their terms, discussion in the Council prior to adoption, and the Charter provisions invoked.[138] The Court even went a step further, noting that

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127 Ibid., 109 para.158.

128 See ibid., 223 paras. 434–438.

129 Ibid., 113 ff. paras. 166–179; in this respect, the Court observed that 'duality of responsibility continues to be a constant feature of international law': cf. 116 para. 173.

130 For detailed discussion of these and related issues, see Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18(4) EJIL 669.

131 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) (ICJ Reports 1971) 16 (hereinafter '*Namibia'*)

132 UNSC res 284 (29 July 1970) UN Doc S/RES/284.

133 UNSC res 276 (30 January 1970) UN Doc S/RES/276.

134 *Namibia*, 23 para. 30.

135 Ibid., 24 para. 32.

136 See *International Status of South West Africa,* (Advisory Opinion) (ICJ Reports 1950) 128, esp. 137, 141–143.

137 *Namibia*, 51 para. 106.

138 Ibid., 52 f. paras. 113–114.

neither the UN nor its Members would 'recognize the validity', 'effects', or 'consequences' of non-Members entering into relations with South Africa concerning Namibia, and that, therefore, 'the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia [we]re opposable to [non-UN members] in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law'.[139] Most significantly, and off its own bat, the Court addressed the very questions it avoided in 1966, declaring that South Africa's policies of racial discrimination under apartheid 'constitute[d] a denial of fundamental human rights' in 'flagrant violation of the purposes and principles of the Charter.'[140] However, the Court did not identify the particular rights breached, or give its views on the manner of their breach or the consequences that flowed from this finding (beyond the Mandate's termination).[141]

The Court continued to exhibit openness to questions concerning decolonisation and the right to self-determination in *Western Sahara* in 1975.[142] Western Sahara had been administered as a Spanish colony from the late 19th Century; from the 1950s on, both Morocco and Mauritania also claimed sovereignty over the territory.[143] After Spain rebuffed Morocco's efforts to commence contentious proceedings,[144] the General Assembly requested that the Court give its views on two questions: (i) whether 'Western Sahara [...] at the time of colonization by Spain [was] a territory belonging to no one (terra nullius)'; and (ii) '[w]hat were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity'.[145]

The Court rejected Spain's arguments that the questions posed were not 'legal',[146] and that it would be improper for the Court to issue its opinion given the identity between the request and the sovereignty dispute.[147] Regarding the latter, the Court distinguished the circumstances from those in *Eastern Carelia*,[148] remarking that although 'lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character',[149] such would only occur when replying 'have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.'[150] The Court held that the dispute between Spain and Morocco related 'to the rights of Morocco over [Western Sahara] at the time of colonization' and that even if the Court settled this issue, this could not affect Spain's status as the administering Power,[151] nor did the request call for 'adjudication upon existing territorial rights or sovereignty over territory'.[152] The Court emphasised it was requested to consider 'the application of General Assembly resolution 1514 (XV)' and the questions were thus 'located in

139 Ibid., 56 para. 126.

140 Ibid., 57 para. 131.

141 See further James Crawford and Paul Mertenskotter, 'The South West Africa Cases' in Bjorge and Miles (n 28) 263–282, esp. 281.

142 *Western Sahara* (Advisory Opinion) (ICJ Reports 1975) 12 (hereinafter '*Western Sahara*').

143 See, e.g., ibid., 25 f. para. 35–38.

144 Ibid., 22 f. paras. 27–28.

145 Ibid.,17 para. 13; UNGA res 3292 (XXIX) (13 December 1974) UN Doc. A/RES/3292 (XXIX).

146 *Western Sahara*, 18 ff. Paras. 15–20.

147 Ibid., esp. 22 ff. paras. 26–30.

148 Ibid., 24 f. para 32; *Status of Eastern Carelia* (Advisory Opinion) (1923) PCIJ Reports Series B, No. 5, 27–29 (hereinafter '*Easter Carelia*').

149 *Western Sahara,* 25 para. 33.

150 Ibid.

151 Ibid., 27 para. 42 citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (Advisory Opinion) (ICJ Reports 1950) 65, 71.

152 *Western Sahara*, 27 f. para. 43.

a broader frame of reference than the settlement of a particular dispute'.[153] In this way, the Court seemingly relegated *Eastern Carelia*.[154]

In respect of Question I, the Court considered that, under customary law applicable when Spain declared Western Sahara a protectorate, the territory could not be considered '*terra nullius*' because it 'was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them'.[155] In answer to Question II, the Court held that neither Morocco,[156] nor the Mauritanian 'entity',[157] had sovereignty over the territory when Spain established its colony.[158] Most significantly, the Court declared that the inhabitants of Western Sahara were a 'people' entitled to the right to self-determination and that its 'application [...] requires a free and genuine expression of the will of the peoples concerned';[159] Spain thus had a duty to give effect to this right in accordance with the 1960 Colonial Declaration and (inter alia) General Assembly resolution 2229 (XXI).[160] Although the Court's opinion represents a significant step forward in the legal recognition of peoples' right to self-determination, the envisaged referendum did not occur; Morocco has occupied the territory (first in part and then in whole) since 1975.[161]

The Court further confirmed and expanded upon this approach in 2004 in *Construction of a Wall*, when it noted that self-determination was recognised in the Charter and had been 'reaffirmed' in the 1970 Friendly Relations Declaration, as well as in Common Article 1 of the ICCPR and ICESCR, and that states have duties to respect this right and to promote its realisation.[162] The Court emphasised that the principle of self-determination was applicable in all non-self-governing territories, whether 'colonies' or not.[163] Further, it reiterated 'that the right of peoples to self-determination is today a right *erga omnes*'.[164] The Court noted that Israel had recognised Palestine as a 'people' entitled to 'legitimate rights'.[165] In the Court's view, the right to self-determination was included in those rights,[166] and, given the construction of the wall had 'severely impede[d] the exercise by the Palestinian people of its right to self-determination', Israel was in breach of its

153 Ibid., 26 para. 38.

154 See further below, text to n 180 ff.

155 *Western Sahara* (n 140), 39 para. 81.

156 Ibid., esp. 42 paras. 92–93 citing *Eastern Greenland* (1933) (Judgment) PCIJ Reports Series A/B, No. 43; see also ibid., 47 f. paras. 103–105, 56 f. para. 129, 68 para. 162.

157 The term the General Assembly used 'to denote the cultural, geographical and social entity which existed at the time in the region of Western Sahara and within which the Islamic Republic of Mauritania was later to be created': ibid, 57 para. 131.

158 Ibid., 63 f. paras. 149–150, 68 para. 162.

159 Ibid., 31 f. para. 55.

160 Which called on Spain to facilitate a referendum on the territory's future: ibid, 34 ff. paras 60–70, 68 para 162; UNGA res 2229 (XXI) (17 October 1966) UN Doc A/RES/2229 (XXI), para. 4.

161 See, e.g., Sidi M. Omar, 'The right to self-determination and the indigenous people of Western Sahara' (2008) 21(1) Cambridge Review of International Affairs 41–57. In December 2018, UN-organised talks concerning the Western Saharan people's right to self-determination recommenced in Geneva; see: UN News, 'First Western Sahara talks at UN in six years, begin in Geneva' (5 December 2018) available at <https://news.un.org/en/story/2018/12/1027691> accessed 1 March 2019.

162 *Wall* (n 104), 171 f. para. 88.

163 Ibid.

164 Ibid., citing *East Timor* (n 62), 102 para. 29.

165 *Wall* (n 104), 182 f. para. 118.

166 Ibid.

obligation to respect that right.[167]

By contrast, the Court was far more hesitant to engage with issues relating to the exercise of the right to self-determination in *Kosovo*.[168] In line with its restrictive interpretation of the question posed,[169] the Court did not elaborate upon the operation of the right to self-determination. Rather, it merely noted that '[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation' and that 'many new States have come into existence as a result of the exercise of this right'.[170] The Court then observed that participants had expressed 'radically different views' on the question of whether 'outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation' the law of self-determination 'confers upon part of the population of an existing State a right to separate from that State' and in what circumstances such a right might arise.[171] The Court avoided giving its views on these issues, as it considered that questions of remedial secession concerned 'the right to separate from a State' and not the legality of a declaration of independence.[172] The interpretation of the question in *Kosovo* operated thus as a quasi-blocking technicality.

Notwithstanding its reticence in *Kosovo*, the Court's recent opinion in *Chagos* provides a further example of its willingness to engage with the right to self-determination and decolonisation when these are presented in a request for an advisory opinion.[173] In June 2017, the UNGA adopted resolution 71/292, requesting the Court render an advisory opinion (a) on whether 'the process of decolonization of Mauritius [was] lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius'; and (b) on 'what are the consequences under international law [...] arising from the continued administration by the [UK] of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals'. Both questions expressly referred to four General Assembly resolutions passed between 1960 and 1967.[174] Unlike earlier requests, the questions in *Chagos* left little room for the Court to avoid determining the state of customary international law relating to decolonisation both at the time of independence of Mauritius and at present, and to give its views on the UK's compliance with any obligations arising from these norms.

The UK acquired Mauritius from France in 1814 and administered Chagos as a Mauritian dependency until November 1965. Between September and November 1965, the UK government negotiated the detachment of the Archipelago with the Mauritian Council of Ministers. The Council

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167 Ibid., 184 para 122.

168 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) (ICJ Reports 2010) 403 (hereinafter '*Kosovo'*).

169 Whether the Provisional Institutions of Self-Government of Kosovo's unilateral declaration of independence was in accordance with international law; see UNGA res 63/3 (8 October 2008) UN Doc A/RES/63/3.

170 *Kosovo*, 436 para. 79.

171 Ibid., 438 para. 82.

172 Ibid., 438 para. 83; see further Cedric Ryngaert, 'The ICJ's Advisory Opinion on Kosovo's Declaration of Independence: A Missed Opportunity?' (2010) 57(3) NILR 481, 489–493.

173 Cf. *Chagos* (n 27).

174 UNGA res 1514 (XV) (14 December 1960) UN Doc A/RES/1514(XV) ('Colonial Declaration'); UNGA res 2066 (XX) (16 December 1965) UN Doc A/RES/2066(XX); UNGA res 2232 (XXI) (20 December 1966) and UNGA res 2357 (XXII) (19 December 1967); the latter three specifically concerned Mauritius's process of decolonisation.

agreed to detachment subject to conditions (notably the payment of compensation and on condition of reversion). Chagos was detached on 8 November 1965 by Order in Council and has been administered as the British Indian Ocean Territory since. Mauritius was granted independence on 12 March 1968 without Chagos. In December 1966 the UK and US agreed to establish a joint military base on the Archipelago's largest island[175] — the Diego Garcia atoll — and between 1967 and 1973, the entire population was compulsorily removed from Chagos.[176]

The questions before the Court were complicated by the fact that Mauritius and the United Kingdom have disputed sovereignty over Chagos since the 1980s.[177] Importantly, Mauritius's sovereignty claim has been based largely on the illegality of detachment and the application of the right to self-determination. Further, Mauritius had (unsuccessfully) attempted to pursue this claim through contentious proceedings before the Court, and, by 'shoehorning' it into a question about the legality of a Marine Protected Area declared by the UK around the Chagos islands in UNCLOS Annex VII arbitral proceedings.[178] Several participants in the advisory proceedings argued that the Court should refuse to give its opinion on the basis of impropriety, as it would be effectively determining the bilateral dispute, thus 'circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.'[179]

Nearly unanimously, the Court determined that it would not be improper to render an opinion.[180] Further, in response to Question (a), the Court unequivocally declared that the UK's separation of the Archipelago was contrary to the Mauritian people's right to self-determination, despite the Council of Ministers' acquiescence.[181] In response to Question (b), the Court declared that the UK's administration of Chagos constitutes a continuing unlawful act entailing an obligation of cessation, and that the UK is obliged to take all steps necessary in order to ensure the lawful completion of Mauritius's decolonisation process.[182] The outcome in *Chagos* constitutes a clear step forward with respect to the right to self-determination in the colonial context, even though some grey areas do remain.

Several issues deserve attention in this respect. First, without entering into analysis of states' practice prior to (or after) December 1960, the Court considered that the Colonial Declaration possessed a 'normative' character and was 'declaratory [...] with regard to the right to self-determination as a customary norm'.[183] In the Court's view, the right to self-determination was

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175 'Exchange of notes constituting an agreement concerning the availability for defense purposes of the British Indian Ocean Territory' (completed 30 December 1966, entered into force 25 February 1976) 603 UNTS 273.

176 Military facilities on Diego Garcia have been operational since the mid-1970s and the lease under the 1966 Agreement is next due for renewal in December 2036: *Chagos* (n 27), 12 ff. paras. 25–53.

177 Ibid., 22 para. 83.

178 See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* PCA Case No 2011-03 (PCA Arbitral Tribunal, Award 18 March 2015) (Dissenting and Concurring Opinion of Judges Kateka and Wolfrum).

179 See *Western Sahara* (n 140), para. 33; see also *Eastern Carelia* (n 146), 27–29.

180 *Chagos* (n 27), 23 paras. 88–90; see also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase,* (Advisory Opinion) (ICJ Reports 1950) 65, 72; *Namibia* (n 129), 23 f. para. 31; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) (ICJ Reports 1989) 177, 188 para. 31; *Wall* (n 104), 159 para. 50; but see Dissenting Opinion of Judge Donoghue on *Chagos* (n 27), 2 ff. paras. 5–21; and Declaration of Judge Tomka on *Chagos* (n 27), 1 ff. paras. 3–8.

181 *Chagos* (n 27), 41 para. 174.

182 Ibid., 42 paras. 177–178.

183 Ibid., 36 para. 152.

'reaffirmed' in 1966 with the adoption of Common Article 1 ICCPR and ICESR,[184] and was 'confirmed' by the General Assembly in the 1970 Friendly Relations Declaration.[185] The Court did not identify a precise point in time for assessment but seemingly considered the entire period relevant. It is not entirely clear when, in the Court's view, the right to self-determination achieved customary status, but it does appear that this had already occurred by December 1960. The Court thus implicitly rejected the UK's arguments that self-determination did not attain customary status, or that the UK was a persistent objector, until 1970.[186] Second, although the Court's approach implies that, in the colonial context, a 'people' is defined by the colony's territorial boundaries, we remain in the dark about how to identify a 'people' entitled to self-determination, especially outside the colonial context.[187] We are also left no wiser concerning the indicia of a people's genuine and free expression of will, beyond the Court's finding that it need not be evidenced through a popular vote.[188] The Court did find that an agreement reached between two parties where one of them is under the authority of the other is not an international agreement and that heightened scrutiny is required with respect to consent in such cases,[189] but went no further. Finally, the Court was sparse in its discussion of the operation of the obligation to respect the territorial integrity of a non-self-governing territory reflected in paragraph 6 Colonial Declaration. It stressed that any adjustments must be consistent with the genuine will of the colonial people, but it did not otherwise consider when territorial adjustment would be permitted.[190] In fairness, however, the Court did not need to deal with any of these issues — beyond the economical responses it gave — in order to render the Opinion requested.

c. Nuclear disarmament

In December 1994, the General Assembly adopted resolution 49/75K, and subsequently requested the Court give its opinion on the question of whether 'the threat or use of nuclear weapons [is] in any circumstance permitted under international law'.[191] In 1996, in what has become a highly-debated passage, in paragraph 105(2)(E) of the dispositif of its *Nuclear Weapons* opinion, adopted only through President Bedjaoui's casting vote, the Court declared that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law', but stated that given the state of the law and the facts before it, it could not 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake'. Many commentators have characterised the Court's

184 Ibid., 37 para. 154.

185 Ibid., 37 para. 155; UNGA res 2625(XXV) (24 October 1970) UN Doc A/RES/25/2625.

186 See, e.g., *Chagos, Written Statement of the United Kingdom* (27 February 2018), Ch 8, esp. paras. 8.59–8.61.

187 *Chagos* (n 27), 38 para. 160.

188 Ibid., 37 f. paras. 157–158.

189 Ibid., 40 f. para. 172.

190 The Court's reluctance may be explained by the fact that such adjustments were relatively commonplace during the main wave of decolonisation. We may, for example, point to the separation of Northern and Southern Cameroons in 1961 (discussed above), the division of Ruanda-Urundi into Rwanda and Burundi in 1962, and the dissolution of the Trust Territory of the Pacific Islands into Micronesia, Palau, the Marshall Islands, and the Northern Mariana Islands; all of these examples occurred, however, following consultations and plebiscites; see Declaration of Judge Abraham on *Chagos* (n 27); and Separate Opinion of Judge Gaja on *Chagos* (n 27), 1 para. 1.

191 *Nuclear Weapons AO* (n 19), 228.

opinion in *Nuclear Weapons* as excessively ambiguous and, therefore, lacking utility,[192] or even a (scarcely) veiled declaration of *non liquet*.[193]

However, what the Court *did* say — within a fraught political situation — was cautiously progressive. The Court confirmed that both international human rights law,[194] and general obligations under international environmental law,[195] continue to apply in times of armed conflict, and are only partially displaced by the *lex specialis* rules on the conduct of hostilities[196] and the use of force in self-defence.[197] Second, striking a significant blow to the (threatened) use of pre-emption as a deterrent, the Court held that a state's declaration of a readiness to use nuclear weapons will comprise an unlawful threat to use force, if the declaration indicates the state would use force in a manner inconsistent with its right of self-defence or in a manner inconsistent with international humanitarian law.[198] Third, while the treaties concerning nuclear weapons deal 'exclusively with [their] acquisition, manufacture, possession, deployment and testing [...] without specifically addressing their threat or use', the Court considered that states' treaty practice ought to be viewed as 'foreshadowing a future general prohibition of the use of such weapons'.[199]

Importantly, the Court declared that 'fundamental rules'[200] of IHL, including the overarching principle of humanity, the prohibition on indiscriminate attacks, and the principle of proportionality,[201] 'constitute intransgressible principles of international customary law' applicable regardless of the category of weapon employed.[202] Given 'methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited', and in light of the 'unique characteristics of nuclear weapons' the Court heavily implied that the use of nuclear weapons will constitute a breach

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192 See, e.g., Vaughan Lowe, 'Shock Verdict: Nuclear War May or May Not be Unlawful' (1996) 55 CLJ 415; Richard A. Falk, 'Nuclear Weapons, International Law and the World Court: A Historic Encounter' (1997) 91(1) AJIL 64; Dapo Akande, 'Nuclear Weapons, Unclear Law?: Deciphering the Nuclear Weapons Advisory Opinion of the International Court' (1998) 69 BYIL 165; Simon Chesterman, 'The International Court of Justice, Nuclear Weapons and the Law' (2009) 44(2) NILR 149; Jörg Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument between Theory and Practice' (2009) 80 BYIL 333; and Surabhi Ranganathan, 'The *Nuclear Weapons* Advisory Opinions' in Bjorge and Miles (n 28) 409–433, esp. 421–430; see more generally Martti Koskenniemi, 'Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons' (1997) 10(1) LJIL 137.

193 See Prosper Weil, '"The Court Cannot Conclude Definitively …" *Non Liquet* Revisited' (1998) 36 Columbia Journal of Transnational Law 109; but cf. Kammerhofer (n 192) 348–349; and Helen Quane, 'Silence in International Law' (2014) 84 BYIL 240, 265–266.

194 Notably the prohibition on the arbitrary deprivation of life reflected inter alia in Art. 6 ICCPR.

195 Including the duty to prevent harm reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.

196 *Nuclear Weapons AO* (n 19), 240 para. 25.

197 Ibid., 241 ff. para. 27, paras. 29–30, para. 33.

198 Ibid., 246 para. 47, 257 para. 78.

199 Ibid., 253 para. 62; however, the Court further considered that while they demonstrated states' significant concern, General Assembly resolutions concerning the use of nuclear weapons did not evidence a general customary prohibition, as the substantial number of negative votes and abstentions in their adoption demonstrated a lack of an established *opinio juris*: ibid., 255 para. 71. The Court noted however that nuclear-armed states' 'adherence to the practice of deterrence' 'hampered' the further development of what it considered to be a 'nascent *opinio juris*'; see: ibid., 255 para. 73.

200 Ibid., 257 para. 79.

201 Ibid., 257 para. 78; the Court made this finding despite that fact that many of the rules applicable to the States' conduct during armed conflict predate the development of nuclear weapons: ibid, 259 f. paras. 85–86.

202 Ibid., 257 para. 79. It is open to debate whether we ought to read 'intransgressible principles of customary law' as a pronouncement that these rules have attained *jus cogens* status.

of IHL in (almost) all conceivable circumstances.[203] It is however understandable that the Court could not possibly exhaust all conceivable constellations of facts surrounding the use of nuclear weapons in order to determine that their use could *never* be lawful, given the absence of a rule banning their use in any circumstances.

Finally, the Court's declaration that states nevertheless have a 'fundamental right' 'to survival'[204] and its refusal to declare the use of nuclear weapons 'by a State in an extreme circumstance of self-defence, in which its very survival would be at stake' as unlawful,[205] can be plausibly read as a declaration that states may only lawfully use nuclear weapons in self-defence in the narrowest range of extreme circumstances: when there is an imminent nuclear attack threatening the state's very existence *and* where the use of nuclear weapons would comply with the rules of IHL.[206] If we adopt this reading, the Court went as close as it could justifiably go to declaring the use of nuclear weapons unlawful, given the absence of established *opinio juris*.[207]

d. Environmental protection

The Court has now taken several opportunities to directly examine questions related to environmental protection (including the protection of animals). In the first such proceedings, in *Gabčíkovo-Nagymaros*, the Court built upon the findings it made a year earlier in *Nuclear Weapons* concerning the emergence of principles of environmental law, confirming its openness to environmental considerations and paving the way for future cases. Largely because of its concerns that aspects of the Gabčíkovo-Nagymaros infrastructure project would cause harm to the environment, Hungary unilaterally suspended (in 1989) and then terminated (in 1992) its performance of the 1977 Budapest Treaty.[208] In 1993, Hungary and Czechoslovakia requested the Court decide 'on the basis of the [Budapest] Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable' whether Hungary was entitled to suspend and then to terminate the 1977 Treaty, and whether Czechoslovakia was entitled to unilaterally dam the Danube on its territory.[209]

The Court repeated the view it had expressed in *Nuclear Weapons* that respect for the environment was of fundamental importance[210] and, having declared that the 1977 Treaty was still in force, found further that both States had continuing obligations of conduct, performance and

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203 The Court declared that 'use of [nuclear] weapons in fact seems scarcely reconcilable with respect for such requirements': ibid., 262 f. para. 95; for the view that the Court ought to have elaborated upon the operation of the rules of discrimination and proportionality, see Akande (n 192).

204 *Nuclear Weapons AO* (n 19), 263 para. 96.

205 Ibid., 263 para. 97.

206 For an elaboration, see Akande (n 192) 211–215; see also Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Oxford University Press 2012), 172–173, 263–264; for a more agnostic approach, see Nobuo Hayashi, 'Using force by means of nuclear weapons and requirements of necessity and proportionality *ad bellum*' in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons under International Law* (Cambridge University Press 2014) 15–30.

207 Were the Court to have declared otherwise, it would have undoubtedly been seen as engaging in legislative reform; see *Nuclear Weapons AO*, 237 para. 18.

208 Treaty Between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks (completed September 1977, entered into force 30 June 1978) 1109 UNTS 235; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) (ICJ Reports 1997) 7, 17 para. 15 (hereinafter '*Gabčíkovo-Nagymaros*').

209 *Gabčíkovo-Nagymaros*, 11, 25 ff. para. 23.

210 *Gabčíkovo-Nagymaros*, 41 para. 53 citing *Nuclear Weapons AO* (n 19).

result, including a duty to enter into negotiations concerning the achievement of the Treaty's 'multiple objectives'.[211] The Court emphasised that 'the Project's impact upon, and its implications for, the environment' were 'of necessity a key issue'[212] and considered that both the wording of the Treaty, and the inclusion of the maintenance of the Danube's water quality and protection of its environment as objectives, meant that to 'evaluate the environmental risks, current standards must be taken into consideration'.[213] In the Court's view, the relevant provisions[214] were obligations of result, requiring the parties to ensure that the Project's completion did not impair water quality or otherwise damage the environment.[215] Furthermore, the Court considered that the inclusion of these 'evolving' provisions meant that 'new environmental norms' could be 'incorporated' into the Joint Contractual Plan implementing the Treaty.[216] The Court enjoined the parties to integrate 'the norms of international environmental law and the principles of the law of international watercourses' in their negotiations toward an agreed solution concerning implementation of the Treaty.[217] Further, and perhaps most significantly in general terms, while it ultimately rejected Hungary's arguments on necessity,[218] the Court accepted that Article 33 ILC Draft Articles on State Responsibility (now Article 25 ARSIWA) accurately reflected customary international law and that the protection of the environment constituted 'an "essential interest" within the meaning of Article 33'.[219]

However, while the Court took the progressive step of confirming that principles elaborated in the decades preceding the dispute pertaining to environmental protection had obtained the status of legal norms, despite Hungary's extensive pleadings concerning the precautionary principle, the principle of prevention, the obligation not to cause transboundary harm, and the duties of prior notification and consultation,[220] it did not actually identify these 'norms' or elaborate on their legal status. Nor did it give its views on how they would operate, either in general or in the circumstances. Illustratively, while it declared that the 'need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development',[221] the Court did not cast this 'concept' in legal terms.[222] Likewise, while the Court recognised that 'in the field of environmental protection, vigilance and prevention are required' due to the irreversibility of damage and inadequacy of reparations, this recognition pointed to practical, not legal, considerations.[223]

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211 Ibid.,76 f. para. 135, 139.

212 Ibid., 77 f. para. 140.

213 Ibid.

214 Esp. Art. 15, 19 and 20 1977 Treaty.

215 *Gabčíkovo-Nagymaros* (n 206), 67 f. para. 112.

216 Ibid; see also Callum Musto and Catherine Redgwell, 'US — Import Prohibition of Certain Shrimp and Shrimp Products (1998)' in Bjorge and Miles (n 28) 489–508, 507–508.

217 *Gabčíkovo-Nagymaros* (n 206), 78 para. 141.

218 Ibid., 41 ff. Paras. 54–59.

219 Ibid., 41 para. 53.

220 See *Gabčíkovo-Nagymaros, Memorial of Hungary* (2 May 1994), esp. para. 6.57 ff.

221 *Gabčíkovo-Nagymaros* (n 206), 77 f. para 140.

222 See: Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press 1999) 19–37.

223 *Gabčíkovo-Nagymaros* (n 206), 77 f. para. 140; but cf. L.-A. Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press 2018) 140–141; for the view that the Court was making an implied reference to the precautionary principle, see: Tim Stephens, *International Courts and Environmental Protection* (Cambridge University Press 2009) 183.

The Court built upon its approach in *Gabčíkovo-Nagymaros* in *Pulp Mills*, demonstrating flexibility and openness to environmental concerns, but again avoiding detailed engagement with the content and operation of the relevant norms. The dispute concerned the application of the 1975 Statute governing the portion of the River Uruguay constituting the Argentina-Uruguay border after Uruguay unilaterally authorised the construction of two wood pulp mills.[224] Argentina's application centred on the questions of the risk of environmental harm posed by the mills and whether Uruguay had breached its procedural obligations.[225] The Court ultimately held that Uruguay had failed to follow the steps required by Articles 7–13 of the Statute, particularly by not informing its Administrative Commission of its proposals prior to authorisation.[226] However, Argentina had not adequately demonstrated that the mill had caused 'harm to living resources or to the quality of the water or the ecological balance of the river'; hence, the Court did not consider that Uruguay had breached any substantive obligations.[227]

In reaching these conclusions, the Court — echoing *Gabčíkovo-Nagymaros* and citing its 2009 decision in *Navigational Rights* — declared that the 1975 Statute included 'evolving' obligations, and thus had to be read in light of developments subsequent to its completion.[228] According to the Court, the parties had an obligation of conduct to coordinate their activities within the Commission, including with respect to the protection of the River's ecosystem.[229] The Court (equivocally) reaffirmed the significance of the 'objective' of sustainable development,[230] and (unequivocally) declared that the principle of prevention had attained customary status, stemming from the no-harm principle elaborated in *Corfu Channel*.[231] Most significantly, the Court declared that states have a resulting customary duty to carry out environmental impact assessments (EIAs) whenever conduct 'may have a significant adverse impact in a transboundary context, in particular, on a shared resource',[232] but that custom does not prescribe the 'scope and content' of EIAs.[233] While progressive, this finding was not especially ground-breaking, given that the practice of requiring EIAs emerged in the 1960s and had been adopted in many domestic legal orders by the 1970s. Similarly, while the Court implicitly accepted the need for precaution, and stated that the 'precautionary approach may be relevant in the interpretation and application of the provisions of the Statute',[234] it did not expressly declare that the precautionary principle had become a self-

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224 Statutes of the River Uruguay (adopted 26 February 1975, entered into force 18 September 1976) 1295 UNTS 331; see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) (ICJ Reports 2010) 14, esp. 34 ff. paras. 28–43 (hereinafter '*Pulp Mills*').

225 Cf. *Pulp Mills*, 70 ff. paras. 159 ff., 47 ff. paras. 67 ff.

226 Ibid., 70 para. 158.

227 Ibid., 101 para. 265; notably, in *Construction of a Road*, the Court affirmed this reasoning, confirming states' general duty to complete EIAs where there is a significant risk of transboundary harm, but likewise finding that, while Costa Rica had breached its 'procedural' obligation by failing to conduct an EIA, Nicaragua had not established Costa Rica's activities had in fact caused harm; see *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Judgment) (ICJ Reports 2015) 665, 720 f. paras. 153–156, 730 f. paras. 192–196, 733 f. paras. 203–207, 735 f. paras. 211–213, 737 para. 217.

228 *Pulp Mills*, 46 para. 64.

229 Ibid., 77 para. 188.

230 Ibid., 48 f. paras. 76–77.

231 Ibid., 55 f. para. 10 citing *Nuclear Weapons AO* (n 19), 241 para. 29; and *Corfu Channel (United Kingdom v. Albania)* (Merits) (Judgment) (ICJ Reports 1949) 4, 22.

232 *Pulp Mills*, 82 f. para. 204.

233 Ibid., 83 f. para. 205.

234 Ibid., 71 para .164.

standing rule of custom.[235] The Court rejected Argentina's argument that a precautionary approach required it to reverse the burden of proof for establishing the risk of harm.[236] The Court's refusal to adopt this innovation — applicable in numerous domestic jurisdictions — has been seen by some as a step backward in concretising States' environmental obligations.[237] The Court was likewise hesitant to modify its approaches to fact-finding and technical evidence, for example by appointing an expert or experts under Article 50 SICJ, despite the voluminous and contradictory evidence adduced by the parties.[238]

Of the Court's decisions concerning environmental protection, *Antarctic Whaling*[239] may well show it at its most 'progressive'. The 1946 International Convention Regulating Whaling (ICRW),[240] originally designed to regulate commercial whaling,[241] has since become the chief legal mechanism for the protection of cetacean species. This is largely due to the International Whaling Commission (IWC) setting a zero-catch limit on commercial whaling for all species in 1982, with exceptions only for aboriginal subsistence hunting and taking 'for the purposes of scientific research',[242] and to its designation of two areas in which commercial whaling will never be permitted.[243] In May 2010, Australia instituted proceedings challenging Japan's practice of issuing licences under Article VIII(1) ICRW within its 'JARPA II' Antarctic whaling programme. After rejecting Japan's jurisdictional objections,[244] the Court determined that Japan was in breach of its obligations under the Schedule, and ordered it to halt JARPA II by cancelling existing, and refraining from issuing new, licenses.[245] The Court's judgment is striking for its willingness to engage in detailed review of JARPA II's design and implementation and also to engage meaningfully with expert evidence concerning lethal methods.

Implicitly rejecting Japan's argument that it ought to be afforded a 'margin of appreciation',[246] the Court considered that Article VIII(1) ICRW is not self-judging and that whether a permit has been issued 'for purposes of scientific research' must be determined objectively,[247] with regard to

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235 Despite Argentina's arguments to this effect: See, ibid., 42 f. para. 55; for an interesting comparison of the approaches to precaution adopted by ITLOS in its provisional measures orders in *Southern Bluefin Tuna* and *MOX Plant*, and by the UNCLOS Annex VII tribunal in *MOX Plant*, see Stephens (n 223) 235–236.

236 *Pulp Mills* (n 222), 71 para. 164.

237 See Daniel Kazhdan, 'Precautionary Pulp: Pulp Mills and the Evolving Dispute between International Tribunals over the Reach of the Precautionary Principle' (2011) 38 Ecology Law Quarterly 527–552; see, more generally, Alan Boyle and James Harrison, 'Judicial Settlement of International Environmental Disputes: Current Problems' (2013) 4 JIDS 245–276, 267; for detailed analysis of the reversal issue, see Caroline E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals* (Cambridge University Press 2011) 240–277.

238 See e.g., Daniel Peat, 'The Use of Court-Appointed Experts by the International Court of Justice' (2014) 84 BYIL 271; as discussed below, the Court faced similar evidentiary challenges in *Construction of Road* and (particularly) the reparations phase in *Certain Activities*.

239 *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) (ICJ Reports 2014) 226 (hereinafter '*Whaling'*).

240 (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

241 According to its Preamble, the ICRW aims, inter alia, to 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.

242 Art. VIII(1) ICRW.

243 The Southern and Indian Ocean Whale Sanctuaries; see Paragraphs 7(a) and (b) ICRW Schedule.

244 *Whaling*, 242 f. paras. 31–32, 245 para. 38.

245 Ibid., 298 paras 244–246.

246 Ibid., 252 para. 59.

247 Ibid., 260 para. 97.

the two criteria contained in the paragraph: (i) whether a given programme 'involves scientific research'; and (ii) 'whether the killing, taking and treating of whales [...] are [in fact] "for purposes of" [such] research'.[248] The Court considered that Japan bore the onus of showing that there was an 'objective basis for its determination' to use lethal methods.[249] The question turned on whether the use of lethal methods was 'reasonable in relation to its stated scientific objectives'.[250] After in-depth analysis of inter alia the type, number, and rate of whales killed, the Court held that JARPA II's design and implementation did not reasonably relate to its stated objectives — especially as these could be achieved equally through non-lethal, or through more selective use of lethal, means.[251] Notably, when interpreting and applying Article VIII(1), the Court did not go down the 'evolving' obligation route, and deemed it unnecessary to examine any effects of the parties' extraneous obligations.[252] The Court likewise did not expressly place weight on the recommendations of the IWC in interpreting Article VIII,[253] but rather confirmed that *all* parties to a multilateral treaty must concur (or at least not object) for subsequent practice concerning the interpretation and application of its terms to be relevant to interpretation under Article 31(3)(a) and (b) VCLT.[254]

In response to the Court's judgment, Japan amended its Article 36(2) declaration in October 2015.[255] After a pause during the 2014/15 season, it introduced a new Antarctic whaling programme (NEWREP-A). In September 2018, Japan made an unsuccessful bid at the IWC to lift the moratorium and, in December 2018, it announced its withdrawal from the ICRW, effective June 2019. Japan has announced it will recommence commercial whaling in its EEZ.[256]

Most recently, the Court addressed questions concerning environmental protection in *Certain Activities in the Border Area*: the Court determined that Costa Rica had not shown that Nicaragua's dredging of the lower San Juan had caused harm to the river or wetlands,[257] but considered that it was responsible for harm arising from its unauthorised activities on Costa Rican territory.[258] In its reparations judgment, the Court declared unequivocally that environmental harm is *per se* compensable.[259] Faced with complex evidence and the parties' (extremely) divergent arguments

248 Ibid., 255 para. 71.

249 Ibid., 254 para. 68.

250 Ibid., 254 para. 67, 258 para. 88.

251 See ibid., 269 f. para. 137, 271 f. paras. 141–146.

252 Under e.g. UNCLOS, the CBD, CITES, or custom; the Court thus avoided the treacherous ground of 'systemic integration' under Art. 31(3)(c) VCLT.

253 Australia and New Zealand argued extensively that IWC Resolutions and Guidelines concerning Art. VIII should be given interpretative weight: see *Whaling*, 247 f. para. 45, 255 ff. paras. 73–83.

254 Ibid., 257 para. 83.

255 Japan's revised declaration precludes the Court's exercising jurisdiction over 'any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea'.

256 Interesting questions arise due to Arts. 65 and 120 UNCLOS, which impose a duty on coastal states to cooperate with the 'appropriate international organisations' in managing and conserving cetacean species within their EEZ; in this context, the 'appropriate' organisation would appear to be the International Whaling Commission.

257 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) Judgment* (ICJ Reports 2015) 665, 712 para. 119–120 (hereinafter '*Certain Activities*').

258 Notably the felling of trees and excavation of three *caños* branching off from the Rio San Juan; see: ibid., 714 para. 129.

259 *Certain Activities, Compensation* (Judgment) (2 February 2018) General List No. 150 [not yet reported], 14 paras. 41–42 (hereinafter '*Certain Activities Compensation*')

concerning the method for quantifying compensation,[260] the Court nevertheless accepted that Nicaragua's activities would have effects on the ecosystem as a whole and that compensation was due for the loss of 'environmental goods and services' in the affected area.[261] While the Court rejected both parties' proposed valuation methodologies,[262] it was willing to compensate where Costa Rica had adequately proven the harm alleged.[263] The Court considered it was 'appropriate to approach the valuation of environmental damage from the perspective of the ecosystem as a whole', requiring an 'overall assessment of the impairment or loss of environmental goods and services prior to recovery', but did not attempt to attribute values 'to specific categories of environmental goods and services' or estimate 'recovery periods for each of them'.[264] However, the Court gave little detail concerning the required standard of proof.[265] While the Court's 'overall assessment' approach — which bears resemblance to the 'equitable considerations' approach adopted in *Diallo*[266] — has been accused of being methodologically 'opaque',[267] it seems to have been adopted to enable states to receive compensation for environmental damage despite complex or contested scientific evidence and expert testimony. We can expect the Court to refine its approach; it will have a chance to do so in *Armed Activities* when it deals with the DRC's much larger and more complex environmental harm claim.

IV. A reluctant progressive

When faced with proceedings involving significant but divisive questions — causes that we have here defined as 'progressive' — the ICJ's practice reveals two main trends. The first trend is a tendency to use 'technical' questions to 'block', but also, more rarely, to 'enable', consideration of substantive issues in contentious and advisory proceedings. The tendency of resorting to blocking technicalities seems to be most clearly aimed at preventing 'shoehorning' and 'repackaging' of disputes in contentious proceedings. Consistent with the purposes of advisory proceedings, however, the Court has shown itself to be more willing to answer such questions when these are presented in a request for an advisory opinion, even if the request clearly relates to a concrete dispute.

The second trend is that of cautious and economical engagement with substantive questions, and a clear tendency to confirm progress already made and to facilitate further action, rather than to forge ahead. Whereas it has only taken a handful of chances to address questions related to discrimination and nuclear disarmament, the trend is particularly evident in the Court's practice on the right to self-determination and the protection of the environment, in which it has had multiple opportunities to engage with important substantive questions.

The Court can be characterised as a reluctant progressive. It will avoid engaging with progressive causes in contentious disputes when the stakes are high, sometimes making strained

260 See ibid., 15 ff. paras. 44–53.

261 The Court concluded that Costa Rica had provided sufficient proof in respect of four such 'goods and services': the felling of trees, destruction of other raw materials (vegetation), gas regulation and air quality regulation, and biodiversity: ibid., 21 para. 75.

262 Ibid., 22 para. 76.

263 Ibid., 21 paras. 72–75.

264 Ibid., 22 para. 78.

265 Cf. Separate opinion of Judge Donoghue on *Certain Activities Compensation*, 1 f. para. 5.

266 See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation* (Judgment) (ICJ Reports 2012) 324, 337 f. para. 33–36.

267 See, e.g., Jason Rudall, 'Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)' (2018) 112 AJIL 288–294.

arguments, and resorting to blocking technicalities, such as lack of a dispute, indispensable third parties, mootness, and other technical points relating to jurisdiction or admissibility. But it will occasionally, and when the stakes are low(er) (*viz. Barcelona Traction*), also enable the adjudication of progressive causes through technical points. This may bear fruit, as it did with respect to *erga omnes* obligations, in the distant future. Likewise, again when the stakes are somewhat lower, or at least it seems to feel so (i.e. in advisory proceedings), the Court is far less ready to resort to such blocking technicalities, despite its discretion to refuse to accede to a request if there are 'compelling reasons'. This may be because the effect of advisory opinions dissipates across the membership and organs of the UN, as compared to a binding decision in a contentious case between states, which brings with it the full force of Article 59 SICJ. Put differently, it is less evident, or less embarrassing, when there is poor compliance with what the Court enunciates in an advisory opinion, as opposed to when a state party to a contentious case ignores the decision of the Court, circumvents it, and withdraws or amends the relevant bases of jurisdiction for the future to boot.

Two sets of factors, hence, explain the Court's practice. The first relates to the need for the Court to preserve its functions as the principal judicial organ of the United Nations and the closest thing the international legal order has to a court of general jurisdiction. As part of a broad institutional framework comprised of diverse organs with political and technical mandates, at its heart the Court's role is to contribute to the purposes and principles of the UN by providing a forum for the peaceful settlement of disputes, and to assist other UN bodies by providing advisory opinions.[268] The Court's continued ability to fulfil its functions is limited by the consensual nature of its jurisdiction, and its effectiveness — measured by respect for it as an institution, the number of proceedings referred to it and the weight placed on its pronouncements (or its 'authority'[269]) — is largely contingent on the perception (however well-founded) that it is fulfilling its mandate appropriately.

As the *South West Africa* experience clearly illustrates, such concerns are not merely abstract. Numerous states have in the past responded to unfavourable or politically undesirable decisions by withdrawing or limiting their consent to the Court's jurisdiction. The US famously amended its Article 36(2) declaration during the *Nicaragua* proceedings, subsequently withdrawing it, and in 2005, following *LaGrand* and *Avena*,[270] withdrew from the Optional Protocol to the VCCR.[271] In 2018, citing the Court's order on provisional measures in *Iran v. US* and Palestine's application in the *Relocation of the US Embassy* proceedings, the US announced its withdrawal from the 1955 Treaty of Amity and the Optional Protocol to the VCDR.[272] Other examples include Japan's amendments to its Article 36(2) declaration following the Court's decision in *Whaling*, the UK's post-*Marshall Islands* Article 36(2) declaration amendments, and France's withdrawal of its Article 36(2) declaration in the midst of the *Nuclear Tests* cases. It bears remembering that, despite its

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268 See, e.g., Arts. 1, 2 and 92–96 UN Charter; Arts. 1, 36 and 65 SICJ; see also Hugh Thirlway, *The International Court of Justice* (Oxford University Press 2016) 3–6.

269 Another fraught term, but one much discussed: see P.-M. Dupuy, 'Competition among International Tribunals and the Authority of the International Court of Justice' in Ulrich Fastenrath, et al. (eds), *From Bilateralism to Community Interest* (Oxford Universtiy Press 2011) 862–876; Hernández (n 18) esp. Chs IV–VI.

270 *LaGrand (Germany v. United States of America)* (Judgment) (ICJ Reports 2001) 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)* (Judgment) (ICJ Reports 2004) 12.

271 Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 487.

272 Treaty of Amity, Economic Relations, and Consular Rights between the Iran and the United States of America (adopted 15 August 1955, entered into force 16 June 1957) 284 UNTS 93; Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 241.

unique place within the UN system, the consensual nature of the Court's jurisdiction makes its position far more tenuous than regional courts and tribunals with (quasi-) compulsory jurisdiction like the CJEU and ECtHR. In this respect, the Court's caution is well-merited. States are the legislators of the international legal order. Especially in relation to highly-significant but highly-contentious issues, it is vital that states are (and are seen to be) the drivers of legislative development.[273] This is by no means to suggest that the Court cannot — and does not — have an important role to play in the context of 'progressive causes', but its role is, and should be, tempered by limitations inherent in its judicial function.

The Court's tendency toward caution is further explained by a second set of — more practical, but no less significant — factors, relating to the institutional realities of the Court as a judicial body and the internal processes through which it adopts decisions. As is well known, the Court's composition is designed to represent the major political and legal systems of the world and includes lawyers trained in the common and civil law traditions.[274] Also, the Court is comprised of members with diverse professional backgrounds, including former diplomats, government legal advisers, domestic judges, practitioners, and academics (and some whose careers span multiple categories), who change periodically and incrementally, bringing new views and experiences. As required by its Statute and Rules, the Court drafts and adopts all decisions collegially (and in plenary) and votes are usually taken on an issue-by-issue basis.[275] Consensual drafting seems to favour conservatism: even where there is agreement on a given outcome, views on the reasoning that produces that outcome can sensibly differ. As well as its tendency to follow or to confirm progress already made, this may partly explain the Court's habit of favouring economical, sparse, and sometimes even Delphic pronouncements, rather than elaborating legal conditions in a detailed manner.[276]

Looking ahead, at the time of writing several proceedings involving 'progressive causes' are pending before the Court. A significant portion of the DRC's (hugely complex, multi-billion dollar) reparations claim in *Armed Activities* relates to Uganda's responsibility to provide compensation for victims of gender- and ethnically-based violence and to compensate for damage to the DRC's environment between 1998 and 2003.[277] The *Ukraine v. Russia* and *Qatar v. UAE* proceedings invite the Court (albeit in diverse circumstances) to elaborate on the requirements of the CERD.[278] Chile's claim in *Silala Waters* similarly invites the Court to determine the content and application of customary law concerning international watercourses in the context of increased global water insecurity.[279] The *Relocation of the US Embassy* case invites the Court to give its

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273 In addition to questions that have yet to be subjected to international regulation, there are, of course, some questions that are too amorphous, too big, or too complicated to be subjected to international legal rules and are particularly ill-suited for judicial settlement without (at least a core of) political, scientific and technical consensus; see Vaughan Lowe, 'The Limits of the Law' (2016) 379 RCADI 9, 27–28.

274 Art. 9 SICJ.

275 See: Art. 55(1) SICJ; Art. 8, Resolution Concerning the Internal Judicial Practice of the Court (Rules of Court, Art. 19) Adopted 12 April 1976.

276 See generally Pieter Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism, or Proactive Judicial Policy' (2007) 56(4) ICLQ 741–753, esp. 742; the potential for individual judges to append declarations and separate and dissenting opinions provides (a partial) outlet in this respect.

277 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations*.

278 See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russia),* (Provisional Measures) (Order of 19 April 2017) (ICJ Reports 2017) 104, 132 ff. para. 78 ff.; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Provisional Measures) (Order of 23 July 2018) esp. paras. 8 ff. 18–28 [not yet reported].

279 See *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia) (*Application Instituting Proceedings of Chile [6 June 2016]), esp. 20 ff. paras. 42–54.

views, inter alia, on whether Palestine is a 'state' entitled to access the Court under Article 34 of the Statute (what many would consider a quintessentially 'progressive' cause, others an issue that is easily avoided by a blocking technicality).[280] Looking further afield, while Palau has (seemingly) abandoned its campaign, we may yet see a request for an advisory opinion on states' obligations in respect of climate change.[281] Similarly, a request for an opinion concerning state officials' immunities in the context of international criminal prosecutions may yet materialise.[282] Precisely how the Court will respond in these proceedings — and others involving 'progressive causes' — only time will tell. However, given its prior practice, we can expect the Court to continue to exercise significant caution and to consolidate and facilitate, rather than to forge ahead.

As we foreshadowed in our introduction, perhaps it would be useful to end this piece with a note of caution. The Court may be well-advised to follow rather than lead, to engage cautiously with progressive causes, to be a reluctant progressive as we have argued above. But, counterintuitive as this may seem, a reluctant progressive — a mild liberal, as it were — may often serve as an agent of conservatism rather than of progress, acting as the handmaiden of the system, helping to diffuse radicalism, to neutralise nascent revolutionary fervour, to normalise it through very incremental change: in short, to maintain the *status quo*, only so changed as to quell destabilising tendencies. But isn't that after all what any institution of the superstructure is there to do?

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280 See *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* (Application Instituting Proceedings of Palestine [28 September 2018]) esp. 12 ff. paras. 36–53.

281 See Sands (n 23); Stuart Beck and Elizabeth Burleson, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations' (2014) 3(1) TEL 17; Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49(2) Arizona State Law Journal 689–712.

282 See, e.g., African Union Legal Affairs, Press Release, 'The AU Open-ended Committee of Ministers of Foreign Affairs on the International Criminal Court Convene 7th Meeting on the Sidelines of the UN General Assembly' (24 September 2018) available at <https://au.int/fr/node/34916> accessed 1 March 2019; see also: Theresa Reinold, 'African Union v. International Criminal Court: episode MLXIII (?)' (23 March 2018) EJIL:Talk! available at <https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/> accessed 1 March 2019.