

2003

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Recommended Citation

Douglass Cassel, *Is There a New World Court?*, 1 *Nw. Univ. J. Int'l Hum. Rts.* [iii] (2003).

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IS THERE A NEW WORLD COURT?

Douglass Cassel*

I am pleased to introduce our conference on *Human Rights and the Law of War: New Roles for the World Court?*¹ With poetic license I have characterized this introduction as the “compromise,” which in the practice of international law means a set of accepted facts and questions of law which parties present to arbitrators or courts to resolve. By analogy I will set out a few facts and illustrative questions that may help to frame our discussion.

I. The International Court of Justice

Commonly called the World Court, the International Court of Justice (“ICJ”) was established by the United Nations Charter in 1945 as the “principal judicial organ” of the U.N.² It is essentially a continuation of an earlier court established under the League of Nations in 1921, known as the Permanent Court of International Justice (“PCIJ”)—which, however, proved to be less than permanent.³

Like its predecessor, the ICJ sits at the Peace Palace in The Hague. Its fifteen judges are nominated by national groups of the Permanent Court of Arbitration and elected by majorities of both the U.N. Security Council and the U.N. General Assembly for nine-year terms.⁴ Our conference is honored by the participation of Professor Bruno Simma of the University of Munich, who has been nominated by the German national group and whose election this year we confidently expect.⁵ In addition, *ad hoc* judges may sit in individual cases involving countries which otherwise have no judge on the Court.⁶

The ICJ has two kinds of jurisdiction: contentious and advisory. Its contentious jurisdiction, where adverse parties ask it to adjudicate a concrete dispute, is limited to states.⁷ No individual or corporation may invoke its jurisdiction or appear

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¹ Updated January 2004 from original version presented April 12, 2002.

² Charter of the United Nations, June 26, 1945, art. 92, T.S. No. 993, 3 Bevens 1153. (hereafter “U.N. Charter”).

³ U.N. CHARTER art. 92. See, e.g., S. ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 15-25 (5th ed. 1995).

⁴ Annex to U.N. Charter, Statute of the International Court of Justice, June 26, 1945, arts. 4-10, 13.1, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1179 (1945) (hereafter “ICJ Statute”). The ICJ Statute “forms an integral part” of the UN Charter. U.N. CHARTER art. 92.

⁵ Professor Bruno Simma was in fact elected to the ICJ effective Feb. 6, 2003. See the ICJ web site, at <http://www.icj-cij.org>.

⁶ ICJ Statute arts. 31.2, 31.3.

⁷ *Id.* art. 34.1.

before it directly. However, they may ask their governments to bring cases on their behalf, which international law permits in certain circumstances.⁸

The nature of inter-state adversary cases before the ICJ is analogous to what common law lawyers call civil, as opposed to criminal cases. The ICJ has no criminal jurisdiction, and cannot convict or imprison anyone. There are now other international courts—the *ad hoc* tribunals for the former Yugoslavia and Rwanda and the global International Criminal Court—which exercise criminal jurisdiction and have been the subject of scholarly and public debate.⁹

Our purpose here is not to revisit those debates, but to examine a topic which has been largely overlooked, namely the role of the ICJ in addressing similar subjects in the context of lawsuits between states. States may ask the ICJ to give declaratory relief by answering a question of international law, or by demarcating a land or maritime boundary. They may seek reparations, including orders to pay monetary damages, to cease unlawful conduct and to provide assurances for the future.¹⁰

They may also request interim relief, known in ICJ practice as an indication of “provisional measures,”¹¹ roughly equivalent to a preliminary injunction in United States domestic civil litigation.

Final judgments of the ICJ are legally binding on the state parties to the case.¹² But until recently, there was debate over whether its indications of provisional measures are legally binding. In June 2001, in *Germany v. U.S.* (in which several of our panelists participated as counsel), the ICJ settled the question by ruling that its provisional measures are binding.¹³

In that case, the ICJ indicated that the U.S. should ensure that a German national not be executed by the State of Arizona until the Court had a full opportunity to rule on Germany’s claim that his right to be notified of his right to seek consular assistance was violated.¹⁴ The ICJ had earlier issued a similar order against the U.S. in a case involving a Paraguayan national.¹⁵ In both cases the State and Justice Departments advised the U.S. Supreme Court that the ICJ provisional measures were not legally binding. In both cases the Supreme Court then declined to stay the executions, and the German and Paraguayan citizens were executed.¹⁶ Now that the ICJ has ruled that its interim measures are legally binding, one hopes that we will no longer see men executed before the ICJ can rule on their rights.

⁸ *E.g.*, *Guinea v. Congo*, 1998 I.C.J. 103 (Dec. 28) available at <http://www.icj-cij.org>.

⁹ *E.g.*, COUNCIL ON FOREIGN RELATIONS, TOWARD AN INTERNATIONAL CRIMINAL COURT? (1999).

¹⁰ *E.g.*, *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104, paras. 116-127 (June 27).

¹¹ ICJ Statute art. 41.

¹² UN CHARTER art. 94; ICJ Statute art. 59.

¹³ *LaGrand*, 2001 I.C.J. at paras. 92-110.

¹⁴ *Id.* at para. 29.I(a) (Order of 3 March 1999).

¹⁵ Vienna Convention on Consular Relations (Para. v. US), 1998 I.C.J. 99, par. 41.I (April 9).

¹⁶ See generally Douglas Cassel, *Judicial Remedies for Treaty Violations in Criminal Cases: Consular Rights of Foreign Nationals in United States Death Penalty Cases*, 12 LEIDEN J. INT’L L. 851, 864-870 (1999).

The ICJ's contentious jurisdiction arises in three main ways. First, states may accept its compulsory jurisdiction generally to resolve cases under international law.¹⁷ About one third of the world's nations—sixty-four as of mid-2003¹⁸—have done so, although many attach reservations to their acceptances. The U.S. accepted the Court's compulsory jurisdiction until 1985, but then withdrew after the ICJ ruled that it had jurisdiction over a case brought by Nicaragua against the U.S. for mining its harbors, supporting the *contra* rebels and otherwise allegedly violating its rights.¹⁹

Second, particular treaties may provide that disputes under the treaty will be resolved by the ICJ. Thus, even though the U.S. is no longer party to the Court's compulsory jurisdiction, we are party to specific treaties that enable us to sue or be sued before the ICJ. For example, the recent cases brought against the U.S. by Paraguay, Germany and Mexico, for alleged violations of the consular rights of their nationals in death penalty cases, were brought under the Optional Protocol to the Vienna Convention on Consular Relations.²⁰ The U.S. used that same treaty, among others, to sue Iran when American Embassy personnel in Tehran were taken hostage in 1979.²¹

A third way is that states may agree to refer particular cases to the ICJ, even when no treaty otherwise provides jurisdiction.²²

The ICJ also has advisory jurisdiction, which may be invoked by the U.N. Security Council or General Assembly, or by other U.N. bodies on questions within their field of work.²³

There are two kinds of advisory questions. First are those not based on an immediate, concrete dispute, such as the World Court's 1996 advisory opinion that use of nuclear weapons would violate international law except in certain extreme conditions.²⁴ Second are cases where the request for an advisory opinion is really a sort of polite way to resolve a concrete case. For example, in two cases involving U.N. human rights rapporteurs whose activities were unlawfully restricted or burdened by their home countries, the U.N. sought advisory opinions to clarify their rights under the Convention on Privileges and Immunities of the United Nations.²⁵ Although termed advisory, in both cases the rulings functioned much the same as a contentious adjudication.

¹⁷ ICJ Statute art. 36.2.

¹⁸ *Report of the ICJ, 1 August 2002-31 July 2003*, 2 (2003), available at <http://www.icj-cij.org>.

¹⁹ See generally Abraham Sofaer, *The United States and the World Court*, 1986 AM. SOC. INT'L L. PROCEEDINGS 204 (1986).

²⁰ Optional Protocol concerning the Compulsory Settlement of Disputes, April 24, 1963; Para., 1998 I.C.J. at par. 31; LaGrand, 2001 I.C.J. pars. 47-48; Mexico v. U.S., 2003 I.C.J. 128, par. 1 (Feb. 5).

²¹ U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 64, paras. 45-46 (May 24).

²² E.g., Certain Criminal Proceedings in France (Congo v. Fr.), 2003 I.C.J. 129, paras. 3, 5-6 (June 17).

²³ UN CHARTER art. 96; ICJ Statute art. 65.

²⁴ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 95 (July 8).

²⁵ Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177 (Dec. 15); Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62 (April 29). See generally, Douglas Cassel, *Making the World Safe for Human Rights Rapporteurs: ECOSOC's Request for an ICJ Advisory Opinion*, 1 TRANSLEX 9 (1999).

II. The Purpose of this Conference

The foregoing sets the stage for two questions: Why this conference? And why now?

Our conference is prompted by two contrasting phenomena: The caseload of the ICJ seems to have been transformed in the post-Cold War period. The World Court is now busier than ever. It has more cases, increasingly involving questions of human rights or ongoing armed conflict. Yet these three inter-related phenomena—increased caseload, and more cases involving human rights or armed conflict—have been little analyzed or studied.

7 Our purpose is to contribute to public and scholarly reflection on these apparent trends, as well as on their causes and import.

III. The World Court's Changing Docket

In the last decade or so, roughly corresponding to the post-Cold War period, the ICJ caseload seems to have been transformed. The World Court is now busier than ever. Of 131 proceedings docketed in the Court since the first case in 1947, some forty-nine, or nearly forty percent, have been filed since 1990. Whereas the Court averaged fewer than twenty matters per decade from 1945 through 1989, since 1990 it has averaged over thirty per decade. In the less than two years since Northwestern's April 2002 conference, up to the present writing in January 2004, the Court has docketed seven new matters. During the Cold War the Court averaged about one judgment per year; now it generates several. And increasingly its cases involve human rights or international humanitarian law in the context of ongoing armed conflict.

During the Cold War (1947-89), the ICJ docketed twenty requests for advisory opinions plus some sixty-two contentious cases.²⁶ These contentious cases concerned forty-three discrete matters according to one scholarly summation.²⁷ Of those forty-three matters, about three-fifths involved land, maritime or fishing boundary disputes (sixteen) or diplomatic protection of nationals in commercial, property or other disputes (twelve). Only two—both arising from the *contra* war in Nicaragua in the 1980s—involved ongoing armed conflict.²⁸ Four involved aspects of decolonization and the collective human right to self-determination.²⁹ Arguably four involved aspects of individual human rights, concerning apartheid,³⁰ political asylum,³¹ unlawfully detained diplomats,³² and prisoners of war.³³

²⁶ Arbitration Tribunal for the Determination of the Maritime Boundary between Guinea-Bissau and Senegal (*Guinea-Bissau v. Senegal*), 1989 I.C.J. 82 (Aug. 23) is treated for present purposes as the “last Cold War case”; *Territorial Dispute (Libya v. Chad)*, 1990 I.C.J. 83 (Aug. 31).

²⁷ See ROSENNE, *supra* note 3, at 155-236.

²⁸ *Id.* at 113-153, 225-227.

²⁹ *Id.* at 170-72 (*Namibia*); 199-200 (*Northern Cameroons*); 232-33 (*Nauru*); 234-35 (*East Timor*).

³⁰ *Id.* at 170-72 (*Ethiopia v. South Africa* and *Liberia v. South Africa*, treated as a single “matter” for purposes of this summary).

Twelve of the twenty Cold War advisory opinions involved internal issues of the U.N. and other international bodies (nine),³⁴ or relations between international organizations and states (three).³⁵ Four involved the collective right to self-determination.³⁶ Only two others, addressing reservations to the genocide treaty and the right of U.N. human rights rapporteurs to travel, clearly involved human rights.³⁷

In the post-Cold War period, the number of cases rose and more involved human rights or ongoing armed conflict. But the change did not come immediately. Cases filed from 1990 through 1992 involved “traditional” ICJ subject matters (border demarcation, self-determination, maritime passage and past use of force).³⁸

The apparent change began in 1993 when Bosnia and Herzegovina sued the Federal Republic of Yugoslavia for genocide in the context of an ongoing armed conflict.³⁹ Since 1993 some thirty-seven contentious cases have been docketed, of which three were requests for interpretation or revision,⁴⁰ so that thirty-four new contested matters were filed. Of these, fifteen involved ongoing armed conflict, with attendant issues of international humanitarian law including genocide.⁴¹ Another six involved issues of human rights or individual rights enforcement (three on rights to consular

³¹ *Id.* at 164-66 (*Colombia v. Peru*).

³² *Id.* at 215-17 (U.S. diplomatic hostages in Tehran).

³³ *Id.* at 204-06 (Pakistani POW's).

³⁴ *See id.* at 158-60 (membership in U.N.) (two opinions); 183-85 (U.N. administrative tribunals) (five opinions); 197-98 (Maritime Safety Committee); 200-02 (U.N. peacekeeping budget).

³⁵ *See id.* at 160-61 (U.N. legal personality); 217-18 (W.H.O. regional headquarters); 229-31 (U.N. headquarters agreement).

³⁶ *See id.* at 168-75 (*Namibia*) (three opinions); 213-15 (*Western Sahara*).

³⁷ *Id.* at 176-77 (genocide); 233-34 (rapporteur). Although the ICJ also gave two opinions on dispute resolution mechanisms of human rights clauses in peace treaties, these opinions did not address human rights. *Id.* at 166-68.

³⁸ Territorial Dispute (*Libya v. Chad*), 1990 I.C.J. 83 (Aug. 31) (Judgment Feb. 3, 1994 (border)); East Timor (*Port. v. Aust.*), 1991 I.C.J. 84 (Feb. 22) (Judgment June 30, 1995 (self-determination)); Arbitration Tribunal for the Determination of the Maritime Boundary between Guinea-Bissau and Senegal (*Guinea-Bissau v. Senegal*), 1991 I.C.J. 85 (March 12) (Order of Nov. 8, 1995 (case settled and removed from list) (border)); *Finland v. Denmark*, 1991 I.C.J. 86 (May 17) (Order of Sept. 10, 1992 (case settled and removed from list) (maritime passage)); *Qatar v. Bahrain*, 1991 I.C.J. 87 (July 8) (Judgment March 16, 2001 (border)); *Libya v. U.S.*; *Libya v. UK*, 1992 I.C.J. 88, 89 (March 3) (Order of Sept. 10, 2003 (cases discontinued and removed from list) (downed aircraft)); *East Timor (Iran v. U.S.)*, 1992 I.C.J. 90 (Nov. 2) (Judgment Nov. 6, 2003 (damage to oil platforms)).

³⁹ Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yug. (Serb. & Mont.)*), 1993 I.C.J. 91 (March 20).

⁴⁰ Request for Interpretation (*Nigeria v. Cameroon*), 1999 I.C.J. 101 (March 25) (requesting interpretation of *Cameroon v. Nigeria*, 1992 I.C.J. 94 (Oct. 10)); Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Yug. (Serb. & Mont.)*), 1999 I.C.J. 122 (requesting revision of *Bosn. v. Yug.*, 1996 I.C.J. 91 (July 11)); *El Salvador v. Honduras*, I.C.J. 127 (requesting revision of *El Salvador v. Honduras*, 1992 I.C.J. 75 (Sept. 11)).

⁴¹ Genocide, 1993 I.C.J. at 91; Legality of the Use of Force (*Yug. (Serb. & Mont.) v. Belg.*), 1999 I.C.J. 105, 114 (April 29); *Congo v. Burundi, Uganda & Rwanda*, 1999 I.C.J. 115, 117 (June 23); *Congo v. Rwanda*, 2002 I.C.J. 126 (May 28).

assistance in death penalty cases,⁴² two on aspects of universal criminal jurisdiction,⁴³ and one further case on genocide⁴⁴).

While after 1993 “traditional” cases continued, including seven border demarcations,⁴⁵ these were now a minority of the contentious matters brought before the Court.

Meanwhile all four requests for advisory opinions since 1993 arguably involve aspects of human rights—two on use of nuclear weapons,⁴⁶ one on the immunities of a U.N. human rights rapporteur,⁴⁷ and one on the duties of an occupying power.⁴⁸

Closer examination, however, may support John Crook’s observation in the conference that there may be less here than meets the eye. Ten of the fifteen docketed cases involving ongoing armed conflict since 1993 involved, in substance, the same case—Serbia and Montenegro’s challenge of the 1999 NATO bombing campaign—filed simultaneously against ten separate NATO member states.⁴⁹ Four more cases (of which three were filed simultaneously) involved another single war—in the Democratic Republic of the Congo—against three neighboring states.⁵⁰

If one recalculates to fit substance rather than form, arguably the fifteen armed conflict cases reduce to three or four truly separate matters. If so, the thirty-four contentious matters since 1993 become only twenty-two to twenty-three matters, of which only three or four involve ongoing armed conflict, and six involve other matters of human rights.

Even with this debatable reduction, however, the ICJ docket in the last decade remains above the Cold War average, and several cases involve new or renewed human rights issues—the right to consular assistance in death penalty cases, universal criminal jurisdiction, and genocide. What explains the continued—even expanded—state interest in using the ICJ?

⁴² Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 99 (Apr. 9) (removed from list by Order of Nov. 10, 1998); *LaGrand*, 2001 I.C.J. 104 (June 27); *Mexico v. U.S.*, 2003 I.C.J. 128 (Jan. 9).

⁴³ *Congo v. Belg.*, 2002 I.C.J. 121 (Feb. 14); *Congo v. Fr.*, 2002 I.C.J. 129 (Dec. 9).

⁴⁴ *Croatia v. Yug. (Serb. & Mont.)*, 1999 I.C.J. 118 (July 2).

⁴⁵ *Cameroon v. Nigeria*, 2002 I.C.J. 94 (Oct. 10); *Botswana/Namibia*, 1999 I.C.J. 98 (Dec. 13); *Indonesia/Malaysia*, 2002 I.C.J. 102 (Dec. 17); *Nicaragua v. Honduras*, 1999 I.C.J. 120 (Dec. 8); *Nicaragua v. Colombia*, 2001 I.C.J. 124 (Dec. 6); *Benin v. Niger*, 2002 I.C.J. 125 (May 3); *Malaysia v. Singapore*, 2003 I.C.J. 130 (July 24).

⁴⁶ *Legality of the Use of Nuclear Weapons in Armed Conflict*, 1996 ICJ 93 (July 8) (Judgment on preliminary objections); *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 95 (July 8).

⁴⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 1999 I.C.J. 100 (April 29).

⁴⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2003 I.C.J. 131 (Dec. 10) (request for advisory opinion).

⁴⁹ See *supra* note 41.

⁵⁰ *Id.*

One factor appears to be growing state confidence in the ICJ. This is evidenced by the continued flow of border demarcation cases, in which the ICJ role in peaceful resolution is an important alternative to potential (or in some cases actual) armed conflict. It is further evidenced by the geographical spread of such cases, which have been filed in recent years by states in Latin America, Africa, Southeast Asia, and the Middle East.

Another factor is that filing cases involving ongoing armed conflict is an attractive alternative for weak states which cannot defeat stronger adversaries by military means. Serbia sued NATO member states against whose bombing it had no effective military defense, while Congo sued neighboring states whose forces it could not oust from its vast territory. An ICJ lawsuit may be war by another means.

A further factor is the jurisdictional provision of the Genocide Convention that grants the ICJ jurisdiction over disputes,⁵¹ whereas the ICJ often lacks jurisdiction over disputes based solely on alleged aggression. Both Serbia's suits against NATO members and Congo's suits against its neighbors arose mainly from alleged aggression, but are styled as challenges to genocide.⁵²

IV. Conclusion

These preliminary reflections are meant only to open, not to close debate. For a fuller reflection we are privileged to have in this conference a distinguished and experienced group of ICJ practitioners and scholars. Their contributions follow.

⁵¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IX, 78 U.N.T.S. 277.

⁵² See, e.g., *Legality of the Use of Force (Yugo. (Serb. & Mont.) v. Belg.)*, 1999 I.C.J. 105, paras. 1, 3 (June 2) ("gross violation of the obligation not to use force"); *Democratic Republic of Congo v. Rwanda*, 2001 I.C.J. 117 (Jan. 31) ("armed aggression").