

REASSERTION AND TRANSFORMATION: FROM  
FRAGMENTATION TO CONVERGENCE IN  
INTERNATIONAL LAW

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ABSTRACT

*This Article explores how the International Court of Justice (I.C.J.) contributes to the convergence of international law and the strengthening of international law as a unitary legal system. The I.C.J. has reasserted its place at the center of international law ~~after the expansion~~, including new courts and enforcement mechanisms, and makes an increasingly important contribution to the transformation of international law that is taking place in response to its expansion. The fear of fragmentation has been one driver in the gradual transformation of international law that is taking place. This fear contributes to the understanding of the I.C.J.'s departure from the traditional methods that had hardened over the years. The I.C.J. has clarified the criteria for the formation of customary law, and the canons of treaty interpretation. It cites case law from other international courts and from domestic courts as persuasive authorities. Old doctrinal restrictions have fallen as the I.C.J. has confirmed the binding effect of its judgments and the role of peremptory norms (jus cogens). The I.C.J. has made clear and important declarations on general principles and customary international law. It has become the main business of the I.C.J. to provide international courts and other bodies with the tools for applying international law and securing coherence and unity. The Article argues that further scholarship on the I.C.J. case law and fragmentation and convergence is called for, and that a new frontier in scholarship is the ~~international law scholarship on~~ the effects of these recent I.C.J. contributions on other international and domestic courts.*

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# I. THE INTERNATIONAL COURT AND THE PRESSING PROBLEMS OF FRAGMENTATION

This Article analyzes the case law of the International Court of Justice (I.C.J.) and the discourse about the fragmentation of international law. As a result of many forces, international law, as a unitary legal system, is under pressure. The expansion of international law to cover new fields and the many new enforcement mechanisms have raised the prospect of the fragmentation of international law into several separated regimes.

Different international courts and tribunals, as well as central international institutions such as the International Law Commission and other United Nations bodies, have made contributions to entrench the coherence of international law as a unitary legal system. Such contributions serve to clarify and strengthen “the systemic nature of international law,”<sup>1</sup> and counter a threat of fragmentation. It is not surprising that fear of fragmentation could influence the development of international law. Nonetheless, it may be difficult to show such influence empirically by way of express statements to this effect in judgments. In light of the developments in the jurisprudence of the I.C.J., and the responses from central international institutions and different courts and tribunals, one conclusion is that even if the problems of fragmentation may remain pressing in different ways, they are not a

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1. Special Rapporteur, *Second Rep. on Identification of Customary International Law*, Int’l Law Comm’n, 13, U.N. Doc. A/CN.4/672 (May 22, 2014).

threat to international law as a legal system.<sup>2</sup> The focus in this Article is the jurisprudence of the I.C.J.

Twenty years of expansion of international law with new courts and enforcement mechanisms sparked concern over fragmentation among academics and judges. Institutional reforms to strengthen international law as a unitary legal system were never likely to come about via the treaty route. This Article explores whether the developments in procedure and substantive law can be seen as an alternative response. On one level the responses are incremental and limited; on another, it is argued in this Article, they contribute to fundamental changes of a transformational character. There is a transformation of international law taking place with changing concepts of state sovereignty, individual rights, jurisdiction, procedure, and evidence incrementally remedying limitations of traditional doctrine. Support for the strengthening of international law as a legal system is found in the Vienna Convention on the Law of Treaties Article 31(3)(c) on the application of “any relevant rules of international law applicable in the relations between the parties.”<sup>3</sup>

The I.C.J. contributes to customary international law, resolving pressing problems of human rights and environmental law, and moving away from the strictly inter-state, non-hierarchical perspective of international law where state consent has put extreme restrictions on jurisdiction, obligations of states and the development of the law.

In 1999, Pierre-Marie Dupuy suggested that as a matter of “judicial policy,” the I.C.J. should revitalize its role as the central judicial body of

2. See JAMES CRAWFORD, *INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS* (2002); James Crawford, *Chance, Order, Change: The Course of International Law*, in 365 *COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 9 (2013); see also MARGARET YOUNG ET AL., *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* (2012); Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *INT’L & COMP. L.Q.*, 279, 280 (2005); Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 *MOD. L. REV.* 1, 1-30 (2007).

3. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that, when interpreting treaties, “[t]here shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.” Vienna Convention on the Law of Treaties art. 31(3)(c), *opened for signature* May 22, 1969, 1155 *U.N.T.S.* 331 (entered into force Jan. 27, 1980). See McLachlan, *supra* note 2, at 279-80 (pointing out that “until very recently, Article 31(3)(c) languished in . . . obscurity,” and commenting on the role of *Oil Platforms* (Iran v. U.S.), 2003 *I.C.J.* 161 (Nov. 6) in its revival); see also Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 *EUR. J. INT’L L.* 483, 483-529 (2006); Dirk Pulkowski, *Universal International Law’s Grammar*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 138, 138-54 (Ulrich Fastenrath ed., 2013).

the international community.<sup>4</sup> Similarly Georges Abi-Saab observed that there could be “a ‘judicial system’ without a centralized ‘judicial power’ invested in it, and with the jurisdiction of its components remaining in general ultimately consensual.”<sup>5</sup> Such a system can develop through the cumulative process of international law, of which custom is the most visible, but not the only, example. Abi-Saab added that this process depends on the behavior of the relevant legal actors, not only states but also the courts and tribunals themselves.<sup>6</sup>

This Article argues that the roles of the I.C.J.—the “principal judicial organ of the United Nations”<sup>7</sup>—and other U.N. organs such as the International Law Commission (the “ILC”), tasked with “encouraging the progressive development of international law and its codification,”<sup>8</sup> are increasingly important in a more complex international law system with a multiplication of treaty regimes and enforcement mechanisms. The I.C.J. and other U.N. organs not limited to a single treaty regime can rely on their own experience from other fields, a wider body of law, and also a general legal method.

Ralph Wilde has suggested for the human rights field that the I.C.J. “might ‘add value’ when compared to treatment by a specialist tribunal.”<sup>9</sup> The I.C.J. has a long-standing practice and experience ranging across all fields of law and in applying multiple fields of law simultaneously, including more than one field of human rights law and multiple human rights treaties and other areas of law. The argument in this Article is that this proposition about the value of the I.C.J. applies not only to human rights law; rather it is true across all of international law and its different disciplines.

Article 92 of the U.N. Charter establishes the I.C.J. as “the principal judicial organ of the United Nations,” and the I.C.J.’s position is strengthened not only by the extensive jurisprudence, clarifying treaty obligations and customary international law, but also by the quality of

4. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791, 801-02 (1999).

5. Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. & POL. 919, 926 (1999).

6. *Id.* at 927.

7. U.N. Charter art. 92.

8. U.N. Charter art. 13, para. 1; see also Peter Tomka, *Major Complexities Encountered in Contemporary International Law-Making*, in MAKING BETTER INTERNATIONAL LAW: THE INTERNATIONAL LAW COMMISSION AT 50 209, 209-10 (1998).

9. Ralph Wilde, *Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice’s Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*, 12 CHINESE J. INT’L L. 639 (2013).

and respect for that jurisprudence across legal communities. Specialist bodies may have specialist competence, both in terms of expertise and authority, and the I.C.J. has, as will be discussed in the Article, paid respect to that in different contexts. The I.C.J.'s authority is particularly strong on general international law, its principles and method.<sup>10</sup> The interaction between the I.C.J. and the ILC on the formation of customary international law in the context of the ILC study on that topic<sup>11</sup> is interesting. The Special Rapporteur Sir Michael Wood rationalizes and closely follows the methodological approaches developed by the I.C.J., which is what other U.N. bodies attempt to do when they address such issues.<sup>12</sup>

This Article explores whether, and to what extent, the case law of the I.C.J. has reasserted the Court's place at the summit of the international legal order. Parallel inquiries into the practice of other international courts and tribunals and their reception and application of the jurisprudence of the I.C.J., and other forms of "dialogues," are important for an understanding of international law as a legal system, and also the fragmentation and convergence issues discussed in this Article. There are valuable studies of different sectors or treaty regimes, but gaps remain and there is a need to consolidate relevant scholarship and compare across those sectors and regimes. Institutional and procedural issues are important, as is the development of substantive law through the clarification of issues that are brought before the I.C.J. and other international courts and tribunals.

A preview of the remainder of the Article is provided in the following brief roadmap. The Article has six parts. Part II introduces the reac-

10. See *Continental Shelf (Tunis./Libya)*, 1982 I.C.J. 18, 46 (Feb. 24); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27); *Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening)*, 2012 I.C.J. 99, ¶ 101 (Feb. 3); see also Peter Tomka, *Custom and the International Court of Justice*, 12 L. & PRAC. INT'L CT. & TRIB. 195 (2013); *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6, 21-23 (Feb. 3) (discussing in connection with treaty interpretation); *Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.)*, 2008 I.C.J. 177, 218 (June 4); *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.)*, 2009 I.C.J. 213 (July 13); Gilbert Guillaume, *Methods and Practice of Treaty Interpretation by the International Court of Justice*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM* 465, 472-73 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006); EIRIK BJØRGE, *THE EVOLUTIONARY INTERPRETATION OF TREATIES* 56-141 (Oxford Univ. Press 2014).

11. Special Rapporteur, *First Rep. on Formation and Evidence of Customary International Law*, Int'l Law Comm'n, U.N. Doc. A/CN.4/663 (May 17, 2003); Special Rapporteur, *Second Rep. on Identification of Customary International Law*, Int'l Law Comm'n, U.N. Doc. A/CN.4/672 (May 22, 2014).

12. See, e.g., Rep. of the Working Group on Arbitrary Detention, Human Rights Council, 22nd Sess., ¶ 43, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012).

tions to the threat of fragmentation of the international legal system and the movement toward convergence. Part III introduces three forms of fragmentation: substantive, institutional and methodological, which are discussed in the Article. Part III.A addresses how different regimes or disciplines lay claim to autonomy and become self-contained fragmented regimes. It explains how, through reliance on the insight that the sources of international law do not operate in a vacuum but rather in relation to a broader context of rules, fragmentation should give way to convergence. Part III.B focuses on how, despite the lack of formal hierarchy between international courts and tribunals, the pronouncements of the I.C.J. as the only permanent tribunal of general jurisdiction, carry particular weight. The I.C.J. provides international law with a center of gravity. Part III.C focuses on the different methods for interpreting treaties and other instruments. The I.C.J. has maintained one universal method of treaty interpretation while, within this framework of a common method, developing a more dynamic understanding and openness to approaches to interpretation that will enable a move towards systemic convergence.

Part IV considers the institutional role of the I.C.J. It explores why the I.C.J. is uniquely positioned to lead the way in the shift from fragmentation to convergence in international law. Having left behind some of the exaggerated strictures of state consent in the doctrines of the 1960s to 1990s, the I.C.J. is now in a better position to resolve pressing problems of the expansion of international law and the multiplication of international courts and enforcement mechanisms. The different mechanisms for making new treaty regimes more effective of the 1990s could have different consequences for the I.C.J. They would strengthen the effectiveness of international law or at least the treaty obligations in question. Their consequences for the I.C.J. and international law as a legal system were less clear.

Part V analyzes the post-war case law of the I.C.J. on consular protection that have remained one of the pressing problems of international law, and how this case law has provided the means for developing human rights protection. This case law provides support for the argument that a transformation of international law is taking place, with a development of international law as a system with a hierarchy of norms as one central feature. The point is made that the I.C.J.'s confirmation of customary international law in different areas of law, also outside the traditional core public international law discipline, includes important contributions to customary international law on human rights and environmental law, moving away from the strictly inter-state perspective and non-hierarchical view of international law where state consent has

put extreme restrictions on jurisdiction, obligations of states, and the development of the law. In Part V.A, the Article analyzes how the I.C.J. restricted diplomatic protection, without much legal support. Focus is on the classic *Nottenbohm* case, and discussing how and why it was decided at the time, and how it might have been decided today. In Part V.B, the Article analyzes how the I.C.J. finally has departed from the old restrictive doctrine, and used diplomatic protection as a remedy against human right abuses. Here the Article explores the shift in the framework of the protection for the rights of individuals in international law. It also explores the remedies in *Diallo*, noting the I.C.J.'s approach to material and non-material injuries, based on a survey of the jurisprudence of other international courts, in particular the European Court of Human Rights. In Part V.C, the Article analyzes how the I.C.J. has continued to give effect to states' human rights obligations, with the clear statements on the prohibition of torture as a peremptory norm (*jus cogens*) of international law. In Part V.D, the more restrictive position taken by the I.C.J. on the rights of investors as a matter of customary international law, is discussed. Part V.E addresses the gradual departure from the exclusionary rules for citation of authorities in the I.C.J. judgments, where citing other U.N. bodies, and then also international courts such as the regional human rights courts, and finally domestic courts, has contributed to making international law an open system also in terms of the formal sources of law or authorities that may be cited.

Part VI revisits the inquiries and shows how they support the main conclusion. International courts and other bodies are increasingly provided with the tools for applying international law and securing coherence and unity by the I.C.J. which now has this as its main business. A final conclusion is that the other courts and international bodies in this relationship may respond by taking a closer account of international law and its fundamental principles in applying the treaty base they may have for their activities.

## II. THE END OF FRAGMENTATION?

The title of this Article, "Reassertion and Transformation: From Fragmentation to Convergence in International Law," could be perceived as an indication that that there is no fragmentation in international law. However, fragmentation of international law has not come to a complete end; the end of all fragmentation is not a realistic prospect. Fragmentation is a part of any dynamic legal system, and fragmentation may be a fruitful perspective from which to study almost any legal system or sub-system. The fragmentation of international law



has been discussed as a threat to international law as a legal system in the last twenty years, and the extent and degree of fragmentation indeed may have posed such a threat.<sup>13</sup>

There is less attention given to the move towards convergence. That is the focus of this Article. Convergence, or the move towards unity and coherence, can be regarded just as much a part of any legal system, as fragmentation, in a Hegelian dialectic process.<sup>14</sup> Fear of fragmentation as a threat to the unity and coherence of international law or its future as a legal system may explain why convergence and unity are becoming more dominating features of international law discourse than the claims to autonomy and specificity of different regimes and disciplines which previously dominated.

Even if convergence is less studied in international law, it nonetheless plays an important role in the current phase of what in this Article is referred to as the reassertion of the I.C.J. Over and above simply being an organ that delivers “transactional justice,” the I.C.J. is asserting its role as “the principal judicial organ of the United Nations.”<sup>15</sup> This is happening in a wider context: the general method and principles of international law are changing as a function of this reassertion, supported not only by the I.C.J. but generally also by most other international courts and tribunals, treaty bodies and U.N. institutions, such as the ILC and special procedures of various kinds.

There is also convergence in the approach taken in many forms of state practice, such as government statements in international and domestic fora, and not the least in the jurisprudence of domestic supreme and constitutional courts, increasingly not only concerned

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13. There is not surprisingly a rich literature on the fragmentation of international law. See, e.g., U.N. Int'l Law Comm'n Chairman, *Fragmentation of I239 187 Convention Rules' (n 10412nt in he interpretation which the International Court made in g circumstances; thus the need international Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Study Group of the International Law Commission, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi); James Crawford, *Chance, Order, Change: The Course of International Law*, in 365 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 205-29 (2013); Mads Andenas, *The Centre Reasserting Itself: From Fragmentation to Transformation of International Law*, in VOLUME IN HONOR OF PABLO HALLSTROM (Matthias Derlén & Johan Lindholm eds., 2012); PHILIPPA WEBB, *INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION* (Oxford Univ. Press 2013).

14. G. W. F. HEGEL, *PHENOMENOLOGY OF SPIRIT* 29-30 (Arnold V. Miller trans., Clarendon Press 1977).

15. U.N. Charter art. 92. See Gilbert Guillaume, *Transformations du droit international et jurisprudence de la Cour Internationale de Justice*, in *LES NOUVEAUX ASPECTS DU DROIT INTERNATIONAL* 175, 175-92 (R. Ben Achour & S. Laghmani eds., Pedone 1994), on the beginnings of the development.



with but actually giving effect to international law in their judgments. Scholarship follows in tow; slowly opening up to the extended comparative perspectives within public international law disciplines, in relation to domestic law, and the role of such scholarship in developing international law and its general method and principles.

Viewing international law as a legal system brings with it challenges for the analysis of institutions, method, and general principles and substantive law. A part of this challenge is the imperative of openness for general international law, typically as applied by the I.C.J., to place itself, and remain, at the center as a generalist discipline with continuing relevance for the emerging specialist treaty regimes and disciplines.

For international law to be an effective legal system, the ever-increasing number of bodies with a role to play in international law must take account of one another, and address possible conflicts. The process of resolving conflicts, and in addressing those conflicts which cannot be resolved, will contribute to the development of general principles and forms of hierarchies of norms and institutions. Such convergence may contribute to a stabilization of the rapidly expanding international legal system. Even if fragmentation, and the fear of fragmentation, is the subject of a rich literature, there is still need for empirical study to understand the impact of fragmentation on the legal system of international law. Empirical study is also required to understand the emphasis on convergence leading to coherence and unity in developing international law and its general method and principles, and increasingly also in finding answers to legal questions as seen in the practice of the courts.

Much of what could be seen as convergence may also be seen as ways of dealing with fragmentation, and does not have to be based on, for instance, general principles or hierarchies of norms and institutions.

Since the law of human rights has become such a vector in the debates concerning fragmentation and convergence in international law,<sup>16</sup> and also for the role of the International Court in what the current reassertion and convergence phase,<sup>17</sup> that particular area merits a particular focus within the context of this Article.

16. See, e.g., Robert Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 2, 6 (1995); R. Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT'L & COMP. L.Q. 1, 5-6 (1996).

17. See, e.g., Andrew Lang, *The Role of the International Court of Justice in a Context of Fragmentation*, 62 INT'L & COMP. L.Q. 777, 777-812 (2013); Ralph Wilde, *The Extraterritorial Application of International Human Rights Law on Civil and Political Rights*, in ROUTLEDGE HANDBOOK OF INTERNA-

### III. THE THREE FORMS OF FRAGMENTATION

This Part introduces three forms of fragmentation: substantive, institutional, and methodological, which, in various ways, are discussed in the Article.

#### A. Substantive Fragmentation

The first of three forms of fragmentation is substantive fragmentation, that is, different regimes or disciplines laying claim to autonomy and being self-contained fragmented regimes. International law, in the words of the I.C.J. in *WHO Regional Headquarters*, “does not operate in a vacuum”; it operates, rather, with “relation to facts and in the context of a wider framework of legal rules of which it forms only a part.”<sup>18</sup> One expression of this is how, over time, customary international law may be called on to mold and even modify the content of otherwise static treaties.<sup>19</sup> As Crawford has observed,<sup>20</sup> that was the case in the I.C.J.’s *Nuclear Weapons* advisory opinion,<sup>21</sup> where the court took the concepts of “proportionality” and “necessity” from the developing customary international law concept of self-defense and read them into the concept of self-defense under Article 51 of the U.N. Charter.<sup>22</sup> Another related aspect of interpretation is that, as the I.C.J. noted in the *Fisheries Jurisdiction* case, “an international instrument must be interpreted by reference to international law.”<sup>23</sup> Similarly, the I.C.J. in *Bosnian Genocide* observed, in connection with the Genocide Convention,<sup>24</sup> that:

[t]he jurisdiction of the Court is founded on Article IX of the [Genocide] Convention, and the disputes subject to that juris-

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TIONAL HUMAN RIGHTS LAW 635, 635-661 (Nigel Rodley & Scott Sheeran eds., 2013); Ralph Wilde, *Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice’s Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*, 12 CHINESE J. INT’L L. 639, 639-77 (2013).

18. Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 1962 I.C.J. 73, 76 (Oct. 10).

19. See JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 33 (8th ed. 2012).

20. See Crawford, *supra* note 13, at 110.

21. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1995 I.C.J. 226, 244-45 (Jul. 8).

22. See U.N. Charter art. 51.

23. Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432, 460 (Dec. 4).

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

diction are those “relating to the interpretation, application or fulfilment” of the Convention, but it does not follow that the Convention stands alone. In order to determine whether the Respondent breached its obligation under the Convention . . . and, if a breach was committed, to determine its legal consequences, the Court will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts.<sup>25</sup>

The same approach has been taken by the European Court of Human Rights.<sup>26</sup> Interpreting and applying instruments which on their face provide that the tribunal having jurisdiction to interpret and apply them shall, as is the case with the U.N. Convention on the Law of the Sea (UNCLOS), “apply this Convention and other rules of international law not incompatible with this Convention,” international courts and tribunals have recognized that this duty is all the stronger.<sup>27</sup> It is not surprising, and entirely fitting, that the International Tribunal on the Law of the Sea (ITLOS), in *Arctic Sunrise* (Provisional Measures),<sup>28</sup> should take into account international human rights law in connection with the detention of the *Arctic Sunrise* crew, who would, absent an order for release, “continue to be deprived of their right to liberty and security as well as their right to leave the territory and maritime areas under the jurisdiction of the Russia Federation. The settlement of such disputes between two states should not infringe upon the enjoyment of individual rights and freedoms of the crew of the vessels concerned.”<sup>29</sup> In this way, through reliance on the insight that the sources of international law do not operate in a vacuum but rather in relation to a broader context of rules, fragmentation gives way to convergence.

25. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 105 (Feb. 26).

26. See, e.g., *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157; *McElhinney v. Ireland*, 2001-XI Eur. Ct. H.R. 37; *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79.

27. See United Nations Convention on the Law of the Sea, art. 293, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397.

28. *Arctic Sunrise* (Neth. v Russ.), Case No. 22, Order of Nov. 22, 2013, 20, <https://www.itlos.org/en/cases/list-of-cases/case-no-22/>.

29. *Id.* But see Douglas Guilfoyle & Cameron Miles, *Provisional Measures and the “MV Arctic Sunrise”*, 108 AM. J. INT’L L. 271, 284-86 (2014).

B. *Institutional Proliferation*

The second of the three forms of fragmentation is institutional proliferation. Despite the lack of formal hierarchy between international courts and tribunals, the pronouncements of the I.C.J., the only permanent tribunal of general jurisdiction, carry particular weight. The I.C.J. provides international law with a center of gravity.<sup>30</sup>

It has in later years been possible to observe a tendency according to which the I.C.J. itself has started referring, even more than it previously had,<sup>31</sup> to other types of international courts and tribunals, not least the human rights courts and bodies. It was indicative of this development when Judge Sir Christopher Greenwood in *Diallo (Compensation)* stated that international law is not a series of fragmented specialist and self-contained bodies of law, but a single, unified system of law, with the consequence for the case at hand that the I.C.J. should draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.<sup>32</sup>

This seems now to have become the new orthodoxy. Special Rapporteur Sir Michael Wood has, in the context of an ILC study on the formation of customary international law,<sup>33</sup> observed that given the unity of international law and the fact that “international law is a legal system,” it is in principle neither helpful nor in accordance with principle to break the law up into separate specialist fields.<sup>34</sup> Wood said that the same basic approach to the formation and identification of customary international law applies regardless of the field of law under consideration.<sup>35</sup> The ILC’s work on this topic would be equally relevant to all fields of international law, including, for example, customary human rights law, customary international humanitarian law, and customary international criminal law.<sup>36</sup>

30. See Crawford, *supra* note 13, at 216.

31. It is important to remember that the Permanent and the International Court have on occasion referred to the decisions of other tribunals, both international and domestic. See ANDREW D. MCNAIR, THE DEVELOPMENT OF INTERNATIONAL JUSTICE 12-13 (1954).

32. Case Concerning Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation Judgment, 2012 I.C.J. 324, 394 [hereinafter *Diallo* 2012 Judgment] (declaration of Greenwood, J.).

33. *Formation and Evidence of Customary International Law/Identification of Customary International Law*, INT’L LAW COMM’N, [http://legal.un.org/ilc/guide/1\\_13.htm](http://legal.un.org/ilc/guide/1_13.htm) (last updated Feb. 3, 2015).

34. Rep. of the Int’l Law Comm’n, 64th Sess., May 7-June 1, July 2-Aug. 3, 2012, 108, U.N. Doc. A/67/10 (2012).

35. *Id.*

36. *Id.*

In the literature, in the jurisprudence of international tribunals, and in the work of the ILC, the tendency seems to have gone from focusing on what is different among the different fields of international law “to move freely over the boundaries, which seem to divide these fields of law and to bring out the underlying unities.”<sup>37</sup>

### C. Methodological Fragmentation and A Fragmented Method?

The last of the three forms of fragmentation is methodological fragmentation. This could lead to different methods for different fields of law such as human rights law, economic law, etc. Some commentators have advanced the possibility of methodological fragmentation in connection with two sources of law: treaty and custom. First, it is true that some international courts and tribunals, perhaps especially treaty bodies, have at times insisted on regarding the treaty that they are interpreting as being special in some way. One example often referred to in this connection is that of *Mamatkulov & Askarov v. Turkey*.<sup>38</sup> There, the Grand Chamber of the European Court held that, while on the one hand “the [European Convention of Human Rights] must be interpreted in the light of the rules set out in the Vienna Convention of 23 May 1969 on the Law of Treaties . . . the Court must [also] take into account the *special nature* of the Convention as an instrument of human rights protection.”<sup>39</sup> It bears mention, however, that as is evident from the reference in *Mamatkulov & Askarov* to *Golder v. United Kingdom*, the European Court based this statement on its finding in *Golder*. There, the Court said that it would follow Articles 31-33 of the Vienna Convention, but and even more importantly in the present connection, that for the purposes of the interpretation of the European Convention<sup>40</sup> it was also bound by Article 5 of the Vienna Convention: for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate to “any relevant rules of the

37. Alfred F. Denning, *Foreword*, 1 INT’L & COMP. L.Q. 1, 1 (1952).

38. *Mamatkulov & Askarov v. Turkey*, 2005-I Eur. Ct. H.R. 293; see Rep. of the Int’l Law Comm’n, 65th Sess., May 6-June 7, July 8-Aug. 9, 2013, 19, U.N. Doc. A/68/10 (2013).

39. *Mamatkulov & Askarov v. Turkey*, 2005-I Eur. Ct. H.R. 293; see *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 14 (1975); *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82, Inter-Am. Ct. H.R. (ser. A) No. 2 (Sept. 24, 1982); *Restrictions to the Death Penalty* (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion OC-3/83, Inter-Am. Ct. H.R. (ser. A) No. 3 (Sept. 8, 1983).

40. *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 22.

organization”—the Council of Europe—within which it has been adopted (Article 5 of the Vienna Convention).<sup>41</sup>

In other words, in the view of the European Court itself, the European Convention must be interpreted in accordance with Articles 31-33, applying the scheme of the Vienna Convention, as set out in Article 5. Adding that that the court must do so “taking into account the *special nature* of the Convention”<sup>42</sup> does not change this. In a sense, then, the “special nature” approach of the European Court follows from the Vienna rules themselves. This works well with the approach taken in the Vienna Convention in which, apart from Article 5, there is no such distinction in the principles of treaty interpretation. It also introduces an interesting circularity into the debate: how can a “specialized” approach be deemed “specialized” if it is mandated by the “generalist” approach? Interstitial points such as this open the debate, and this Article suggests that they have, putting the point at its lowest, played a minor role in the debates as yet.

The same is the case in relation to international environmental law. For example, it is possible in principle to see the evolutionary interpretations made by the I.C.J. in environmental law cases such as *Gabcikovo–Nagymaros*,<sup>43</sup> *Pulp Mills*,<sup>44</sup> and, to some extent, *Whaling in the Antarctic*<sup>45</sup> as evidence of a particular type of approach to treaty interpretation taken in a particular type of international law.<sup>46</sup> Yet, the disagreement between Australia and Japan in *Whaling in the Antarctic* as to, *inter alia*, whether the terms of “conservation and development” of whale resources in the preamble as well as in Articles III and V of the Whaling Convention ought to be interpreted evolutionarily or not, was plainly capable of being solved by relying upon the traditional tools of treaty interpretation.<sup>47</sup>

Catherine Redgwell must be right, therefore, to observe that environmental treaty-making has engendered new rules of treaty interpreta-

41. *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 14 (1975).

42. *Mamatkulov & Askarov v. Turkey*, 2005-I Eur. Ct. H.R. 293.

43. *Gabcikovo–Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7, 67-68, 78-79 (Sept. 25).

44. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, 83 (Apr. 20).

45. *Whaling in the Antarctic* (Austl. v. Japan: N.Z. intervening), 2014 I.C.J. 148, ¶ 45 (Mar. 31) (describing the International Convention for the Regulation of Whaling, Washington, Dec. 2, 1946, 161 U.N.T.S. 72 as “an evolving instrument”).

46. See generally Malgosia Fitzmaurice, *International Environmental Law as a Special Field*, 25 NETH. Y.B. INT’L L. 181 (1994).

47. *Whaling in the Antarctic* (Austl. v. Japan: N.Z. intervening), 2014 I.C.J. 148, ¶ 45 (Mar. 31).

tion applicable only in that sphere. The dynamic development of international environmental treaties should, instead, be seen as contributing to the dynamic development of the general law of treaties.<sup>48</sup> In any case, as Eirik Bjorge has observed, often with what we have come to term the evolutionary interpretation of treaties, recourse to evolution is wholly unnecessary.<sup>49</sup> There often is no need for it as the result already follows from the plain meaning of the text read in good faith. This point was made by the Permanent Court in *Employment of Women during the Night* when, in a statement of principle regarding “provisions which are general in scope,” the court stated that the fact that at the time when the treaty in question was concluded, certain facts or situations were not thought of, which the terms of the treaty in their ordinary meaning were wide enough to cover, “does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms.”<sup>50</sup>

Secondly, arguments as to methodological fragmentation have been put forward in connection with customary international law. With a possible academic exception in relation to the importance of *opinio juris*,<sup>51</sup> the rules as to the formation of customary international law are mostly settled.<sup>52</sup> Judge Read in the *Fisheries* case described customary international law as “the generalization of the practice of States.”<sup>53</sup> The reasons for making the generalizations involve an evaluation of whether the practice is fit to be accepted and is in truth generally accepted as law.<sup>54</sup> It is in this connection that it has been argued that special problems arise in connection with human rights law.

48. Catherine Redgwell, *Multilateral Environmental Treaty-Making*, in *MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN THE INTERNATIONAL LEGISLATIVE PROCESS* 107 (Vera Gowlland-Debbas ed., 2000); see also PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* 20-2 (Oxford University Press 2009).

49. BJORGE, *supra* note 10, at 191-93.

50. Interpretation of the Convention of 1919 Concerning Employment of Women During the Night, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50, at 377 (Nov. 15).

51. Maurice Mendelson, *The Formation of Customary International Law*, 272 HAGUE RECUEIL 155 (1998); INT’L LAW ASS’N, FINAL REPORT BY THE COMMITTEE ON FORMATION OF CUSTOMARY LAW OF THE INTERNATIONAL LAW ASSOCIATION 712, 744 (2000).

52. See Statute of the International Court of Justice art. 38, June 26, 1945, 892 U.N.T.S. 119; Special Rapporteur, *First Rep. on Formation and Evidence of Customary International Law*, Int’l Law Comm’n, U.N. Doc. A/CN.4/663 (May 17, 2003); Special Rapporteur, *Second Rep. on Identification of Customary International Law*, Int’l Law Comm’n, U.N. Doc. A/CN.4/672 (May 22, 2014); Tomka, *supra* note 10; CRAWFORD, *supra* note 19, at 23-24.

53. *Fisheries* (U.K. v. Nor.), 1951 I.C.J. 116, 191 (Dec. 18) (Read, J., dissenting).

54. CRAWFORD, *supra* note 19, at 23.



According to Hugh Thirlway, ascertaining developments in customary international law presents particular difficulties in connection with human rights; in his view, “there is a problem with basing human rights law on custom.”<sup>55</sup> This, he observes, is because in the past “the relationship of a State with its own subjects . . . has been generally immune from the impact of developing customary law,” the reason being that “custom derives from the *de facto* adjustment of conflicting claims and interests of the subjects of international law, and it has always been—and probably still is—one of the most fundamental tenets of international law that individuals and private corporations are not subjects of international law.”<sup>56</sup> The traditional position, set out by Lassa Oppenheim, according to which only states were considered subjects of international law,<sup>57</sup> has been left behind. As Sir Christopher Greenwood has recently stated, it is now abundantly clear that “states can no longer be regarded as the only subjects of international law.”<sup>58</sup>

While admitting that the traditional position does not represent the current stage of development of international law, Hugh Thirlway observes that “teasing intellectual problems remain.”<sup>59</sup> In the traditional view, the essence of custom is that its provisions have been hammered out in the resolution of conflicts of interests, or disputes, between states in their day-to-day relations. This leads Thirlway to two problems. First, he cites Bruno Simma and Philip Alston, who have observed that an element of interaction—in a broad sense—is intrinsic to, and essential to, the kind of state practice leading to the formation of customary international law. The processes of customary international law can only be triggered, and continue working, in situations in which states interact, where they apportion or delimit in some tangible way. But, they add: “at least in most cases, this is not what happens when a consensus about substantive human rights obligations, to be performed domestically, grows into international law.”<sup>60</sup>

55. HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* ch. 2 (Oxford Univ. Press 2014).

56. HUGH THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 7 (1972). He maintains the views from the first edition. See LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 8-9 (1st ed. 1905).

57. OPPENHEIM, *supra* note 56, at 8-9.

58. Christopher Greenwood, *Sovereignty: A View from the International Bench*, in *SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN AND INTERNATIONAL PERSPECTIVES* 255 (Richard Rawlings, Peter Leyland & Alison Young eds., Oxford Univ. Press 2013); see also Crawford, *supra* note 13, at 139.

59. THIRLWAY, *supra* note 55, ch. 2.

60. Bruno Simma & Peter Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 99 (1988);

Secondly, Hugh Thirlway draws attention to “the striking differences between the settings in which customary law traditionally arose and the issues on which it spoke, on the one hand, and the contemporary settings in which advocates of customary international law”—particularly, one might add, in the human rights field—“seek to employ customary norms, on the other.”<sup>61</sup>

It may be, however, that the types of assertions on the part of states to which one must look for the ascertainment of customary international law in connection with human rights are more manifold than the ones that Hugh Thirlway is prepared to accept. By definition, it will be a more complex matrix than only statements by ministries of foreign affairs. As foreshadowed above, Special Rapporteur on the Formation of Custom, Sir Michael Wood, has observed that while the formation and evidence of rules of customary international law in different fields may raise particular issues, and it may therefore be for considered whether, and if so to what degree, different weight may be given to different materials depending on the field in question. At the same time he recalls, and here he cites the words of Judge Greenwood, “[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.”<sup>62</sup>

The unified approach suggested by the Special Rapporteur, trending towards convergence rather than to Thirlway’s fragmentation, must be the correct one. On the view put forward in this Article, there is in the method of international law more that unites than what differentiates.

It is certainly no less true to say today, than it was when, in the preface of the first published<sup>63</sup> volume of *The Annual Digest of Public International Law Cases*, Lassa Lauterpacht and Andrew McNair observed that they suspected that there is more international law already in existence and daily accumulating “than this world dreams of.”<sup>64</sup> Through the

61. Emily E. Kadens & Ernest A. Young, *How Customary is Customary International Law?*, 54 WM. & MARY L. REV. 885, 914 (2013).

62. Special Rapporteur, *First Rep. on Formation and Evidence of Customary International Law*, 8, Int’l Law Comm’n, U.N. Doc. A/CN.4/663 (May 17, 2003) (citing Diallo 2012 Judgment, *supra* note 32, at 394 (declaration of Greenwood, J.)).

63. The volumes were not numbered until 1958; as Sir Robert Jennings explains, the volumes after 1958 then numbered 1 and 2 were edited by Sir John Fischer Williams and Hersch Lauterpacht; the present volume 3 was the first published and edited by Andrew McNair and Hersch Lauterpacht. R. Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT’L & COMP. L.Q. 1, 1 (1996).

64. Andrew McNair & Hersch Lauterpacht, *Preface*, in ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1925-26 ix (Lauterpacht & Fischer Williams eds., 1929).

process that Dame Rosalyn Higgins has called the “widening and thickening of the context of international law,”<sup>65</sup> public international law has developed considerably from its beginnings. It has grown from bilateral relationships to something that is surely no more fragmented than it once was; international law has only become more diverse.<sup>66</sup> The more diverse international law becomes, the more important its coherence and integration become. The tools needed to secure that coherence and integration of the diverse international of today law are all to hand.

#### IV. AN AUTONOMOUS REGIME AMONG OTHERS?

This Part explores why the I.C.J. is uniquely positioned to lead the way in the shift from fragmentation to convergence in international law. The prime concerns of this Article are the developments in the case law of the I.C.J. Having left behind some of the exaggerated strictures of state consent in the doctrines of the 1960s to 1990s, the I.C.J. is now in a better position to resolve pressing problems of the expansion of international law and the multiplication of international courts and enforcement mechanisms. The different mechanisms for making new treaty regimes more effective of the 1990s could have different consequences for the I.C.J. They would strengthen the effectiveness of international law or at least the treaty obligations in question. Their consequences for the I.C.J. and international law as a legal system are less clear.

In 2013, Theodor Meron, President of the International Criminal Tribunal for the former Yugoslavia, reiterated the claim made by that court’s first President, Antonio Cassese, to autonomy for every international court or tribunal.<sup>67</sup> The boundaries that divide international law increasingly came to divide international law into different disciplines with claims to autonomy. Such claims were made not only by international criminal lawyers or human rights lawyers, but also on behalf of international trade law, European Union law, investment law, humanitarian law and several other disciplines, by practitioners and scholars who saw themselves belonging to that autonomous discipline. Sover-

65. Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT’L & COMP. L.Q. 791, 792 (2006).

66. See Crawford, *supra* note 13, at 228.

67. Dean Spielmann, *Speech at the Solemn Hearing for the Opening of the Judicial Year of the European Court of Human Rights*, EUR. CT. OF HUM. RTS. (Jan. 25 2013), [http://www.echr.coe.int/Documents/Speech\\_20150130\\_Solemn\\_Hearing\\_2015\\_ENG.pdf](http://www.echr.coe.int/Documents/Speech_20150130_Solemn_Hearing_2015_ENG.pdf). Antonio Cassese was the first president of International Criminal Tribunal for the former Yugoslavia.

eighty claims in relation to domestic law would be followed by claims in relation to the general discipline of international law. Such claims have served different purposes. One consequence for academic scholarship has been increased specialization: few scholars continued to undertake research in more than one of the emerging international law disciplines, very few in combination with research in general public international law, national constitutional law, or comparative law in any of its many forms.

When many proponents of the new treaty regimes laid claim to autonomy, this often entailed a “self-contained” status. There would be a discussion of whether general international law, including the general law on treaties and interpretation, could be disregarded, thus leaving the treaty regime “self-contained.” The I.C.J.’s emphasis on state sovereignty not only in matters of jurisdiction, but also in interpretation, evidence and procedure, narrowed its ability to contribute to the different, new treaty regimes. The court’s approach to individual rights, as well as its narrow focus on the relationship between states, exacerbated this. Finally, caution in developing international customary law and resistance to *erga omnes*<sup>68</sup> and peremptory norms (*jus cogens*) focused on a role for the I.C.J. in resolving disputes brought before it, and not in developing international law and its coherence as a legal system. There was also the concern that courts with compulsory jurisdiction, such as the World Trade Organization’s Appellate Body, the European Union’s Court of Justice, regional human rights courts, and international criminal courts in their different ways, would receive cases that not only gave them the opportunity to develop international law but to take over as the judicial fora for developing international law. General international law as developed in the I.C.J. could have been increasingly marginalized.

In 1995, Sir Robert Jennings identified what he saw as “the tendency of particular tribunals to regard themselves as different, as separate

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68. Latin phrase that literally means towards all or everybody. In international law it denotes rights or obligations are owed toward all or everybody, and has been developed by the I.C.J. See *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, 32 (Feb. 5); *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, 102 (June 30); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 172, 199 (July 9); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Judgment, 2006 I.C.J. 6, 32, 51-52 (Feb. 3); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, 104, 111 (Feb. 26).

little empires which must as far as possible be augmented.”<sup>69</sup> His concern seemed primarily to be the European Human Rights Court and the emergence of international criminal tribunals.

Another judge and subsequent President of the I.C.J., Gilbert Guillaume, had voiced concern over the proliferation of international courts and tribunals more generally. He suggested that references on points of international law might be made from other international courts to the I.C.J.<sup>70</sup> This proposal was not particularly well received among the Anglo-American lawyers. It illustrated Guillaume’s concern, shared by some other international lawyers, that the I.C.J. may be sidelined by the WTO Appellate Body, and other trade and human rights bodies. Several of these bodies shared a compulsory jurisdiction setting them apart from the I.C.J. with its reliance on state consent and with the threat of its withdrawal.<sup>71</sup>

Guillaume was also a clear opponent of developing international law beyond a system of state consent and treaty obligations all at the same level. He opposed the development of *jus cogens* with a higher place in a hierarchy of norms that would prevail over norms below in the hierarchy. Guillaume set out these views in a 2008 article the title of which points to his line of argument, “Jus cogens et souveraineté (Jus Cogens and Sovereignty).”<sup>72</sup>

A different view on international law, and a strong emphasis on international law as a system with a hierarchy of norms, is provided by “The Report of the Study Group on the Fragmentation of International Law,” finalized by Martti Koskeniemi at the 58th session of the International Law Commission in 2006. The view has been developed

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69. Robert Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 2, 6 (1995); R. Y. Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT’L & COMP. L.Q. 1, 11 (1996).

70. Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT’L & COMP. L.Q. 848 (1995).

71. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISP. SETTLEMENT 1, 5-23 (2011).

72. Gilbert Guillaume, *Jus cogens et souveraineté*, in MÉLANGES À JEAN-PIERRE PUISOCHET 127-36 (2008). Another perspective on international law and individual rights is set out by Ronny Abraham, Guillaume’s successor as judge of the I.C.J., in an article where he explains how the traditional perspective of reciprocity and in treaty law does not apply to the European Convention on Human Rights with consequences for the application of the convention in French law. Lack of reciprocity cannot limit the application of a convention right. See Ronny Abraham, *Les Incidences de la Convention Européenne des Droits de L’homme sur le Contentieux Administratif Français*, 6 REV. FR. DRIOT ADM. 1053, 1055 (1990).

in the ILCs subsequent work, as shown by the observation by the ILC Special Rapporteur on the Formation of Custom, Sir Michael Wood, about international law as a single, unified system of law.<sup>73</sup>

The unified approach suggested by the Special Rapporteur, trending towards convergence rather than Thirlway's fragmentation, must be the correct one. On the view put forward in this Article, there is in the method of international law more that unites than what differentiates.

Sir Robert Jennings' 1995 statement about "separate little empires" has often been revisited in the context of courts not acting in accordance with his prediction. Sir Christopher Greenwood, in an analysis of the interpretation given by the Grand Chamber of the European Court of Human Rights of Article 1 of the European Convention in *Bankovic* observed with approval that the meticulous care which the court showed in ensuring that it took full account of other relevant rules of international law in establishing the terms of "jurisdiction" in Article 1—which included the citation of a long list of juristic writings on international law and other materials from outside the specialist literature of human rights—is a welcome recognition on its part that international human rights law and agreements are themselves part of international law as a whole. The court did not succumb to what Sir Robert Jennings has described as "the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented."<sup>74</sup>

However, Sir Christopher Greenwood had earlier made a point that went much along the same lines as Sir Robert Jennings' set out above. He made the general statement that international human rights law is part of international law and should be seen as such. To understand it, he underlined, it is necessary to understand the principles of treaty interpretation and application and the approach to sources, which form an integral part of international law. All too often, he added, human rights lawyers—and sometimes human rights tribunals—fail to do this and treat human rights conventions and the jurisprudence that has grown up around them as though they constitute self-contained

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73. Special Rapporteur, *First Rep. on Formation and Evidence of Customary International Law*, 8, Int'l Law Comm'n, U.N. Doc. A/CN.4/663 (May 17, 2003) (citing Diallo 2012 Judgment, *supra* note 32, at 394 (declaration of Greenwood, J.)).

74. Christopher J. Greenwood, *Jurisdiction, NATO and the Kosovo Conflict*, in *ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES* 145, 166-67 (Patrick Capps, Malcolm Evans & Stratos Konstantinidis eds., 2003).

legal regimes.<sup>75</sup>

Sir Christopher Greenwood's and Jennings's warnings did not go unheeded. Judges Sir Nicholas Bratza and Matti Pellonpää in *Al-Adsani v United Kingdom*, where the European Court was at pains not to go against the grain of what was seen as the demands of international customary law, ended their concurring opinion by quoting the eminent jurist, Sir Robert Jennings, who some years ago expressed concern about "the tendency of particular tribunals to regard themselves as different, as separate little empires which must as far as possible be augmented."<sup>76</sup> In this case, the I.C.J. avoided the kind of development of which Sir Robert warned.<sup>77</sup>

## V. THE RESPONSES BY THE INTERNATIONAL COURT

This Article uses the I.C.J.'s recent case law on states' rights of consular protection for their citizens to support the argument that a transformation of international law is taking place, with a development of international law as a system with a hierarchy of norms as one central feature.

One response is the I.C.J.'s confirmation of customary international law in different areas of law, also outside the traditional core public international law discipline. The I.C.J. has made important contributions to customary international law on human rights and environmental law, moving away from the strictly inter-state perspective and non-hierarchical view of international law where state consent has put extreme restrictions on jurisdiction, obligations of states and the development of the law.

The recognition and development of *erga omnes*, and *jus cogens* are other aspects of this transformation.<sup>78</sup> The provisions about peremptory norms in Articles 53 and 64 of the 1969 Vienna Convention have

75. Christopher J. Greenwood, *Using Human Rights Law in English Courts*, 114 L. Q. REV. 523, 525 (1998).

76. *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79.

77. *Id.*

78. Such recognition and development spurred a considerable literature. See ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* (Oxford Univ. Press 2006); Paolo Picone, *The Distinction between Jus Cogens and Obligations Erga Omnes*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 411 (Enzo Cannizzaro ed., Oxford Univ. Press 2011); Enzo Cannizzaro, *A Higher Law for Treaties?*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 425 (2011); see also PATRICK DAILLIER, MATHIAS FORTEAU & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* (LGDJ 2009), for a precise analysis.



played a role in some states withholding their ratification.<sup>79</sup> The provisions about *erga omnes* and peremptory norms (*jus cogens*) in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission brings the gradual development of the law further forward.<sup>80</sup> The recognition of *jus cogens* by arbitral tribunals and international courts before the I.C.J. itself did so in *Congo v. Rwanda*,<sup>81</sup> is an example of the I.C.J. being in a position to consider and review, before gradually receiving and confirming, an emerging doctrine of international law. The I.C.J. clarified and developed further its doctrine in *Diallo*<sup>82</sup> and *Belgium v. Senegal*.<sup>83</sup> The objections against *jus cogens* by countries as France and Norway have in practice been withdrawn, in recognition of the aforementioned court decisions.<sup>84</sup>

The doctrine of *jus cogens* has been conceived as a force binding international subsystems “within a minimal communal sphere.”<sup>85</sup> Thomas Weatherall has recently argued that divergent applications of *jus cogens* across domestic and international courts and tribunals has the potential to expose *jus cogens* to the very forces of fragmentation that it is purported to combat.<sup>86</sup> This risk is highlighted by the

79. Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 22, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (defining *jus cogens* as a category of peremptory norms of general international law “accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted”).

80. *Draft Articles on Responsibility of States for Internationally Wrongful Act*, 1966 Y.B. Int’l L. Comm’n 43, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Vol. IV.E.1) (Nov. 2001); see JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (Cambridge Univ. Press 2002).

81. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6 (Feb. 3).

82. *Case Concerning Ahmadou Sadio Diallo*, (Guinea v. Dem. Rep. Congo), Judgment, 2010 I.C.J. 639, ¶ 87 (Nov. 30) [hereinafter *Diallo* 2010 Judgment].

83. See *Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), 2012 I.C.J. 422, 424, 457 (July 20); Mads Andenas & Thomas Weatherall, *International Court of Justice: Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal) Judgment of 20 July 2012*, 62 INT’L & COM. L.Q. 753 (2013).

84. See Mads Andenas, *International Court of Justice, Case Concerning Ahmadou Sadio Diallo*, 60 INT’L & COM. L.Q. 810, 818 (2011).

85. Andreas Paulus, *Jus Cogens in a Time of Hegemony and Fragmentation*, 74 NORDIC J. INT’L L. 297, 332 (2005).

86. Thomas Weatherall, *Against Fragmentation: International Common Law and the Development of Jus Cogens* (Feb. 16, 2015) (unpublished manuscript) (on file with author), available at <http://ssrn.com/abstract=2565165> (citing Ulf Linderfalk, *Normative Conflict and the Fuzziness of the International ius cogens Regime*, 69 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 961 (2009) (“Academics, NGOs, governmental legal advisors and experts, domestic courts,

reception of the I.C.J.'s recent *Jurisdictional Immunities of the State* decision,<sup>87</sup> which has been rejected by the Constitutional Court of Italy.<sup>88</sup> While international courts and tribunals had until now successfully resolved divergence in the application of *jus cogens*, Weatherall cautions that Italy's rejection of the I.C.J.'s determination of the legal effects of *jus cogens* raises the potential for the doctrine's integrity to be compromised by contrary application.<sup>89</sup> Indeed, there is much scope for fragmentation in the clarification of the application of *jus cogens*. There is a long way to go before a common understanding of this foundational concept is established, and this is not surprising.

The acknowledgment, conformation and development of customary international law and a hierarchy of norms are incrementally remedying the limitations of traditional doctrine. This is both reflecting and influencing the changing concepts in the I.C.J.'s jurisprudence on state sovereignty, individual rights, jurisdiction, procedure and evidence. The I.C.J. itself has started referring to other international courts and tribunals, not least the human rights courts and bodies. The statement by Sir Christopher Greenwood in *Diallo (Compensation)* establishes that the I.C.J., as every other international court can, and should, draw on the jurisprudence of international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.<sup>90</sup>

In this Article, the relaxation of a number of restrictive doctrines and practices in the case law of the I.C.J. will be analyzed in the context of the discourses on "fragmentation of international law," "proliferation of international courts," and the loss of axiological direction of public international law.

The I.C.J. has, in a short period of time, developed a rather powerful jurisprudence on human rights, environmental law, and remedies. In the same period, the I.C.J. has developed the rights of individuals and confirmed the constitutionally fundamental doctrines of *jus cogens* and *erga omnes* effects. Also, the opening up of the closed system of legal sources by allowing for cross citation to, and taking account of, other

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and increasingly, international courts and tribunals—in modern international legal discourse, they are all users of *jus cogens*. Scholars debate whether this proliferation of the *jus cogens* argument is a sound development or not.”).

87. *Jurisdictional Immunities of the State* (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99, ¶¶ 92-97 (Feb. 3) (denying an exception to the jurisdictional immunity of the state where *jus cogens* violations are at issue).

88. Corte Cost, 22 Ottobre 2014, n.238 (It.), available at <http://italyspractice.info/judgment-238-2014> (declaring legislation conforming to the 2012 I.C.J. Judgment unconstitutional).

89. Weatherall, *supra* note 86, at 2.

90. *Diallo* 2012 Judgment, *supra* note 32, at 394 (declaration of Greenwood, J.).

courts, and the lesser emphasis on jurisdictional limitations, places the court in a new position, closer to the summit of the international legal system.

#### A. ~~Consular~~ Protection and the Nottebohm Case

A strong starting point for this analysis is the *Nottebohm* case of 1955.<sup>91</sup> Lichtenstein claimed to exercise diplomatic protection for a naturalized citizen.<sup>92</sup> The I.C.J. however did not recognize the Lichtenstein citizenship.<sup>93</sup> To recognize a naturalization giving the right to grant diplomatic protection, the I.C.J. required “effective nationality,” and “a meaningful connection” to the state.<sup>94</sup>

One remaining question is whether the case could have been decided this way today. In 1955 the I.C.J. invented and then relied upon the requirements of “effective nationality” and “a meaningful connection” to the relevant state.<sup>95</sup> There would have been strong pressure from the victors of World War II. These countries had strong economic interests in not opening up international law fora of review for many wartime confiscations. In *Nottebohm*, the majority on the I.C.J. used all the tools at hand for such a task. State sovereignty was given a new twist: while states themselves decided on the law of citizenship, other states’ sovereignty gave them the right to refuse recognition if there was no “effective nationality” or “meaningful connection.”<sup>96</sup> The majority on the I.C.J. also used evidence as a limiting mechanism: it applied a high evidential threshold that allowed a finding against Lichtenstein. The majority kept its considerations at the inter-state level: the focus was not

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91. See *Nottebohm Case (second phase)* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); Kurt Lipstein & Erwin H. Loewenfeld, *Liechtenstein Gegen Guatemala. Der Nottebohm-Fall*, in GEDACHTNISSCHRIFT LUDWIG MARXER, 275-325 (1963); Kurt Lipstein, *The Nottebohm Case—Reflexions by Counsel*, 3 WIG & GAVEL 6 (1981); Kurt Lipstein, *Acta et Agenda*, 36 CAMBRIDGE L.J. 47 (1977). Mr. Nottebohm fell victim to the measures taken against enemy nationals or individuals with suspected allegiance to enemy states after the United States entered the Second World War. The U.S. measures extended beyond the U.S. borders. Mr. Nottebohm was deported by the Guatemalan authorities to the U.S. where he spent several years in camps for enemy aliens. He was not allowed to return to Guatemala after his release and could not raise any effective challenge before the Guatemalan courts against the confiscation of his considerable property. Only in the 1990s did certain U.S. citizens of Japanese origin get official rehabilitation and reparation through U.S. federal legislation for their internment and confiscation of property in this period.

92. *Nottebohm Case (second phase)* (Liech. v. Guat.), 1955 I.C.J. 4, 13 (Apr. 6).

93. *Id.* at 26.

94. *Id.* at 22-23.

95. See *id.*

96. See *id.* at 21-23.

the consequences for the individual in this case, or the many other individuals in similar cases. It was the interests of states not wanting review of their confiscations that was given weight.

This was an example of “dynamic interpretation”: there was only tenuous support for the two requirements of “effective nationality” and “a meaningful connection” to the relevant state.<sup>97</sup> Judge Owada has pointed out that the genuine-link theory had never been mentioned in the textbooks before the *Nottebohm* case was decided.<sup>98</sup> He added, “now, it is accepted that a genuine link has to exist in order to exercise the right of diplomatic protection. But that was, in a sense, judicial legislation, if you like to call it.”<sup>99</sup>

The three judges in the minority had a very different emphasis from the majority. For example, in his dissent, Judge Read said, “justice would not be done on any plane, national or international.”<sup>100</sup> The three dissenting judges included the I.C.J.’s subsequent President, Helge Klaestad, and all three also made clear and unconditional findings on the factual issues. They did not accept the requirements of “effective nationality” or “meaningful connection,” and then went on to make findings of facts in favor of Lichtenstein, which would satisfy even these higher requirements that the majority claimed.<sup>101</sup>

Judge Read’s dissent powerfully sums up the argument in a passage that begins: “There is another aspect of this case which I cannot overlook.” Judge Read sets out how *Nottebohm* was arrested on October 19, 1943, by the Guatemalan authorities, who were acting not for reasons of their own but at the instance of the United States Government. *Nottebohm* was turned over to the armed forces of the United States on the same day. Three days later he was deported to the United States and interned there for two years and three months. There was no trial or inquiry in either country and he was not given the opportunity of confronting his accusers or defending himself, or giving evidence on

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97. There are other views on the judgment which is often cited and relied upon, and which has established a legal doctrine of “effective nationality” or “meaningful connection” also further developed in treaty law. See CRAWFORD, *supra* note 19, at 40 nn.128-29 (stating *inter alia* that “the approach of I.C.J. in *Nottebohm* would seem to be perfectly logical in this respect”).

98. Joseph Weiler, *Interview with Hirashi Owada, Judge at the International Court of Justice*, N.Y.U. SCH. OF L. (Nov. 9, 2005), [https://web.archive.org/web/20130405044300/http://www.law.nyu.edu/global/eventsandnews/distinguishedfellowslectureseries/ECM\\_DLW\\_015735](https://web.archive.org/web/20130405044300/http://www.law.nyu.edu/global/eventsandnews/distinguishedfellowslectureseries/ECM_DLW_015735).

99. *Id.*

100. *Nottebohm Case (second phase) (Liech. v. Guat.)*, 1955 I.C.J. 4, 35 (Apr. 6) (dissenting opinion of Read, J.).

101. *See id.*

his own behalf.<sup>102</sup>

Then, continues Judge Read, in 1944, a series of fifty-seven legal proceedings was commenced against Nottebohm, designed to expropriate, without compensation to him, all of his properties, whether movable or immovable. The proceedings involved more than one hundred and seventy one appeals of various kinds. Counsel for Guatemala had demonstrated the existence of a network of litigation, which could not be dealt with effectively in the absence of the principally interested party. Further, all of the cases involved, as a central and vital issue, the charge against Nottebohm of treasonable conduct. It was common ground that Nottebohm was not permitted to return to Guatemala. He was thus prevented from assuming the personal direction of the complex network of litigation. He was allowed no opportunity to give evidence of the charges made against him, or to confront his accusers in open court. Judge Read stated that in such circumstances he was bound to proceed on the assumption that Liechtenstein might be entitled to a finding of denial of justice, if the case should be considered on the merits.<sup>103</sup>

Lord Read concluded "that justice would not be done on, any plane, national or international." He would not refuse Lichtenstein's claims unless the grounds to do so were beyond doubt, and they were not.<sup>104</sup>

Courts were not strong on upholding individual rights, in any jurisdiction, in the 1940s or 1950s. The majority in the I.C.J. reflected a general view on the role of courts in restricting rights of the individual against the state, rather than in upholding them, and it did so through doctrines of state sovereignty, jurisdiction and state intent, and rules of procedure and evidence. As we shall see, the I.C.J. has only recently opened up to diplomatic protection as a more effective tool in the protection of individual rights. Individual rights were previously just not the business of the I.C.J. It took time for the human rights protection set out in the Universal Declaration of Human Rights of 1948 to take effect through recognition as customary international law and human rights treaties giving weight to individual rights, and in the application of international law more generally.

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102. *Id.*

103. *Id.*

104. *Id.*

B. *Congo v. Uganda and Diallo in the I.C.J.*

The I.C.J. had an opportunity to revisit its restrictive practices on diplomatic protection and individual rights in *Congo v. Uganda*.<sup>105</sup> There, the majority of the I.C.J. used evidential issues relating to citizenship as an effective limiting mechanism. In his separate dissent, Judge Simma took another approach: humanitarian and human rights law are obligations *erga omnes*, which by their very nature are the concern of all states.<sup>106</sup>

In *Republic of Guinea v. Democratic Republic of the Congo (Diallo)*,<sup>107</sup> the Guinean nationality of Diallo was not in question, so the I.C.J. could then consider the human rights violations. Diallo, a Guinean citizen resident in the Congo for thirty-two years, founded two companies: an import-export company and a company specializing in container transport of goods.<sup>108</sup> Diallo was the managing director and, in the end, the sole member of these private limited liability companies.<sup>109</sup> As the managing director of the two companies, Diallo initiated various efforts, including judicial ones, to recover alleged debts from the state and several companies.<sup>110</sup> He was arrested and imprisoned on January 25, 1988. More than a year later, the public prosecutor in Kinshasa ordered his release.<sup>111</sup> On October 31, 1995, the Prime Minister issued an expulsion order against Diallo, who was again detained, and on January 21, 1996, deported to Guinea.<sup>112</sup>

Only states may be parties to cases before the I.C.J., and Diallo's case came before the court by virtue of Guinea seeking to exercise diplomatic protection of his rights. The I.C.J. ruled in its 2007 Judgment on Preliminary Objections that Guinea could exercise diplomatic protection for Diallo's direct rights as a member of the private limited liability companies, and rejected the Congolese objections of failure to exhaust local remedies.<sup>113</sup>

105. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

106. See *id.* at 334 (separate opinion by Simma, J.).

107. Diallo 2010 Judgment, *supra* note 82.

108. *Id.* ¶ 16.

109. *Id.*

110. *Id.* ¶ 17.

111. *Id.* ¶ 18.

112. *Id.* ¶ 19.

113. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582 (May 24).

In the 2010 Judgment on Merits, all the claims that were based on Diallo's direct rights as a member or as managing director of the private limited liability companies failed.<sup>114</sup> Congolese restrictions on these rights did not constitute a violation of any protected right to property.<sup>115</sup> Claims concerning the 1988-89 arrest were submitted too late and therefore rejected.<sup>116</sup>

But the 1995-96 detention and expulsion were arbitrary and in violation of the United Nations Covenant on Civil and Political Rights (ICCPR) and the African Charter, and gave rise to a right of compensation.<sup>117</sup> There was however no violation of the prohibition of degrading or inhumane treatment.<sup>118</sup>

In the 2007 Judgment on Preliminary Objections, the I.C.J. had already moved away from the formalistic and traditional limitations<sup>119</sup> on diplomatic protection. Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, had subsequently widened to include, *inter alia*, internationally guaranteed human rights.<sup>120</sup>

In his Separate Opinion to the Judgment of 2010 (on the merits), Judge Cançado Trindade explained the new approach. The subject of the rights that the I.C.J. had found to be breached by the respondent state was not the applicant state: the subject of those rights was Diallo, an individual. The procedure for the vindication of the claim originally utilized by the applicant state was that of diplomatic protection, but the substantive law applicable in the present case—as clarified after the Court's Judgment of 2007 on Preliminary Objections, in the course of

114. Diallo 2010 Judgment, *supra* note 82, ¶ 159.

115. *Id.*

116. *Id.* ¶ 48.

117. *Id.* ¶ 161.

118. *Id.* ¶ 89.

119. See Giorgio Gaja, *The Position of Individuals in International Law: An ILC Perspective*, 21 EUR. J. INT'L L. 11 (2010); Chitharanjan F. Amerasinghe, *Influence of the Law of Human Rights Protection-Parallels*, in DIPLOMATIC PROTECTION 329-33 (2008); Luigi Condorelli, *La Protection Diplomatique et L'évolution de son Domaine D'application*, in RIVISTA DI DIRITTO INTERNAZIONALE (2003); Giorgio Gaja, *Droit des États et Droits des Individus dans le Cadre de la Protection Diplomatique*, in LA PROTECTION DIPLOMATIQUE: MUTATIONS CONTEMPORAINES ET PRATIQUES NATIONALES 64 (Jean-François Flauss ed., 2003); ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS 801-02 (1984).

120. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, ¶ 39 (May 24).



the proceedings (written and oral phases) as to the merits—is the International Law of Human Rights.<sup>121</sup>

In *Congo v. Uganda*,<sup>122</sup> as already mentioned, Uganda could not satisfy the I.C.J. about the Ugandan nationality of the victims of human rights abuses.<sup>123</sup> So in that case the traditional application of diplomatic protection became an effective limiting mechanism. In his separate opinion in *Congo v. Uganda*, Judge Simma argued for the application of humanitarian and human rights law as obligations *erga omnes*, which by their very nature are the concern of all states.<sup>124</sup> In *Diallo*, the Guinean nationality of Diallo was not in question in the way nationality was in *Congo v. Uganda*, and the Court could then consider the human rights violations.

Diallo had not been informed at the time of his arrest of his right to request consular assistance from his country.<sup>125</sup> The I.C.J. held that Congo was in breach of Article 36(1)(b) of the Vienna Convention on Consular Relations of 1963, to which both Guinea and the DRC were parties.<sup>126</sup>

In *Diallo (Merits)*, the I.C.J. provided an extensive analysis of the alleged violation of international human rights obligations, first addressing Diallo's rights as an individual,<sup>127</sup> and then his rights as a member or as managing director of the private limited liability companies.<sup>128</sup>

The I.C.J. discussed the legality requirement, not accepting the claim for a national security exception, and taking the opportunity to clarify that the prohibition against arbitrary expulsion does not only provide procedural rights but a substantive right, requiring the I.C.J. to review whether the expulsion was justified on its merits.<sup>129</sup>

Article 13 of the International Covenant of Civil and Political Rights<sup>130</sup> and the Article 12 of the African Charter<sup>131</sup> require that an expulsion

121. *Id.* ¶ 223.

122. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

123. *Id.*

124. *See id.* at 334 (separate opinion by Simma, J.).

125. Diallo 2010 Judgment, *supra* note 82.

126. *Id.* ¶¶ 90-98.

127. *Id.* ¶¶ 21-98.

128. *Id.* ¶¶ 99-159.

129. *Id.* ¶ 63.

130. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

131. African (Banjul) Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58.

of an alien can only take place “in accordance with the law.”<sup>132</sup> The I.C.J. set out three conditions that follow from this requirement of legality. First, compliance with national law is a necessary condition but not a sufficient one.<sup>133</sup> Second, domestic law must also be compatible with the other requirements of the Covenant and the African Charter.<sup>134</sup> Third, an expulsion must not be arbitrary in nature.<sup>135</sup>

The court relied on the jurisprudence of other international and regional human rights bodies, such as the United Nations Human Rights Committee and the African Commission on Human and Peoples’ Rights. It also found support in the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights of their respective human rights conventions.<sup>136</sup> Judges Sir Christopher Greenwood and Sir Kenneth Keith in their Joint Declaration argued that this jurisprudence did not go beyond procedural guarantees.<sup>137</sup> In his case note on *Diallo* in the *American Journal of International Law*, Eirik Bjorge agrees with Greenwood and Keith that the I.C.J. goes further than the international and regional human rights bodies.<sup>138</sup> He concludes that “by developing international human rights in this way, the Court in *Diallo* forcefully has staked its claim as an arbiter of human rights to be reckoned with.”<sup>139</sup> It is not surprising that members and staff of human rights bodies already have given *Diallo* much attention, and it is difficult to imagine that any of these human rights bodies would do anything but gratefully adopt the view of the I.C.J.

The I.C.J. held that there had been violations of both procedural and substantive guarantees. There was breach of the domestic law require-

132. *Diallo* 2010 Judgment, *supra* note 82.

133. *Id.*

134. *Id.*

135. *Id.* ¶ 65.

136. *Id.* ¶ 68.

137. Judge Cançado Trindade in his Separate Opinion provides an extensive discussion of the prohibition of arbitrariness in the international law of human rights. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 541 (July 20) (separate opinion of Trindade, J.). He advances a general prohibition of arbitrariness when rights are restricted, following from the legality requirement. A closer reading for instance of the case law of the European Court goes far to bearing this out. First, the due process requirements under Protocol 7 to the European Convention are set so high that there is no need for further substantive protection in any of the cases. Second, there is no limitation to procedural rights under the prohibition of arbitrary detention under Art 5 of the European Convention which practically always will come into play in the expulsion cases.

138. Eirik Bjorge, *Case Concerning Ahmadou Sadio Diallo*, 105 AM. J. INT’L L. 534, 539-40 (2011).

139. *Id.*

ments of consultation and the provision of reasons,<sup>140</sup> and of the right to be heard.<sup>141</sup> The I.C.J. did not accept that there were “compelling reasons of national security” for an exception.<sup>142</sup>

The I.C.J. also held that there was a violation of Article 9 of the Covenant and of Article 6 of the African Charter against arbitrary detention.<sup>143</sup> Again there were breaches of domestic procedures (including the forty-eight hours before going before a judge).<sup>144</sup> Account had to be taken of the “number and seriousness of irregularities” tainting them.<sup>145</sup> Diallo had been “held for a particularly long time.”<sup>146</sup> The Government had “made no attempt to ascertain whether his detention was necessary,”<sup>147</sup> and the decisions had not been “reasoned in a sufficiently precise way.”<sup>148</sup> The proceedings against Diallo were not criminal, but he still had right to be notified of reasons for arrest, and the burden was on the state to show that this had been done.<sup>149</sup>

The I.C.J., in the aftermath of the decade of “anti-terror” measures, then took this opportunity to state that “there is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on states in all circumstances, even apart from any treaty commitments.”<sup>150</sup> The I.C.J.’s use of the words “even apart” is a useful reminder that we are dealing with a rule of customary international law.<sup>151</sup> The use of the words “in all circumstances”<sup>152</sup> can refer to a rule’s peremptory or *jus cogens* status in the sense of its unconditional applicability and lack of reciprocity, even if other states breach the rule in question, or if a contrary rule or instrument is invoked to bypass the rule.<sup>153</sup> But in *Diallo* there was no normative conflict that would require the I.C.J. to address further the peremptory or *jus cogens* status or nature of the prohibition of inhuman and degrading treatment. This was left to further elaboration by the

140. Diallo 2010 Judgment, *supra* note 82, ¶ 73.

141. *Id.* ¶ 74.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* ¶ 82.

149. *Id.* ¶¶ 72, 84.

150. Diallo 2010 Judgment, *supra* note 82.

151. *Id.*

152. *See id.*

153. *Id.*

I.C.J. on some later occasion and by the human rights bodies the I.C.J. otherwise relied so expressly on for its development of this part of international law.<sup>154</sup>

The I.C.J. clarified and developed further its doctrine in 2012 in *Belgium v Senegal* is discussed below.<sup>155</sup>

C. *Arbitrary Expulsion and Detention, and Degrading and Inhuman Treatment in Diallo and in Belgium v. Senegal*

In *Diallo (Merits)*, the I.C.J. discussed the provisions of Article 7 of the ICCPR (against torture and degrading treatment), Article 10 (treatment of detainees: with humanity and respect for dignity), and Article 5 of the African Charter (“dignity inherent in a human being”). The I.C.J. held that no breach of the prohibition of inhuman and degrading treatment “had been demonstrated.”<sup>156</sup>

The I.C.J. also established a new evidentiary position for claims to succeed in human rights cases. The burden of proof was placed on the claimant in *Pulp Mills*,<sup>157</sup> but this could not apply to human rights cases in general, especially not when a party claims not to have been afforded procedural guarantees.<sup>158</sup>

The I.C.J. referred to the limits on its review of a state’s interpretation of own domestic law.<sup>159</sup> It is for each state, in the first instance, to interpret its own domestic law and the I.C.J. will “not substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts.”<sup>160</sup> The threshold for the review is that “a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case.”<sup>161</sup> The I.C.J. could provide convincing support for breach of domestic law; there had been no consultation, sufficient reasons were not provided,<sup>162</sup> and a breach

154. Neither did it, strictly speaking, require the Court to deal with the customary international law status of the prohibition.

155. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 424 (July 20). See the discussion below.

156. *Id.*

157. *Pulp Mills on the River Uruguay (Arg. v. Uru)*, Judgment, 2010 I.C.J. 14, ¶ 162 (Apr. 20).

158. *Diallo* 2010 Judgment, *supra* note 82, ¶ 55.

159. *Id.* ¶ 70.

160. *Id.* ¶ 55.

161. *Id.* ¶ 70.

162. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, ¶ 73 (July 20).

of the right to be heard.<sup>163</sup>

In *Diallo*, the I.C.J. also stated that the prohibition of inhuman and degrading treatment was binding on states “in all circumstances,” clearly assuming that the prohibition of torture would be no less binding. The I.C.J. explicitly stated that there is no doubt that the prohibition of inhuman and degrading treatment is “among the rules of general international law which are binding on states in all circumstances, even apart from any treaty commitments.”<sup>164</sup> Here the I.C.J. was unanimous, and this gives the statement particular authority. It may sometimes be difficult for all judges to agree on the reasons, which were not set out in the 2010 judgment in *Diallo*. In the 2012 judgment in *Belgium v. Senegal* the reasons are set out, and the I.C.J. is equally unanimous on this point, with the exception of Judge *ad hoc* Sur. In addressing torture, the I.C.J. in *Belgium v. Senegal* revisited the 2010 judgment in *Diallo* on inhuman and degrading treatment, and in this judgment the I.C.J. provided full reasons for the classification of the prohibition of torture as *jus cogens*. The I.C.J. could readily have listed many additional authorities in the U.N. and regional human rights systems, but that was simply not called for. Judge *ad hoc* Sur’s statement about “a disputed notion, whose substance has yet to be established” is clearly wrong in law and unfortunate as a matter of policy.<sup>165</sup> None of the permanent judges shared his view, which is otherwise reduced from its former place as a minority position to an expression of eccentricity.

The I.C.J. for some period of time appeared most comfortable in the realm of obligations *erga omnes*. The concept of *erga omnes*—obligations owed to the international community as a whole, the performance of which all states have a legal interest—was first articulated by the I.C.J. in *Barcelona Traction (Second Phase)* and has since been revisited on numerous occasions.<sup>166</sup> In *Belgium v. Senegal*, the I.C.J. for the first time

163. *Diallo* 2010 Judgment, *supra* note 82, ¶ 74.

164. *Id.* ¶ 87; see Mads Andenas, *International Court of Justice, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 60 INT’L & COMP. L.Q. 810, 814 (2011) (indicating room for “further elaboration by the Court at some later occasion”).

165. Questions Relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), 2012 I.C.J. 422 (July 20).

166. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, 32 (Feb. 5); *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, 102 (June 30); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 172, 199 (July 9); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda)*, Judgment, 2006 I.C.J. 6, 32, 51-52 (Feb. 3); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, 104, 111 (Feb. 26).

pronounced one legal effect of obligations *erga omnes* for third parties, determining that the existence of a common interest in the performance of an *erga omnes* obligation was, alone, sufficient to grant legal standing to third-party states with respect to breaches of the obligation.<sup>167</sup> In the Draft Articles on State Responsibility (2001), the ILC indicated that the general legal interest in the fulfillment of obligations *erga omnes* entitles any state to which the obligation is owed to invoke the responsibility of the state in breach.<sup>168</sup> The reasoning of the ILC in this respect was clear. In case of breaches of obligations under Article 48, it may well be that there is no state which is individually injured by the breach, yet it is highly desirable that some state or states be in a position to claim reparation, in particular restitution. In accordance with paragraph 2(b), such a claim must be made in the interest of the injured state, if any, or of the beneficiaries of the obligation breached.<sup>169</sup>

In *Belgium v. Senegal*, the common interest of state parties to obligations arising under the Torture Convention—as obligations *erga omnes partes*—was sufficient to establish the standing of Belgium before the I.C.J. The obligations of a state party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other states parties have a common interest in compliance with these obligations by the state in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any state party to all the other states parties to the Convention. All the states parties “have a legal interest” in the protection of the rights involved.<sup>170</sup>

The “common interest in compliance with the relevant obligations” under the Torture Convention, particularly those obligations arising

167. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 449-50, 575 (July 20).

168. Rep. of the Int'l Law Comm'n, 53 Sess., Apr. 23-June 1, July 2-Aug. 10, 2011, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) (“Article 48. Invocation of responsibility by a State other than an injured State. 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole.”).

169. *Id.*

170. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 449 (July 20) (citing *Barcelona Traction*, 1970 I.C.J. at 32).

under Article 6 and Article 7 of the instrument, was sufficient to establish the admissibility of Belgium's claims, apart from whatever special interest Belgium might have with respect to Senegal's compliance.<sup>171</sup> In this respect, the I.C.J. took a significant step in recognizing this procedural effect arising from obligations of an *erga omnes* nature and in doing so, gave weight to the ILC's codification of the invocation of state responsibility by third-party states for obligations *erga omnes*.

The I.C.J.'s basis of admissibility upon obligations *erga omnes partes* was heavily criticized by several members of the court,<sup>172</sup> and reveals an underlying tension in the I.C.J.'s formalistic approach to obligations under the Torture Convention and the way in which these conventional obligations codify general international law. Certain members of the I.C.J. felt that the judgment went beyond the scope of the Torture Convention in its *erga omnes partes* finding, suggesting the absence of such obligations in the realm of customary international law.<sup>173</sup> From a purely functional standpoint, such a finding was likely necessary to preserve the admissibility of Belgium's claim. However it is conceivable that there was something more fundamental at play in the I.C.J.'s decision. The Torture Convention, which entered into force only in 1987, codified a long-standing prohibition against torture that is widely accepted today as a peremptory norm (*jus cogens*).<sup>174</sup> This very matter

171. *Id.* at 449-50.

172. *See id.* at 574 (dissenting opinion of Xue, J.); *id.* at 613-14 (dissenting opinion of Judge *ad hoc* Sur).

173. *See id.* at 476, 478-79 (separate opinion of Abraham, J.); *id.* at 613-14 (dissenting opinion of Judge *ad hoc* Sur).

174. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980); *Siderman de Blake v. Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 153-54 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶ 454 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Urgarte* (No 3), [1999] Eng. Rep., 119 I.L.R. 136 (appeal taken from U.K.); *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 466 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); *Al-Adsani v. United Kingdom*, 2001-XI Eur. Ct. H.R. 79; *Bouzari v. Iran*, 2002 O.J. No. 1624, ¶ 60 (Can. Ont. Sup. Ct. J.), *appeal dismissed*, 220 O.A.C. 1, ¶ 86 (Can. Ont. C.A.); *Prosecutor v. Simić*, IT-95-9/2-S, Sentencing Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002); *Gómez-Paquiyaui Brothers v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 111-12 (July 8, 2004); *Tibi v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 143 (Sept. 7, 2004); *Ceaser v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 123, ¶ 100 (Mar. 11, 2005); *Baldeón García v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 117 (Apr. 6, 2006); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia), [2006] UKHL 26, [43] (appeal taken from Eng. and Wales); *Demir and Baykara v. Turkey*, 1345 Eur. Ct. H.R. at 21 (2008).



arose in oral proceedings before the I.C.J. regarding the issue of provisional measures in 2009. Judge Simma asked if the prohibition against torture is an obligation *erga omnes*. Belgium and Senegal appeared to reply in the affirmative. Senegal had submitted that the Senegalese law, which brings the main crimes under international humanitarian law within the Senegalese Penal Code, represents the incorporation of international rules of conventional and customary origin, referring to general customary rules, not local or regional ones. Stating that these rules have the character of *jus cogens*, Senegal had provided another basis for the *erga omnes* character of the international rules.<sup>175</sup>

Judge Cançado Trindade notes in his Separate Opinion that Senegal, “much to its credit, acknowledged the importance of the obligations, ‘binding on all States,’” and in particular that the obligation to extradite or prosecute arising from the prohibition against torture was binding on Senegal before the Torture Convention entered into force.<sup>176</sup> Further, Judge Cançado Trindade rightly identified the source of the *erga omnes* status of the obligations under consideration: it arises from the *jus cogens* nature of the prohibition against torture.<sup>177</sup> It is certainly not the case that all obligations under multilateral conventions constitute obligations *erga omnes partes* conferring standing to all states parties, and the I.C.J. makes no such claim; however the demarcation of conventional obligations that are *erga omnes* from those that are not requires a principled distinction.

In distinguishing the obligations in question from other multilateral convention obligations, the I.C.J. invokes its prior rulings in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) and *Barcelona Traction*.<sup>178</sup> The most pertinent passage in the I.C.J.’s jurisprudence, which accounts for this distinction, is found in *Military and Paramilitary Activities in and against Nicaragua* (1986), stating that “‘simply because’ principles of general international law have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.”<sup>179</sup>

175. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 429-30 (July 20).

176. *Id.* at 552 (separate opinion of Trindade, J.).

177. *See id.* at 505, 541 (separate opinion of Trindade, J.).

178. *See id.* at 449.

179. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 44 (June 27).

In effect, obligations in the Torture Convention that parallel obligations *erga omnes* have, at a minimum, a legal effect commensurate to the obligations *erga omnes* they codify, which for present purposes permit any state to which the obligation is owed to invoke the international responsibility of a state in breach.<sup>180</sup> To maintain otherwise would be to suggest that obligations to prevent and punish articulated by instruments codifying peremptory norms, such as the Torture Convention, do not go so far as the *erga omnes* obligations to which they give expression. The perverse effect of such reasoning in this instance would be to deny Belgium standing to invoke Senegal's responsibility for breaching an obligation *erga omnes* because the specific obligation invoked, to punish violations of the prohibition against torture, is articulated in a convention established to remove barriers to the performance of the obligation in question.

The I.C.J. was right to reject such a regressive understanding of the conventional expression of obligations arising from a peremptory norm in this instance.<sup>181</sup> The *erga omnes* character of obligations to prevent, through necessary legislative means, and punish, through extradition or prosecution, violations of the prohibition against torture codified by the Torture Convention is clearly identified by the I.C.J., as are the legal effects arising from a breach of these obligations, namely standing of any party to which the obligation is owed to bring a claim against the offending state. This finding, as indicated below, was integral to the standing of Belgium before the I.C.J. and arises as a consequence of the *jus cogens* status of the prohibition against torture. What this further indicates is that, contrary to the position of some of its members, the I.C.J.'s pronouncement on the *jus cogens* status of the prohibition against torture was not mere dicta; it is, rather, central to both the substance and procedure of the case in question.

#### D. *Restricting Another Form of Protection: Companies and Investor Rights in Diallo, Barcelona Traction and Legal Personality*

The I.C.J. took a more restrictive position on Diallo's rights as an investors protected as a matter of customary international law. Guinea could exercise diplomatic protection for Diallo's direct rights as a member of the private limited liability companies, and the I.C.J.

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180. Rep. of the Int'l Law Comm'n, 53 Sess., Apr. 23-June 1, July 2-Aug. 10, 2011, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

181. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 541-42 (July 20) (separate opinion of Trindade, J.).

rejected the Congolese objections on grounds of failure to exhaust local remedies.<sup>182</sup> In its 2007 *Judgment on Preliminary Objections*, the I.C.J. rejected the claims by companies owned by Diallo or in which he held a controlling position.<sup>183</sup> The I.C.J. did not allow Guinea's claim to extend its protection to the two limited liability companies.<sup>184</sup> They were legal persons, formed and established in the Congo, and separate from their shareholder and manager, Diallo.<sup>185</sup> The I.C.J. based its determination on *Barcelona Traction*.<sup>186</sup> Protection by substitution had been developed in *Elettronica Sicala* by the Chamber of the I.C.J. to apply the treaty protection often used in bilateral investment treaties to protect shareholder claims for compensation for violations against a company.<sup>187</sup> In *Diallo*, Guinea also placed reliance on the ILC's draft Articles on Diplomatic Protection and case law from various human rights bodies.<sup>188</sup> But the I.C.J. did not in *Diallo* extend protection by substitution to a rule of customary international law. This left Diallo's direct rights as a member or as managing director of the private limited liability companies. In the 2010 Judgment on Merits, all the claims based on Diallo's direct rights failed.<sup>189</sup>

The joint dissenting opinion of Judges Al-Khasawneh and Yusuf revisited the I.C.J.'s reading of *Barcelona Traction*. They first pointed out that the court in *Barcelona Traction* saw the need to attribute the diplomatic protection to one state.<sup>190</sup> With one country of incorporation or establishment determining the nationality of the company, and shareholders from many countries, there could be good reasons to choose the former over the latter.<sup>191</sup> In *Diallo*, shareholders of different nationalities were not a concern, as Diallo was the sole owner.

182. Diallo 2010 Judgment, *supra* note 82, ¶ 55.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 33-34 (Feb. 5).

187. *Elettronica Sicala SPA (ELSI) (U.S. v. It.)*, 1988 I.C.J. 158 (Dec. 20).

188. Diallo 2010 Judgment, *supra* note 82, ¶ 55.

189. In both the 2007 Judgment on Preliminary Objections and the 2010 Judgment on Merits there is discussion of the managing director, the sole member, and the private limited liability company in the company law of the Congo. See MADS ANDENAS & FRANK WOOLDRIDGE, *EUROPEAN COMPARATIVE COMPANY LAW* 111, 114 (Cambridge Univ. Press 2009), on the French and Belgian private companies that the Congolese system and terminology of company law builds upon.

190. Diallo 2010 Judgment, *supra* note 82.

191. *Id.*

Judges Al-Khasawneh and Yusuf pointed out that the developments in the field of foreign investment have abandoned the distinction between the corporate personality of the company on the one hand, and that of the shareholders on the other, leading to a discrepancy between the customary international law standard and the standard contained in most investment treaties.<sup>192</sup>

### E. Remedies

In *Diallo*, remedies were discussed under the heading “reparation.”<sup>193</sup> Given the findings in the judgment these were limited to detention and expulsion.<sup>194</sup> The parties were given a short deadline to reach a settlement, which was not complied with, paving the way for the final set of proceedings before the I.C.J.<sup>195</sup>

The I.C.J. awarded damages in *Diallo* in 2012,<sup>196</sup> which was the I.C.J.’s first judgment on damages in a human rights case.<sup>197</sup> The I.C.J. made the point that it had determined an amount of compensation once before, in the *Corfu Channel* case.<sup>198</sup> However, the *Diallo* judgment is different because *Corfu Channel* involved injury by one state to another. As Judge Greenwood noted in his separate declaration to the judgment in *Diallo* (2012), although Guinea had brought the action in the exercise of its right of diplomatic protection, “the case is in substance about the human rights of Diallo.”<sup>199</sup>

In *Diallo* (*Merits*), the I.C.J. had established that the 1995-96 detention and expulsion of Diallo were arbitrary and thus obligated the DRC “to make appropriate reparation, in the form of compensation, to the Republic of Guinea for the injurious consequences of the violations of international obligations” under the Covenant and the African Char-

192. *Id.*

193. *Diallo* 2012 Judgment, *supra* note 32. The term used in the text is “compensation.”

194. *Id.*

195. *Id.*

196. *Id.*

197. See *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 244 (Dec. 15) (concerning compensation for loss suffered by a state); see also *Factory at Chorzów* (Ger. v. Pol.) 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) (concerning compensation to two companies). Neither court had awarded damages in a human rights case.

198. See *Corfu Channel Case*, 1949 I.C.J. 244.

199. *Diallo* 2012 Judgment, *supra* note 32, at 394 (declaration of Greenwood, J.). The Court itself emphasized the point when it stated “that the sum awarded to Guinea in the exercise of diplomatic protection of Diallo is intended to provide reparation for the latter’s injury.” *Diallo* 2012 Judgment, *supra* note 32, ¶ 57.

ter.<sup>200</sup> In the subsequent proceedings of *Diallo (Compensation)*, Guinea sought compensation for non-material injury as well as three heads of material damage: alleged loss of personal property, alleged loss of professional remuneration during Diallo's detentions and after his expulsion, and alleged deprivation of "potential earnings."<sup>201</sup> The total amount of the claim exceeded \$11.5 million. The DRC offered \$30,000 for non-pecuniary injury and nothing for material damage.

In its judgment on compensation, the I.C.J. first addressed the non-material injury. It recalled its earlier finding that Diallo had been arrested without being informed of the reasons for that action or being given the possibility of seeking a remedy; that he had been detained for an unjustifiably long period pending expulsion; that he had been made the object of accusations that were not substantiated; and that he was wrongfully expelled from the country where he had resided for thirty-two years and engaged in significant business activity.<sup>202</sup> Noting that "non-material injury can be established even without specific evidence," the I.C.J. said it was "reasonable to conclude that the DRC's wrongful conduct caused Diallo significant psychological suffering and loss of reputation."<sup>203</sup> The I.C.J. took into account the duration of Diallo's detention and certain aggravating factors, including the link between the expulsions and Diallo's attempts to recover debts from the state or state-owned companies.<sup>204</sup> Turning to quantification, the I.C.J. stated that compensation for non-material injury necessarily rests on equitable considerations.<sup>205</sup> It fixed on the amount of \$85,000 as "provid[ing] appropriate compensation" for the nonmaterial injury suffered by Diallo.<sup>206</sup>

The I.C.J. then addressed the issue of material damage. Guinea's claim for the loss to Diallo of his personal property included the furnishings of his apartment listed on an inventory prepared after his expulsion, certain high-value items not on that inventory, and assets in bank accounts.<sup>207</sup> Holding that Guinea had failed to prove the loss of any specific item, the I.C.J. was nevertheless satisfied that the DRC's

200. Diallo 2012 Judgment, *supra* note 32, ¶ 165 (citing International Covenant on Civil and Political Rights art. 9(1), 9(2), 13, Dec. 16, 1966, 99 U.N.T.S. 171; African (Banjul) Charter on Human and Peoples' Rights, art. 6, 12(4), June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58.).

201. Diallo 2012 Judgment, *supra* note 32.

202. Diallo 2012 Judgment, *supra* note 32, ¶ 21.

203. *Id.*

204. *Id.* ¶¶ 22-23.

205. *Id.* ¶ 24.

206. *Id.* ¶ 25.

207. *Id.*

unlawful conduct had caused some material injury, and that “at a minimum Diallo would have had to transport his personal property to Guinea or to arrange for its disposition in the DRC.”<sup>208</sup> The I.C.J. therefore awarded compensation on the basis of equitable considerations for \$10,000.<sup>209</sup>

The I.C.J. pointed to additional evidentiary deficiencies in rejecting Guinea’s claims for alleged loss of professional remuneration during the detention of Diallo and as a result of his expulsion. While “in general, a claim for income lost as a result of unlawful detention is cognizable as a component of compensation,” the I.C.J. observed,<sup>210</sup> Guinea had failed to submit evidence capable of establishing its claims in this regard.<sup>211</sup> For the same reasons, the I.C.J. rejected the claims based on loss of remuneration as a result of the unlawful expulsion, which it also dismissed as “highly speculative”<sup>212</sup> Finally, the I.C.J. rejected claims for loss of “potential earnings” as essentially based on the loss in value of Diallo’s companies and therefore “beyond the scope of these proceedings, given this Court’s prior decision that Guinea’s claims relating to the injuries alleged to have been caused to the companies are inadmissible.”<sup>213</sup>

As noted, Guinea had sought more than \$11.5 million.<sup>214</sup> The I.C.J., however, ordered the DRC to pay a total of \$95,000, or less than one percent of that claim. There were two reasons for the lower amount.<sup>215</sup> First, Guinea was unsuccessful in convincing the I.C.J. to reconsider its restrictive rulings in the two earlier judgments. As discussed above, in its judgment on preliminary objections, the I.C.J. had held that Guinea could not claim for alleged infringements of the rights of Diallo’s two companies.<sup>216</sup> In the 2010 judgment on the merits, the I.C.J. had rejected Guinea’s claims for the violation of Diallo’s rights as a shareholder of the companies.<sup>217</sup> The I.C.J. did not extend protection by substitution to a rule of customary international law in the judgment on the merits of 2010, and did not reconsider the matter in the judgment on compensation in 2012.

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208. *Id.* ¶ 33.

209. *Id.* ¶ 36.

210. *Id.* ¶ 40.

211. *Id.* ¶¶ 41-46.

212. *Id.* ¶ 49.

213. *Id.* ¶ 53.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

The second reason for the I.C.J.'s award of less than one percent of Guinea's claim was the lack of supporting evidence. The award of \$95,000 was wholly based on "equitable considerations."<sup>218</sup>

In *Diallo (Merits)* of 2010, the I.C.J. brought up the length of proceedings. The application before the I.C.J. was first lodged in 1998.<sup>219</sup> With such delay, remedies can hardly be effective in a human rights case as this. There is a reason to undertake reforms of different kinds to reduce delay, some of which is due to the deference I.C.J. procedures show to state parties, and which are less appropriate where the fundamental rights of a private individual is involved. It must on the other hand be recalled that both national and other international courts have considerable delays in human rights cases, although the twenty-two years Diallo's case took in the I.C.J., starting some ten years after the end of his detention with the final expulsion, must be at the extreme end.

#### E. *Sources of Authority: International Law as an Opened System after Germany v. Italy and Croatia v. Serbia*

Courts follow different practices when it comes to citation of other courts. I.C.J. judgments<sup>220</sup> have traditionally not referred to decisions by other courts, national or international, or for that matter to academic scholarship.<sup>221</sup> It has for some time cited and relied on arbitral decisions.<sup>222</sup>

In the *Wall Case* (2004)<sup>223</sup> the I.C.J. for the first time cited the U.N. Human Rights Committee (HRC), noting its decisions in individual cases, its "constant practice" on extraterritorial application, and its

218. *Id.*

219. *Diallo* 2010 Judgment, *supra* note 82.

220. Individual judges have more freedom in their opinions that are appended to the judgments.

221. The European Human Rights Court has an open practice, whereas the EU Court of Justice has been most closed and restrictive in this respect but now openly relies on judgments from the Human Rights Court. Many national courts have treated law as a closed system and not cited international or foreign courts, and in some countries this remains a contested issue. But most national, and international, courts have increasing rates of citation of decisions by courts from other jurisdictions. See Mads Andenas & Duncan Fairgrieve, 'There is a World Elsewhere'—Lord Bingham and Comparative Law, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW 831 (Oxford Univ. Press 2009), for a discussion of this development.

222. See Guillaume, *supra* note 71, at 5-23.

223. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 13 (July 9).



statements on the interpretation of the ICCPR at issue.<sup>224</sup> The I.C.J. also cited the Committee on Economic, Social and Cultural Rights (CESCR) and the U.N. Special Human Rights Mandates or Rapporteurs.<sup>225</sup> The I.C.J. placed clear reliance on the statements of the two U.N. committees in its interpretation of their respective 1966 U.N. Covenant, and relied in the determination of factual matters on the CESCR and the U.N. Special Human Rights Mandates or Rapporteurs.

In its 2007 judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*, the I.C.J. cited both the trial chamber of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>226</sup> While declining to embrace the Yugoslav Tribunal's views on state responsibility, the I.C.J. did rely on its findings of fact and on both *ad hoc* tribunals for the elements of international criminal offenses.<sup>227</sup> In *Former Yugoslav Republic of Macedonia v. Greece*,<sup>228</sup> *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization*,<sup>229</sup> and *Belgium v. Senegal*,<sup>230</sup> the I.C.J. continued to develop the use of decisions of other courts and tribunals, and in *Germany v. Italy*<sup>231</sup> even broadening its consideration to an extensive review of the case law of national courts. In *Croatia v. Serbia*<sup>232</sup> the I.C.J. has continued the dialogue with the International Criminal Tribunal for the Former Yugoslavia.

The *Diallo* case occupies an important place in this development and the multiplicity of sources reflects the nature of public international law as an open system.<sup>233</sup> In the 2010 judgment on the merits, for example, the I.C.J. relied explicitly on the HRC's jurisprudence, includ-

224. *Id.* ¶¶ 109-10.

225. *Id.* ¶ 112.

226. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

227. *Id.* ¶¶ 188, 198.

228. Application of the Interim Accord of 13 September 1995 (Former Yugoslav Rep. of Maced. v. Greece), 2011 I.C.J. 644 (Dec. 5).

229. Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed Against the International Fund for Agricultural Development, Advisory Opinion, 2012 I.C.J. 10 (Feb. 1).

230. *See* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 424 (July 20).

231. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99 (Feb. 3).

232. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2015 I.C.J. 1 (Feb. 3).

233. *See* JAMES CRAWFORD, INTERNATIONAL LAW AS AN OPEN SYSTEM: SELECTED ESSAYS 17-38 (2002).

ing *Maroufidou v. Sweden* and General Comment No. 15.<sup>234</sup> It justified this step on the importance of achieving “the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the states obliged to comply with treaty obligations are entitled.”<sup>235</sup> While in no way obliged to model its own interpretation of the Covenant on that of the HRC committee, the I.C.J. said, it believed that “it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.”<sup>236</sup>

Referring to the decisions of regional courts and bodies presents a different set of considerations from the perspective of the “regime problem” in international adjudication. Because the DRC (a party to the proceeding) had ratified the African Charter on Human and Peoples’ Rights, it followed that the I.C.J. would find some relevance in the practice of the African Commission on Human and Peoples’ Rights, and indeed in its 2010 judgment on the merits the I.C.J. did cite two of its cases, *Kenneth Good* and *World Organization Against Torture v. Rwanda*.<sup>237</sup> It did not necessarily follow, however, that the I.C.J. should make use of the jurisprudence of other regional bodies, such as the Inter-American Court of Human Rights and the European Court of Human Rights.<sup>238</sup> But, in fact, the I.C.J. took the opposite approach and found additional support in the case law of both the Inter-American and the European Courts, which was “consistent” with the I.C.J.’s own findings.<sup>239</sup>

Gilbert Guillaume was proponent of autonomy and not citing other bodies, stating that the I.C.J. “always abstained itself from the smallest reference to the rationales employed by the regional jurisdictions.”<sup>240</sup> Previously, the I.C.J.’s registrar would informally advise judges that the

234. Human Rights Comm., *Maroufidou v. Sweden*, UN Doc. CCPR/C/12/D58/1979 (1985); Human Rights Comm., *General Comment No. 15: The Position of Aliens Under the Covenant* (Apr. 11, 1986), <http://www.unhcr.org/refworld/docid/45139acfc.html>.

235. Diallo 2010 Judgment, *supra* note 82, ¶ 66.

236. *Id.*

237. *Id.* ¶ 67 (citing African Comm’n on Human & Peoples’ Rights, *Good v. Rep. of Bots.*, in 28TH ANNUAL ACTIVITY REPORT 66 (2010); African Comm’n on Human & Peoples’ Rights, *World Org. Against Torture v. Rwanda*, in 10TH ANNUAL ACTIVITY REPORT 49 (1996)).

238. See James Crawford & Penelope Nevill, *Relations Between International Courts and Tribunals: The ‘Regime Problem’*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 235 (Margaret Young ed., 2012).

239. Diallo 2010 Judgment, *supra* note 82, ¶ 68.

240. Guillaume, *supra* note 71, at 19-20.

I.C.J. does not cite regional courts in its judgments.<sup>241</sup>

In the secretariats of the different U.N. human rights bodies different views have been taken on this, which is reflected in their decisions and general comments. But here, too, the system of citations is opening up. There is an interesting discussion in the HRC, reflected in the view<sup>242</sup> in *Yevdokimov v Russia* where the dissenting views clarify the breach with established practice that the majority's reliance on the European Court of Human Rights in this case represented.<sup>243</sup>

The 2012 *Diallo* judgment on compensation further developed the I.C.J.'s use of judgments by other international courts and tribunals. In reaching its decision, the I.C.J. consciously took into account the practice in other international courts, tribunals and commissions in the application of general principles governing compensation when fixing its amount, including in respect of injury resulting from unlawful detention and expulsion. The I.C.J. listed the International Tribunal for the Law of the Sea, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission. Judge Cançado Trindade highlighted this important issue in his separate opinion by noting that "the I.C.J. has rightly taken into account the experience of other contemporary international tribunals in the matter of reparations for damages."<sup>244</sup> Judge Greenwood elaborated the point in his declaration, observing first that there was very little in its own jurisprudence on which the I.C.J. could draw. He then concluded that it is entirely appropriate that the I.C.J. made a thorough examination of the practice of other international courts and tribunals, especially the main human rights jurisdictions, which have extensive experience of assessing damages in cases with facts very similar to those of the present case.<sup>245</sup>

However, Judge Greenwood argued that the \$85,000 for Diallo's non-material injury far exceeded the level awarded by the European and Inter-American Courts of Human Rights.<sup>246</sup> Interestingly, in the

241. See Andenas, *supra* note 84, at 817 n.26.

242. "View" is the designation used for the decisions by the HRC in individual cases.

243. Rep. of the Human Rights Comm., 101st Sess., Mar. 14-Apr. 1, 2011, UN Doc. A/67/40 (Vol. I).

244. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 422, 541 (July 20) (separate opinion of Trindade, J.).

245. *Diallo* 2012 Judgment, *supra* note 32, at 394 (declaration of Greenwood, J.).

246. *Id.*

judgment on the merits, Judges Greenwood and Keith had pointed out that the jurisprudence cited by the I.C.J. on the human rights treaty provisions on arbitrary expulsion did not confer protection on substance, only on procedure.<sup>247</sup>

In *Jurisdictional Immunities of the State* the I.C.J. supported the jurisdictional immunity of the state where *jus cogens* violations are at issue.<sup>248</sup>

The I.C.J. finds support in customary international law based on state practice accepted as law (*opinio juris*).<sup>249</sup>

In an extensive inquiry into state practice, a wide array of sources from domestic law is cited, including numerous judgments by national courts. On one level it seems obvious that the I.C.J. inquires into sources from domestic law, including national courts, as this is where most state practice is found. On the other hand, this is one of the first times the I.C.J. has cited national courts as authorities in determining the rule in international law, and the very first time it has gone beyond a brief reference. As is to be expected, at this stage the I.C.J. does not show any advanced methodology, and the use of such sources seems to provide the I.C.J. wide discretion in selecting authorities and determining their relative weight.

In *Croatia v. Serbia*<sup>250</sup> the I.C.J. ~~has continued the dialogue with the International Criminal Tribunal for the Former Yugoslavia and broadened its use of sources even further.~~

## VI. CONCLUSIONS: INCREMENTAL TRANSFORMATION

*Nottebohm* and *Diallo* are good paradigm cases for studying the incremental transformation of international law. This has not been linear, and certain periods have seen more of a hardening of conservative doctrine to be followed by relaxation and development of the law. Currently the development is going the latter way.

This Article argues that the I.C.J. today may not have invented the requirements of “effective nationality” and “a meaningful connection” to the relevant state as it did in *Nottebohm* under strong pressure from

247. *Diallo* 2010 Judgment, *supra* note 82, 716-19 (Joint Declaration, Greenwood & Keith, JJ.).

248. *Jurisdictional Immunities of the State* (Ger. v. It.: Greece Intervening), 2012 I.C.J. 99 (Feb. 3).

249. *Id.*

250. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), 2015 I.C.J. 1 (Feb. 3).

the victors of the Second World War.<sup>251</sup> The three dissenting judges did not accept the requirements of “effective nationality” or “meaningful connection,” but then went on to make findings of fact in favor of Lichtenstein, which would satisfy even these higher requirements.<sup>252</sup> In the time intervening between *Nottebohm* and *Diallo* reaching the I.C.J., the Universal Declaration of Human Rights of 1948 had taken effect through human rights treaties, and a new system of international human rights protection included a number of courts and other international bodies.

Returning to Sir Robert Jennings and Gilbert Guillaume and their concern over the proliferation of international courts and tribunals, it is interesting to consider the aims of the Guillaume’s proposal that references on points of international law may be made from other international courts to the I.C.J.<sup>253</sup> The reference mechanism were to prevent that the I.C.J. should be side-lined by the WTO Appellate Body, other trade bodies, human rights courts and treaty bodies, and international criminal courts, many of which have compulsory jurisdiction. Gilbert Guillaume has on several occasions expressed his critical views on the relaxation of previous restrictive doctrine, typically asking if there is state consent for the developments.<sup>254</sup> One of the questions raised in this Article is whether the I.C.J. relaxing its doctrines has promoted these aims.

In *Diallo*, it becomes much clearer how the open method the I.C.J. has adopted puts the I.C.J. at the top of the international law system. The inclusion of domestic law sources, including judgments by national courts in *Jurisdictional Immunities of the State*, opens for dialogue also with national courts.<sup>255</sup> The development of customary international law by the I.C.J. is now more likely to include human rights law, international trade law, environmental law, and other fields of interna-

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251. Judge Read’s dissent pointed to issues and rights that the current I.C.J. would find difficult to neglect, from the statement that “justice would not be done on any plane, national or international” with the lack of any trial or inquiry in Guatemala or the United States, denying Nottebohm the opportunity of confronting his accusers or defending himself, or giving evidence on his own behalf, and the many (fifty-seven) legal proceedings was commenced against Nottebohm, designed to expropriate, without compensation to him, all of his properties, which could not be dealt with effectively in the absence of the principally interested party. *Nottebohm Case (second phase) (Liech. v. Guat.)*, 1955 I.C.J. 4, 35 (Apr. 6) (Read, J., dissenting).

252. *See id.*

253. Guillaume, *supra* note 70.

254. Guillaume, *supra* note 71.

255. *See Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, 2012 I.C.J. 99 (Feb. 3).

tional law which until recently seemed to fragment into autonomous regimes. The I.C.J. has provided itself with the tools to contribute to some level of unity and coherence of international law.

The first feature of this transformation of public international law is in the relaxation of the restrictions of state consent. The law of the I.C.J. is no longer predominantly concerned with the jurisdictional issues: it is concerned with substance. *Diallo* in 2010 and *Georgia v. Russia*<sup>256</sup> in 2011 illustrate a gradual development. In the latter case, the majority of the I.C.J. rejected the claim with reference to the requirement of exhausting the treaty procedures that Georgia had not followed.<sup>257</sup> But the argument in the latter case as well, both by a strong minority, and also a cautious majority, points towards further lowering of the barriers of state consent when jurisdictional clauses are interpreted.<sup>258</sup> In both *Bosnia and Herzegovina v. Serbia and Montenegro*<sup>259</sup> of 2007 and *Belgium v. Senegal*<sup>260</sup> of 2012 the I.C.J. held a defendant state liable for breach of a human rights treaty. The outcome of these developments will be the gradual strengthening of the I.C.J.'s contentious jurisdiction. The immediate past president at the time of writing, Hirashi Owada, concluded his remarks to the U.N. group of government legal advisers in 2010 by underlining the importance of the recognition of the I.C.J.'s compulsory jurisdiction: "It is the interconnected web of optional clause declarations and compromissory clauses which create a foundation upon which the Court can develop a continuous jurisdiction that does not have to be re-established with

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256. Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Judgment on the Preliminary Objections to Jurisdiction Raised by the Russian Federation (*Geor. v. Russian Fed'n*), 2011 I.C.J. 70 (Apr. 1). This case shows how the current disagreement in international law divides I.C.J. judges, and the limits to the transformation in the International Court's approach to jurisdiction this far. *Id.* The I.C.J. concluded that it lacked jurisdiction under Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) because, in the Court's view, Georgia was required, but had failed to, enter into negotiations with Russia over its claims under the CERD. *Id.* The I.C.J. practically split down the middle with President Owada, Judges Simma, Abraham and Donoghue and Judge *ad hoc* Gaja disagreeing with the majority.

257. *Id.*

258. *See id.*

259. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 43 (Feb. 26).

260. *See* Questions Relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), 2012 I.C.J. 422, 424, 462 (July 20).

each new dispute as does jurisdiction by special agreement.”<sup>261</sup>

Other features discussed above are the I.C.J.’s confirmation of customary international law in different areas of law, also outside the traditional core public international law discipline, as in *Diallo*, and the development of *erga omnes* and *jus cogens*. In the core discipline of general public international law, the I.C.J.’s jurisprudence on the binding character of provisional measures following *LaGrand (Germany v. United States of America)*<sup>262</sup> has been generally received by other international bodies with adjudicative functions, including the regional human rights courts and U.N. treaty bodies.

The citation of other courts and international bodies is another feature opening up for a dialogue across treaty regimes and other jurisdictions.<sup>263</sup> The 2012 *Diallo* judgment on compensation further developed the use of judgments by other international courts and tribunals. Judge Greenwood placed this expansion into the context of the fragmentation discourse when he noted that international law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others but a single, unified system of law. The consequence, he noted with approval, is that “each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even though it is not bound necessarily to come to the same conclusions.”<sup>264</sup>

The other courts and international bodies in this relationship may respond by taking a closer account of international law and its fundamental principles in applying the treaty base they may have for their activities. International courts and other bodies are increasingly provided with the tools for applying international law and securing coherence and unity, and for the I.C.J., this is its main business.

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261. Hisashi Owada, Remarks to the UN group of government legal advisers at the Seminar on the Contentious Jurisdiction of I.C.J. (Oct. 26, 2010), <http://www.I.C.J.-cij.org/presscom/files/5/16225.pdf?PHPSESSID=5c407>.

262. *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466 (June 27).

263. A former President of the I.C.J. at the time of writing, Gilbert Guillaume, adds that the Court’s policy of precedent essentially aims to assure a constructive dialogue with arbitration tribunals dealing with interstate disputes, primarily in border disputes. Guillaume, *supra* note 71, at 20. For their part, these tribunals are very attentive to the jurisprudence of the Court; by this method, coherence is satisfactorily assured in those matters. This more narrow view of the role of the International Court otherwise taken in this Article illustrates how radical a departure from previous doctrine that is taken in the new case law that *Diallo* contributes to. *Id.* This can be contrasted with the views of Hisashi Owada, as president at the time of his speeches cited in this Article. See Owada, *supra*, note 261.

264. *Diallo* 2012 Judgment, *supra* note 32, at 394 (declaration of Greenwood, J.).