



INTERNATIONELLA HANDELSHÖGSKOLAN  
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# **Painting stripes on a horse does not make it a zebra...**

The present and the potential future of the International Court of Justice

Master thesis in Political Science

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## **Abstract**

Upon a closer examination of the role and performance of the International Court of Justice, we find that it does primarily fulfil its role and obligation as far as the UN charter and the Courts stature are concerned. It is upon the application of Kjell Goldmann's *Internationalists Programme* that we find ourselves wanting more from the Court.

If we assume the development of international institutions, exchange, communication and the like to be desirable and necessary for the continued development of international peace and security, the ICJ can be shown to have had historical opportunities to affect the development to such an effect, but lacks the formal means to do so.

With the subscription to the internationalists programme, we find that there are plenty of potential improvements that could reasonably be made. These are primarily about the official influence of the Court, with regards to cases relevant to it and its jurisdiction, which is severely crippled by current regulatory framework. This is a condition shared with plenty of other international courts in their various forms.

Essentially, the current state of the ICJ lacks the desirable attributes and possibilities to influence the development of international law to any meaningful extent. If we indeed were to look for an international court with the means to build international legal institutions and seek to further enforce international peace and security, the ICJ is not what we are looking for.

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# 1 Introduction

*Sovereignty in its original sense means "highest authority"*

-Hans Kelsen (Kelsen, 2004, p.108)

The above quote from Hans Kelsen's book, "Principles of International Law", illustrates one of many reasons why the area of international relations and law remains fascinatingly ambiguous, partly because sovereignty remains a keyword. The first notion that springs to mind is that, while sovereignty is all good and well when we deal with one state, keeping the above quote in mind, it is essentially an elephant in a china-shop, once we introduce more than one. Or better yet, 192 of them. This is because, while we do not turn our attention towards the difficulty of enforcing any form of international law when everyone is basically given a carte blanche, how can we even begin to form any kind of international system or speak of multilateral interaction when each and every piece of the puzzle is "of the highest authority"? Or to put it in another way, how would we best deal with a system in which everyone wants to be the centre of a circle in which there should be none? Now I speak in metaphors and paradoxes, but it is the best way to illustrate this point.

At this point it could be asked: Would not the present international condition of increased interdependence, globalization and creation of international institutions hint at the weakening of the sovereign nation state? There is a fairly broad base of academics that claim the lessened role of sovereignty today. However, this group of academics do not constitute the little child who remarked that the emperor is naked, upon which everyone gasped and had to agree. Rather, they constitute a crowd of people standing next to the parade, screaming that the fool should put on some clothes. Only these people are disregarded, since most have already dressed for the occasion, so to speak. Thus, the perceived importance of sovereignty is still going strong and the questions remain numerous, and at this point we will not indulge in seeing if the crowd of objectors have valid points or not, for it is but one of many subjects of discussion relevant to the topic. This topic, by the way, is not sovereignty *per se*, but the perhaps more interesting idea of international law. Or the notion that there can be a system of rules and norms that will dictate the actions of something possessing "the highest authority".

Why should sovereign states commit to limit their influence and submit to someone else's authority? When there is a breach of agreed legislation, who should enforce the supposed punishment? Do we only apply the law when it seems convenient, or consistently, disregarding circumstances? Where does this "international law" come from? These are only a few taken from a list that can be elaborated on indefinitely, or at least for a very, very long time.

Still, obvious difficulties and conflicting interests have not deterred attempts to tame the anarchy of the international system. The International Court of Justice, which will be the prime focus of this thesis, came into being as the charter of the United Nations was signed in San Francisco on June 26<sup>th</sup>, 1945. In chapter XIV it is declared to be the principal judicial organ of the UN, whose stature all members are subject to (UN, 2009). After being around for more than sixty years now, what has the International Court of Justice been up to? At the same time it is perhaps not merely as interesting to know what has taken place, as it would be to know as to what effect it has been. Has the court vitally contributed to a peaceful world-society, or is it a waste of space?

## 1.1 Background

The area of international law has, to no big surprise, spawned a plethora of literature on the subject. The academic contributions range from a more general approach, and inherently vaguer and less inspiring contributions (Brownlie, 2003; Shaw, 2003; Lowe, 2007), to studies that put the subject in relation to other scholarly disciplines and relevant fields, in a more in-depth fashion. Examples of this can be the relation between international law and non-governmental organizations (Lindblom, 2005) and international co-operation and trade (Benvenisti & Hirsch, 2004).

A common theme in the more general approach to international law, which is perhaps the most prudent when it comes to such a complicated field, are roundabout definitions of what international law is. It seems to breed more questions than answers, as stated by Charlotte Ku and Paul F. Diehl, the question of what international law is breeds four sub-questions to guide us to an answer: What does it do? How does it work? Is it effective in what it does, and what do we expect from it (Ku & Diehl, 2003)? Except perhaps for the last question, which is considerably more subjective and debatable in nature and answered in brief on the spot, the initial three merely serve as the springboard from which we must jump into further considerations, definitions and differences of opinion.

Vaughan Lowe, Chichele Professor of public international law at the University of Oxford and fellow of All Souls College, is for similar reasons reluctant in “defining” international law. He instead refers to it as a “description of international law”, as a definition that must set up boundaries to illustrate differences between one thing and the other, is not appropriate in this context (Lowe, 2007, p.5).

By contrast to the almost overwhelming amount of literature on international law in general and the variety in its application and analysis, the lack of the same concerning the International Court of Justice, after more than sixty years in existence, is almost staggering. In most cases it is more of a peripheral to a main subject, as in David Schweigman’s analysis of the authority and conduct of the UN Security Council, where the court is addressed more for purposes of expanding the debate, rather than to offer a qualitative analysis of the Court’s influence (Schweigman, 2001). A more coherent gathering of essays concerning the court, however, is *Fifty years of the International Court of Justice*, published in relation to the fiftieth anniversary of the Court, as well as in honour of Sir Robert Jennings, who was president of the Court between 1991 and 1994.

Among other things, it is stated that it is not an easy task to analyse the Court’s approach, as it rarely defines in detail what source is applied to a particular judgement. In addition to this however, it is claimed that the Court has contributed greatly to the development of regional and customary law. The manner in which these contributions have taken place is, unfortunately, somewhat random (Lowe & Fitzmaurice, 1996, p.71). In addition, some light is shed on the relationship between the Court and the UN, “soft” and “hard” law, the substance of international law and where evidence in cases are derived from (Lowe & Fitzmaurice, 1996). Neither of these examples can be appropriately accounted for here, which is why they are merely mentioned to illustrate what the areas of interest has historically been.

What seems to have been lacking in the up to date literature that concerns the International Court of Justice, whether it be directly or not, is a more concrete approach to the conduct of the Court. The discourse is perhaps overly academic, and has failed to give a persuasive empirical account of these past sixty plus years, as well as deliver a verdict in relation to what we might expect from a court of international law.

## 1.2 Purpose

Hence, the purpose of this master's thesis is to provide an empirically based foundation for the continued discussion of the ICJ, its purpose and continued function in the international society. Potential trends of the cases that reach the ICJ and why this is will be examined. Overall, I shall attempt to address the overall functionality and role of the court, and supply the basis for debate and speculation as to what should necessarily be a part of international law and its courts in the future. Part of the foundation for this discussion will be derived from Kjell Goldmann's theory called the Internationalist's Programme. This essentially refers to the importance of increased communication, institution building and more, with regards to creating a peaceful and safe international society.

As indicate above, peripheral subjects, regardless of implied importance will not be extensively discussed. This is because attempting to gain an overarching understanding of the system is well beyond the scope of this thesis. Indeed, this is true for most books, as they can typically do little more than describe different theories or explain why it is so hard to understand what is going on.

In summary, during the course of this thesis, Efforts will be made to reduce, or perhaps refine, a very complex topic to the more fundamental questions of "why" and "what". That is, why do we have the court and what has it been doing. In attempting to answer these questions they can be placed in relation to each other to see if they "match". If the initial purpose is at odds with the result one would be inclined to suggest changes. From that point it would this make sense to take the step into the discussion about the course that the Court should be on. This is not possible in a thesis of this size if we do not make concessions as to the amount of relevant topics we include as well as the level of analysis.

## 1.3 Problem

When dealing with an area of interest such as international law, even though the focus has already be delineated to the International Court of Justice (henceforth referred to as the ICJ or just the Court), even further restriction of the focus is required in order to attempt a more concrete analysis of (what might end up being just one aspect of) the ICJ.

Initially, a couple of main questions can be stipulated based on the previous sections:

1. What is the ICJ supposed to do?
2. What kind of cases has the ICJ ended up adjudicating?
3. What conclusions can we draw from the case analysis?
4. What can, or should, the Court do in addition to this?

Consequently, the questions above limit the discourse to initial intentions and quantitative as well as qualitative analysis of the ICJ case history, but also to a certain extent warrants a discussion about the future of the Court. Hence, it is not part of this essay to address issues such as what the mere existence of the court might imply, neither academically nor "more concretely". To no great extent will subjects like sovereignty or the deeper nature of international law, be debated. It is, however, true that sovereignty and international law will be accounted for, as they are key-components to what the ICJ can do or have done.

## 1.4 Method

It becomes necessary to define an initial framework in order to have a clear idea of what we are looking at and from what criteria we can reasonably seek to give constructive criticism.

Thus, the area of international law and, in relation to this, sovereignty, will be touched upon. This will be done by reference to already existing material, chiefly comprised of textbooks and essay collections, such as the works of Ian Brownlie and Malcolm N. Shaw.

Once the theoretical framework has been established focus shifts to the other side of the coin, the ICJ. A review of the purpose of the court as well as the circumstance under which it came to be will be conducted, meaning a deeper look at the stature and relevant articles of the UN charter. The study of case history will be conducted on the basis of cases made public by the ICJ. From this, statistics which will indicate what has been happening will be derived. Later, a number of the cases will be chosen to be more closely scrutinized in order to draw conclusions concerning the cases that end up at the Courts desk. The criteria with which each case was chosen will be accounted for as the cases are addressed.

In conclusion these two major parts of the thesis, the framework concerning international law and its purpose and the role of the ICJ as well as the performance and case-nature, will be put into relation to determine whether the court is doing a good job, or if it leaves much to the imagination.

To summarize, qualitative text analysis will be combined with a form of statistics compilation and the conclusions derived there from, in order to compare and contrast the documented intentions of the institution, to the reality of the matter.

## **1.5 Disposition**

Initially it will be determined what we mean by international law and what we expect thereof, in chapter 2. Initially international law will be explained in very general terms, followed by an explanation of Kjell Goldmann's *Internationalists Programme*. Following this, national law will be discussed in relation to international law, as well as their respective courts in the proceeding chapter. This is finalized by a brief discourse on the relationship between international law and sovereignty, and why states do or should comply with international law. Summing up chapter 2 will be a short summary to emphasize the relevant aspects of the chapter and sub-sections, needed for the continued discussion.

Thus, chapter 3 pertains to the International Court of Justice. Here Stature and function, performance (that is, a review of the case history) as well as the definition of the various cases handled by the court will be accounted for.

Chapter 4 proceeds in direct relation to the previous chapter by examining the case studies that have been selected in order to offer a better understanding of the case-nature, as well as a foundation for analysis and conclusion. Subsequently, the analysis is elaborated on in chapter 5, followed by the conclusion in chapter 6.

## 2 Elements of International Law

When embarking on an academic journey such as this, it becomes necessary to first get a basic understanding of the port from which we will depart. What I mean is of course that it would make little sense to even attempt any kind of analysis of the workings of the ICJ without at least trying to understand the basics of international law in general, since that is what the court is concerned with.

I say “trying to understand”, not because the subject is necessarily incomprehensible, but the complexity of the system and decades of debate has led to the creation of several different schools of thought. As a direct consequence, the amount of literature available is massive and the variations in conclusions depending on the starting position, is perhaps equally noticeable.

Just the mentioning of “international law” is enough to immediately present a number of questions. What is international law? Where does it come from? Is international law relevant to individuals? What does it mean to national law? Does international law reign supreme over national law? Give it a few more seconds and more questions will become apparent to us. Initially, however, contemplating the very fundamentals of the subject, and not dwell excessively on peripherals or superfluous analysis, will be a priority.

In the following sections various elements of international law will be addressed. This is primarily to thoroughly describe the basic framework needed for a meaningful discussion concerning the ICJ. In addition to international law in general, its sources and meaning, the differences and relationship with national law will be accounted for. Similar to this, the difference between national and international courts will be handled. Furthermore, what international law means to the traditional concept of sovereignty and thus why states do or should comply with international law is examined.

What, then, is international law? Just to make an initial distinction, Malcolm N. Shaw, professor of international law at the University of Leicester, describes it international law as being divisible into private international law (or conflict of laws) and public international law (which is typically referred to as just “international law”). The former one applies to cases where foreign elements “intrude” in particular legal systems. An example offered by Shaw is in the event that two Englishmen make a contract in France to sell goods situated in Paris, an English court would use French legislation when looking upon the validity of the contract. Public international law, however, is explained as regarding “relations between states in all their myriad forms...” (Shaw, 2003, p.2). It is the latter version, public international law, or just international law, which we will be looking at.

In order to put a more detailed spin on the above definition of international law, let us have a look at the following quote from Vaughan Lowe’s book *International Law*:

*“The central core of international law may be described as a body of rules and principles that determine the rights and duties of States, primarily in respect to their dealings with other States and the citizens of other States, and that determine what is a State – which political entities, such as Australia and Palestine and Quebec, count as States, and when and within what geographical territory they exist.”* (Lowe, 2007, p.5)

As mentioned in the background chapter, this is the “description” of international law, which Lowe was unwilling to refer to as a “definition”. It would appear that this was a choice Lowe made based on the premise that the principles, techniques and materials of international law is applied with greater variation than just the rights and duties of states with regards to their interaction between each other.

Lowe states that international law is concerned with the rights and duties of states *primarily* in respect to what they do in relation to other states. What this must necessarily imply is that international law is not limited to bi- or multilateral conduct or affairs, but can also be applied in the context of a single state. This gives rise to dualism and monism, and is an area of debate that deserves a slightly more extended examination, as it regards the relationship between international and national law. Thus, this question will be dealt with in chapter 2.2. In said chapter, we will elaborate on the importance of international law in national law and vice versa, as well as the different opinions on the role of the individual in the international context of rights and duties.

For now, declaring that international law is a set of rules and principles that has as a primary purpose to regulate inter-state behaviour is enough. What set of rules that would be and where they come from has yet to be defined. Starting at the beginning, focus will briefly be turned to the sources of international law.

Scholars typically define two different kinds of sources:

- *Formal sources* – legal procedures and methods that seek to create rules that are generally applicable and legally binding to the addressees. In the case of nations, or municipal law, this would be referring to constitutional law making. It is, however, a source of confusion if we attempt to transfer the concept directly to international law, as there is no real system, or machinery, as Brownlie calls it, for creating generally binding rules on the international level.
- *Material sources* – basically refers to a situation when it has been proven that a specific kind of rule exist (typically established through traditional practice) it becomes legally binding.

The distinctions between these two forms of sources are hard to maintain when we dig deeper into international law, formal law being the most troublesome. What we then fall back on is the idea that rather than a system of creating generally binding rules, typically the general consent of states is viewed as creating rules that have general application (Brownlie, 2003).

So what source will be used and, more importantly, what set of rules does it lead to? Since the International Court of Justice will be examined in this thesis, being the principal judicial organ of the UN, it makes a great deal of sense to examine the charter of the UN, which establishes the Court. Here the stature of the ICJ is found. At this point it is sufficient to say that article 38 of the ICJ statute is typically regarded as a statement of the sources of international law (Brownlie, 2003). The article is closer examined in the chapter 3.1. This does not, of course, offer any explanations carved in stone, but provides the initial stepping-stone.

Thus far a definition, or description, of international law and where it comes from has been briefly mentioned. Remaining are several other pieces of the puzzle, which can now be identified as a few main pieces, or questions, that will help in this endeavour. They are the following:

1. *What is the relationship between international and national law?* This is a question that we must ask and answer in as great an extent as possible for a couple of reasons. One is to determine whether national law is truly superior to international law, in which case it makes little sense to have international law, if there are national forces that can negate or even reverse the intended effect. Secondly, it concerns the role of in-

dividuals and whether they must only adhere to national laws or if breaches of international principles on an individual level is something that must be considered. Finally, without an understanding of the relationship between international and national law, one can not hope to understand why nations should submit to international law at all.

2. *What is the difference between national courts and international ones?* As a point of entry into the discussion concerning structure, function and role of international courts such as the ICJ, it makes sense to include a differentiation between national and international courts. This will also serve to compare and contrast the different courts, and offer us material for further reflection upon the state of the system, if there indeed is one.
3. *How does international law affect sovereignty and vice versa?* Is a state still sovereign if it submits to a set of rules that is superimposed on the national ones? Does sovereignty mean that any international law is at the mercy of arbitrary subjugation and hence arbitrary (and consequentially justifiable) breaches of international law? In order to start to grasp questions like these, which are relevant to the field of international law on a fundamental level, we must spend some time looking upon the relationship between international law and state sovereignty. It is necessary in order to determine if international law is just a user-friendly kitten, or a determined lion.
4. *Why do or do not states comply with international law?* By looking further into this question we would hope to figure out if states submit to a particular international law for the simple reason that they have once agreed to do so, or if there are other factors affecting the decision to comply (or not comply). Naturally we would like to think that states honour previous agreements, as this would mean that institutions such as the ICJ do indeed have important influence. Should the facts indicate the opposite, however, we would be more inclined to believe that the court is a waste of space.

There are naturally more questions that can be regarded as important, but these have been selected as the most fundamental in this context, since they all to a great extent refer to the level of influence that we could reasonably assume international law and hence the ICJ to exercise on states.

## 2.1 The Internationalists Programme

In order to supply a basis for the continuing discussion Kjell Goldmann's *The Internationalists Programme* will be accounted for. Basically, the programme builds upon the theory that increased communication, exchange, organization and law between states aid in the effort to reinforce peace and security on the international level. This is elaborated on in his book *The Logic of Internationalism*, where the essential question is whether or not we can assume it to be a moral responsibility to pursue this internationalist programme, based on the premise that we find it of the utmost importance to safeguard human life. In the end, there is lacking persuasive argument to consider this programme a moral obligation. It is argued, however, that there is basis to argue a moral obligation in considering the implications of the programme, and not ignore it (Goldmann, 1994, p. 209).

During his discourse, Goldmann encounters one problem in particular that might be of interest in the context of this thesis, which is what he refers to as "the internationalists' dilemma". This dilemma stems from the idea that an internationalist, in seeking to reinforce

international peace and security, must be prepared to both ostracize and empathize. This is a form of tension between *accommodative internationalism* and *coercive internationalism*. In short, should we let a nation submit to the rule of international law on its own accord (accommodative), or do we enforce the law in a more forceful manner (coercive). Another way to describe it would be: When is it prudent to compromise with the law? The problem lies in determining when to employ which attitude, or method, and that most of the time a balance must be struck between them. Some form of priority-creating norm is needed, but it is not easy to tell how such a norm would look like (Goldmann, 1994, p. 207).

Like stated above, Goldmann can not find sufficient basis to argue that the pursuit of the internationalists programme is moral obligation, due to ambiguities and uncertainty in the arguments, and criticism such as a lack of empirical basis. The argument is thus dependent on the presumption that we find the protection of human life to be a moral obligation. If we do, however, consider it to be a moral obligation to pursue prudent internationalism, and hence at the very least consider internationalist-systematic implications in relation to foreign policy, there are short-term and long-term obligations. The short-term being to make sure that various courses of action are considered with internationalist-systemic implications in mind, and the long-term obligation being the increased knowledge of the area (Goldmann, 1994, p.209).

To summarize, if the idea of adopting the viewpoints of the internationalists programme is entertained, a top-priority would be to be in favour of and actively support institution-building and cooperation in order to further international peace and security. Also, to place this objective first, when encountering conflicting objectives. A crucial part of this theory is the influence of international opinion, which must be assumed to hold some level of influence, not to mention that it should go against policies and behaviour that are likely to instigate conflict (Goldmann, 1994, p.207).

In essence, international law and the organs that are meant to enforce it, to attempt to build institutions that can safeguard human life. This could also reasonably entail the effort to deal with some of the shortcomings of international courts, as will be mentioned in chapter 2.3, such as the lacking in coordination between courts, ambiguities in jurisdiction, and help in developing a tradition amongst international legal agents, and so on.

## 2.2 International and national law

A favourite topic of discussion amongst international law academics is to which extent international law affects municipal, or national, law. What is for certain is that they do affect each other and share a very complex relationship. A very common result of this discussion, which is addressed to various extents in the literature concerning international and national law, is the differentiation between the *monist*- and *pluralist*-approach.

Regardless of which one might chose to stand on, the initial assumption is the same: There are certain areas, or a field, where both international and national law might be applied at the same time to the same subject-matter. The issue that arises will naturally be “which one will be supreme to the other?” That is, is national law above international law, or the other way around (Brownlie, 2003)?

Pluralism (or dualism) is the idea that neither legal system, not international nor national, has any form of supremacy over the other. They are supposed to be clearly defined (perhaps separated is a better word) from each other and the only way for national law to enforce international law is to first incorporate it into the national legal order (Bederman,

2002). Another way to put it is that national law is concerned with domestic issues and the relations that citizens have with each other and with the executive institutions of the domestic government (Brownlie, 2003).

Monism elaborates on the idea that both national and international law is part of the same legal system, only international law is of a somewhat higher order (Bederman, 2002). One who contests pluralism in favour of monism is Hans Kelsen. He claims that there are a number of manners in which national and international law do not differ to such a great extent as claimed by others, but that the differences are more relative in nature. While Kelsen does not directly claim that international law is supreme to national law, there are plenty of arguments in his discourse to indicate that, at the very least, national law is affected by international to such an degree that one can not claim them to be two separate legal systems.

Enough time can not be spent here to do Kelsen's discourse any real justice. Thus, two issues will be briefly mentioned for the sake of argument. One is that of the subject-matter of the two legal systems, which is claimed to be completely different in pluralistic theory. Basically, Kelsen states that one cannot use such distinctions as "states" and "individuals" when trying to delineate two different subject-matters. This would be because one can reduce the behaviour of states to the behaviour of individuals, meaning the leader or leaders of a state (Kelsen, 2004).

The second issue is the idea that some areas of legal interest are distinctly domestic while some are distinctly international. While this is true, it is claimed that essentially any domestic issue can be made international through, for example, a treaty. He points out that while there is indeed a difference between national and international law in the sense that one is "interstate" law and the other is "one-state" law. Following this, however, Kelsen states that "*the differentiation does not concern the subject-matter; it concerns the creation of international and national law*" (Kelsen, 2004, p.405).

Up to this point it has been made clear that there are some who believes national and international law to be fairly independent of each other and any affect that international law might have on national law is essentially an authoritative expression of national law. Then there are those who believe the two to be merely different sides of the same coin, with international law exercising more influence over national law, and perhaps even being "superior" in some sense.

This discussion is not, however, believed by everyone to be of a healthy nature. David J, Bederman, for example, states that while there is significance to the discussion, it has certain limits that must be addressed. One of these limits being that the discussion is only of relevance when we deal with domestic law. "*International law simply does not care how a rule of international law is applied in internal law*" (Bederman, 2002, p.142). In addition, Brownlie points out that the theoretical constructions that have risen due to the discussion about the relation between national and international law has been clouding the reality of the situation (Brownlie, 2003).

In response to this, Brownlie seems to be more in favour of an approach perpetuated by Fitzmaurice and Rousseau, where the notion that both legal systems occasionally operate within the same field is contested. In stead, it is claimed that each system has a field of its own in which it is supreme, and neither can be said to exercise dominating influence over the other. As a consequence to this approach, Brownlie lists three factors that affect the

subject-matter, and illuminates in part the complex relationship between the different legal systems (Brownlie, 2003, p. 53):

1. Organizational: To what extent will, or could, states submit to and apply international legislation both internally and externally? The bulk of considerations that need to be made, are in this case made up by issues like state responsibility and sanctions.
2. Proving the existence of particular international laws: If there are indeed difficulties in proving that a certain international law exists, municipal courts might turn towards national precedents, leading to an outcome that is at odds with “an objective appreciation of the law”.
3. Appropriateness of the system: It is claimed that courts in both systems will be faced more repeatedly with a situation that is more technical in nature and there is a need to determine whether a municipal or an international court is the most appropriate for the particular issue.

Initially it should be made clear that the systems do indeed affect each other, as indicated by the three factors listed by Brownlie. It is stated by Kelsen that international law is based on norms that are, to some extent, incomplete and require national law in order to be implemented (Kelsen, 2004). It is further emphasized by Bederman that the relationship between international and national law is a situation of mutual exchange, or as he calls it, a “two-way street” (Bederman, 2002).

Prior to attempting any kind of conclusion here, a few clarifications shall be made. There have been instances where the case was made that since an act was carried out in accordance with national law, international law should not be able to hand down judgement upon the individual. More specifically we could be thinking of war-crimes and the like. A number of national tribunals, as well as the International Military Tribunal at Nuremberg, would not concur with the idea that such a claim justifies war-crimes. Furthermore, there is apparently little disagreement concerning the idea that a state can not plea to be innocent of a violation of international obligation based on national law (Brownlie, 2003).

What needs to be clearly stated is that at this point the discourse accounted for here and later in the thesis lacks a sufficient analysis to provide the insight necessary to give form to the actual relationship that exists between national and international law, and what practical consequences it entails. Based on what has been elaborated on above, however, a few assumptions can be made

It is reasonable to assume that international law is founded upon norms and traditional behaviour that must necessarily have its origin, or at the very least a great part of it, in national law and national law still affects international law to a great extent (Bederman, 2002). In addition to established norms, there is a great amount of treaties that regulate interstate behaviour. These kind of multilateral agreements fall under the international obligations of a state and can thus not be breached with reference to national law, lest the treaty was in violation of the national constitution at the time of it being signed. In this sense it is also true, in accordance with Kelsen’s statement that national issues can be made international through treaties.

The conclusion must reasonably be that international law or agreements of similar status, is supreme to national law in the areas that they have been officially agreed to rule over. This is perhaps a slight modification of the monistic approach, but it makes perfect sense for us to be heading in that direction. We are after all concerning ourselves with the ICJ, which is

the judicial organ with regards to the member states of the UN. They have thus agreed to submit to the UN charter and ratified the stature of the Court. This means that while the initial legislation may indeed have been affected by national law and norms stemming there from, it holds true that any new legislation or changes in existing legislation on the national level must be in accordance with the international laws.

In summary, for this thesis it will be assumed that even if there are contesting legislations on the national and the international plane concerning the same subject-matter of the case, since we will necessarily deal with UN member states, the international legislation will reign supreme over national law. After all, at some point the member states involved have agreed to these terms, or else they would not be members (this kind of positivism is further elaborated on later as well).

### **2.3 National and international courts**

As the matter of international law was just placed in relation to national law, it would be prudent to, prior to advancing further into the other aspects of the theoretical framework, spend some time on the differences that exist between domestic courts of law and international ones, such as the ICJ. The bulk of this material will be reviewed with reference to renowned law professor Brian Z. Tamanaha, of St. John's University School of Law.

In recent decades a fairly large amount of international tribunals, albeit with rather specified fields of interests have emerged in addition to the ICJ, such as the WTO Dispute Settlement Body and Appellate Body, the European Court of Justice, the Inter-American Court of Human Rights and more. One immediate concern arising from the creation of so many judicial organs, who lack official means to coordinate their actions, is the potential for overlapping or competing interests, which could cause significant disturbances (Tamanaha, 2004 p.130).

One major difference between any domestic court and most of the international ones (with the exception of the WTO Dispute Settlement Body) is that they are based on the "recurring" consent of the parties involved. This will be elaborated on and the limitations of the system will be discussed, but suffice to say for now, the concept implies that any party involved in a dispute must agree to the idea that the court has jurisdiction, before any proceedings can take place (Tamanaha, 2004 p.130). Basically, if a nation is accused of having committed a crime, it can most of the time simply refuse to show up in court and face the consequences.

Differences in power on the international scene held by different nations affect the equality of the international legal system. Some nations might have the means and inclinations to not comply while other nations might simply be "too weak" to do the same. This results in the law being unequal in its application, and it also becomes uncertain in its application as it is dependent on more factors than just the occurrence, or discovery, of a crime (Tamanaha, 2004).

Furthermore, a seemingly sporadic creation of new treaties in various courts or through various international organizations and business endeavours creates a library of treaties that could lead to problems as far as coherence and consistency is concerned, in addition to the possibility that treaties with overlapping areas will come into conflict and cause what would be unnecessary tension and dispute. In many courts, there is a problem of transparency, such as in the WTO dispute settlement decisions, which would normally be a highly peculiar state of affairs in domestic proceedings (Tamanaha, 2004).

Also, Tamanaha mentions the potential difficulties that arise from the fact that international lawyers do not have the same kind of shared “culture” that domestic ones have, even though it is argued that this will be resolved in time. Currently, however, this is a field dominated by western tradition, a trend that must be balanced out, according to Tamanaha. He also mentions the potential problem with the idea that most courts, including the ICJ, give the parties the right to have a judge of their nation partaking in the proceedings and if none is currently a member of the judges, an ad hoc judge can be appointed. Studies have shown that ad hoc appointed judges more frequently judge in favour of their nation (but not exclusively). The notion that a judge should be unbiased is given a peculiar handicap, due to this form of proceeding (Tamanaha, 2004, p.134)

The points accounted for above would seem to be more of flaws in international courts rather than differences with domestic ones. It is, however, stated by Tamanaha that these problems can be handled, or at least “massaged”, and are thus not his primary concerns. Rather, his main concerns seems to be that the international legal community does not satisfactory reflect the shared interest of the international community, as shown by what he calls blatant self-interest and hypocrisy in the west (Tamanaha, 2004), although we will not elaborate on that here.

To summarize, many international courts, in their various forms, lack coherence, consistency, transparency, equality and coordination. There is also the lacking legal culture, which is under development, and a peculiar way of treating the idea that judges should be unbiased. Furthermore there is naturally the fact that there are no real means to enforce judgments, as the parties involved are primarily sovereign states.

It is also true, however, that most of the matters addressed are not beyond repair or reform. As such this is merely the current condition of most of the international courts and it would be unwise to primarily see the flaws in the system, as it is compared to the domestic ones which can be argued to be fundamentally different (since one deals with what is happening inside one nation and the other with what has happened between nations). Rather, this will be used as material for the discussion later in this thesis, when the role of the ICJ as well as expectations, potential and so forth, will be addressed. Initially we should be able to see that there is room for improvement.

## **2.4 The relation to sovereignty**

While it is true that sovereignty did originally mean “of the highest order” it can hardly be said to be the case in modern international politics. It is continuously challenged by factors of globalization, increased trade, communication and the like. Furthermore, in this context some concessions can be made as to the width of the discussion and simplify the framework within which we tackle the issue.

A recurring concept in the field of international law is “sovereign equality” of states. Basically this principle boils down to the idea that every state is equal on the international scene, regardless of territorial, economic or military size (and whatever other differences as such one might come to think about). It is a sort of “one vote per state” concept (Lowe, 2007).

Lowe points out that this concept is “fundamental and unshakeable” in theory, but once we leave the theoretical and direct our eyes towards reality, the idea is “baseless and with few meaningful consequences in practice” (Lowe, 2003, p.114). Essentially this means that while we can apply the principle of one vote per state in international organizations where

we seek to decide matters through consensus, there are not that many situations where it is useful. This is because equality is a something that matters chiefly in a democracy and there is no such thing as a democratic system on the international level. In addition to that we can say that there is certain value to the idea that every state is equal in a judicial sense, but there are neither states nor academics that hold any delusions of actual equality amongst states. This is consistent with the previous statement of Tamanaha, concerning the unequal application of international law, due to power-differences on the international scene.

The idea of sovereign equality was established in the drafting of the UN charter (although it first appeared in the Moscow Declaration of 1943). It was as this happened in the post-World War II years, that sovereignty in its traditional meaning became subject to a number of changes. In the 1930's, there were still quite a few academics that did not hesitate to define sovereignty as "a highest, exclusive, irresistible and independent power of a state". In contrast, today, there are plenty that argue the non-existence of such a power whether we turn to theory or practice (Walker, 2003, p.125).

The mention of sovereign equality in the UN charter signalled great change for the role of sovereignty, even though attempts were made to limit the appearance of this change. States (at the very least those who joined the UN) shifted from traditionally sovereign states into a form of organization with a number of international legal obligations (Walker, 2003). As such, it should be duly noted that we will now turn away from the traditional notion of sovereignty, which still very much lingers on, that states are "of the highest authority" in any meaningful sense.

Hans Kelsen once defined sovereignty as follows:

*"[S]overeignty of the State, as subjects to international law, is the legal authority of the State under the authority of international law... [T]he State is then sovereign when it is subjected only to international law, not to the national law of any other State. Consequently, the State's sovereignty under international law is its legal independence from other States"* (Walker, 2003, p.129).

As such, sovereignty is not some sort of natural phenomenon that is inherent in every state, but a set of rights that is handed down to the state in accordance with international law. Furthermore, sovereignty is not a "static" concept, as the substance of international law has changed and, presumably, will change again.

It was previously noted that Hans Kelsen leaned towards the monistic camp of international law, and thus we might expect pluralists to have a problem with this chain of thought. There is, however, one rule in particular that we can use to support the above definition, and this is even a rule that has been pretty much universally accepted, even if it is broken more often than we would like it to be: The rule that a state can no longer arbitrarily wage war. The decision is strictly left to the Security Council (the exception, of course, being that of self-defence). The act of waging war has been the most clearly identifiable characteristic of a sovereign state. Therefore, we would expect the idea that it is, at least in western political culture, politically correct to condemn war. This means signalling that this is an accepted limitation to traditional sovereignty. Consequently, we can not be far off when we define sovereignty in relation to a set of rights and obligations stipulated by international law.

Before reaching a conclusion on this subject, it is important to notice that there are indeed strong lingering effects of the traditional sense of sovereignty, and the concept of war is still closely linked to this. It has been called "the untamed side of sovereignty" and refers to the idea that while sovereign equality has some impact and is widely accepted, at least in

theory, sovereignty in a more traditional sense is still influencing international conduct behind the scenes. This in spite of the attempts by the UN charter to create an international constitution that would be less volatile due to the fickleness of states that sometimes have good intentions, and sometimes less good ones (Walker, 2003).

What conclusions can be drawn from what has been accounted for thus far? It should be obvious at this point that the extremes can immediately be eliminated from this discussion: there is no longer any state that is “of the highest authority”, but likewise there is no state that is completely controlled by the framework of international law and the legal obligations that it entails.

To be perfectly honest, international law is just the manifestation of a set of circumstances that influence (if not govern) the behaviour of states. While this can be true about plenty of domestic laws as well, it can be said that it is not the laws or obligations themselves that encourage states to act in accordance with them, but the potential repercussions that breaches of them may have. It is not unreasonable to assume a state to worry about being internationally antagonized or losing trade opportunities because of “inappropriate” behaviour at the world scene.

It can be assumed that states are to a larger extent, now more than ever, affected by the conduct and the procedures of the international society and have several reasons to comply with international law (not just the fact that they have at some point agreed to do so). This essentially eliminates the possibility that a state is completely sovereign with the potential to act arbitrarily, neither domestically nor internationally.

Nevertheless, the potential fickleness of states should not be underestimated. Especially in this field of study, being the International Court of Justice. It is still a brand of justice that is based on consent. This will be dealt with in greater detail in chapter 3, but since the premise of any contentious case in the court is based on the fact that both parties in dispute must consent to being subject to the ruling of the court on a case-by-case basis, the state can still exercise an old-school form of sovereignty by simply not wanting the case to go to court (this is disregarding other forms of conflict-management, but since we are not dealing with them, it makes sense to stop here). Ultimately the only argument plausible here is that states are at the complete mercy of international law and the rulings of the court, well after they have had a chance to consider the “risks”, and agreed to them.

## 2.5 Compliance

Up until this point it has been established that sovereignty, despite the modern development of international organizations such as the UN, the EU and any number of treaties that must be considered as legally binding, is still lurking around in the background. This provides a certain degree of, perhaps, unsettling potential for unpredictability and destructive behaviour. Sovereignty is of course not all bad, or one would be inclined to think that it would no longer be a part of modern international politics or have already dragged us down into the abyss with it. It does, however, beg the question of compliance. Why do states comply with international regulations, if they could actually choose not to?

This question will not be entertained for too long, as it actually does not seem to be that complicated, once we examine the fundamentals of the issue. In doing so, we turn to Vaughan Lowe, who states that most nations obey most laws most of the time. “*My guess is that the extent of compliance with international law is in fact significantly higher than the extent of compliance with many, perhaps most, national legal systems*” (Lowe, 2007, p.20).

According to Lowe, the issue boils down to two separate questions: why *do* states comply with international law most of the time, and why *should* they? Starting with the first, and more influential, question, we can say that there are two main reasons why states do comply with international law:

- The laws suit them
- It is usually the safest option

The first point adheres to the fact that international law stems from treaties and customary international law; they are not imposed by some sort of supra-national or superior institution. Treaties are basically contracts, meaning that the state goes over the terms of the contract in order to weigh the potential benefits with the potential downsides, since every situation like this includes a give and take element. Hence, if they chose to sign the treaty, making it binding once signed, it means that they have decided that the benefits outweigh the drawbacks, and are thus not just legally obligated to “keep their word”, but very much inclined to. Roughly the same kind of argument applies to customary law, as they are patterns that offer a certain amount of security in the dealings with other states. They are not really “made”, but derived from this kind of consistent behaviour and eventually comes to be assumed as a given and since states have, in a sense, contributed to forming this behaviour, there is more often than not an incentive to simply go along with it. In consequence: the laws suit the states (Lowe, 2007, p.19).

The second point, that it is usually the safest option, really does not need much elaboration. The acts of states are the acts of the individuals that have been selected to lead it, and thus most of the ones we are concerned with are normal people trying to keep their job. Most people are not willing to take a chance on an act that has the potential for great pay-off, but is illegal. It is always a good response to say that a certain policy was formed and implemented because it was in line with international law, and is thus simply necessary and the right thing to do (Lowe, 2007, p. 20).

Why, then *should* states comply? This is really a peripheral question that is relevant but not of significant influence as we have already determined why states *do* comply, and there are not too many who spend time on the underlying theoretical reasons for this. Nevertheless, it deserves some brief mention here. It will also reflect somewhat on previous argument mentioned in this thesis; that states at some point *agreed to comply*.

This is referred to as positivism, and is signified by the idea that people (and states) are subjects to the law by effect of consent. Historically the power of the king and whatnot was derived from the notion that he was put in place by God. Thus, an attack on the king’s messenger was an attack on the king, which is an attack on God. As time went on, this more “natural” notion of authority and subjugation came into debate, as more and more political philosophers advocated that people should only be subjects to the law since they have consented to it (Lowe, 2007, p. 26).

This positivistic train of thought found its way into international politics. It is argued that states should comply with the international law that is derived from customary law, as they have contributed to the formation of this custom. Hence, they have, even if not explicitly, agreed to the laws and even aided in forming them. The same holds true for treaties, of course. There was some amount of debate arising in relation to this, mainly as new states formed from the remnants of old ones, like the Soviet Union. They were given the formal choice to accept the international rules, as they had not technically been part of the forming

earlier, but there was hardly any doubt that these new states would not willingly turn into antagonists of the system. There would be little benefit in such a situation (Lowe, 2007).

The arguments for why states do and should comply are very closely linked. One can say that they do because they should, and they should because they have done. This is all rooted in conduct that can be traced back to actions that were in the best interest of the states.

As a consequence states are likely to not only follow rules, but that they perpetuate a pattern of expected behaviour that maintains a certain degree of stability and compliance with international law. As stated, it is usually in their best interest to do so.

What this must inherently mean, is that a state can act against international doctrine, if they deem it to be in their best interest, as long as they can find some form of argument to support it, sometimes not even that. Even if international law is based on custom and consent, there is nothing to suggest that consent will prevail in situations that are of great international importance, as they are typically the ones charged with the most disagreement. It will become clearer just how important consensus is when further examination the International Court of Justice is discussed.

## 2.6 Summary

After going through what can be understood as some of the most important elements of international law and the relationship with states, the below list of the most important attributes should be kept in mind as we give the ICJ a closer look:

- National law does not hold superiority over international law or signed treaties.
- Sovereignty of a state is explained as the right to remain independent from other states.
- Rather than sovereignty, we will most of the time speak of and think about various international rights and obligations.
- Through the forming of customary law and signing of treaties, not the mention joining the UN, it will be assumed that all states involved have accepted the responsibilities they entail and are *required* by law to comply with international legislation. Hence, claims to sovereignty or the like is not accepted as an excuse to breach any form of agreement or legislation. Particular circumstances are required.

The above sections are vital for the understanding of the workings of the Court as well as the potential it has. With Goldmann's programme as the guideline for future potentials of the court, it is necessary to start with the fundamentals of international law. When looked upon as a whole, the discourse above on the relationship between international and national law as well as sovereignty and compliance, offers all the necessary building blocks. Since it has been defined what international law is, what national law is, as well as the indication that states are likely to comply with a law once participating in its development, further discussions are possible. This is because the above sections offer the means to explain what derive potential functions of the ICJ, as well as plausible ideas concerning the role of sovereignty.

## 3 The International Court of Justice

With the signing of the UN charter the ICJ was established as "the principal judicial organ of the UN", and formally began its work in 1946. Prior to this the role of an international

court with general jurisdiction was filled by the Permanent Court of International Justice. Naturally, it was not that permanent as it was replaced by the ICJ when it began its work (ICJ, 2009).

In this section of the thesis no particular attention will be paid to the structure of the court, its various chambers and committees or compilation of judges, apart from what might be mentioned as the ICJ stature is examined. After all, the interest at this point is not so much how they do what they do, but what exactly that is.

### **3.1 Function and statute**

Chapter XIV of the United Nations charter describes the general purpose and role that is supposed to be filled by the International Court of Justice. Article 92 states the following:

*The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter (UN, 2009).*

Apart from this the charter does not go into any great detail as to the general procedures of the court. In articles 93 through 96, it is merely stated that all members of the UN are subject to the court and have an obligation to comply with decisions in cases of which the member is a party. In addition, it is stipulated that the court can, upon request, supply the General Assembly or the Security Council with legal opinions. What might be worthy of brief mention is article 95, which grants member states the right to seek a solution to whatever problem they might be faced with in other forms of arbitration, such as another tribunal, if they exist “by virtue of agreement” (UN, 2009). Whether this is of much practical consequence to the amount of work the court puts in or the influence it can be expected to exercise is not a part of this thesis. What should be kept in mind, however, is the fact that not all legal disputes are handled by the ICJ, despite its status as principal judicial organ.

In essence, it is in the stature of the court that the articles that define the how the court is supposed to be organized as well as what it is supposed to actually do are found. In defining these matters, the statute is divided into five chapters, with the initial Article 1 being placed outside them, as a sort of chapter-less introductory article. This is the case since it merely states what Article 92 of the UN charter has already stated. The statute is compiled as follows (ICJ, 2009):

- Chapter I: Organization of the Court (Articles 2-33)
- Chapter II: Competences of the Court (Articles 34-38)
- Chapter III: Procedure (Articles 39-64)
- Chapter IV: Advisory Opinions (Articles 65-68)
- Chapter V: Amendments (Articles 69 & 70)

At this point some initial conclusions relevant to the purpose of this thesis can be drawn, by simply looking at the above list of chapters, or more specifically, the articles. It can immediately be observed that the greater portion of the articles has been dedicated to the organization and the procedures of the court. Chapter I offer a fairly elaborate explanation of what is required of the judges of the court, pertaining to the characteristics of the individual, how he/she is to be chosen and the conditions of the job. Any details of the first chapter would at this point be, quite frankly, a waste of space. Suffice to say, if one had memorized this chapter, one would be knowledgeable in little more than the hiring procedure, working conditions and that members of the Court actually get paid for what they do. This

is of course not irrelevant in the larger scheme, but for my immediate intents and purposes of little interest.

The other large piece of the statute then, Chapter III, deals with the procedural matters. Basically it elaborates on matters ranging from which language a case is to be dealt with to how the decisions are to be taken. This is very much like the first chapter, in the sense that it is worth mentioning but its content is of little or no relevance as we neither deal with the organization of the court nor the procedures through which it seeks to resolve cases as our primary field of interest. Chapters IV and V are of even less interest at this point, merely stating when and how to ask the court for a legal opinion and what the court should do if it feels changes or additions need be made in the statute.

Those with a near immense ability of deduction have thus far realized that the chapter in which we are interested is Chapter II: Competences of the Court. The purpose of mentioning the other chapters, chiefly I and III, was to show that great attention has been paid to create a fair and efficient organizational structure to resolve disputes.

Chapter II consists of five articles, Article 34-38. While there is no need for us to go through all of them in detail, there are a few paragraphs that we should pay attention to. Article 34 declares that only states can be parties in a case that is brought before the court (ICJ, 2009). This makes it perfectly clear that the influence of the court is limited to that of problems that pertain to state-state issues. This means that while there are crimes considered so gruesome that they can be called crimes against humanity, which typically fall at the hands of a few individuals, the International Court of *Justice* has no jurisdiction.

Article 36 goes slightly more into detail about the jurisdiction of the court. Paragraph 1 states: *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force* (ICJ, 2009).

Paragraph 2 elaborates on the areas over which every member state shall, by consequence of membership and the acceptance of the other party in the case, recognize that the court has jurisdiction (ICJ, 2009):

- The interpretation of a treaty
- Any question concerning international law
- The existence if any fact which, if established, would constitute a breach of an international obligation
- The nature or extent of the reparation to be made for the breach of an international obligation.

Article 36, paragraph 6, further explains that if there is a disagreement as to whether the ICJ has jurisdiction or not, the matter shall be settled by the ICJ itself. This would mean that while paragraph 1 states that “*the jurisdiction of the Court comprises all cases which the parties refer to it...*” it is subject to the condition that there is no other form of tribunal or treaty that makes other instances of arbitration more appropriate.

Article 38, paragraph 1, basically concerns which sources of law that are to be applied when seeking to resolve a dispute (ICJ 2009):

- International conventions, whether general or particular, establishing rules expressly recognized by the contesting states.
- International custom, as evidence of a general practice accepted as law.

- The general principles of law recognized by civilized nations.
- Subject to the provisions of Article 59, judicial decisions and the teachings of the highly qualified publicists of the various nations, as subsidiary means for determining of rules of law.

Paragraph 2 states that if the parties involved agree to, the judges of the ICJ can basically put the first paragraph aside and decide a case “*ex aequo et bono*” (ICJ, 2009). This essentially refers to the idea that a case is resolved on the basis of what the arbitrator considers to be “fair” in this particular case.

In summary, the premises from which the ICJ can chose to accept to arbitrate a case and what the reference material is for solving the dispute, have now been elaborated on. A few things are thus clear. Like the case with international customary law, the influence of the court is very much subject to the will of the parties involved. Any decisive power the court might hold cannot take shape until the parties involved has agreed to be subject to it, essentially meaning that the nations of the UN have to agree *twice* to be subject to the court prior to actually being just that. This is meant in the sense that it was agreed upon once a nation joins the UN, constituting the first time the nation agreed to be subject to the decisions of the court. The second time would be when the parties actually bring the case before the court, most likely after having determined that it is the most beneficial solution to the situation.

At the very least, this holds true for the party instigating the procedures (it is not uncommon for one of the parties to immediately question the if the court has jurisdiction or not, effectively seeking a way out of the proceedings) and any nation that might be affected by the courts ruling but not a direct party, as the decision is only binding on the parties involved in the specific case, and any nation that chooses to intervene. This is in accordance with Article 59 of the Statute (ICJ, 2009). Furthermore, while it is unclear as to how great an influence this grants the accused state, the case is not entered into the General List of the Court (which is the list where the cases dealt with are registered) until that state has “consented to the Court’s jurisdiction for the purposes of the case”, according to Article 38 (5) of the Rules of Court (ICJ, 2009). In consequence, it seems the court is a tiger, but it only has teeth when those involved with it wants it to.

## 3.2 Performance

It is thus finally time to look at the actual track record of the ICJ. In this chapter a general overview of the cases which the court has been presented with will be given. Initially, however, there are a few issues concerning the statistics we will be reviewing that need to be explained in order to fully understand the circumstances under which the discussion will be carried out.

Since the first case in 1947, concerning an incident in the Corfu Channel, over a hundred cases has been brought before the court. In addition to this, the court has on several occasions been asked by the General Assembly or the Security Council to give its legal opinions, so called Advisory Opinions. These, however, will be completely ignored in this thesis, as they are merely requested opinions and not a situation in which the court decided what is “right and wrong”.

The cases, or as they are referred to in general, contentious cases, are the centre of attention. The information was compiled from the information available on the ICJ official website, as of April, 2009. On the list of contentious cases, however, is also listed the cases

which the court found was not in its jurisdiction. While they have for some reason been listed in the case history, they are not included in the numbers that have been used here. This is because they are not considered to be part of what the Court deals with, as it is the very opinion of the Court that it has no jurisdiction, and consequently, nothing to do with it. After reviewing the list on the official website, we can determine that since 1947, stretching until 2009, there has been a total of 16 cases dismissed by the court, on the basis of a lack of jurisdiction.

After going through the list and, as stated above, removing the cases that were not handled by the court due to jurisdictional inadequacies, 101 cases are relevant here. Below is a staple diagram showing the cases on five-year intervals. Note that they have been categorised according to the year that they were officially brought before the court.

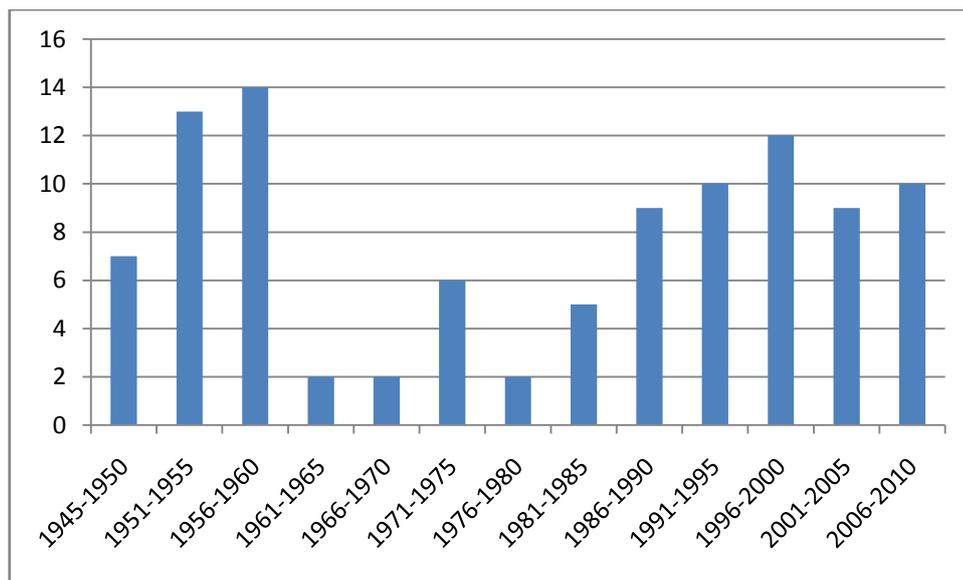


Chart 1 – Cases in the ICJ per 5 years

While there have naturally been variations in the frequency of cases, there is no specific year that stands out. It could be interesting to mention, however, that this is due to the restrictions placed on the cases in order to be relevant to the purpose of this thesis. More specifically, it is because cases which were deemed to be outside of the courts jurisdiction are of no interest at this point. If, for a second, the idea that such cases should be included in the numbers is entertained, 1999 is the unquestionable winner. This is as far as number of cases brought to the courts attention is concerned, with 17 cases. Out of these, however, as much as 11 were found to be outside of ICJ jurisdiction. It might also serve to mention that most of these cases were essentially the same, initiated by the same country but with several other countries on “the accused side”, so to speak.

This is because in any one case there can only be two countries involved. As such, any party that feels it has been wronged by more than one other part (nation), have to submit several cases on the same basis, which are listed separately, but considered jointly. This adds to a slightly longer list of cases than if we were to consider them as one.

Hence, there have undoubtedly been busy years, with as much as six cases handed in some years, and years where not a single new case was presented to the Court. This is not to say that the court has not been busy, as many cases are complex and often take several years to reach a definite conclusion. For example, the Oil Platforms case (Islamic Republic of Iran

vs. United States of America) was registered in 1992, but did not receive a final official judgement until 2003.

### 3.3 What kind of cases are there?

As implied by the heading above, we are about to deal with what sorts of cases the court has been dealing with. A cursory review of the cases has earned them placement in one of five categories. However, the following categories have not surfaced in any previous literature. This is perhaps not surprising, given the lack of relevant literature. As such, these five categories have been formulated for the sake of this thesis to offer an appropriate system of categorising the different cases handled by the court. They are very much necessary in order to draw some form of general conclusions as to what has been occupying the Court's attention. They are as follows:

- *Incident* – While this is not a common occurrence in the case history, it is of great interest. This category basically pertains to cases in which there has been an “incident” between two or more countries, whose circumstances are somewhat more charged. Typically these are more violent in nature, concerning the destruction of infrastructure or loss of life, such as the Corfu Channel case of 1947, where an explosion in Albanian waters resulted in “the damage and loss of human life” to the United Kingdom (ICJ, 1949).
- *Treaty* – As implied, this category is about ambiguities or disagreements about earlier signed treaties. Basically, the parties involved in a treaty have in this situation sought to receive the judgement of the court as to the proper interpretation or application of a treaty, or if it is at all still in affect.
- *Sovereignty issues* – This one is pretty straight forward, as the issue is typically about which nation has the right to exercise sovereignty over a geographical area, such as an island, or what right other countries have in certain areas. Included here are cases which pertain to maritime borders or fishery jurisdictions, that is, where a country can legitimately send its fishing fleet.
- *Discontinued* – These are essentially cases that were brought before the court, but no real binding judgement were typically delivered. Unlike cases where the court found that it has no jurisdiction, these cases were accepted by the court, but where discontinued, aborted, so to speak, on the request of the parties involved. As we shall see, they are surprisingly numerous, which is why it was decided that they deserve a category of their own.
- *Other* – A self-explanatory category, I feel. While cases in the other categories have plenty of variations in their details, they could with some ease be assigned one. This final category is thus composed of cases that were somewhat too ambiguous in their nature and details to assign into another category. There are cases about unjust treatment of foreign nationals, illegally ceased assets, or resources that have ended up “in the wrong hands” since before and during World War II.

Now that the definition of the categories and their content has been accounted for, the distributed in the hundred and one cases relevant here, can be examined.

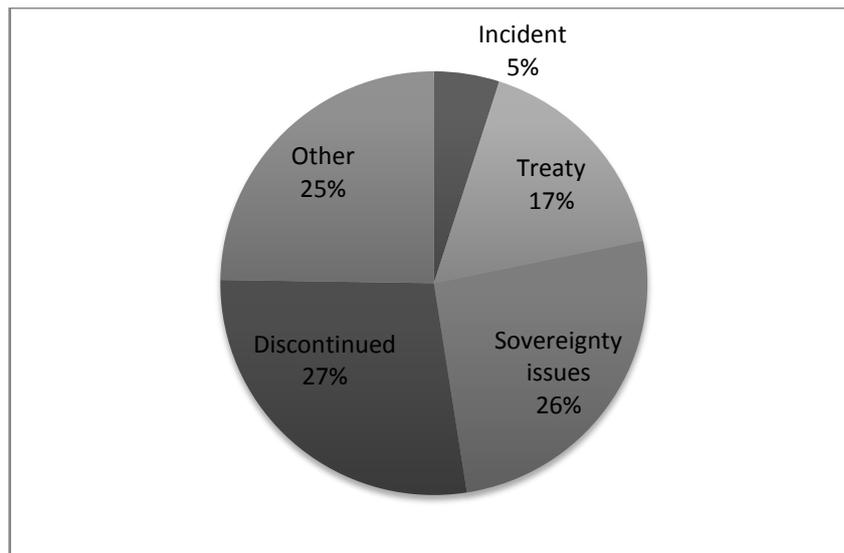


Chart 2 - Areas the ICJ cases concern

Note that in the category “Sovereignty issues” is not included the more war-like situations that one might think could occur when sovereignty is the issue. In other words, there are no cases concerning any form of armed violation of a nation’s sovereignty (things like that are more likely to have been included in the “incident” category, but none of the cases have ever seemed to be of a pressing enough nature, to risk a larger scale armed conflict). Rather, this category is made fairly large because of the incorporation of maritime disputes, as they were deemed to concern what countries can or cannot do in certain areas.

Since the category “Other” is more flexible in its span of cases, it is not of such a great surprise that it is found at a neat 25%, and perhaps the mere 5% of “incident” cases should be seen as surprisingly positive. Treaties, too, are fairly wide in what the actual contexts of the cases are.

What should be of greater interest is that the discontinued cases reach a noticeable 27%, meaning that more than a quarter of the cases brought before the court are cancelled, in the vast majority of cases, before a binding verdict is delivered by the court. There are even cases where there is an actual judgment published, but the case is none the less listed as discontinued and summary removed from the courts list. It is unclear at this point whether this implies that the parties involved are obliged to abide by the judgment, or if they “pulled the plug in time”.

This makes for a topic of discussion fertile for speculation. It could be argued that the court is, in these cases, used as a form of pressure. In other words, if there is a situation that does not seem to go anywhere, one of the parties involved submit the case to the court and the second part would be inclined to support the case being submitted (although it has not been unusual for one of the parties to question the jurisdiction of the court from the offset), in order not to appear as the “bad guy”. Should it then at any time appear as if the court is going to deliver a less-than beneficial judgment, there are greater incentives to renew unofficial efforts to solve the dispute. Perhaps other form of political pressure has been used by one side to coax the other into agreeing to request that the case is discontinued.

That is, of course, intentionally pessimistic. It is perhaps just the case that a solution was found as the case was accepted by the ICJ, and there was no further need to waste the

Court's time. As stated, these are merely speculations but present an interesting area of discussion, one which would hope become more substantiated in the following chapters.

## **4 Case studies**

At this point any meaningful conclusions about the performance and the conduct of the court cannot be made, beyond mere numbers. What follows will be a more in-depth review of a few select cases.

Basically, a case has been selected from each category in order to closer examine the characteristics that the cases have. Naturally certain concessions must be made as the cases cannot be expected to be exactly similar in enough aspects to make perfect generalizations and draw impeccable conclusions. As a comfort, one can say that this holds true for plenty of other subjects as well.

Nevertheless, these cases that will receive a closer look, shall serve as a means to gain a better understanding of the nature of the cases dealt with by the court. It is here that we shall hope to find vital pieces of the puzzle to the meaning of the courts work.

### **4.1 Incident - Oil Platforms**

In short, this case was selected due to the potentially hazardous situation that it was. As shall be seen once the case details are elaborated on, it would appear that there were several situations when larger conflicts could have erupted. Thus, this case makes for an interesting example of what kind of incidents that have been and the potential danger that they entailed. This is further elaborated on in the analysis chapter.

On November 2<sup>nd</sup>, 1992, the Islamic Republic of Iran had its application to institute proceedings against the United States of America filed with the Registry of the ICJ. In the application, it was claimed that the US had violated a treaty between the two nations, signed in 1955, referred to by Iran as the Treaty of Amity, as US warships had attacked three Iranian oil complexes in October of 1987 and in April of 1988 (ICJ, 1992).

Essentially, the basis was two-fold: Article I of the treaty states that "there shall be firm and enduring peace and sincere friendship between the United States and Iran". Furthermore, Article X(1) states that "between the territories of the High Contracting Parties there shall be freedom of commerce and navigation" (ICJ, 1992, p. 5). The arguments were consequently referring to the hostile act of destroying the platforms as well as the damage this did to the commerce between the nations, as was referred to by the 1955 treaty. Hence, Iran requested that the court judge that the US was indeed in violation of the treaty and international law, and put the US under the obligation to make reparations (ICJ, 1992).

To counter, the US claimed that the acts were carried out mainly in self-defence. The attacks were supposedly responses to incidents that the US accredited to Iran in 1987 and 1988. In April 1987, a Kuwaiti tanker, which had re-flagged to US colours, was struck by a missile near a Kuwait harbour. Following this, the US attacked the first Iranian oil complex a few days later. The second incident that spawned an attack was the mining of the warship USS Samuel B. Roberts, which struck a mine in international waters. A few days later the US destroyed two more Iranian oil complexes (ICJ, 2003).

While the US also made the claim that they were acting in self-defence, both parties were essentially pleading that the other were in violation of the 1955 treaty. It thus came upon the Court to decide what the impact of the attacks, from both sides, had on the commerce

that took place between the parties as well as what might have constituted a proportional response or self-defence, from the US in response to the attacks that Iran was supposed to have carried out.

Let us first deal with the aspect of commerce. The treaty of 1955 basically deals with commerce between the US and Iran. As such, it was claimed that destroying the oil platforms significantly damaged any commerce taking place. It was found by the court, however, that there was no relevant commerce going on *between* US and Iran at the relevant time. One reason was that the oil platforms were not operational but rather undergoing repairs, due to Iraqi attacks. The other reason was that by executive order, the US had effectively ceased all trading with Iran. It was counter-claimed by Iran that plenty of petroleum products ended up at the US market, but the argument was dismissed, as it was essentially no direct trading in oil between the parties.

As such, one can most likely make the claim that commerce on some front was indeed damaged, perhaps significantly, but the treaty that the Court was asked to arbitrate on concerned trade between the US and Iran *exclusively*. Hence, the claim that the US had violated the treaty of 1955, in terms of damaging commerce between the parties, was rejected by the Court. The claim made by the US that Iran had done something similar by attacking the tanker in 1987, was also rejected as the court could not see sufficient proof that the vessel, or any other that might have been attacked by Iran, was engaging in commerce between the two parties. Consequently, no reparations were ordered (ICJ, 2003).

As for the claim that the US was protecting its vital security interests in conformity with Article XX, paragraph 1(d) of the 1955 treaty, as well as acting in self defence, the Court found that it could not agree with the claims. As the Court considered the idea of proportionate response, it did find that the first attack in 1987 could be considered proportionate. The second one, however, was found to be part of a larger military operation designated "Operation Praying Mantis", and could in no way be seen a proportionate (thus legitimate) use of force in self-defence. Consequently, the court found that the US was incorrect in its claim that the attacks were justified under the treaty and international law (ICJ, 2003).

In summary the court found (by fourteen votes to two) that the attacks could not be justified by the US as necessary to protect essential security issues of the US, but they could neither be seen, as argued by Iran, to have breached obligations imposed by the US under the treaty of 1955. Furthermore, it was found (by fifteen votes to one) that Iran had not violated the treaty of 1955 either, with regards to any attacks on commercial ships. Thus, there were no reparations ordered in regards to any aspect of the issue (ICJ, 2003).

It is true that the issue is riddled with references to articles in the 1955 treaty and the interpretations thereof, and one might hence wonder why this case is not under the "treaty" heading? It was deemed that since the case involves some degree of armed conflict, a larger scale military operation, loss of life (although minimal) as well as the fact that the US and Iran are not famous for being best friends, while the main reference in the case is a treaty, the issue is dense with ambiguous incidents that might as well have panned out quite differently.

This case does, however, leave a peculiar after-taste. What were the consequences? Who was the bad guy? Was there even a crime committed? The court seems to have been content with finding that neither claim was justifiable and that no form of reparations should be made. But even if an oil platform is being repaired, the fact that it was attacked remains. It was found by the court that the overall response of the US did not qualify as self-defence

and someone did in fact die during the attacks, but where does that leave us? Even if the ships were not in “relevant commerce” they were attacked, but where does that leave us? After a total of 11 years in the machinery of the UN’s primary judicial organ, it remains remarkably ambiguous, based on official ICJ records, what exactly the consequences of the case and its verdict were.

## **4.2 Treaty – Elettronica Sicula S.p.A.**

The cases in the treaty category share the very simple nature of being fundamentally reliant on specific treaties, mostly pertaining to a form of economic cooperation or trade agreement. As will be elaborated on later, this case was chosen for its near extreme complexity. As will be seen, the necessary considerations are numerous. This means that this case is more desirable to examine rather than simpler cases, in order to discuss the competences of the court and the level of scrutiny that the cases face.

In February of 1987, the US government instituted proceedings against the Italian government, for actions they were claimed to have taken, resulting in grave financial injury for an American owned company in Italy. The company in question was Elettronica Sicula S.p.A (henceforth called “ELSI”), a company that in the late 1960’s became completely owned by two American corporations and a major manufacturer of various electronic equipment (ICJ, 1987).

After some time, however, the company ceased to generate a profit and as several attempts to rectify this failed, there seemed to be little light at the end of the tunnel and shareholders were forced to consider liquidating the assets in order to minimize their losses. Discussions were held with the Italian government that sought to prevent the liquidation and keep the plant in operation, by considering making the Italian government an investor. As little progress was made, the Italian government proceeded to requisition the plant in order to prevent the liquidation of the assets. The requisition was motivated by the intent to protect general economic interest of the region, and avoid “unforeseeable disturbances of public order” (ICJ, 1987, p.5).

In spite of these claimed intentions to protect the economic state, and hence also those who would lose and had lost their jobs, it was claimed by the US application that no measures were taken to re-hire fired personnel, and at the bankruptcy auction where the agents of the Italian government were supposed to bid for the company assets, they did in fact not. No one did (ICJ, 1987). Finally in 1969, 16 months after the requisition had been initiated but a mere six weeks since any of the assets had actually been bought by a government controlled company, the requisition was found to lack legal basis and was annulled. It is therefore claimed by the American application that the requisition and prolonged process of discussion with the Italian government, and promises not kept, created a situation where ELSI sales prices were manipulated to the owners disadvantage and incurred a substantially greater financial loss than if the assets had been liquidated, due to outstanding loans to Italian banks. The bankruptcy proceedings did not close until November 1985, and from the amount generated from auctioning of the assets, there was no surplus to distribute between shareholders (ICJ, 1989).

It was thus the contention of the US that during this process, the Italian government had violated several articles of the Treaty of Friendship, Commerce and Navigation the United States of America and the Italian Republic of 1948 and requested from the Court that Italy be deemed to pay appropriate compensation (ICJ, 1987).

Initially it can be stated that one of the mayor factors in this case, the requisition, was contested by the US and was even found by the local Italian authorities to be unlawful, which is the reason why it was annulled in 1969 (ICJ, 1989). In the case brought before the ICJ, it was argued that the requisition was in violation of article III of the previously mentioned treaty (FCN Treaty), which concerns the right of the company to manage their operations as they see fit, albeit in compliance to the applicable laws and regulations of the relevant territory. Typically, it would be clear that the actions taken by the Italian government did indeed violate the right of the ELSI owners to liquidate the assets and minimize losses, and since even the Italian authorities found the requisition to be unlawful, the case would seem clear.

The ICJ judged, however, that ELSI did not, prior to the requisition, have plausible means to carry out the orderly liquidation as it was claimed and might even already have forfeited the right to do so under Italian law. As such, it was deemed that the requisition did not actually deprive them of the control needed to do this, and hence the claim that Italy violated article III was dismissed (ICJ, 1989).

It was also claimed that Italy violated Article V, paragraphs 1 and 3, which is a matter that boils down to whether the local law that was applied in this situation discriminated against US nationals. In combination with this it was further claimed that the long time it took to closer examine the requisition and deem it unlawful, 16 months, also violated Article V and contributed to the losses sustained by the US party. The Court claimed, however, that discriminatory treatment was not sufficiently proved and with reference to the judgement regarding Article III and the possibilities ELSI could reasonably be expected to have, the following claim was also dismissed. Neither was any claim that the Italian authorities failed to protect the property of ELSI as employees were allowed to occupy the plant during the requisition sustained by the court (ICJ, 1989).

Paragraph 2 of Article V was also claimed to have been violated, on the basis that US-owned property was unlawfully seized and no compensation administered. This issue suffered, however, from differences in the terminology of the Italian and US version of the treaty, and it was eventually deemed that the claim could only be sustained if the requisition caused the bankruptcy, which it was previously found that it did not (ICJ, 1989).

Finally, it was argued by the US application that Italy had also violated Article I of Supplementary Agreement to the FCN Treaty as well as Article VII of the FCN Treaty. The just mentioned Article I refer to impairing management and legal rights, as it was in fact judged by the Prefect of Palermo and the Court of Appeals of Palermo. The ICJ judged, however, that a breach of local law does not entail a breach of international law, and the claim was dismissed, as they did not find the actions of the Mayor of Palermo, who had initiated the requisition, to be “arbitrary”, which was deemed to be a vital factor in this issue (ICJ, 1989).

Article VII is about the right to acquire as well as dispose of immovable property of interest in the nation of the other contracting party. Here the ICJ also found discrepancies in the phrasing used in the two different versions of the Treaty (the US and the Italian one), and there were some difficulties as to exactly what rights the treaty was about. In the end, this issue suffered from the same difficulties as did the claim as to Article III. Basically, the course of the company and its possibilities had already been determined prior to the requisition and it could thus not be reasonably argued to have solely caused the damage claimed (ICJ, 1989).

In the end, all claims by the US party of violations of the FCN Treaty of 1948, were dismissed by the Court, although not unanimously. This is one of the more complicated cases in the ICJ case history. To make an informed decision across the board on these issues, one would need great knowledge of economic theory, as with regards to what possibilities the ELSI did or did not have. Furthermore, the issue concerned different interpretations of the Italian as well as the US version of the FCN Treaty, and what differences might have occurred as it was translated into the respective language. There was also the interpretation of local law versus international law, the intentions of local power holders and the state of international standards of security and protection of property. In short, it is not surprising that the Chamber of the Court which delivered its judgement could not reach a unanimous decision, despite only being composed of four judges.

Once again, the actual outcome of the case is unclear. Naturally, the Court fulfilled its role in settling the issue between the contesting parties, or more specifically, making it somewhat clear that there is in fact no issue as no breaches of agreements had occurred after all. As to whether the Courts decision had any effects worth the trouble, we can not say with absolute certainty. It is true that this process could have highlighted potential flaws or the like in the relevant treaty. Still, one might also feel that the Court has, in this particular case, not been so much an adjudicator in a crime, as it rather seemed to fill a function in the form of a mere treaty interpreter and scrutinizer of complex details, which the parties themselves did not fully understand.

### **4.3 Sovereignty Issues – Right of Passage over Indian Territory**

In this case the potential dispute that can arise between two sovereign nations, even though not enemies, are made fairly clear. It has been chosen because of the several different arguments with respect to each party's sovereign rights that can be adopted. It also indicates that sovereignty issues are not always as easy as determining which nation "owns" what particular geographic area. Furthermore, arguments as to the potential role can be clearly derived from this case, as will be explained in the coming analysis.

In December of 1955, Portugal initiated proceedings against India, claiming that India had denied Portugal their rights to pass from the Portuguese territory of Damão to the Portuguese territories of Dadrá and Nagar-Aveli, completely surrounded by Indian territory. It was claimed that those areas in the Indian peninsula create the legitimate enclaves of Dadrá and Nagar-Aveli, which Portugal thus have a right to pass through Indian territory in order to get to as well as pass between. It was emphasized that Portugal nationals as well as officials had passed through Indian territory, by virtue of a 1779 treaty as well as custom and general international law. Thus, such passage had supposedly been going on undisputedly for about 200 years (ICJ, 1955).

In 1954, however, previously mentioned enclaves were attacked by armed bands originating from India and subsequently occupied by them. At this point communications with the enclaves was effectively cut off by India, and it is now that the refusal to allow Portuguese officials, or more specifically armed Portuguese forces, passage to reach the enclaves (ICJ, 1955).

As a result of this violation, by India, of the 1779 treaty as well as custom and international law, it is claimed by the Portuguese that the enclaves remain at the time of the application cut off from the rest of Portugal, and rendering Portugal unable to fulfil its duty and come to the rescue. Hence, Portugal sent the application to the ICJ, requesting the court to deal

with the issues as to whether Portugal has the right of passage, if India had violated its obligations under international law and custom and if India should cease the blockade of Portuguese armed personnel (ICJ, 1960).

The final judgment by the Court was delivered in April of 1960, after dealing with preliminary objections to a judgement delivered in 1957. A total of six preliminary objections were delivered by India, all which were rejected by the Court. As for the question if Portugal had a right of passage over Indian territory at the time, being 1954, the Court found, by 11 votes to 4, that such a right did in fact exist. For Portugal, however, this was a good-news-bad-news scenario. It was found that Portuguese officials and national had this right, but armed forces and transports of munitions were a different matter entirely (ICJ, 1960).

It was found by the Court, based on a number of previous treaties between Portugal, India and Britain that military forces and arms had not been subject to the same historically lenient rules as civilians. Military passage or munitions export were most of the time subject to special license or authorisation by relevant authorities received prior to actual movement or transport. As such, the Court was forced to judge in favour of India, as it did not seem to be the case that preventing Portuguese forces passage was in violation of treaties or custom, but rather in conformity with them (ICJ, 1960).

Likewise, the Court did not find that India was in violation of any of its obligations under international law. For that to have been the case, it would have been necessary for India to have an obligation to adopt a certain attitude towards the parties that caused the unrest in the enclaves. It was maintained by the Court that it was actually never asked to decide whether India's attitude in this case could be interpreted as a violation of general international law. In the end, Portugal did have the right of passage, but it did not extend beyond unarmed civilians and typical goods. Furthermore, India was not in violation of any form of obligation under international law. That being said, the right of passage for civilians in 1954 was granted by 11 votes to 4, while the other two issues, stopping armed Portuguese forces and breaches of international obligation on India's part, was rejected by 8 votes to 7 and 9 votes to 6, respectively, indicating some ambiguity in the issues (ICJ, 1960).

Our role here is not to question the seriousness or the difficulties inherent in this issue. We can, however, raise some questions as to the perhaps overly limited role that the Court played once the case was actually at its desk. The decisions made on the issue that were at the table can not be challenged, as the case can not be investigated to a satisfactory degree here. It is not unreasonable, however, to wonder about the actions taken by the court when presented with this situation: The sovereignty of the Portuguese areas to which armed forces were denied passage, was never questioned. Would it not be reasonable to, in this situation, wonder why India would not allow Portuguese forces to pass in order to attempt to restore order to the enclaves?

The fact of the matter is that the Court fully avoided this issue on the simple reference that it was not specifically asked to deliver an opinion on the conduct of India, aside from whether India was in violation of some treaty or not. The fact also remains that India effectively hindered any Portuguese attempts to restore order in their area. Why? The reason for India's behaviour can not be deduced through the material published by the ICJ, unless one is well acquainted with the historical context and India's political tendencies.

To summarize, the Court fulfilled its formal responsibilities, but it is not a difficulty to identify areas of ambiguity or potential improvements in how events such as these are handled. It could be argued that the Court played an overly limited role in this case, and was

forced to overlook issues that adhere to more fundamental values. For example, the sovereignty of the enclaves were never challenged, yet the right to protect them as they came under assault was effectively hindered, and the debate concerning whether this was just or not, was essentially completely evaded.

#### **4.4 Discontinued – Various cases**

At a point no single case can offer sufficient understanding of the nature of the cases to attempt generalisations. This is because they all vary too much in the details. Understanding the real nature of the cases require more time and space than available here. It can also be argued that less attention should be devoted discontinued cases, as the judgement of the Court is most likely either not reached or not in force.

Still, this is a large portion of the cases that are accepted by the Court and it is thus of some interest to see what kind of cases they were, which was presented to the Court but, sometimes very swiftly, withdrawn on the request of the parties involved. Hence, a few questions will be accounted for, very briefly.

*Aerial Incidents of 1952 & 1953 (United States of America v. Czechoslovakia & U.S.S.R.)*

During 1955 the US submitted two applications instituting proceedings against Czechoslovakia and the Soviet Union, claiming that on two separate occasions US aircrafts had been damaged or destroyed by the accused nation's combat aircraft. In the accusations against Czechoslovakia, it was claimed that a US aircraft conducting routine patrol in the US-controlled area of Germany was, without provocation, pursued and destroyed by a Czechoslovakian combat aircraft, causing injury to the pilot (ICJ, 1955).

In a similar fashion, the US accused the Soviet Union of having attacked US aircrafts close to Hokkaido in Japan, on October 7, 1952. The claim was also in this case that this had taken place with no provocation from the US forces, and that the Soviets had after the crash of the US vessel, concealed any information as to the state or location of the crew members who had yet to be heard from (ICJ, 1955).

On March 15<sup>th</sup>, 1956, however, the ICJ issued a press release, stating that the cases had been removed from the courts list. This had been done on the basis that Czechoslovakia and the Soviet Union had simply not accepted the jurisdiction of the court, and as a result, the court dismissed the case (ICJ, 1956). What is essentially exactly the same situation took place in 1959 as well. It should be noted that, naturally, the facts of the case was questioned by the accused parties as well as the ICJ jurisdiction denied.

*Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal).*

This case concerned a dispute over maritime delimitations between Guinea-Bissau and Senegal, and is peculiar in the sense that it is actually comprised of two application (and in a sense two cases), one in which a judgement was delivered and one which was discontinued, but listed under the same case by the ICJ.

The dispute concerned the delimitations made by an arbitral award of 1989, but when the judgment was delivered on this issue a new application was filed, stating that the actual delimitations were unaffected after all. The Court was thus given a new application to deal with this situation. During the proceedings, however, there were several changes in fixed time-limits and fairly intensive negotiation between agents of the parties and the president of the Court. In the end, an agreement was reached by the parties, communicated to the

ICJ president and in consequence the parties agreed that there is no need to continue the proceedings, which were thus discontinued on November 14<sup>th</sup>, 1995 (ICJ, 1995).

*Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Rwanda, Burundi & Uganda).*

On June 23<sup>rd</sup>, 1999, the Democratic Republic of Congo accused Rwanda, Burundi and Uganda of violating international law as well as gross violations of human rights as troops of the accused nations supposedly invaded Congolese territory on August 2<sup>nd</sup>, 1998. The accusations were quite serious, including massacres, rape and attempted kidnapping, in addition to the violations of Congo's sovereignty (ICJ, 1999).

Steps were taken to set the time-limits for the written proceedings with regards to the jurisdiction of the Court as well as the admissibility of the applications. On January 15, 2001, however, Congo formally requested that the case be discontinued, at which point all that was left for the accused parties were to either accept or oppose this request. Naturally, the discontinuance of the case was not opposed (ICJ, 2001).

As far as the ICJ official records are concerned there is not that much information regarding the circumstances in which this case was discontinued. Unlike the previous two cases we have looked at, there was no direct reference to the refusal to recognize ICJ jurisdiction, nor were there any clear indications that a settlement to the dispute had been reached by other means than the Court's influence. As a consequence, determining the actual state of affairs here and determining the effect of the application sent to the court (if indeed there was one), would take measures that are well beyond the scope and purpose of this thesis. After this brief glance at some cases that were discontinued, the final discussion can contain some reflections upon this.

## **4.5 Other – Various cases**

Prior to actually attempting to reach a conclusion, however, a moment will be devoted to mention some of the cases that ended up in the "Other" category. It should be mentioned that while these cases are not necessarily less interesting than previously mentioned cases, they will not be used in the final analysis or conclusion. This is because the time and space necessary to examine all the relevant details is unavailable at this time. They are primarily mentioned just to supply examples of the cases one might find in this category.

*Aerial Herbicide Spraying (Ecuador v. Colombia).*

On April 1<sup>st</sup>, 2008, it was communicated by the ICJ that Ecuador wished to institute proceeding against Colombia, on the alleged basis that Colombia had been conducted aerial sprayings of toxic herbicides near, at and cross the border of Ecuador, causing damage.

The claim is that the sprayings have already caused damage to both people and animals in the area, not to mention the environment. In its claim, Ecuador makes reference to the American Treaty on Pacific Settlement, or "The Pact of Bogotá, and requests that Colombia be deemed to compensate Ecuador for any damage or loss of life as well as any costs that might have come to be due to the toxic herbicide (ICJ, 2008).

At the time of writing, not much has transpired in this case, as the deadline for the submission of Ecuador's memorial was set to April 29<sup>th</sup>, 2009, and the counter-memorial by Colombia to be handed in no later than March 29<sup>th</sup>, 2010.

### *Asylum (Colombia v. Peru)*

On January 3<sup>rd</sup>, 1949, the Colombian embassy in Peru granted asylum to one Victor Raúl Haya de la Torre, head of a political party in Peru. He was granted asylum as he was viewed by the Colombians as a political offender, and as such, the safe passage out of Peru for de la Torre, was requested by the Colombian Embassy. The Peruvian authorities did not, however, agree in the Colombian assessment of the crimes committed. They were supposedly not of a political nature, but “common crimes”, and as such de la Torre did not deserve the benefits of asylum.

In the judgment of the ICJ delivered on November 20<sup>th</sup>, 1950, the Colombian embassy was without authority to on its own decide the nature of the crimes that had been committed by de la Torre. Consequently they found that the Peruvian government was without obligation to grant the safe passage that was requested. They also found, however, that the nature of the crimes committed were not those of mere “common crimes”, as it was a military rebellion. Still, it was decided that the conditions that one could be reasonably expected to meet in order to be granted asylum, was in fact not fulfilled, at the time when de la Torre was granted asylum by Colombia (ICJ, 1950).

### *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and the United States of America)*

In May of 1953 Italy instituted proceedings against a number of nations, where the core issue was to which country, Italy or Great Britain, a certain amount of monetary gold should go, which was initially removed by the Germans from Rome in 1943 and subsequently part of a deal for reparations. It was found that this gold actually belonged to Albania, but it was argued by both Italy and Great Britain that Albania had outstanding debts to each. The matter thus became which debt that should take precedent.

It was, however, found by the court that it could only decide the priority of the claims if it had jurisdiction to adjudicate upon the affair between Italy and Albania. It was found that since Albania did not recognize the jurisdiction of the Court, meaning that it could not give a judgment concerning the claims. As a result of this it became the case that, despite the fact that all parties involved had agreed to the jurisdiction of the court, it was reluctant to deal with the issue, and thus, did not. Simply, the absence of Albania at the table, rendered the court unable to adjudicate on one of Italy’s claim, and it “refrained” from handling the other (ICJ, 1954).

These three cases have been described with the bare essentials, and one should thus refrain from reading too much into the situation, as the backgrounds or more specific characteristics of the cases have not been reviewed enough. It does show at least two things, however. One would be that the nature of the ICJ cases does indeed have great variety, as is also supported by the fact that the “Other” category composes a full 25% of ICJ cases. The second, as best highlighted by the Monetary Gold case, is the complex situations under which the Court has to make its decision. This will be elaborated on further in the “Analysis” chapter.

## **4.6 The relevance of the cases**

Prior to conducting the analysis with regards to the above referenced cases, some time should be spend to consider the purpose for which they were reviewed. In addition to shedding light on the nature of the categories, the purpose has been to illuminate the issues the court has dealt with. What is necessary to remember as the analysis commences, are

some of the specifics of the cases as well as the potential “bigger picture”. What is meant by this is that while most cases make reference to a single treaty, many can also be placed in relation to a more fundamental value. As the analysis progresses, keep these few questions in mind as the cases are elaborated on: What was the point of trying the case? What was the direct consequence? Could the outcome have been better, or worse?

## 5 Analysis

After establishing the framework for what is meant by international law and the actual applications of it, as well as the actual case history and performance of the ICJ, deeper reflections on the subject can now be made. A good part of this chapter will be spent on elaborating on the statistics as well as the case studies, in order to draw conclusions as to what the ICJ has accomplished in contrast to what we might want it to accomplish.

*Is all this within the framework of international law?*

In the most formal meaning of the expression, the Court is crossing all the T’s and dotting all the I’s. What is meant by this is that the Court has paid great attention to the existence of the forms of international law that we would expect them to, but perhaps more so to the treaties mentioned in a case, rather than general principles of international law. This is further elaborated later.

It need not be thoroughly discussed here, as most of the factors of relevance will be discussed later in the analysis, but in short the Court can be said to have been conducting itself, seemingly, with great attention to the boundaries that have been set up. What I mean by this, and as is further mentioned below, is that the Court seems reluctant to take steps beyond arbitrating on the direct issue that is at hand, even though there might be closely related issues that deserve attention. While it might appear to some that there are problems in addition to whatever treaty that has been highlighted by the parties, which might even be more important in the long run, the Court is seemingly making no effort at all to address these issues. At least, no official efforts.

Thus, the Court is very faithful to the framework of international law that has been established, and as stated before in the thesis, it would appear to accept the notion that “most states follow most of the rules most of the time”, and settle at that. This will be noticed further, as the cases are further analysed.

*What the cases told us?*

Based on the cases elaborated on in chapter 3, we a few areas of discussion that deserve some closer scrutiny can be pointed out. The objective at this point is to more thoroughly get an idea of the nature of the cases so that an understanding of what the Court has been doing can be formed. This is preferable to falling back on the declaration of the Court’s duties based on the UN charter and stature of the Court, since they actually leave quite a bit to the imagination.

Initially, a more formal approach to the conduct of the Court follows here. It is by no means surprising that most of the stature is composed of how to appoint judges and under which conditions they are to conduct their business, as well as the procedure of a case. This is, after all, quite necessary in order to build a rigorous institution and convince those that are subject to it that the circumstances and methods are legitimate. This is further enforced by the fact that the charter of the UN and the stature of the Court are further complemented by the 109 articles that constitute the Rules of the Court.

Upon looking at the cases and the statistics, however, it can be concluded that the formality of the institution, which might be perceived as meant to handle the rather normatively loaded matter of *justice*, is perhaps an overly dominating characteristic. This point will be illustrated by going back and looking at the case studies once again. First up is the Oil Platform case between Iran and the US.

*What does the Oil Platform case tell us?*

In this case, it should be obvious that indeed some form of international norm or law has been broken, seeing as how some form of attack was launched from both sides and lives were lost. It is true that this incident is by far not the most pressing situation, by no means a “Cuba crisis”. It should stand to reason, however, that at some point, someone was acting in err, as we should not expect any attacks, on neither oil platforms nor commercial vessels, to take place if everything was done “correctly”. The relevant treaty alone stated that there should be peaceful relations between the parties and the UN charter also calls out for peaceful behaviour. Yet, the Court was forced to act upon factors different from the mere fact that hostilities had taken place, as well as trying to go deeply into the reason for the events and assign responsibility on that basis. Rather, the Court in its judgment could merely refer to the treaty and the aspect of it referring to commerce and trade. Despite the section of the treaty stating that there should be peace and lasting, sincere, friendship between Iran and the US, in addition to the military acts taken by the US being found as illegitimate and not in the scope of what can be seen as self-defence, the Court did not seem to take this further.

It would make sense to assume that a Court that is supposedly built on the principles of justice and peaceful resolution of disputes on the international arena, especially when treating an agreement that further emphasizes the continuing of peaceful relations, would not stop at merely stating that the treaty to which the parties referred to was not violated. This was a case brought to the Courts attention, but it did nothing more than state that one particular treaty was not violated, while one can easily state that some of the more fundamental principles were violated here: that of peaceful behaviour. Regardless of who should be assigned blame in the matter, there was aggression, property was destroyed and at least one man died, yet this is barely mentioned in the summary of the Courts judgment.

*What about the case of Elletronica Sicula S.p.A.?*

This is by far one of the more complicated cases that have appeared before the Court, in the sense of the multiple angles and areas of expertise that one must explore to make even an educated guess. This is part of the reason why this case was chosen to be included as the example under the “treaty” heading. Essentially all cases have references to at least one treaty above the general principles of international law (like the Congo-case that was discontinued, even though one might think that if massacres takes place, a treaty in addition to the general principles should not be necessary), and thus most, if not all, cases can be seen as yet another instance when the Court has to interpret a treaty and analyse the situation. But as previously stated, this particular case was selected in part due to its great complexity.

If anything, it shows us that the Court is well equipped to handle cases with this amount of angles of “attack”, as well as the amount of time and care that is put into the investigation and consideration of all possible aspects, which is further supported by the fact that many cases take years to settle. While this is perhaps a less romantic idea of justice, the Court does deserve credit for settling the case, as it did go incredibly deep into the relevant treaty as well as the circumstances that led to the case being filed with the Court. Still, what this

case also does, and perhaps more so than any other of the cases, is show that the Court has to spend a considerable amount of time being a mere proof-reader and interpreter of treaties.

Hopefully, the flaws that the Court discovered in the treaty, such as the differences between the different translations, were properly dealt with. Thus, it is in its place that the Court be given credit for solving a complex dispute and in the process highlight flaws that can be resolved to aid in future interaction between the parties. If this behaviour is indeed desired of the parties, by the Court, it is, at best, merely hinted at.

#### *The sovereignty issue of Passage over Indian Territory*

This case also has most of the fundamental flaws that the others share. The issue essentially boils down to whether India should let Portuguese forces pass over their land to restore order in their areas that are indeed unreachable unless they are allowed the passage. It was established by the Court that armed troops and other armaments were not allowed to pass over Indian territory arbitrarily during the claimed 200 year period that such events had transpired uninterrupted. With reference to the treaty and the history that was reviewed, we can not say that the Court was in any significant way mistaken in the judgment.

Here, as well, the Court limits itself to the formal aspects of the treaty and history it was asked to examine and issue it was asked to settle. The Court was far from unanimous in some of the issues, indicating the difficulty of the matter. Still, here reference could be made to greater principles, more modern and supposedly generally accepted. As stated when reviewing the case, the sovereignty of the enclaves that came under occupation by armed bands attacking from Indian territory, was never questioned. Portugal's right to defend the enclaves was not questioned either, indeed, it was barely mentioned, if at all.

Does it not stand to reason that if a legitimate area "belonging" to a sovereign with whom there are friendly relations is under an attack, it is not unreasonable to allow forces of said sovereign to travel there in order to re-establish order? It was never clearly stated why India would want to stop this from happening, apart from the fact that weapons and troops have always needed some form of special clearance. In the end, India made any effort of Portugal to protect its enclaves impossible, but this issue was summary avoided by the Court since "it was never asked to judge in the attitude of India in this matter".

At this point it would be, however, erroneous to simply assume that the Court lacked interest of means to further the agenda that might be put in relation to this issue. This is to a great extent due to the fact that we cannot account for the discussions that the judges partook in, nor can we here give sufficient room to all relevant customs and treaties to appropriately include their content in a rational discussion. Basically, too little information concerning the circumstances that led to this particular outcome is known at this point. It would appear to stand to reason, however, that there is room for improvement.

Across the board the International Court of Justice seems to have quite faithfully restricted its arbitration to the very specific issues and treaties that was brought before it. But it also seems that because of this it at times have been forced to ignore issues of immediate importance, which might be more relevant to the development of international law and the furthering of the international society, than the original matter ever was.

#### *And then there were the discontinued cases*

Let it first be said that this topic of discussion might be plagued with more speculation than actual analysis or constructive criticism. Seeing as how time has been spent investigating the conduct of the ICJ, it is mainly from the official ICJ records that information has been attained. In the discontinued cases, it is not irrational to assume that there were plenty of factors which affected this outcome, most of which would not be accounted for by the Court. At least, this would hold true for the instances when the case has already been started. In those instances, it would thus be out of place for us to attempt to draw any significant conclusions, except for the possibility that during the process in the ICJ, efforts to solve the dispute were renewed and eventually succeeded. That can not, however, be the whole picture, or the point we would seek to make by contemplating these cases.

The point is that there are a few cases that were discontinued because a party would not acknowledge the Courts jurisdiction. This is fairly perplexing. The stature of the Court states that if there are any controversies as to the jurisdiction of the Court then that matter will be settled by the Court before initiating any proceedings. It is also stated, however, in the Rules of the Court, that a case will not be listed until all parties involved have accepted the jurisdiction of the Court.

Yet, there are many cases that are initiated and listed with the Court, upon which one party challenges the jurisdiction which is then investigated. Would that not mean, in accordance with the rules, that the jurisdiction has been accepted? Or, if a party simply denies the jurisdiction, does that not mean that it was in fact that party who decided that there was or was not jurisdiction, rather than the Court, in compliance with the stature? Perhaps this issue requires deeper understanding of the Rules of the Court as well as the stature, which is an analysis that is beyond the scope of the present thesis. It does serve to highlight a confusing aspect of the way this particular institution is constructed. It also serves to make the grave limitations of ICJ conduct apparent, with respect to the clarification of jurisdiction

It also leads down a path which question the use of a Court that can only exercise influence when and if both parties involved accept the role of the Court. Are there differences between cases when a party denies the jurisdiction from the get-go, and when it is later filed as an issue for the Court to decide? At this level of analysis no salient conclusions concerning this can be drawn. An accurate idea of the circumstances would require deeper scrutiny of the discontinued cases, which are numerous and by no means identical.

Still, it can be rightly noticed that the Court does fill a role. It might even be so that it plays a part even if the case is discontinued. It could be guessed that once a case has been accepted by the Court, the parties involved would have more incentives to, on their own, get a better understanding of the situation and the options available to them. If a case would appear to lead down a very unfavourable avenue, the party that feels this way would be encouraged to settle the dispute quicker, through less official channels. This is, of course, mere speculation, but even if the Court is a mere tool for political pressure, it does fill a function, even if that is perhaps less flattering than one might like, but useful.

#### *Time to join the different trains of thought*

It cannot be denied that the Court has undoubtedly resolved a number of disputed, more than most might think, and consequently we must admit that the Court fills a necessary function. The Court has often been presented with quite complex issues and would appear to have been thorough and unbiased in its handling and judgment of the matter.

Still, it is the overarching feeling one gets when investigating the performance of the Court, which an institution with such potential and such an important field of responsibility as jus-

tice, is lacking in vision. This is the result of several tendencies that we have seen as we look at the case history as well as the examples that have been studied, not to mention some of the ambiguous aspects of the stature and rules. For example, the idea that the Court should decide if it has jurisdiction, but the parties involved can chose to accept jurisdiction.

27% of the cases discontinued, several cases that appear to be less of a matter of judging what is right and wrong and more a matter of intense scrutiny of the details, and the perhaps overly arbitrary field in which the Court can legitimately do its job all leads us to wonder if the circumstances could not be organized better. Couple this with the fact that we have seen several examples where it would seem that the Court is indeed presented with matters of a much larger scope and more fundamental principles to consider than the treaty that have been referenced to by the involved parties, and the Court could appear as either tired and unmotivated or overly shackled. What I mean is that in a case such as the Oil Platforms, it takes either indifference or restrictions to find no crime when four attacks take place, several vessels damaged, oil platforms destroyed and lives lost.

## 6 Conclusion

In the beginning of this thesis, several questions were asked in relation to the International Court of Justice and its conduct up to date.

1. What is the ICJ supposed to do?
2. What kind of cases has the ICJ ended up adjudicating?
3. What conclusions can we draw from the case analysis?
4. What can, or should, the Court do in addition to this?

The primary function of the Court, and thus what it is supposed to do, is accounted for in the UN charter and the stature, and it is thus to arbitrate on all cases brought before it, based on international law and treaties in effect. This is a guideline that is faithfully followed, primarily due to the regulations that exist with regards to jurisdiction. There can be no denying that once a case has initiated formal proceedings that the jurisdiction has been accepted by all involved parties, and as a consequence, even if the Court had the inclination to arbitrate on cases that were not explicitly brought before the Court, it simply cannot, under present regulation. The great difference between the ICJ and national courts being, of course, a form of police that unbiased bring crimes before the court.

It is more because of the incredibly restrictive system of assigning jurisdiction than anything else, that the Court has been faced with the kind of cases that have been accounted for. The vast majority of cases are matters of treaties and the details they are concerned with and it could be argued that these are also the cases in which the involved parties simply can not reach a solution on their own. This would also, however, indicate a situation in which the parties accept the risk of an unbeneficial verdict, which might cause us to question the actual severity of the situation, as a nation is more likely to refuse any instance where its influence can be limited, the more crucial the issue is to national interests.

The second question, concerning what kinds of cases that have been handled by the Court, it can be argued that essentially all cases (not including the discontinued ones) can be traced back to a treaty. This is not necessarily neither good nor bad, but if we subscribe to the theory formulated by Kjell Goldmann, the internationalists programme, we might be inclined to debate the positive results, or lack thereof. Hence, by combining the third and fourth question, we can further discuss the issue.

The purpose of the internationalists programme would be to build and enforce international institutions, communication, exchange and law, in order to establish a continuous tradition of peace and security in the world. Initially, we can say that there seems to be aspects that develop in a favourable fashion, with regards to this theory. It is mentioned by Goldmann that international opinion is of importance to the internationalists programme, and Tamanaha states that in the instances that nations seemingly go against a treaty or international law, they make an effort to make it appear legal. As a consequence, it would appear that on the international scene, the appearance of abiding by the law is of importance (Tamanaha, 2004). This can also be seen in the cases where a nation has accepted the responsibility of the Court to determine jurisdiction, rather than simply claim it has none. The notion that the state acts in accordance with international law, presumably to shape public international opinion in its favour, can thus be said to have sufficient basis. As mentioned earlier, this could also be seen to aid in solving whatever problems might occur due to a lacking common legal culture on the international level.

If we accept the premise that institution building is desirable, however, we might be inclined to criticise the role of the Court, based on the stature and the cases that have been analysed. Initially, it can be stated that the role of the Court is extremely limited, not only as far as jurisdiction is concerned, but also regarding the fact that all conduct is on a case-by-case basis. That is, there is nor a possibility to contribute to the development of general international law, neither a possibility to create references in international legal conduct. Since there could be, in theory, an identical situation progressing beside the case handled by the Court, but whatever verdict delivered have no effect on that situation. That is, unless the other parties actively seek to be included and fall under the power of the Court. The case-by-case conduct as well as the crucial notion of consent in combination severely cripples the potential for making an effective peace and security developing institution of the ICJ.

It is not peculiar that the Court, that was created in the immediate Post-World War II era, is so heavily dependent on consent, as it must have been necessary to be weary of any form or notion of coercion with regards to multi-lateral interaction (at least between winner states and neutral ones).

Thus, if we accept Goldmann's idea, we would be inclined to request that the Court aids in whatever means possible to enforce global peace and security, by means of creating an institution with greater means to shape international law. In the case studies we have been presented with several instances in which the Court could have contributed on a bigger scale to the development of international law by adhering to the moulding of greater principles rather than the mere interpretation of treaties. Such as in the Oil Platforms case, where one might be inclined to seek an answer to the nature and cause of the aggressions, as opposed to whether it just affected commerce or not. The same goes for the case of Passage over Indian Territory, as several major areas of discussion are relevant to that situation. Essentially, if one chooses to pursue the internationalists programme, there are several instances where the Court, if given the right and means, could contribute even greater to the development and furthering of international customary law. Additionally, it could deliver more generally sweeping verdicts, as it can hardly be considered effective to judge on a case-by-case basis, as any outcome, regardless of whatever positive (or negative, I suppose) effect it might have, does not affect any nation other than the two involved.

It would also, in this context, be relevant to recall the differences between national and international courts, as stated by Tamanaha in an earlier chapter. It has already been stated that the lack of a legal culture is being continuously solved, like any developing culture. Furthermore, the ICJ does not seem to suffer to any major extent from a lack of transpar-

ency, as a good deal of information concerning its cases and conduct, even though somewhat vague on occasion, is made public.

Remaining are shortcomings in equality and coherence, due to power differences and the sheer amount of treaties that are existent and continuously created. Starting with the coordination of treaties, it could be assumed that this is also a factor that could be redeemed through the continued development of an international legal institution, and the hopefully more coordinated and effective bureaucracy that it would entail, along with the potential for more generally applicable laws and verdicts, which might negate the need for many treaties to be signed in addition to customary law.

As for differences in power, it is not likely to be solved quite so easily, but perhaps somewhat eased if there could be a greater consistency in the determination of the Courts jurisdiction. What might be necessary for this is that it is not made a continuous choice for the parties involved.

A great deal of this concluding discourse is dependent on the idea that we subscribe to the Internationalists Programme, as described by Goldmann, and the idea that it is our moral responsibility to safeguard human life. I have a hard time imagining any modern politician making an official argument to the contrary. Nevertheless, it is apparent that the Court could be given greater opportunity to build a form of institution to further the development of international law, as well as international peace and security. It might be the case that the Court has changed far to little since its creation, over sixty years ago, the biggest sign of this potentially being a far to restrictive stature, mostly with respect to the issue of jurisdiction. If we seek the development of international law and security, would it not make sense, based on the above discourse, to give the Court more room to act and contribute?

If we do indeed find it as a form of moral obligation to adopt the internationalists viewpoint, or at the very least consider the implications of the programme and how it matches the current state of affairs, the International Court of Justice can not be satisfactory in its role and possibilities.

In the end there are thus a few questions that must necessarily be asked in order to draw any meaningful conclusions or discussion-material from this thesis. The first one must necessarily be if we do perceive the safeguarding of human life as a moral obligation. If this is the case, there is a basis to agree with Goldmann and the Internationalist Programme. Secondly, it could be asked what changes, if any, should be made and above all, who has the responsibility to initiate these changes? These are questions which this thesis cannot answer.

It is, however, the opinion of the author that the safeguarding of human life is indeed a moral responsibility. As such, I am compelled by the results of this thesis to believe that several changes can be made in the official responsibilities and structure of the ICJ to aid in this goal. As a consequence, I must also question the nature of the justice, for which the Court currently stands. The saddening fact is that I cannot with any convincing certainty say that it is justice at all.

Allow me to tell you a story about a zebra named Justice. We have all heard of this zebra, as it was supposed to be a very nice zebra. We have even heard stories of friends who have seen it. We hear tales of places where it would be nice if this zebra would go there, and we had a sinking feeling that this particular animal might be around; we are just not sure what

it looks like. Then we hear the announcement: This great creature seems to have settled down somewhere around here, but it can reach pretty much everywhere in the world

So we go there. We wish to get a closer look. We have now heard such wonderful stories about the shape and colors of this marvelous creature, and we want to see it with our own eyes. There is an uphill before the mythical beast, so we must struggle a bit to get a good look at it. But we eventually get there and we smile and cheer, and then we look up. We are surprised. This creature we are looking at sure looks like what we have heard, it kind of looks like a zebra.

We then realize that the distinct characteristics, the stripes, are not quite like they should be. They have been painted. This was indeed not a zebra, which we had sought after, but a horse. While it is a fine horse that we can use, it matters not how many stripes one might paint on this horse, or even if you rename it. It is not the zebra which we have sought for. Even if they are somewhat similar, this is not the Justice we wanted.

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