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The International Court of Justice: A Legacy of Peace and Justice

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Introduction

This year the International Court of Justice celebrates its sixtieth year. This anniversary marks a particularly critical time to appraise the Court’s work and to reflect on the path that lies ahead. It does not help, however, when taking stock of the state of the world today, that one still finds considerable conflict and violence from every continent. Universal peace and justice “in larger freedom” still is in many areas far off indeed. This reality is a healthy motivator to examine anew the record and role of quite a number of institutions in the world today—the World Court being no exception.

And so it is that we take the opportunity presented us to reflect on the legacy of the Court. Sixty years and ninety-four Judgments is not too little from which to stake a positive place for the Court in the history of the world, nor to hazard a guess at some ways forward. We find a Court today that is increasingly comfortable in its jurisdictional “shoes.” Its contributions to the corpus of international law are already considerable, even in the most politically-charged and consequential disputes. Perhaps more importantly, the Court’s fairness and legitimacy in resolving international disputes is evidenced not least by the weight of its current docket, which includes more—and more important—cases than it has had at any point in its history. But the Court is also necessarily limited by its Statute as to the disputes and parties that it can hear. It also finds itself not unaware of the political environment in which it carries out its judicial functions. So how did we get where we are and where do we go from here?

The Origins of the ICJ

The idea of resolving international disputes peacefully, through diplomacy and the processes of justice, finds its roots across religions, cultures, and continents. State-to-State arbitration began in the 19th century, but before World War I countries could not agree on establishing a permanent judicial court because of reactions against settling its composition or jurisdiction in advance of any dispute. It took the wrenching experience of World War I for States to come to agreement on the Statute of the Permanent Court of International Justice. The PCIJ’s jurisdiction was based upon States’ consent and it would become the true institutional predecessor to the ICJ. During the interwar years, it was entrusted with hearing even high-stakes cases arising out of the Peace Treaties of 1919 and European colonial rivalries in Africa. But the PCIJ, together with the rest of the League, was doomed by its limited membership and the escalating deterioration of order in Europe and around the world.

World War II put the PCIJ on ice. The end of that war, however, saw the emergence of the ICJ in its place. The UN system was designed to remedy the deficiencies of the League of Nations and to promote international peace and security under international law. The ICJ was to be “the principal judicial organ of the United Nations.” UN Members were automatically parties to the Court’s statute, which, together with their consent to the Court’s jurisdiction, would provide the Court with the legitimacy it would need to settle States’ disputes under law rather than by force.

By the time the ICJ held its first public sitting in April 1946, however, the hardening of the Cold War was already dampening the promise of the UN Charter. With the polarization that followed, the Court’s early docket tended to deal with disputes several degrees away from the predominant political tensions of the day. But with the Security Council so often deadlocked by a

Permanent Member's veto, the Court and the General Assembly managed to carve out a role for themselves in securing the purposes and principles of the UN Charter.

The Certain Expenses Case and the Development of UN Peacekeeping

Perhaps the most landmark example of this independent role for the Court and General Assembly came in the form of the Court's 1962 Advisory Opinion, unglamorously called *Certain Expenses of the United Nations*. To overcome a deadlocked Security Council, the General Assembly over the course of the 1950s authorized and budgeted for UN forces to intervene in the 1957 Suez crisis and in the escalating civil strife in the Congo by 1960. The essential question put to the Court was whether the Security Council has exclusive responsibility for the maintenance of international peace and security, or whether the General Assembly also has responsibilities in this regard. The General Assembly had maintained its concurrent responsibility since its famous 1950 "Uniting for Peace" resolution. This resolution had resolved that, if a veto at the Security Council should lead to its "failure" to fulfill its primary responsibilities for international peace and security, then the General Assembly could consider the matter immediately with a view to making—and budgeting for—its own recommendations.

The Court's Advisory Opinion largely backed the General Assembly. While the Security Council has exclusive authority to order binding enforcement action under Chapter VII of the Charter, the Court reasoned that "the functions and powers conferred by the Charter on the General Assembly . . . are not merely hortatory." "Each organ [of the United Nations]," the Court continued, "must, in the first place at least, determine its own jurisdiction." Here, the General Assembly intended to effect a "peaceful adjustment" of the Middle East and Congo "situations" where the Security Council had taken no action. The General Assembly further used the budgetary powers provided it by the UN Charter to allocate resources to that end. Given that the General Assembly was acting in furtherance of the principles of the Charter, the Court held that these peacekeeping expenses were thus undoubtedly "expenses of the organization" as a whole.

Still, UN peacekeepers are nowhere mentioned specifically in the Charter. Yet one need only reflect for a moment on the contributions UN peacekeepers have made in places like East Timor and Namibia—or to rue their absence wherever humanitarian crises are unfolding—to appreciate the contributions they have made to the purposes and principles of the UN Charter. The evolution of peacekeeping remains an important lesson in the creativity necessary to meet contemporary challenges or to step in where others have fallen short. The Court's opinion provided a solid legal foundation for this development that would earn the UN blue-helmet forces a Nobel Peace Prize in 1988.

Decolonization, Self-Determination, and the World Court

The Court's second major contribution to peace and justice comes in the realm of self-determination. The basic and universal idea is that a people's destiny should be determined by the free and genuine expression of their own will, rather than by outside compulsion or violence. The past sixty years have witnessed the blossoming of self-determination, not only in flowery words of principle but in the considerably harder real world. As peoples from Europe, the Middle East, Africa, Latin America, and the Pacific began to reconstruct their lives and polities after the Second World War, self-determination became the central theme of decolonization as well as a critical new project for international peace, law, and democracy. The ultimate success of this project has been most visible in the expansion of the United Nations from 51 to 191 members and in the continued efforts of non-self-governing territories to choose for themselves their role in the world, most recently in Tokelau. These developments remain a defining legacy of the United Nations and the World Court.

While it may be tempting to take these developments as evidence of smooth progress, the path remains a trying one. As the distinguished jurist Antonio Cassese has observed:

[Self-determination] is, at one and the same time, both boldly radical (in that it promotes democratic self-government, and free access of peoples to the role of international actors) and deeply subversive and disruptive (in that it undermines territorial integrity and may lead to the fragmentation of the international community into a myriad of national or ethnic entities, all poised to fight one another).¹

¹ Antonio Cassese, "The International Court of Justice and the Right of Peoples to Self-Determination," in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 351, 351 (LOWE & FITZMAURICE, eds., 1996).

Indeed, some self-styled self-determination movements have only managed to witness further oppression and bloodshed. The end of the colonial era too has brought its own complications in the form of more locally-nuanced efforts aimed at democratic representation or at withdrawing in varying degrees from an existing State.

The philosophical, political, and legal roots of self-determination spread far and deep. For peoples “not yet able to stand by themselves under the strenuous conditions of the modern world,” Article 22 of the League of Nations Covenant sought to ensure that their “well-being and development . . . form a sacred trust of civilization.” With the exception of Iraq, however, none of these Mandates escaped colonial status before the Second World War.

The end of hostilities in that war ushered in the promise of a new world order based on the purposes and principles of the UN Charter. No longer would aggression, colonial competition, or imperialism be tolerated by the international community. Accordingly, “equal rights and self-determination of peoples” was placed at the very forefront of the Charter system in Article 1. Chapters XI and XII of the Charter give direction to this “sacred trust” by promising that the object of UN Trusteeship would be “self-government or independence” according to the “freely expressed wishes of the peoples concerned.” The Court has been resolute in its support for the right to self-determination and has not hesitated to uphold this right between Parties to appropriate disputes before it.

The first real opportunity for the Court to grapple with self-determination came in a series of cases concerning the situation in South West Africa (now Namibia). South Africa was charged with a League of Nations Mandate for South West Africa, but after the Second World War South Africa clashed repeatedly with the General Assembly and the Security Council over its stewardship of this Mandate. The General Assembly urged South Africa to convert the Namibia Mandate to a UN Trust territory. The situation grew more strained as the General Assembly began to assert a greater supervisory role over the Mandate against ongoing defiance by South Africa. In a pair of Advisory Opinions in 1955 (*Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*) and 1956 (*Admissibility of Hearings of Petitioners by the Committee on South-West Africa*), the Court sided with the General Assembly, finding that the General Assembly could hear complaints about their treatment by South Africa in person. Further, the Court advised that the General Assembly was permitted to make decisions about the Mandate with merely a two-thirds majority, rather than by the unanimity required under the League. Pressure on South Africa by the international community continued to grow and Ethiopia and Liberia soon brought contentious cases against South Africa (*South West Africa* cases). However, the Court in 1966 on quite technical grounds denied requests to declare that apartheid and other objectionable policies instituted in Namibia violated international law. This decision seemed to deal a sobering setback for self-determination.

Reacting with some dismay at this decision, the General Assembly in 1966 instead found South Africa in breach of its Mandate obligations and assumed direct responsibility for the territory. Since 1945 a new constellation of countries had come into being and with them came a renewed dedication to self-determination. The 1960 *Declaration of Principles* by the General Assembly set out self-determination and decolonization as a clear agenda for the world. Already most of the former colonies in Africa and Asia had gained their independence to become full members of the United Nations. In the 1966 elections Africa and Asia also netted a gain of three seats on the Court to more equitably reflect the balance of countries in the world.

After its somewhat shaky start, the attitude of the Court towards self-determination underwent a significant transformation after 1966. The Security Council in 1968 and 1970 agreed with the General Assembly’s decision to terminate South Africa’s Namibia Mandate and asked the Court to give its opinion on the legal consequences of South Africa’s continued presence there. In an Advisory Opinion as sweeping as it was eloquent, the Court in 1971 (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*) embraced the principle of self-determination for all peoples as set out in the UN Charter and developed by the General Assembly in the 1960 *Declaration of Principles*. The Court found itself unable to ignore developments over the preceding fifty years that had left “little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.” The Court thus found that South Africa had an obligation to withdraw from its illegal administration of Namibia immediately and that all countries had a duty to refrain from recognizing or aiding South Africa’s presence there. The Court characterized South Africa’s introduction and enforcement of apartheid in Namibia as “a denial of fundamental human rights” and “a flagrant violation of the purposes and principles of the Charter.”

The Court went even further with its 1975 Advisory Opinion on the situation in the *Western Sahara*. As Spain decolonized, both Morocco and Mauritania laid conflicting claims to the Western Sahara based on alleged pre-colonial ties. But what of the wishes of the peoples of the Western Sahara? This was not a question raised directly by the General Assembly. Rather it was a question the Court felt itself obliged to address in light of its view that all peoples have a right to self-determination under international law. This inherent right of *peoples* to self-determination goes a good way towards dispelling the idea that only *States* can be the subjects of international law. The Court found that the right to self-determination ultimately trumped any pre-existing claims by Morocco or Mauritania to the Western Sahara. The Court went even further to define self-determination as requiring “a free and genuine expression of the will of the peoples concerned” under “procedures and guarantees” to be established by the General Assembly. This formula set out by the Court, to be developed by the practices and oversight of the General Assembly, opened the door to the decades of UN election monitoring that would follow.

Since 1975, the long decolonization process has largely come to a close and the new face of self-determination is increasingly revealing both the principle’s inherent tensions as well as some of the limitations of the Court to address them. The Court was asked in 1986 by Burkina Faso and the Republic of Mali (*Delimitation of a Frontier in Western Africa*) to delimit approximately 300 kilometers of an often forcefully contested border. This case presented an “apparent conflict” between, on the one hand, self-determination for the peoples living in the contested border area and, on the other, the need to avoid the instability that could well result from any further breakup in the territorial integrity of the countries involved, however arbitrary the original colonial boundaries may have been. In reconciling this tension, the Court placed significant emphasis on resolutions by the Organization of African Unity and by the parties that the pre-independence borders should prevail—a principle known as *uti possidetis juris*. Reference to the pre-independence border would allow these African States to enjoy their own form of self-determination by ensuring them, in the Court’s words, “the essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields.”

The *East Timor* case in 1995 exemplifies both the Court’s support of the principle of self-determination, as well as the limitations inherent in a compulsory jurisdiction that extends only so far as States’ consent. When Indonesia and Australia entered into an agreement for the joint exploration and exploitation of the continental shelf resources of the Timor Gap, Portugal objected to this agreement as a violation of its rights as the *de jure* administering power and as an abuse of the “sacred trust” owed the people of East Timor. Australia had already accepted the Court’s jurisdiction for this type of dispute, but Indonesia had not, and so Portugal could assert its claim against only Australia. The Court took pains to emphasize that the right of peoples to self-determination is “irreproachable” and has a universal, “*erga omnes* character,” but it ultimately found that it had no jurisdiction. The Court reasoned that it could not settle the dispute without also effectively determining Indonesia’s rights and obligations vis-à-vis East Timor, since if Australia acted wrongfully in concluding the Timor Gap treaty then Indonesia necessarily must have acted wrongfully as well. Without Indonesia’s consent or participation in the case it would have been improper for the Court to pass judgment.

The Court reaffirmed the universal character of the right to self-determination in the so-called *Wall* case in 2004 (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*), by pronouncing that the construction of the wall in “Occupied Palestinian Territory” amounted to a forceful annexation in violation of the right to self-determination of those who lived there. The Court’s insistence that the use of force to partition territory was inimical to self-determination suggests powerfully that self-determination within the bounds of territorial integrity stands central to the principles of the UN Charter.

So how can the World Court’s work on self-determination be assessed? The Court’s jurisprudence in many cases substantially contributed to a peaceable and definitive end to disputes in which the genuine exercise of a people’s self-determination was an integral part. The protracted dispute over South Africa’s administration of Namibia is instructive. The Court’s more than twenty years of accumulated jurisprudence on this dispute affirmed the right of self-determination for all peoples, condemned apartheid, supported the General Assembly’s oversight role, and ultimately called for an end to South Africa’s continued presence in Namibia. It is true that South Africa did not allow Namibia its independence until 1990—nearly two decades after the Court’s final decision on the matter—but it is doubtful that even this could have taken place when it did without the concerted efforts of the international community, including the World Court. The Security Council’s ultimately successful efforts to shepherd Namibian self-determination, for example, repeatedly relied on the Court’s key 1971 Advisory Opinion for legal justification.

The rest of the Court's record has also had generally positive results. The Court's decision in the frontier delimitation case between Burkina Faso and the Republic of Mali has so far proven successful in securing the parties' respective independence. In response to the Court's decision in the *Wall* case, the Israeli Supreme Court also ordered that a number of adjustments be made to the wall to better ensure proportionality and human rights under international law. And only four years after the Court invoked the right of the East Timorese to self-determination, Indonesia permitted a UN-sponsored referendum in the mold of what the Court anticipated in its *Western Sahara* opinion. Unfortunately, the dispute at the heart of the *Western Sahara* case has not been resolved and the territory remains non-self-governing and is a continuing source of international tensions.

Regarding the future role of the Court, we have seen that as the UN has grown in size and scope, so too has the Court. The Court has established a jurisdiction and a jurisprudence that is both diverse and significant. It has minimized the possibility of self-doubt in future disputes by establishing its judicial power to decide. At the same time, it has proven it can tackle big problems of self-determination and the use of force in a sufficiently satisfactory way to continue to inspire confidence. And so the Court's legacy is as idealistic as it is pragmatic—as it faces an increasing real-world, we should still expect it to continue to demonstrate some measured creativity in the eternal service of the ideals of international peace and justice.