

Representation, Inequality, Marginalization, and International Law- Making: The Case of the International Court of Justice and the International Law Commission

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This Article assesses the extent of inequality and marginalization in the making of international law. It examines whether there is equal contribution, and equal opportunity for contribution, in the making of international law by and for all States. In particular, the Article ponders whether the Global South is marginalized in law-making processes, or, put another way, whether the Global North is privileged. The Article evaluates whether there is equitable representation in international law-making bodies, and it focuses on the two most prominent ones, namely the International Court of Justice and the International Law Commission. The assessment addresses both the formal requirements of representation and the actual practices within both bodies.

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INTRODUCTION

International law is premised on the ideal of sovereign equality of States,¹ or at least it purports to be premised on that ideal.² This applies equally to international law-making. Thus, no State, not even the weakest and poorest, or the most marginalized, can be bound by treaty obligations to which they have not consented.³ Similarly, it is generally accepted that customary international law is established by the general, widespread, and representative practices of States accepted as law.⁴

Yet, while sovereign equality is, in theory, a fundamental principle of international law, it is well known that in reality there is no equality between sovereigns. Much of the knowledge of sovereign inequality is intuitive and does not require deep critical analysis. The inequality of the international system is there for all to see. The most obvious (in your face) illustration of the inequality, the one that receives the most attention, is the UN Security Council and the lack of representation of African and Latin American States in the permanent membership of the Council and the underrepresentation of developing States generally.⁵ It is not only the underrepresentation of some States or the fact that the privileged States have secured for themselves vetoes on the Council that undermines the notion of sovereign equality and its pursuit. The arrogance and the added privileges that come with the status of being a permanent member on the Council provide further evidence of the illusion of sovereign equality. The arrogance of permanent members of the UN Security Council is illustrated by the lack of humility these members

1. See, e.g., *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 99, ¶ 57 (noting that immunity “derives from the principle of sovereign equality of States which . . . is one of the fundamental principles of the international legal order.”); see also Hannah Woolaver, *Sovereign Equality as a Peremptory Norm of General International Law*, in *PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS): DISQUISITIONS AND DISPUTATIONS* (Dire Tladi ed., 2021).

2. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289 (7th ed. 2008) (“The sovereignty and equality of States represents the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of States having a uniform legal personality.”).

3. See, e.g., Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 (providing that a “treaty does not create either obligations or rights for a third State without its consent,” the so-called *pacta tertiis* rule).

4. See Int’l Law Comm’n., Draft Conclusions on the Identification of Customary International Law, Conclusion 8, cmt. 3, U.N. Doc. A/73/10 (2018).

5. The well-known statistics are quite revealing: under the distribution of the Council as it stands, 47% of the seats are allocated to fifty-two States (including Europe, the United States, New Zealand, Australia, Canada and Israel), which account for around 17% of the world’s population. The fifty-three States of the Asia-Pacific region, which account for nearly 60% of the world’s population, are only allocated three seats (20%). The fifty-four States of the African group of States, account for around 15% of the population, are also only allocated three seats. See Jean Francois Thibault, *The UN Security Council Isn’t Working: Will it Ever be Completely Reformed*, CONVERSATION (June 21, 2020, 1:33 AM), <https://theconversation.com/the-un-security-council-isnt-working-will-it-ever-be-completely-reformed-141109>.

demonstrate in claiming that the Council is not to be bound by the most basic, fundamental rules of international law.⁶ This arrogance is also reflected in the permanent members' disdain of the processes designed to present a façade of equal contribution of other States to the process of law-making on the Council.⁷ The added privileges of permanent membership include control over important aspects of the Secretariat's functioning, such as the appointment of the Secretary-General and the writing of the reports of the Secretary-General. For example, while under the Charter, the Secretary-General is to be "appointed by the General Assembly upon the recommendation of the Security Council,"⁸ in reality, the Council gives the General Assembly a single name which it has to rubber-stamp, making a mockery of the idea that it is the General Assembly that makes the appointment.⁹ Similarly, while the Charter provides that the Secretary-General (and the rest of the Secretariat), is to be independent of all governments,¹⁰ there is at least anecdotal evidence that permanent members have access to and are able to influence the contents of the report of the Secretary-General in ways that would be unthinkable for less powerful states.¹¹ Permanent members also wield their power in the one

6. For example, China made the following comment in its statement before the Sixth Committee:

Nonetheless, it was inappropriate to make an explicit reference to the relationship between Security Council resolutions and *jus cogens* in the commentaries. The Council was the core of the collective security mechanism of the United Nations. Its resolutions, whose authority flowed from the Charter, must meet stringent procedural requirements and be in compliance with the purposes and principles of the United Nations, as set out in the Charter. . . . His delegation therefore suggested that references to Security Council resolutions be removed from the commentaries to the draft conclusions.

U.N. GAOR, 74th Sess., 23d mtg. at ¶ 54, U.N. Doc. A/C.6/74/SR.23 (Oct. 28, 2019). Similarly, in its written observations to the Commission, stated that "draft conclusion 16 and its commentary risk undermining the authority of the United Nations Security Council (UNSC) and the binding nature of UNSC resolutions issued under Chapter VII of the UN Charter, noting that the "commentary states expressly that draft conclusion 16 would apply to binding UNSC resolutions" and thus inviting "States, irrespective of Article 103 of the UN Charter, to disregard or challenge binding UNSC resolutions by relying on *jus cogens* claims." Similar views were expressed by all the Permanent members.

7. For this statement, I present anecdotal evidence: During the negotiations of what became UN Security Council Resolution 1989 on due process for the listing and delisting of suspected terrorists or those associated with terrorist groups, the Russian delegate, which opposed the strengthening of due process standards and knew that the overwhelming majority of the Council supported the strengthening of due process, arrived at the informal consultations with a newspaper and would not utter a single word. When, one day, as a delegate of South Africa, I asked him why he was not participating, he said plainly, that these were not the negotiations, the real negotiations were taking place between the Permanent members in the evenings after "you guys have left."

8. See U.N. Charter art. 97.

9. See James O.C. Jonah, *Secretariat: Independence and Reform*, in THE OXFORD HANDBOOK ON THE UNITED NATIONS 160, 170–71 (Thomas G. Weiss & Sam Daws eds., 2007). Even the adoption of General Assembly Resolution 69/231, which seeks to promote "transparency and inclusiveness," does not fundamentally alter the procedure. G.A. Res. 69/231, ¶ 34 (Sept. 11, 2015).

10. See U.N. Charter art. 100, ¶ 1 ("In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization.").

11. I beg indulgence to share an anecdote: In 2011, while serving as legal adviser of South Africa to the United Nations, I was surprisingly invited to the farewell dinner of the UK legal adviser. In attendance, apart from me, were the legal advisers of the permanent members of the Security Council

organ of the United Nations touted for its egalitarianism, representativeness, and democratic nature—the General Assembly—by exerting their international relations power on smaller States.¹²

There are other ways that European heritage is privileged in law-making within international law. The UN Legal Counsel, the top lawyer of the United Nations, is at the level of the Under-Secretary-General and is appointed at the discretion of the Secretary-General of the United Nations.¹³ It is probably not a well-known fact that the position of legal adviser of the United Nations is as a practice reserved for a European. Since the inception of the United Nations, eight people have held the title of UN Legal Counsel, and all of them have come from Europe.¹⁴ Why? Because

and the Legal Adviser of the United Nations, at the time, Patricia O'Brien. At some point, in the course of the conversation, they start reminiscing about how the Legal Adviser of the United Nations went back and forth between the US legal adviser and the Russian legal adviser to get agreement on the text of a Secretary-General's Report on piracy off the coast of Somalia. The following year, in 2012, during the annual interaction between UN International Law Commission and the Legal Adviser of the United Nations, still Ms. O'Brien, I took the opportunity to ask her the question about the process for drafting the reports of the Secretary-General. *See* U.N. ILCOR, 64th Sess., 3132d mtg. at ¶ 70, U.N. Doc. A/CN.4/3132 (May 22, 2012) ("Mr. Tladi asked to what extent the Office of Legal Affairs, when contributing to the reports on legal matters issued by the Secretary-General, felt the need to strike a balance between providing high-quality information, on the one hand, and furnishing information that was acceptable to Member States, on the other. For example, in the matter of piracy, the issue of regional prosecution mechanisms—including specialized anti-piracy courts—had been covered in the reports in some detail, while less coverage had been given to the question of natural resources, which some States considered to be important"). As expected, Ms. O'Brien's response insisted that there was no undue influence. *See id.* at ¶ 75 ("Replying to Mr. Tladi's question . . . The Office had compiled its reports with objectivity, professionalism and integrity and had duly submitted them to the Security Council. On the basis of advice provided to it not only by her Office but also by national legal advisers, the Council had decided that it would not be desirable to set up such a tribunal.")

12. Here I offer, yet another, slightly more well-known anecdote from my time in the belly of the beast. In 2012, a group of small island developing calling themselves Ambassadors for Responsibility for Climate Change circulated a concept note and draft resolution (on file with author), seeking to have the General Assembly request an advisory opinion from the International Court of Justice on the "obligations and responsibilities under international law of a State for ensuring that activities under its jurisdiction" do not contribute substantially to climate. It is now well-known that while the resolution was widely supported by States, the group of States decided to withdraw it on the eve of its adoption due to pressure from big States, in particular the United States, decided to withdraw the application. Thus, through the sheer force and influence of economic muscle, some States exercise a degree of control over law-making activities within the General Assembly. *See generally* Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, in *THE PURSUIT OF A BRAVE NEW WORLD: ESSAYS IN HONOUR OF JOHN DUGARD* 114 (Tiyanjana Maluwa, Max du Plessis & Dire Tladi eds., 2017).

13. U.N. Joint Inspection Unit, Senior-Level Appointments in the United Nations, Its Programmes and Funds, ¶ 33, U.N. Doc. JIU/REP/2000/3 (2000) ("[A]ppointments to USG and ASG positions . . . have traditionally been the personal responsibility of the Secretary-General. They fall within the discretionary powers of the Secretary-General.")

14. 1946–1952, Ivan Kerno (Czechoslovakia); 1953–1973, Constantin A. Stavropoulos (Greece); 1974–1982, Eric Suy (Belgium); 1983–1994, Carl-August Fleischhauer (Germany); 1994–2004, Hans Axel Valdemar Corell (Sweden); 2004–2008, Nicolas Michel (Switzerland); 2008–2013, Patricia O'Brien (Ireland); 2013–current, Miguel de Serpa Soares (Portugal).

no African, or Latin-American, or Asian can be trusted with directing the international law affairs of the United Nations.¹⁵

The theme of this conference, *Colonialism, Capitalism, and Race in International Law* provides an opportunity to revisit questions of law-making, to ponder how international law-making, and in particular the pursuit of equality in law-making, is affected by colonialism, capitalism, and/or race. For the most part, legal scholarship concerned with inequality, racism, and colonialism in international law has focused on the content of the rules of international law and how these rules reflect international law's imperial and colonial past.¹⁶ The focus in much of the scholarship is on deconstructing popular and hagiographic histories of international law emerging from Europe.¹⁷ The actual practice of international law-making, and the method of international law, has not featured so prominently in these accounts.¹⁸

This Article addresses the question of inequality in international law-making institutions—a question that has received very little attention in critical scholarship.¹⁹ It does so by examining the International Law Commission (hereinafter the “ILC” or “Commission”) and the International Court of Justice (hereinafter the “ICJ” or “Court”), two marque institutions in international law-making. The work of these institutions in the context of inequality in law-making has also received very little attention in the literature. In 2000, for example, *Villanova Law Review* published a symposium on “Critical Race Theory and International Law”.²⁰ The articles in that volume cover a wide range of issues on race and international law, but none address the role of the International Law Commission and the International Court of Justice. Most recently, in 2021, *UCLA Law Review* carried a symposium entitled “Transnational Legal Discourse on Race and

15. In an interview, former Legal Counsel of the United Nations, Hans Corell, described the position as “one of the most interesting legal positions in the world, at the *crossroads between law and politics*.” See International Centre for Ethics, Justice and Public Life, *The Ad Hoc Tribunals Oral History Project: An Interview with Hans Corell* 17 (Brandeis, 2015).

16. See, e.g., Antony Anghie, “*The Heart of My Home: Colonialism*”: *Environmental Damage and the Nauru Case*, 34 HARV. INT'L L.J. 445 (1993) (describing how colonialism was central to the project of international law and how many of international law's fundamental concepts emerged to perpetuate it); James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013 (2007); cf. Emmanuelle Jouannet, *Universalism and Imperialism: The True-False Paradox of International Law*, 18 EUR. J. INT'L L. 379 (2007).

17. See Antony Anghie, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 3 (2004); see also Anne Orford, *The Past as Law or History? The Relevance of Imperialism for Modern International Law*, in INTERNATIONAL LAW AND NEW APPROACHES TO THE THIRD WORLD: BETWEEN REPETITION AND RENEWAL (Mark Toufayan, Emmanuelle Tourme-Jouannet & Hélène Ruiz Fabri eds., 2013).

18. But see MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES (1999).

19. For a rare example, see Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005), although this paper adopts an historical approach, looking at different eras of hegemony—Spanish, British, and U.S. hegemony.

20. See Ruth Gordon, *Foreword—Critical Race Theory and International Law: Convergence and Divergence*, 45 VILLANOVA L. REV. 827 (2000).

Empire”.²¹ As with the *Villanova Law Review* symposium twenty years earlier, none of the *UCLA Law Review* symposium articles address the question of inequality in law-making institutions and their practices. Yet the ILC and ICJ, individually and collectively, exert more influence on the development of international law than perhaps any other institution. It is thus important to consider how, if at all, inequality in international law-making is reflected in their practice. There are many ways that inequality and marginalization in these institutions could be studied. For example, the study might consider the sources or materials relied upon by these institutions and, in particular, the extent to which there is a proportional reliance on sources and materials from different parts of the world. In this article, however, I focus only on representation (i.e., who is represented in these bodies).

The Article begins in Part I by setting the scene of inequality and marginalization in the context of the themes of the conference—colonialism, capitalism, and race. Race is prominent and at the core of these themes and the next Part, therefore, provides tentative observations of what race might mean in the context of international law. Part II will provide a description of the role of the International Court of Justice and the International Law Commission in law-making. This is followed in Part III by a discussion of representational inequality and marginalization in the International Court of Justice and the International Law Commission, including addressing why representation matters at all. Finally, I offer some initial concluding thoughts.

A caveat is necessary. There are many other sources highlighting inequality and marginalization in international law-making. A major factor for the disproportionate influence of Europe in international law-making is education. Top students all over the world have, for quite some time, sought to enhance their legal education, including in international law, by studying abroad.²² Yet the flow is disproportionately in one direction, from South to North. Latin-Americans, Asians, and Africans—myself included—are rushing to undertake studies in the United States, United Kingdom, France, and Switzerland, but Europeans and Americans are not rushing to study in Africa, Asia, and Latin-America.²³ Related to, but quite apart, is the fact that a significantly disproportionate number of international judges—and I would add members of the International Law Commission—hold degrees from the United States and Europe.²⁴ Another contributor to the

21. See E. Tendayi Achiume & Asli Bâli, *Race and Empire: Legal Theory Within, Through, and Across National Borders*, 67 *UCLA L. REV.* 1386 (1989).

22. See BRYANT GARTH & GREGORY SHAFFER, *The Globalization of Legal Education: A Critical Perspective*, in *THE GLOBALIZATION OF LEGAL EDUCATION: A CRITICAL PERSPECTIVE* (forthcoming 2021).

23. Anecdotally, I have come to know of people who, having obtained doctorate degrees at South African universities, have decided to pursue the “lower” master’s degree in the United States, in particular, at Harvard, ostensibly for the prestige conferred by a degree from this monument of U.S. excellence.

24. According to Madsen, the top ten universities in education of international judges are, in descending order: University of Cambridge (38), University of London (33), Harvard University (25), University of Paris (24), University of Oxford (19), Columbia University (14), Yale University (11), University of Madrid (10), University of Bonn (10) and New York University (10). See Mikael Rask

disproportionate influence of some States in international law-making is what I have elsewhere referred to as capacity constraints.²⁵ For example, while some States have an “army of legal advisers for international law,” developing States have very few.²⁶ In these circumstances, legal advisers having to choose between completing mundane administrative tasks that are due and commenting on legally significant international development, such as judicial decisions of the ICJ or the report of the ILC, will choose the former.²⁷

I. SETTING THE SCENE: RACE AND REPRESENTATION

The title of the symposium *Colonialism, Capitalism, and Race in International Law* alludes to three themes, colonialism, capitalism, and race, and how these themes are reflected in international law. Embedded in all three themes is “race.” It is thus appropriate to say a few words about the concept of “race” in the context of international law. Race, of course, isn’t real. It is an invention.²⁸ We are all, after all, human beings. In this regard, the Special Rapporteur on Contemporary Forms of Racism has recalled that “today, race is appropriately understood as a social construction”²⁹ Yet this invention or social construction has historically been used to subjugate and brutalize some people. Those that have been the victims of the subjugation and oppression are those that this invention has classified as Blacks, Asians, Latinos—anyone who was not white. For international law, the invention of race has also meant that international law tends to reflect the interests of the

Madsen, *Who Rules the World? The Educational Capital of the International Judiciary*, in *THE GLOBALIZATION OF LEGAL EDUCATION*, *supra* note 22, fig.5.

25. See Dire Tladi, *Reflections on Advising the South African Government on International Law*, in *THE ROLE OF THE LEGAL ADVISER IN INT'L L.* 170 (Andraž Židar & Jean-Pierre Gauci eds. 2017).

26. Perhaps a final anecdote is warranted. In 2014, while giving lectures for the UN Regional Course in International Law (Africa) in Addis Ababa, Ethiopia, I enquired from those that worked in the Legal Advisers of Foreign Ministries, how many lawyers their Legal Advisers office had. I recall the participant from Malawi said it was just he and the Legal Adviser. Only *two* lawyers servicing Malawi on international law. This response caused to reflect about an experience I had had two years prior, while South Africa was on the UN Security Council: In 2012 I facilitated a UN Security Council Presidential Statement on the Rule (S/PRST/2012/1). One day, after a particularly long session in which the United States had a truckload of proposals for amendments, I received a call from the U.S. delegate who, to the best of my memory said, “Look Dire, I am really sorry to have to do this to you, but I have a few more comments on the text. Unfortunately, I have fifteen lawyers studying these text from different angles.” So, Malawi had *two* lawyers in total, the United States had *fifteen* lawyers *working on one* Presidential Statement, not even a resolution!

27. Tladi, *supra* note 25.

28. See Ian Haney F. López, *The Social Construction of Race*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995).

29. See Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism), *Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance: Global Extractivism and Racial Inequality*, ¶ 12, U.N. Doc. A/HRC/41/54 (May 14, 2019). Thus, while the notion of biological race is rejected, there is a recognition that construction of race is based on “physical features and lineage” not because these are “a product of racial variation but because societies invest them with social meaning.” *Id.* at ¶ 13; see also Anibal Quijano, *Coloniality of Power and Eurocentrism in Latin America*, 15(2) INT'L SOCIO. 215, 216–217 (2000).

dominator while marginalizing the subjugated, leading to calls for the “unwhitening” of international law.³⁰

Yet, in the context of international law, race cannot simply mean the color of one’s skin. As Makau Mutua observes, in the context of international law, race in the narrow sense of color has “no immediate utility to a global population . . . three quarters of whom live in the developing or so-called “Third World.””³¹ In this sense, the approach to race in this chapter is directed at “persisting structures of global racial inequality” which affect “formerly colonized nations and peoples subordinate to the interests of powerful nations.”³² Thus, for the purposes of this paper, race (when it is used) is understood in the context of geopolitics, with those regarded as the excluded and marginalized race coming from the peripheral, formerly colonized territories of the world commonly known as the South or the Third World, and with the privileged race being those from territories of the descendants of Europe, or the North.³³ In UN language, the privileged would be those from the so-called Western Europe and Other Group (Western Europe, the United States, Canada, New Zealand, Australia and Israel),³⁴ and the Eastern European Group. The South is composed of the territories of the Africa Group, the Group of Latin American and the Caribbean States, and the Group of Asian and Pacific States, and the inhabitants of those territories. For Mutua, the North is “the global white racial hierarchy” and the marginalized group from the South is “Africa in particular and the Third World in general.”³⁵ This sentiment is also expressed by Gordon who states that “southern, developing Third World is for the most part the colored world and . . . it is marginalized, disproportionately poor and relatively powerless.”³⁶

This geopolitical approach to race, of course, raises a question of nuance that cannot be addressed in an article whose focus is on law-making institutions. This approach may be critiqued as an oversimplification—and it probably is—for it equates (or seems to equate) race with nationality. We might, in this context, ask where we are to place members of the diaspora who find themselves in the territories of the privileged? Where are we to place Europeans (or descendants from Europe) who find themselves in the territories of marginalized?³⁷ The issue that this question evokes is probably central in the dividing line between TWAIL scholarship and Critical Race Theory scholarship, with the former focused more on the

30. See Christopher Gevers, “Unwhitening the World”: *Rethinking Race and International Law*, 67 UCLA L. REV. 1652 (2021).

31. Makau Mutua, *Keynote Address – Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILLANOVA L. REV. 841, 843.

32. See Achiume Report, *supra* note 29, ¶ 14. See also E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to Int’l L.*, 67 UCLA L. REV. 1462, 1466 (2021).

33. Upendra Baxi, *Some Newly Emergent Geographies of Injustice: Boundaries and Borders in Int’l L.*, 23 IND. J. GLOB. LEGAL STUD. 15 (2016).

34. While this is meant to be a regional group, you will notice that there is nothing geographical about this group. When my students ask me what do these States have in common, I always say “rich, white countries.”

35. Mutua, *supra* note 31, at 847.

36. Gordon, *supra* note 20, at 831.

37. See *id.* at 834 (positing similar questions).

geopolitical and the latter on race in a narrow sense.³⁸ Concerning the critique of oversimplification and of equating race with nationality, however, it should be recalled that race is a social construct, *ascribed* to people and not inherent in them. As such, it will mean different things in different contexts. In international law, race *should be seen from a geopolitical perspective*. But equally important, because it is a social construct without scientific and objective meaning, it is perfectly acceptable to assign a sliding scale to questions of race, so that, at least in the context of international law, one may be less or more marginalized and more or less privileged. By this I mean that there are varying degrees of marginalization,³⁹ and this article seeks to account generally for marginalization. Thus, while accepting the possibility of imprecision, this paper focuses on geopolitical marginalization as the prism through which to account for race in international law-making.

I should also pause to say that, while this conference concerns colonialism and race, and, as a result, the article is concerned with a particular basis for marginalization and inequality in law-making, it is safe to assume that the same conclusions would be reached if the questions were posed from a gender perspective. At the risk of prejudging the discussion in Section 3, the basic statistics bear this out. The first women elected to the International Law Commission, Paula Escarameia and Hanqin Xue, were elected only in 2000, an incredible 51 years after the Commission came into existence. In its seventy-three-year history,⁴⁰ only seven women have ever served on the Commission.⁴¹ The same is gender imbalance plays out in respect of the International Court of Justice.⁴²

II. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL LAW COMMISSION IN LAW-MAKING

A. The International Court of Justice

The International Court of Justice is the preeminent judicial organ of international law. Even though, as a doctrinal matter, international law operates as a horizontal, non-hierarchical system, with all courts having equal status, there is no

38. See Achiume & Carbado, *supra* note 32, at 1464 (describing the divide, the authors make the following observations: “One might, for example, reasonably ask the colonization question vis-à-vis CRT (why are problems of empire, imperialism, and colonization largely absent from CRT?). In a similar vein, one might reasonably ask the racialization question vis-à-vis TWAIL (why are problems of racialization . . . not more central part of TWAIL?).” See also Gordon, *supra* note 20, at 830 (“International legal theory rarely mentions race, much less employs it as a basis of analysis. Internationalists frame hierarchy in terms of economic strength, military power or technological advancement. Terms such as north/south, developed/developing or ‘Third World,’ are the preferred terms of reference.”).

39. The idea of differentiation, sliding scale, hierarchy in recognition (and non-recognition), is nothing new. See Martii Koskenniemi, *Race, Hierarchy and International Law: Lorimer’s Legal Science*, 27 EUR. J. OF INT’L L. 415, 417, 427 (2016).

40. This figure is likely to change in 2023.

41. As of 2021, the women that have served on the Commission are Paula Escarameia, Hanqin Xue, Marie Jacobsson, Concepción Escobar Hernandez, Patrícia Galvão Teles, Marja Lehto, and Nilufer Oral.

42. As of 2021, the ICJ had had 109 judges in its seventy-five-year history.

question that the ICJ is regarded is the most important court.⁴³ Rosenne has, for example, asserted notwithstanding this horizontal nature of international law, and the lack of hierarchy of courts in international law, “other international courts generally follow the ICJ’s reasoning An international court or tribunal that fails to heed the ICJ’s decisions would rapidly lose the confidence of its clientele.”⁴⁴ Disproportionate influence over the Court—referred to by some as the World Court—will also mean a disproportionate influence on the development of international law.

The claim that influence over the Court implies an influence over the development of international law may be refuted on the basis that the Court’s role is to resolve disputes between States, and not to develop the law. It might certainly be pointed out that the Statute of the Court itself states that the “decisions of the Court [have] no binding force except between the parties and in respect of that particular case.”⁴⁵ Yet, it is undeniable that the Court has been the primary driver behind many rules of international law,⁴⁶ and is often cited as an authority for various propositions in international law, despite its rules clearly providing that its decisions only bind the states party to the dispute. The role of the Court in the development of international law has varied from laying the seeds for new rules of international law to refining the content and scope of existing rules. Perhaps even more significantly, the methodological rules on how substantive rules of international law must be identified have developed mainly on the basis of the jurisprudence of the Court.

The significant influence that the Court has exerted over international law can be illustrated in several areas.⁴⁷ I refer to three examples in particular. The first example is the doctrine of *erga omnes* obligations.⁴⁸ As is well-known, under the general rules of international law, the responsibility of a State can only be invoked

43. See Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. OF INT’L L. & POL’Y 791, 798 (1999) (describing the I.C.J. as having a “a central role”); Leo Park, *The International Court and Rule-Making: Finding Effectiveness*, 39 UNIV. PA. J. INT’L L. 1965, 1074 (2018).

44. SHABTAI ROSENNE, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. ¶ 20 (2006).

45. See Art. 59 of Statute of the I.C.J. In this respect, Art. 38(1)(d) provides that decisions of courts serve as a subsidiary means for the determination of rules of international law. While Art. 38(1)(d) does not specify that this refers to the I.C.J., it is understood that pre-eminent authority relied on under Art. 38(1)(d) of the Statute is the I.C.J. See Int’l L. Comm’n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10, at Conclusion 13 (“Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules.”).

46. See generally Abdulqawi A. Yusuf, President of the Ct., Speech of the President of the Court Abdulqawi Yusuf before the Sixth Committee of the General Assembly: “The UN at 75: International Law and the Future We Want” (Oct. 26, 2020) (describing the role of the Court in the development of international law).

47. The section of the article is adapted from a forthcoming chapter Dire Tladi, “The Role of the International Court of Justice in the Development of International Law.”

48. See generally Martha M. Bradley, *Jus Cogens’ Preferred Sister: Obligations Erga Omnes and the International Court of Justice – Fifty Years after the Barcelona Traction Case*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS): DISQUISITIONS AND DISPUTATIONS (Dire Tladi ed., 2021) (discussing the ICJ’s role in the entrenchment of the doctrine of *erga omnes*).

by a State whose rights are breached by the responsible State.⁴⁹ An illustration of this principle is the 1966 judgement of the Court where it found that neither Ethiopia nor Liberia had “established any legal right or interest appertaining to them in the subject-matter of the” claim against South Africa in respect of the latter’s application of its Apartheid policies in Namibia,⁵⁰ essentially reversing its decision in the preliminary phase of the proceedings, where it had held that Liberia and Ethiopia had standing.⁵¹ While this decision has been criticized from a normative perspective,⁵² it was probably justifiable from a purely positivist perspective relying on the general rule that the responsibility of a State can only be invoked by a State whose rights are breached by the responsible State.⁵³ Yet, in *Barcelona Traction*, the Court came up with the famous distinction between obligations *inter partes* and obligations *erga omnes*.⁵⁴ While the Court’s conclusion is (normatively) justifiable, the Court offers not a single evidence of practice to support the distinction it puts forward. This distinction, which when put forward by the Court, was not based on any identified evidence of State practice, is now generally accepted, unquestionably, as part of international law.⁵⁵ It was simply an invention—a welcome invention, but an invention nonetheless—by the Court of a concept which has since come to be unquestioned in law.

49. Phosphates in Morocco, Judgment, 1938 P.C.I.J., (ser. A/B) No. 74, 10, at 28 (“This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States.”); see also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, at 181–82 (“The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that *only the party to whom an international obligation is due can bring a claim in respect of its breach*” (emphasis added)).

50. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, at 51.

51. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J., 319, at 319.

52. See Leo Gross, *Conclusions*, in *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 747 (Leo Gross ed., 1976); see also John Dugard and Rosalind Elphick, *International Adjudication*, in *DUGARD’S INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 683–84 (John Dugard, Max du Plessis, Tiya Maluwa and Dire Tladi eds., 2018); see generally Jean Allain, *Decolonisation as the Source of Concepts of Jus Cogens and Obligations Erga Omnes*, 2016 ETH. Y.B. OF INT’L. L. 35; see also Dire Tladi, *The International Court of Justice and South Africa*, in Achilles Schodas, *HANDBOOK ON THE INT’L. CT. OF JUST.* (forthcoming 2020).

53. See, e.g., Phosphates in Morocco, Judgment, 1938 P.C.I.J., (ser. A/B) No. 74, 10, at 28 (explaining that an internationally wrongful act establishes a relationship of responsibility “between the States”); see ¶ 1 of the Comm. to Art. 42 of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, Rep. of the Int’l Law Commission on Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) (“Article 42 provides that the implementation of the State responsibility is *in the first place* an entitlement of the ‘injured State.’” (emphasis added)).

54. Case Concerning Barcelona Traction, Light and Power Company, Limited: New Application, Judgment, 1970 I.C.J. 3, at ¶ 33–35 (July 24).

55. See, e.g., *Art. 48(1)(b) of the Article on the Responsibility of States for Internationally Wrongful Acts*, 2001 Y.B. OF THE INT’L. L. COMM’N. 128; Draft Conclusion of the Draft Conclusions on Peremptory Norms, *supra* note 16; see generally Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Judgment, 2019 I.C.J. (Feb. 25); see generally CHRISTIAN TOMUSCHAT & JEAN-MARC THOUVENIN, *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

A second notable example concerns the scope of immunity *ratione personae* under international law. In the *Arrest Warrant case*, the International Court of Justice had to answer two interrelated questions concerning immunity *ratione personae*.⁵⁶ First, the Court had to determine whether Ministers for Foreign Affairs were entitled to immunity *ratione personae*, and second, if so, whether there are exceptions to this type of immunity for serious crimes such as crimes against humanity and genocide. The Court answered the first question in the affirmative (i.e., Ministers for Foreign Affairs were entitled to immunity *ratione personae*, while determining that there were no exceptions to this rule). Yet, as was the case with the introduction of *erga omnes* obligation in *Barcelona Traction*, the Court did not provide any practice in support of the conclusion that Ministers for Foreign Affairs are entitled to immunity *ratione personae*,⁵⁷ relying instead on deductions based on the functions of the Foreign Minister and comparisons with the Heads of State.⁵⁸ The *Arrest Warrant case* has been significant for the development of international law on immunities. The rules set forth in the *Arrest Warrant case* have been the starting point for any discussion on the scope of immunity *ratione personae*.⁵⁹

While *Barcelona Traction* and *Arrest Warrant* are examples of judgments of the Court which, without the requisite State practice, have contributed to the development of international law in new areas, the jurisprudence of the Court on the use of force against non-State actors has influenced the development of law in a slightly different way. In the *Military and Paramilitary Activities case*, the Court held that the right to use force in response to an attack from non-State actors is permissible only if the non-State actors in question were sent by or acting on behalf of a State (i.e., the State in whose territory the self-defense measures are to be taken must have exercised effective control over the non-State actors in question).⁶⁰ This

56. Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2000 I.C.J. Rep. (Oct. 17).

57. For its conclusion that there were no exceptions to immunity *ratione personae*, the Court did engage in a rather detailed analysis of State practice and *opinio juris*. *Id.* at ¶ 58.

58. *Id.* at ¶ 53 (“In order to determine the extent of these immunities, the Court must therefore first consider the nature of the functions exercised by a Minister for Foreign Affairs. He or she is in charge of his or her Government’s diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. His or her acts may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State. . .”).

59. See generally KOBINA DANIEL, HEAD OF STATE IMMUNITY UNDER THE MALABO PROTOCOL: TRIUMPH OF IMPUNITY OVER ACCOUNTABILITY? (2021).

60. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 195 (June 27) (“There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to” [inter alia] an actual armed attack conducted by regular forces, “or its substantial involvement therein.”).

view has been confirmed by the Court in subsequent decisions.⁶¹ Unlike *Barcelona Traction* and *Arrest Warrant*, this jurisprudence was based on State practice in the form of treaty practice and resolutions of General Assembly.⁶² Furthermore, unlike the examples in *Barcelona Traction* and *Arrest Warrant*, the Court's jurisprudence concerning the use of force in self-defense against non-State has, at least in recent times, being questioned in some quarters.⁶³ The impact of the Court's jurisprudence on the development of international law has, therefore, not been in the form of putting forward a rule which was subsequently followed and solidified into a rule of customary international law. Rather, the Court's jurisprudence has been used to ward off attempts to amend (some would say undermine) the existing rule and put in place a system that makes the use of force more permissive.⁶⁴

B. *The International Law Commission*

The International Law Commission is a subsidiary organ of the General Assembly and aids the General Assembly in its mandate for the codification and progressive development of international law.⁶⁵ The Commission too has played (and continues to play) an influential role in the development of international law.⁶⁶ Its role is undoubtedly not nearly as pronounced as that of its more prestigious sister institution, the Court, but it would be a mistake to underestimate the role played by the Commission in shaping international law.⁶⁷ Indeed because of the significant role that the International Law Commission plays in the development of international law, a new debate has arisen over the role of the Commission as a creator of "new law."⁶⁸

61. Case Concerning Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6); Case Concerning the Armed Activities in the Territory of the Congo (Dem. Rep. Congo. v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 146 (Dec. 19); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9).

62. *Nicar. v. U.S.*, 1986 I.C.J., ¶¶ 195–96.

63. For an accessible account of the debate, see MARY ELLEN O'CONNELL, CHRISTIAN TAMS & DIRE TLADI, *MAX PLANCK TRIALOGUES ON THE LAW OF WAR AND PEACE (VOLUME 1): SELF-DEFENCE AGAINST NON-STATE ACTORS* (2019).

64. Dire Tladi, *The Extraterritorial Use of Force Against Non-State Actors*, 418 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L DE LA HAYE 237 (2021).

65. See Statute of the International Law Commission, art. 1 ("The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.").

66. See generally Laurence Boisson de Chazournes, *The International Law Commission in Mirror – Forms, Impact and Authority*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION: DRAWING A BALANCE FOR THE FUTURE (U.N. ed., Brill 2021) (stating that the Commission work has "transposed many rules of customary international law into easily accessible pronouncements . . . [and has] resulted in the establishment of many new rules").

67. See Alejandro Rodiles, *The International Law Commission and Change: Not Tracing It but Facing It* in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION at 116–18 (noting that what is sometimes perceived as its waning importance is in fact a reflection of its "resilience").

68. See Yifeng Chen, *Between Codification and Legislation: A Role for the International Law Commission as an Autonomous Law-Maker*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION; see also Ineta Ziemela, *The Functions of the International Law: Identifying Existing Law or Proposing New Law?*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION; see also Sean D. Murphy, *Immunity Ratione Materiae of State Officials from Foreign Criminal Jurisdiction: Where is the State Practice in Support of Exceptions?*, in 112 AM. J. INT'L L. UNBOUND 4 (2018); see, e.g., Dire Tladi, *Codification, Progressive*

Very often, the contribution of the International Law Commission is reduced to its historical contribution in producing texts that States then adopt (after some adaptation) as treaties. Its contribution to areas such as the law of the sea,⁶⁹ the codification of the law of treaties,⁷⁰ and immunities⁷¹ are of course well-known.⁷² Its contribution to the adoption of the Statute of the International Criminal Court is well-known.⁷³ But it is not only in treaty-making that the Commission's influence can be felt. The Commission's effect on the development of international law is just as significant in connection in relation to customary international law and approaches to international law.

There are several examples of the impact of the Commission's work on international law and the fundamental principles of international law, beyond the classical treaty adopted on the basis of its work. In the interest of time and space, I will provide only three examples. The first example is the role of the Commission in setting out the basic principles of what has become the field of international criminal law. The second example is the Commission's role in the secondary rules of international law on State responsibility. Finally, the third example that will be addressed in this section is the notion of peremptory norms of general international law (*jus cogens*) in international law.

As noted above, the Commission's contribution to the Statute of the ICC is well-known. But in fact, the Commission's influence on international criminal law has been broader than just the adoption of the Rome Statute. The very principles

Development, New Law, Doctrine, and the Work of the International Law on Peremptory Norms of General International Law (Jus Cogens): Personal Reflection of the Special Rapporteur, 13 FLA. INT'L UNIV. L. REV. 1137, 1138 (2019).

69. See, e.g., *1956 Articles Concerning the Law of the Sea*, 1956 Y.B. INT'L L. COMM'N. U.N. Doc. A/CN.4/SER.A/1956/Add.1. The treaties adopted on the basis of this set of articles are: 1958 Convention on the Territorial Sea and the Contiguous Zone; 1958 Convention on the High Seas; 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas; 1958 Convention on the Continental Shelf; and the 1958 Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes.

70. *1966 Draft Articles on the Law of Treaties*, 1966 Y.B. INT'L L. COMM'N., U.N. Sales No. 67.V.2. Vol II (forming the basis of which 1969 Vienna Convention on the Law of Treaties was adopted); see also *1982 Draft Articles on the Law of Treaties between States and International Organisations or between International Organisations*, 1982 Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER.A/1982/Add.1(Part 2) (forming the basis of the 1986 Vienna Convention on the Law of Treaties).

71. See *1958 Draft Articles on Diplomatic Intercourse and Immunities*, 1958 Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SER.A/1958/Add.1 (forming the basis of several treaties: 1961 Vienna Convention on Diplomatic Relations, 1961 Optional Protocol Concerning Acquisition of Nationality, and the 1961 Optional Protocol Concerning the Compulsory Settlement of Disputes).

72. For a comprehensive list of treaties adopted on the basis of the work of the Commission, see Pemmaraju Sreenivasa Rao, *International Law Commission (ILC)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L L. (Mar. 2017) (select bibliograph, multilateral conventions concluded under the auspices of the United Nations following the consideration of the topics by the International Law Commission).

73. The 1998 Rome Statute of the International Criminal Court was negotiated by States on the basis of two instruments of the International Law Commission. See *1996 Draft Code of Crimes Against Peace and Security of Mankind*, 1966 Y.B. INT'L L. COMM'N., A/CN.4/SER.A/1966/Add.1; *Draft Statute of the International Criminal Court*, 1994 Y.B. Int'l L. Comm'n., U.N. Doc. A/CN.4/SER.A/1994/Add.1(Part 2). For a discussion of the history, see Dire Tladi, *International Criminal Court*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (2020).

that are now regarded as the core of international criminal law were first enunciated in an instrument of general application in the Commission's Nuremberg Principles.⁷⁴ These include the fundamental principle of individual criminal responsibility for commission of offences of international law,⁷⁵ and the principle that the official capacity does not constitute a ground for exclusion of criminal responsibility.⁷⁶ Indeed the crimes that today are considered crimes under international law can be traced back to the ILC's principles.⁷⁷ These principles, which were ultimately reiterated in the 1996 Draft Code of Crimes,⁷⁸ were developed further after 1950 in the first Draft Code of 1954.⁷⁹ It was really through the Commission's work that these principles which, without the legitimating effect of the Commission, would be seen as an application of victor's justice, came to be seen as principles of international law applicable beyond the context of a particular conflict. These principles today form the foundation of an area of international law concerned with individual criminal responsibility—international criminal law.

The ILC's Articles on State Responsibility⁸⁰ are perhaps the ILC's most influential output—second perhaps only to the ILC's draft articles on the law of treaties.⁸¹ This instrument, a culmination of nearly four decades' work by the Commission, has been one of the most important outcomes of the Commission, notwithstanding (or perhaps because of) the fact that it was not eventually approved by States as a treaty.⁸² This set of articles, or at least a large part of it, is generally regarded as an expression of customary international law.⁸³ Unlike the ILC's work on international criminal law, the Articles on State Responsibility do not apply to only a particular area of international law, but broadly to all areas of international law.

74. *1950 Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal*, 1950 Y.B. INT'L L. COMM'N., U.N. Doc. A/CN.4/SERA/1950/Add.1 (1957).

75. *Id.* at 195.

76. *Id.*

77. *Id.*

78. *1996 Draft Code of Crimes against Peace and Security of Mankind*, *supra* note 73.

79. *1954 Draft Code of Offences against the Peace and Security of Mankind*, 1954 Y.B. INT'L COMM'N., U.N. Doc. A/Cn.4/SERA/1954/Add.1.

80. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 Y.B. Int'l L. Comm'n., U.N. Doc. A/CN.4/SERA/2001/Add.1(Part 2).

81. Pavel Šturma, *The Responsibility of States: State of Play and the Way Forward*, ANNUÁRIO DE DEREITO INTERNACIONAL 95, 95 (2013) ("Let me start by expressing my view that the Articles on the Responsibility of States for Internationally Wrongful Acts are of the major achievements in the codification and progressive development of international law. They can be considered together with the Vienna Convention on the Law of Treaties as the most important results of the work of the International Law Commission.").

82. See, e.g., Patrícia Galvão Teles, *The Impact and Influence of the Articles on State Responsibility on the Work of the International Law Commission and Beyond*, EJIL:TALK! (Aug. 3, 2021), <https://www.ejiltalk.org/the-impact-and-influence-of-the-articles-on-state-responsibility-on-the-work-of-the-international-law-commission-and-beyond/>; see also Dire Tladi, *The Fate of the Draft Articles on State Responsibility: Act Soon or Face the Further Erosion of the Role of States in the International Law-Making Process*, ANNUÁRIO DE DEREITO INTERNACIONAL 87 (2013).

83. For discussion, see David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L. L. 857 (2002).

The third example of the ILC's immense influence concerns the place of *jus cogens* in modern international law. Through its work on the law of treaties, the International Law Commission, almost singlehandedly, took *jus cogens*, a concept that at the time was at the periphery of international law, championed by scholars but with no pedigree in the practice of States, and placed it smack bang in the center of international law.⁸⁴ I must stress that this was not simply a transposition of a rule without pedigree! This particular rule—that there existed, in international law, rules that were superior to international law, so much so that they could invalidate other rules—was so contrary to the fundamental logic of international law as an horizontal system that it was nothing short of a revolution.⁸⁵ Yet, largely because the ILC said so, *jus cogens* is now firmly part of modern international law. Moreover, even beyond the treaty rule contained in Article 53 of the Vienna Convention, it has been through the Commission that other aspects of the doctrine of *jus cogens* have been developed. For example, the Articles on State Responsibility referred to above identified particular consequences of *jus cogens* beyond treaty law (e.g., the rule that grounds excluding wrongfulness cannot be relied upon in respect of *jus cogens* norms),⁸⁶ and the duty not to recognize or assist in the maintenance of situations caused by a serious breach of *jus cogens*.⁸⁷ The norms generally recognized as having *jus cogens* character are those that the ILC has decreed to have such status in its works on the law of treaties,⁸⁸ State responsibility,⁸⁹ and fragmentation.⁹⁰

C. *The ILC and the ICJ: Formidable Individually, Untouchable United*

The International Law Commission and the International Court of Justice both exert an incredible amount of influence on the development of international law. Moreover, very often, though certainly not always, these two powerful institutions act together in concert and when they do, the result is an irresistible influence on international law. While the ILC has, as part of its agenda, interactions with other bodies, it is clear that its interactions with the International Court of Justice, represented by the President of the Court, are most important.⁹¹ The strong

84. The full extent to which the Commission's introduction of the concept of *jus cogens* into the mainstream of international law was "awe-inspiring" and "nothing short of a miracle" is considered in a forthcoming manuscript. Dire Tladi, *Grotian Moments and Peremptory Norms of General International Law: Friendly Facilitators or Fatal Foes?*, 42 GROTIANA (forthcoming 2021).

85. Dire Tladi, *The ILC's Draft Conclusions on Peremptory Norms of General International Law: Personal Reflections of the Special Rapporteur*, 24 AUSTRIAN REV. OF INT'L & EUR. L. 121, 126 (2019).

86. *Draft Articles on State Responsibility*, *supra* note 82, at art. 26.

87. *Id.* at art. 41.

88. See Commentary to art. 50 of the Draft Articles on the Law of Treaties, *supra* note 70, at ¶ 4.

89. See Commentary to art. 26 of the Articles on States Responsibility, *supra* note 53, at ¶5.

90. See Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Int'l Law Comm'n Rep. on the Work of its Fifty-Eighth Session, at ¶ 33, U.N. Doc. A/61/10 (2006).

91. When, due to time pressures, the Commission decided to reduce the amount of time spent with each body to half a morning, it retained the full morning interaction with the President of the Court. Moreover when, due to the time pressures resulting from Covid-related changes in working methods in 2021, it decided not to have any interactions with external bodies, the President of the ICJ was still invited to interact with the Commission.

bond between these two bodies, which has been described as a “special relationship,”⁹² is forged in part because the two bodies, while performing different functions, are the main organs for international law in the UN system. The late Judge James Crawford, who had served on both bodies, was reported by the current President of the ICJ to have described the relationship between the organs as a “‘symbiotic’ yet ‘dialectical’ relationship that had developed . . . irrespective of the completely different tasks of the two bodies.”⁹³

This “special relationship” is reflected in a variety of ways. It is not lost on many observers that many members of the Court, prior to their elevation to the Court, had been members of the Commission. At the time of writing, about a third of the fifteen members of the Court had previously been members of the International Law Commission (exactly a third if we include the late James Crawford who had just passed on at the time of writing).⁹⁴ Second, and perhaps most important, is the extent to which each body relies on the work. Notwithstanding the accepted wisdom that views the Court’s jurisprudence as “subsidiary,” the jurisprudence of the Court is at the heart of the most important positions adopted by the Commission, ranging from the fundamental rules on the identification of customary international law,⁹⁵ the conclusion that the rule in Article 31 of the Vienna Convention is customary international law,⁹⁶ and the fundamental rule that the breach of an international obligation by a State entails its responsibility,⁹⁷ to name but a few.⁹⁸ The International Law Commission’s work on the Immunity of Officials from Foreign Criminal Jurisdiction has, at least in respect to immunity *ratione personae*, been based on the *Arrest Warrant* case findings concerning persons covered by immunity *ratione personae* and the rules on exceptions.⁹⁹ The ICJ itself

92. Omri Sender, *THE SPECIAL RELATIONSHIP: THE INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL LAW COMMISSION, AND THEIR UNEXPECTED PARTNERSHIP IN SHAPING INTERNATIONAL LAW* (Cambridge, forthcoming).

93. See Judge Joan Donoghue, ILC Summary Records, 72d Sess., 3548th mtg., U.N. Doc. A/CN.4/SR.3548 (July 22, 2021).

94. In addition to Crawford, Judges Nolte (Germany), Gevorgian (Russia), Tomka (Slovakia), and Xue (China), had all been members of the Commission.

95. See Conclusions on the Identification of Customary International Law, *supra* note 4, at 17–22.

96. See *id.* at 17.

97. See, e.g., Commentary to art. 1 of the Articles on the Responsibility of States *supra* note 53, at ¶ 2 (referring to many ICJ and its predecessor the Permanent Court of International Justice judgments in support of the rule).

98. For a discussion, see Dire Tladi (Special Rapporteur), *Fourth Report of the Special Rapporteur on Peremptory Norms of General International Law (Jus Cogens)*, U.N. Doc A/CN.4/727 (Jan. 31, 2019).

99. On persons covered, see Int’l Law Comm’n, Rep. on the Work of Its Sixty-Fourth Session, U.N. Doc. A/72/10, 175 (2017) (“Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.”); on exceptions, see Draft Article 7, which, while permitting exceptions to immunity *ratione materiae*, does not do the same for immunity *ratione personae* (“As Draft Article 7 refers solely to immunity from jurisdiction *ratione materiae*, it is included in Part Three of the draft articles and does not apply in respect of immunity from jurisdiction *ratione personae*. . . .”); see also *Minister of Justice and Constitutional Development and Others v. Southern African Litigation Centre and Others* (4) BCLR 487 (SCA) (Mar. 3, 2016), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=06B21F9772B4BB00C1257FB1002E7060&action=openDocument&xp_countrySelecte

routinely cites to the work of the ILC in support of its findings.¹⁰⁰ Indeed the Court even often refers to uncompleted work of the International Law Commission.¹⁰¹ Sometime ago, I described the relationship between the Commission and the Court in terms of law-making in the following terms:

The problem is that reverence with which the [ILC's Articles on State Responsibility] is held has had the effect of excluding the State, the principal law-maker, from the law-making process . . . The law-making process concerning State responsibility can be crudely described as follows: the Commission speaks through the Articles, the Court and academics endorse the work of the Commission and then *voilà*, you have rules of customary international law.¹⁰²

III. REPRESENTATIONAL INEQUALITY AND MARGINALISATION IN INTERNATIONAL LAW-MAKING

A. The International Court of Justice

The Statute of the International Court of Justice addresses representation, directly and explicitly. It provides that the Court “shall be composed of a body of independent judges, *elected regardless of their nationality* from among persons of high moral character.”¹⁰³ At the same, the Statute provides that at each election “the electors *shall bear in mind* . . . that in the body as a whole the representation of the main forms of civilization and the principal legal systems of the world should be assured.”¹⁰⁴

A preliminary point to make in assessing the Statute is whether the phrases “the main forms of civilization” and “the principal legal systems” are sufficient to require the representation of the traditionally excluded and marginalized peoples. Whether representation is required will be dependent on interpretation. A dynamic interpretation of these concepts would promote the representation of nationals from the South. The second point to make is that whatever the scope of those concepts, the Statute *does not require* the representation “of the main forms of

d=ZA&xp_topicSelected=GVAL-992BU6&from=state (causing the South African Supreme Court of Appeal to rely heavily on the *Arrest Warrant* case conclusion that there were, under customary international law, no exceptions to the rules on immunity from foreign criminal jurisdiction).

100. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, at ¶ 136 (Feb. 3).

101. The Articles on State Responsibility provide an interesting illustration of the mutual citation by the two bodies. In 1997, the International Court of Justice relied on the Draft Articles of the ILC provisionally adopted in 1980 for its statement that it “is well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation . . .” See Case Concerning Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, at ¶ 47 (Sept. 25). Four years later, the Commission relied on the 1997 judgment when it adopted on final reading, Articles on State Responsibility. See Commentary to Draft Articles on the Responsibility of States art. 1, *supra* note 53, at ¶ 2.

102. Dire Tladi, *The Fate of the Draft Articles on State Responsibility: Act Soon or Face the Further Erosion of the Role of States in the International Law-Making Process*, ANNUARIO DE DEREITO INT'L 87, 91 (2015).

103. U.N. Charter & Statute of the International Court of Justice art. 2 (emphasis added).

104. *Id.* at art. 9 (emphasis added).

civilization” or for that matter “of the principal legal systems of the world.” To the contrary, the Statute itself states that the composition shall be determined “regardless of [the] nationality [of its members].” In other words, there is no requirement for nationals of States from the South to be represented. An ICJ composed of fifteen members from the North, if duly elected in accordance with the procedures of the electoral bodies (the General Assembly and the Security Council), would thus be fully consistent with the Statute. Thus, the Statute itself appears to be neutral toward representation. While the Statute is neutral toward representation, in practice, certain nationalities are underrepresented in the ICJ.

Elections to the Court reveal that States do take seriously the call in Article 9 to “take into account” the need for representation. In practice—with the exception of a recent election—States respect an informal agreement to reserve a set of number of seats for different regions, thus ensuring *some* spread and representatives. Yet, questions can be asked about whether this representation is sufficiently fair and equitable. To make a rough comparison, under this general understanding, WEOG (that group of States that I routinely describe to my students as the group of “white rich States”), a significantly smaller group, whether in terms of number of States or populations,¹⁰⁵ is “entitled” to a third of the seats (five seats),¹⁰⁶ while Africa, which has nearly double the number of States and larger population, is entitled only a fifth (three seats). Similarly, the Group of Asia and the Pacific which also accounts for nearly double the number of States of WEOG and nearly sixty percent of the population of UN members, is entitled to only two seats.¹⁰⁷ These are truly remarkable statistics, but they should come as no surprise. A close inspection of this informal arrangement reveals that the “desired” composition of the Court reflects the composition of the UN Security Council—a body whose lack of representativeness is well documented.

It is true that a large part of the reasons for the skewed representational arrangement of the ICJ is the voting system, which requires a majority in both the General Assembly and the Security Council,¹⁰⁸ thus giving the same States that are overrepresented in the Security Council a greater say in the composition of the Court. The main reason for the skewed representation under the informal arrangement, however, is the expectation that some States *must* be represented in the Court. The result of this expectation is that even those States that are disadvantaged by the informal arrangement continue to vote in accordance with the

105. See *supra* note 5.

106. At the time of writing, WEOG only has three seats but this is because of the death of James Cameron, whose seat had yet to be filled, and the exceptional break from the tradition, when the Lebanese Judge Nawaf Salam defeated the British, then sitting Judge, Christopher Greenwood. Dapo Akande, *ICJ Elections 2017: UN General Assembly and Security Council Elect Four Judges to the ICJ but Fail to Agree on a Fifth, Yet Again! + Trivia Question*, EJIL: TALK! (Nov.11, 2017), <https://www.ejiltalk.org/icj-elections-2017-un-general-assembly-and-security-council-elect-four-judges-to-the-icj-but-fail-to-agree-on-a-fifth-yet-again-trivia-question/>.

107. At the time of writing Asia has three seats on account of the rather extraordinary election victory of Judge Salam over Judge Greenwood. *Id.* at 2.

108. See U.N. Charter & Statute of the International Court of Justice art. 4.

skewed representational framework. This sense almost of inevitability is well-captured in the reporting by Dapo Akande in the midst of the anomalous elections that resulted in Asia and the Pacific securing a third seat “at the expense of WEOG”:

What is perhaps most remarkable about this election, at least thus far, is that Judge Christopher Greenwood, the judge of British nationality, was not re-elected in the first “meeting.” The two remaining judge candidates for re-election, who must now fight out on Monday are Judge Greenwood and Judge Bhandari (India), both sitting judges on the Court. Were Judge Greenwood not to be re-elected on Monday this would be a *very significant break from the past* It would be the *first time that there would be no British judge* on the ICJ It would break the tradition of there being a judge of the nationality of each of the permanent of the UN Security Council. Finally, were he not to be re-elected, this would be a departure from the tradition that regional allocation of seats on the ICJ bench mirrors the regional allocation of membership of the Security Council. This because the re-election of Judge Bhandari and the election of Ambassador Salam from Lebanon would mean Asia gets one additional seat on the Court and the WEOG . . . gets one fewer seat.¹⁰⁹

The practice thus reveals an apparent paradox. The idea of an arrangement, informal or not, to give effect to the spirit of Article 9 of the Statute appears to be intended to promote inclusivity and representativeness in the composition of the Court and thus in law-making. Yet, the informal agreement itself, by entrenching the idea that those that come from the North are entitled to greater representation, merely perpetuates the inequality in law-making that we all know exists.

While the issue of representation (or lack thereof) in the composition of the Court is the most obvious way in which marginalization takes place in law-making at the Court, there is another way in which marginalization is illustrated in the process of law-making at the International Court of Justice. Judges on the Court have to respond to arguments made by counsel. Thus, counsel before the International Court of Justice are hugely influential in shaping the jurisprudence of the Court and thus in law-making. Counsel for States before the International Court of Justice are overwhelmingly from that same group of States, WEOG, that is overrepresented in the Court.¹¹⁰ While it is probably known, even if intuitively, that the overwhelming number of persons appearing before the Court as counsel are nationals of States from the North, the statistics are quite simply jaw-dropping. By counsel, I mean individuals’ externally appointed counsel, not in the permanent employ of the appearing State.

According to a study of persons appearing before the Court between 1999 and 2012, around ninety-seven percent of counsel appearing before the Court are nationals from the Organisation for Economic Co-operation and Development

109. Akande, *supra* note 106.

110. Shashank P. Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice 1999-2012*, 25 EUR. J. INT’L L. 893, 917 (2014).

(OECD)¹¹¹—another grouping of developed States.¹¹² According to the study, ninety-seven percent of counsel appearing on behalf of member States of the OECD were also from OECD, while only three percent of counsel appeared on behalf of OECD States.¹¹³ Interestingly (but unsurprisingly), when non-OECD States appeared before the Court, they were also overwhelmingly represented by counsel from OECD States—also ninety-seven percent.¹¹⁴ It should be mentioned that of non-representation applies equally to the question of gender.¹¹⁵ Kumar and Rose's study was limited to cases between 1999 and 2012. Yet most recent cases reveal a similar trend. Since 2018, twenty-two cases were finalized by the Court.¹¹⁶ Based on the description of counsel as externally appointed experts in international law, roughly forty-six lawyers appeared as counsel in those matters, and of those, only one can be said to be from the South. Thus, forty-five out of forty-six lawyers (ninety-seven percent) came from the global North.¹¹⁷

B. *The International Law Commission*

The Statute of the International Law Commission mirrors that of the ICJ with respect to representation. Article 2 of the ILC Statute provides that members of the Commission are to be “persons of recognised competence in international law.” Article 8 of the Statute then provides that “electors shall bear in mind that . . . in the Commission as a whole representation of the main forms of civilisation and of the principle legal systems of the world should be assured.” Unlike the Statute of the ICJ, the ILC Statute goes further, ensuring that this representational requirement is not left up to an informal agreement. Through an amendment introduced in 1981, the Statute provides that each UN regional group shall have a maximum number of seats allocated to it.¹¹⁸ The regional seat allocation for the ILC was established by the General Assembly, thus making it a formal, compulsory arrangement. Under this arrangement, Africa would be entitled to eight seats, Asia and the Pacific would be entitled to seven seats, Eastern Europe would be entitled to three seats, Latin American and the Caribbean States would be allocated six seats, while WEOG

111. *Id.* at 903.

112. Of the 38 members of the OECD, only the following four States would fall under what we have described as the developing world: Chile, Colombia, Costa Rica, Mexico. *Id.* at 900.

113. *Id.*

114. *Id.*

115. *Id.* at 904.

116. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v U. A. E.), Judgment, 2021 I.C.J. (Feb. 4); Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), 2018 I.C.J. Rep. 218; *see also* Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Judgment, 2020 I.C.J. (11 Dec.); Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahr., Egypt, Saudi Arabia and U. A. E. v. Qatar), Judgment, 2020 I.C.J. (14 July); Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahr., Egypt and U. A. E. v. Qatar), Judgment, 2020 I.C.J. (14 July); Jadhav (India v. Pak.), 2019 I.C.J. Rep. 418.

117. In these statistics, I have only included the senior counsel. Including all externally senior counsel would, however, not change this statistic. In fact, such inclusion would likely make it worse since many of the other persons not included come from the same law firm.

118. Statute of the Int'l L. Comm'n. art. 9. This amendment was introduced by General Assembly Resolution 36/39 of 1981.

would be allocated eight seats. Two additional seats would rotate between Africa, Eastern Europe, Asia and the Pacific, Latin America, and the Caribbean, respectively. While certainly more equitable than the informal arrangement for the ICJ, it is hard to ignore that WEOG is allocated a greater number of seats than the much larger Asia and Pacific Group of States.

In a very interesting paper, Monica Pinto suggests that the allocation of the Commission's membership among regional groups "roughly corresponds to the distribution of population around the world."¹¹⁹ This conclusion, though stated tentatively as "roughly," is probably overly optimistic. The population of WEOG is not greater than, or even equal to, that of Asia and the Pacific. But more importantly, Pinto's paper raises another important issue. She states that the equitable regional representation of the membership in the Commission "is not translated to the level of the appointment of Special Rapporteurs on the Commission."¹²⁰ Yet it is the Special Rapporteur that drives the work of the Commission. Of course, the Commission prides itself on the collegial nature of its working method, suggesting an equality of all members. Yet there is no question that on any given topic, the Special Rapporteur is more equal than other members. According to the United Nation's codification division, the Special Rapporteur "marks out and develops the topics, explains the state of the law and makes proposals for draft provisions in the reports on the topic."¹²¹ The reports of the Special Rapporteur are said to "form *the very basis* of the work of the Commission" on any given topic.¹²² Within the Drafting Committee of the Commission, it is the Special Rapporteur that presents the drafts to be considered (other members can, of course, suggest proposals for amendments and even counter-proposals, but it is the drafts of the Special Rapporteur that serve as the basis for the amendments and counter-proposals), explains the rationales and the pros and cons of other proposals and generally tries to steer the Commission towards a successful conclusion.¹²³

Since its creation, the Commission has appointed sixty-one Special Rapporteurs.¹²⁴ Pinto noted that of the sixty-one Special Rapporteurs of the Commission between 1949 and 2016, thirty-one came from WEOG—another jaw-dropping statistic of more than fifty percent. Africa accounted for only seven Special Rapporteurs while only five Special Rapporteurs have come from the Asia and Pacific Group of States. Pinto also observed that on those topics with a systemic reach (i.e., not limited to a particular area of law, such as on the law of treaties, customary international law, and State responsibility), the Special Rapporteurs have

119. See Mónica Pinto, *The Authority and Membership of the Commission in the Future*, in SEVENTY YEARS OF THE COMMISSION 370 (U.N. ed., 2021).

120. *Id.*

121. The Work of the International Law Commission, U.N., U.N. Sales No. E.12.V.2, at 26 (9th ed. 2017).

122. *Id.*

123. *Id.*

124. For a full list, see *Membership: Special Rapporteurs of the International Law Commission (1949-2016)*, INT'L L. COMM'N, <http://legal.un.org/ilc/guide/annex3.shtml> (last visited Aug. 27, 2021).

almost always been “white and male.”¹²⁵ She concludes, correctly, I think, that it is questionable whether the ideal in Article 8 of a Commission reflecting the “main forms of civilization” has been attained.¹²⁶ More specifically, it may be said that this skewness in the proportion of representation of Special Rapporteurs perpetuates the disenfranchisement of people of the South in international law-making.

IV. DOES REPRESENTATION MATTER ANYWAY

It may well be asked whether representation *as such* really matters. In other words, does it really matter that this or that group is represented? A different way of putting this question is whether the decisions of the ICJ or the outputs of the ILC would have been different—and how—had there been greater representation? After all, what is important for these bodies in terms of composition is the expertise of its members, and their qualifications in international law, not their race or their nationality; not whether they come from the North or South or whether they come from powerful or not such powerful States. A similar question, albeit in the context of gender, has been posed by Zuzana Trávníčková.¹²⁷ In her article, she states that when her students “look at the picture of the Commission members on the Commission’s website” they immediately notice the “disproportion between the number of women and men” and “express disapproval.”¹²⁸ She states that her students then ask “whether it is wrong, [or whether] it is a real problem that there are less women than men.”¹²⁹ The answer to that question, according to Trávníčková is that “knowledge of and attitude towards international law are a matter of experience and not a matter of gender”¹³⁰ In the context of race and representation, the argument may well be that “knowledge and attitude towards international law are a matter of experience and not a matter of race, nationality, or origin.” From this perspective, the composition ought not to matter, because it would after all not “influence the quality of the Commission’s outcomes” or the Court’s decisions.¹³¹ In my comment on Trávníčková’s paper, I expressed disagreement with the conclusion that the underrepresentation of gender as such is “not wrong” and “is not a real problem.” I believe the underrepresentation of women “is wrong” and is a “real problem.”¹³² By the same token I believe that the underrepresentation of people from the South, whether in the Commission or in the Court, is also wrong and would be a real problem.

125. Pinto, *supra* note 119, at 371.

126. *Id.*

127. See Zuzana Trávníčková, *The International Law Commission and the International Law Codification Market*, in SEVENTY YEARS OF THE INT’L.L. COMM’N. 351 (U.N. ed., 2021).

128. *Id.* at 357–58.

129. *Id.* at 358.

130. *Id.*

131. *Id.*

132. See Dire Tladi, *Concluding Remarks: The Authority and the Membership of the Commission in the Future – Art, Science and Economics: A Comment on Trávníčková and Pinto*, in SEVENTY YEARS OF THE INTERNATIONAL LAW COMMISSION 375, 379 (“Her answer is interesting—and that I do not agree with, but more on that in the conclusion.”).

Quite apart from the value inherent in representation, we ought to not forget that all of us are products of cultural influence, background, education and, in general, our experience. Whether we care to admit or not, our legal positions are also driven by normative and policy considerations, which are significantly shaped by our backgrounds.¹³³ If anyone doubts the relevance of the background of individuals, one only need to look at the voting records of members of both the Court and the Commission on various international law issues, particularly those of a sensitive nature. When the ILC adopted on first reading, its Draft Conclusions on Peremptory Norms, it was not a surprise to me that all members of the Commission that were nationals of Permanent members at the time expressed strong criticism to draft conclusion 16 and its commentaries because, in their view, decisions of the UN Security Council are not subject to *jus cogens*—a view also held by their States.¹³⁴ By the same token, it is not surprising that members of the ILC from the South generally supported the Draft Articles on Expulsion of Aliens and would have liked to see greater restrictions on the right of States to expel non-nationals since it is mainly non-nationals from the South that often face expulsion from States in the North.¹³⁵

133. In the context of the law on self-defense, I have explained my own biases as follows: “It is worth setting out . . . the approach and normative premises from which this chapter proceeds Second, powerful States tend to seek to ‘de-constrain’ themselves from the shackles of law while leaving the illusion of the constraining power of law. I am thus concerned about—and thus seek to avoid—an interpretation of law that facilitates the ‘de-constraining’ through an expansive interpretation . . . [that] benefits the powerful.” Dire Tladi, *The Use of Force in Self-Defence Against Non-State Actors, Decline of Collective Security and the Rise of Unilateralism: Whither International Law?*, in 1 SELF DEFENSE AGAINST NON-STATE ACTORS 14, 21 (Anne Peters & Christian Marxsen eds., 2019).

134. See, e.g., Zagaynov (Russian member), U.N. ILCOR, 70th Sess., 3416th mtg. at 6, U.N. Doc. A/CN.4/SR.3416 (June 1, 2018) (“According to the draft conclusion, States and courts could decide whether to comply with a resolution of an international organization, including that of the Security Council, based on their own assessment of the resolution’s compliance with peremptory norms. States that wished to avoid their obligation to comply with binding decisions could interpret the draft conclusion as an invitation to do just that, on the basis of such *jus cogens* norms [This] could have a negative impact on the work of the Security Council to promote international peace and security, which already faced well-known challenges, and on the overall effectiveness of international organizations.”); Murphy (U.S. member), *id.* at 11 (“As indicated by Mr. Zagaynov, the specific reference to the Security Council of the United Nations was inappropriate.”); see also Huang, U.N. ILCOR, 70th Sess., 3419th mtg., at 10, U.N. Doc. A/CN.4/SR.3419 (July 3, 2018) (“Draft conclusion [16], in his view, presented serious problems.”); Huang, U.N. ILCOR, 70th Sess., 3421st mtg., at 14, U.N. Doc. A/CN.4/SR.3421 (July 26, 2018) (“The only criterion for the legality of a binding resolution adopted by the Security Council was that it must have received more than nine votes from Council members, including the five permanent members.”); Wood, *id.* at 6 (“[I]nclusion of a separate reference to Security Council resolutions seemed unwise and risked undermining the effectiveness of its resolutions and the collective security system put in place by the Charter of the United Nations, and could even take the international community back to the era of the League of Nations, when each member ultimately decided whether or not to comply with the decisions of the Council of the League.”).

135. See, e.g., Wisnumurti, U.N. ILCOR, 66th Sess., 3204th mtg., at 6, U.N. Doc. A/CN.4/SR.3204 (May 14, 2014) (“In his view, the draft articles reflected the balance between the sovereign rights of a State and the rights of aliens present in its territory.”); Niehaus, U.N. ILCOR, 66th Sess., 3202d mtg. at 3, U.N. Doc. A/CN.4/SR.3202 (May 9, 2014) (criticizing the view of States promoting “the traditional practice through which States had full discretion to expel foreigners from their territory without any outside interference” describing these views as based on “confusion”); Al-Marri, U.N. ILCOR, 64th Sess., 3129th mtg. at ¶¶ 25, 27, U.N. Doc. A/CN.4/SR.3129 (May 8, 2012)

The ILC's work on the Immunity of State Officials, in particular the controversial Draft Article 7,¹³⁶ provides an apt illustration of how the place of origin of members of the Commission affects their positions. All the African members that participated in the vote, with the exception of Ahmed Laraba from Algeria, supported Draft Article 7.¹³⁷ Similarly, all six members of the Latin American group voted in favor of Draft Article 7.¹³⁸ For the Asian group, only Huikang Huang, the Chinese member, and Aniruddha Rajput, the Indian member, voted against the Draft Article, while the other four members voted in favor.¹³⁹ What was also interesting is that members of the Commission that opposed the draft article were nationals of the more powerful States (i.e., nationals of Security Council member States¹⁴⁰ and generally from Europe and the United States). The exceptions to this trend (members of the Commission hailing from Europe that did support the Draft Article) were Concepción Escobar Hernández, Patrícia Galvão Teles, Marja Lehto and August Reinisch. The point here is not that members from

("[A]ll over the world, aliens who were legitimate residents of countries were increasingly falling under the scrutiny of Governments that wished to return them to their countries of nationality. That was particularly true in Europe, which was traditionally host to aliens from Africa and other regions The report and draft articles submitted by the Special Rapporteur deserved careful attention and, to the extent that they sought to ensure that any order of expulsion should be in accordance with the law and international standards and should guarantee [the rights of the aliens], they should be supported."); Tladi, *id.* at ¶ 37 ("[U]nlike Mr. Murphy, he did not believe that the starting point [of the draft articles] should be the sovereign right of States to decide who was authorized to reside in their territory and in what circumstances. . . ."); Saboia, *id.* at ¶ 51 ("[H]e agreed entirely with Mr. Tladi on the need to strike a balance between the rights of States and the rights of individuals subject to expulsion"). These more positive statements can be compared with the positions of members of the Commission from States whose nationals are not generally the subject of expulsion. *See, e.g.,* Murphy, *id.* at ¶ 22 ("First, the Commission needed to consider whether [instead of draft articles it] should instead be . . . reworking . . . the current articles into a series of guidelines or best practices. Second, if draft articles were . . . adopted, [the Commission should] rework them so that they truly reflected the current obligations that States had accepted, either through treaties to which they had become parties or through their well-established practice."); Wood, U.N. ILCOR, 66th Sess., 3204th mtg. at 7, U.N. Doc. A/CN.4/SR.3204 (May 14, 2014) ("[A]ll States had detailed laws and regulations on expulsion; if a rule the Commission articulated was not actually reflected in national laws, then it should say so, or its reasoning might be criticized."). Even Forteau, who generally took on a positive attitude towards the draft articles did make this point, which would serve to limit the protection offered by the draft articles: "Generally speaking, what was extremely problematic was that the draft articles made no provision for possible derogations along the lines of Article 4 of the [ICCPR] and it allowed no exceptions [to rights of aliens]."

136. Article 7 of the Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, Report of the International Law Commission, Sixty-Ninth Session (A/72/10), provides for exceptions to the rule on immunity *ratione materiae* from foreign criminal jurisdiction in respect of the crime of genocide, crimes against humanity, war crimes, the crime of apartheid, torture, and enforced disappearance.

137. Voting in favor of the provision from the African group of members were Yacouba Cisse, Hussein Hassouna, Charles Jalloh, Hassan Ouazzani Chahdi, Chris Maina Peter,

138. These were Carlos Argüello Gomez, Juan Manuel Gomez-Robledo, Juan José Ruda Santolaria, Gilberto Saboia, Eduardo Valencia Ospina, and Marcelo Vásquez-Bermúdez.

139. Mahmoud Hmoud, Shinya Murase, Hong Thao Nguyen, and Ki Gab Park all voted in favour.

140. All members of the Commission that are nationals of UN Security Council (Koman Kolodkin, Sean Murphy, Huikang Huan, and Michael Wood) not only opposed Draft Article 7 but gave strongly worded statements in explanation of vote. U.N. ILCOR, 69th Sess., 3378th mtg. at 9–11, U.N. Doc. A/CN.4/SR.3378.

particular regions or parts of the world *will always* take particular positions. Rather, it is that members from particular regions and parts of the world, whether they are from developing or developed States, whether they are from powerful or vulnerable States, are more likely to adopt particular postures, so that representation, including representation as Special Rapporteurs matters. Thus, the underrepresentation of some in the working of the ILC, including in the appointment of Special Rapporteurs, does have an influence on the products of the Commission.

A similar observation can be made with respect to the International Court of Justice. For example, given the policy position of the United States and the United Kingdom regarding the use of force, is it any surprise that all the judges from those States have generally adopted different positions to the Court on the rules of international law relevant to the use of force in self-defense against non-State actors?¹⁴¹ I do not, by any means, mean to suggest that all lawyers from those States will of necessity hold those positions, or even that judges nominated by those States will always hold those positions (I know many prominent US international lawyers who hold a different position, just like I know African lawyers who hold a different position). Rather, the more nuanced point I wish to make is that that position *is more likely* to be held by an international lawyer from those States than an international lawyer from the South. Responding to Trávníčková's claim that gender representation did not matter, I said the following:

So, while we can never have the answer to the hidden question of whether a more equitable representation would have affected the outcomes of the work of the Commission, surely there is value in diversity itself. Moreover, having experienced two versions of the Commission, I can attest that the presence of women has had an impact.¹⁴²

Perhaps, a reader may ponder whether the composition of the Court has generally affected decisions of the Court—this is a more direct way of asking the “does it matter question.” Whether particular decisions of the Court would be different if the Court were composed differently is difficult to say and would be a matter of speculation.¹⁴³ Yet it would hard to imagine that composition of a court or tribunals did not matter.¹⁴⁴ The *Nuclear Advisory Opinion* might provide some

141. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 259 (June 27) (dissenting opinion of Judge Schwebel); *id.* at 528 (dissenting opinion of Judge Jennings); see generally *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, 270 (Nov. 6) (separate opinion of Judge Buergenthal); see generally *id.* at 225 (separate opinion of Judge Higgins); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 240 (July 9) (declaration of Judge Buergenthal); *id.* at 207 (separate opinion of Judge Higgins).

142. Tladi, *supra* note 132, at 383.

143. See, e.g., Rosemary Hunter, *Introduction: Feminist Judgments as Teaching Resources*, 2 OÑATI SOCIO-LEGAL SERIES 47 (2012).

144. See, e.g., JOHN DUGARD, *CONFRONTING APARTHEID: A PERSONAL HISTORY OF SOUTH AFRICA, NAMIBIA AND PALESTINE* 291 (2018); Jean Allain, *supra* note 52, at 35, 43 (who both show how the change in the composition of the Court resulted in the Court reversing its decision in the South West Africa Cases (*Eth. v S. Afr.*; *Liber. v S. Afr.*), Judgment, 1966 I.C.J. Rep. 6 (July 18)).

insights about how composition matters.¹⁴⁵ As is now well-known, in that advisory opinion, the Court controversially held, by seven votes to seven, with the President casting a deciding vote, that “the threat or use of nuclear weapons would *generally* be contrary to the . . . rules of humanitarian law” but that “in view of the current state of the law . . . the Court cannot conclude definitively whether” such use “would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”¹⁴⁶ Less prominently, the Court held that there is “neither in customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”¹⁴⁷ The general correlation between the positions of the judges—whether they are from developed or developing countries, whether they are from nuclear weapon States or non-nuclear weapon States—is both unsurprising and revealing.

As to the question of whether international law provides a comprehensive and universal prohibition on the use of nuclear weapons, all but two of the judges from developing countries voted against the decision of the Court that there was no such prohibition.¹⁴⁸ Moreover, not a single judge from the developed world, or from any nuclear weapons State, voted against that *dispositif*. Even more interesting was the *dispositif* concerning international humanitarian law. There, in addition to Shahabuddeen, Koroma, and Weeramanry, Judges Schwebel (United States), Oda (Japan), Guillaume (France), Oda (Japan) and Higgins (the United Kingdom) all voted against the *dispositif*. In other words, three judges from nuclear weapon States dissented, and all four judges hailing from developed States dissented. Yet the dissents of these four judges from developed States, including three from nuclear weapon States, support, rather than detract from, the point that composition matters. All four of these judges—Schwebel, Oda, Guillaume, and Higgins—objected to the equivocal language in the second part of that *dispositif*, suggesting that the more correct position was not the that “the Court cannot conclude definitively” that the use of nuclear weapons was unlawful, but rather that as a matter of law the use of nuclear weapons in those “extreme circumstances” *was lawful*. While, for example, Judge Higgins’ dissenting opinion is extremely nuanced, critiquing mainly the methodology employed by the Court in coming to the *dispositif*,¹⁴⁹ and while it is equally critical of the possible implications of the *dispositif* that the use of nuclear weapons contrary to international humanitarian and *jus ad bellum* could be lawful, the essence of the advisory opinion is that,¹⁵⁰ in those

145. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

146. *Id.* at ¶ 105, (Dispositif 2E).

147. *Id.* at ¶ 105 (Dispositif B).

148. Judges Shahabuddeen (Guyana), Weeramanry (Sri-Lanka) and Koroma (Sierra Leone) all voted against while Judges Bedjaoui (Algeria), Ranjeva (Madagascar) were the only judges from the South to vote in favour of that *dispositif*.

149. Legality of the Threat or Use of Weapons, Advisory Opinion, 1996 I.C.J. Rep. 583, ¶ 9 (separate dissenting opinion by Higgins, J.).

150. *Id.* at 590 (“Through this formula of non-pronouncement the Court necessarily leaves open the possibility that a use or nuclear weapons contrary to humanitarian law might nonetheless be lawful. This goes beyond anything that was claimed by the nuclear weapon States appearing before the

extreme circumstances of self-defense, the use of nuclear weapons would be consistent with international humanitarian law and the law on self-defense subject to the rules of those fields of law.¹⁵¹ The dissenting opinion of Judge Schwebel and the Separate opinion of Judge Guillaume express similar sentiments.¹⁵² At the other end of the spectrum, the opinions of Judges Shahabuddeen, Koroma, and Weeramantry are unequivocal that the Court ought to have found that the threat or use of nuclear weapons is not permitted under international law.¹⁵³ Indeed, even the two African judges, particularly Judge Ranjeva, that voted in favor of the *dispositif* did so on the understanding that paragraph 2E of the *dispositif*, in essence, prohibited the use of nuclear weapons.¹⁵⁴

Court, who fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the *jus ad bellum* and *jus in bello*.”)

151. *Id.* at 589 (“We may believe that, in the present stage of weapon development, there may be very limited prospect of a State being able to comply with the requirements of humanitarian law. But that is different from finding the use of nuclear weapons ‘generally unlawful’”); *Id.* at 591 (“If a substantial number of States in the international community believe that the use of nuclear weapons might in extremis be compatible with their duties under the Charter . . . they presumably also believe that they would not be violating their duties under humanitarian law”); *id.* at 593 (“It not clear to me that either a pronouncement of illegality in all circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2E best serve to protect mankind . . .”).

152. *See, e.g.*, Legality of the Threat or Use of Weapons, Advisory Opinion, *supra* note 149, at 291 (separate opinion of Guillaume, J.) (“In other words, [the Court] concluded that in such circumstances the law provided no guidance for States. But if the law is silent in this case, States remain free to act as they intend . . . The constant practice of States is along these lines as far as the *jus in bello* concerned.”); *id.* at 292 (“In these circumstances it follows implicitly but necessarily from operative paragraph 2E of the Court’s Opinion that States can resort to ‘the threat or use of nuclear weapons . . . in an extreme circumstance of self-defence . . . This has always been the foundation of the policies of deterrence whose legality is thus recognised.”); *see also* the dissenting opinion of Judge Schwebel, at 323 (“Moreover, far from justifying the Court’s inconclusiveness, contemporary events rather demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances”).

153. *See, e.g.*, Legality of the Threat or Use of Weapons, Advisory Opinion, *supra* note 149, at 427 (separate opinion of Shahabuddeen, J.) (“It follows that to hold that humanitarian law does not apply to the use of nuclear weapons in the main circumstances . . . is to uphold the substance of the thesis that humanitarian law does not apply at all to the use of nuclear weapons. That view has long been discarded . . . I am not persuaded that that disfavoured view can be brought back through an exception based on self-defence”); *see also id.* at 580 (dissenting opinion of Koroma, A.) (“In the light of the foregoing conclusion, it cannot be maintained, as the Court has done, that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.”); *see also id.* at 433 (Judge Weeramantry’s detailed dissent which, at the very outset makes plain his view: “My considered opinion is that the use or threat of nuclear weapons is illegal *in any circumstances whatsoever*. It violates the fundamental principles of international, law, and represents the very negation of the humanitarian concern which underline the structure of humanitarian law.”)

154. *See, e.g.*, Legality of the Threat or Use of Weapons, Advisory Opinion, *supra* note 149 at 294 (separate opinion of Judge Ranjeva, J.) (stating that the reasons he outlines produce “the conclusion of the illegality of the threat or use of nuclear weapons, merely confirm, in my view, the state of positive law.” He further states that the “absence of a direct and specific reference to nuclear weapons cannot be used to justify the legality, even indirect, of the threat or use of nuclear weapons.” More definitively, Judge Ranjeva states that if the “two clauses of paragraph 2E had appeared as separate paragraphs, I would have voted without hesitation in favour of the first clause and . . . I would have abstained on the second clause.” The Declaration of Judge Bedjaoui is less clear, but nonetheless point to a preference for the view that nuclear weapons are or ought to be prohibited.)

The most recent advisory opinion of the Court, the *Chagos* advisory opinion, also provides some interesting insights.¹⁵⁵ At first glance, that opinion suggests sensitivity to the interests of developing States. But could the Court have gone even further had the Court been composed differently? Since, from the outset, it was so clear that the right to self-determination had been violated,¹⁵⁶ the really contentious aspect of the proceedings was whether the Court would find that self-determination was a peremptory norm.¹⁵⁷ In response to a question posed by me to then President of the Court, Judge Yusuf, the President said the Court had not addressed the *jus cogens* character of the right, not because it did not believe the right was not *jus cogens* but rather because it was not necessary in order to resolve the issue presented.¹⁵⁸ Of course, given that the question concerned not only whether the decolonization process was completed but also the legal consequences arising from the continued administration by the United Kingdom of Chagos, the peremptory character of the right of self-determination was implicated. Finding that the right of self-determination would permit the Court to opine not only on the United Kingdom's responsibility but also the agreement between the United Kingdom and the United States concerning the establishment of a military base by the latter in Chagos.¹⁵⁹

While many participants in the *Chagos* proceedings referred to the *jus cogens* character of self-determination, the Court did not itself make an explicit declaration as to the peremptory character of *jus cogens*. What is interesting is that, while not a single individual opinion questioned the peremptory character of self-determination, several individual opinions did make that pronouncement. It is also worth pointing out that *all* the individual opinions making the claim that self-determination did have peremptory character were appended by judges from countries of the South. These include the separate opinion of Judge Cançado

155. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25).

156. Only the U.S. judge, Judge Donoghue, came to a different conclusion.

157. See generally Craig Egget & Sarah Thin, *Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion*, EJIL! TALK (May 21, 2019), <https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/> (last visited Oct. 21, 2021); see also Julia Sebutinde, *Is the Right to Self-Determination Jus Cogens? Reflections on the Chagos Advisory Opinion*, in 75 DEVELOPMENTS IN INTERNATIONAL LAW: PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS) 386–413 (Dire Tladi ed., 2021).

158. See Summary Records of the 3478th Meeting, [2019], 71 Y.B. INT'L L. COMM'N. 71, U.N. Doc. A/CN.4/SR.3478 (for the exchange between the author and the President of the Court. In responding to the question, Judge Yusuf said that “the Court had deemed it unnecessary to address the matter of whether the right to self-determination was a peremptory norm of international law in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, because that had not been the point at issue.” In his view, “[t]he General Assembly’s question had been whether the decolonization process of Mauritius had been lawfully completed.”).

159. See 1966 Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America the Availability for Defence Purposes of the British Indian Ocean Territory.

Trindade (of Brazil),¹⁶⁰ Separate Opinion of Judge Robinson (of Jamaica),¹⁶¹ the joint declaration of Judges Cançado Trindade and Robinson,¹⁶² and the Separate Opinion of Judge Sebutinde.¹⁶³

The discussion above suggests that composition does matter. This does not mean that the International Court of Justice will always find, or even often, find against developing States in favor of developed States.¹⁶⁴ The point, however, is that a system in which the powerful are disproportionately represented in comparison to the marginalized facilitates the ability of the privileged to disproportionately contribute to law-making. As a consequence, international law continues to reflect the interest of the powerful, while paying lip service to politically correct concepts such as sovereign equality and shared community interests.

CONCLUSION

International law is founded on the notion of sovereign equality of States. Applied to law-making, this foundational principle would imply that States have equal opportunity to make, and contribute to the making of, international law. In customary international law, this basic idea is reflected in the idea that it is general and widespread practice of States that is at the base of formation of customary international law. In treaty law, this basic idea is reflected in such notions as the *pacta tertiis nec nocent* rule. Yet international law is not made only by States. Two of the most important entities that contribute to international law-making are the International Court of Justice and the International Law Commission. Given the important role that these two bodies play in international law-making, this Article considered the extent to which these bodies are appropriately representative in the pursuit of equal contribution to law-making. The discussion showed that the representation of both bodies was skewed in favor of powerful, developed States.

An obvious conclusion from the discussion above is that the disproportionate representation of persons from developed, powerful States has the effect of marginalizing States of the South and undermines the notion of sovereign equality of States. But there are questions beyond this obvious conclusion. While there are many sources of disproportionate influence on international law over which the marginalized States have little or no influence, such as resource constraints and education, the marginalized States themselves are active participants in the marginalization flowing from (under)representation. For example, the composition of both the International Law Commission and the International Court of Justice is determined by the General Assembly, a body in which marginalized States hold an overwhelming majority. By the same token, it is States, including developing States,

160. See Legal Consequences of the Separation of the Chagos Archipelago, Advisory Opinion *supra* note 155, ¶¶ 120 (separate opinion by Cançado, J.) .

161. *Id.* at ¶ 48 (separate opinion by Robinson, J.).

162. *Id.* at ¶ 8 (joint declaration of Cançado, J. Trindade, J. and Robinson, J.).

163. *Id.* at ¶ 26 (separate opinion of Sebutinde, J.).

164. A cursory review of the jurisprudence of the Court reveals that no such pattern is discernible. For example, the *Military and Paramilitary Activities* case, *supra* note 60, and the *Arrest Warrant* case, *supra* note 56, were both decided in favor of developing States.

that continue to appoint counsel from developed States. If States are serious about leveling the playing fields in international law-making, then addressing issues of representation would be the first step. Representation would not, by any stretch of the imagination, bring marginalized States to a place of equal participation and equal opportunity to contribute to international law. It would only be baby steps we take on our path to addressing inequality and marginalization in international law.