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THE INTERNATIONAL COURT OF JUSTICE: NEW CHALLENGES IN THE HAGUE FOR ADJUDICATION OF INTERSTATE DISPUTES

This panel was convened on Thursday, March 30, 2023 at 10:30 a.m. by its moderator Catherine Amirfar of Debevoise & Plimpton LLP, who introduced the panelists: Sarah Cleveland of Columbia University Law School; and Juan Manuel Gómez-Robledo Verduzco, the Deputy Permanent Representative to the United Nations for Mexico.

Introductory Remarks by John Bellinger*

Good morning and welcome to the discussion with two distinguished international lawyers, both of whom I know well, who have been nominated for election to the International Court of Justice (ICJ). You are all wondering, no doubt, who is this person? If you do not know me, I am John Bellinger, and I am here to make a brief announcement. I am head of the International Law Practice at Arnold & Porter. I served as the State Department Legal Advisor from 2005 to 2009, but I am actually here in my capacity as a member of the U.S. National Group of the Permanent Court of Arbitration. Acting Legal Advisor Rich Visek, who is the current chair of our group, was supposed to be standing right here this morning and would have liked to be here with you, but he is at this very moment in the Peace Palace, in The Hague, receiving the judgment of the Court in *Certain Iranian Assets*. Many of the people in this room, including me, keep checking our phones to see what is happening, and I am sure the panelists would like to know, but we do not know yet.

For those of you who do not know how nominations to the ICJ are done, nominations for candidates to the ICJ are not made by national governments. They are made by the national groups of each country to the Permanent Court of Arbitration. The members of the U.S. National Group are Rich Visek as the acting chair and former Legal Advisors Brian Egan, Jennifer Newstead, and myself. Nominations are not made, except maybe in some countries, by their governments. Our national group is independent of the government.

Last year, our national group was proud to have nominated Professor Sarah Cleveland, and her nomination continues a legacy of eminently qualified U.S. candidates to the Court that started with Greene Hackworth and Philip Jessup, and then continued through our current ICJ president, Joan Donoghue, who I was privileged to have as my Principal Deputy Legal Advisor at the State Department. So we are very proud of President Donoghue.

On behalf of my fellow members of the U.S. National Group, I am pleased to announce this morning that the U.S. National Group has also co-nominated Ambassador Juan Manuel Gómez-Robledo who is here and Judge Hilary Charlesworth of Australia, who is over in The Hague right now. They are both highly qualified to serve on the Court, and we are honored to have Ambassador Gómez-Robledo with us today. I have to simply add a personal note that I have known Ambassador Robledo for almost twenty years. He previously served as Mexico's Legal Advisor, and he served as agent for Mexico in the *Avena* case in 2004 and then in

* Arnold & Porter, LLP.

Mexico's request for interpretation of the judgment of the *Avena* case in 2008, in which I represented the U.S. government, and Catherine Amirfar, who I will introduce in a minute, represented Mexico along with Ambassador Robledo. This is a bit of an *Avena* reunion. Ambassador Robledo and I stood side by side on many occasions in the Peace Palace demonstrating how the peaceful resolution of disputes can be achieved, and we had a good relationship, even though we were on opposite sides of that issue. I know him to be a very fine international lawyer, with extensive government experience, which the ICJ needs. He would make a fine judge, as would Professor Sarah Cleveland, of course. and Judge Charlesworth, who is already on the Court. So our National Group wishes each of these candidates every success in the upcoming election.

And now for someone who needs no introduction, our moderator of today's panel is Catherine Amirfar, who is, of course, the former past President of the Society, a regular advocate before the International Court of Justice, heads the International Law practice at Debevoise, and is a former counselor to the Legal Advisor of the State Department in the Obama administration. Catherine?

Introductory Remarks by Catherine Amirfar*

John, thank you very much. Thank you for giving us that wonderful news hot off the presses, and thank you for your continued service. Much appreciated and wonderful to have you here.

Without further ado, let us get started. I am going to be criminally brief in the introductions. Obviously, these two and their remarkable achievements in the field of international law are very much documented in the materials that you have, but we have here Professor Sarah Cleveland, Lewis Henkin Professor of Human and Constitutional Rights at Columbia University Law School, and Ambassador Juan Manuel Gómez-Robledo, Deputy Permanent Representative to the United Nations for Mexico.

I am so pleased to be here with you this morning. We are going to do a roundtable of questions. I will ask one of you to respond fulsomely, three to four minutes, and then the other to have a brief response. Thank you so much for being here. I know active campaigning is no small feat, and to be here in D.C., it is a pleasure to be able to host you on behalf of the Society.

Let me start with the Court's docket. The Court's docket is extraordinarily busy. Just to give you a sense of it, as of July 2022, the number of cases on the general list stood at fifteen, with the Court being seized of four new contentious cases. To put that in context, that is an over 30 percent increase to the caseload from just ten years ago and exponentially more than that if you go back further. So not only is this a period of immense activity for the Court, but the scope of the docket is extraordinarily broad. Pending contentious cases concern Asia and the Pacific, Latin America and the Caribbean, Africa, and both Western and Eastern European states. The subject matter is likewise diverse with cases involving human rights, environmental protection, jurisdictional immunity, and the prevention of genocide.

On the one hand, the Court's heavy and diverse docket is welcome news. It is a sign of rising confidence, perhaps, among states in the utility of the Court as a forum for peaceful dispute resolution and the authority and the legitimacy of its judgments and advisory opinions are held in high regard.

In light of this period of high engagement with the Court, I wanted to first ask you as to what to be the main challenges going forward. Sarah, I am going to ask you to go first and then Juan Manuel to respond.

* Debevoise & Plimpton LLP.

Remarks by Sarah Cleveland*

Great. Thank you so much, Catherine, former President of the American Society and also ICJ litigator extraordinaire. I consider you a fully equal member of the substantive discussion of the panel, and congratulations to my friend, Ambassador Gómez-Robledo, and deep thanks and appreciation to the U.S. National Group for the very wise decision to co-nominate you.

The Court is busier than it has ever been. Its level of work is unprecedented. The General Assembly just approved a new request for an advisory opinion on climate change yesterday following on the heels of the Palestinian request that was voted last fall, and I think that the workload of the Court is its main challenge at the moment. I will speak to three points.

The Court is ultimately the guardian of its own legitimacy. It is the entity that ensures that it enjoys the ongoing approval and support of states in the international system, and as Catherine said, the fact that so many states are turning to the Court as well as the General Assembly for guidance on international law questions, does suggest that they trust the state and the Court and respect its authority.

But the Court needs to ensure that remains the case. The Court, first and foremost, needs to avoid politicization and protect its own legitimacy and authority. It is getting large, complex cases, often highly political cases. This is not the first time the Court has had highly political cases. Historically the Court has done a very good job of remaining above the fray and not being subject to the kinds of controversy or critique that, for example, some regional human rights Courts have faced. It remains a highly respected institution. It needs to sustain that respect, including by continuing to deliver high-quality, well-reasoned judgments in a timely manner, including focusing on legal issues, which are the basis for its authority and its expertise, and to guard its jurisdiction.

Second, and relatedly, is timeliness. The fact that the Court has so many cases, including a number of interventions, which will be my third point, means that a Court that has been criticized historically for being slow. It now has a particular need to not be slow and at least ensure that it is able to maintain, if not improve, the timeliness of its decisions. This is a long-standing complaint of states. States also contribute to the length of time required in the Court's proceedings because they ask for long periods of time to make submissions. There is a role that states could play, for example, in accepting shorter periods for written submissions, forgoing replies and rejoinders unless they are really necessary, and complying with the Court's practice directive that they be concise.

The Court has demonstrated it can move quickly. It does so in provisional measures routinely. It also moves relatively quickly in the context of advisory opinions, but it may need to consider greater efficiencies in its internal working methods, given the burdens currently facing the Court, as long as it can do so without compromising quality.

Finally, I think a very interesting new development and challenge is the number of interventions that the Court is seeing, particularly in the *Ukraine-Russia* case. There are now thirty-four states that have intervened in that case, showing very heightened interest and engagement by states. This is something new under the sun for the Court, and the Court is going to have to figure out procedurally and logistically how it manages this phenomenon. Personally—I am a civil procedure professor—I think that this is a good thing because it brings before the Court more perspectives on the issue that it will be adjudicating and also ultimately binds the intervening parties to the Court's interpretation.

* Columbia University Law School.

Now, these are interventions because these states are parties to a multilateral treaty whose interpretation is before the Court, and therefore, they have an interest and are allowed to intervene. But this should not unreasonably delay the proceedings. The intervenors create rights to respond with respect to the original contentious parties, their translation issues, their issues of oral proceedings. Intervening states are able to submit joint or consolidated submissions to the Court so that the Court does not have to receive individual submissions from each of the intervening states.

The Court actually has a lot of experience in this context from its work with advisory opinions. For example, in the *Chagos* advisory opinion, thirty-one states in the African Union submitted written statements; twenty-two states participated in oral proceedings. The Court has managed such engagement before but not in the context of intervention.

Other challenges include diversity, multilingualism, compliance, non-appearance, and the list goes on.

Catherine Amirfar

Thank you. Juan Manuel?

Remarks by Juan Manuel Gómez-Robledo Verduzco*

Thank you very much, Catherine. I cannot start without, of course, saying thank you to the U.S. National Group. I am very moved, and thank you, Mr. Bellinger, for having shared the news here. Thank you very much. I am really very touched.

I hope I will cope with emotions, and I would certainly agree with Professor Cleveland. The request for an advisory opinion on climate change, which was just decided yesterday by consensus, has 131 co-sponsors behind it. There will be a significant number of states and international organizations participating in the proceedings. That will add to the burden of the Court, and one can expect that those proceedings will take perhaps several months, even beyond 2023.

The Court, it is remarkable to say, has coped with these increasing demands with limited resources—human resources and financial ones as well. If we compare what the Court has at its disposal in terms of human resources, it is really very scarce, if we see what all constitutional national tribunals have, for instance. It is remarkable, and of course, it is legitimate that from time to time the Court goes back to the Fifth Committee in the General Assembly to request adjustments.

On the lengthiness of proceedings, overall the average is not terribly long. According to my own calculations, it is 4.7 years. There was a case which lasted for more than twenty years, the *DRC-Uganda* case, and that was a very long case, but, in general, four years. *Havana* was around fourteen months.

What we also have to take into account is the expansion of international law and its diversification. That is part of the challenge. In 1945, no one would have ever imagined that the Court would have had to deal with climate change or with major environmental issues. Now the Court will have to face issues on cyber law, outer space, and others, and that is, to me, very good news. It proves that international law keeps expanding, keeps creating new rules, as we just proved three weeks ago at the UN in agreeing on the new BBNJ treaty. In times like these, this is very good news for international law.

* Deputy Permanent Representative to the United Nations for Mexico.

Catherine Amirfar

Thank you. Juan Manuel, I want to stay with you for this next question. It is a thread of challenges, and one of the challenges that is often discussed is the Court when it is faced with significant scientific technical evidence in the context of adjudicating disputes. Over a decade ago, many will remember that Judges Simma and Al-Khasawneh's dissenting opinion in the *Pulp Mills* case criticized the Court's treatment of scientific evidence in that case, noting that the Court had failed to utilize the mechanisms provided for in its statute to evaluate such evidence and consequently raised doubts as to the Court's ability and competence and whether it is well placed to tackle complex technical questions.

Now, in the ensuing years, in the last decade, the Court has subjected party-appointed experts to cross-examination in the *Whaling* case. It has encouraged the parties to appoint experts in *Construction of a Road* and appointed Article 50 independent experts in recent maritime delimitation and land boundary cases. But criticism for its handling of technical evidence still persists, at least in some corners.

Juan Manuel, for you, the Court's growing docket of diverse cases surely means that it will continue to have to deal with scientific and technical evidence.

Juan Manuel Gómez-Robledo Verduzco

Certainly. One cannot but accept that the Court and its judges do not have the scientific or technical competence that is involved in a number of cases. These critics that you mentioned might have been justified at the time, but let us first remind that the Court has relied on expert advice, because the criticism was very much about to what extent experts could perhaps take the role of the Court. The Court has resorted to experts only in three cases—four occasions, but only three cases. That is not that much.

Second, where problems existed, parties had their experts as part of their own delegation, as part of councils. That was corrected. That was encouraged by the Court; parties now present their experts as witnesses who then can be cross-examined. That is very good because it allows the two parties to question the evidence that has been produced by the parties.

I think that the important issue is that we never think that the Court outsources its judicial competence. The Court remains the one who decides. The Court is the one who knows the law, and the Court can certainly rely on experts, even at its own request, not just experts provided by the parties. This is consistent with Article 50 of the Statute. I think it has been exaggerated to say that these experts are phantom experts. The Court has the discretion to have this evidentiary value, and it has proven over the years that the core principles of the procedure, namely equality of arms and the fact that the Court is the one that makes the final decision, are being respected.

I believe that we will have to face that more and more on delimitation cases, where very complex issues are at stake. We will see that in environmental ones. We will see that in a number of those new fields that I mentioned earlier.

I think that the Court needs to adapt its methods of work as it has done to have the possibility of combining all of the pieces, but I really think that the question that raised some criticism has been overcome by the fact that now more and more experts are witnesses who are subject to cross-examination.

Catherine Amirfar

Sarah?

Sarah Cleveland

Yes. I agree both that the Court is facing greater need and that it is making progress in using experts in various ways. The critical problem arises from the fact that the Court is a court of first instance as well as a court of last instance. The Court in any case that comes before it, unless there is agreement on the factual record, is going to have to evaluate evidence, including technical and scientific evidence, in order to be able to render a judgment in the case, and obviously, the Court is not itself expert in scientific and other technical fields.

The criticism of Judges Simma and Al-Khasawneh in the *Pulp Mills* case was to the use of experts, as has been said, as counsel who therefore could not be subject to cross-examination and were not treated as freestanding experts. This practice has adjusted. The Court does have a number of tools under its Statute. Under Article 50 of the Rules, the Court may entrust any individual or entity that it selects with the task of carrying out an inquiry or giving an expert opinion. The Court has quite broad authority in principle to designate an expert.

The Court can call for an inquiry or an expert opinion even after the oral proceedings have closed and did this in the *DRC v. Uganda* reparations phase. It also did it in its first case, the *Corfu Channel* case.

Separately, parties may appoint experts under Article 62 of the Rules. They are permitted to call experts in written and oral proceedings and should present them as experts and not as counsel. They can be cross-examined and asked questions by the judges, and this happened, in among other cases, the *Whaling* case and the *Salala* case.

Now, interestingly, the *Nicaragua-Colombia* proceeding that is currently before the Court regarding delimitation of the continental shelf beyond 200 nautical miles raises extremely complicated technical issues, and the Court in December held a hearing on legal questions that some of the members of the Court suggested was in part so that if the legal questions were answered in a particular way, it would relieve the Court of having to grapple with this quite weighty body of technical questions.

The final thing I would like to point out is that Article 32 of the Statute allows assessors to sit with the Court without the right to vote, and the Court has never done this, but this is another procedural mechanism by which the Court could bring in expertise.

Catherine Amirfar

Thank you. It sounds like progress has been made with opportunities to innovate.

Let me shift gears for a minute, and, Juan Manuel, I will start with you again on this one, and that is with respect to a very important ongoing conversation about equity and, in particular, the accessibility of the Court to those outside of Europe and North America. The Court has taken several steps to address this issue, which I will go through and then ask you where are we now and where should we go.

The Court has made an effort to achieve more equitable representation among its staff, including by establishing a trust fund to enable young practitioners from developing states to participate in the Court's judicial fellowship program. There are also calls on the Court to modify its language requirements, so that fellows be proficient in the two working languages of the Court, English and French, and an acknowledgement that this presents a barrier to young lawyers from non-Francophone, non-English developing states, and entrenches a bias in the system. There are

also important conversations around the Court's operating languages and the lack of representation seen in, for example, its exclusion of Spanish as a working language.

In that regard, there certainly are steps taken, but many view the ICJ as somewhat lagging behind other international fora in this regard. At The Hague Conference on Private International Law, for example, I will note Spanish was recently added as the third official language.

Juan Manuel, to you. What are the challenges relating to accessibility to multilingualism for the Court in your view?

Juan Manuel Gómez-Robledo Verduzco

Very big challenges, starting with the fact that even at the UN, we are not able to really give equality to all six official languages. That is a reality, and COVID only made it worse.

Having said that, I think that some progress has been made. French and English are still the two official working languages, but for instance, in the late 1980s, Mexico promoted in the Sixth Committee that translations, in a summarized way, be made of all of the judgments and advisory opinions in all six languages. It was not an easy task. We had to persuade several players, but finally, now it is the Office of the Registrar who does these translations in real time. They are put on the website quite quickly after the ruling is issued, and it is, of course, under the understanding that these summarized translations cannot be used in actual proceedings. They can only be used for dissemination, educational purposes. But this is exactly what countries like mine want, for students, of course, but for the fact that, as you rightly said, the docket of the Court takes more and more cases from Latin America and the Caribbean. We have become one of the frequent clients of the Court. On the present docket are five or six cases from the region. Nicaragua has had eight or nine. It is ever more important. Spanish, in the end, is the fastest-growing language in the world, not only in this country, but worldwide.

It is important to see that these incremental steps are taken. In the end, we all know that to amend the Statute, we have to go through the same rules as amending the Charter, and we all know how it works, two-thirds of the members of the General Assembly and ratifications to follow, including each of the five Permanent Members of the Security Council. It is not so easy to achieve it, but I think that through practical measures, such as those you mentioned, it is possible.

Catherine Amirfar

Thank you. Sarah?

Sarah Cleveland

Yes. I agree. The Court has two official languages. The role of both of those official languages is very important. Different languages reflect different ways of thinking as well as different cultures and legal traditions.

It is striking to me as a former member of the UN Human Rights Committee that had at least three working languages that the Court does only work in two official languages, and this, of course, does create a barrier for accessibility for large portions of the world, including law teachers in large portions of the world if they do not have access to the Court's judgments in accessible languages.

The Court in the last hearings between *Guyana and Venezuela* arranged for translation to and from Spanish at the request of Venezuela but required Venezuela to pay for it. One of the possible practical solutions would be to use the rules of the Court to allow for the creation of a freestanding fund to provide for interpretation and translation into other languages, which would be a way to

include and expand accessibility without in any way tinkering with the official languages and work of the Court.

Catherine Amirfar

Definitely a practical solution. Let me switch gears again to advisory opinions, which is on everyone's mind. Now, advisory opinions are definitely having a moment in international law. Juan Manuel, you mentioned the *Palestine Territory* advisory opinion. Also everyone knows that yesterday, the UN General Assembly passed, with consensus vote, a historic resolution to seek an advisory opinion from the Court regarding a state's legal obligations to address the climate crisis. This follows advisory opinion requests put into ITLOS and the Inter-American Court of Human Rights with respect to climate change under the law of the sea and human rights law, respectively. There is a moment here and a newfound appetite for advisory opinions and an opportunity for us to pause and ask what their role is in the development of the fabric of international law.

As we know, while they are not binding, they are authoritative, but what does that really mean? What role do they have to play, not only with regard to the progressive development of international law but with respect to political discourse, where advisory opinions are seen as helpful, potentially, in setting the terms of the debate and impacting the leverage of participating states in negotiations?

There is a lot there in terms of advisory opinions and their role, but of course, many have complained that they risk clashing with political goals and objectives, and could ultimately be counterproductive. From your perspective—and, Sarah, to you first—what do you see as the risks and opportunities for the Court with respect to advisory opinions, and in your view, what are advisory opinions best placed to achieve?

Sarah Cleveland

As a little background, Article 96 of the Charter and Article 65 of the Court's Statute allow the Court to exercise advisory jurisdiction with respect to any question of law that is referred by the General Assembly or the Security Council. There is more restrictive advisory jurisdiction with respect to other questions from international organizations.

But the General Assembly and the Security Council have general authority to refer questions. The Court has received 156 contentious cases and twenty-eight, soon to be twenty-nine, advisory opinion requests in its history. The Court in the *Nuclear Weapons* advisory opinion said that the purpose of such opinions is not to settle, at least directly, disputes between states but to offer legal advice to the organs and institutions that request the opinion.

Now, the Court has discretion not to exercise its advisory jurisdiction in order to protect the integrity of the Court's function. One of the primary reasons that is often articulated for why the Court should not exercise jurisdiction is because it would essentially be treading on the principle of state consent, because an advisory opinion encompasses a bilateral dispute, but the Court has taken the position that giving an advisory opinion represents the Court's participation in the activities of an organization like the General Assembly and, in principle, should not be refused absent compelling reasons. The Court to date has never declined to exercise advisory jurisdiction.

The Court does have the ability to reformulate a question or to interpret a question as it wishes, as it did quite notably in the *Kosovo* advisory opinion. These can be very influential. They help clarify the law. They influence state behavior. The *UK and Chagos*, for example, have begun conversations in light of the *Chagos* advisory opinion. They influence the work of other tribunals. ITLOS, for example, in the *Mauritius/Maldives* dispute, rejected the Maldives preliminary objections on the ground that the ICJ in the *Chagos* decision had resolved the question of sovereignty over the

Chagos. The European Court of Justice relied on the *Western Sahara* advisory opinion to establish the third-party status of the peoples of Western Sahara in an agreement between Morocco and the EU.

Challenges. Obviously, this goes back to the issue I raised at the beginning. There is a risk of politicization of the Court in the context of advisory opinions that raise very sensitive geopolitical questions. The Court needs to make sure that it is, in fact, addressing legal questions in exercising its advisory jurisdiction, not to allow circumvention of the principle of state consent, which is, in fact, a core part of the Court's authority and jurisdiction. Advisory opinions can raise difficult questions regarding scientific evidence and technical expertise, as certainly the climate advisory opinion will.

The influence can be quite broad. For example, Russia's military doctrine and state policy on nuclear deterrence "reserves the right for Russia to use nuclear weapons" if the very existence of the state is in jeopardy, lifting the language from the *Nuclear Weapons* advisory opinion as the basis for that policy.

In summation, I think that the Court does have this jurisdiction and has used it quite robustly in the past. Obviously, there is great interest in it now. It does raise some cautionary flags for the Court with respect to the care with which it needs to proceed.

Juan Manuel Gómez-Robledo Verduzco

I believe that it needs to be reminded that advisory opinions are not less rigorous than contentious decisions. They follow exactly the same procedure. When the Court delivers an advisory opinion, it renders a service to the international community as a whole. That is why, to a certain extent, the advisory proceedings take precedence over contentious cases because, as the principal judicial organ of the United Nations, the Court renders, especially if it is the General Assembly that requests the advisory opinion, a service to the community as a whole.

Then I would say that from the beginning, there has been an evolution on the kind of questions put to the Court. We started with very administrative or legal questions related to the functioning of an international organization, and we now have opinions of general international law which, as Professor Cleveland just said, may be surrounded by quite sensitive political issues.

Let me share with you an example in which I was personally involved, and it was the case of the opinion on the legality of the use or threat of use of nuclear weapons in the 1990s. The opinions of the Court radically changed, in my view, the way we debate and negotiate, within disarmament bodies, a number of agreements on disarmament.

There has been a shift with a systematic approach now through the lenses of international humanitarian law (IHL), and that was very much one of the very important things that the Court gave us through that opinion. Cardinal principles of IHL were recognized as *erga omnes* obligations. That influenced the very last phase of the negotiations on the Comprehensive Test Ban Treaty, because the last year of negotiation took place exactly the same year in which the Court delivered that opinion. It had an influence in the outcome of that treaty, which is absolutely essential in promoting non-proliferation of nuclear weapons. Ultimately, it also influenced the review process of the non-proliferation treaty (NPT) where the catastrophic humanitarian consequences of the use of a nuclear weapon are now part of that discussion within the NPT review process, and ultimately, that opinion influenced the treaty on the prohibition of nuclear weapons that was just adopted in 2017.

I believe that in the case of the resolution that was approved yesterday on climate change, this is going to be even more powerful because, as Catherine reminded us, three international tribunals will be dealing with the issue sequentially. It is not very difficult to imagine that the Inter-American

Court of Human Rights will be the first one, then the International Tribunal for the Law of the Sea, and then when the Court will look at that, it will have to deliver an opinion that responds not only to the expectation of the international community but also to what the other tribunals have done. This is more proof that the Court takes care, and quite wisely, on keeping the uniformity of interpretation of international law.

Catherine Amirfar

Thank you. That is a perfect segue because I want to stay with that thought, because the fact that there are these pending requests in different fora raises the possibility and the risk of fragmentation to the extent that these fora take different or potentially contradictory approaches.

On that point and for its part, the Court has not necessarily taken a consistent approach to its consideration of an engagement with other international courts, tribunals, and expert bodies. Just as one example, in the *Diallo* case, the Court closely considered the work of the Human Rights Committee. Whereas, in *Qatar v. UAE*, the Court arguably did not do the same with respect to the CERD Committee and its views as manifest in its general recommendations.

Sarah, what do you see is the relationship between the Court and other tribunals and UN treaty bodies?

Sarah Cleveland

I actually love this question because, as a member of the Human Rights Committee, we frequently struggled with the relationship between the work of the Committee and other bodies, whether it was other UN treaty bodies or, for example, regional human rights Courts that had actually addressed the exact same issue, and then it had come to the Human Rights Committee and what level of deference was warranted in that context. It is the possibility of fragmentation, on the one hand, and transnational judicial dialogue on the other. There is a struggle to respect treaty specificity. The fact that different treaties are negotiated at different times by different parties have different language objects and purposes, et cetera, as well as the need to promote consistency, coherence, and predictability in the international legal system. I have done a lot of recent scholarship on the issue of connectivity among particularly human rights entities, but the same considerations apply in this context.

Now we have three advisory opinion requests that are based on different international instruments. One is based on the American Convention on Human Rights, one on UNCLOS, and then one on many possible instruments. Yet I think there will be an important informal conversation happening among the entities at least as those opinions come out.

Interestingly, in *Diallo*, the Court took the position that although the Court was in no way obliged in exercising its judicial functions to model its own interpretation on that of a treaty body, it should ascribe great weight to the interpretation adopted by the treaty body that was established specifically to supervise and monitor the application of that treaty. The Court emphasized that the point was to achieve the necessary clarity and consistency of international law as well as legal security, both for individuals and for affected states.

And then, as Catherine said, in the recent *Qatar v. UAE* case, the Court disagreed with the CERD Committee's general recommendation, which had found an overlap between the principles of national origin and nationality discrimination, and the Court distinguished the two and found national origin did not encompass nationality under the CERD. We do have a disagreement between two bodies, both with authority to interpret the same treaty regarding the same language, and I think that is it is unfortunate when it happens But I think because different entities in the international system are given authority to interpret overlapping issues, this can happen.

The important issue is for different international bodies to be aware of and fully informed of the work of the other entities, so that if there is a disagreement, it is a conscious disagreement, and there are well-articulated reasons for it.

Judge Robinson in the *Qatar* case objected that the Court had rejected the CERD Committee's interpretation without explanation. I think disagreement is to be avoided where possible, but uninformed disagreement can be avoided and should be avoided in order to promote coherence in the international system.

Catherine Amirfar

Juan Manuel, any different views?

Juan Manuel Gómez-Robledo Verduzco

No, no, but some complementary ones. First of all, disagreements are the name of the game in domestic courts, and still, the judicial system of every single country works or should work or is supposed to work. That is one thing.

The other is the fact that, as Sarah mentioned, in the two requests both from the General Assembly of the UN and the one addressed to ITLOS, both mentioned the United Nations Convention on the Law of the Sea. The two tribunals will have to look at the same set of rules, and of course, it is in the minds of everyone to do whatever it takes to guarantee the uniformity of interpretation of international law.

Sarah mentioned the treaty bodies, but there is also the International Law Commission (ILC), which is not a treaty body but which takes very seriously this issue and makes sure that every single line of what it adopts is in conformity with the jurisprudence of the Court. I went through ten years at the ILC, and the ILC is very rigorous on that. By the way, the ILC also relies on experts for scientific issues because it is the same challenge.

There is also another thing. I would say that the Court—and again on the question of climate change—will have to not only see what the other two tribunals have said before it, but ultimately what the Court will look at in an issue like this is what we could call the *effet utile* of its opinion, and the *effet utile* of its opinion cannot be anything but the one that renders a service to those who are the beneficiaries, and who the beneficiaries are, the peoples who are adversely affected by climate change. The Court will have to do that in a way that bears in mind that when delivering this opinion, it is a service to humankind.

Catherine Amirfar

Thank you. Let me shift gears again. I know this is speed dating in terms of questions, but let me shift gears again to compliance issues. Obviously, many consider the Court to be one of the most effective international judicial bodies because of its extraordinary record of compliance. In the sense that the vast majority of its rulings are implemented by parties, it is recognized by third states and cited authoritatively by other courts and tribunals.

A recent example of that compliance is Uganda's timely payment of reparations to the DRC, consistent with the Court's *Armed Activities* judgment. But, on the other hand, there are notable examples of non-compliance. There is the example of the United States vis-à-vis the Court's judgment in *Avena*. The Court's *Chagos* advisory opinion, of course, did not cause the UK to return the Chagos archipelago to Mauritius as of yet. And Nicaragua has disregarded the 2012 territorial and maritime dispute judgment. But the Court has reacted. It has shown capacity to innovate, and it has shown capacity to innovate particularly with compliance. And 2020 was a remarkable year in that

regard. First, in *Gambia v. Myanmar*, the provisional measures order, the Court imposed a novel requirement on Myanmar to report on its compliance with the order, and in the same year, the Court adopted Article 11, which allows it to elect three judges to form an *ad hoc* committee to monitor the implementation of provisional measures.

Sarah, to you, how would you assess the record of compliance with the Court's orders and judgments, and is there anything that the Court can do to promote that compliance?

Sarah Cleveland

Compliance is a challenge for all regional and international institutions. They do not have an executive arm of the same government that is responsible for implementation. I have to quibble slightly with the portrayal of the United States as completely non-compliant with the *Avena* judgment—John Bellinger referred to the two of you as part of the *Avena* reunion. I consider myself also part of the *Avena* reunion because I spent a lot of my time in the State Department working to try to get legislation implemented in response to the *Medellín* decision, but also working on trying to prevent members of the *Avena* group from being executed and also to ensure that prospectively the United States is providing consular notification in appropriate context.

As you say, the Court actually has a quite high rate of compliance. It has a lot of cases come to it by special agreement which does not ensure compliance at the end but may encourage it. Namibia, for example, brought a boundary delimitation claim involving the Chobe River before the Court and announced that it would comply with the Court's judgment, and Namibia lost completely before the Court and has been quite public in the fact that it was nevertheless complying with the Court's judgment, because that was the commitment that it had made. Obviously, primary responsibility for compliance lies with states. In that famous language of Article 94 of the UN Charter, they undertake to comply with the decisions of the ICJ. But sometimes they need help, and sometimes the reason for needing help is difficulties with securing compliance through domestic structures. This was true obviously for *Avena* but also has been an issue for Italy in the *Germany-Italy* ongoing litigation. But there are also things that the Court can do, and there are things that other entities can do.

I do think that monitoring of provisional measures, as the Court has started to do, is very important because it signals to parties that the Court actually cares about whether they comply with its provisional measures. Asking parties to report back on implementation of provisional measures, taking it into account in a final merits judgment are all ways that the Court can nudge compliance with provisional measures. Likewise, other entities, other Courts, and treaty bodies have developed follow-up mechanisms for their final judgments.

Now, a question would have to be addressed whether the Court has authority to engage in such oversight, but asking states to report back regarding compliance is one thing that other Courts have done in order to try to monitor.

If parties do not comply, the approach provided for in the Charter is that the Security Council is supposed to enforce ICJ judgments if a party requests under Article 94.2 of the Charter. Now, this has never happened, and many people say, "Oh. Well, this is meaningless because the Security Council has a veto." Yes, it does. But states also do not ask for help from the Security Council. There has been one case, the *Nicaragua* case where Nicaragua sought Security Council assistance, and that was vetoed. But the few other circumstances in which case states have referred cases to the Security Council, they have ultimately withdrawn them, and the Security Council has not had reason to act.

The Security Council has ducked a role here, and here again, the Court could promote engagement by the Security Council, for example, when it issues a judgment to report in detail to the

Security Council on the judgment rather than simply referring the document to the Security Council.

In its annual reports to the Security Council and the General Assembly, the Court could report on compliance by states, which would be a way to help try to engage not only those entities but the UN member states in diplomatic encouragement of compliance. I do think there are possible ways that greater compliance can be secured in more cases.

Catherine Amirfar

Thank you. Juan Manuel, we have one minute before I get the hook. Can you take us home on this compliance?

Juan Manuel Gómez-Robledo Verduzco

Just to clarify that Mexico did go to the Security Council on *Avena*, no resolution, of course, but we sent a letter. But there are other ways. We also went to the General Assembly, and a resolution was adopted two or three years ago. I must admit that the number of those who voted in favor was not that high, but it was the first time that any party went to the General Assembly

But there is another way also, and it is to resort to the secretary-general. The secretary-general can help parties to implement a ruling. There is a precedent. It is *Cameroon v. Nigeria*, and they had problems, technical problems, financial problems to deal with it. The secretary-general provided to them, and President Donoghue reported in November 21 at the Security Council that things were almost completed. And then the debate, as Sarah said, of the report of the ICJ, which was not a given twenty years ago, that report was not debated. Now it is a normal procedure, and in that debate, we could certainly address more in detail the level of compliance.

Catherine Amirfar

Thank you very much. Please help me in thanking these two brilliant candidates.