CIL
CENTRE FOR INTERNATIONAL LAW
National University of Singapore

SUMMARY NOTES - 2024 CASES

INTERNATIONAL COURT OF JUSTICE

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

The following document was prepared by Ms Trisha Unnikrishnan, Research Associate (Public International Law) at the Centre for International Law (CIL). This research was conducted on the occasion of the International Law Year in Review Conference (22 January 2025), for the panel "Review of International Dispute Resolution before International Courts and Tribunals" moderated by Professor S Jayakumar (National University of Singapore). Thank you to Mr Devarakonda Yasaschandra, Student Researcher under CIL's International Dispute Resolution programme, for his support with the online version of the document.

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Type: Contentious case

Output in 2024: Judgment

Date: 31 January 2024

1.1. Summary

The proceedings were instituted by Ukraine following the Russian invasion of Crimea in 2014. Notwithstanding the subsequent invasion and war, the scope of the judgment is limited to the provisions and circumstances under which the initial case was filed

1.1.1. Subject-matter of the dispute

- Whether Russia had an obligation under the International Convention for the Suppression of the Financing of Terrorism, 1999 (ICSFT), to take measures and cooperate in the prevention and suppression of the alleged terrorism financing in the context of Eastern Europe. Whether Russia breached this obligation.
- Whether the measures taken by Russia against the Crimean Tatar and Ukrainian communities in Crimean breached its obligations under CERD

1.1.2. Alleged violations of the ICSFT

- Court rejected the clean-hands doctrine, invoked by Russia.
    - The Court treats the doctrine with caution, finds that it cannot be applied in an inter-State dispute where the Court's jurisdiction is established and the application is admissible.
- No violation of Article 8 ICSFT.
    - Obligations, *inter alia*, to identify, detect, freeze or seize funds allocated or used to commit offences under Article 2, which relate to terrorism.
    - The obligation to freeze or seize such funds is only triggered when the State has reasonable grounds to suspect that the funds are used for terrorism financing.
    - Ukraine did not point to any specific funds that Russia failed to identify to seize.
- Violation of Article 9(1) ICSFT
    - Obligation to investigate allegations of terrorism financing offences by persons in the State's territory.
    - Low threshold; sufficient that the State received information of persons alleged to have committed the offence.
    - Russia received three *Notes Verbales* with sufficiently detailed allegations of terrorism financing in its territory.
    - Almost a year later, the Russian Federation has failed to even identify several of the offenders, and did not attempt to cooperate with Ukraine to undertake the necessary investigations.

- Ukraine requested declaratory relief, cessation of the ongoing violations, guarantees of non-repetition, compensation and moral damages. The Court ordered Russia to undertake the necessary investigations, and did not grant any other forms of relief requested.

- No violation of Article 10(1) ICSFT
  - Obligation to either prosecute or extradite alleged offenders of terrorism financing.
  - The information that Ukraine provided to the Russian authorities did not give rise to reasonable grounds to suspect terrorism financing, which would have given rise to an obligation to prosecute. It did not make any requests for extradition.
- No violation of Article 12(1) ICSFT
  - Obligation to assist other States parties in investigating terrorism financing.
  - Court held that the requests by Ukraine concerned alleged conduct that did not fall within the scope of Article 12.
- No violation of Article 18(1) ICSFT
  - Obligation to cooperate in the prevention of terrorism financing.
  - Ukraine appeared to allege that Russia violated this provision because of its alleged policy of financing armed groups in Eastern Ukraine. Court held that such conduct was not within the scope of Article 18(1). It also held that Ukraine had failed to point to individual specific measures that Russia failed to take to prevent terrorism financing offences.

- It did not violate the obligation by failing to monitor and disrupt certain fundraising networks, because it had no reason to suspect that they were used for terrorism financing.

1.1.3. Alleged violations of CERD

- Court rejected the clean-hands doctrine, invoked by Russia.
- It assessed a range of conduct by Russia, which Ukraine alleged amounted to violations of CERD provisions
- Disappearances, murders, abductions and torture of Crimean Tatars and ethnic Ukrainians – no violations
    - Acts do not amount to racial discrimination under Article 1
        - Failed to show that persons were specifically targeted because of their ethnic origins. They could have been targeted because of their political opposition to the Russian authorities.
- Law enforcement measures (searches, detentions, prosecutions) against Crimean Tatars or Ethnic Ukrainians - No violations
    - Neither the legal framework itself, nor its application, was discriminatory under CERD
        - Failed to show that the purpose of the relevant domestic law was to differentiate between persons, based on a prohibited ground under Article 1.
        - While its application did have a particularly adverse effect on Crimean Tatar persons, it was not proven that they were subject to this *because* of their ethnic origin.

    - No violation of the obligation to prevent and punish speech that incites racial hatred or discrimination, including from public authorities and institutions (Article 4 CERD).
    - No violation of the obligation to investigate allegations of discriminatory law-enforcement measures (Article 6 CERD), as it was not proven that Russian authorities had reasonable grounds to suspect racial discrimination at the time.

- Law enforcement measures (searches, detentions, prosecutions) against the Mejlis - No violations
    - The law enforcement measures did target the leadership of an ethnic group (the *Mejlis*), but it is not established that they were targeted *because* of their ethnic identities.
- The school system implemented by Russia in Crimea and, in particular the unavailability of education in the Ukrainian language, violated its obligations under Articles 2, paragraph 1 (a), and 5 (e) (v) of the International Convention on the Elimination of Racial Discrimination.
- The limitations imposed on the *Mejlis* violated the Provisional Measures Order of 19 April 2017, which called on Russia to not impede the ability of the Crimean Tatar to maintain representative institutions.
- The recognition of the "republics" of Donetsk and Luhansk, and the "special military operation" against Ukraine violated the 19 April 2017 Provisional Measures Order to refrain from actions that will aggravate the dispute or make it more difficult to resolve

1.2. Commentary

1.2.1. The failure to recognise the ban on the *Majlis* as racial discrimination under CERD

- The majority in the Court held that Russia's ban on the *Mejlis* did not constitute racial discrimination as it was a measure based on the group's political, not ethnic identity, notwithstanding that the effects were more strongly felt by those of Crimean Tatar ethnicity.
- This was criticised by commentators, and in a number of Separate and Dissenting Opinions, and Judges' Declarations.
- President Donoghue, for example, commented that the majority failed to recognise that the organisation is central to the ethnic identity of Crimean Tatars. The Court has even recognised in the past that the policies of States often pursue more than one goal. The Court's decision on this matter was an "oversimplification", as "the distinct ethnic identity of a particular group goes beyond shared physical characteristics and can be forged or strengthened by a variety of forces, including the way in which that group is characterized and treated by governmental authorities."[1] It should have found that the ban violated the Mejlis.
- Similarly, Judge Sebutinde argued that the *Mejlis* played a unique representative role for the Crimean Tatar community and its ban impeded the fundamental rights of the Mejlis and constituted racial discrimination against the Crimean Tatars, in

[1] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judge Donoghue, Separate Opinion.

violation of CERD.[2]

- Judge Iwasawa found that "racial discrimination is one of the most invidious forms of discrimination," and such cases should be rigorously scrutinized.[3] The prohibitions under CERD relate measures that have not only the purpose but also the effect of discriminating on a prohibited ground. International human rights courts and treaty bodies, including the CERD Committee, have recognised this form of indirect discrimination as within the scope of racial discrimination. The Respondent had rejected the Applicant's contention that even equal treatment that has unequal effects may amount to discrimination. Judge Iwasawa, however, confirmed that "equal treatment can also constitute racial discrimination if it has an unjustifiable disproportionate prejudicial impact on a protected group under CERD."[4]

- Dr Iryna Marchuk argued that this was the most discouraging aspects of the Court's decision, as it failed to recognise "the broader context in which discriminatory practices were carried out by Russian occupation authorities."[5]

- Dr. Gabriela García Escobar contends that a broader observation can be made on the basis of this aspect of the majority's decision, relating to the frequent divergences between the ICJ and human rights treaty monitoring bodies.[6] (found

[2] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judge Sebutinde, Dissenting Opinion.
[3] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judge Iwasawa, Separate Opinion
[4] ibid.
[5] Iryna Marchuk, 'Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v Russia (CERD and ICSFT)' (EJIL:Talk!, 22 February 2024) <https://www.ejiltalk.org/unfulfilled-promises-of-the-icj-litigation-for-ukraine-analysis-of-the-icj-judgment-in-ukraine-v-russia-cerd-and-icsft/>.
[6] Gabriela García Escobar, 'ICJ's Judgment in Ukraine v. Russia regarding CERD's Scope of Racial

below)

1.2.2. Dr. Gabriela García Escobar: Divergence between the Approaches of the ICJ and Treaty Monitoring Bodies

- The ICJ has traditionally seemed reluctant to apply the interpretations of human rights treaty monitoring bodies (TMBs), when applying and interpreting their respective Conventions.
- She notes that "the ICJ has ascribed 'great weight' to the pronouncements of TMB, but it has been careful to qualify that it is not obliged to adopt their interpretations."[7]
- In the present case, the Court departed from the CERD Committee's views on two matters: (1) the question of indirect discrimination, and (2) differential treatment between citizens and non-citizens.
    - On the first issue, the Court recognised that CERD prohibits even indirect discrimination but maintained that the policies that disproportionately affect some groups must be based on discriminatory bases. In finding that the disparate adverse effects on Crimean Tatars and ethnic Ukrainians were on political, not ethnic, grounds, it paid little regard to the CERD Committee's recommendations that an intersectional approach to indirect discrimination be adopted. Similarly, it disregarded OHCHR reports on the grounds that they did not provide first-hand assessments.

Discrimination: ICJ's Approach to CERD Committee's Views' (EJIL:Talk! 29 February 2024) <https://www.ejiltalk.org/icjs-judgment-in-ukraine-v-russia-regarding-cerds-scope-of-racial-discrimination-icjs-approach-to-cerd-committees-views/>.

[7] ibid.

- On the second issue, the Committee has held that differential treatment between citizens and non-citizens is within the scope of CERD. In the present case, however, the ICJ held that the rules of citizenship did not fall within the scope of the Convention.

- Critics of this approach contend that "the ICJ places itself in a relationship of superiority to these bodies."[8]
- Alternatively, "it might be related to TMB's legal nature as a non-judicial entity whose pronouncements are non-binding."

  It might even reflect growing criticisms of the expansive approaches of TMBs and shortcomings in their legal and methodological analysis.[9]

1.2.3. The narrow interpretation of "funds" under the ICSFT

- The majority decision in the Court held that Russia did not breach Article 2(1) of the ICSFT, as weapons were not included in the definition of "funds" under Article 1(1) of the Convention. Judge Tomka, in his Declaration, upheld this position
- Others, however, criticised this as an overly narrow interpretation.[10]
- Dr Iryna Marchuk, for example, argued that this interpretation was "disheartening", and excluded "the means to commit acts of terrorism" from its ambit. It was fatal to Ukraine's case concerning the MH 17 aircraft and Russian support for militia groups in the Donbas.
- A number of judges echoed this position.

[8] For example, Geir Ulfstein
[9] For example, Joanna Harrington, Kerstin Mechlem
[10] Judges *ad hoc* Pocar, Bhandari, Charlesworth.

1.2.4. Whether Russia breached the Provisional Measure of non-aggravation

- In a previous Provisional Measure Order, the Court had instructed the parties not to aggravate or extend the dispute, or "make it more difficult to resolve".
- In the present case, the majority found that Russia's "special military operation" against Ukraine and its recognition of the "republics" of Donetsk and Luhansk breached this obligation.
- A number of Dissenting and Separate Opinions, however, expressed skepticism over this. First, Judge Bennouna questioned whether the provisional measure exists as an independent, enforceable obligation, or merely to complement other obligations and encourage States to respect international law. Conversely, Judges Sebutinde and Charlesworth argued that it was an independent obligation, arising from the duty to settle disputes peacefully under the UN Charter. She argued that "the Respondent's conduct not only dramatically worsened the relations between the Parties, almost entirely eliminating the possibility that the dispute could be peacefully settled, but concretely affected Ukraine's ability to prepare its case before the Court." Second, a number of Judges questioned whether Russia's conduct may truly be considered to aggravate the dispute or make it difficult to resolve.[11] Judge Bennouna argued that neither the "special military operation" nor the recognition of the "republics" clearly fall within the subject matter of the dispute under CERD or the ICSFT and, hence, the Court may lack the jurisdiction to comment on it. Judge Abraham suggested that, in finding that the acts breached the provisional measure, the Court is arguably commenting on the legality of the

[11] Judges Abraham, Yusuf

Russian operation, which was outside the subject-matter jurisdiction. In fact, he asked whether an act may be regarded as breaching a Provisional Measures order when it is not, by itself, prohibited under international law. He conveyed that "if, hypothetically, a State acts in self-defense … it is difficult, if not logically impossible, to say that, in doing so, it has aggravated a dispute or made it more difficult to resolve."

- Similar questions were raised over the alleged breach of the Provisional Measures Order through the ban of the *Mejils*.

1.2.5. Whether Russia breached the Provisional Measures Order through the ban of the *Meijlis*

- In its Provisional Measures Order of 19 April 2017, the Court ordered Russia to "refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis." In the present judgment, it held that the ban on the *Mejlis* by the Russian authorities breached this order, even though the same action did not constitute an independent violation of CERD.
- Some judges questioned the cogency of this finding.[12] Judge Tomka, for example, argued that "States have not granted to the Court the power to create and impose on them independent obligations" and, in the present case, the provisional measures sought to preserve the rights of States under CERD. However, given that the Court found that there was no such obligation under CERD, it was wrong to conclude that Russia had violated the related provisional measure order. Similarly,

[12] Judges Tomka, Abraham

Judge Brant opined that "the provisional measure as indicated in the Order of 19 April 2017 is without object" as the majority found that "the provisional measure in question could not serve to preserve Ukraine's rights under CERD." Hence, Russia could not be held to have violated the Order.

1.2.6. On the duty to extend legal assistance to investigate and prosecute allegations of terrorism financing

- The Court found that Russia had not breached Article 12(1) ICSFT, concerning the obligation to assist in investigating allegations of terrorism financing. A number of judges disagreed with this outcome in their Separate and Dissenting Opinions.[13] It was argued that the majority set too high a threshold for States seeking such assistance from one another. Judge Donoghue argued that, at the very least, a good faith interpretation of the obligation would require that a State provide a reasonable explanation for refusing to extend the assistance requested by the other State, which Russia failed to provide in the present case.

1.3. Other points of discussion

- Applicability of the *clean hands* doctrine (Judge *ad hoc* Tuzmukhamedov argued that it was applicable)
- Whether the policy on education in the Ukrainian language constitutes a violation of CERD, when there is no right to education in a minority language under the Convention (Judge *ad hoc* Tuzmukhamedov argued that it did not).
- On the award of remedies: The lengthy list of remedies requested by Ukraine were largely denied. Dr Iryna Marchuk prescribed this as "a huge blow for Ukraine as

[13] Judges Donoghue, Sebutinde, Pocar

it has sustained huge financial losses" due to the armed conflicts.[14] She highlighted that, while actual compliance with an order by the Court by Russia was improbable, "a strong judgment on the merits in favour of Ukraine had the potential of being used by the Ukrainian government when lobbying to confiscate frozen Russian assets." This was particularly because of the "exorbitant" legal fees paid by Ukraine for litigation before international courts and tribunals.

2. Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem

Type: Advisory Opinion

Output in 2024: Judgment

Date: 19 July 2024

2.1. Summary

- On 19 January 2023, the UN Secretary General requested the ICJ, on behalf of the General Assembly, for an Advisory Opinion on the following questions:
    - What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of

[14] Iryna Marchuk, 'Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v Russia (CERD and ICSFT)' (EJIL:Talk!, 22 February 2024) <https://www.ejiltalk.org/unfulfilled-promises-of-the-icj-litigation-for-ukraine-analysis-of-the-icj-judgment-in-ukraine-v-russia-cerd-and-icsft/>.

Jerusalem, and from its adoption of related discriminatory legislation and measures?

- How do the policies and practices of Israel referred to in paragraph 18 (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

2.1.1. Jurisdiction and Discretion

- Must determine if the General Assembly asks a "legal question" (Article 96 UN Charter, Article 65 ICJ Statute). This was satisfied.
- The Court recognised that it still had the discretion to decline to give an opinion, but would require compelling reasons to do so once jurisdiction was established.
- Participants in the proceedings raised the following as compelling reasons for the Court to decline to give an opinion, none of which it accepted:
    - The request relates to a dispute between Palestine and Israel, and the latter did not consent to the Court's jurisdiction.
        - Court did not regard it as a purely bilateral matter as the UN, and even the League of Nations, have been involved in questions relating to Palestine since the Mandate System.
    - The General Assembly is not seeking the opinion for a matter on which it requires assistance, but rather for confirmation on issues relevant to the bilateral dispute between Palestine and Israel.
        - This was not a compelling reason.

- The Opinion may undermine ongoing negotiations between Israel and Palestine.
    - Court held that this was mere conjecture, and it could not speculate about the implications of its decision.
- The Opinion would be detrimental to the Security Council's work, which as primarily responsibility for resolving the conflict.
    - Court held that it was mere conjecture that the Opinion would be detrimental to the Security Council's work and, given that the General Assembly also has the competence to address matters of international peace and security, it saw no reason to decline to give the opinion.
- The Court lacks sufficient information to be able to render an Opinion.
    - Court held that it had sufficient information for this.
- The questions are formulated in a biased manner and assume that Israel has violated international law.
    - Court held that it may determine the scope and meanings of the questions itself.

2.1.2. Opinion on Substantive issue (i): Israel's policies and Practices in the Occupied Palestinian Territory (OPT)

- The prolonged nature of the occupation does not, in itself, render it unlawful. The policies adopted during occupation must be individually assessed:
    - Settlement policies were unlawful

- These included the transfer of civilian populations, confiscation or requisitioning of land, exploitation of natural resources, extension of Israeli law, the forced displacement of Palestinian populations, and violence against Palestinians. Held that the settlements were established and maintained in violation of international law, and that these policies have been expanding since the *Wall* Advisory Opinion.

  - These policies were designed to remain indefinitely and create permanent changes, amounting to annexation of large parts of the OPT.

  - There was systematic discrimination of Palestinians in the OPT on the bases of race, religion or ethnic origin, in violations of Articles 2(1) and 26 ICCPR, Article 2(2) ICESCR and Article 2 CERD as well as Article 3 CERD.

  - There were violations of the right to self-determination.

2.1.3. Opinion on Substantive issue (ii): Effects of Israel's Policies and Practices on the Legal Status of the Occupation

- The annexation and violation of the Palestinian peoples' right to self-determination renders Israel's presence in the OPT unlawful.

- Legal consequences for Israel: It is obligated to bring this presence to an end as quickly as possible. It must cease all new settlement activity and repeal all legislation that creates the unlawful situations. It must make full reparation for the damage caused, including restitution, compensation and/or satisfaction. Restitution includes the return of land and immovable property, seized assets, evacuation of settlers, dismantling parts of the wall, allowing displaced Palestinians to return. Where impossible, it must compensate.

- Legal consequences for other States: It is for the General Assembly and Security Council to determine how to end Israel's illegal presence in the OPT, and all States must cooperate to implement this. Some of the violations are of obligations *erga omnes*. Hence, States must not recognise as lawful any changes in the physical character or demographics of the territory, they must not render aid or assistance to the maintenance of the unlawful situation, and they must ensure that any impediment to the exercise of the Palestinian people's right to self-determination is brought to an end. All States Parties have an obligation, under the Fourth Geneva Convention, to ensure that Israel complies with IHL under the Convention.
- Legal Consequences for the UN: Also bound by the duty of non-recognition. The General Assembly and Security Council must consider how to bring the illegal presence to an end.

2.2. Commentary

2.2.1. Widespread consensus within on the bench

- Despite the 14 individual opinions from the judges, commentators noted that "there was a remarkable degree of consensus within the Court."[15] There was even unanimity on a large number of highly contentious issues (construction of settlement, failure to prevent settler violence, violations of IHL, IHRL, right to self-determination).
- Even those such as Judge Sebutinde, who argued that the Court should have refrained from issuing an Advisory Opinion, appeared to at least acquiesce to the

[15] Marko Milanovic, 'ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories' (EJIL: Talk!, 20 July 2024), <https://www.ejiltalk.org/icj-delivers-advisory-opinion-on-the-legality-of-israels-occupation-of-palestinian-territories/>.

majority's decision on the first question, highlighting that "the answers to question one, even if based on a one-sided narrative, may not pose any surprises for the General Assembly, especially since much of the applicable law was already pronounced by the Court in previous advisory opinions, including the Wall Opinion, Namibia Opinion and Chagos Opinion. That is a straightforward mathematical exercise"[16]

2.2.2. Whether the Court was right to issue an Advisory Opinion

- The Court found that it had the jurisdiction to issue an Advisory Opinion, and that there were no compelling reasons for it to exercise its discretion to refrain from doing so.
- The second point was more contentious, with, for example, Judge Sebutinde arguing that a number of reasons should have compelled the Court to refuse to render an Opinion. She opined that the Court lacked accurate and reliable information because of "the one-sided formulation of the questions posed in resolution 77/247, coupled with the one-sided narrative in the statements of many participants in these proceedings, some of whom do not even recognize the existence or legitimacy of the State of Israel." Additionally, she contended that the Opinion allows parties to circumvent existing negotiated frameworks, such as the Oslo Accords, and undermines the principle of State consent, as the Court decided on "what is essentially a bilateral dispute between Israel and the Palestinian people in the absence of comprehensive arguments from one of the parties."

[16] Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Judge Sebutinde, Dissenting Opinion

2.2.3. Going forward

- Judge Sebutinde questioned the appropriateness of awarding *Chorzow Factory*-style reparations as remedies. Shecontends that "there is enough blame to go round", not just to Israel, and "without first ascertaining and balancing the competing sovereignty and territorial claims of the concerned parties, it is … unrealistic and simplistic to recommend the kind of reparations referred to in the Advisory Opinion."[17]
- Beyond this particular case, this sheds light on broader questions regarding the role that Courts and Advisory proceedings play in the peaceful settlement of disputes, particularly where they relate to long-standing disagreements and ongoing armed conflicts.

OTHER (PRELIMINARY) JUDGMENTS AND ORDERS CONCERNING JURISDICTION AND ADMISSIBILITY

1. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)

Type: Contentious case

Output in 2024: Judgment on preliminary objections

Date: 2 February 2024

[17] ibid.

1.1. Summary

1.1.1. Background

- Ukraine instituted proceedings against Russia on 26 February 2022, over a dispute concerning the interpretation and application of the Genocide Convention.
- This concerned Russia's allegation of "abuse and genocide" committed by Ukraine in the Donetsk and Luhansk regions, which was used by the former to justify its "special military operation" in the regions.
- Ukraine requested the Court to adjudge and declare that:
    - The Court had jurisdiction over the dispute.
    - There was no credible evidence of acts of Genocide committed by Ukraine, in violation of the Convention, in Donetsk or Luhansk.
    - The use of force by Russia against Ukraine, starting on 24 February 2024, breaches Articles I and IV of the Convention.
    - Russia's recognition of Donetsk and Luhansk as independent "republics" violates Articles I and IV of the Convention.
    - The failure to immediately suspend its military operations, and the failure to ensure that such operations were not continued by groups directed, supported or controlled by it, Russia violated the provisional measures ordered by the Court on 16 March 2022.
- Russia raised the following preliminary objections concerning jurisdiction and admissibility:
    - *"(1) the Court lacks jurisdiction as there was no dispute between the Parties*

under the Genocide Convention at the time of the filing of the Application;

- *(2) the Court lacks jurisdiction ratione materiae;*
- *(3) Ukraine made new claims in the Memorial and these should be found inadmissible;*
- *(4) Ukraine's claims are inadmissible as the Court's potential judgment would lack practical effect;*
- *(5) Ukraine's request for a declaration that it did not breach its obligations under the Convention is inadmissible; and*
- *(6) Ukraine's Application is inadmissible as it constitutes an abuse of process."*

1.1.2. Judgment on preliminary objections

- Objection 1: Rejected
  - Several Russian State organs had claimed that Ukraine was committing acts of genocide against Russian-speaking residents in Donetsk and Luhansk, reiterated by President Putin while recognising these regions as "independent republics" and used to justify the "special military operation". Ukraine consistently rejected these accusations.
  - There was a clear dispute between the two parties over whether Ukraine's conduct amounted to genocide, and hence the legality of Russia's actions.
- Objection 2: Upheld
  - Ukraine alleged that Russia acted in bad faith when it claimed that acts of genocide had occurred.

- However, the Court stated that the principle of good faith is not an independent obligation. An "abuse of the Convention" should simply result in the claim being dismissed.
- Hence, complaints (c) and (d) by Ukraine fell outside the scope of the Convention's compromissory clause.

- Objection 3: Rejected
- Objection 4: Rejected
  - A judgment in the present case would clarify the parties' rights and obligations under the Genocide Convention.
- Objection 5: Rejected
  - This is a "reverse-compliance request", where Ukraine has asked the Court to declare that it has complied with the Convention. Such cases are rare, but not inadmissible.
  - Russia further submitted that the principle of *res judicata* would exonerate Ukraine from future responsibility "by pre-empting the rights of the Respondent and other States to invoke Ukraine's responsibility under the Genocide Convention in the future." The Court rejected this, as it was not required to consider the hypothetical that another State might wish to engage Ukraine's responsibility in the future.
- Objection 6: Rejected
  - There was no evidence of abuse of power

1.2. <u>Commentary -</u> Reverse compliance and the broader objective for bringing a case

- As in the Advisory Opinion on the OPT, questions arise over the role of international Courts and Tribunals in settling long-standing disputes–often manifesting as armed conflicts–between States.
- In the present case, Ukraine challenged the interpretation and application of the Genocide Convention by Russia, which was used by the latter to justify its "special military operation" in Ukraine. Judge Gevorgian, in his Dissenting Opinion, submitted that, in bringing the case, Ukraine had attempted to circumvent jurisdiction and consent-based limits of the Court. He argued that "while Ukraine's submissions seem ostensibly related to the Genocide Convention, it is evident that the true aim of these submissions is to bring before the Court matters not regulated by the Convention, namely the legality of the use of force by the Russian Federation against Ukraine."
- This is because the case brought by Ukraine is one of "reverse-compliance", which Judge Gevorgian opined is "incompatible with the Court's judicial function in contentious cases."
- The Court upheld Russia's preliminary objection that alleged false accusations of genocide are outside the scope of the Convention. Even the Judge ad hoc appointed by Ukraine rejected this point. Professor Marko Milanovic described this as a "huge loss for Ukraine … essentially kill[ing] Ukraine's creative argument." The decision on the merits will only deal with Ukraine's potential violations of the Convention, without commenting on Russia's alleged responsibility. As conveyed by Professor Milanovic, "this, in turn, entails that Ukraine will NOT be able to rely on this case in order to, for example, obtain from third states the confiscation and transfer of

Russian state assets that they had frozen, because no reparation of that kind will be due."

2. Alleged Breaches of Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v Germany)

Type: Contentious case

Output in 2024: Order concerning provisional measures

Date: 2 February 2024

2.1. Summary - Background

- On 1 March 2024, Nicaragua instituted proceedings against Germany, alleging violations of the latter's international obligations with regards to the Occupied Palestinian Territory (OPT).
- It requested the Court to order the following provisional measures:
    - Suspend aid to Israel, particularly military assistance, where this aid may support violations of the Geneva Convention, peremptory norms and IHL.
    - Ensure that weapons and other military equipment "delivered by Germany and German entities" are not used to commit such acts.
    - Resume financing and support for UNRWA "in respect of its operations in Gaza."
- The Court noted that Germany's domestic legal framework required licencing for the export of weapons and other military equipment, based on a government assessment of whether the goods may be used in acts of genocide, crimes against

humanity or grave breaches of the Geneva Convention. Additionally, Germany is bound by a number of arms trade agreements.

- Additionally, the Court noted that contributions to UNRWA are voluntary and, in any case, no new payments were due in the weeks following Germany's decision to suspend its assistance. In fact, Germany continues to support other initiatives that fund UNRWA's work and assist organisations in the Gaza strip.
- Hence, the Court concluded that it was not necessary for it to exercise its powers under Article 41 of the Statute to indicate provisional measures

2.2. Commentary - The Monetary Gold Principle

- Germany invoked the principle in the oral proceedings, arguing that the Court cannot exercise jurisdiction in the absence of an indispensable third Party, in this case Israel. While the Provisional Measures Order did not address the question, it is likely to arise in the merits phase.
- Questions may arise over the manner in which the principle can be reconciled with the erga omnes nature of the obligations contained in the Genocide Convention.
- Some commentators have found that the principle may not necessarily bar a State's international responsibility before a competent court or tribunal. On the one hand, Dr Longobardo argues that the negative obligations contained in the Genocide Convention, such as the duty to not aid or abet acts of genocide, does not require a pronouncement on the legality of the third State's (alleged perpetrator of genocidal act) actions.[18] It is sufficient that the Respondent State (in this case,

[18] Marco Longobardo, 'Alleged Violations of the Duty to Ensure Respect for IHL and the Monetary Gold Principle' (EJIL: Talk! 11 March 2024) <https://www.ejiltalk.org/alleged-violations-of-the-duty-to-ensure-respect-for-ihl-and-the-monetary-gold-

Germany) is aware of a serious risk. Conversely, others have argued that Israel is "an indispensable third party" for claims concerning the negative obligations under the Convention, but the positive obligations under customary IHL–such as the duty to ensure respect for its rules–are triggered where there is a "foreseeable risk" of violations.[19]

3. EMBASSY OF MEXICO IN QUITO (MEXICO V. ECUADOR)

Type: Contentious case

Output in 2024: Order concerning provisional measures

Date: 23 May 2024

3.1. Summary

3.1.1. Background

- Mr Jorge David Glas Espinel–former Vice-President of Ecuador–requested protection from the Mexican Embassy in Quito, citing safety concerns. While staying at the embassy, he filed for asylum with the Mexican authorities. Ecuador alleges that, at the time, there were ongoing legal proceedings against him.
- Mexico granted the request for asylum, requesting that Ecuador guarantee his safety and the inviolability of the diplomatic premises.
- Armed Ecuadorian security forces entered the embassy without its authorisation,

principle/#:~:text=The%20so%2Dcall%20Monetary%2 0Gold,'%20(Akande%2C%20140).>.

[19] Wentker, Stendel, 'Conspicuously Absent: The Indispensable Third Party Principle at the ICJ in Nicaragua v Germany'(Verfassungsblog, 13 March 2024) <https://verfassungsblog.de/conspicuously-absent/>.

forcibly removing Mr Espinel.

- Mexico institutes proceedings against Ecuador on 11 April 2024, over "legal questions concerning the settlement of international disputes by peaceful means and diplomatic relations, and the inviolability of a diplomatic mission."
- It further sought the following provisional measures:
    - "*(a) That the Government of Ecuador refrains from acting against the inviolability of the premises of the Mission and the private residences of [Mexico's] diplomatic agents, and that it takes appropriate measures to protect and respect them, as well as the property and archives therein, preventing any form of disturbance.*
    - *(b) That the Government of Ecuador allows the Mexican Government to clear [its] diplomatic premises and the private residence[s] of [its] diplomatic agents.*
    - *(C) That the Government of Ecuador ensures that no action is taken which might prejudice the rights of Mexico in respect of any decision which the Court may render on the merits.*
    - *(d) That the Government of Ecuador refrains from any act or conduct likely to aggravate or widen the dispute of which the Court is seized.*"

3.1.2. Examination of the request

- The Court must determine whether there is an urgency to order the provisional measure because of a "real and imminent risk [of] irreparable prejudice" to the rights being claimed by the Applicant.
- It noted that, in accordance with the Vienna Convention on Diplomatic Relations,

Ecuador had provided a number of assurances, including, inter alia, providing security and protection to the premises, property and archives of the diplomatic mission.

- The Court held that these assurances were binding and created legal obligations for Ecuador.
- Consequently, there was no urgent need to order provisional measures

4. APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (THE GAMBIA V. MYANMAR: 7 STATES INTERVENING)

Type: Contentious case

Output in 2024: Order on the admissibility of interventions

Date: 3 July 2024

4.1. Summary

4.1.1. Background

- The Gambia instituted proceedings against Myanmar, alleging violations of the Genocide Convention.
- Maldives filed a declaration of intervention in the case, pursuant to Article 63 ICJ Statute. A similar joint declaration was filed by Canada, Denmark, France, Germany, the Netherlands and the United Kingdom.
- Myanmar contended that the interventions were not admissible.
- The Court held that it need not assess whether States that wish to intervene have a legal interest in the proceedings. The Court must simply ensure that the

intervention is within the scope of Article 63 of the Statute, and complies with Article 82 of the Rules of the Court.

4.1.2. Decision on admissibility

- Article 63 provides that third States to a dispute have the right to intervene when the construction of a provision of the Convention is in question. The Court held that this was satisfied in the present case.
- Article 82 sets out the manner in which such declarations must be submitted, which was held to be satisfied in the present case.
- The Court concluded that the interventions were admissible. Arguments and observations that do not concern the construction of the Genocide Convention's provisions will be disregarded.

5. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)

Type: Contentious case

Output in 2024: Judgment on preliminary objections

Date: 12 November 2024

5.1. Summary

5.1.1. Background

- The Second Nagorno-Karabakh War (called the "Second Garabagh War" in Azerbaijan) ended in November 2020, when the two States and the Russian

Federation signed a 'Trilateral Statement', providing for a complete ceasefire and the termination of all hostilities in the Nagorno-Karabakh region. Hostilities erupted again in September 2022 and 2023.

- Armenia instituted proceedings against Azerbaijan on 16 September 2021, alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). It alleged that Azerbaijan had implemented a decades-long policy of racial discrimination, subjecting Armenians to "systematic discrimination, mass killings, torture and other abuse."
- Azerbaijan raised 2 preliminary objections concerning the court's jurisdiction

5.1.2. First preliminary objection: precondition of negotiation under Article 22 CRED

- Article 22, CERD provides that disputes over the interpretation or application of the Convention may be submitted to the Court, where they have not been settled by negotiation.
- The requirement to negotiate is satisfied if they either fail or become futile.
- Court held that Armenia had made genuine attempts to resolve the dispute through negotiations, but it had become futile as the parties' positions remained largely unchanged over several months.
- Hence, the Court rejected the first preliminary objection

5.1.3. Second preliminary objection: Jurisdiction Ratione Materiae

- Article 22, CERD provides that disputes over the interpretation or application of the Convention may be submitted to the Court, where they have not been settled by negotiation.

- The requirement to negotiate is satisfied if they either fail or become futile.
- Court held that Armenia had made genuine attempts to resolve the dispute through negotiations, but it had become futile as the parties' positions remained largely unchanged over several months.
- Hence, the Court rejected the first preliminary objection

5.1.4. Alleged violations of CERD

- Armenia alleged that Azerbaijan subjected ethnic Armenians to murder, torture and inhuman treatment, as well as arbitrary detentions and enforced disappearances because of their nationality or ethnic origin, in violation of Articles 2(1), 4(a) and 5(b) CERD.
- Court held that the alleged acts are capable of amounting to discriminatory treatment based on national or ethnic origin. This applies equally to civilians and members of the armed forces.
- It did not need to consider whether there might be an alternative explanation for this differential treatment, which is not based on ethnic or national grounds. At this jurisdictional stage, it was sufficient that the alleged acts are capable of amounting to violations of CERD

5.2. Commentary - The Determination of Racial Discrimination in the Context of an Armed Conflict

- The majority decision confirmed that the CERD provisions continue to apply during armed conflicts. It found that the acts alleged by Armenia were capable of amounting to discrimination, thereby establishing jurisdiction *ratione materiae.*
- However, Judge Yusuf's dissenting opinion argued that, in making this

determination, the majority did not apply the test set-out in *Ukraine v. Russia*, which asks whether (a) there is differential treatment on a prohibited ground, (b) which impairs the human rights of one group, as compared to others. He states that the comparative standard in part (b) receives little attention from the majority.

- In particular, he highlights that the acts alleged by Armenia (murder, torture, enforced disappearance etc) took place during an armed conflict, fought primarily between the armed forces of two different ethnic groups. As such, it was presumable that the actions of Azerbaijan's armed forces, including those that might violate IHL, significantly impact ethnic Armenians in Armenia's armed forces.
- While it is largely uncontentious that international human rights law continues to apply during armed conflicts, this case raises questions over its precise scope and the manner in which it interacts with IHL. Once again, it prompts discussions on the role of international courts and tribunals, and international human rights mechanisms, during armed conflicts, and the extent to which they may be used to resolve or mitigate hostilities

6. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)

Type: Contentious case

Output in 2024: Judgment on preliminary objections

Date: 12 November 2024

6.1. Summary

- Shortly after Armenia instituted proceedings, Azerbaijan did the same against

Armenia, alleging violations of CERD.

- Armenia raised the following three preliminary objections on the jurisdiction and admissibility:
    - The Court *lacked* jurisdiction over the claims concerning conduct that took place before Armenia had acceded to CERD between 23 July 1993 and 15 September 1996.
        - The *Court* accepted that it lacked jurisdiction *ratione temporis* over those claims.
    - The Court lacked jurisdiction *ratione materiae* over the alleged placing of *landmines* and booby traps.
        - The *Court* rejected this, as Azerbaijan's claim was not that the laying of mines itself was a breach of CERD.
    - The Court lacked jurisdiction *ratione materiae* over claims of alleged *environmental* harm.
        - The Court accepted that these alleged acts were outside the scope of CERD, as they were not capable of amounting to differential treatment on the basis of a prohibited ground.
- Hence, the Court accepted the first and third preliminary objections raised by Armenia, rejecting the second one

6.2. Commentary - Environmental harm and racial discrimination

- The Court accepted Armenia's third preliminary objection, stating that alleged environmental harm cannot amount to racial discrimination and is, consequently,

outside of the scope of CERD.

- The Joint Dissenting Opinion of Judges Nolte, Charlesworth, Cleveland and Tladi disagreed with this. They held that, where environmental harm causes differentiation on a prohibited ground and is aimed at impeding the human rights of a particular group, it falls within the ambit of CERD.
- There is growing recognition of the human rights implications of environmental degradation, and the CERD Committee has even identified its potential to cause racial discrimination, particularly with regards to indigenous communities

7. APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP (SOUTH AFRICA V. ISRAEL)

ORDER 1

Type: Contentious case

Output in 2024: Order concerning provisional measures

Date: 26 January 2024

7.1. Summary

7.1.1. Background

- South Africa instituted proceedings against Israel on 29 December 2023, alleging violations of the Genocide Convention in the Gaza Strip.
- It requested the Court to indicate a number of Provisional Measures, including an order for Israel to immediately suspend its military operations in Gaza. Other measures concerned Israel's obligations under the Genocide Convention, and

preserving the fundamental rights of the Palestinian population in Gaza.

7.1.2. Prima facie jurisdiction

- Court said there was clearly a dispute as the parties had clearly opposing interpretations of the Genocide Convention.
- This also placed the dispute within the scope of the Genocide Convention.
- Consequently, prima facie jurisdiction was established.
- Israel did not challenge South Africa's standing in the case, and the Court reiterated the erga omnes obligations contained in the Genocide Convention

7.1.3. The rights whose protection is sought and the link between these rights and the measures requested

- The Court must determine whether the rights asserted by the Applicant party are at least plausible. Also, there must be a link between these rights and the provisional measures being requested.
- It noted the large number of deaths, injuries, forced displacement, destruction of homes and damage to civilian infrastructure caused by the military operation since 7 October 2023, and the concerns raised by independent expert groups by UN bodies of the genocidal rhetoric from the authorities. Thus, at least some of the rights claimed by South Africa are plausible. At least some of the provisional measures requested seek to preserve these rights.

7.1.4. Risk of irreparable prejudice and urgency

- The Court may indicate provisional measures under Article 41 of the ICJ Statute only where there is a degree of urgency because of a risk of irreparable harm to the

rights being engaged.

- It noted that the severe humanitarian crises are at risk of further deteriorating before the final judgment of the Court.

7.1.5. Conclusion and measures to be adopted

- Israel must "take all measures within its power to prevent the commission of all acts" of genocide against the Palestinian population, including "(a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group."
- Additionally, it must take all possible measures to prevent and punish incitement to commit genocide and allow urgent provisions and humanitarian assistance to be provided to the Palestinian population. Finally, it must take effective measures to prevent the destruction of evidence relating to possible acts of genocide, and report to the Court on the measures taken to implement the Order in a month.

ORDER 2

Type: Contentious case

Output in 2024: Order concerning additional provisional measures

Date: 28 March 2024

7.2. Summary

- On 6 March 2024, South Africa requested the Court to modify its previous Order (of 26 January 2024) and indicate a number of additional provisional measures. These

included measures addressing all States Parties to the Genocide Convention.

- Article 76(1) of the Rules of the Court allow it to revoke or modify its provisional measures if it is justified by a change in the situation.
- The Court noted that there were "exceptionally grave" changes to the situation in Gaza, particularly relating to food insecurity and malnutrition, which are not fully addressed in the provisional measures ordered on 26 January 2024. Hence, this calls for modifying the provisions.
- In a similar analysis to the one conducted above, the Court found that the conditions for the granting of provisional measures were satisfied.

Conclusion and measures to be adopted

- The Court could not indicate the Provisional Measures that concerned third States not party to the present dispute, who would not be bound by its judgment.
- It granted other measures, ordering Israel to ensure the provision of basic services and humanitarian assistance to Gaza, and compliance with the the obligations under the Genocide Convention.
- It reaffirmed the provisional measures indicated on 26 January 2024.

ORDER 3

Type: Contentious case

Output in 2024: Order concerning the modification of provisional measures

Date: 24 May 2024

7.3. Summary

7.3.1. Background

- South Africa urgently requested the court to modify its provisional measures and indicate new ones, including an Order for Israel to immediately cease its military operations in the Gaza Strip and withdraw from the Rafah crossing

7.3.2. Conditions for amendments

- The Court noted that the humanitarian conditions in Gaza further deteriorated since the Order of 28 March 2024, particularly in Rafah. The conditions to amend existing Provisional Measures were satisfied

7.3.3. Conditions for the indication of provisional measures

- The conditions for the indication of new measures (prima facie jurisdiction, plausibility of violations, measures aimed at preserving those rights, and the risk of irreparable harm) were all satisfied

7.3.4. Conclusion and measures to be adopted

- Reaffirming the previous provisional measures, the Court ordered the following:
    - Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part;
    - Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance;
    - Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate

allegations of genocide;

- Decides that the State of Israel shall submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order.

Commentary - Implications for Third States

- While speculations are abound over the effects of these Provisional Measures and the extent to which they will help resolve or mitigate the crisis, commentators also focus on the implications for Third States.[20]
- The Court's pronouncement that it is plausible that Israel might be committing genocidal acts may trigger the international responsibility of third States that continue to provide it with financial and military support.

[20] British Institute of International and Comparative Law, 'Reflections on the South Africa v. Israel Case at the International Court of Justice' (9 February 2024), p. 3

CASES BEFORE ITLOS IN 2024

CASES CULMINATING IN 2024

1. REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW

Type: Contentious case

Output in 2024: Order concerning the modification of provisional measures

Date: 24 May 2024

1.1. Summary

1.1.1. Background

- On 12 December 2022, the Commission of Small Island States (COSIS) submitted a request for an Advisory Opinion from the Tribunal. It asked the Tribunal to outline what the obligations of States Parties are under the United Nations Convention on the Law of the Sea (UNCLOS), including under Part XII:

  > *"to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which* are *caused by anthropogenic greenhouse gas emissions into the atmosphere."*
  >
  > *"to* protect *and preserve the marine environment in relation to climate*

change impacts, including ocean warming and sea level rise, and ocean acidification."

1.1.2. Jurisdiction and discretion

- The Tribunal established that, under Article 21 of the ITLOS Statute, it may issue Advisory Opinions.
- Although the Tribunal does have discretionary power to refuse to issue an Advisory Opinion, even when its jurisdiction is established, it held that it would only do so for "compelling reasons".
- The Tribunal considered it appropriate to issue the Advisory Opinion.

1.1.3. Question (a): The obligation of States to prevent, reduce and control pollution of the marine environment

- The Court described how provisions of UNCLOS give rise to obligations to address marine pollution.
- Article 194(1) of UNCLOS requires States to take "all measures … that are necessary to prevent, reduce and control pollution of the marine environment from any source."
- The Tribunal held that anthropogenic greenhouse gas emissions into the atmosphere constitutes "pollution of the marine environment".
- While the "scope and content" of measures that States must take, pursuant to Article 194(1) UNCLOS may vary based on their respective capabilities, the Tribunal held that States do have an obligation to take the necessary measures to reduce greenhouse gas emissions.

- The content of such measures should be determined in accordance with, among other factors, the best available science and the relevant international rules and standards, such as those contained in the Paris Agreement and the UNFCCC.
- It was held that Article 194(1) imposes an obligation of due diligence, which sets a stringent standard but may, nevertheless, account for States' varying capabilities and resources.
- Moreover, Article 194(2) of UNCLOS provides that States must "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment," and to ensure that pollution arising from their "incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights."
- This imposes a due diligence obligation more stringent than that under Article 194(1) UNCLOS, because of the particular harms caused by transboundary pollution.
- Articles 207 of UNCLOS obligates States to "adopt laws and regulations to prevent, reduce and control marine pollution from land-based sources," while Article 212 of UNCLOS provides that "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere." These must take into account international rules and standards, such as those contained in the UNFCCC and the Paris Agreement. The Tribunal held that States must take measures, particularly when acting through international organisations and diplomatic conferences, to establish the necessary rules, practices and

standards to address the land and atmosphere-based sources of pollution.

- Article 212 UNCLOS also specifically addresses pollution caused by vessels. The obligation to adopt the necessary laws and regulations to address the sources of pollution extends to those that apply to vessels that fly a State's flag, or appear on their registries.
- Articles 213 and 222 of UNCLOS concern the enforcement of these rules. It was held that this extends to an obligation for States to take the necessary measures to implement the international rules and standards to prevent rules and control marine pollution through anthropogenic greenhouse gas emissions.
- Article 217 of UNCLOS requires States to ensure that vessels flying their flags or on their registries comply with the relevant international rules and standards. This extends to those addressing marine pollution caused by greenhouse gas emissions from vessels.
- Under Article 197 of UNCLOS, States must cooperate to formulate rules, standards and practices, in accordance with the available scientific evidence, to address this pollution. Article 200 of UNCLOS further requires States to undertake research and encourage the exchange of information relevant to this topic.
- Article 202 UNCLOS imposes an obligation on States to assist developing and particularly vulnerable States to combat marine pollution from anthropogenic greenhouse gas emissions.
- Under Articles 204, 205 and 206 of UNCLOS, States must monitor and conduct environmental impact assessments to address this pollution and publish their reports. This includes keeping permitted activities under ongoing surveillance to

ensure continuing compliance with the relevant standards.

1.1.4. Question (b): Obligation to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification

- It was held that Article 192 of UNCLOS has a broad scope, and includes an "obligation to protect and preserve the marine environment from climate change impacts and ocean acidification." Where degradation has already occurred, States must take necessary measures to restore the environment. The Article also requires States to anticipate such risks.
- It is an obligation of due diligence, but of a stringent standard.
- Article 194(5) of UNCLOS contains an obligation to "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life," which applies to threats posed by climate change and ocean acidification.
- Articles 61 and 119 of UNCLOS contain the obligation to conserve living resources, both of which were held to apply to the threats posed by climate change and ocean acidification. The measures taken pursuant to this must account for the best available science and other environmental and economic considerations and apply the precautionary and ecosystem approaches.
- Similarly, the obligations to consult and cooperate under Articles 63(1) and 64(1) of UNCLOS must "take into account the impacts of climate change and ocean acidification on living marine resources."
- Article 118 of UNCLOS specifically requires that this cooperation extend to the

conservation of living marine resources in the high seas affected by climate change and ocean acidification.

- Article 196 of UNCLOS obligates States to take the necessary measures to prevent the pollution caused by introducing non-indigenous species and requires the application of the precautionary approach.

1.2. Commentary

1.2.1. The significance of the Advisory Opinion

- It has been "hailed as a landmark ruling that will serve to strengthen the States Parties' obligations to prevent, reduce and control marine pollution from anthropogenic GHG emissions and to protect and preserve the marine environment from climate change and ocean acidification."[21]
- It is the first of three Advisory Opinions on climate change, with similar cases also pending before the ICJ and the Inter-American Court on Human Rights. This Opinion "will likely inform those opinions and have a major impact on international legal understanding of climate-related obligations,"[22] prompting discussions on the interactions and dialogue between the different international courts and tribunals.

1.2.2. Widening participation in international courts and tribunals

- The request for the Advisory Opinion was submitted by the COSIS, which comprises the following member States: Antigua and Barbuda, Tuvalu, Palau, Niue, Vanuatu, St. Lucia, St. Vincent and the Grenadines, and St. Kitts and Nevis.

[21] Vice President Judge Neeru Chadha, ITLOS, Press 364.
[22] Silverman-Roati, Bönnemann, 'The ITLOS Advisory Opinion on Climat Change' (Verfassungsblog,22 May 2024) <https://verfassungsblog.de/the-itlos-advisory-opinion-on-climate-change/>.

- It reflects the growing participation of small island developing States, particularly from the Pacific region, increasingly involved in the activities of international bodies such as ITLOS, the ICJ and the International Law Commission, on topics relating to climate change and sea-level rise. The process for the ICJ Advisory Opinion was, for example, started by a group of students from Vanuatu.

OTHER (PRELIMINARY) JUDGMENTS AND ORDERS CONCERNING JURISDICTION AND ADMISSIBILITY

1. "ZHENG HE" CASE (LUXEMBOURG V. MEXICO)

Type: Contentious case

Output in 2024: Order on Provisional Measures

Date: 27 July 2024

1.1. Summary

1.1.1. Background

- The "Zheng He" dredger, operated by a company from Luxembourg, arrived in the Mexican territorial sea in October 2023. While docked in the port in Tampico, Mexico, the vessel was subject to an onboard inspection and a subsequent "precautionary seizure". The Mexican authorities claimed that this was because of the failure of the shipowner or its agents to present the necessary customs documents.
- Luxembourg instituted proceedings against Mexico on 4 June 2024, and requested

the Tribunal to prescribe a number of Provisional Measures including, inter alia, those related to preserving the rights and freedoms of the crew on board the "Zheng He", preserving the rights of Luxembourg as the flag State, refraining from aggravating or extending the dispute, and ensuring the equality of the parties in the proceedings before the dispute.

1.1.2. Decision on prima facie jurisdiction

- It must be established that there is a dispute between the parties concerning the interpretation or application of the Convention (Article 288(1) UNCLOS).
    - On the one hand, Luxembourg claimed that there was disagreement on a point of international law, namely the interpretation of multiple provisions of UNCLOS, and the rights and obligations of flag and coastal States.
    - On the one hand, Mexico contended the case was outside the scope of the Convention; it is not sufficient that one State alleges that the other has breached its provisions while the other denies it, as there must be opposing views regarding its interpretation or application. This case concerned the application of Mexico's tax and custom laws in its internal waters, which the Convention does not regulate.
- The Court concluded that the diplomatic exchanges between the States following the detention of the vessel suggest that there was a dispute *prima facie* between the parties. Luxembourg repeatedly referred to rules of international law, including provisions of UNCLOS, and Mexico's position on the matters could be inferred from its conduct.

1.1.3. Plausibility of rights

- Before ordering provisional measures, the Tribunal must be satisfied that the rights that the Applicant seeks to protect are at least plausible.
- It noted that Luxembourg is a landlocked State and, pursuant to Article 131 of UNCLOS, is entitled to equal treatment as other foreign ships in maritime ports. The Parties have opposing views on the alleged unequal treatment of the vessel and, consequently, the rights claimed on the basis of Article 131 of UNCLOS are plausible.

1.1.4. Real and imminent risk of irreparable prejudice

- The Tribunal held that there was no real and imminent risk of irreparable prejudice. Mexico had given assurances to preserve the rights and integrity of the crew and safeguard the integrity of the vessel. This was held to be sufficient