Introduction

Professor Carlos Espósito and Dr Kate Parlett

The International Court of Justice held its first sitting on 18 April 1946 and heard its first two cases in 1948: it heard preliminary objections in *The Corfu Channel Case* from late February to early March, and it held hearings in the advisory opinion on *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* in late April. Those first two cases were emblematic of the kinds of disputes that the Court would eventually hear and resolve as part of its ordinary caseload: they both dealt with practical issues, with significant political implications, and were an opportunity for the Court to provide guidance to the broader international community on disputed issues of international law. They provided the Court with scope to fulfil its mandate as the principal judicial organ of the United Nations; to function as a prominent interpreter of international law, as it is used and applied in practice. As international law has become more present in global policy-making and in academic and journalistic commentary, the International Court has come to occupy an essential and increasingly visible role in international relations, and has exercised jurisdiction over a significant number of international disputes addressing the same matters as are being wrestled with in the halls of the United Nations, and in ministries of foreign affairs across the world, and are being discussed as leading stories in international newspapers.

Some seventy years on from the Court's first hearings, we offer a timely, thorough, reflective and critical study of the role of the ICJ, its practice and the impact of its jurisprudence. It is with this in mind that we proposed the inclusion of this Companion into the series of *Cambridge Companions*, a decade after Professor James Crawford and Professor Martti Koskenniemi edited the *Cambridge Companion to International Law (2012)*, an intellectually ambitious project which provided thought-provoking fodder for the most senior of specialists, and at the same time, an accessible introduction for the non-specialist student and those with a more general interest in international affairs. We hope that this *Cambridge Companion to the*

International Court of Justice might go some way to opening up the work of this important judicial body for the non-specialist, while also giving those of us who practice, teach and research across the field of international dispute settlement some food for thought.

The *Companion* is structured in three parts, each of which is intended to cover substantive developments as well as critical perspectives.

The first (Part I) looks at the historical and contemporary role of the ICJ, including its various functions, history and context, jurisdiction (both theoretical and as it has been practically exercised), and its effectiveness as a dispute settlement body and as contributing to the development of international law and to international peace and security within the UN system.

It is fitting that the *Companion* commences with a chapter co-authored by Judge James Crawford, together with Professor Freya Baetens and Rose Cameron, on the functions of the ICJ. Chapter 1 was finalised a few months before James's untimely death. James was a towering presence at Cambridge, and one of the world's most experienced practitioners and academics on matters related to the Court, as well as many other aspects of international law. He was to us also a good friend and mentor. He is and will be much missed on the Bench and elsewhere. The chapter traces the origins of the ICJ in its predecessor, the PCIJ, and then considers the Court's core functions: deciding the disputes submitted to it and exercising its advisory functions. It also critically examines the Court's functions in finding and developing the law, and in maintaining international peace and security.

Sir Kenneth Keith, former judge of the ICJ, contributed Chapter 2 on 'The Role of an ICJ Judge', considering first the process of nomination and election of judges, as well as their qualifications and the outcomes of the election process. He then examines the way in which the Court engages as a judicial body with the parties, with specific reference to the Court's exercise of its advisory jurisdiction. Finally, he discusses the process of decision-making, before drawing conclusions on the outcomes of that process – the judgments and opinions of the Court.

In Chapter 3 Professor Dire Tladi looks in more depth at the role of the ICJ in the development of international law, from both a doctrinal and a practical perspective. He considers concrete examples of the way in which the Court's judgments and opinions have had an influence on the development of international law, and he concludes that the Court has in practice had a significant impact on the development of international law, even though that goes beyond its core mandate.

The institutional context of the Court is then examined by Professor Tom Ginsburg. Chapter 4 focuses first on the Court's function as a court, that is, as the principal judicial organ of the United Nations. He then considers the Court's relations with States, as an *international* court. Finally, he considers the Court's institutional grounding as an organ of the United Nations, and examines its relationship with the United Nations. Professor Ginsburg discovers that there is a gap between the Court's formal institutional structures and its actual operation in practice, and he emphasises in particular the way in which the Court has taken a central role in the development of international law.

The final chapter in Part I, Chapter 5, by Professors Rotem Giladi and Yuval Shany, assesses the effectiveness of the ICJ. They first set out an evaluative framework for assessing the Court's effectiveness, adopting a goals-based analysis. They identify the ICJ's goals, and then consider the structural features of the Court that assist and hinder it from achieving those goals. By reference to specific examples, the authors then consider whether the ICJ has achieved its goals in practice, concluding that its record of achievement produces mixed results, but highlighting the Court's success in preserving confidence in international adjudication.

The second part of the book (Part II) examines the role of the ICJ in the settlement of international disputes. It commences with Chapter 6 by Professor Jean-Marc Thouvenin on the jurisdiction of the Court. He addresses the Court's jurisdiction in contentious cases and its jurisdiction in advisory opinions, using specific examples from the Court's judgments and opinions. He considers whether a novel approach is needed to confer on the Court compulsory jurisdiction across a wider range of disputes.

Professor Kolb's Chapter 7 on provisional measures provides a thorough and timely analysis of the Court's jurisdiction to order provisional measures. He identifies an evolution in the Court's practice on provisional measures, with the Court most recently developing specific conditions for the indication of provisional measures. He examines those conditions and their elaboration through the Court's caselaw, together with the Court's findings as to the binding effect of its provisional measures orders. He also addresses issues of procedure. From this survey, he concludes that provisional measures continue to evolve in significant ways, that the law on provisional measures has been fleshed out and is relatively complex, and that the Court's jurisprudence has had a strong influence on the approach of other international courts and tribunals.

Then follows Chapter 8 on the ICJ 'as the master of the sources' by Professor Jean d'Aspremont. It commences with some preliminary remarks on the Court's significant role as the master of the sources of international law. It then considers the repressive dimension of Article 38, before turning to consider the ways in which the Court has concretely used its role in respect of the sources of international law. Finally, he critically examines how repression and mastery can often work together in international legal thought.

Dr James Devaney's Chapter 9 on fact-finding and expert evidence considers how the Court has treated competing evidentiary claims, and how it engages in a fact-finding process, looking at the evolution of the Court's process in this regard. He evaluates the significant criticism that has been directed against the Court in respect of its approach to fact-finding and the ways in which the Court has begun to address those criticisms. His chapter concludes with some further practical suggestions as to how the Court could increase confidence in its fact-finding processes.

In Chapter 10 Professor Philippa Webb then considers the ICJ's relationship with other courts and tribunals through the dual prism of integration and fragmentation. She argues that three factors influence the degree of the Court's integration or fragmentation: the identity of the court, the substance of the law, and the procedures employed. She selects three legal issues that have been considered by the ICJ and other courts and tribunals in recent years: jurisdiction over issues of immunity involving treaties that do not expressly refer to immunity; inferring specific intent for genocide; and the nature of consular assistance as a treaty obligation, individual right or human right. These issues provide insight into the way that identity, area of law and procedure influence integration or fragmentation among international courts

The working practices of the Court are critically examined by Callista Harris in Chapter 11. She looks at the framework for these practices and then considers how they operate in practice, as cases proceed through the Court's dispute-resolution process. She notes that reforms have been made to the Court's working practices to increase the speed of cases, as well as to improve the processes. She notes that the Court has demonstrated significant agility in its more recent amendments to the Rules to take account of the worldwide pandemic, and argues that there is evidence to suggest that the Court is becoming more assertive, moving away from its traditionally high level of deference to States.

Specific aspects of the Court's procedure in contentious cases are examined in Chapter 12 by Dr Kate Parlett and Amy Sander. They focus on the

key features of procedure: the institution of proceedings; provisional measures; preliminary objections; intervention; and non-appearance. For each of these aspects of procedure, the authors set out the current rules and practice, commenting on the way in which they have evolved, and making some suggestions for further innovation by the Court. They note that there have been recent calls urging the Court to codify aspects of its practice on procedural issues into generally applicable rules. While this might seem an attractive approach, the authors argue that this has the potential to unduly restrict the way in which the Court addresses cases – each of which may have its own particular procedural needs. They emphasise the need for the Court not to be overly prescriptive, but to make certain that it retains power to ensure a fair and just outcome in each particular case.

The second part concludes with Chapter 13 on effective advocacy before the ICJ, by Samuel Wordsworth QC and Kate Parlett. It examines both written and oral advocacy before the Court, with the fundamental objective of the advocate in all cases being to persuade, making it essential to consider what will be of most utility to the judges when they come to reach a decision on the case. They also emphasise the significant role the advocate has to play in the pre-litigation stage and in early procedural exchanges: she or he must bear in mind that they have a dual function of presenting the best case for the client to the Court, while also persuading the client as to the most effective way in which to do that.

The final part of the book (Part III) assesses the impact of the ICJ's jurisprudence, with a focus on the principal substantive areas of international law which have been the subject of the Court's cases. Each chapter provides an overview of the Court's contribution to the development of the law by reference to its jurisprudence and taking account of broader developments in international law-making.

Professor Antonio Remiro Brotóns examines the law of treaties in the jurisprudence of the ICJ in Chapter 14. He highlights the Court's position on key selected issues of interpretation: specifically the language of the treaty; time and treaty interpretation; and the role of policy. He also examines the issues of systemic integration, hierarchy and concurrence of rules.

In Chapter 15 Professors Marcelo Kohen and Mamadou Hébié look at the ICJ and territorial disputes, which is an area where the Court has had significant scope to consider the applicable law in multiple cases. They identify three areas in which the Court has made a significant contribution to the law on territorial disputes: first, the reconceptualisation of the rules

of international law governing the acquisition of territorial sovereignty; second, the clarification of the territorial implications of the fundamental principles of international law; and finally, the elaboration of a clear and coherent method for the legal settlement of territorial disputes, the core of which rests on respect for the principle of legality.

Professor Nilufer Oral, in Chapter 16, considers the contribution of the ICJ to the law of the sea, highlighting four areas where the Court has made a key contribution to the development of the law: maritime delimitation cases, the status of islands and rocks, navigational rights in straits and lastly, the conservation of natural resources. She notes that the Court's influence is not equal in all of these areas, but emphasises the significant rule that the Court has played in developing the principles and rules of international law applicable to maritime boundary delimitations.

The ICJ's influence on international environmental law is addressed by Professor Daniel Bodansky in Chapter 17. Drawing on concrete examples, he identifies six ways in which the Court's jurisprudence has contributed to environmental law: by articulating foundational principles; by acting as a gatekeeper for customary international law; by elaborating existing principles; by interpreting environmental agreements; by valuing environmental harms; and by incorporating environmental considerations into other areas of international law. He reflects on potential future evolutions of the Court's role in the international environmental law space, given the increasing number of disputes that the Court has addressed in this field in recent years.

Dr Federica Paddeu's Chapter 18 considers the ICJ's contribution to the law of State responsibility, looking back to the Court's contribution to the codification of that law by the ILC; looking at the Court's current attitude to the ILC's Articles on State Responsibility; and looking to the future, addressing one of the main challenges facing the Court in this field, that of multilateral disputes. She concludes that the Court has been an important player in this field of international law, and it has made a significant contribution to vesting the ILC Articles with the authority they have today. She emphasises that the Court has an important role to play going forwards in the growth and development of community interest litigation for the enforcement of *erga omnes* obligations.

The ICJ's contribution to the law on jurisdictional immunities is elucidated by Professor Roger O'Keefe in Chapter 19. He argues that, through its case law in this area, the ICJ has affirmed basic aspects of the international

law of jurisdictional immunities, clarified a few more specific points, and variously crystallised, consolidated, and catalysed the further development of important customary rules on controversial issues in relation to civil and criminal proceedings respectively. Through its work in this field, the Court has reasserted an orthodox, possibly conservative vision of the role of jurisdictional immunities in the international legal order.

In Chapter 20 Professor Alejandro Chehtman examines the ICJ's contribution to the law on the use of force. He considers the Court's case law on the prohibition of the use of force and its potential exceptions, most notably the law on individual and collective self-defence. He identifies the main conceptualisations, inconsistencies, disagreements, and limitations of the Court's opinions, arguing that although the Court initially had a significant influence, it has faded significantly over the years as a result of what appears to be a conscious or strategic decision of its judges.

The contribution of the ICJ to the law of international organisations is assessed by Professor Jan Klabbers in Chapter 21. He emphasises the limited role of the Court in this field, setting out the multiple reasons for this: parts of the law were developed before the Court commenced its work; and the Court has only had intermittent opportunities to consider it through its cases. He argues that the Court's approach reflects a more general ambivalence of classic international law when it comes to international institutions: that it emphasises the centrality of States in the international legal system, notwithstanding the steps that have been taken by States to institutionalise significant areas of international law.

In Chapter 22, Professor Carlos Espósito deals with the ICJ and human rights. He argues that, while the Court is not and will never be a specialised human rights court, it has a significant role in the protection and development of human rights. He first explains some structural obstacles and impediments to the engagement of the Court with human rights, and then offers some instances of substantial incorporation of human rights into the fabric of general international law through interpretation and legal concepts encompassing international community interests. In other words, the chapter suggests that structural disengagement in the sense of norms allowing only States to litigate before the Court does not impede substantial incorporation which may depend on other factors, including the changing attitudes of the ICJ judges and lawyers before the Court.

This overview of the contents of the *Companion* reveals its ambition to explain and discuss all aspects of the ICJ's law and practice in a handy

volume. The logical structure of the book requires no further elucidation: it is based on the institutional relevance of the Court in the international legal system and stems from the main functions of this principal judicial organ of the United Nations – that is, to decide in accordance with international law such disputes as are submitted to it, and to contribute to the development of international law. These basic roles of the Court are present throughout the chapters in all varieties, with both comprehensive descriptive internal and external analysis, and rich normative discussions.

Regarding the *dispute settlement role* of the Court, the contents of the *Companion* recognise consent as the linchpin of its jurisdiction and States as the main clients of the Court, as established by the Statute. Consent is a key element of the system, a premise of any analysis of the contentious jurisdiction of the Court. Its fundamental importance, to give just one example, has recently been underlined by President Donoghue addressing the United Nations General Assembly on the occasion of its seventy-sixth session, on 28 October 2021. She declared that the Court 'is mindful that its authority hinges, among other things, on the unwavering respect for the boundaries of its jurisdiction, since the ICJ Statute made consent a cornerstone of the jurisdictional framework'. Consent, however, is not necessary for the advisory jurisdiction of the Court, which requires only a legal question – 'any legal question' – asked by the Security Council or the General Assembly. Other organs or specialised agencies authorised by the General Assembly may request such advisory opinions on legal questions arising within the scope of their activities. Many chapters of the *Companion*, including those of Judge Keith and the late Judge Crawford together with Baetens and Cameron, underscore the importance of the advisory function of the Court for the development and clarification of international law. In relation with consent it is interesting to mark in particular the comments by Thouvenin referring to the impact of the *Chagos* advisory opinion as viewed from the Special Chamber of the ITLOS, which considered the opinion of the Court as putting an end to the bilateral sovereign dispute between the UK and Mauritius, notwithstanding the fact that the UK never consented to have the dispute resolved by the ICJ.

The *Companion* offers analysis and commentary on the key elements of the Court's dispute settlement role after jurisdiction is established. The sources of law, of course, are a fundamental element of the law and practice of the Court as explained by D'Aspremont, who argues that the obligation to decide the disputes as are submitted to it applying the sources

of international law, as provided for in Article 38 of the Statute, is a command that has not impeded the Court to become 'the master of the sources of international law'. Another fundamental element of the judicial function of the Court is the establishment of the facts. Devaney argues that 'any failure to establish the facts could lead to the application of the wrong rule, or of the right rule in the wrong manner', with disastrous consequences to the authority of the judgment and the very function of the Court as a judicial body. He also comments on the efforts of the Court to introduce best practices with regard to fact-finding and expert evidence. This appreciation coincides with Parlett and Sander's conclusion on the will of the Court to evolve its procedure 'to ensure it adapts in a flexible and pragmatic manner to the needs of its users and the objective of ensuring a fair and just outcome'. An objective that can only be achieved with competent advocacy, as Wordsworth and Parlett argue in their chapter. The functioning rules and methods of the Court are explained by Harris, who signals the will of the judges to improve and innovate 'the machine of the Court' through the constant review of its rules and methods of work, as shown by the new practices needed to deal with the cases during the pandemic or the new ad hoc committee to monitor the implementation of provisional measures. These measures, which have posed important humanitarian challenges to the Court, have been addressed deftly by Kolb, unveiling their complexity and constant evolution.

With regard to the contribution to the *development of the law*, the chapters of the *Companion* explicitly or implicitly recognise the 'tangible contribution of the Court to the development and clarification of the rules and principles of international law', as Sir Hersch Lauterpacht put it in his classic book on *The Development of International Law by the International Court*, published in 1958. The authors of the *Companion* are well aware that the Court is not a legislator, but give full credit to the law development function as much more than simply a by-product of the Court`s judicial function. For instance, Tladi speaks of 'an immense impact on the development of the law', which can hardly be denied as an empirical fact and is relevant both in specific rules and in the 'more methodological aspects of the identification of rules' that may have a more systemic impact in the international legal system. Ginsburg suggests that, given the institutional design of the Court and the international system in which it operates, 'its most important contributions have been in the development of the law, a task not formally assigned to the Court at all'. Shany and Giladi affirm that

the Court, as principal judicial organ of the United Nations world institution, 'is expected to *develop* international law, not merely engage in law-application'. Part III of the *Companion* is filled with specific considerations of the development of international law by the Court. Some of these fields of international law have been fully specified by the Court, as it happens with the international law governing territorial disputes. There are other fields in which the Court has had a less determinant role, such as international environmental law or human rights law. All the international legal fields considered in Part III have benefitted from some degree of development and clarification by the Court, which, as Judge Crawford has suggested, provides 'a centre of gravity' in international law.

The Court, the principal judicial organ of the United Nations, is *an instrument for maintaining international peace*. It performs its contribution to the maintenance of international peace primarily through the settlement of international disputes in accordance with international law, using fair procedures and issuing high quality judgments. The Court also contributes to the maintenance of international peace through the development and clarification of the law and principles of international law, providing more certainty in the law, fostering a culture of respect for the rule of law and legitimising the role of law in international relations. The potential of the Court as an instrument of peace is, of course, conditioned both by the inherent limits of the law for securing peace, the will of States to abide by the rule of law and the state of international society at a given time. Whatever its limitations, the Court is a central, essential and established institution for the peaceful settlement of international disputes and the advancement of the international rule of law.

Recommended General Further Reading

Kolb, R., *The International Court of Justice* (Elgar, 2013).
Lauterpacht, H., *The Development of International Law by the International Court* (London: Stevens & Sons, 1958).
Shaw, M. N., *Rosenne's Law and Practice of the International Court: 1920–2015* (vols. I–IV, 5th ed., Nijhoff: Brill, 2016).
Tams, C. and R. Sloan, *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013).
Zimmerman, A. and C. Tams (eds.), *Statute of the International Court of Justice: A Commentary* (3rd ed., Oxford University Press, 2018).