Chapter 17

The Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest

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1. Introduction

The reign of law, represented by the incorporation of obligatory arbitration as a rule of positive international law, is not the only means for securing and preserving peace among nations. Nevertheless, it is an essential condition of peace.¹

The maintenance or restoration of peace and the quest for sustainable peace have been part of international legal thought for a long time. Lauterpacht considered the idea of peace as an important aspect of the Grotian tradition, reflected in Grotius ground-laying work, *De Jure Belli ac Pacis*.² Constraining the effects of war and working towards sustainable peace has been an important feature of the activity of the international community for many decades, if not centuries. The result of these efforts is a complex normative and institutional framework for monitoring and enforcing human rights and for the peaceful resolution of disputes.³ International courts and tribunals (ICs) are an important component of that ever-evolving system of global governance. In acknowledging the role of ICs with regard to peace, Hersch Lauterpacht has pointedly noted that, the primary purpose of the International Court (including both the Permanent Court of International Justice and the International Court of Justice) lies in its function as one of the instruments for *securing peace in so far as this aim can be achieved by law*.⁴ That statement underlines the enabling as well as the constraining effects of international law on the activity of ICs.

¹ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), p. 437.

² Hersch Lauterpacht, 'The Grotian Tradition in International Law', *BYIL* 23 (1946), p. 46.

³ For the core international human rights instruments and their monitoring bodies see www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx. For a better overview of the UN system see www.un.org/en/aboutun/structure/org_chart.shtml. See also J. G. Merrills, *International Dispute Settlement* (Cambridge: Cambridge University Press, 2011).

⁴ Hersch Lauterpacht, *The Development of International Law by the International Court* (Steven & Sons Limited, 1958) reprinted 1982, p. 3 (emphasis added).

The last several decades have been marked by a conspicuous process of ‘humanization of international law’ in several aspects.⁵ That *humanization* is expressed in the impressive development of several branches of international law as human rights, humanitarian law and international environmental law. Another related process is that of increased judicialization of international law and international relations, expressed in the qualitative and quantitative expansion of the international institutional framework entrusted with the monitoring and enforcement of international law, including a large number of international and regional judicial and quasi-judicial mechanisms.⁶ International courts are an important component of the operating system of international law, which exercise an increasing influence on interpreting and developing the normative content of international law.⁷ As mechanisms for the enforcement of international law, international and regional courts can play an important role in providing the necessary forums for ensuring the peaceful solutions of inter-State disputes, for dealing with individual complaints concerning human rights violations, or for prosecuting individuals alleged to have committed internationally recognized crimes, as genocide, war crimes and crimes against humanity.

This chapter will first discuss the role and contribution of ICs with regard to promoting, maintaining or restoring peace, as a community interest, within the larger legal and institutional framework of the international legal system. Simma has defined ‘*community interest*’ as a consensus according to which respect for certain *fundamental values* is not to be left to the free

⁵ Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff Publishers, 2006). For a historical perspective see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001); Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Leiden: Brill, 2010), esp. pp. 635-645; Ruti G. Teitel, *Humanity’s Law* (Oxford: Oxford University Press, 2011).

⁶ See inter alia Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, 2002); Karen J. Alter, ‘The Multiplication of International Courts and Tribunals’, in *The Oxford Handbook of International Adjudication*, edited by Cesare Romano, Karen Alter, and Yuval Shany (Oxford: Oxford University Press, 2014), pp. 63-89.

⁷ For a discussion of the relationship between the normative system and the operating system of international law see inter alia Paul F. Diehl and Charlotte Ku, *The Dynamics of International Law* (Cambridge: Cambridge University Press, 2010), pp. 28-73. For the discussion of the contribution of different international courts to the development of international law see inter alia Hersch Lauterpacht, *The Development of International Law by the International Court* (Steven & Sons Limited, 1958) reprinted 1982; Gideon Boas and William A. Schabas (eds), *International Criminal Law: Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff Publishers, 2003); Larissa van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Leiden: Martinus Nijhoff Publishers, 2005); Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Antwerpen: Intersentia, 2008); Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010); Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013); Nerina Boschiero, Cesare Pitea, Tullio Scovazzi and Chiara Ragni (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (The Hague: TMC Asser Press, 2013).

disposition of States individually or *inter se* but is recognized and sanctioned by international law as a *matter of concern to all States*.⁸ Moreover, he has noted that international peace and security is the most prominent among such community interests.⁹ International courts serve as guardians of community interests and values, which have come into being in a piecemeal fashion.¹⁰ Those community interests, even if in an embryonic fashion, have been read into or have been embedded in relevant international human rights and humanitarian law treaties and customary international law. Nollkaemper has categorized courts themselves as an intermediate public good, which contributes towards the provision of ‘final global public goods’, as peace.¹¹ That shows the importance of ICs as important tools which can contribute to the interests of peace.

The second aim of this chapter is to analyze the contribution of these courts to clarifying different aspects of State responsibility, the responsibility of international organizations, as well as individual responsibility with regard to promoting, maintaining or restoring peace. The issues selected for a more detailed discussion include the prohibition of the unlawful use of force and non-intervention, the duty to prevent mass atrocities, the duty to investigate and punish perpetrators thereof, and duty to cooperate with international criminal courts and tribunals. By analyzing relevant case law and referring to legal findings of these ICs, this chapter tries to shed light on different components of required conduct for individual States, third States, international organizations and non-state actors more generally. As Lauterpacht and Rosenne have noted,¹²

⁸ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’, in *Recueil des Cours (Collected Courses of the Hague Academy of International Law)*, Vol. 250 (1994), (Leiden: Martinus Nijhoff Publishers, 1997), p. 233 (emphasis added)

⁹ Simma, ‘From Bilateralism to Community Interest’, p. 236. In Simma’s list of community interests are solidarity between developed and developing countries, protection of the environment, the ‘common heritage’ concept, and international concern with human rights.

¹⁰ See *inter alia* Bruno Simma, ‘From Bilateralism to Community Interest’, pp. 217-384; Santiago Villalpando, ‘The Legal Dimension of the International Community: How Community Interests Are Protected in International Law’, *European Journal of International Law* 21 (2010), pp. 387-419; André Nollkaemper, ‘International Adjudication of Global Public Goods: The Intersection of Substance and Procedure’, *European Journal of International Law* 23(3) (2012), pp. 769-791. See also Ulrich Fastenrath, Rudolf Geiger, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: Oxford University Press, 2011). On the issue of global values see *inter alia* Otto Spijkers, *The United Nations, the Evolution of Global Values and International Law* (Antwerpen: Intersentia, 2011). Spijkers argues that a common desire to eradicate war, poverty, inhuman treatment, and to halt the exploitation of peoples, has led to an affirmation of the values of peace and security, social progress and development, human dignity and the self-determination of all peoples.

¹¹ André Nollkaemper, ‘International Adjudication of Global Public Goods: The Intersection of Substance and Procedure’, *European Journal of International Law* 23(3) (2012), p. 783.

¹² Hersch Lauterpacht, *The Development of International Law by the International Court* (Steven & Sons Limited, 1958) reprinted 1982, pp. 4-5; Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th ed., (Leiden: Brill Publishers, 2006), pp. 175-193 analyzing the attitude of States towards judicial settlement by the ICJ.

while discussing the role and contribution of ICs with regard to furthering peace, it is necessary to be mindful of the institutional and other limitations imposed by their statutes, international law and the actions and interests of important actors.

Kingsbury distinguishes ten major types of ICs, namely inter-governmental claims commissions, ad hoc inter-state arbitration, inter-State arbitration, standing international courts, international criminal courts, international administrative tribunals, regional human rights courts, regional economic integration courts, the WTO dispute settlement system, and investment arbitration tribunals.¹³ This chapter, however, shall focus on the work of the International Court of Justice (ICJ) which is entrusted with settling inter-State disputes and providing legal advice to the main UN organs and specialized agencies; the work of the International Criminal Court (ICC); and the work of the two ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR), which are entrusted with investigating and prosecuting individuals for having committed mass atrocity crimes, namely genocide, war crimes and crimes against humanity. These selected ICs have dealt extensively with specific issues and aspects of State responsibility and individual criminal responsibility for mass atrocity crimes which present a threat to international peace and security.

Albeit not dealt with in this chapter, the activity of regional human rights courts is relevant even if these courts are not particularly well-suited for addressing widespread and systematic violations of human rights.¹⁴ These judicial mechanisms provide an important remedy against violations of individual rights and freedoms and have had a significant impact on improving the domestic legal systems of the countries party to the regional human rights treaties. In that sense, regional human rights courts have contributed to the strengthening of the rule of law and human rights protection, which are important for a peaceful society. The choice to deal with some ICs, while excluding others, does not mean that these other ICs are not relevant to peace, since it can be claimed that by solving international disputes any of the existing ICs contributes in one way or another to promoting, maintaining or restoring peace. Such contribution to peace extends not only to inter-State relations, but also to relations between different groups within a society, making it relevant also at an intra-State level.

¹³ Benedict Kingsbury, 'International Courts: Uneven Judicialisation in Global Order', in *The Cambridge Companion to International Law*, edited by James Crawford and Martti Koskeniemi (Cambridge: Cambridge University Press, 2012), pp. 205-211. For a discussion of the WTO dispute settlement see Ole Christian Fauchald, chapter 10 in this book.

¹⁴ While their procedural law is not particularly well-suited for dealing with mass claims, regional human rights courts have dealt with several issues which are relevant to inter-state peace. Examples include cases by the IACtHR concerning the laws on amnesties in a number of Latin-American States. The ECtHR has been involved in a number of cases stemming from armed conflicts in Cyprus, the former Yugoslavia, Chechnya, and Georgia. Thus, the ECtHR was seized with a request for provisional measures concerning the August 2008 armed conflict between Russia and Georgia and concerning the conflict between Russia and Ukraine in March 2014.

2. The multifaceted role of international courts with regard to promoting, maintaining or restoring peace

First, it must be noted that peace treaties have been material to the formation of international law,¹⁵ as well as to the establishment of arbitration and adjudication mechanisms entrusted with the peaceful resolution of international disputes. As Roelofsen points out, institutions for the peaceful settlement of disputes developed considerably since the hesitant start at The Hague Peace Conferences of 1899 and 1907.¹⁶ The Versailles Peace Treaty made the German Emperor liable to criminal prosecution under Article 227 for his ‘supreme offence against international morality and the sanctity of treaties’, while also providing for the prosecution of other individuals responsible for violations of the laws and customs of war.¹⁷ The prosecution of war criminals continued with the August 1945 Charter of the International Military Tribunal for Nuremberg (IMTN) and the January 1946 International Military Tribunal for the Far East (IMTFE).¹⁸ While not much happened with regard to international criminal justice during the Cold War period, the two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda and the permanent International Criminal Court were established within a short period in the 1990s.¹⁹ Their activity, together with that of number of hybrid criminal tribunals established in the early 2000s, put considerable emphasis on individual criminal accountability for mass atrocity crimes.²⁰ Regional human rights protection mechanisms were established and further evolved in Europe, the Americas, and in Africa, with similar efforts undertaken also in Asia and the Arab world. Notably, the last few decades have seen the coming into being of several specialized international and regional courts.

The *general legal basis* for the role of ICs with regard to maintaining peace is laid down in Article 33 of the UN Charter which requires the parties to a dispute the continuance of which is likely to endanger the maintenance of international peace and security to seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, *judicial settlement*, resort to regional

¹⁵ See inter alia Randall Lesaffer, ‘Peace Treaties and the Formation of International Law’, in *The Oxford Handbook of the History of International Law*, edited by Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), pp. 71-94.

¹⁶ Cornelis G. Roelofsen, ‘International Arbitration and Courts’, in *The Oxford Handbook of the History of International Law*, edited by Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), p. 168. For a general overview see Cesare Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: Oxford University Press, 2014).

¹⁷ See inter alia Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford: Oxford University Press, 2014), pp. 27-63.

¹⁸ See inter alia Franz B. Schick, ‘Crimes against Peace’, *Journal of Criminal Law and Criminology* 38(5) (1947-1948), pp. 445-465; B Röling and C Rüter (eds), *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E), 29 April 1946 - 12 November 1948* (Amsterdam: APA-University Press Amsterdam, 1977).

¹⁹ See respectively UNSC Res. 827 25 May 1993, UN Doc. S/RES/827; UNSC Res. 955, 8 November 1994, UN Doc. S/RES/955; and, ‘Statute of the International Criminal Court’, 17 July 1998, UN Doc. A/CONF.183/9

²⁰ See inter alia Cesare PR Romano, André Nollkaemper and Jann K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford: Oxford University Press, 2004).

agencies or arrangements, or other peaceful means of their own choice.²¹ While the UN Charter does not impose any preference or hierarchical order among the various means of international dispute settlement, it provides a clear link between judicial settlement and the protection of an important community interest embedded in the UN Charter, namely the maintenance or restoration of peace. A *specific legal basis* for the furtherance of peace is explicitly or implicitly included in the Statutes establishing a number of ICs, including the ICJ, the ICC, and the ICTY and the ICTR. Since its Statute is annexed to the UN Charter, and the ICJ is one of the UN's main organs and its principal judicial organ, the maintenance of international peace and security is part and parcel of the considerations for the establishment and for the activity of this court.²² On its part, the UN has emphasized the obligation of States to settle their disputes by peaceful means, including, when appropriate, by the use of the ICJ.²³ Through its case law the ICJ has clarified a number of general principles intrinsically relevant to peace, including the prohibition of the threat or use of force, self-determination of peoples, the prohibition of racial discrimination, and the prohibition of genocide.²⁴ The third paragraph of the preamble of the ICC

²¹ For a commentary to this article see *inter alia* Christian Tomuschat 'Article 33', in *The Charter of the United Nations: A Commentary*, 2nd ed., edited by Bruno Simma et al., (Oxford: Oxford University Press, 2002), pp. 583-594; Christian Tomuschat 'Article 33', in *The Statute of the International Court of Justice: A Commentary*, 2nd ed., edited by Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian J Tams (Oxford: Oxford University Press, 2012), pp. 119-133.

²² The ICJ settles inter-State disputes and advises the main UN organs and specialized agencies on different legal questions. For a discussion of the ICJ's contribution in this regard see *inter alia* Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003), pp. 213-262.

²³ UNGA Res. 60/1, '2005 World Summit Outcome', 25 October 2005, UN Doc. A/RES/60/1, para. 73.

²⁴ See *inter alia* *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (Judgment) [1948] ICJ; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment) [1980] ICJ; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America; Libyan Arab Jamahiriya v. United Kingdom)* (Judgment) [1998] ICJ; *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [1996] ICJ; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (Judgment, jurisdiction of the Court and admissibility of the application) [2006] ICJ; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ; and so on. See *inter alia* Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003); Gentian Zyberi, 'Self-Determination through the Lens of the International Court of Justice', *Netherlands International Law Review* (2009), pp. 429- 453; Bruno Simma, 'Human Rights Before the International Court of Justice: Community Interest Coming to Life', in *The Development of International Law by the International Court of Justice*, edited by Christian J Tams and James Sloan, (Oxford: Oxford University Press, 2013), pp. 301-325; Gentian Zyberi, 'The International Court of Justice and the Rights of Peoples and Minorities' in

Statute recognizes that mass atrocity crimes threaten the peace, security and well-being of the world.²⁵ Other paragraphs in the preamble of the ICC Statute are also related to the maintenance of peace in one way or another, since such interests are served by emphasizing the prohibition of the threat or use of force and the principle of non-intervention in an armed conflict or in the internal affairs of any State. Schabas has argued that, as a result of their inclusion in the preamble, the ‘interests of peace’ become germane to the Court’s activities, and to policy decisions, such as whom to prosecute.²⁶ He also has noted that both objectives are best promoted by an approach that seeks to deliver as much of each as possible in the circumstances of a particular conflict.²⁷ The Office of the Prosecutor of the ICC (OTP/ICC) has provided an explanation of its understanding of the interests of justice and their relationship to peace processes.²⁸ First, the 2007 policy paper of the OTP/ICC notes that the ICC was created on the premise that justice is an essential component of a stable peace. Subsequently, while recognizing the role of the Security Council under Article 16 of the ICC Statute, the OTP/ICC has taken the position that the broader matter of international peace and security is not the responsibility of the Prosecutor as it falls within the mandate of other institutions.

The ICTY and the ICTR were established by the UN Security Council respectively in 1993 and 1994 on the basis of its competences under Chapter VII of the UN Charter relating to action with respect to threats to the peace, breaches of the peace and acts of aggression. Both resolutions establishing the ad hoc tribunals note that the prosecution of persons responsible for serious violations of international humanitarian law would *contribute to* the process of national reconciliation and to the *restoration and maintenance of peace*.²⁹ Despite the establishment of these tribunals, however, the situation in the former Yugoslavia and that in the Great Lakes region continued to be problematic and peace was established through subsequent political agreements. In the former Yugoslavia peace was achieved between the warring parties in a number of agreements which include the Dayton Accords in November 1995,³⁰ the Kumanovo

The Development of International Law by the International Court of Justice, edited by Christian J Tams and James Sloan, (Oxford: Oxford University Press, 2013), pp. 327-352.

²⁵ See inter alia William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), pp. 31-53, at pp. 42-43.

²⁶ Ibid., p. 42-43. See also Janine Natalya Clark, Peace, ‘Justice and the International Criminal Court: Limitations and Possibilities’, *Journal of International Criminal Justice* 9 (2011), p. 521-545, especially 538 and subsequently; Nick Grono, *The Role of the International Criminal Court in African Peace Processes: Mutually reinforcing or mutually exclusive?*, (London: Institute for Public Policy Research, 2006).

²⁷ Schabas, (supra note 25), p. 43.

²⁸ See ICC-OTP, Interests of Justice (Policy Paper), September 2007, available at www.icc-cpi.int.

²⁹ See respectively UNSC Res. 827, 25 May 1993, UN Doc. S/RES/827 (1993), and UNSC Res. 955 8 November 1994, UN Doc. S/RES/955 (1994) (emphasis added).

³⁰ General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Accords), 21 November 1995, UN Doc. A/50/790, www.state.gov/p/eur/rls/or/dayton/52602.htm.

agreement of June 1999³¹ and the Ohrid agreement of August 2001³². The conflict in Rwanda spilled over in the Democratic Republic of the Congo and the overall situation in the Great Lakes region has continued to be problematic, despite there being a number of peace agreements between the parties concerned.

The role and contribution of ICs with regard to peace can be discussed from different inter-related perspectives, namely from the scope of their jurisdictional reach, from the perspective of their judicial activity and from the perspective of how their users perceive and decide to employ them (or not) in relevant situations. Put differently, assessing their role is a matter of assessing what these courts are meant to do, what they actually do and the extent to which they are considered relevant and are used by important international actors when dealing with situations where peace is at stake. In terms of assessing their effectiveness, as Shany has pointed out, the goals of public organizations, such as courts, tend to be ambiguous, and the public goods that they generate, such as justice, *peace*, and legal certainty, are hard to quantify.³³ Discussing the role and contribution of ICs to peace is not easy, as peace is a concept which lends itself to many different understandings.³⁴ As any other concept, peace can be construed restrictively or expansively. *Positive peace*, as a broader understanding of peace, includes national peace and concerns a number of issues including social justice, human rights protection and elimination of structural violence. For Galtung positive peace addresses among others respect for human rights, provision of social justice, and elimination of structural violence causing poverty and exclusion.³⁵ A restrictive understanding of the concept of peace is that of *negative peace*, closely related to the prohibition of unlawful use of force. The legal findings of the selected ICs provide some important insights on aspects of both *negative* and *positive* peace under contemporary international law.

Generally speaking, the purpose of the judicial function has two inter-related components: *first*, an IC provides legal services to those entities that have access to it, including States, international organizations and individuals. Besides the parties directly concerned, the provision of these legal services benefits more broadly the international community as a whole. *Second*, through interpreting and developing applicable rules and standards of conduct under

³¹ Military Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (Kumanovo agreement), 9 June 1999, in 38 ILM 1217, www.nato.int/kosovo/docu/a990609a.htm.

³² Ohrid Framework Agreement (Ohrid agreement), 13 August 2001.

³³ Yuval Shany, ‘Assessing the Effectiveness of International Courts: A Goal-Based Approach’, *American Journal of International Law* 106(2) (2012), p. 239.

³⁴ See Bailliet and Larsen, chapter 1 in this book. See also David P. Barash, *Approaches to Peace: A Reader in Peace Studies*, 2nd ed. (Oxford: Oxford University Press, 2010).

³⁵ See Johan Galtung, *A Theory of Peace: Building Direct Structural Cultural Peace* (Transcend University Press, 2013), especially pp. 52-61. See also Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (London: Sage Publications, 1996), especially pp. 31-33.

international law for States, international organizations, and individuals, the ICs strengthen the rule of law both at an international and at the domestic level.³⁶ The international legal system remains State-centred, although non-State actors are increasingly recognized as playing an important role and as being accountable under international law.³⁷ Besides its corrective effect in righting wrongs, the exercise of judicial function by ICs is also ascribed a potentially preventive effect, exercised either directly in the course of their judicial activity, or through the indirect effect that the mere possibility of being subjected to judicial proceedings has on the behavior of States or non-State actors. The preventive effect of the activity of ICs, relevant for purposes of ensuring peace or deterring atrocities, has been subject to considerable criticism.³⁸ In any event, provisional measures by the ICJ or by regional human rights courts,³⁹ and investigations and statements by the ICC Prosecutor carry the potential to change the behavior and actions of States or non-State actors involved in activities that might be detrimental to peace. The UN Secretary-General has noted that threat of referrals to ICC can undoubtedly serve a preventive purpose.⁴⁰

³⁶ See inter alia Gentian Zyberi, 'The Role of International Courts in Post-Conflict Societies', in *Human Rights and Conflict: Essays in Honour of Bas de Gaay Fortman*, edited by Ineke Boerefijn, Laura Henderson, Ronald Janse and Robert Weaver (eds) (Cambridge: Intersentia, 2012), pp. 367-385; Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority', *Leiden Journal of International Law* 26(1) (2013), pp. 49-72; Karen J. Alter, *The New Terrain of International Law: Courts, Politics and Rights* (Princeton: Princeton University Press, 2014), pp. 161-331; Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, (Oxford University Press, 2014). Domestic courts are also quite important in terms of ensuring accountability and strengthening the rule of law. For a detailed discussion of their contribution see inter alia André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011).

³⁷ See inter alia Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), pp. 39-55; Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (New York: Routledge, 2011).

³⁸ For a critical discussion see inter alia Janine Natalya Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace', in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, edited by Bert Swart, Alexander Zahar, and Göran Sluiter (Oxford: Oxford University Press, 2011), pp. 56-81; Niki Frencken and Göran Sluiter, 'The United Nations Criminal Tribunals for Yugoslavia and Rwanda', in *An Institutional Approach to the Responsibility to Protect*, edited by Gentian Zyberi (Cambridge: Cambridge University Press, 2013), pp. 386-410.

³⁹ On the issue of provisional measures see inter alia Lawrence Collins, *Provisional and Protective Measures in International Litigation*, *Recueil des Cours de la Académie de Droit International de la Haye*, Volume 234, 1992-III (Leiden: Martinus Nijhoff, 1992); Rudolf Bernhardt (ed), *Interim Measures Indicated by International Courts* (Heidelberg: Springer, 1994); Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea* (Oxford: Oxford University Press, 2005); Chester Brown, *A Common Law of International Adjudication* (New York, Oxford University Press, 2007) pp. 119-151; Clara Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights* (Cambridge: Intersentia, 2010); Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Cambridge: Intersentia, 2010); Gentian Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations', *Leiden Journal of International Law* 23 (2010), pp. 571-584.

⁴⁰ UNSG Report, 'Responsibility to Protect: Timely and Decisive Response' (July 2012) UN Doc. A/66/874-S/2012/578, 25, para. 29.

Rosenne has pointed out that, as a time honoured attribute of the judicial mission courts should, within the limits of the judicial function, do what they can to prevent the escalation of the conflict between the litigating parties.⁴¹ Provisional measures, indicated by the ICJ in several armed conflict situations, are relevant to restoring peace, despite a marked failure on the part of concerned States to comply with them and a little-developed procedure and possibilities for the Court to effectively monitor such compliance.⁴² Even non-compliance with judgments of the ICJ or most other courts rarely draws measures of coercion in response.⁴³ Preliminary investigations by the ICC also might have a preventive effect on the occurrence of mass atrocities by dissuading potential perpetrators from engaging in such conduct for fear of prosecution.⁴⁴ That said, generally ICs would be seized in the aftermath of mass atrocities and would be part of a larger process of transitional justice aimed at restoring peace between States or between opposed groups within a given society.⁴⁵ The fact that many individuals indicted by the ICC remain at large demonstrates that ensuring accountability for mass atrocity crimes requires strong international cooperation and a considerable degree of commitment on the part of the international community.

⁴¹ Shabtai Rosenne, 'A Role for the International Court of Justice in Crisis Management', in *State, Sovereignty, and International Governance*, edited by Gerard Kreijen, Marcel Brus, Jorris Duursma, Elizabeth de Vos and John Dugard, (Oxford: Oxford University Press, 2002), p. 181.

⁴² See inter alia the provisional measures in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Provisional Measures), [1993] ICJ Reports 1993, p. 3; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, (Provisional Measures) [2000] ICJ Reports 2000, p. 111; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Provisional Measures) [2008] ICJ Reports 2008, p. 353; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Provisional Measures) [2011] ICJ Reports 2011, p. 6; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (Provisional Measures) [2011] ICJ Reports 2011, p. 537.

⁴³ Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority', *Leiden Journal of International Law* 26(1) (2013), p. 55. More generally on the issue of compliance see Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford: Oxford University Press, 2005); Alexandra Huneus, 'Compliance with International Court Judgments and Decisions', in *Oxford Handbook of International Adjudication*, edited by Karen J. Alter, Cesare Romano and Yuval Shany, (Oxford: Oxford University Press, 2014), pp. 437-463.

⁴⁴ For a detailed discussion see inter alia David Bosco, 'The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal', *Michigan State Journal of International Law* 19(2) (2011), pp. 163-200; Hector Olasolo, *Essays on International Criminal Justice* (London: Hart Publishing, 2012), pp. 1-19. See also Michael Contarino and Selena Lucent, 'Stopping the Killing: The International Criminal Court and the Responsibility to Protect', *Global Responsibility to Protect* 1(4) (2009), pp. 560-83; Michael Contarino and Melinda Negrón-Gonzales, 'The International Criminal Court', in *An Institutional Approach to the Responsibility to Protect*, edited by Gentian Zyberi (Cambridge: Cambridge University Press, 2013), pp. 411-435.

⁴⁵ For a discussion of peace and transitional justice see Jemima Garcia-Todos, chapter 15 in this book; see also Jessica Lincoln, *Transitional Justice, Peace and Accountability: Outreach and the Role of International Courts after Conflict* (New York: Routledge, 2011).

From a *jurisdictional* perspective, the role and potential contribution of ICs to promoting, maintaining or restoring peace generally depends on the subject-matter, geographical and temporal scope of their activity. The contribution of ICs to peace is first and foremost linked to the independent and impartial exercise of their judicial function. A traditional dispute-settlement mechanism, as the ICJ, settles inter-State disputes which, if left unaddressed, could potentially disturb international peace and security. Such international disputes range from armed conflict situations to the delimitation of land or maritime boundaries.⁴⁶ The ICJ has also provided a number of important advisory opinions on South-West Africa (Namibia), Western Sahara, the Occupied Palestinian Territory, and Kosovo. As rightly noted by a judge of the ICJ, following the court's findings in such politically loaded cases would make a great contribution to the cause of international peace and security and, more, to the cause of friendly relations amongst not only the nations but amongst all men.⁴⁷ Under Article 38(2) of the ICJ Statute the Court can settle a dispute *ex aequo et bono*, if the parties agree thereto.⁴⁸ No State has made use of this procedure so far. That said, equity is a part of the law and the ICJ has established a methodology which it usually employs in seeking an equitable solution to cases of maritime delimitation.⁴⁹ The judicial function of international criminal justice mechanisms, as the ICTY, ICTR and the ICC involves the investigation and prosecution of alleged perpetrators of mass atrocity crimes. This work is important, primarily for the societies affected by mass violence, but also more generally for the international community in terms of upholding a community interest, namely ensuring accountability for mass atrocity crimes. Notably, the work of the selected ICs includes and permeates both national and international dimensions of peace.

An important contribution of ICs with regard to peace is closely related to their *institutional function* within a larger organizational system, part of which they are. These international organizations are governed by the 'principle of speciality', which means that they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.⁵⁰ Mainly through its advisory opinions the ICJ has rendered general support to the work of the Security Council and the General

⁴⁶ See Shabtai Rosenne in Connie Peck and Roy S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Leiden: Martinus Nijhoff Publishers, 1997), p. 472.

⁴⁷ ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Oral Statements and Correspondence: Declaration of President Zafrullah Khan, ICJ Reports 1971, pp. 65-66.

⁴⁸ See inter alia Allain Pellet, 'Article 38', in *The Statute of the International Court of Justice: A Commentary*, 2nd ed., edited by Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian J Tams, (Oxford: Oxford University Press, 2012), pp. 791-797. See also Markus Kotzur, 'Ex Aequo et Bono', in *Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/home/EPIL>.

⁴⁹ See the latest Court judgment on this issue, *Maritime Dispute (Peru v. Chile)* (Judgment) [2014] ICJ, para. 180. See also Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Cambridge: Grotius Publications Limited, 1991), pp. 117-152.

⁵⁰ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, (Advisory Opinion) [1996] ICJ Reports 1996, p. 78, para. 25.

Assembly in pursuing the interests of peace.⁵¹ An important aspect of such support has taken place in the context of the process of decolonization. The ICJ has managed to play a constructive role within the institutional framework of the UN with regard to the maintenance of peace by *first* recognizing the latter's international legal personality;⁵² *secondly*, by laying the legal basis for peace-keeping and other quasi-military operations of the UN;⁵³ and, *thirdly*, by interpreting the concurrent functions of the General Assembly and the Security Council in matters related to the maintenance of international peace and security.⁵⁴ Under Article 1(1) of the UN Charter the maintenance of international peace and security is considered to be one of the main purposes of the UN. Under Article 24(1) of the UN Charter the Security Council has primary responsibility in this regard, with the General Assembly retaining a subsidiary responsibility,⁵⁵ as well as the possibility to take action should the Security Council be deadlocked.⁵⁶ The ICJ has noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security, adding that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.⁵⁷ This interpretation highlights the complementary nature of activities undertaken by the Security Council and the General Assembly.

⁵¹ See *inter alia* Mahasen Mohammad Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005* (Heidelberg: Springer Law International, 2006).

⁵² *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Reports 1949, p. 178.

⁵³ See *inter alia* *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Reports 1962, p. 151. For a more detailed discussion see *inter alia* Kjetil Mujezinović Larsen, chapter 7 in this book; Michael Bothe, 'Peace-Keeping' in *The Charter of the United Nations: A Commentary* 2nd ed, edited by Bruno Simma et al., (Oxford: Oxford University Press, 2002), pp. 648-700.

⁵⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Reports 2004, pp. 148-152, paras. 26-35; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion) [2010] ICJ Reports 2010, pp. 418-423, paras. 36-48. See *inter alia* Shabtai Rosenne, 'The Contribution of the International Court of Justice to the United Nations', *Indian Journal of International Law* 35 (1995), pp. 67-76; Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003), pp. 137-141.

⁵⁵ See article 11(2) of the UN Charter investing the General Assembly with competence to discuss "any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations", subject to the limitation included under Article 12(1), stating that "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

⁵⁶ See UNGA Res. 337, 'Uniting for Peace', 3 November 1950 UN Doc. A/RES/337(V).

⁵⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion) [2010] ICJ Reports 2010, p. 419, para. 41.

Although an independent, treaty-based international court outside the UN system, there is a close relationship between the ICC and the United Nations, established through the ICC Statute and a separate agreement adopted in 2004.⁵⁸ Two situations deemed to endanger international peace and security have been referred to this court by the Security Council so far, namely Sudan and Libya.⁵⁹ The institutional relationship between the ICC and the UN is quite complex.⁶⁰ That relationship seems to be based on a broader understanding of the role of the Security Council in the maintenance of peace, which concerns not only peace between States, but also peace within States. This understanding, and the fact that the primary responsibility for the maintenance of peace is vested with the Security Council, is reflected in the latter being able to exercise a certain degree of control over the activity of the ICC.⁶¹ The close relationship between the ICC and the Security Council brings to the fore the close link that exists between international law and international politics. At the same time, this relationship also highlights the potential tension that might arise between the interests of peace and justice. Schabas has noted that deference to the Security Council, acting under Article 16 of the ICC Statute, may be the way to resolve the difficulty, assuming the wisdom of staying international justice in the interests of peacemaking.⁶²

2.1 Key obligations with regard to promoting and enforcing the right to peace

An important development for peace has been the adoption in 2005 of the overarching *responsibility to protect* doctrine by the UN General Assembly, as a clear expression of

⁵⁸ See respectively Article 2 of the ICC Statute which requires that the court be brought into a relationship with the United Nations; Article 13(b) under which the Security Council acting under Chapter VII of the UN Charter can refer to the ICC a situation where crimes falling under the jurisdiction of the ICC seem to have been committed; Article 16 which provides that the UN Security may, in a resolution adopted under Chapter VII of the Charter, request the Court to defer (not commence or proceed with) an investigation or prosecution for a renewable period of twelve months; Article 115(b) on funds provided by the United Nations, in particular in relation to the expenses incurred due to referrals by the Security Council; Article 121(1) on amendments to the Statute requiring that the text of any proposed amendment be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties; Article 125 whereby the Secretary-General of the United Nations is the depositary of instruments of ratification, acceptance or approval by Member States to the ICC Statute. See also 'Negotiated Relationship Agreement between the International Criminal Court and the United Nations', 7 September 2004, ICC-ASP/3/Res.1.

⁵⁹ Respectively Sudan in 2005 through UNSC Res 1593, 31 March 2005, UN Doc. S/RES/1593, of and Libya in 2011 through UNSC Res 1970, 26 February 2011, UN Doc. S/RES/1970.

⁶⁰ See inter alia 'The Relationship between the International Criminal Court and the United Nations', War Crimes Research Office, Washington College of Law, August 2009 www.wcl.american.edu/warcrimes/icc/documents/WCRO_Report_on_ICC_and_UN_August2009.pdf; Hemi Mistri and Deborah Riuz Verduzco (rapporteurs), 'The UN Security Council and the International Criminal Court', International Law Meeting Summary, with Parliamentarians for Global Action, 16 March 2012, www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf; Larry D Johnson, 'The Lubanga Case and Cooperation between the UN and the ICC: Disclosure Obligation v. Confidentiality Obligation', *Journal of International Criminal Justice* 10(4) (2012), p. 887-903.

⁶¹ Schabas (supra note 25), pp. 325-334.

⁶² Schabas (supra note 25), p. 333.

community interests of the highest importance.⁶³ According to this doctrine, well-established under both treaty and customary international law,⁶⁴ ICs in general and the ICC in particular, have an important role to play in efforts aimed at ensuring that populations are protected from mass atrocity crimes, namely genocide, war crimes and crimes against humanity.⁶⁵ International and regional courts have played an important role in clarifying a number of key legal obligations relevant to the right to peace. It must also be noted that while the existence of these judicial mechanisms offers a possibility for settling disputes, access to them is not automatic due to practical and jurisdictional obstacles.⁶⁶ The so-called compulsory jurisdiction of the ICJ under Article 36(2) of its statute has been accepted by a limited number of States.⁶⁷ Despite calls on the part of the UN and proposals to increase that number, the situation has not changed much.⁶⁸ Similarly, the ICC Statute has not been universally ratified.⁶⁹ On several occasions States coming

⁶³ See UNGA Res 60/1, World Summit Outcome, 24 October 2005, UN Doc. A/Res/60/1, paras. 138-139. See also the related Secretary-General reports, namely 'Implementing the Responsibility to Protect', UN Doc. A/63/677, 12 January 2009; 'Early Warning, Assessment and the Responsibility to Protect', UN Doc. A/64/864, 14 July 2010; 'The Role of Regional and Sub-Regional Arrangements in Implementing the Responsibility to Protect', UN Doc. A/65/877-S/2011/393, 27 June; 'Responsibility to Protect: Timely and Decisive Response', UN Doc. A/66/874-S/2012/578, 25 July 2012; 'Responsibility to protect: State responsibility and prevention', UN Doc. A/67/929-S/2013/399, 9 July 2013. For a detailed discussion of RtoP and peace see Engdahl, chapter 6 in this book. See also Gentian Zyberi 'The International Court of Justice', in *An Institutional Approach to the Responsibility to Protect*, edited by Gentian Zyberi (Cambridge: Cambridge University Press, 2013), pp. 365-385.

⁶⁴ Since the initial 2001 ICISS report, it has been pointed out that RtoP has a strong foundation on specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law (ICISS, *The Responsibility to Protect*, p. XI). See also *Implementing the Responsibility to Protect*, para. 3; *Timely and Decisive Response*, paras. 9 and 59; *Prevention*, paras. 6 and 40.

⁶⁵ See respectively *Implementing the Responsibility to Protect*, paras. 17-19 and 53-54; *Regional and Sub-Regional Arrangements*, paras. 19-20 and 37; *Timely and Decisive Response*, paras. 29 and 40; *Prevention*, paras. 25 and 40.

⁶⁶ Only six of the major international human rights treaties have a compromissory clause bestowing jurisdiction on the ICJ. Namely Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide; Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Article 29 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 92 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Article 42 of International Convention for the Protection of All Persons from Enforced Disappearance (CEED). The main instruments of international humanitarian law, namely the Geneva Conventions of 1949 and their two Additional Protocols of 1977 do not include compromissory clauses bestowing jurisdiction on the ICJ.

⁶⁷ So far 70 States have accepted the compulsory jurisdiction of the ICJ. For a list of the States see the official website of the Court <www.icj-cij.org/homepage/index.php> under 'Jurisdiction'. See also Renata Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, (Leiden: Brill, 1993).

⁶⁸ UNGA Res 60/1, World Summit Outcome, 24 October 2005, UN Doc. A/Res/60/1, para. 134(f). See also Andrew Strauss, 'Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice with Referral Jurisdiction', *Cornell International Law Journal* 44 (2011), pp. 603-658.

⁶⁹ So far 122 States have become a member to the ICC Statute. Out of them 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States. For a list of the States visit the official website of the ICC, www.icc-cpi.int.

to the ICJ have not been able to adjudicate their claims on the merits for lack of jurisdiction.⁷⁰ Notably, that has been the case even when violations of *jus cogens* norms, as the prohibition of genocide and torture have been at stake. The ICJ has been adamant in emphasizing that its jurisdiction is based on the consent of States. Another obstacle to the adjudication of international disputes is the fact that sometimes there is more than one State involved in the violations. In these cases one can speak of shared or joint State responsibility.⁷¹ However, the procedures before ICs are not particularly well-suited for handling such situations. Despite such obstacles, the ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), have interpreted and developed a number of important aspects of rights of peoples and minorities,⁷² as well as rules and principles of international human rights and humanitarian law which are relevant to ensuring peace.⁷³ Besides solving the disputes at hand, these findings of the

⁷⁰ See *Legality of Use of Force* cases (*Serbia and Montenegro v. Netherlands* (Judgment) [2004] ICJ; *Serbia and Montenegro v. Belgium* (Judgment) [2004] ICJ; *Serbia and Montenegro v. Canada* (Judgment) [2004] ICJ; *Serbia and Montenegro v. France* (Judgment) [2004] ICJ; *Serbia and Montenegro v. Germany* (Judgment) [2004] ICJ; *Serbia and Montenegro v. Italy* (Judgment) [2004] ICJ; *Serbia and Montenegro v. Portugal* (Judgment) [2004] ICJ; *Yugoslavia v. Spain* (Provisional Measures) [1999] ICJ; *Serbia and Montenegro v. United Kingdom* (Provisional Measures) [1999] ICJ; *Yugoslavia v. United States of America* (Provisional Measures) [1999] ICJ; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (Judgment) [2005] ICJ Rep 2006, p. 6; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 2011, p. 70.

⁷¹ See inter alia André Nollkaemper, 'Issues of Shared Responsibility before the International Court of Justice', in *Evolving Principles of International Law: Studies in Honour of Karel C. Wellens*, edited by Eva Rieter and Henri de Waele, (Leiden: Martinus Nijhoff Publishers, 2012), pp.199-237.

⁷² See inter alia Anne-Laure Vaurs-Chaumette, 'Peoples and Minorities', in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 993–1003. For a more general discussion see AM de Zayas, 'The International Judicial Protection of Peoples and Minorities' in *Peoples and Minorities in International Law*, edited by Catherine Brölman, René Lefebvre and Marjolein Zieck, (Dordrecht: Martinus Nijhoff, 1993), pp. 253-87; Gentian Zyberi 'The International Court of Justice and the Rights of Peoples and Minorities' in *The Development of International Law by the International Court of Justice*, edited by Christian Tams and James Sloan (Oxford: Oxford University Press, 2013), pp. 327-352.

⁷³ See inter alia Raymond Goy, *La Cour Internationale de Justice et les Droits de l'Homme* (Bruxelles: Bruylant, 2002); Shiv R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (London: Hart Publishing, 2007); Rosalyn Higgins, 'Human Rights in the International Court of Justice', *Leiden Journal of International Law* 20(4) (2007), pp. 745-751; Gentian Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (Antwerpen: Intersentia, 2008); Sandesh Sivakumaran, 'The International Court of Justice and Human Rights', in *Research Handbook on International Human Rights Law*, edited by Sarah Joseph and Adam McBeth (Cheltenham: Edward Elgar Publishing, 2010), pp. 299-325; Gentian Zyberi, 'Human Rights in the International Court of Justice', in *International Human Rights Law: 60 Years after the UDHR*, edited by Mashood Baderin and Manisuli Ssenyonjo, (Surrey: Ashgate, 2010), pp. 289-304; Bruno Simma, 'Human Rights Before the International Court of Justice: Community Interest Coming to Life', in *The Development of International Law by the International Court of Justice*, edited by Christian J Tams and James Sloan, (Oxford: Oxford University Press, 2013), pp. 301-325; Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties', *Chinese Journal of International Law* 12 (2013), pp. 639–677.

ICJ provide some clarity on the legal obligations incumbent upon States and international organizations with regard to ensuring the right to peace, as well as the relevant entitlements under international law accruing to individuals and groups of individuals. At the same time, by investigating and prosecuting alleged perpetrators of mass atrocity crimes, the ICC renders a contribution to the protection of fundamental human rights and ultimately to ensuring peace.⁷⁴ The success of the activity of these ICs with regard to peace is dependent on State cooperation and their willingness to comply with the decisions rendered and other relevant international legal obligations.

The discussion in the following subsections focuses on a number of selected key legal obligations which are important for promoting, maintaining and restoring peace, namely the duty to refrain from the unlawful use of force and military intervention, the duty to prevent mass atrocities, the duty to investigate and punish perpetrators of mass atrocities, and the duty to cooperate with ICs. There might be tension at times between these duties, especially between the duty to refrain from the unlawful use of force and that of preventing mass atrocities, in the event that the Security Council does not authorize such intervention in the face of ongoing mass atrocities. Also, occasionally the duty to investigate and prosecute alleged perpetrators of mass atrocity crimes might compete with the duty to cooperate with ICs, as States might have different understandings of what complementarity between domestic criminal jurisdiction and international criminal jurisdiction entails.

2.1.1 The duty to refrain from the unlawful use of force and (unauthorized) military intervention

The duty of States to refrain from the unlawful use of force and military intervention in conducting their international affairs is an important foundation of international law and a precondition for peaceful relations among States. As such, this important prohibition is laid down in Article 2(4) of the UN Charter and has become part of customary international law.⁷⁵ The duty of States to refrain from the unlawful use of force is intrinsically related to the prohibition of aggression.⁷⁶ Acts of aggression would potentially trigger both State responsibility and

⁷⁴ See inter alia Dinah Shelton (ed), *International Crimes, Peace, And Human Rights: The Role of the International Criminal Court* (New York: Transnational Publishers, 2000); Errol P Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham: Edward Elgar Publishing, 2010). See also ‘Strengthening the International Criminal Court and the Assembly of States Parties’, 27 November 2013, UN Doc. ICC-ASP/12/Res.8, noting ‘*Convinced that the International Criminal Court (“the Court”) is an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law, as well as to the prevention of armed conflicts, the preservation of peace and the strengthening of international security and the advancement of post-conflict peacebuilding and reconciliation with a view to achieving sustainable peace, in accordance with the purposes and principles of the Charter of the United Nations*’ (emphasis added).

⁷⁵ See inter alia UNGA Res 290(IV), 1 December 1949, UN Doc. A/RES/290(IV); UNGA Res 2625 (XXV), 24 October 1970, UN Doc. A/RES/2625(XXV).

⁷⁶ See inter alia Russell Buchan, *International Law and the Construction of the Liberal Peace*, (Oxford and Portland: Hart Publishing, 2013), pp. 54-59 and 60-64. See also UNGA Res 3314 (XXIX) ‘Definition of Aggression’, 14 December 1974, UN Doc. S/RES/3314(XXIX).

individual criminal responsibility. The ICJ has made a number of relevant legal findings concerning State responsibility. Thus, in the *Nicaragua* case, the ICJ has found that ‘Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of States, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated.’⁷⁷ In noting the customary law character of the principle of non-intervention, the Court stated that ‘The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law’.⁷⁸ Moreover, the ICJ has emphasized that ‘The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.’⁷⁹ Through these findings the ICJ has emphasized resorting to peaceful means for the settlement of disputes and refraining from the threat or use of force as expected standards of State conduct. While that has not always prohibited powerful countries from resorting to the illegal use of force, through its case law the ICJ has laid down standards for assessing State conduct and for assigning international legal responsibility in case of violations.

Besides State responsibility, the illegal use of force can trigger individual criminal responsibility. The military tribunals for Nuremberg and the Far East tried major war criminals individuals for such crimes at the end of WWII. Both Statutes included crimes against peace.⁸⁰ The same crime was initially included in the ICC Statute and further laid down in the 2010 Review Conference in Kampala.⁸¹ Under the ICC Statute, the crime of aggression can be committed by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter. In other words, the crime of aggression can only be committed by senior State officials. By allowing these ICs to adjudicate issues of State responsibility or individual criminal responsibility concerning acts or omissions which disturb international peace, States have vested them with significant powers and responsibilities.

⁷⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Preliminary Objections) [1984] ICJ Rep 1984, p. 424, para. 73.

⁷⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (Merits), [1986] ICJ Rep 1986, p. 106, para. 202.

⁷⁹ *Ibid.*, p. 108, para. 205.

⁸⁰ Respectively Article 6(a) of the Statute of the International Military Tribunal of Nuremberg and Article 5(a) of the Statute of the International Military Tribunal for the Far East. For more information visit http://avalon.law.yale.edu/subject_menus/imt.asp. See inter alia Larry May, *Aggression and Crimes Against Peace* (Cambridge: Cambridge University Press, 2008).

⁸¹ ICC Statute, Article 8*bis* (RC/Res.6, annex I, of 11 June 2010).

2.1.2 The duty to prevent mass atrocity crimes

Basically, the duty to prevent mass atrocity crimes includes the duty to prevent genocide, war crimes and crimes against humanity. This community interest is expressed clearly in the doctrine of responsibility to protect (RtoP), adopted by the UN in the 2005 World Summit Outcome Document.⁸² Based on treaty and customary international law the ICJ has made a number of important findings with regard to certain aspects of State responsibility and ensuing legal consequences for violations of the duty to prevent mass atrocity crimes. States have a duty to respect and ensure respect for international humanitarian law (IHL).⁸³ While the scope of the obligation to ensure respect for IHL incumbent upon a State, or the organized community of States, it is not entirely clear, at least a State must respect IHL in any international or non-international armed conflict to which it is a party. This subsection will deal mainly with the findings of the ICJ concerning the duty to prevent genocide.

With regard to the duty to prevent genocide, the ICJ has held that:

The obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty. It has its own scope, which extends beyond the particular case envisaged in Article VIII, namely reference to the competent organs of the United Nations, for them to take such action as they deem appropriate.⁸⁴

Indeed, the duty to prevent genocide cannot be equated with the duty to punish the culprits in its aftermath. Nor can it be understood as simply limited to a formal reference to certain important international organs, as the Security Council, the General Assembly, or the Human Rights Council.⁸⁵ As the Court has emphasized, the obligation on the part of States to prevent genocide has a continuous and distinct character, extending alongside that of the competent organs of the UN:

⁸² UNGA Res 60/1, 'World Summit Outcome', 24 October 2005, UN Doc. A/Res/60/1, paras. 138-140. For more on RtoP see *inter alia* Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington D.C.: Brookings Institution Press, 2008); Alex J Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009); Jared Genser and Irwin Cotler (eds), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time* (Oxford: Oxford University Press, 2011); Julia Hoffmann and André Nollkaemper (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam: Amsterdam University Press, 2012); Gentian Zyberi (ed), *An Institutional Approach to the Responsibility to Protect* (Cambridge: Cambridge University Press, 2013).

⁸³ See Common Article 1 to the Geneva Conventions of 1949. See also *Military and Paramilitary Activities* (supra note 78), p. 114, para. 220.

⁸⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Reports 2007, p. 220, para. 427.

⁸⁵ See respectively chapters 4 (Terry D. Gill), 5 (Cedric Ryngaert and Hanne Cuyckens) and 7 (Lyal S. Sunga) in *An Institutional Approach to the Responsibility to Protect*, edited by Gentian Zyberi, (Cambridge: Cambridge University Press, 2013).

Even if and when these organs have been called upon, this does not mean that the States parties to the Convention are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the United Nations Charter and any decisions that may have been taken by its competent organs.⁸⁶

This finding of the ICJ highlights the shared responsibility of individual States and the international organizations entrusted with protecting populations from mass atrocity crimes, as well as the need for international solidarity and close cooperation in putting a stop to grave violations of international law. However, while urging States to take action, the ICJ limits the scope of such action by reference to the UN Charter and any decisions that may have been taken by its competent organs.

2.1.3 The duty to investigate and to prosecute perpetrators of mass atrocity crimes

The duty to investigate and to prosecute perpetrators of mass atrocity crimes is largely a post-conflict process. Many authors have noted that peace and justice seem to enjoy a complex relationship in a post-conflict environment.⁸⁷ There seems to be a division also across disciplinary lines, with lawyers putting more emphasis on judicial processes and accountability and political scientists and international relations' scholars leaning more towards other forms of dealing with the past, as amnesties and truth and reconciliation commissions. A moral theory of international law takes the chief moral goals of the international legal system to be peace, not just among, but also within States, and justice.⁸⁸ The duty to investigate and to prosecute perpetrators of mass atrocity crimes is well-established under both treaty and customary international law.⁸⁹ The ICJ has addressed in considerable detail the *duty to punish* under Articles IV, V and VI and the *duty to co-operate with international courts and tribunals* under Article VI of the Genocide Convention.⁹⁰ Based on the fact that the genocidal acts were not carried out in its territory, the Court concluded that Serbia could not be charged with not having

⁸⁶ *Application of the Genocide Convention* case, (supra note 84), para. 427.

⁸⁷ See *inter alia* Colm Campbell, 'Peace and the Laws of War: The Role of International Humanitarian Law in the Post-Conflict Environment', *International Review of the Red Cross* 82 (2000), pp. 627-652; Olivier Ribbelink (ed), *Beyond the UN Charter: Peace, Security and the Role of Justice* (The Hague: Hague Academic Press, 2008); Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014).

⁸⁸ See *inter alia* Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2007), p. 60; Grenville Clark and Louis B Sohn, *World Peace through World Law*, 2nd ed., (Cambridge: Harvard University Press, 1960); Ruti G Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011).

⁸⁹ See *inter alia* the Statutes and the case law of the IMTN and the IMTFE; the ILC's Nuremberg Principles (29 July 1950); the 1948 Genocide Convention; the 1949 Geneva Conventions; the 1984 Convention Against Torture; the Statutes and the case law of the ICTY, the ICTR and the ICC; and the Statutes and the case law of a number of hybrid criminal courts.

⁹⁰ *Application of the Genocide Convention* case, (supra note 84), paras. 439-50.

tried before its own courts those accused of having participated in the Srebrenica genocide, either as principal perpetrators or as accomplices, or of having committed one of the other acts mentioned in Article III of the Convention in connection with the Srebrenica genocide.⁹¹ The ICJ has laid emphasis on territorial jurisdiction by finding that Article VI of the Genocide Convention only obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction.⁹² In accordance also with the *Lotus* principle,⁹³ States are not prohibited, however, from conferring jurisdiction on their criminal courts based on criteria other than where the crime was committed which are compatible with international law, in particular the nationality of the accused.⁹⁴ The jurisdiction of the permanent ICC is based on the principle of complementarity, whereby every participating State has a primary responsibility to investigate and prosecute alleged perpetrators of the serious crimes falling under the ICC Statute which have been committed in its territory.⁹⁵ Accordingly, the ICC would only get involved when a State is unable or unwilling to carry out this obligation. With eight situations and a number of cases before it, the ICC is an important tool in the fight against impunity for serious crimes, with all the challenges involved.

While most of this international judicial activity takes place *ex post facto*, that is, in the aftermath of egregious human rights and humanitarian law violations, both the ICJ and the ICC can potentially play a preventive role in terms of maintaining or restoring peace. The ICJ can do so mainly through its ability to indicate provisional measures to the parties to a dispute.⁹⁶ In seven cases involving situations of armed conflict there were 17 requests for provisional measures filed with the ICJ.⁹⁷ The ICC can do so through its ability to receive information on gross human rights violations, its preliminary investigations and the statements of its Chief Prosecutor. An interesting development in terms of enforcing State obligations concerning the investigation and prosecution of alleged perpetrators of serious crimes are the legal proceedings in the case of *Belgium v. Senegal*, which can be considered as the first successful case of protection of an

⁹¹ *Ibid.*, para. 442.

⁹² *Ibid.*, paras. 439-45.

⁹³ PCIJ, *The Case of the S.S. "Lotus" (France v. Turkey)*, PCIJ Reports 1927, Ser. A, No. 10.

⁹⁴ *Application of the Genocide Convention* case, (supra note 84), paras. 439-45.

⁹⁵ See inter alia Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Leiden: Martinus Nijhoff Publishers, 2008); Carsten Stahn and Mohamed M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011); Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

⁹⁶ Under Article 41 of its Statute the ICJ has been given the power to indicate, if it considers that the circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. See inter alia Hugh Thirlway, 'The Indication of Provisional Measures by the International Court of Justice', in *Interim Measures Indicated by International Courts*, edited by Rudolf Bernhardt (Heidelberg: Springer, 1994), pp. 1-36.

⁹⁷ Gentian Zyberi, 'Provisional Measures of the International Court of Justice in Armed Conflict Situations', *Leiden Journal of International Law* 23(3) (2010), p. 572.

international community interest by a third party.⁹⁸ There the ICJ found that Belgium as a State party to the 1984 Convention against Torture (CAT) had standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Articles 6(2) and 7(1) of CAT to make an immediate preliminary inquiry into the facts and prosecute or extradite Mr Hissène Habré, former President of Chad, for large scale violations of human rights.⁹⁹ According to the ICJ, Belgium's standing was based on the entitlement of each State party to CAT to make a claim concerning the cessation of an alleged breach by another State party.¹⁰⁰ However, similar cases where a third State invokes the responsibility of another State to take active steps to ensure individual criminal accountability for serious human rights violations are most likely to remain an exception to the norm.

2.2 *Certain aspects of the responsibility of international organizations in ensuring peace*

Through the broad range of their rights and duties, international organizations play an important role in ensuring peace. The ICJ has made a number of relevant findings with regard to the rights and obligations of the UN in ensuring peace, mainly through its advisory opinions.¹⁰¹ While there are differing views with regard to the value and legal basis for such recommendations of the ICJ,¹⁰² the advisory role of the ICJ, as the principal legal organ of the UN, and the authority of its legal opinions, cannot be underestimated. First, the ICJ has acknowledged the legal personality of the UN and its capacity to carry out its functions. Secondly, the ICJ has recognized the right of the UN to bring a claim for reparations for injuries suffered by its staff in the performance of duties assigned to them by this organization.¹⁰³ At the same time this court has

⁹⁸ Bruno Simma, 'Human Rights Before the International Court of Justice: Community Interest Coming to Life', in *The Development of International Law by the International Court of Justice*, edited by Christian J Tams and James Sloan, (Oxford: Oxford University Press, 2013), pp. 313-314.

⁹⁹ For a summary of the facts of the case, see *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, (Judgment) [2012] ICJ, pp. 431-440, paras. 15-41.

¹⁰⁰ *Ibid.*, paras. 67-70.

¹⁰¹ See inter alia *Reparation for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion) [1949] ICJ Rep 1949, p. 174; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, (Advisory Opinion) [1962] ICJ Rep 1962, p. 151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, (Advisory Opinion) [1971] ICJ Rep 1971, p. 16; *Western Sahara*, (Advisory Opinion) [1975] ICJ Rep 1975, p. 12; *Legality of the Threat or Use of Nuclear Weapons*, (Advisory Opinion) [1996] ICJ Rep 1996, p. 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 2004, p. 136. See generally Nigel D White, *The Law of International Organisations* (Manchester: Manchester University Press, 2005); Jan Klabbers, *An Introduction to International Institutional Law*, 2nd ed., (Cambridge: Cambridge University Press, 2009); Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 5th revised ed., (Leiden: Martinus Nijhoff Publishers, 2011). See also 'Draft Articles on the Responsibility of International Organizations, with Commentaries', *Yearbook of the International Law Commission*, 2011, Vol. II, Part Two.

¹⁰² See respectively Jean d'Aspremont, 'The Recommendations Made by the International Court of Justice', *International and Comparative Law Quarterly* 56 (2007), pp. 185-198; cf. Hugh Thirlway, 'The Recommendations Made by the ICJ: A Skeptical View', *International and Comparative Law Quarterly* 58(1) (2009), pp. 151-162.

¹⁰³ See *Reparation for Injuries* case (supra note 52), pp. 187-188.

cautioned that all agents of the United Nations, in whatever official capacity they act, must take care not to exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations.¹⁰⁴ The ICJ has stated that when the Security Council adopts a decision in the course of fulfilling its responsibility for the maintenance of international peace and security, it is for all member States to comply with that decision, since to hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.¹⁰⁵ In assisting the Security Council and the General Assembly in their work in the framework of the process of decolonization, the ICJ has clarified the scope of rights of these main organs under the UN Charter vis-à-vis the State and the peoples concerned.¹⁰⁶ As part of its recommendations, in the *Wall* advisory opinion the ICJ considered it its duty to draw the attention of the General Assembly to the need for negotiating efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbors, with peace and security for all in the region.¹⁰⁷ In the *dispositif* of this decision the Court only called on the General Assembly and the Security Council to consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime.¹⁰⁸ Through these legal findings the ICJ has provided necessary legal guidance, while supporting the activity of the main organs of the UN in pursuing the interests of peace.

2.3 *The contribution of the international criminal courts and tribunals with regard to peace*

International criminal courts and tribunals have been instrumental in establishing and enforcing the principle of individual criminal responsibility for internationally recognized crimes.¹⁰⁹ The ICTY was established in 1993, in the midst of the armed conflicts unfolding in the former Yugoslavia. However, neither its establishment, nor the indictments the tribunal issued in the course of its activity managed to restore peace in this region, with conflicts erupting in Kosovo in 1998-1999 and in Macedonia in 2001. Nor did the parties to the conflict heed the repeated

¹⁰⁴ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, (Advisory Opinion) [1999] ICJ Rep 1999, p. 89, para. 66.

¹⁰⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, (Advisory Opinion) [1971] ICJ Rep 1971, p. 54, para. 116.

¹⁰⁶ *Western Sahara* case (supra note 101), pp. 31-33, paras. 54-59.

¹⁰⁷ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, (supra note 24), pp. 200-201, paras. 161-62.

¹⁰⁸ *Ibid.*, p. 201, para. 162.

¹⁰⁹ See respectively Article 6, Charter of the Nuremberg Military Tribunal; Article 5, Charter of the Military Tribunal for the Far East; Article 7, ICTY Statute; Article 6, ICTR Statute; Article 25, ICC Statute; also Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the International Law Commission, 1950, vol. II, para. 97. See generally Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (New York: Oxford University Press, 2012); Kirsten Sellars, *'Crimes against Peace' and International Law* (Cambridge: Cambridge University Press, 2013).

calls by the Security Council to respect human rights and humanitarian law and to bring the conflict to an end. The impact of the ICTY in limiting the scope of the conflict in the former Yugoslavia and restoring peace has been questioned.¹¹⁰ Empirical research is necessary to measure the preventive effect of the ICC on the conflicts taking place in different parts of the world and in furthering peace. The establishment of international criminal courts and tribunals and the ensuing strong emphasis on individual accountability for mass atrocity crimes has triggered a peace versus justice discussion.¹¹¹ On its part, the UN has distanced itself clearly from amnesties which provide immunity for gross violations of human rights and serious violations of international humanitarian law.

In acknowledging the importance of reparations for the victims of mass atrocity crimes, the international community included in the ICC system a Trust Fund and allowed victims to participate in the legal proceedings. The ICTY has recognized that reparations for victims are important for peace and that the investigation and prosecution of perpetrators alone is not sufficient. Thus, the ICTY has stated that, 'The Tribunal cannot, through the rendering of its judgements alone, bring peace and reconciliation to the region: other remedies should complement the criminal trials if lasting peace is to be achieved, and one such remedy should be adequate reparations to the victims for their suffering.'¹¹² From a general perspective, reparations for the victims seem to not have received the necessary attention and the willingness on the part of the international community to shoulder the financial burden for such compensation is lacking.

3. Concluding remarks

This chapter has tried to provide a general perspective on the role and contribution of ICs in promoting and ensuring peace within the broader framework of international law, alongside other methods and mechanisms of dispute settlement, as provided under Article 33 of the UN Charter. The case law and activity of these ICs demonstrates their significant role and contribution in clarifying certain aspects of the relevant legal obligations incumbent upon States, international organizations, and individuals. That said, their role and contribution to peace should not be overestimated, as it is heavily dependent on the willingness of States and international

¹¹⁰ See inter alia Janine Natalya Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace', in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, edited by Bert Swart, Alexander Zahar, and Göran Sluiter, (Oxford: Oxford University Press, 2011), pp. 56-81.

¹¹¹ See inter alia Paul R. Williams and Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Lanham: Rowman & Littlefield Publishers Inc., 2002); Margaret E. McGuinness, 'Peace v. Justice: The Universal Declaration of Human Rights and the Modern Origins of the Debate', *Diplomatic History* 35(5) (2011), pp. 749-768; Richard Falk, *Seeking Peace and Justice in the 21st Century: Humanitarian Intervention, Responsibility to Protect, and Legitimacy Wars* (New York: Routledge, 2014).

¹¹² 'Letter dated 12 May 2011 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council', 18 May 2011, UN Security Council, UN Doc. S/2011/316, para. 90.

organizations to make use of their procedures and subsequently to comply with their decisions. Indeed, as Rosenne has aptly put it, the real test for States is found in their willingness in general to allow the law to occupy a prominent and constructive part in their international relations.¹¹³ The contribution of the selected ICs to peace would fall broadly under the concept of *negative peace*, in that they try to prevent, stop and condemn the unlawful use of force, as well as assign State responsibility and individual criminal responsibility for serious human rights and humanitarian law violations.

By settling inter-State disputes and rendering advisory opinions to the main organs of the UN and its specialized agencies the ICJ has contributed in maintaining or restoring international peace and security, alongside the main organs of the UN. This role is mainly relevant for instances of inter-State conflicts on various grounds, which could endanger peace and security. The ICTY and the ICTR have played an important role in investigating and prosecuting perpetrators of genocide, war crimes and crimes against humanity. That function is continued on a permanent basis and broader coverage by the ICC. By emphasizing individual criminal accountability for mass atrocities these judicial mechanisms can play a retributive as well as a preventive and deterrent role, which is potentially important for purposes of maintaining or restoring peace. At the same time, by exposing the truth and creating a broad narrative, these international judicial organs can contribute to the restoration of peace between different ethnic or religious groups in a State.

The first aspect of the contribution of ICs to peace is related to their primary function, namely the settlement of international disputes or the investigation and prosecution of individuals for crimes which are of concern not only to an affected society, but also to the international community as a whole. The second aspect of their contribution is broader and relates to their institutional role within the respective organization, namely rendering support and legitimacy to the actions of their sister organs. Thus, the ICJ has supported the General Assembly and the Security Council on different issues relating to the maintenance of international peace and security, through clarifying the scope of their powers as well as the nature of their inter-relationship. The ICTY and the ICTR have assisted the Security Council in addressing mass atrocity crimes committed respectively in the former Yugoslavia and Rwanda. The third aspect of ICs' contribution, which follows from their judicial function, is their ability to hold States as well as individuals responsible for serious crimes which disturb international peace and security. As the ICJ has rightly observed, that duality of responsibility continues to be a constant feature of international law.¹¹⁴ A related, fourth aspect of the contribution of ICs to promoting and ensuring peace is the development of relevant standards of behavior for States, international organizations, individuals and non-State actors more generally, lest they incur international

¹¹³ Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, 4th ed., (Leiden: Brill Publishers, 2006), p. 176.

¹¹⁴ *Application of the Genocide Convention case*, (supra note 84), p. 116, para. 173.

responsibility.¹¹⁵ To the extent the main ICs have been engaged in these complex processes of maintaining or restoring peace and ensuring accountability for serious crimes which endanger peace, these four aspects of their activity seem to have been used to serve the interests of peace.

¹¹⁵ On the issue of judicial law-making see inter alia Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Steven & Sons Limited, 1958), pp. 155-223; Edward McWhinney, 'The International Court of Justice and International Law-Making: The Judicial Activism/Self-Restraint Antinomy', *Chinese Journal of International Law* 5(1) (2006), pp. 3-13; Thomas Buergenthal, 'Lawmaking by the ICJ and Other International Courts, Proceedings of the Annual Meeting' *Am. Soc'y Int'l L. Proc.* 103 (2009), pp. 403-406; Shane Darcy and Joseph Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010); Armin von Bogdandy and Ingo Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', *German Law Journal* 12 (2011), pp. 979-1004; Niels Petersen, 'Lawmaking by the International Court of Justice—Factors of Success', *German Law Journal* 12 (2011), pp. 1295-1316; Armin von Bogdandy and Ingo Venzke (eds), *International Judicial Lawmaking* (London: Springer 2012); Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013); Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford: Oxford University Press, 2014).