The International Court of Justice and the Rights of Peoples and Minorities

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Gentian Zyberi
University of Oslo
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Gentian Zyberi*

1. Introduction

A number of legal issues concerning the rights of peoples and minorities have been argued before the International Court of Justice (ICJ, or 'the Court') and its predecessor, the Permanent Court of International Justice (PCIJ, or 'the Permanent Court').[1] Since peoples or minorities as such do not have standing before the ICJ, the Court's involvement with regard to these rights has arisen mainly through its advisory function. Nevertheless, there have also been a number of relevant contentious cases. Although it is unquestionable that certain rights have been granted to peoples and minorities, these two groups have not yet achieved legal capacity to demand respect for those rights.[2] It has been states or organs of the League of Nations or later of the United Nations which have taken action on behalf of affected peoples and minorities. In acknowledging that fact in the context of the right of peoples to self-determination, the ICJ has noted that 'all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.'[3] Interestingly, neither the Permanent Court nor the ICJ has endeavoured to provide a general, comprehensive definition of either the notion of peoples or that of minorities.[4] In any case, in the framework of the United

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[1] See generally T Koivurova, 'The International Court of Justice and Peoples' (2007) 9 *Intl Community L Rev* 157; A-L Vaurs-Chaumette, 'Peoples and Minorities' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford: OUP, 2010) 993–1003. For a more general discussion see AM de Zayas, 'The International Judicial Protection of Peoples and Minorities' in C Brölman, R Lefeber and M Zieck (eds), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993) 253–87.

[2] Vaurs-Chaumette (n 1) 994.

[3] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [1971] ICJ Rep 16, 56, para 127.

[4] Nor has that been done to date by other international adjudicatory mechanisms. However, it bears mentioning that the PCIJ defined a minority community as a 'group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instructions and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other'. A definition of the term 'minority' can be found in the Report *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, Commission on Human Rights: Sub-Commission on Prevention and Protection of Minorities, by Asbjørn Eide, UNGAOR, forty-fifth Sess, Agenda Item 17, UN Doc E/CN.4/Sub.2/1993/34 (1993), 7, para 29. That definition reads: 'For the purpose of this study, a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the

Nations (UN) several instruments have been adopted which provide for extensive rights for minorities and peoples, including indigenous peoples.

This chapter provides a tentative assessment of the extent to which international law in these areas has been shaped by the PCIJ's and ICJ's findings. That evaluation is based on a comparison of the legal findings of the PCIJ and the ICJ in these areas with relevant international law standards that have developed subsequently and in tracking the influence of such findings on international law-making processes as well as on the case law of other (quasi-)judicial bodies. Eventually, violations of the rights of peoples and minorities trigger questions of international responsibility, including both individual and shared state responsibility.[5] Although on occasion the stage of attributing responsibility to states for internationally wrongful acts affecting peoples and minorities has not been reached because of jurisdictional hurdles, as the ICJ has correctly observed, states remain responsible for acts attributable to them which are contrary to international law.[6]

Divided in two main parts, the chapter focuses on the PCIJ's and ICJ's contributions to interpreting and developing the rights of peoples and minorities through their case law. The contribution of the Permanent Court to interpreting and developing the rights of minorities is dealt with in the first part, since it is mainly this court which has dealt with minority issues.[7] This part starts with a discussion of the PCIJ's role in the system of minorities protection. The discussion then turns to the principles of equal treatment and the prohibition of discrimination, followed by the right of a minority to preserve its specific identity, namely its language, religion, and cultural traditions. The second part deals with the contribution of the ICJ with regard to the rights of peoples. In this part, the right of peoples to self-determination

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population.' An earlier definition is provided by Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, in a 1977 report, who defines a minority as a 'group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language'. See UN Doc E/CN.4/Sub.2/384/Rev.1, para 568.

[5] On the issue of shared responsibility see *inter alia* A Nollkaemper, *Issues of Shared Responsibility before the International Court of Justice*, ACIL Research Paper No 2011-01, April 2011, <http://www.sharesproject.nl/publication/issues-of-shared-responsibility-before-the-international-court-of-justice> (accessed 29 December 2012).

[6] See inter alia *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Judgment, Preliminary Objections) [2004] ICJ Rep 279, 328, para 128; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Judgment, Preliminary Objections) [2006] ICJ Rep 6, 53, para 127; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment, Merits) [2007] ICJ Rep 43, 155, para 277.

[7] For a general discussion of the evolution of minority rights see *inter alia* N Lerner, 'The Evolution of Minority Rights in International Law' in Brölman et al (n 1) 77–101 and comments by M Novak, Brölman et al (n 1) 103–18. Lerner distinguishes four major stages in that evolution, namely pre-World War I; the League of Nations system; the pattern followed by the United Nations implying a shift from group protection to the protection of individual rights and freedoms almost exclusively; and the modern group-oriented trends. See also K Henrard, 'Charting the Gradual Emergence of a More Robust Level of Minority Protection: Minority Specific Instruments and the European Union' (2004) 24(4) *Netherlands Quarterly of Human Rights* 559; K Henrard, *Equal Rights versus Special Rights? Minority Protection and the Prohibition of Discrimination* (European Communities, 2007).

and peoples' right to natural resources are dealt with first. Subsequently, the discussion turns to the Court's contribution to interpreting and developing peremptory norms protecting the rights of peoples, namely the prohibition of genocide, of racial discrimination, and of apartheid.

2. International protection of the rights of minorities through the Permanent Court

As noted above, a significant contribution to the law relating to the rights of minorities was made by the ICJ's predecessor, the PCIJ, in the period between the two World Wars.[8] Between 1922 and 1940 the PCIJ dealt with twenty-nine contentious cases between states, and delivered twenty-seven advisory opinions, a number of which dealt with issues concerning the rights of minorities.[9] With the dissolution of the Ottoman Empire and other major changes in the political map of Europe between the First and the Second World Wars which resulted in the creation of a number of new states, the rights of minorities took on increased importance.[10] Many of the newly created states in Europe included large minorities within their borders. Their governments had little desire to comply with the numerous international obligations imposed upon them under the Paris Peace Treaties or undertaken through unilateral declarations.[11] Moreover, it is not certain that the minorities themselves were sufficiently cohesive or motivated to take responsibility for their own cultural affairs, not to mention their political affairs.[12] Many controversial issues arose between states in the context of mutual and voluntary emigration of individuals and communities of minorities, as well as the voluntary or compulsory exchange of populations, which took place mainly between countries emerging from the former Ottoman Empire.

While not providing a comprehensive definition of minorities, a distinction was drawn by the Permanent Court between minorities in the broad sense and minorities in the narrow sense. Thus, according to the PCIJ, the members of minorities who are not citizens of the state enjoyed protection—guaranteed by the League of Nations—of life and liberty and the free exercise of their religion, while minorities in the narrow sense, that is, minorities whose members are citizens of the state, enjoyed—under the same guarantee—amongst other rights,

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[8] For general information on minorities under international law see <http://www.ohchr.org/EN/Issues/Minorities/Pages/internationallaw.aspx> (accessed 29 December 2012).

[9] For the full text of the publications of the PCIJ see <http://www.icj-cij.org/pcij/index.php?p1=9> (accessed 29 December 2012). Generally on the PCIJ see MO Hudson, *The Permanent Court of International Justice 1920–1942* (New York: Macmillan, 1943).

[10] A number of treaties were concluded during that time, including the Treaty of Lausanne (July 1923, League of Nations Treaty Series, vol 28, 112–13), the Treaty of Trianon (League of Nations Treaty Series, vol 6, 188), and the Treaty of Saint Germain (September 1919, 226 CTS 182).

[11] See, *inter alia*, Declaration by the Government of Albania, issued 2 October 1921 (League of Nations Treaty Series, vol 9, 174–9); Declaration by the government of Lithuania, issued 12 May 1922 (League of Nations Treaty Series, vol 22, 394–9); Declaration by the government of Bulgaria, issued 29 September 1924 (League of Nations Treaty Series, vol 29, 118–21); Declaration by the government of Greece, issued 29 September 1924 (League of Nations Treaty Series, vol 29, 124–7).

[12] C Fink, 'The Minorities Question at the Paris Peace Conference: The Polish Minority Treaty, June 28, 1919' in MF Boemeke, GD Feldman and E Gläser (eds), *The Treaty of Versailles: A Reassessment after 75 Years* (Cambridge: CUP, 1998) 263.

equality of rights in civil and political matters, and in matters relating to primary instruction.[13] The PCIJ's role in and contribution to developing and interpreting minority rights is dealt with in some detail in the following four subsections.

2.1 The PCIJ's role in the League of Nations system of minorities protection

The PCIJ made its contribution to the League of Nations' minority protection system by solving disputes arising from the application of relevant minority treaties. Because of the potential adverse effects on international peace and security, the treatment of minorities has been considered a matter of international concern. Among others, reciprocal and voluntary emigration and exchange of populations were some of the measures employed to reduce the potential for conflict.[14] In the *Greco-Bulgarian 'Communities'* case, the PCIJ noted the close relationship that existed between the relevant Greco-Bulgarian Convention concerning emigration and the general body of measures designed to secure peace by means of the protection of minorities.[15] As the PCIJ put it:

> The general purpose of the instrument is thus, by as wide a measure of reciprocal emigration as possible, to eliminate or reduce in the Balkans the centres of irredentist agitation which were shown by the history of the preceding periods to have been so often the cause of lamentable incidents or serious conflicts, and to render more effective than in the past the process of pacification in the countries of Eastern Europe.[16]

Besides rather radical and quite traumatic measures such as emigration and exchange of populations, the minority treaties under the League of Nations included certain guarantees such as the granting of citizenship, equal legal protection and religious freedoms. It bears mentioning that minorities treaties and the case law of the PCIJ with regard to the issue of citizenship were considered by the International Law Commission (ILC) in its work on the topics 'Nationality, including statelessness'[17] and 'Nationality in relation to the succession of States'.[18] As the PCIJ pointed out, the idea underlying the treaties for the protection of minorities was to secure for minorities the possibility of *living peaceably* alongside that population and cooperating amicably with it, while at the same time *preserving the characteristics* which distinguish them from the majority, and satisfying the ensuing special

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[13] PCIJ, *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, PCIJ Series A/B (1932), No 44, 39.

[14] The policy of solving possible minority conflicts by physically uprooting minorities or whole populations instead of trying to guarantee them their human rights in their homelands was pursued even following World War II. See de Zayas (n 1) 258–9.

[15] *The Greco-Bulgarian 'Communities'*, PCIJ Series B (1930), No 17, 19.

[16] *The Greco-Bulgarian 'Communities'*, (n 15) 19.

[17] See *Ybk of the ILC*, vol II, 1954, 33, 51, and 93 dealing with the issue of conferring nationality on all persons born or domiciled in the territory of the new state; and allowing the right of option upon reaching adulthood, widely recognized in the peace treaties and minorities treaties that were concluded after the end of World War I. The work of the International Law Commission on this topic resulted in the Convention on the Reduction of Statelessness of 1961, United Nations Treaty Series, vol 989, 175.

[18] See the ILC's Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, *Ybk of the ILC*, 1999, vol II, Part Two, 37.

needs.[19] While supposedly treaties on the rights of minorities were to herald a new era with regard to minority rights, by and large these treaties lacked effective tools for enforcement.[20]

Although never formally abrogated, the system of the League of Nations on the protection of minorities ceased to exist, as the activity of the League came to an end.[21] While that system of protection was operating, through its advisory opinions the PCIJ assisted the Council of the League of Nations in its work on various minority problems and laid the foundations relevant to the scope of minority rights under international law. In the case *German Settlers in Poland*, the PCIJ construed the terms of the Minorities Treaty as allowing the Council, when acting under this treaty, to consider and interpret the laws or treaties on which the rights claimed to be infringed were dependent, so as to ensure that the pledged protection for the minority might be certain and effective.[22] That is a very important finding, since a minority lacked the legal capacity to invoke the international responsibility of the responsible state when its rights were breached.

From the start the Permanent Court emphasized that in the relations between the contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.[23] Moreover, the PCIJ considered as self-evident the principle according to which a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken.[24] Basically, the PCIJ articulated a principle of international law which, as Fitzmaurice has rightly noted, informs the whole international legal system and applies to every branch of it.[25] That general principle on the relationship between domestic law and international treaties is embodied in Article 27 of the 1969 Vienna Convention on the Law of Treaties, which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[26] Giving priority to the terms of the minority treaties over domestic laws was necessary in order to prevent the imposition of discriminatory domestic laws and practices on minorities.

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[19] *Minority Schools in Albania*, PCIJ Series A/B (1935), No 64, 17.

[20] For a detailed discussion of the system of minorities protection see, *inter alia*, H Rosting, 'Protection of Minorities by the League of Nations' (1923) 17(4) *AJIL* 641, <http://www.jstor.org/stable/2188655> (accessed 29 December 2012); JL Kunz, 'The Present Status of the International Law for the Protection of Minorities' (1954) 48(2) *AJIL* 282, <http://www.jstor.org/stable/2194377> (accessed 29 December 2012); Fink (n 12) 249–74; L Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Dordrecht: Martinus Nijhoff, 2005).

[21] *Study of the Legal Validity of the Undertakings concerning Minorities* (E/CN.4/367, 7 April 1950). See also Kunz (n 20) 284.

[22] *Advisory Opinion given by the Court on September 10th 1923 on certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, PCIJ Series B (1923), No 6, 25.

[23] *The Greco-Bulgarian 'Communities'* (n 15) 32.

[24] *Exchange of Greek and Turkish Populations*, PCIJ Series B (1925), No 10, 20.

[25] GG Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *RdC* 85.

[26] For a detailed discussion see, *inter alia*, the commentary to Art 27 by A Schaus in O Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford: OUP, 2011) 688–701.

2.2 The prohibition of discrimination and equal treatment of minorities

As the PCIJ noted, in order to ensure peaceful cohabitation within the countries concerned and to enable the preservation of the particular characteristics of the minorities living therein, the provisions of minority treaties addressed two closely related concerns. The first concern was placing nationals belonging to racial, religious, or linguistic minorities on a footing of perfect equality in every respect with the other nationals of the state. The second concern was ensuring for the minority suitable means for the preservation of their racial peculiarities, their traditions, and their national characteristics. As the PCIJ put it, these two issues are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority.[27] The Permanent Court also observed that the Polish Minorities Treaty, like all other minorities treaties, lays down the *minimum guarantees* which the state concerned is required to accord.[28] Further, it added that the state is at liberty, either by means of domestic legislation or under a convention, to grant to minorities rights over and above those assured by the Minorities Treaty.[29] The minimum guarantees safeguard was incorporated as a legal provision in many international human rights treaties adopted after the Second World War under the framework of the United Nations.

The PCIJ applied the general legal principles of non-discrimination and equal treatment in several cases concerning minorities. The prohibition of discrimination is a general principle of international law which permeates not only the system of international protection of minorities, but also more generally the body of international human rights law developed after the Second World War. Under the minority protection regime, minorities could draw from public funds for their own educational, religious, or charitable purposes. Moreover, in towns and districts containing a considerable proportion of nationals belonging to racial, religious, or linguistic minorities, these minorities were to be assured an equitable share in sums provided out of public funds under the state, municipal or other budgets, for educational, religious, or charitable purposes.[30] In its Advisory Opinion on *German Settlers in Poland*, the PCIJ stated that the main object of the Minorities Treaty is to 'assure respect for the rights of minorities and to prevent discrimination against them by any act whatsoever . . . independent of whether the rights the infraction of which is alleged are derived from a legislative, judicial or administrative act, or from an international engagement'.[31] Many years later, in the *Minority Schools in Albania* case, the PCIJ observed again that the idea underlying the treaties for the protection of minorities was 'to ensure that nationals belonging

[27] *Minority Schools in Albania* (n 19) 17.

[28] *Treatment of Polish Nationals* (n 13) 40. In *Minority Schools in Albania* the Permanent Court spoke about a minimum of rights to be granted to all inhabitants without distinction as to birth, nationality, language, race, or religion as the minimum necessary to guarantee effective and genuine equality as between the majority and the minority.

[29] *Treatment of Polish Nationals* (n 13) 40.

[30] *Minority Schools in Albania* (n 19) 22.

[31] *German Settlers in Poland* (n 22) 25.

to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State'.[32]

In interpreting the meaning of the phrase 'same treatment and security in law and in fact' contained in Article 8 of the Minorities Treaty,[33] the PCIJ held that '[e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations'.[34] According to the PCIJ, 'same treatment and security in law and in fact' implies a notion of equality which is peculiar to the relations between the majority and minorities.[35] In further clarifying its understanding of equality under the applicable law, the PCIJ noted that '[t]here must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law'.[36] The PCIJ also emphasized that equality between members of the majority and of the minority must be an *effective, genuine* equality.[37] Unsurprisingly, in the *German Settlers in Poland* case the Permanent Court found a violation with regard to a Polish law which, while ostensibly drafted in neutral terms, in fact affected only German farmers who had settled in Poland before the First World War under leases granted by the Prussian State.[38] Almost a decade later, the Permanent Court took a similar position in the *Treatment of Polish Nationals* case by stating that a measure which in terms was of general application, but in fact was directed against Polish nationals and other persons of Polish origin or speech, constituted a violation of the prohibition of discrimination.[39] In that same case the PCIJ noted again that 'the prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law.'[40] It has been noted that, through these cases, the Permanent Court laid the foundations for what would become some decades later the policy of positive discrimination in favour of minorities, thus paving the way for the famous concept of 'affirmative action', so dear to American liberals in the 1970s.[41] These findings of the PCIJ provide a useful discussion of and distinction between formal and substantive equality, a distinction which over time has become part and parcel of international human rights law theory and practice.

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[32] *Minority Schools in Albania* (n 19) 17.

[33] *German Settlers in Poland* (n 22) 20. The relevant part of Art 8 reads: 'Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the *same treatment and security in law and in fact* as the other Polish nationals' (emphasis added).

[34] *Minority Schools in Albania* (n 19) 19.

[35] *Minority Schools in Albania* (n 19) 19.

[36] *German Settlers in Poland* (n 22) 24.

[37] *Minority Schools in Albania* (n 19) 19.

[38] *German Settlers in Poland* (n 22) 36–7. For a very succinct discussion of the contribution of the PCIJ to minority rights see, *inter alia*, the speech given by His Excellency Judge Gilbert Guillaume, President of the ICJ, to the Sixth Committee of the General Assembly of the United Nations on 30 October 2002, para 2, <http://www.icj-cij.org/presscom/files/3/3123.pdf> (accessed 29 December 2012).

[39] *Treatment of Polish Nationals* (n 13) 28.

[40] *Treatment of Polish Nationals* (n 13) 28.

[41] Guillaume (n 38).

A rather controversial issue arising in the context of implementing agreements on population exchanges was how to dispose of property belonging to minority communities. In the *Greco-Bulgarian 'Communities'* case the PCIJ stated that the provisions of the Convention dealing with the issue of 'property belonging to communities' had to be construed in accordance with the aim the Convention was designed to achieve, namely to facilitate emigration as far as possible, and not as including only those communities which have been accorded special legal recognition by the local legislation.[42] In introducing the concept of equality of treatment among emigrant members of these communities, the PCIJ held that just as persons emigrating subsequent to the Convention participate in the property of the community the dissolution of which is brought about by their emigration, so former refugees ought to have the possibility of participating in the proceeds of the liquidation of property belonging to a community of which they were members and the dissolution of which resulted from their departure.[43] These findings of the Permanent Court were important in that they tried to facilitate to the greatest extent possible the emigration of minority communities and transfer of their assets, while preserving equality of treatment among the members of these communities.

2.3 The right of a minority to preserve its identity

The right of a minority to preserve its own identity was probably one of the first internationally recognized group rights. The treaty clauses aimed at protecting a minority's culture and specific identity are an important component of the minority protection system. In *Minority Schools in Albania*, the PCIJ observed that the idea underlying the treaties for the protection of minorities was 'to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics'.[44] To that end, minorities had the right, usually at their own expense, to establish, manage, and control charitable, religious, and social institutions, schools, and other educational establishments, as well as the right to use their own language and follow their own religious beliefs. Although minority rights were granted in terms of group rights, there was no agreed-upon definition as to what constitutes a minority community. Perhaps this was due to the PCIJ considering that the existence of communities was a question of fact and not one of law.[45] The Permanent Court underscored the importance of religion, language, and traditions in distinguishing a minority community from the rest of the population in holding that:

By tradition, which plays so important a part in Eastern countries, the 'community' is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in

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[42] *The Greco-Bulgarian 'Communities'* (n 15) 22.

[43] *The Greco-Bulgarian 'Communities'* (n 15) 32. Moreover, the PCIJ's interpretation test of 'aim and spirit' has become the ICJ's 'object and purpose' test. This test was ultimately included in Art 31(1) of the 1969 Vienna Convention on the Law of Treaties, which provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its *object and purpose*.

[44] *Minority Schools in Albania* (n 19) 17.

[45] *The Greco-Bulgarian 'Communities'* (n 15) 22.

a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.[46]
In its Advisory Opinion on *Rights of Minorities in Upper Silesia (Minority Schools)* the PCIJ recognized the right of every national to declare freely according to their conscience and on their personal responsibility whether or not they belong to a racial, linguistic, or religious minority and to declare the language of a pupil or child for whose education they are legally responsible.[47] Moreover, according to the Permanent Court, such a declaration could be subject to no verification, dispute, pressure, or hindrance whatsoever on the part of the authorities.[48] Basically, this finding of the Permanent Court respects the right of the parents or legal guardian of a child belonging to a minority to choose the language of education of that child. The right of parents or guardians to choose a child's language of education was reconfirmed a few years later in the *Access to German Minority Schools in Upper Silesia* case.[49]

The cultural rights conferred on minorities under the minorities treaties in function of preserving their specific identity and further elaborated in the case law of the PCIJ have found expression in several international human rights instruments. A general provision to this end is Article 27 of the 1966 International Covenant on Civil and Political Rights (ICCPR).[50] A similarly worded provision is Article 30 of the 1989 United Nations Convention on the Rights of the Child, which provides that in those states in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, and to use his or her own language. More far-reaching provisions with regard to the right to education of minorities are included in the European Charter for Regional or Minority Languages of November 1992.[51] The safeguards discussed in the case law of the PCIJ concerning equality before the law and equal protection of the law and the prohibition of adverse discrimination are included in the 1995 Framework Convention for the Protection of National Minorities.[52] The Framework Convention provides strong guarantees

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[46] *The Greco-Bulgarian 'Communities'* (n 15) 21 and 33.

[47] *Rights of Minorities in Upper Silesia (Minority Schools)*, PCIJ Series A (1928), No 15, 46.

[48] *Rights of Minorities in Upper Silesia (Minority Schools)* (n 47) 47.

[49] *Access to German Minority Schools in Upper Silesia*, PCIJ Series A/B (1931), No 40, 20.

[50] Art 27 of the ICCPR reads: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

[51] See esp Art 8 on Education. Twenty-five states members of the Council of Europe are party to the European Charter for Regional or Minority Languages. For the full text of this instrument see <http://conventions.coe.int/treaty/en/Treaties/Html/148.htm> (accessed 29 December 2012).

[52] Under Art 4 of the Framework Convention for the Protection of National Minorities the states parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. This article explicitly prohibits any discrimination based on belonging to a national minority. The states parties also undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political, and cultural life, full and effective equality between

also in the field of education.[53] A number of these safeguards are included in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[54]

Another important finding of the PCIJ with regard to the right of minorities to preserve their identity is that acknowledging the obligation of a state to allow minorities to establish and maintain their own educational institutions.[55] Obviously, in the absence of such a right the ability of a minority to pass on from generation to generation their language, culture, and religion would be severely curtailed. Article 13 of the 1995 Framework Convention for the Protection of National Minorities reflects this finding, in providing that within the framework of their education systems, states parties shall recognize that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.[56]

2.4 Interim observations on the PCIJ

The PCIJ's contribution to protecting the rights of minorities is multifaceted and its findings cover both procedural and substantive legal issues. In explaining the aim and purpose of the minority treaties, the PCIJ emphasized the close relationship between these treaties and the preservation of peace. From an institutional perspective, the Permanent Court supported a reading of minority treaties which recognized the power of the Council of the League to consider and interpret the laws or treaties on which the rights claimed to be infringed were dependent, so as to ensure certain and effective international protection for the minority concerned. That reading provided necessary institutional support to the minority protection system of the League. By interpreting the meaning of equality in fact and in law in the sense of an obligation on the part of the state to ensure genuine and effective equality, the PCIJ laid the theoretical and legal basis for affirmative action. The PCIJ applied the principle of equality of treatment not only between the minority and the majority, but also between the minority elements themselves. The Permanent Court also clarified that in order for the prohibition against discrimination to be effective, such prohibition must ensure the absence of

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persons belonging to a national minority and those belonging to the majority by taking due account of the specific conditions of the persons belonging to national minorities. The third paragraph of Art 4 provides that positive measures adopted shall not be considered an act of discrimination. For more on the protection of minorities within the framework of the Council of Europe see <http:/www.coe.int/minorities> (accessed 29 December 2012).

[53] See the Commentary on Education under the Framework Convention for the Protection of National Minorities, Advisory Committee on the Framework Convention for the Protection of National Minorities, ACFC/25DOC(2006)002, March 2006, <http://www.coe.int/t/dghl/monitoring/minorities/3_fcnmdocs/pdf_commentaryeducation_en.pdf> (accessed 29 December 2012).

[54] GA Res 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 18 December 1992. For the full text of the Declaration see <http://www2.ohchr.org/english/law/minorities.htm>.

[55] *Minority Schools in Albania* (n 19) 22.

[56] It should be noted, however, that this article provides that the exercise of this right does not entail any financial obligation for the states parties.

discrimination in fact as well as in law, that is, through legislation or the conduct of administration by state authorities.

It is now generally accepted that the protection of national minorities and of the rights and freedoms of persons belonging to those minorities form an integral element of the international protection of human rights, and as such falls within the scope of international cooperation.[57] Another important contribution made by the PCIJ was its interpretation of minorities treaties as laying down the minimum guarantees which the state concerned is required to accord, while leaving the state at liberty, either by means of domestic legislation or under a convention, to grant to minorities more rights. The language of minimum rights or minimum standards is routinely included as a provision in several important human rights instruments adopted under the framework of the United Nations after 1945. Through its legal findings on minority rights the PCIJ also rendered its modest contribution to the cause of peace, albeit that could not avoid the outbreak of the Second World War.

The PCIJ did not simply interpret the fairly ambitious minorities treaties agreed after World War I; through its legal findings it also contributed significantly to laying the foundations and the standards for the present-day international legal framework on minority protection. Nonetheless, the case law of the PCIJ seems generally neglected and subject to little attention, except in specialized scholarly writings. The reasons for this may be of a political or purely practical nature. From a political standpoint, perhaps the demise of the League caused the case law of the PCIJ to be perceived as tainted by the League's weak legacy. Moreover, there still exists a general hesitance on the part of international adjudicatory mechanisms to refer to the case law of other international adjudicatory mechanisms. On a practical level, not much attention is devoted to the case law of the PCIJ probably because of a general lack of familiarity with it. Also, until recently, when the publications of the PCIJ were made electronically available through the ICJ's website, quick and easy access to them remained fairly limited. Otherwise, it is difficult to explain the lack of reference to relevant findings of the PCIJ in the relevant case law of the European Court of Human Rights,[58] the work of the Human Rights Committee,[59] and the thematic commentaries issues by the Advisory Committee on the Framework Convention for the Protection of National Minorities.[60]

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[57] Art 1 of the Council of Europe Framework Convention on National Minorities of 1995 (ETS No 157). For more information see <http://www.coe.int/t/dghl/monitoring/minorities/default_en.asp> (accessed 29 December 2012).

[58] See eg *Gorzelik and others v Poland* (Application no 44158/98), Grand Chamber, Judgment of 17 February 2004. For a detailed discussion of the work of the European Court of Human Rights on minority issues see, *inter alia*, G Pentassuglia, 'The Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' (2012) 19 *Intl J Minority and Group Rights* 1.

[59] See General Comment No 23, 'The Rights of Minorities', Art 27, CCPR/C/21/Rev.1/Add.5, <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

[60] See the Advisory Committee on the Framework Convention for the Protection of National Minorities, thematic commentaries on Education, and that on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs under the Framework Convention for the Protection of National Minorities, respectively documents ACFC/25DOC(2006)002 of March 2006 and ACFC/31DOC(2008)001 of May 2008.

3. The rights of peoples through the lens of the ICJ

While there are several international treaties which acknowledge that peoples enjoy some broad rights, it remains fairly elusive what the scope and parameters of those rights are and who is entitled to claim them on behalf of the peoples concerned.[61] In any event, under Article 34 of the ICJ Statute, only states—not peoples—can be parties to cases brought before the Court. So far, only two entities have been allowed to submit their views to the Court in cases which concerned them, namely the PLO as representative of the Palestinian people and the Kosovar authorities who had declared the independence of Kosovo on 17 February 2008.[62] The Court appears somewhat lenient in allowing entities that can provide useful information to it to participate in the course of advisory proceedings.

The only case before the ICJ where rights of minorities have come to the fore is the *Georgia v Russia* case of August 2008. In setting forth the basis for the dispute the ICJ stated that the disputes between these two countries undoubtedly did arise between June 1992 and August 2008 in relation to events in Abkhazia and South Ossetia, which involved among others alleged breaches of international humanitarian law and of human rights, including the *rights of minorities*.[63] Finding that it lacked jurisdiction, the Court did not address Georgia's claims that this case was about the ethnic cleansing, as a form of racial discrimination, of ethnic Georgians and other minorities from regions within Georgian territory (regions of Abkhazia and South Ossetia), save for mentioning the Moscow agreement of 1992 and the Sochi agreement of 1993 which confirmed the application of international human rights law including rules against discrimination.[64]

The following subsections deal respectively with the ICJ's contribution to interpreting and developing the right of peoples to self-determination and to use their natural resources, as well as to clarifying obligations incumbent upon states under certain peremptory norms of

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[61] The UN Charter includes a couple of references to the principle of equal rights and self-determination of peoples, as well as references to the duties of states towards peoples living in non-self-governing and trust territories. Art 1 common to the two International Covenants (ie, on civil and political rights and on economic, social, and cultural rights) provides *inter alia* that 'all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.'

[62] For the sake of clarity it must be added that although they are not state members of the UN, both entities appeared in the course of advisory proceedings as parties that could provide the Court with pertinent information. See, respectively, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Order of 19 December 2003 [2003] ICJ Rep 429 (Palestine), and *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Order of 17 October 2008 [2008] ICJ Rep 410 (Kosovo).

[63] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)*, Judgment of 1 April 2011 (Preliminary Objections), para 32, <http://www.icj-cij.org/docket/files/140/16398.pdf> (accessed 29 December 2012); emphasis added.

[64] *Georgia v Russia* (n 63) paras 40, 44.

international law, namely the prohibition of genocide and of racial discrimination and apartheid.

3.1 The right of peoples to self-determination

The ICJ has clarified a number of issues regarding the right of peoples to self-determination in the context of the process of decolonization.[65] Its contribution relates to the external aspect of self-determination concerning the right of peoples to freely determine their political status. The right of peoples to self-determination is one of the main principles of international law enshrined in the Charter of the United Nations and the two 1966 International Covenants, as well as in other international law instruments. From an institutional perspective the Court has supported the work of the General Assembly and the Security Council concerning the realization of the right of peoples to self-determination.[66] Thus, the Court has acknowledged the right of the General Assembly to exercise supervisory competences over the territories under the trusteeship system and the power to terminate mandate and trusteeship agreements.[67] Dame Rosalyn Higgins, former President of the ICJ, has noted that the legal findings of the ICJ and successive General Assembly resolutions have facilitated the articulation and acceptance of self-determination as a justiciable right, and not solely as a mere political aspiration.[68] In 1960 the General Assembly emphasized the importance of the process of decolonization in its Declaration on the Granting of Independence to Colonial Countries and Peoples (the Decolonization Declaration) and in other resolutions it reaffirmed the importance of the universal realization of the right of peoples to self-determination for the effective guarantee and observance of human rights.[69] In its work the ICJ has been mindful of and has taken into account the development over time of the law on self-determination of

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[65] For a detailed discussion see, *inter alia*, A Cassese, 'The International Court of Justice and the Rights of Peoples to Self-Determination' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge: CUP, 1996) 351–63; J Crawford, 'The General Assembly, The International Court and Self-Determination' in Lowe and Fitzmaurice, 585–606; TD Musgrave, *Self Determination and National Minorities* (Oxford: OUP, 2002) 77–90; J Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Dordrecht: Martinus Nijhoff, 2007) 255–73, 301–17; G 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* (Antwerp: Intersentia, 2008) 102–34; G Zyberi, 'Self-Determination through the Lens of the International Court of Justice' [2009] *Netherlands Intl L Rev* 429. More generally on the rights of peoples see J Crawford and H Kruuk (eds), *The Rights of Peoples* (Oxford: OUP, 1992); Brölmann et al (n 1); Alston (ed), *Peoples' Rights* (Oxford: OUP, 2001).

[66] For a detailed discussion see *inter alia* M Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer, 2003) 146–8, 152–5.

[67] See, respectively, *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 137; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 3) 50, para 105.

[68] See R Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) 113.

[69] GA Res 1514 (XV) of 14 December 1960. For more information on the United Nations and Decolonization, see <http://www.un.org/en/decolonization/index.shtml> (accessed 29 December 2012). For resolutions on self-determination see eg GA Res 65/201, Universal Realization of the Right of Peoples to Self-Determination, seventy-first plenary meeting, 21 December 2010.

peoples and the activities of the main UN organs in this regard.[70] Future resolutions of the General Assembly on self-determination issues may benefit from paying due attention to relevant legal findings of the ICJ on this matter. And in General Assembly resolutions concerning the right to self-determination in specific cases, reference might be made to relevant ICJ decisions in a more consistent manner. Notably, the General Assembly resolution adopted on the issue of self-determination of Palestine does refer to the Court's Advisory Opinion of 2004,[71] whereas that on Western Sahara does not.[72]

The Court has made a significant legal contribution to the process of decolonization of South West Africa (Namibia) by finding that the ultimate objective of the sacred trust referred to in Article 22, paragraph 1 of the Covenant of the League of Nations was the self-determination and independence of the people concerned.[73] With regard to the result of the process of decolonization, the Court clarified that General Assembly Resolution 1541 (XV) contemplated for non-self-governing territories more than one possibility, namely:

(a) emergence as a sovereign independent state;
(b) free association with an independent state; or
(c) integration with an independent state.[74]

Whatever the end-result of the process, according to the Court there were two important requirements for the exercise of the principle of self-determination by a people, namely that the expression thereof be (a) free, ie, be taken without outside interference and, (b) genuine, ie, be the expressed will of the people of the territory concerned.[75] In acknowledging the broad powers of the General Assembly, the ICJ has made clear its view that the validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, was not affected by the fact that in certain cases the General Assembly had dispensed with the requirement to consult the inhabitants of a given territory.[76]

In 2010 the Court recognized the important place of this right in the framework of international law by stating that 'one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination'.[77] According to the ICJ, Article 1 common to the International Covenant on

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[70] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 3) 31–2, para 53. The ICJ held: 'These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.'

[71] See GA Res 66/17, Peaceful Settlement of the Question of Palestine, sixty-ninth plenary meeting, 30 November 2011.

[72] See GA Res 66/86, Question of Western Sahara, eighty-first plenary meeting, 9 December 2011.

[73] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 165, para 70; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 3) 31, paras 52–3.

[74] *Western Sahara* [1975] ICJ Rep 12, 32, para 57.

[75] *Western Sahara* (n 73) 32, para 55.

[76] *Western Sahara* (n 73) 33, para 59.

[77] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, paras 79 and 82, <http://www.icj-cij.org/docket/files/141/15987.pdf>

Economic, Social and Cultural Rights (ICESCR) and the ICCPR reaffirms the right of all peoples to self-determination, and imposes upon the states parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.[78] On several occasions the ICJ has noted that the right of peoples to self-determination is a right which has an *erga omnes* character.[79] According to the ICJ, the *erga omnes* character of the right to self-determination entails the duty of every state to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and also to render assistance to the United Nations in implementing this principle.[80] Taking measures which negatively impact a people's right to self-determination obviously amounts to a violation of a state's obligation to respect this right. The Court found such a violation with regard to the wall constructed by Israel in the Occupied Palestinian Territories.[81]

As far as the obligations on the part of other states were concerned, in the *Wall* case the Court found that they were under an obligation not to recognize the illegal situation resulting from the construction of the wall, not to render aid or assistance in maintaining the situation created by such construction, and to see to it that any impediment to the exercise by the Palestinian people of its right to self-determination resulting from the construction of the wall was brought to an end.[82] These findings of the Court leave unanswered the question of what exactly the *erga omnes* character of the right to self-determination adds to the scope of state obligations arising under this right which is different from other international law norms. Also unanswered is the question of whether those *erga omnes* obligations which arise for states with respect to the right to self-determination are obligations of conduct or obligations of result.

The ICJ has noted that different views exist among states on whether the international law of self-determination confers upon part of the population of an existing state a right to separate from that state, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination, and exploitation.[83] Those differences of position among states were also expressed in the *Kosovo* case with regard to whether international law provides for a right of 'remedial secession' and, if so, under what circumstances.[84] Since there are several cases of *de facto* secession of parts of existing countries, it is possible that at

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(accessed 29 December 2012). The Court did not, however, find it necessary to dwell upon the application of this principle to the situation in Kosovo. For a discussion of this right in the context of Kosovo see the Separate Opinion of Judge Cançado Trindade, <http://www.icj-cij.org/docket/files/141/16003.pdf> (accessed 29 December 2012).

[78] *Israeli Wall* (n 73) 172, para 88.

[79] See, *inter alia*, *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102, para 29; *Israeli Wall* (n 73) 171–2, paras 88 and 89. On the *erga omnes* nature of self-determination see, *inter alia*, Summers (n 65) 393–6.

[80] *Israeli Wall* (n 73) 199, para 156.

[81] *Israeli Wall* (n 73) 184, para 122.

[82] *Israeli Wall* (n 73) 200, para 150.

[83] *Kosovo* (n 77) 31, para 82.

[84] *Kosovo* (n 77) paras 82–3.

some point in the future cases of this nature might end up before the ICJ. The sensitivity of these issues and the potential of the ICJ to develop the law in this regard are demonstrated by the considerable number of states that participated in the legal proceedings of the *Kosovo* case.[85]

3.2 The right of peoples to make use of their own natural resources

The right of peoples to make use of their own natural resources is very important. Article 1, paragraph 2, common to the two 1966 International Human Rights Covenants, provides that all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. The Court has found that the principle of permanent sovereignty over natural resources is a principle of customary international law.[86] In the *Armed Activities* case the Court dealt for the first time with the issue of the prohibition of illegal exploitation, plundering, and looting of natural resources as part of the obligations imposed under international humanitarian law. The Court found that Uganda had violated its duty of vigilance by not taking adequate measures to ensure that its military forces did not engage in the looting, plundering, and exploitation of the natural resources of the Democratic Republic of the Congo (DRC).[87] According to the Court, Uganda was internationally responsible for failing to comply with its obligations under Article 43 of the Hague Regulations of 1907 as an occupying Power in Ituri in respect of all acts of looting, plundering, and exploitation of natural resources in the occupied territory.[88] The ICJ also observed that the fact that Uganda was the occupying Power in the Ituri district extended Uganda's obligation to take appropriate measures to prevent the looting, plundering, and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of the Ugandan military forces.[89]

In the *East Timor* case Portugal contended that Australia had violated its obligation to respect Portugal's status as administering Power, East Timor's status as a non self-governing territory, and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources, by entering into a treaty with Indonesia in 1989 over the 'Timor Gap'.[90] The Court found that it could not exercise jurisdiction over this case, since in doing so it would have to rule upon the lawfulness of Indonesia's conduct as a

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[85] Thirty-six member states of the United Nations and Kosovo filed written statements in the first written phase and fourteen member states of the United Nations and Kosovo filed written statements in the second written phase. Twenty-eight member states of the United Nations (including the five permanent members of the Security Council) and Kosovo presented oral statements before the Court.

[86] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 251, para 244. Para 7 of GA Res 1803 (XVII) of 14 December 1962 reads: 'Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.'

[87] *Armed Activities* (n 86) 252, para 246.

[88] *Armed Activities* (n 86) 253, para 250.

[89] *Armed Activities* (n 86) 253, para 248.

[90] *East Timor* (n 79) 104, para 33.

prerequisite for deciding on Portugal's contention, in the absence of Indonesia's consent.[91] However, the Court deemed Portugal's assertion of the right of self-determination of peoples having a *jus cogens* character as irreproachable. The right to freely dispose of their natural resources is a corollary of the right of peoples to self-determination.

3.3 Peremptory norms of international law for the protection of groups

The ICJ has dealt with several international law norms aimed at the protection of peoples and minorities which are of an *erga omnes* character and whose violation entails state responsibility, as well as individual criminal responsibility.[92] The prohibition of genocide and of racial discrimination and apartheid practices are the most prominent amongst these norms. In its celebrated *dictum* in the *Barcelona Traction* case, the Court stated that obligations *erga omnes* in contemporary international law derive, among others, from the outlawing of acts of aggression, and of genocide, as also from principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[93] It is not entirely coincidental that the 1948 Genocide Convention and the 1965 UN Convention on the Elimination of Racial Discrimination were the first human rights instruments to be adopted under the framework of the UN. Genocide, racial discrimination, and apartheid have been strongly condemned by the ICJ, as well as the other main organs of the UN.[94] Over time these important rules for the protection of peoples and minorities have acquired an *erga* omnes character and even the status of *jus cogens*. The breach of these norms has also been systematically qualified as an international crime, that is, as a serious breach of an obligation owed to the international community as a whole.[95]

The *jus cogens* status of these norms does not mean, however, that the ICJ can automatically exercise jurisdiction over situations where violations of these norms have occurred which gravely affect the rights of concerned peoples and minorities. The Court has accepted that the prohibition of genocide is a *jus cogens* norm, while clarifying that the fact that a dispute relates to a state's compliance with a *jus cogens* norm cannot of itself provide a basis for the jurisdiction of the Court.[96] The Court has been adamant in emphasizing that its jurisdiction is only based on the consent of the parties. Since peoples or minorities do not have direct access to the Court, legal action by third states, in the form of *actio popularis*, represents a potentially useful means to bring before the Court situations of serious violations of their rights. However, the ICJ seems rather reluctant to adopt a broad interpretation of

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[91] *East Timor* (n 79) 105, para 35.

[92] More generally on the ICJ and human rights see Bruno Simma's contribution to this volume at Chapter 13, and 'Mainstreaming Human Rights: The Contribution of the International Court of Justice', *Journal of Int'l Dispute Settlement* 3 (2012), 7–29. See also G Zyberi, 'Human Rights in the International Court of Justice' in MA Baderin and M Ssenyonjo (eds), *International Human Rights Law: Six Decades after the UDHR and Beyond* (Aldershot: Ashgate, 2010) 289–304.

[93] *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain)* (Second Phase) (Merits) [1970] ICJ Rep 3, 32, para 33.

[94] See GA Res 2202A (XXI), 16 December 1966; and SC Res 556 (1984), 23 October 1984.

[95] See Vaurs-Chaumette (n 1) 998–9.

[96] *Armed Activities (Democratic Republic of the Congo v Rwanda)* (n 6) 32, para 64.

actio popularis.[97] And even if the Court were able and willing to entertain cases on this basis, the paucity of use of inter-state complaints included in international human rights instruments shows that peoples and minorities cannot reasonably put much hope in this option. The ICJ's case law relating to the prohibition of genocide and the prohibition of racial discrimination and of apartheid are dealt with in the following subsections.

3.3.1 The prohibition of genocide

The 1948 Genocide Convention provides for the prevention and the punishment of the crime of genocide. As the ICJ noted, while referring to a December 1946 resolution of the General Assembly, genocide is a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.[98] In adopting the object and purpose test of treaty interpretation, which later became part of Article 31 of the 1969 Vienna Convention on the Law of Treaties, the Court indicated that this test prevented states from entering any reservations they choose with regard to a convention by virtue of their sovereignty.[99] That balanced approach to reservations is important not only for the Genocide Convention but also for other international human rights treaties.

In clarifying the character of the Genocide Convention, the Court noted that this Convention was intended by the General Assembly and by the contracting parties to be definitely universal in scope and manifestly adopted for a purely humanitarian and civilizing purpose.[100] As the Court pointed out, it is difficult to imagine a convention that has a greater humanitarian and civilizing character, since its object is on the one hand to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.[101] According to the Court, the intrinsic character of the Genocide Convention gave rise to two legal consequences. First, the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation.[102] This finding of the Court recognizes the customary law status that the prohibition of genocide had already achieved. The second consequence which the Court established as flowing from the character of the Genocide Convention was the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge'.[103]

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[97] *South West Africa (Liberia v South Africa and Ethiopia v South Africa)* (Second Phase) [1966] ICJ Rep 6, 47, para 88. In this Judgment the ICJ ruled out a conception of *actio popularis* pursuant to which every member of a community would be entitled to vindicate community, or 'public' interests. While that initial position seems to have been implicitly reversed in later decisions, notably *Barcelona Traction* (n 93), no other cases based on *actio popularis* have been brought before the Court.

[98] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23. The Court was referring to GA Res 96(1), 11 December 1946.

[99] *Reservations to the Genocide Convention* (n 98) 24.

[100] *Reservations to the Genocide Convention* (n 98) 23.

[101] *Reservations to the Genocide Convention* (n 98) 23.

[102] *Reservations to the Genocide Convention* (n 98) 23.

[103] *Reservations to the Genocide Convention* (n 98) 23.

Rightfully, the Court emphasized the necessity of international cooperation in order to prevent and punish the crime of genocide.

The Court has held that acts of genocide have to be directed against a collection of people who have a particular group identity.[104] Through this finding the Court has clarified that the targeted group has to be defined in positive terms according to the specific characteristic protected under the Genocide Convention which connects the group, namely their national, ethnical, racial, or religious identity. Additionally, the Court has also observed that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area.[105] With regard to the issue of 'cultural genocide', the Court has concluded that the destruction of historical, religious, and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention.[106] At the same time, however, the ICJ endorsed the observation made by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Krstić* case that 'where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group'.[107] While emphasizing that genocide aims at the physical elimination of the group, the Court has allowed for acts of 'cultural' genocide to be taken into account for the purpose of proving the genocidal intent of the perpetrators.

In the *Legality of the Threat or Use of Nuclear Weapons* case, some states contended that the prohibition against genocide, contained in the Genocide Convention, is a relevant rule of customary international law which the Court must apply; that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial, or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would not take into account the well-known effects of the use of such weapons. Through its findings the Court clarified that the prohibition of genocide would be pertinent, if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the Genocide Convention.[108] In the view of the Court, it would only be possible to arrive at such a conclusion having taken due account of the circumstances specific to each case.[109] Taken together, these findings of the Court highlight the importance and necessity of establishing conclusively the special intent required for the crime of genocide, to destroy in whole or in part a national, ethnical, racial, or religious group as such.

In dealing with the issue of international responsibility for this crime, the Court has held that states party to the Genocide Convention are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is

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[104] *Application of the Genocide Convention* (n 6) 124–6, paras 193–6.

[105] *Application of the Genocide Convention* (n 6) 126, para 199.

[106] *Application of the Genocide Convention* (n 6) 186, para 344 (citing *Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para 580).

[107] Krstić (n 106) para 580.

[108] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 240, para 26.

[109] *Nuclear Weapons* (n 408).

attributable to them, genocide and the other acts enumerated in Article III.[110] The ICJ's finding on the duty of states to prevent genocide is also important from the perspective of protecting the rights of peoples. The Court formulated this duty in the following way:

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. 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.[111]

Further, the Court has clarified that the obligation to prevent genocide is one of conduct and not one of result, in the sense that a state cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of states parties is rather to employ all means reasonably available to them, so as to prevent genocide as far as possible.[112] According to the Court, a state's performance can be judged through the 'due diligence' test, which involves assessing whether a state has manifestly failed to take all measures within its power to prevent genocide.

The various parameters to be taken into account in that assessment include the capacity to influence effectively the actions of persons likely to commit, or already committing, genocide, which depends, among other things, on the geographical distance of the state concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that state and the main actors in the events.[113] This legal finding would seem to indicate that, *prima facie*, neighbouring or regional states have more responsibility than other states, and that the more powerful states, including the five permanent members of the Security Council, share more responsibility since they have an elevated capacity to influence the course of action of the main actors in the events.

Although implicitly, the Court has also introduced the issue of shared state responsibility for the prevention of genocide by referring to what every state should do to prevent genocide. Thus, the ICJ has held that it is irrelevant whether the state whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide.[114] For the Court that would be irrelevant to the breach of the obligation of conduct, since the possibility remains that the combined efforts of several states, each complying with its obligation to prevent, might have achieved the result—averting the commission of genocide—which the efforts of only one

[110] *Application of the Genocide Convention* (n 6) 119, para 179.

[111] *Application of the Genocide Convention* (n 6) 220, para 427.

[112] *Application of the Genocide Convention* (n 6) 221, para 430.

[113] *Application of the Genocide Convention* (n 6) 221, para 430.

[114] *Application of the Genocide Convention* (n 6) 221, para 430.

state were insufficient to produce.[115] In order for the Court to assign responsibility to a state for failing to prevent genocide, it is enough that the state was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed.[116] Obviously, the inter-related tests of 'due diligence', 'manifest failure to take action', and the standard of state awareness ('was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed') remain to be applied on a case-by-case basis by the Court. In any case, the Court has already spelled out in general terms what is expected of states with regard to the prevention of genocide and how their conduct will be assessed.

Besides the duty to prevent genocide, the Court has also clarified the duty of states to punish persons suspected of having committed genocide. In interpreting Article VI of the Genocide Convention, which deals with the prosecution of persons by domestic or international courts, the Court found that this article only obliges the contracting parties to institute and exercise territorial criminal jurisdiction.[117] The Court added that while this article certainly does not prohibit states, with respect to genocide, 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, it does not oblige them to do so.[118] With regard to the obligation of states to cooperate with the 'international penal tribunal' mentioned in Article VI of the Genocide Convention, the Court has clarified that the notion of an 'international penal tribunal' within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) which are of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III.[119] That general interpretation of Article VI lays down a *prima facie* obligation of states to cooperate with international criminal courts and tribunals established to prosecute perpetrators of genocide, including the International Criminal Court. In order to grant reparations to the injured party on the basis of a state's failure to prevent genocide, the Court requires a sufficiently direct and certain causal nexus between the wrongful act, that is, the breach of the obligation to prevent genocide, and the injury suffered.[120] Through that legal finding the Court has established a rather high threshold for awarding reparations.

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[115] *Application of the Genocide Convention* (n 6) 221, para 430. For a more detailed discussion of the ICJ and the responsibility to protect doctrine see *inter alia* G Zyberi, 'The Responsibility to Protect Through the International Court of Justice', in A Nollkaemper and J Hoffmann (eds), *Responsibility to Protect: From Principle to Practice* (Amsterdam University Press, 2012) 305-317; G Zyberi, 'The International Court of Justice', in G Zyberi (ed), *An Institutional Approach to the Responsibility to Protect* (Cambridge University Press, 2013) 365-385.

[116] *Application of the Genocide Convention* (n 6) 223, para 432.

[117] *Application of the Genocide Convention* (n 6) 226–27, para 442.

[118] *Application of the Genocide Convention* (n 6) 227, para 442.

[119] *Application of the Genocide Convention* (n 6) 227, para 445.

[120] For a more detailed discussion of the issue of reparations see, *inter alia*, C McCarthy, 'Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice' in C Ferstman et al (eds), *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* (Dordrecht: Martinus Nijhoff, 2009) 283–311; G Zyberi, 'The

3.3.2 The prohibition of racial discrimination and apartheid

The Court has recognized that the prohibition of racial discrimination is a *jus cogens* norm.[121] In its Advisory Opinion on *South West Africa (Namibia)* in 1971, the ICJ noted that South Africa had pledged itself in Namibia 'to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race'.[122] Subsequently, the Court found that establishing and enforcing distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent, or national or ethnic origin which constituted a denial of fundamental human rights was a flagrant violation of the purposes and principles of the UN Charter.[123] Through these findings the Court added its authoritative voice to the wide condemnation by the international community of measures establishing limitations, exclusions, or restrictions for the members of the indigenous population groups in respect of their participation in certain types of activities, fields of study or of training, labour, or employment, as well as submitting that part of the population to restrictions or exclusions on residence and movement in large parts of Namibia.[124] Moreover, and most importantly, the Court anchored the principle of prohibition of discrimination in the Charter of the United Nations, as a corollary of the principle of equal rights of peoples. The prohibition of discrimination is a general principle of international law, which is embedded in all international human rights law instruments.

In interpreting Article 22 of the UN Convention on the Elimination of Racial Discrimination (CERD) the Court held that the express choice of two modes of dispute settlement, namely, negotiations or resort to the special procedures under CERD, suggested an affirmative duty to resort to them prior to seizing the Court.[125] It is difficult to see, however, how following such protracted procedures, clearly envisioned for a peacetime situation, would be of any use in the context of a fast developing armed conflict. And should it be compulsory to exhaust or have resort to remedies which under the circumstances ruling at the time would seem to be *prima facie* non-effective?[126] In its 2008 order on provisional measures the Court had indicated that both parties within South Ossetia and Abkhazia and adjacent areas in Georgia should refrain from any act of racial discrimination against persons, groups of persons, or institutions; abstain from sponsoring, defending, or supporting racial

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International Court of Justice and Applied Forms of Reparation for International Human Rights and Humanitarian Law Violations' (2011) 7 *Utrecht L Rev* 204.

[121] *Armed Activities (Democratic Republic of the Congo v Rwanda)* (n 6) 35, para 78.

[122] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 3) 57, para 131.

[123] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 3) 57, para 131.

[124] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 3) 57, para 130.

[125] *Georgia v Russia* (n 63) para 134.

[126] Unfortunately, the ILC does not address this specific issue in its work on the 'Effect of Armed Conflict on Treaties'. The Draft Articles on the effects of armed conflicts on treaties with commentaries were adopted by the ILC at its 63rd session (2011) and are available at <http://untreaty.un.org/ilc/reports/2011/english/chp6.pdf> (accessed 29 December 2012).

discrimination by any persons or organizations; do everything in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin, their security, freedom of movement, and residence within the border of the state, the protection of the property of displaced persons and of refugees.[127] The Court also required that the authorities of both states do everything in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons, or institutions.[128] Perhaps this is the most comprehensive provisional measures order given by the Court thus far with the aim of preventing racial discrimination against individual persons and ethnic groups (minorities) and guaranteeing them a wide range of rights in a conflict situation.

3.4 Interim observations on the ICJ

How do the ICJ's findings on self-determination compare to that of other 'agents of legal development'? In a general sense, the Court's findings are reflected in the relevant general comments of the Human Rights Committee and the CERD with respect to self-determination.[129] The transformative potential of self-determination has been realized through the political processes of decolonization, steered mainly through the General Assembly. For its part, the ICJ has clarified a number of state obligations arising under the right of peoples to self-determination and has interpreted the relevant supervisory and other competences of the General Assembly and the Security Council. According to the Court, the right of peoples to self-determination has an *erga omnes* character. With regard to obligations of states to respect the right of peoples to self-determination, the Court has pointed at the threefold duty of states not to recognize an illegal situation impinging on this right, not to render help in the maintenance of such a situation, and to promote the realization of the right to self-determination, in accordance with the provisions of the United Nations Charter. Another significant contribution with regard to this right is the Court's emphasis on the importance of respecting the free and genuine will of the peoples concerned.

The ICJ has clarified that the obligation to prevent the commission of the crime of genocide is imposed by the Genocide Convention on any state party which, in a given situation, is able to contribute to restraining in any degree the commission of genocide. By introducing the interrelated tests of 'due diligence', 'manifest failure to take action', and the standard of state awareness as 'was aware, or should normally have been aware, of the serious danger that acts of genocide would be committed', the Court has laid down a number of somewhat specific, though not sufficiently articulated, criteria for expected state behaviour concerning the duty to prevent genocide. The Court has also clarified that acts of genocide have to be directed against a collection of people who have a particular group identity, with the genocidal intent to destroy them, even when the intent is to destroy the group within a

[127] *Georgia v Russia* (Order on Provisional Measures) [2008] ICJ Rep 353, 398, para 149.

[128] *Georgia v Russia* (Order on Provisional Measures) (n 127) 353, 398, para 149.

[129] It should be noted, however, that there are no direct references to findings of the ICJ in these general comments. See CCPR, General Comment No 12: The right to self-determination of peoples (Article 1), Twenty-first session, 1984; CERD, General Recommendation No 21: Right to self-determination, Forty-eighth session, 1996.

geographically limited area. With regard to the issue of 'cultural genocide', the Court has found that the destruction of historical, religious, and cultural heritage cannot be considered a genocidal act within the meaning of Article II of the Genocide Convention, but such attacks could be considered as evidence of an intent to physically destroy the group. Notably, the two ad hoc tribunals established by the Security Council, the Tribunal for the former Yugoslavia and that for Rwanda, have taken note of the Court's 1951 Advisory Opinion on the customary nature of the principle of prohibition of genocide as laid down in the Genocide Convention, as well as other findings concerning different legal aspects of the crime of genocide made by the Court in its 2007 Judgment in the *Application of the Genocide Convention* case.[130]

Other important legal developments for the protection of the rights of peoples and minorities are the Court's findings relating to the prohibition of racial discrimination and apartheid. The Court has held that the prohibition of racial discrimination is a *jus cogens* norm, and that establishing and enforcing distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent, or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the UN Charter. The ICJ has also found that the principle of permanent sovereignty over natural resources is a principle of customary international law. These findings are important because they lay down certain obligations for states not only vis-à-vis their own populations, but also vis-à-vis other peoples and minorities beyond their jurisdiction.

4. Concluding remarks

Through their case law, the PCIJ and the ICJ have rendered a significant contribution to interpreting and developing the international legal framework concerned with fundamental rights of peoples and minorities. The PCIJ has dealt mainly with the rights of minorities, whereas the ICJ has dealt with the rights of peoples more generally. Although the PCIJ and the ICJ have avoided providing a comprehensive definition of the concept of minorities and peoples, their findings concerning rights accruing to them have left a recognizable and important mark in the development of international law. The PCIJ provided institutional support to the Council of the League in its supervisory function over the minority protection regime. Similar institutional support was given by the ICJ to the General Assembly and the Security Council in their activities in the context of the decolonization process. Moreover, through its findings the ICJ established a link between the older mandates regime of the League of Nations with the UN system, in order to ensure the international supervision of the mandates and accountability on behalf of the peoples concerned.[131] A reading of the case law

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[130] See, *inter alia*, ICTR, *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment of 2 September 1998, para 495. Trial Chamber I stated: 'The Genocide Convention is undeniably considered part of customary international law, as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention, and as was recalled by the United Nations' Secretary-General in his Report on the establishment of the International Criminal Tribunal for the former Yugoslavia.' See also ICTY, *Prosecutor v Popović et al*, IT-05-88-T, Judgment of 10 June 2010, paras 807, 808, 809, 812, 813, 814, 817, 819, 821, 822, 827 and 831 (footnotes 2910, 2911, 2913, 2916, 2925, 2926, 2929, 2934, 2937, 2940, 2943, 2944, 2958, 2968).

[131] See, respectively, *International Status of South West Africa* (n 67) 136–7; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* (n 3) 33, paras 56–7.

of the PCIJ and the ICJ reveals that these international courts have kept the concepts of peoples and minorities separate, despite their similarities. From a general perspective, minorities would be entitled to a considerable degree of internal self-determination within an existing state, whereas peoples enjoy the full spectrum of the right to self-determination.

Estimates suggest that 10 to 20 per cent of the world's population belong to minorities, which means that between 600 million and 1.2 billion people are in need of special measures for the protection of their rights, given that minorities are often among the most disadvantaged groups in society and their members are often subject to discrimination and injustice and excluded from meaningful participation in public and political life.[132] These figures show that the rights of minorities cannot be overlooked if we are to ensure just and stable societies. Minority rights are increasingly recognized as an integral part of the United Nation's work towards the promotion and protection of human rights, sustainable human development, and peace and security. The findings of the PCIJ in this regard provide support for efforts to mainstream the consideration of minority issues within the framework of the UN and other relevant international and regional mechanisms.

As demonstrated above, the effect of the legal findings of the ICJ is not strictly limited to solving the dispute at hand, but, in the present complex framework of the international legal system with its many adjudicatory mechanisms, these findings influence to a considerable extent the practice of international law in a rather broad context.[133] In present international law practice the ICJ's findings are an important and authoritative source, bound to provide necessary guidance and to surface regularly in decisions taken by a significant number of adjudicatory and supervisory mechanisms concerned with the rights of peoples and minorities. The importance of the findings of the ICJ is evident, since states routinely accept them as the most authoritative statements on the status of a certain international law norm. By virtue of its important position as one of the main organs of the UN and its principal judicial organ, the decisions of the ICJ are taken note of by governments, other relevant actors, and by the ILC in its work on progressive development and codification of international law. While it is rather difficult to state with certainty the effect of the ICJ's findings in shaping international law in a certain area, including the rights of peoples and minorities, it can be said that the case law of the Court is attentively followed by states, international organizations, and other relevant actors.

[132] For a general overview of the issue of protection of minorities under international law and the UN Guide on Minorities see <http://www.ohchr.org/EN/Issues/Minorities/Pages/MinoritiesGuide.aspx> (accessed 29 December 2012).

[133] For a more detailed discussion of the relationship of the ICJ with other international courts and tribunals and quasi-judicial bodies, and the issue of cross-fertilization, see *inter alia* Zyberi 2008 (n 65) 343–430.