

# Modernizing the Role of the International Court of Justice

Bertrand Ramcharan

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ASSER PRESS



Springer

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Segny, France

ISBN 978-94-6265-518-8      ISBN 978-94-6265-519-5 (eBook)  
<https://doi.org/10.1007/978-94-6265-519-5>

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands [www.asserpress.nl](http://www.asserpress.nl)  
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

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The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

*To the Rose and the Templar*

# Foreword

Is there anything new that can be said about the Charter of the United Nations and the annexed Statute of the International Court of Justice? Dr. Ramcharan thinks so. In particular, he seeks in this creative monograph to breathe life into the hitherto overlooked jurisdictional language of Article 36(1) of the Court's Statute. It confers jurisdiction on the Court over "all matters specially provided for in the Charter". Like most scholars, I had written it off as a dead letter. It had, I assumed, been inserted in the draft Statute at an early stage when it was quite possible that somebody else would give concrete reference to it at a later stage of the negotiations. Nobody did; and nobody thought to simply delete it at the end of the negotiations in San Francisco. A dead letter then with no point of reference? But Dr. Ramcharan has another analysis. Words have meaning, especially words in a constitutional instrument like the foundation document for the United Nations. The Charter and Statute are living instruments, to be interpreted according to the developing needs of the international community. These words "and all matters specially provided for in the Charter" are "sleepers" waiting to be infused with practical application. And the current needs of the international community are dire. The author expounds upon three dramatic present crises: vaccine equity in a global pandemic, climate disaster and mass movements across borders. UN organs like the General Assembly and the Security Council and Specialized Agencies like the World Health Organization have fallen short on the task of responding adequately to such events. A new approach to international organization and norm creation is needed. The solution as he sees it is a vastly expanded role of the International Court of Justice, both in its contentious jurisdiction and in its advisory jurisdiction. He discusses models like the Supreme Courts in the USA, India and South Africa which have stepped up to act decisively where the political process is stymied. Using the general language in Article 36(1) of the Statute, he believes that it is possible to state either bilateral or advisory proceedings, based substantively on the Charter, to clarify the legal aspects of the problems and presumably free up the ultimate political solution that will then present itself.

Ramcharan's argument is detailed and scholarly. He relies on a wealth of material that he has gathered during his career as a distinguished international civil servant and marshals it well. To my taste, he is a little too sanguine about the ability of the ICJ

judges to invest themselves fully in the task at hand. In my eclectic career, I appeared as counsel twice in cases before the Court. They both involved the issue of nuclear weapons, a continuing scourge of our time. One was the Advisory Proceedings on the legality of the use or threat of use of nuclear weapons; the other was the effort by the Republic of the Marshall Islands to enforce the conventional and customary legal obligation of the nuclear powers to negotiate in good faith to rid the world of all such weapons. I must confess that I got the distinct feeling in both instances that many of the judges saw these basic issues as toxic to their professional health and best avoided. There were exceptional judges up to the task. Part of what needs to be achieved for Dr. Ramcharan's brilliant idea to prosper is to find a way to (s)elect candidates to the Court who are up to the job.

I trust that this inspiring work will be widely read in diplomatic as well as academic circles and will help in the solution of the crushing problems that the world faces.

November 2021

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# Preface

This is admittedly a daring book, and the views advanced on the future role of the International Court of Justice do go against the grain of conventional thinking. But we think that the extraordinary threats to the earth and its inhabitants call for bold new approaches by the United Nations and its principal organs, in this instance the International Court of Justice.<sup>1</sup>

For our doctoral thesis at the London School of Economics and Political Science (LSE) in 1973, we examined a topic at the heart of international law, namely The Approach of the International Law Commission to the Codification and Progressive Development of International Law.<sup>2</sup> We followed up on this at the Hague Academy of International Law, where we earned the Diploma of the Academy in its fiftieth anniversary year in 1973, and directed its Research Centre ten years later, in 1983.

We pursued a career of four decades at the United Nations with eight fascinating chapters: first, as Special Assistant to Director of the UN Centre for Human Rights for over a decade—during which period, human rights fact-finding was brought in;<sup>3</sup> second as Head of the speechwriting team of the UN Secretary-General for five years, during which one of our assignments was to write the first draft of Agenda for Peace; third, three and a half years as Director of the International Conference on the Former Yugoslavia during which we worked closely with the peacemakers and peacekeepers during the conflicts in the Former Yugoslavia, and during which we drafted the recommendation to the Secretary-General Boutros Boutros-Ghali for the establishment of the historic UN Preventive Deployment in the Former Yugoslav Republic of Macedonia; fourth, as Director in the UN Department of Political Affairs dealing with African conflicts for three years; fifth, as Deputy and then Acting UN High Commissioner for Human Rights, all together for six years; sixth, as Special Adviser to Secretary-General Ban Ki-moon on the conflict in Georgia; seventh, as

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<sup>1</sup> See, e.g. Telesetsky A (2020) International governance of global health pandemics. *American Society of International Law, Insights* 24(3): 5.

<sup>2</sup> Published by Martinus Nijhoff in 1977.

<sup>3</sup> See Ramcharan BG (2019) The advent of universal protection of human rights. Theo van Boven and the transformation of the UN role. Martinus Nijhoff, The Hague.

Member of the Human Rights Council High-Level Panel on Darfur, the first fact-finding mission established by the Council; and, eighth, as Member of the ILO Commission of Inquiry on Zimbabwe. ILO Commissions of Inquiry are the highest instance in the protection system of the ILO.

We have served in peace and war and have seen war close up. As Head of the Secretary-General's speechwriting team, we helped provide inputs into UN policies on peace, development, human rights, and the international civil service. We were very much involved in the progressive development of international human rights law. Prompted and inspired by these experiences, we have written most recently on Contemporary Preventive Diplomacy at the UN,<sup>4</sup> Conflict Prevention in the UN's Agenda 2030,<sup>5</sup> and Modernizing the UN Human Rights System.<sup>6</sup> It is in this spirit that we offer the thoughts in this volume on Modernizing the Role of the International Court of Justice. Our proposals are admittedly bold, but we think they are necessary in these extraordinary times. In our understanding, the World Court is potentially the body with the greatest integrity in the UN system. We must modernize its future role for the benefit of humanity.<sup>7</sup>

In preparing this book, we have based our understanding of the fundamentals of international law on five sources: Oscar Schachter's *International law in theory and practice. General course on Public International Law* (Martinus Nijhoff, Dordrecht, Martinus Nijhoff: Collected Courses of the Hague Academy of International Law, Vol. 178 (1982-V));<sup>8</sup> James Crawford, *Brownlie's principles of public international law* (9th edn., Oxford University Press, Oxford, 2019); James Crawford, *Chance, order, change: The course of public international law* (General course on Public International Law at the Hague Academy of International Law. Martinus Nijhoff, Leiden, 2014); Christian Tomuschat, *Human rights. Between idealism and realism* (3rd edn., Oxford University Press, Oxford, 2014); and Jakob Th. Moller and Alfred de Zayas, *The UN Human Rights Committee case law, 1977–2008. A handbook* (Engel, Kiehl/Strasbourg, 2009).

In his *General Course at the Hague Academy of International Law*, James Crawford pointed out that "There is a legal element to every international dispute; it may

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<sup>4</sup> Routledge, London, 2020.

<sup>5</sup> Ramcharan B, Ramcharan R (2020) *Conflict Prevention in the UN's Agenda 2030*. Springer Nature, Switzerland.

<sup>6</sup> Ramcharan BG (2019) *Modernizing the UN human rights system*. Martinus Nijhoff, The Hague/Leiden.

<sup>7</sup> See on this, Kateb G (2011) *Human dignity*. Harvard University Press, Cambridge, MA, pp. 5–6: "... the dignity of every individual is equal to that of every other, which is to say that every human being has a *status* equal to that of all others. The idea of individual dignity thus applies to persons, in relation to one another, and moves ideally in a progression from an individual's self-conception to a claim that other persons have no less than equal status. All individuals are equal; no other species is equal to humanity. These are the two basic propositions that make up the concept of human dignity".

<sup>8</sup> Autographed copy given to the author.



or may not be decisive, but it cannot be ignored.”<sup>9</sup> He aptly noted that “The life of international law has not been logic but experience.”<sup>10</sup> And he wisely cautioned that only when the Court has “clear jurisdiction judicially to review action of all United Nations political agencies, including the Security Council...could the rule of law be said to extend to international political life”.<sup>11</sup>

We have been heartened by George Spicer’s mid-twentieth-century book, *The Supreme Court and fundamental freedoms* (2nd edn., Appleton Century Crofts, New York, 1967); and we have taken to heart the insights of US Supreme Court Justice Stephen Breyer in his *Scalia Lecture 2021* at Harvard Law School, published as the authority of the Court and the peril of politics (Cambridge, MA, 2021).

To give an idea of the kind of change we are seeking in the future roles of the ICJ, we give three examples below of pressing contemporary issues of security, protection and judicial review on which we think that only the principal judicial organ of the United Nations could help lay down equitable legal regimes.

## Vaccine Equity in a Global Pandemic

On 25 October 2021, the *Financial Times* published an analysis showing that wealthy countries had received more than 16 times more COVID-19 vaccines per capita than poorer nations relying on WHO’s Covax programme.<sup>12</sup> According to the analysis, just 9.3 vaccines for every 100 people had been delivered to low-income countries—7.1 of which had been through Covax. This compared with 155 for high income countries, of which 113 were received through known bilateral and multilateral agreements, according to data compiled by UNICEF.

The consequences were far reaching, as insufficient inoculation in poorer regions could lead to a rise in cases and the emergence of more virulent strains, and hold back global economic recovery. The gap remained wide between haves and have-not countries. Less than three per cent of people in low-income countries had received at least one dose, according to *Our World in Data*, compared with three quarters of the population in richer nations.

In bypassing the WHO-backed scheme in the race to buy vaccine supplies from manufacturers, wealthier economies that were rolling out booster shots had prevented millions of the world’s poorest people from getting their first doses. The Covax scheme had been able to deliver only about 400 million doses out of a yearly projec-

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<sup>9</sup> Crawford C (2014) *Chance, order, change: The course of public international law*. General course on Public International Law at the Hague Academy of International Law. Martinus Nijhoff, Leiden, para 47.

<sup>10</sup> *Ibid.*, para 171.

<sup>11</sup> *Ibid.*, para 566.

<sup>12</sup> Mancini DP et al. (2021) Covax falters as rich countries buy up COVID vaccines. *Financial Times*. <https://www.ft.com/content/0e240929-033a-457f-a735-ec7cf93b2f3c>. Accessed 4 November 2021, p. 3.

tion of 1.4 billion. The Financial Times quoted one commentator as saying that Covax had no power at all to coerce manufacturers to honour their contracts through, for example, lawsuits.

African Union officials had forecast that Covax would deliver about 470 million doses to African countries by the end of 2021—less than a quarter of what would be needed for Africa’s 1.3 billion population on two-shot regimes. Covax recipient countries continued to have only month-by-month visibility into deliveries, which made planning difficult. An African commentator told the Financial Times: “At the beginning of the pandemic we thought that the world had changed and...there would be more solidarity. But, well, the rest is history.”

This is an issue of global security as well as of protection. In a matter affecting the right to life of billions of people, they are without any protection whatsoever. Is it not reasonable to think that in a case like this, one or more Governments, or an organ such as the General Assembly or the Security Council, should request the ICJ to invite legal submissions urgently and to lay down an order calling for the equitable allocation of vaccines worldwide?

Vaccine manufacturers would be hard pressed to ignore an order from the ICJ. One cannot expect such an order from the General Assembly, the Security Council or the Human Rights Council. Only the ICJ could possibly perform such a role. If there is anything that would support the modernization of the role of the ICJ that we are calling for in this book, it would be a case like this. It is a case of global insecurity and injustice on a massive scale.

## Climate Disaster

In an article on the eve of the climate summit in October–November 2021, the Economist carried a briefing which noted that, under the Paris Agreement of 2015, all countries were supposed to have announced tough new targets for reducing emissions, while rich countries were supposed to be helping poor ones finance green schemes. Unfortunately, it pointed out, “On both fronts, the world is coming up short.”<sup>13</sup>

At the Paris conference, Governments had promised to try to keep the increase in the Earth’s mean surface temperature to well below 2 degrees centigrade compared with pre-industrial levels and ideally to be no more than 1.5 degrees. Limiting heating to 1.5 degrees centigrade is a demanding task and the world, on the eve of the Glasgow summit was nowhere near to achieving it. On top of this, rich countries had failed to provide funding for developing countries to help them meet their emission targets. In the assessment of the International Energy Agency, developing countries would need two trillion dollars annually in investments to control emissions. In 2019, according to the OECD, only eighty billion dollars had been provided.<sup>14</sup>

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<sup>13</sup> The Economist (2001) Climate change: Heated Debates. October 23: 60.

<sup>14</sup> Ibid.

In the prognosis of the Economist, “Any progress made at COP 26 [in Glasgow] will probably be incremental, not a ‘big leap’ of the sort John Kerry, America’s climate envoy has promised.”<sup>15</sup> So here is an issue of international protection. No less than the future of the Earth and its inhabitants is involved. In the face of imminent danger, Governments continue to engage in horse-trading. Would it not be right for some international authority to pronounce on the legal duties of Governments to cooperate in achieving the targets necessary to save the Earth and humanity? And should this not be the role of the principal judicial organ of the United Nations, the ICJ? Here is a second instance of the imperative need for security and protection action by the principal judicial organ of the UN.

## Mass Movements of Population Across Borders

On 7 August 2021, The Economist carried a story on the 70th anniversary of the UN’s refugee convention.<sup>16</sup> More people, the Economist, pointed out, were fleeing intolerable conditions in their home countries, while fewer Governments were willing to take them in.

The UN refugee convention, adopted on 28 July 1951, governs the obligations that Governments have to people who flee their countries because of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Governments must not send them back to danger.

In 2020, according to the Economist, 1.4 million people had sought protection outside their home countries—despite a pandemic brake on migration—while nearly 10 million had been forcibly displaced within them. That had brought the total number of forcibly displaced people to 82.4 million, the highest on record. About 30 million were refugees or asylum-seekers, people asking for refugee status.

“The demands on the refugee system are absolutely unprecedented”, commented a staff member of the Office of UN High Commissioner for Refugees (UNHCR).<sup>17</sup> On average, the gap between what UNHCR asks for to meet refugees’ immediate needs and what donors give is around 45%. The European Union, at the time of writing, was considering appointing a “return coordinator” to watch over the return of applicants for asylum.<sup>18</sup>

From the above, one may see dramatic and pressing challenges of security and protection that Governments would not be able, by themselves, due to internal political pressures, to regulate. Neither the General Assembly, the Security Council, nor the Human Rights Council would be able to come up with acceptable answers. The issues involved require impartial deliberation on the relevant legal principles and

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<sup>15</sup> Ibid.

<sup>16</sup> The Economist (2021) The UN Refugee Convention at 70. Well-founded fears. 7 August: 44–46.

<sup>17</sup> Ibid., p. 45.

<sup>18</sup> Ibid., p. 45.

the laying down of a legal regime of the future that would attract the support of the peoples of the world. Only an institution like the ICJ could carry out this task, a third instance in support of the modernization of the role of the ICJ that we are arguing for in this book.

\* \* \*

A role for the ICJ in helping to regulate these problems would be indispensable if humanity is to avoid utter disaster.

Segny, France

Bertrand Ramcharan

# About This Book

This book offers an exploration of the future roles of the ICJ in a world facing existential threats. It is grounded in deep appreciation of the traditional roles of the Court in deciding cases brought before it and rendering advisory opinions. It notes, however, that leading judicial institutions such as the US Supreme Court, the Indian Supreme Court and the South African constitutional court, as well as regional courts such as the European Court of Justice, have made major contributions to the governance of their societies and in shaping their legal systems to deal with evolving challenges.

The book discusses threats such as climate change and environmental degradation that threaten the earth and humanity and argues that, in the future, the ICJ will need to carry out judicial, security, and protecting functions. It is the only organ of the UN that can discharge such functions in view of its independence and expertise.

He presents three examples of issues that would require the urgent attention of the ICJ: vaccine equity in a global pandemic, climate disaster, and mass movements of people across frontiers due to climate change and environmental degradation. He argues that the ICJ can deal with issues such as these under a hitherto unused jurisdictional provision in Article 36 of its Statute that allows it to deal with all matters specifically provided for in the UN Charter.

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## About the Author

**Dr. Bertrand Ramcharan** B.A. Hons. History (Lon.), B.A. Hons. Philosophy (Lon.); LL.B. (Hons.) (Lon.); LL.M. (Lon.); Ph.D. (Lon-LSE), is a Barrister-at-Law of Lincoln's Inn. He earned the Diploma in International Law of the Hague Academy of International Law in 1973, the Academy's 50th anniversary year.

In a UN career of 33 years, he was Chief Speechwriter for the UN Secretary-General, Director of the International Conference on the Former Yugoslavia, Director in the UN Political Department, High Commissioner for Human Rights (Ag.) and Special Adviser to the UN Secretary-General.

He has been Commissioner of the International Commission of Jurists, Member of the Permanent Court of Arbitration, Professor of International Human Rights Law at the Geneva Graduate Institute (First Swiss Chair), Chancellor of the University of Guyana, Visiting Professor at Columbia University, Visiting Professor at the University of Ottawa and Visiting Professor at Lund University, Sweden.

He wrote the first draft of Agenda for Peace and the recommendation for the establishment of the UN's preventive deployment force in the former Yugoslav Republic of Macedonia. In 2008, Secretary-General Ban Ki-moon asked him to undertake a special assignment to assess the peace process in Georgia.

He is Author, among other works, of *The International Law Commission; Preventive Diplomacy at the UN; Contemporary Preventive Diplomacy; Conflict Prevention in the UN's Agenda 2030; UN Protection of Humanity and its Habitat; The Advent of Universal Protection of Human Rights and Modernization of the UN Human Rights System*. In October 2019, the Academy of the Caribbean Court of Justice, in its first honour roll, conferred on him the award of Eminent Caribbean International Jurist.