

FROM CRISIS TO EPOCH: HOW TO UNDERSTAND THIS ERA OF INTERNATIONAL LAW?

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I INTRODUCTION

Twenty-two years ago in her defining article, ‘International Law: A Discipline of Crisis’ (‘A Discipline of Crisis’), Hilary Charlesworth observed that international lawyers are fascinated, even obsessed, by crisis.¹ Viewing our discipline through the lens of crisis encourages us ‘to cast ourselves grandly in an heroic mould’.² But this focus on crisis comes at considerable cost to the discipline. She rightly pointed out that the crisis model is technically limited and narrows the agenda of international law.³ In this lecture, I take up her call to enlarge the frame of inquiry.⁴

I suggest that we step back and consider what *epoch* we are living in. Others are also thinking about this question.⁵ In March 2024, a panel of geological scientists rejected a proposal to declare this geological epoch the “Anthropocene”

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¹ Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65(3) *Modern Law Review* 377, 377.

² *Ibid* 387. See also Makane Moïse Mbengue and Jean d’Aspremont (eds), *Crisis Narratives in International Law* (Brill Nijhoff, 2021); George Ulrich and Ineta Ziemele (eds), *How International Law Works in Times of Crisis* (Oxford University Press, 2019); Paul B Stephan, *The World Crisis and International Law: The Knowledge Economy and the Battle for the Future* (Cambridge University Press, 2023).

³ Charlesworth (n 2) 382.

⁴ *Ibid*.

⁵ My proposed approach differs to Wilhelm G Grewe, *The Epochs of International Law*, tr Michael Byers (Walter de Gruyter, 2000), which determined epochs by reference to the dominant power in the system of states from the Middle Ages.

— the age of humans.⁶ Economist and historian, Adam Tooze, labels this the age of ‘polycrisis’, with challenges in economics, politics, geopolitics and the environment interacting with each other.⁷ In 2022, the *Collins Dictionary*’s word of the year was ‘permacrisis’ — where situations can only be managed, never resolved.⁸ *The New Yorker* has suggested we are living in ‘The Terrible Twenties’ or ‘The Omnishambles’.⁹ I hope to present a more positive picture.

In this lecture, I will proceed in four parts. First, I will lay out the key features of the crisis model that Charlesworth identified. Second, I will define the features of an epoch approach, using an example of accountability for modern slavery. Third, I will illustrate the limitations of a crisis approach and the potential benefits of an epoch approach with two case studies: the Russian Federation’s aggression against Ukraine and climate change. Finally, I conclude with some reflections on the importance of our mindset, with both hope and awe further supporting the call to enlarge the frame of our inquiry in international law.

II THE CRISIS MODEL: THEN AND NOW

In ‘A Discipline of Crisis’, Charlesworth identified two types of limitations of the crisis model.¹⁰ The first limitation is that the approach rests on the ‘contentious construction of crises’, assuming in the process that the ‘facts’ of the crisis are straightforward.¹¹ In the case study she adopted, Charlesworth noted that the labelling of the North Atlantic Treaty Organization intervention in Kosovo as ‘humanitarian’ in character was treated as an ‘uncontroversial and factual description’.¹²

⁶ Damian Carrington, ‘Geologists Reject Declaration of Anthropocene Epoch’, *The Guardian* (online, 22 March 2024) <<https://www.theguardian.com/science/2024/mar/22/geologists-reject-declaration-of-anthropocene-epoch>>, archived at <<https://perma.cc/8SZY-6H9U>>. The proposal was rejected by members of the Subcommission on Quaternary Stratigraphy, which is part of the International Union of Geological Sciences. The vote followed a 15-year process to select a geological site that best captures humanity’s impact on the planet. The International Union of Geological Sciences’ Anthropocene Working Group made an announcement in July 2023 that ‘identified the location as Crawford Lake in Ontario because of the way sediment from the lakebed reveal[ed] the geochemical traces of nuclear bomb tests ... from 1950’: Katie Hunt, ‘Proposal to Mark a New Chapter in Earth’s History Rejected, Scientists Say’, *CNN World* (online, 6 March 2024) <<https://edition.cnn.com/2024/03/05/world/anthropocene-epoch-rejected-scn/index.html>>, archived at <<https://perma.cc/SZM4-43CC>>.

⁷ Adam Tooze, ‘Welcome to the World of the Polycrisis’, *Financial Times* (online, 29 October 2022) <<https://www.ft.com/content/498398e7-11b1-494b-9cd3-6d669dc3de33>>, archived at <<https://perma.cc/UG85-UNA7>>.

⁸ Neil Turnbull, ‘Permacrisis: What It Means and Why It’s Word of the Year for 2022’, *The Conversation* (online, 12 November 2022) <<https://theconversation.com/permacrisis-what-it-means-and-why-its-word-of-the-year-for-2022-194306>>, archived at <<https://perma.cc/U4T8-QVSQ>>.

⁹ Kyle Chayka, ‘The Terrible Twenties? The Assholocene? What to Call Our Chaotic Era’, *The New Yorker* (online, 7 December 2023) <<https://www.newyorker.com/culture/2023-in-review/what-to-call-our-chaotic-era>>, archived at <<https://perma.cc/BAZ8-SUJW>>.

¹⁰ Compare this to the view that while crises are painful, they ultimately reveal ‘our needs and aspirations for change’ and ‘help us to design a future based on rules of international law that are specifically adapted to attend to our future needs in a changing world’: Yves Daudet, “‘Never Let a Good Crisis Go to Waste’: Can International Law Seize the Advantage?” (2022) 37(3) *American University International Law Review* 673, 694.

¹¹ Charlesworth (n 2) 382.

¹² *Ibid* 383.

To that end, she observed that international lawyers ‘typically do not report on the basis of their own experiences and lives’ and the ‘facts’ we use are ‘gathered from the media, government reports and other sources’ without ‘weighing up competing versions’.¹³

This aspect of the crisis model has changed in the last two decades. The rise of misinformation, exacerbated by social media and artificial intelligence, means that we tend to be more sceptical of “facts” these days: ‘Only 40% of people trust “most news most of the time” according to the Reuters Institute’.¹⁴ But this scepticism does not necessarily translate into a commitment to independent and rigorous fact-finding.

Relatedly, Charlesworth noted that the crisis model of international law is also characterised by a ‘[l]ack of analytic progress’.¹⁵ She observed our tendency to move on from crisis to crisis and noted Gerry Simpson’s pertinent observation that ‘[t]his is a discipline that leaves you jet-lagged, breathless and numb’.¹⁶ This remains relevant today and is again exacerbated by social media.¹⁷ For example, the exchanges on international law Twitter are sometimes illuminating but are also often a race to declare a position, argue with detractors, block, report and move on to the next controversy.

A related point is that the crisis approach makes us ‘concentrate on a single event or series of events and often ... miss the larger picture’, resulting in ‘[t]hin description’.¹⁸ Hélène Ruiz Fabri has observed that ‘crisis’ is a ‘convenient descriptor to convince of [sic] the seriousness of a situation or event without having to go into details’.¹⁹ Charlesworth pointed out that the international law literature on Kosovo paid little attention to the complex history of Kosovo and

¹³ Ibid 384.

¹⁴ Minos Bantourakis, ‘How Can We Build Trustworthy Media Ecosystems in the Age of AI and Declining Trust?’, *World Economic Forum* (Forum Post, 9 October 2023) <<https://www.weforum.org/agenda/2023/10/news-media-literacy-trust-ai/>>, archived at <<https://perma.cc/K8C4-9TCR>>.

¹⁵ Charlesworth (n 2) 384.

¹⁶ Ibid.

¹⁷ One example is the way that Ukraine has been replaced by Gaza in the discourse in 2023–24: see, eg, John Raine, ‘Ukraine vs Gaza’ (2024) 66(1) *Survival* 173; Samuel Ramani, ‘Russia Asks: How to Benefit from the Gaza War?’, *Center for European Policy Analysis* (Web Page, 12 October 2023) <<https://cepa.org/article/russia-asks-how-to-benefit-from-the-gaza-war/>>, archived at <<https://perma.cc/5C99-KURC>>. One of the interesting elements of this has been the way that ideological coalitions among international lawyers have formed and reformed as each new crisis emerges. People who were in furious agreement over Ukraine are now in furious disagreement over Gaza (such as on the proper role of the International Criminal Court): James A Goldston, ‘Don’t Let Gaza Be Another Example of International Criminal Court Double Standards’, *Politico* (online, 26 October 2023) <<https://www.politico.eu/article/dont-let-gaza-conflict-be-another-example-international-criminal-court-icc-double-standards-ukraine/>>, archived at <<https://perma.cc/9YC6-P2MQ>>. This might be seen to result in a common approach to each crisis being undermined as a new crisis causes the coalition to fracture. The only beneficiary of this has been Russia.

¹⁸ Charlesworth (n 2) 384.

¹⁹ Hélène Ruiz Fabri, ‘Crisis Narratives and the Tale of Our Anxieties’ in Makane Moïse Mbengue and Jean d’Aspremont (eds), *Crisis Narratives in International Law* (Brill Nijhoff, 2021) 34, 37.

Serbia, including the system of power-sharing established by the *Dayton Accords*.²⁰

This is also relevant today; international lawyers struggle to capture the complexity of the conflict in Gaza.²¹ Some memories go back to 7 October 2023, or perhaps the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004, but not much further.²² We are not accustomed to, and not good at, unpacking the history of the region — 1967, 1947, 1922, 1918 and 1840 are also years that demand consideration.²³

The second type of limitation is the ethical cost of crises. According to Charlesworth, international lawyers ‘present our task as a straightforward, if agonising, choice between two competing principles ... good or bad, right or wrong, justifiable or unjustifiable’.²⁴ She observed that this ‘approach mimics the rhetoric of politicians who are keen to truncate the range of policy options’.²⁵ The German Foreign Minister Annalena Baerbock recently observed that when she speaks with international law experts, they ‘can list ten arguments for and ten arguments against. And these legal debates, which then become political too, offer the perfect front for every politician to hide behind’.²⁶

I agree, and I see the tendency towards polarisation growing stronger. Karthik Ramanna, writing in the *Harvard Business Review*, has observed that we are living in the ‘[a]ge of [o]utrage’ due to a perfect storm of three forces: first, ‘many people feel unhopeful about the future’; second, ‘they often feel ... the game is rigged and

²⁰ Charlesworth (n 2) 384–5; *Letter Dated 29 November 1995 from the Permanent Representative of the United States of America to the United Nations Addressed to the Secretary-General*, UN GAOR, 50th sess, Agenda Item 28, UN SCOR, 50th sess, UN Docs A/50/790 and S/1995/999 (30 November 1995) annex (‘*General Framework Agreement for Peace in Bosnia and Herzegovina*’) (‘*Dayton Accords*’).

²¹ Ardi Imseis, *The United Nations and the Question of Palestine* (Cambridge University Press, 2023).

²² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136; Bethan McKernan, ‘Israel and Hamas at War after Surprise Attacks from Gaza Strip’, *The Guardian* (online, 7 October 2023) <<https://www.theguardian.com/world/2023/oct/07/hamas-launches-surprise-attack-on-israel-as-palestinian-gunmen-reported-in-south>>, archived at <<https://perma.cc/D4SM-NMCK>>.

²³ Respectively, the Six-Day War, the foundation of Israel and the Nakba, the declaration of the British Mandate for Palestine, the capture of Palestine by the Allies from the Ottoman Empire and the Ottoman Empire’s recapture of Palestine from Egypt: ‘Six-Day War’, *Encyclopedia Britannica* (Web Page, 25 August 2024) <<https://www.britannica.com/event/Six-Day-War>>, archived at <<https://perma.cc/R2P9-Y9K5>>; ‘1948 Arab-Israeli War’, *Encyclopedia Britannica* (Web Page, 10 May 2024) <<https://www.britannica.com/event/1948-Arab-Israeli-War>>, archived at <<https://perma.cc/YF6G-DJCV>>; ‘World War I and After’, *Encyclopedia Britannica* (Web Page, 21 September 2024) <<https://www.britannica.com/place/Palestine/World-War-I-and-after>>, archived at <<https://perma.cc/TZE8-FKCC>>; ‘History of Palestine: Ottoman Rule’, *Encyclopedia Britannica* (Web Page, 21 September 2024) <<https://www.britannica.com/place/Palestine/The-Crusades>>, archived at <<https://perma.cc/3ZBY-34KP>>. The term “we” here refers mainly to international lawyers outside of Palestine and Israel.

²⁴ Charlesworth (n 2) 386.

²⁵ *Ibid* 387.

²⁶ Annalena Baerbock, ‘Strengthening International Law in Times of Crisis’ (Speech, Hague Academy of International Law, 16 January 2023).

they have been treated unfairly’; third, people ‘are being drawn to ... ideologies of “othering” ... an us-versus-them approach’.²⁷

Another skewing effect of the crisis model is ‘that international lawyers concentrate on the public realm, of war and conflict and violence’, rather than the ‘politics of everyday life’ and ‘longer-term trends and structural problems’, such as the position of women.²⁸ In this regard, I think we have made significant progress — thanks in part to the work of Charlesworth and other scholars who have exposed the gendered coding of international law.²⁹ There is still much work to be done for other vulnerable groups and in terms of intersectionality.³⁰ We are also better at paying attention to non-state actors and including them in the international legal system than we were two decades ago, though our efforts at defining responsibilities and ensuring accountability are still nascent.³¹

III WHAT IS AN EPOCH APPROACH?

What is an epoch? In simple terms, an epoch is a distinctive period in history. Whereas a generation is 20–30 years,³² an epoch does not have a fixed number of years.³³ In the historical sense — the sense in which I use it here — an epoch is an extended period of time characterised by ‘new developments and great change’.³⁴ In the geological sense, it is ‘one of the periods of time in which the history of the earth can be measured, into which an era can be divided’.³⁵ Taking an epoch approach enlarges our frame of reference beyond successive crises and disputes. It resists the 24-hour news cycle and overlooks the latest viral sensation. It gazes beyond the next election and even beyond the next generation.

For the purposes of this lecture, I define “an epoch approach to international law” as having three features — the “three Ls”: (1) long-term view, (2) linkages and (3) lateral thinking. This approach does not overcome the problems with the crisis model that Charlesworth identified, but it does mitigate some of them and generates some new ways of approaching our world and our discipline. Let me elaborate on each of these features with some examples.

First, the long-term view. In his recent article ‘Project 2100: Looking Back, Looking Forward’, Sir Daniel Bethlehem, former Legal Adviser to the United

²⁷ Karthik Ramanna, ‘Managing in the Age of Outrage’ (2023) 101(1) *Harvard Business Review* 96, 96.

²⁸ Charlesworth (n 2) 388–9.

²⁹ Ibid 390. See, among others, Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85(4) *American Journal of International Law* 613.

³⁰ See, eg, Aisha Nicole Davis, ‘Intersectionality and International Law: Recognizing Complex Identities on the Global Stage’ (2015) 28(1) *Harvard Human Rights Journal* 205; Jens T Theilen, ‘Intersectionality’s Travels to International Human Rights Law’ (2023) 45(2) *Michigan Journal of International Law* 233.

³¹ See Rishi Gulati and Philippa Webb, ‘The Legal Accountability of Transnational Institutions: Past, Present and Future’ (2023) 34(3) *King’s Law Journal* 411.

³² *Cambridge Dictionary* (online at 1 July 2024) ‘generation’ (def 2).

³³ *Cambridge Dictionary* (online at 1 July 2024) ‘epoch’ (def 1).

³⁴ Ibid. Within the discipline of history, where one epoch begins and ends is not a settled matter, with periodisation recognised as being without clear boundaries. I note also that an epoch may relate to paradigm shifts in multiple areas: see, eg, Jeremy Baskin, ‘Paradigm Dressed as Epoch: The Ideology of the Anthropocene’ (2015) 24(1) *Environmental Values* 9.

³⁵ *Cambridge Dictionary* (online at 1 July 2024) ‘epoch’ (def 2).

Kingdom Foreign and Commonwealth Office, urges us to focus on the longer term:

We are not good, as a profession, at looking into the deep future and considering whether change is required. We too often retreat into a defensive posture.³⁶

Framing the enquiry around 2100 is not intended to focus attention on the point of arrival. It is intended to focus attention *away* from the here and now — away from the challenges of 2024 ... [i]f we are to get to the higher ground of the longer term, we need a sense of direction that is focused on the horizon.³⁷

I have been reading about the Svalbard Global Seed Vault in Norway which safeguards 1.3 million seed samples from almost every country ‘to secure the foundation of our future food supply’.³⁸ ‘Permafrost and thick rock ensure the samples will remain frozen’ even if power fails; ‘seeds are sealed in custom-made’ foil packages, sealed inside boxes and sealed in the vault set 120 metres into a mountain.³⁹

For an international law example, we can look to boundary treaties, which are also often peace treaties. The International Court of Justice (‘ICJ’) in the *Temple of Preah Vihear* case explained:

[W]hen two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question ... Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious.⁴⁰

The second feature of the epoch approach is linkages. This operates on two levels. First, there is a constant interaction between domestic and international systems on a vertical axis as well as between those systems on a horizontal level. Domestic practice can and does shape international law, and international law is received in different ways into domestic practice. It is a dynamic process.⁴¹ Second, an epoch approach makes linkages between groups — it is diverse and inclusive — and has a democratising impulse. Making linkages may include building unlikely coalitions. My example here is the partnership between the

³⁶ Daniel Bethlehem, ‘Project 2100: Looking Back, Looking Forward’ (2024) 13(1) *Cambridge International Law Journal* 154, 166.

³⁷ *Ibid* 160 (emphasis in original). See also the argument for ‘a more proactive, forward-looking approach that is geared toward the future, with a view to preventing risks and realizing opportunities well in advance’: Michal Saliternik and Sivan Shlomo Agon, ‘Proactive International Law’ (2024) 75(3) *UC Law Journal* 661, 661.

³⁸ ‘Svalbard Global Seed Vault’, *Crop Trust* (Web Page) <<https://www.croptrust.org/work/svalbard-global-seed-vault/>>, archived at <<https://perma.cc/XW9V-KM48>>.

³⁹ *Ibid*.

⁴⁰ *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 34. See also *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India) (Award)* (2014) 32 RIAA 1, 74 [216].

⁴¹ Antonios Tzanakopoulos and Christian J Tams, ‘Introduction: Domestic Courts as Agents of Development of International Law’ (2013) 26(3) *Leiden Journal of International Law* 531, 531. See also André Nollkaemper, Yuval Shany and Antonios Tzanakopoulos (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press, 2024).

Clooney Foundation for Justice, the Obama Foundation's Girls Opportunity Alliance and Melinda French Gates to end child marriage worldwide.⁴² Civil society organisations do not traditionally join forces; they have their own networks and areas of expertise, but this collaboration shows the great potential that can be unleashed.⁴³

In Malawi, 42% of girls are married by the age of 18, which means they leave education and are more likely to experience domestic violence.⁴⁴ They have worse health and economic outcomes than their unmarried peers.⁴⁵ Six hundred and fifty million girls who are alive today married when younger than 18.⁴⁶ Among the initiatives of the alliance, they have set up mobile legal aid clinics — a van with female lawyers travels to rural communities in Malawi to teach girls about their rights and offer free legal advice (85% of the population lives in such areas).⁴⁷ At the current rate of progress, the United Nations has estimated that child marriage will take 300 years to eradicate worldwide.⁴⁸ But the Clooney-Obama-French Gates alliance aims to change that — they want to wipe it out in less than a generation.⁴⁹

The third feature is lateral thinking. An epoch approach calls for reimagining how things are. An epoch is, after all, a period marked by development, not stasis. But revolution may not serve the long-term view, nor maintain the linkages that need to be created and nurtured. I suggest an effective method for the epoch approach is “incremental creativity” — using existing exceptions and mechanisms in innovative ways to make progress. As James Crawford observed, ‘[o]ne of international law’s strengths (it has many weaknesses) is its capacity to keep issues on agendas for decades’.⁵⁰ This enables evolution. Let me give you an example. It is a case in which I was involved that used the existing commercial activity exception to diplomatic immunity to hold a diplomat accountable for allegations of modern slavery: *Basfar v Wong*.⁵¹

⁴² ‘Michelle Obama, Melinda French Gates, and Amal Clooney Announce Collaboration to Support Adolescent Girls’ Education and Help End Child Marriage’, *The Obama Foundation* (Web Page, 25 October 2022) <<https://www.obama.org/press-releases/michelle-obama-melinda-french-gates-and-amal-clooney-announce-collaboration-to-support-adolescent-girls-education-and-help-end-child-marriage/>>, archived at <<https://perma.cc/24EX-8MXG>>. See also ‘Who We Are’, *End FGM: European Network* (Web Page) <<https://www.endfgm.eu/who-we-are/>>, archived at <<https://perma.cc/ET4E-RHNT>>.

⁴³ See also the non-governmental organisation Coalition for the International Criminal Court: ‘Coalition for the International Criminal Court’ (Web Page) <<https://www.coalitionfortheicc.org/>>, archived at <<https://perma.cc/H4E6-MVJ7>>.

⁴⁴ UNICEF Malawi, *Budget Scoping on Programmes and Interventions to End Child Marriage in Malawi* (Report, December 2019).

⁴⁵ *Ibid.*

⁴⁶ ‘Child Marriage’, *UNICEF Data* (Web Page, October 2022) <<https://data.unicef.org/topic/gender/child-marriage/>>, archived at <<https://perma.cc/NGQ3-H7X4>>.

⁴⁷ Megha Mohan, Yousef Eldin and Emma Ailes, ‘Obama, Clooney and Gates: “We Can End Child Marriage in a Generation”’, *BBC News* (online, 21 November 2023) <<https://www.bbc.co.uk/news/world-67473254>>, archived at <<https://perma.cc/5GCY-TUJS>>.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ James Crawford, ‘Reflections on Crises in International Law’ in George Ulrich and Ineta Ziemele (eds), *How International Law Works in Times of Crises* (Oxford University Press, 2019) 10, 14.

⁵¹ [2023] AC 33.

Diplomats have extensive immunity — more extensive than that of the states they represent. They have absolute immunity from criminal jurisdiction.⁵² There are three narrow exceptions to immunity from civil jurisdiction: proceedings about immovable property,⁵³ proceedings about succession⁵⁴ and proceedings concerning a ‘professional or commercial activity ... outside [of the diplomat’s] official functions’.⁵⁵

Ms Josephine Wong, my client, was a migrant domestic worker employed by a Saudi Arabian diplomat in London. She is from the Philippines and supports 11 family members back home.⁵⁶ Her employment contract stated she would be paid national minimum wage (around £7 per hour), work six days per week, work eight hours per day, have one month off per year and be provided with sleeping accommodation.⁵⁷ She alleges that her conditions were not like this at all. She said she was confined to the diplomat’s house,

except to take out the rubbish. She was held virtually incommunicado, being allowed to speak to her family only twice a year using [the diplomat’s] mobile telephone. She was made to work from 7am to around 11.30pm each day, with no days off or rest breaks, and was required to wear a door-bell at all times so that she was at the family’s beck and call 24 hours a day. She was shouted at incessantly and regularly called offensive names. When the family was at home, Ms Wong was only allowed to eat their left-over food.⁵⁸

She lost 10 kilograms. She said she had to sleep in a cupboard where the family kept their suitcases. Over the course of 21 months, she was paid just £1,800, which was a fraction of what her employment contract stated.⁵⁹ She said she endured these abusive conditions for 21 months until she managed to escape and find help with a non-governmental organisation, Kalayaan, dedicated to helping migrant domestic workers in the United Kingdom.⁶⁰

The UK government found that there were ‘conclusive grounds’ that Ms Wong was a victim of modern slavery.⁶¹ Ms Wong did not bring a claim for human rights abuse, even though the prohibition of slavery is a *jus cogens* norm.⁶² She brought claims for ‘wrongful dismissal, failure to pay the National Minimum Wage, unlawful deductions from wages ... claims under the *Working Time Regulations 1998*, failure to provide written wage slips and failure to provide written employment particulars’.⁶³ The legal question was whether exploiting a domestic

⁵² *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964) art 31(1).

⁵³ *Ibid* art 31(1)(a).

⁵⁴ *Ibid* art 31(1)(b).

⁵⁵ *Ibid* art 31(1)(c).

⁵⁶ *Basfar* (n 51) 2 [1].

⁵⁷ *Ibid* 3 [7]; Brigid Francis-Devine, *National Minimum Wage Statistics* (Report, 7 March 2024) 8 <<https://researchbriefings.files.parliament.uk/documents/CBP-7735/CBP-7735.pdf>>, archived at <<https://perma.cc/P7HF-Q4RJ>>.

⁵⁸ *Basfar* (n 51) 3 [7]–[8].

⁵⁹ *Ibid* 4 [9].

⁶⁰ *Ibid* 3 [5], 4 [10].

⁶¹ *Ibid* 30 [86].

⁶² See, eg, Cherif Bassiouni, ‘Enslavement as an International Crime’ (1991) 23(2) *New York University Journal of International Law and Politics* 445.

⁶³ *Wong v Basfar* (Employment Tribunals (England and Wales), Brown J, 11 June 2019) 1.

worker in the manner alleged constituted ‘exercising’ a ‘commercial activity’ within the exception to diplomatic immunity.⁶⁴

The majority of the Supreme Court found that it did, that the diplomat was not immune and therefore that Ms Wong’s claims could proceed:

Employment is a voluntary relationship, freely entered into and governed by the terms of a contract ... By contrast, the essence of modern slavery is that it is not freely undertaken. Rather, the work is extracted by coercion and the exercise of control over the victim. This usually involves exploiting circumstances of the victim which make her specially vulnerable to abuse. Those constraints generally make it impossible or very difficult for the worker to leave. That is why, on the assumed facts, we describe Ms Wong’s departure from service with Mr Basfar as an ‘escape’.⁶⁵

The Court accepted Ms Wong’s argument that the diplomat made a profit even if no money changed hands.⁶⁶ It rejected gendered assumptions about what constitutes “work”.

The judgment marks a milestone in the fight against modern slavery. This ‘is the first case in the world in which a [domestic] apex court has concluded that the alleged exploitation of a domestic worker in circumstances of modern slavery falls within the “commercial activity” exception’ of the *Vienna Convention on Diplomatic Relations*.⁶⁷ The *Basfar v Wong* judgment has the potential to unlock accountability for the exploitation of migrant domestic workers by foreign diplomats in other jurisdictions and has been welcomed by the Philippines’ Department of Migrant Workers.⁶⁸ And it does this within the existing framework of diplomatic immunity through incremental creativity.

IV CASE STUDY OF THE RUSSIAN FEDERATION’S AGGRESSION AGAINST UKRAINE

I now turn to a case study of the Russian Federation’s full-scale aggression against Ukraine, a crisis that has occupied international lawyers, politicians, international organisations, civil society and many others since at least 24 February 2022.⁶⁹ It is a crisis for which the stage was set by Russia’s invasion and annexation of Crimea in 2014.⁷⁰

Charlesworth’s crisis model maps fairly well onto this case study. We have the contentious construction of the crisis. The actual war on the ground has been

⁶⁴ *Basfar* (n 51) 2 [2].

⁶⁵ *Ibid* 15–16 [43].

⁶⁶ *Ibid* 19 [56].

⁶⁷ ‘*Basfar v Wong* 2022 UKSC 20’, *United Nations Office on Drugs and Crime* (Web Page) <https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/gbr/2022/basfar_v_wong_2022_uksc_20.html>, archived at <<https://perma.cc/MF9M-UL2L>>.

⁶⁸ Department of Migrant Workers, Republic of the Philippines, ‘Statement on UK Supreme Court Ruling on Diplomatic Immunity vs Modern Day Slavery Cases’ (Statement) <<https://dmw.gov.ph/statement-and-advisories/On-UK-Supreme-Court-Ruling-on-Diplomatic-Immunity-vs-Modern-Day-Slavery-Cases>>, archived at <<https://perma.cc/8LKF-UGWZ>>.

⁶⁹ Paul Kirby, ‘Has Putin’s War Failed and What Does Russia Want from Ukraine?’, *BBC News* (online, 24 February 2023) <<https://www.bbc.com/news/world-europe-56720589>>, archived at <<https://perma.cc/MF3M-6XJ>>.

⁷⁰ *Ibid*.

accompanied by an information war about the success or failure of various operations.⁷¹ Within Russia, the propaganda is pervasive. While some individuals will be able to resist, a great many will not; the state is ‘bombing their minds’, to quote the European Union’s chief diplomat.⁷²

However, unlike the Kosovo case,⁷³ the legal qualification of Russia’s action is not ambiguous. Despite Russia calling it a ‘special military operation’, Russia’s aggression has been consistently deplored by the international community as a violation of art 2(4) of the *Charter of the United Nations* (‘*Charter*’).⁷⁴ On 14 November 2022, the UN General Assembly

[r]ecognize[d] that the Russian Federation must be held to account for any violations of international law ... [and] that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts.⁷⁵

But we see what Charlesworth called the ethical cost of a crisis approach emerge. The case brought by Ukraine against Russia at the ICJ has, for jurisdictional reasons, had to fit through the eye of the needle of the *Convention on the Prevention and Punishment of the Crime of Genocide*.⁷⁶ In February, the Court gave its decision on jurisdiction, rejecting some of Ukraine’s claims.⁷⁷ The result is that Ukraine’s case on the merits will have to focus on a lack of credible evidence that Ukraine is responsible for genocide in Eastern Ukraine.⁷⁸ This is an

⁷¹ See, eg, Keir Giles, ‘Russian Cyber and Information Warfare in Practice: Lessons Observed from the War on Ukraine’ (Research Paper, Chatham House, 14 December 2023).

⁷² Josep Borrell, High Representative of the Union for Foreign Affairs and Security Policy, ‘Disinformation’ (Speech, European Parliament, 8 March 2022).

⁷³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403.

⁷⁴ *Aggression against Ukraine*, GA Res ES-11/1, UN GAOR, Agenda Item 5, UN Doc A/RES/ES-11/1 (18 March 2022) 3; *Humanitarian Consequences of the Aggression against Ukraine*, GA Res ES-11/2, UN GAOR, Agenda Item 5, UN Doc A/RES/ES-11/2 (28 March 2022); *Suspension of the Rights of Membership of the Russian Federation in the Human Rights Council*, GA Res ES-11/3, UN GAOR, Agenda Item 5, UN Doc A/RES/ES-11/3 (8 April 2022); *Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations*, GA Res ES-11/4, UN GAOR, Agenda Item 5, UN Doc A/RES/ES-11/4 (13 October 2022); *Furtherance of Remedy and Reparation for Aggression against Ukraine*, GA Res ES-11/5, UN GAOR, Agenda Item 5, UN Doc A/RES/ES-11/5 (15 November 2022) (‘*GA Res ES-11/5*’); *Principles of the Charter of the United Nations Underlying a Comprehensive, Just and Lasting Peace in Ukraine*, GA Res ES-11/6, UN GAOR, Agenda Item 5, UN Doc A/RES/ES-11/6 (2 March 2023).

⁷⁵ *GA Res ES-11/5* (n 74) para 2 (emphasis omitted).

⁷⁶ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (‘*Genocide Convention*’).

⁷⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia) (Preliminary Objections)* (International Court of Justice, General List No 182, 2 February 2024) 56–7 [149].

⁷⁸ *Ibid.* There is also the issue of Russia’s responsibility for violating the provisional measures order of 16 March 2022, ordering Russia to immediately suspend its use of force in Ukraine: *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia) (Provisional Measures)* [2022] ICJ Rep 211.

example of narrowing the agenda of international law.⁷⁹ Moreover, the crisis-driven emphasis on the war has perhaps led international lawyers to overlook some other aspects of the conflict. It was therefore welcome that the International Criminal Court issued an arrest warrant against President Vladimir Putin for the war crime of the deportation and transfer of children: around 20,000 children have been forcibly removed.⁸⁰ Though this too does not come close to capturing the range of violations that President Putin is responsible for, it has led to advocacy for a special tribunal for aggression, possibly based on an agreement between Ukraine and the Council of Europe.⁸¹ In the words of Charlesworth, this crisis has become the ‘heroic mission’ of many international lawyers.⁸²

What could an epoch approach bring to this case? On a long-term view, the Russian Federation’s aggression against Ukraine has highlighted the need to revive multilateral institutions. With the UN Security Council deadlocked by the Russian Federation’s veto, we have seen the revival of the *Uniting for Peace* procedure,⁸³ some creative initiatives on restraining the veto⁸⁴ and new prominence for European institutions.⁸⁵ Oona A Hathaway, Maggie Mills and Heather Zimmerman have written on the possibility of reform of the UN without amending the *Charter* — enabling the Organisation to ‘respond flexibly to the new and constantly evolving challenges that the world faces now and will face in the future’.⁸⁶

The role of other actors has come to the fore in positive ways. Over 2 million Ukrainians fled to Poland and while the government initially scrambled to

⁷⁹ Other aspects of Ukraine’s complaint may still play out — and are still playing out — in other fora, such as in the European Court of Human Rights: Registrar of the Court, European Court of Human Rights, ‘The European Court Grants Urgent Interim Measures in Application concerning Russian Military Operations on Ukrainian Territory’ (Press Release, 1 March 2022).

⁸⁰ Alison Bisset, ‘The UN Committee on the Rights of the Child and Russia’s Deportation of Children from Ukraine’, *Opinio Juris* (Blog Post, 12 April 2024) <<http://opiniojuris.org/2024/04/12/the-un-committee-on-the-rights-of-the-child-and-russias-deportation-of-children-from-ukraine/>>, archived at <<https://perma.cc/NZL9-4NLP>>.

⁸¹ See Gaiane Nuridzhanian, ‘International Enough? A Council of Europe Special Tribunal for the Crime of Aggression’, *Just Security* (Blog Post, 3 June 2024) <<https://www.justsecurity.org/96320/council-of-europe-ukraine-tribunal/>>, archived at <<https://perma.cc/XA3G-ZPA8>>.

⁸² Charlesworth (n 2) 387.

⁸³ *Uniting for Peace*, GA Res 377A(V), UN GAOR, 5th sess, 302nd plen mtg, UN Doc A/RES/377(V) (3 November 1950).

⁸⁴ See Ben Donaldson, ‘Liechtenstein’s “Veto Initiative” Wins Wide Approval at the UN: Will It Deter the Big Powers?’, *PassBlue* (Opinion, 26 April 2022) <<https://www.passblue.com/2022/04/26/liechtensteins-veto-initiative-wins-wide-approval-at-the-un-will-it-deter-the-major-powers/>>, archived at <<https://perma.cc/XPQ7-Q897>>.

⁸⁵ Council of Europe, Committee of Ministers, *Cessation of the Membership of the Russian Federation to the Council of Europe*, CM/Res(2022)2, 16 March 2022; Council of Europe, Committee of Ministers, *Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe*, CM/Res(2022)3, 23 March 2022.

⁸⁶ Oona A Hathaway, Maggie Mills and Heather Zimmerman, ‘Crisis and Change at the United Nations: Non-Amendment Reform and Institutional Evolution’ (2025) *Michigan Journal of International Law* (forthcoming), 85. For example, the authors have written about the possibility of reviving the ‘expectation that states cannot vote on a matter brought under Chapter VI if they are directly involved in the dispute’: at 69. ‘The General Assembly could trigger this process by adopting a resolution outlining an interpretation of the Article 27(3)’s key terms and reaffirming its mandate on Security Council members’: at 72. The UN General Assembly ‘could also request an advisory opinion from the ICJ on the legality of a veto of a Chapter VI resolution by a State directly involved in the matter’: at 73.

respond, Polish people opened up their private homes to them.⁸⁷ There were no refugee camps.⁸⁸ There have also been concerning revelations. Internet access in Ukraine, including for drone warfare, has been at the discretion of one man: Elon Musk.⁸⁹

As regards linkages, the conflict has triggered the rise in participation by third-party states before international courts. Ukraine's case against Russia at the ICJ has attracted the intervention of 32 states.⁹⁰ Ukraine's case against Russia at the European Court of Human Rights triggered the intervention by an unprecedented 31 states.⁹¹

Finally, on lateral thinking, there have been extensive debates on the confiscation of more than \$300 billion of Central Bank of Russia assets to provide reparations to Ukraine and its people.⁹² I have written about four potential avenues under existing international law: avoidance of immunity through purely executive or legislative action; justification for the breach of international law on the grounds that it is a countermeasure; evolution of international law to lift immunity from enforcement upon, for example, a finding of aggression by a UN principal organ; and an exception in international law for the enforcement of international judgments.⁹³ In June 2024, in an example of incremental creativity, the G7 agreed to use windfall profits from the frozen assets to secure \$50 billion in loans to Ukraine, to be repaid using either future profits or reparations eventually paid by Russia.⁹⁴

⁸⁷ 'UN Expert Praises Generosity towards Ukrainian Refugees by Poland and Urges Belarus and Poland to End Pushbacks', *United Nations Office of the High Commissioner for Human Rights* (Press Release, 28 July 2022) <<https://www.ohchr.org/en/press-releases/2022/07/un-expert-praises-generosity-towards-ukrainian-refugees-poland-and-urges>>, archived at <<https://perma.cc/VSF9-Z8FC>> .

⁸⁸ *Ibid.*

⁸⁹ Elon Musk is head of Starlink, a privately owned satellite internet communications company: Ronan Farrow, 'Elon Musk's Shadow Rule: How the US Government Came to Rely on the Tech Billionaire — and Is Now Struggling to Rein Him In', *The New Yorker* (online, 21 August 2023) <<https://www.newyorker.com/magazine/2023/08/28/elon-musks-shadow-rule>>, archived at <<https://perma.cc/DR9A-LCPA>>; Anthony Capaccio, 'Pentagon Deal with Musk's Starlink in Ukraine Extended Six Months for \$14 Million', *Bloomberg* (online, 13 June 2024) <<https://www.bloomberg.com/news/articles/2024-06-13/pentagon-extends-deal-with-musk-s-starlink-in-ukraine-for-six-months>>, archived at <<https://perma.cc/SC5W-WGRF>>.

⁹⁰ 'Verbatim Record', *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia)* (International Court of Justice, General List No 182, 27 September 2023) 35 [7]. The US also attempted to intervene but was excluded for having a reservation to art IX of the *Genocide Convention* (n 76): *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia)* (Order on 5 June 2023) [2023] ICJ Rep 354, 377 [98].

⁹¹ European Court of Human Rights, 'Update on the Third-Party Intervention Requests Granted in Inter-State Case *Ukraine and the Netherlands v Russia*' (Press Release, 17 March 2023).

⁹² Philippa Webb, *Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine* (Report, 23 February 2024) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU\(2024\)759602](https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2024)759602)>, archived at <<https://perma.cc/S7KP-WBZM>>.

⁹³ *Ibid.*

⁹⁴ 'Explainer: What is the G7's \$50 Billion Loan Plan for Ukraine?', *Reuters* (online, 14 June 2024) <<https://www.reuters.com/world/europe/what-is-g7s-50-billion-loan-plan-ukraine-2024-06-14/>>, archived at <<https://perma.cc/534B-MGZP>>.

V CASE STUDY OF CLIMATE CHANGE AND THE INTERNATIONAL TRIBUNAL ON THE LAW OF THE SEA ADVISORY OPINION

Climate change is the ultimate crisis. In the words of the UN Secretary-General, the ‘alarm bells are deafening, and the evidence is irrefutable’ that climate change is a ‘code red for humanity’.⁹⁵

The crisis narrative around climate has been effective at getting attention but less effective in securing systemic change. Jean d’Aspremont has noted that, unless changes are made to the way that international law deals with crises, international law will be found ‘wordless in front of a ravaging of the earth’.⁹⁶ There is strong evidence to the contrary in recent litigation.

Applying Charlesworth’s model, there has been a contentious construction of the crisis. Initially, it was doubted that climate change was even “real”, but now those doubts are largely swept away in the face of overwhelming scientific consensus. There are, however, other contentious concepts, such as that of ‘common but differentiated responsibilities and respective capabilities’.⁹⁷ Many states agree that that it means that ‘States with greater means and capabilities must do more to reduce ... emissions than States with less means and capabilities’.⁹⁸ Others use it as an excuse to ‘unduly postpone, or even be exempt from’ action to limit global warming to 1.5°C.⁹⁹

The ethical cost of the crisis model is also evident. Some high-emitting states have narrowed the agenda of international law to nationally determined contributions (‘NDCs’) under the *Paris Agreement*.¹⁰⁰ The Intergovernmental Panel on Climate Change has calculated that *published* NDCs would achieve only a 4% reduction by 2030 as compared to the 43% needed to keep global warming to 1.5°C; the trend from *implemented* NDCs shows emissions increasing by 5%.¹⁰¹ There have also been silences around the disproportionate and unfair impact of

⁹⁵ António Guterres, United Nations Secretary-General, *Secretary-General’s Statement on the IPCC Working Group I Report on the Physical Science Basis of the Sixth Assessment*, 9 August 2021.

⁹⁶ Jean d’Aspremont, ‘International Law as a Crisis Discourse: The Peril of Wordlessness’ in Makane Moïse Mbengue and Jean d’Aspremont, *Crisis Narratives in International Law* (Brill, 2022) 69, 83. The authors also note that ‘[a]s international law continues to live off crises, live its crises, and be in crisis, international lawyers should seriously rethink their vocabularies and narratives, not only to do something for the world with their words, but also to salvage the legacy of international law’: at 84. See also Leslie-Anne Duvic-Paoli’s argument that ‘an ambition discourse’ can fulfil objectives that a ‘crisis narrative’ around climate change is unable to accommodate: Leslie-Anne Duvic-Paoli, ‘International Law: A Discipline of Ambition’ (2023) 36(2) *Leiden Journal of International Law* 233, 233.

⁹⁷ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)* (International Tribunal for the Law of the Sea, Case No 31, 21 May 2024) 82 [227] (‘*ITLOS Advisory Opinion*’).

⁹⁸ *Ibid* (emphasis added).

⁹⁹ *Ibid* 81–2 [226].

¹⁰⁰ Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report* (Report, 2023) (‘*Climate Change 2023*’); *Paris Agreement*, opened for signature 22 April 2016, 3156 UNTS 79 (entered into force 4 November 2016).

¹⁰¹ *Climate Change 2023* (n 100) 59. See also United Nations Environment Programme, *Emissions Gap Report: The Closing Window* (Report, 2022); ‘CAT Emissions Gap’, *Climate Action Tracker* (Web Page, 5 December 2023) <<https://climateactiontracker.org/global/cat-emissions-gaps/>>, archived at <<https://perma.cc/DW77-P6UZ>>; Conference of the Parties Serving as the Meeting of the Parties to the Parties Agreement, United Nations Framework Convention on Climate Change, *First Global Stocktake: Proposal by the President*, 5th sess, Agenda Item 4, UN Doc FCCC/PA/CMA/2023/L.17 (13 December 2023) para 21.

climate change on certain groups in society and on certain states. The Small Island States have contributed less than 1% of global greenhouse gas emissions but ‘bear the brunt of climate change impacts’.¹⁰²

But we have an insight into an epoch approach to climate. In May 2024, the International Tribunal for the Law of the Sea (‘ITLOS’) issued an advisory opinion in *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (‘ITLOS Advisory Opinion’).¹⁰³ Twenty-one judges — an unlikely coalition from states as diverse as South Africa, Iceland, Russia, China, India, Jamaica, Ukraine and Japan — reached a unanimous decision with wide-ranging implications. I will come to those in a moment; first, I want to tell you how we got here.

At the 2021 UN Climate Change Conference, Antigua and Barbuda and Tuvalu, frustrated by the pace of negotiations, formed the Commission of Small Island States on Climate Change and International Law (‘COSIS’) to pursue the definition, implementation and development of rules of international law concerning climate change.¹⁰⁴ COSIS grew to nine members.¹⁰⁵ I am a member of its Committee of Legal Experts.¹⁰⁶ COSIS requested ITLOS to give an opinion on the specific obligations of states with respect to climate change. In hearings in September 2023, 53 states and organisations participated or were invited to participate.¹⁰⁷ The *ITLOS Advisory Opinion* is applicable to 170 states party to the *United Nations Convention on the Law of the Sea* (‘UNCLOS’).¹⁰⁸ Why did the Small Island States bring this to ITLOS?

Climate change is largely a *marine* phenomenon. The ocean is the largest carbon and heat sink on earth. It has absorbed 25% of the carbon dioxide that we emit into the atmosphere and 90% of the excess heat trapped in the climate system since the pre-industrial era.¹⁰⁹ In 2022, the ocean absorbed the energy equivalent

¹⁰² ‘Written Statement of the Commission of Small Island States on Climate Change and International Law’, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (International Tribunal for the Law of the Sea, Case No 31, 16 June 2023) 38 [122].

¹⁰³ *ITLOS Advisory Opinion* (n 97).

¹⁰⁴ *Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law*, opened for signature 31 October 2021 (entered into force 31 October 2021).

¹⁰⁵ Palau, Niue, Vanuatu, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis and the Bahamas: *ITLOS Advisory Opinion* (n 98) 4–5 [2].

¹⁰⁶ *Ibid.*

¹⁰⁷ ‘Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion Submitted to the Tribunal)’, *International Tribunal for the Law of the Sea* (Web Page) <<https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>>, archived at <<https://perma.cc/PD79-WZHG>>.

¹⁰⁸ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994); ‘United Nations Convention on the Law of the Sea’, *United Nations Treaty Collection* (Web Page, 21 September 2024) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3>, archived at <<https://perma.cc/UJ32-LAEB>>.

¹⁰⁹ ‘The Ocean: The World’s Greatest Ally against Climate Change’, *United Nations Climate Action* (Web Page) <<https://www.un.org/en/climatechange/science/climate-issues/ocean>>, archived at <<https://perma.cc/T5N7-DSA9>>.

of seven Hiroshima bombs every second.¹¹⁰ The COSIS states, such as Tuvalu, which has an average elevation of 183 cm,¹¹¹ are facing sea level rise, more tropical cyclones and increased acidification.¹¹²

*This is a lateral thinking strategy of using existing law — UNCLOS was concluded in 1982 — to prevent and reduce climate change. In the unanimous ITLOS Advisory Opinion, there were six key takeaways. First, greenhouse gas (‘GHG’) emissions meet the definition of ‘pollution of the marine environment’ which triggers specific obligations to prevent, reduce and control pollution.¹¹³ Second, states must ‘take all necessary measures’, which are to be determined objectively, taking into account the ‘best available science’.¹¹⁴ Third, the obligation to “protect the marine environment” is broad — to prevent harm, to mitigate harm but also to restore degraded environments (the seagrass meadows, tidal marshes and mangroves that form “blue carbon” ecosystems).¹¹⁵ Fourth, states are obliged to protect the marine environment not only when we know activity will harm it, but also where there is scientific uncertainty (the precautionary approach).¹¹⁶ Fifth, because of the severe and irreversible effects of GHG emissions on the marine environment, the standard is stringent due diligence.¹¹⁷ Sixth, the *United Nations Framework Convention on Climate Change*¹¹⁸ and *Paris Agreement* may be taken into account, but they do not set the standard for assessing states’ obligations under the law of the sea.¹¹⁹ A state’s NDC may be insufficient or irrelevant to fulfilling its law of the sea obligations. Overall, as Jacqueline Peel has observed,*

by advancing a more holistic vision of climate-relevant international law — one that seeks to harmonise but also allow for complementary interaction amongst the obligations set under different regimes — the ITLOS advisory opinion offers hope.¹²⁰

¹¹⁰ John Abraham, ‘We Study Ocean Temperatures: The Earth Just Broke a Heat Increase Record’, *The Guardian* (online, 11 January 2022) <<https://www.theguardian.com/commentisfree/2022/jan/11/ocean-temperatures-earth-heat-increase-record>>, archived at <<https://perma.cc/L42Z-5P7K>>. See also National Centers for Environmental Information, ‘Global Ocean Heat and Salt Content: Seasonal, Yearly, and Pentadal Fields’ (Web Page) <<https://www.ncei.noaa.gov/access/global-ocean-heat-content/>>, archived at <<https://perma.cc/3KH7-BDCH>>.

¹¹¹ ‘Tuvalu’, *New Zealand Foreign Affairs and Trade* (Web Page) <<https://www.mfat.govt.nz/en/countries-and-regions/australia-and-pacific/tuvalu/>>, archived at <<https://perma.cc/H454-CKEW>>.

¹¹² *ITLOS Advisory Opinion* (n 97) 31 [59].

¹¹³ *Ibid* 148.

¹¹⁴ *Ibid* 147.

¹¹⁵ *Ibid* 151.

¹¹⁶ *Ibid* 152.

¹¹⁷ *Ibid*.

¹¹⁸ *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

¹¹⁹ *Ibid* 148–9.

¹²⁰ Jacqueline Peel, ‘Unlocking UNCLOS: How the ITLOS Advisory Opinion Delivers a Holistic Vision of Climate-Relevant International Law’, *Climate Law* (Blog Post, 24 May 2024) <<https://blogs.law.columbia.edu/climatechange/2024/05/24/unlocking-unclos-how-the-itlos-advisory-opinion-delivers-a-holistic-vision-of-climate-relevant-international-law/>>, archived at <<https://perma.cc/Y4X3-8SWS>>. See also the linking of regime interaction and the challenge of legal education in Margaret A Young, ‘Climate Change and Law: A Global Challenge for Legal Education’ (2021) 40(3) *University of Queensland Law Journal* 351.

We can look forward to six specific outcomes. First, the *ITLOS Advisory Opinion* will influence the broader climate change case before the ICJ — which covers more than the ocean. Sixty-two states are participating.¹²¹ Second, it will be the legal basis for the Small Island States' claims for climate justice, including loss and damage. Third, it will set a “floor” for climate negotiations affecting the ocean going forward. Fourth, it is part of a wave of public interest litigation — meaning litigation where parties not only aim to advance their own interests but also those of the public at large and not only those of states but also those of others, such as those of communities threatened by sea level rise or individuals at risk of torture or genocide.¹²² One hundred and twenty-six states are currently involved in proceedings before the ICJ in one way or another.¹²³ Fifth, law and science have been brought together. As the Ambassador for the Bahamas stated on the day the *ITLOS Advisory Opinion* was issued, ‘[s]cience and law got married today’. Sixth, we now have a permanent tribunal for climate change litigation that has

¹²¹ International Court of Justice, ‘*Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Filing of Written Comments*’ (Press Release No 2024/61, 16 August 2024) <<https://www.icj-cij.org/sites/default/files/case-related/187/187-20240816-pre-01-00-en.pdf>>, archived at <<https://perma.cc/5CD2-LF7E>>.

¹²² See, eg, Cecily Rose, ‘Introduction to Symposium: Public Interest Litigation at the International Court of Justice’ (2023) 22(2) *Law and Practice of International Courts and Tribunals* 229.

¹²³ There are currently 21 cases in the ICJ docket: ‘Pending Cases’, International Court of Justice (Web Page) <<https://www.icj-cij.org/pending-cases>>, archived at <<https://perma.cc/GH9D-FEZ5>>. At the time of writing, seven states are intervening in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*; 33 states are intervening in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russia)*; 49 states and three international organisations participated orally in *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)*; an unprecedented 91 written statements have been filed in *Obligations of States in Respect of Climate Change (Advisory Opinion)* and eight states have filed declarations of, or applications for, intervention in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*: see International Court of Justice, ‘*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar): Canada, Denmark, France, Germany, the Netherlands, the United Kingdom (jointly) and the Maldives File Declarations of Intervention in Proceedings under Article 63 of the Statute*’ (Press Release No 2023/68, 16 November 2023); ‘*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation): Intervention*’, *International Court of Justice* (Web Page) <<https://www.icj-cij.org/case/182/intervention>>, archived at <<https://perma.cc/94NY-524Q>>; International Court of Justice, ‘*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Request for Advisory Opinion): Conclusion of the Public Hearings Held from 19 to 26 February 2024*’, (Press Release No 2024/17, 26 February 2024) <<https://www.icj-cij.org/sites/default/files/case-related/186/186-20240226-pre-01-00-en.pdf>>, archived at <<https://perma.cc/PE8Q-7BAV>>; International Court of Justice, ‘*Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Filing of Written Statements*’ (Press Release No 2024/31, 12 April 2024) <<https://www.icj-cij.org/sites/default/files/case-related/187/187-20240412-pre-01-00-en.pdf>>, archived at <<https://perma.cc/Z9AQ-GQKB>>; ‘*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel): Intervention*’, *International Court of Justice* (Web Page) <<https://www.icj-cij.org/case/192/intervention>>, archived at <<https://perma.cc/9NMS-SUFQ>>.

compulsory jurisdiction over 170 states.¹²⁴ Ultimately, if 21 judges can agree, then we have hope for building unlikely coalitions in an increasingly polarised world, in order to produce better and more sustainable solutions.

VI CONCLUSION

As lawyers, we are taught to focus on the case, dispute or crisis: to get instructed, rigorously represent the client and then move on to the next case. Some of us may have been attracted to the law because we were already built this way. We need to change our mindset if we are to make meaningful contributions in the current epoch.

There is much to despair of in the world today. We are confronted with actions that not only shock our conscience but that we must somehow mentally process, failing which we would be unable to function. Women, children, cultural heritage, the natural environment — in some conflicts, nothing is off limits. We face existential threats to our health, our planet and our future. The doomsday clock is at 90 seconds to midnight.¹²⁵ The state of the world may be summed up by a recent image of Russian Federation President Putin and North Korean leader Kim Jong Un going for a spin in a limousine after signing a ‘mutual defence pledge’, offering greater North Korean support for Russia’s war in Ukraine in exchange for Russia facilitating North Korea’s quest for functioning nuclear weapons.¹²⁶ It is very easy to feel despair and cynicism. But I want to urge you to cultivate two different emotions: hope and awe.¹²⁷

Hope-based communication is a pragmatic strategy drawing on history, communications, neuroscience and cognitive linguistics that grounds communication about human rights violations on the values we stand for and the vision of the world we want to see.¹²⁸ It means talking about solutions, highlighting universal shared values, creating opportunities, emphasising support

¹²⁴ International Tribunal on the Law of the Sea, ‘Tribunal Delivers Unanimous Advisory Opinion in Case No 31’ (Press Release, 21 May 2024). See also Caroline E Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, 2011).

¹²⁵ ‘A Moment of Historic Danger: It Is Still 90 Seconds to Midnight’, *Bulletin of the Atomic Scientists* (Web Page, 23 January 2024) <<https://thebulletin.org/doomsday-clock/>>, archived at <<https://perma.cc/Z7WH-D378>>.

¹²⁶ Andrew Osborn, ‘Putin and North Korea’s Kim Take Turns to Drive Each Other in Russian-Made Limousine’, *Reuters* (online, 20 June 2024) <<https://www.reuters.com/world/asia-pacific/putin-takes-north-koreas-kim-drive-around-pyongyang-russian-made-limousine-2024-06-19/>>, archived at <<https://perma.cc/BUB4-PXQ4>>; Anthony Kuhn, ‘Concerns Mount as Russia and North Korea Commit to a Mutual Defense Pact’, *NPR* (online, 20 June 2024) <<https://www.npr.org/2024/06/20/nx-s1-5011604/leaders-of-russia-and-north-korea-sign-pact-indicating-a-deeper-cooperation>>, archived at <<https://perma.cc/SLX2-ZTUI>>.

¹²⁷ One can also nurture enthusiasm by engaging in a process that one loves, even if it seems immediately futile. A recommitment to the basic processes of international law, in full cognisance of the situation as presently constructed, frees us from outside domination and the perpetual threat of nihilism. ‘This universe henceforth without a master seems to him neither sterile nor futile. Each atom of that stone, each mineral flake of that night-filled mountain, in itself forms a world. The struggle itself toward the heights is enough to fill a man’s heart. One must imagine Sisyphus happy’: Albert Camus, *The Myth of Sisyphus*, tr Justin O’Brien (Penguin Press, 1st ed, October 2005) 89. I am grateful to Cameron Miles for this observation.

¹²⁸ ‘A Guide to Hope-Based Communications’, *Open Global Rights* (Web Page, 19 February 2019) <<https://www.openglobalrights.org/hope-guide/>>, archived at <<https://perma.cc/8DN5-ZQYC>>; Kathryn Sikink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press, 2017).

for survivors rather than pity for victims and celebrating victories along the way. Kathryn Sikkink, in her book *Evidence for Hope*, makes a simple suggestion: ‘[W]e must be prepared to critique *and* propose’.¹²⁹ We also have to recommit to basic principles of our discipline during the dark times. Tanisha M Fazal has recently observed:

[B]eneath the surface, norms in fact work as a powerful motivator and constraint. They lie at the heart of the biggest foreign policy debates in Washington. Whether to support Ukraine, what to do about China, how to handle Israel — plenty of the most contested questions are, at base, arguments over whether to promote certain principles.¹³⁰

But norms also need maintenance — ‘they must be cultivated, enforced, and sometimes adjusted — and maintenance requires long-term thinking and accepting some short-term costs’.¹³¹ This process is a fruitful one: ‘[I]f the foundational norms of the post-1945 order erode, it will not be the result of a careful cost-benefit analysis. It will be because ... politicians gave up on these ideals in a fit of pique. The result will be a world in which everyone is worse off’.¹³² As the UK Parliament has stated in a report on its foreign policy in a ‘shifting world order’:

This system [of a rules-based international legal order] ‘is not “natural” or permanent; its continued existence depends ultimately on the willingness of its members to uphold it and its principles, particularly when confronted by authoritarian states that seek to revise the rules or challenge the liberal assumptions on which it is based’.¹³³

In *The Audacity of Hope*, Barack Obama urged his readers to ‘hang on to our values, even if they seem at times tarnished and worn; even if, as a nation ... we have betrayed them more often than we care to remember. Those values are our inheritance, what makes us who we are as a people’.¹³⁴ He also said, relevantly: ‘I wish the country had fewer lawyers and more engineers.’¹³⁵

As for awe, recent research by psychologist Dacher Keltner has found that awe — a sense of wonder — is critical to our wellbeing and has tremendous health

¹²⁹ Sikkink (n 128) 51 (emphasis in original).

¹³⁰ Tanisha M Fazal, ‘The Power of Principles: What Norms Are Still Good For’ (2024) 103(4) *Foreign Affairs* 148, 148.

¹³¹ *Ibid* 154.

¹³² *Ibid*.

¹³³ Select Committee on International Relations, *UK Foreign Policy in a Shifting World Order* (House of Lords Paper No 250, 18 December 2018) 7 (citation omitted). Cf John Dugard, ‘The Choice before Us: International Law or a “Rules-Based International Order”?’ (2023) 36(2) *Leiden Journal of International Law* 223. See also Daniel Bethlehem and Donald McRae, ‘The International Trading System: Looking to 2100’ in Daniel Bethlehem et al, *The Oxford Handbook of International Trade Law* (Oxford University Press, 2nd ed, 2022) 1065, 1066: ‘The notion of a “rules-based international order” has for decades been the cornerstone of efforts to shape the international trading system — broadly conceived to include not only trade in goods and services, and their associated legal framework, but also monetary and development policy, investment, and everything more that oils transnational economic interaction across sovereign boundaries. Our rules-based international order, however, remains an accommodation to Westphalia, even as it endeavours to shrink and ameliorate the effects of segmenting national policies, to manage disputes that arise between them, and to address the challenges that are perceived, even if still debated, on the approaching horizon.’

¹³⁴ Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (The Text Publishing Company, 2008) 90.

¹³⁵ *Ibid* 21.

benefits.¹³⁶ It can be triggered by ‘being in the presence of something vast that transcends your understanding of the world’ — or by simpler events, like ‘witnessing an act of kindness’.¹³⁷ Awe seems to deactivate the default mode network in our brains, the part of the cortex involved in how we perceive ourselves; it gets us out of our own heads and places us in a larger context.¹³⁸

I am in awe of the bravery of my client Ms Wong, who put her life in limbo for four years to set a legal precedent to help other migrant domestic workers.

I am in awe of Truth Hounds, an organisation that has recorded more than 5,000 eyewitness accounts and other evidence of international crimes committed in Ukraine.¹³⁹ This evidence has been submitted to Ukrainian and foreign investigative bodies, the International Criminal Court and the European Police Department.¹⁴⁰

I am in awe of the 27 students from the University of the South Pacific who created a successful campaign to ask the ICJ for an advisory opinion on climate change,¹⁴¹ and the Senior Women for Climate Protection Switzerland¹⁴² and Portuguese children who brought climate cases at the European Court of Human Rights,¹⁴³ my Small Island State co-counsel at COSIS who so eloquently made the case before ITLOS and the First Nations leaders, Uncle Pabai and Uncle Paul, from the Torres Strait, who have brought the Australian climate case to the Federal Court.¹⁴⁴

I am in awe of those who try to ease the horrors of armed conflict — aid workers, medical personnel and those engaged in quiet diplomacy, peaceful protest and brave reporting. They do not cast themselves in the heroic mould but try their best to relieve human suffering.

¹³⁶ Hope Reese, ‘How a Bit of Awe Can Improve Your Health’, *The New York Times* (online, 3 January 2023) <<https://www.nytimes.com/2023/01/03/well/live/awe-wonder-dacher-keltner.html>>, archived at <<https://perma.cc/LBD5-7758>>.

¹³⁷ Ibid.

¹³⁸ Ryota Takano and Michio Nomura, ‘Neural Representations of Awe: Distinguishing Common and Distinct Neural Mechanisms’ (2022) 22(4) *Emotion* 669, 674.

¹³⁹ ‘About Us’, *Truth Hounds* (Web Page) <<https://truth-hounds.org/en/about/>>, archived at <<https://perma.cc/4TPW-DL9A>>.

¹⁴⁰ ‘Truth Hounds to Receive Clooney Foundation for Justice’s Albie Award’, *Truth Hounds* (Web Page, 13 September 2023) <<https://truth-hounds.org/en/cases/truth-hounds-to-receive-clooney-foundation-for-justices-albie-award/>>, archived at <<https://perma.cc/RK3C-7D2U>>.

¹⁴¹ ‘Our Journey’, *Pacific Island Students Fighting Climate Change* (Web Page) <<https://www.pisfcc.org/ourjourney>>, archived at <<https://perma.cc/26Q3-9BL7>>.

¹⁴² *Verein Klimaseniorinnen Schweiz v Switzerland (Judgment)* (European Court of Human Rights, App No 53600/20, 9 April 2024); ‘KlimaSeniorinnen v Switzerland (EctHR)’, *Climate Change Litigation* (Web Page) <<https://climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-council-and-others/>>, archived at <<https://perma.cc/9FPW-F5A2>>.

¹⁴³ *Aghostinho v Portugal (Decision)* (European Court of Human Rights, App No 39371/20, 9 April 2024).

¹⁴⁴ ‘This case is the first time that anyone in Australia has argued that the whole of the Federal government — not just one Minister or agency — has a duty to protect people from climate harm ... Uncle Pabai and Uncle Paul ... argue that by failing to prevent climate change the Australian Government has unlawfully breached its duty of care, because of the severe and lasting harm that climate change would cause to their communities. They are seeking an order from the [Federal Court of Australia] requiring the government to prevent this harm to their communities by cutting greenhouse gas emissions’: ‘The Case’, *The Australian Climate Case* (Web Page) <<https://australianclimatecase.org.au/the-case/>>, archived at <<https://perma.cc/8HQW-ZMRH>>.

But I am also in awe of my son's debating prowess and my daughter's ability to do a one-handed cartwheel. Integrating awe and hope into our work and lives can be easier than you think.

Charlesworth's critique of the crisis approach resonates today. Let us try an epoch approach, adopting a long-term view, making linkages and engaging in lateral thinking. It is perhaps not an exaggeration to say our future depends on it.