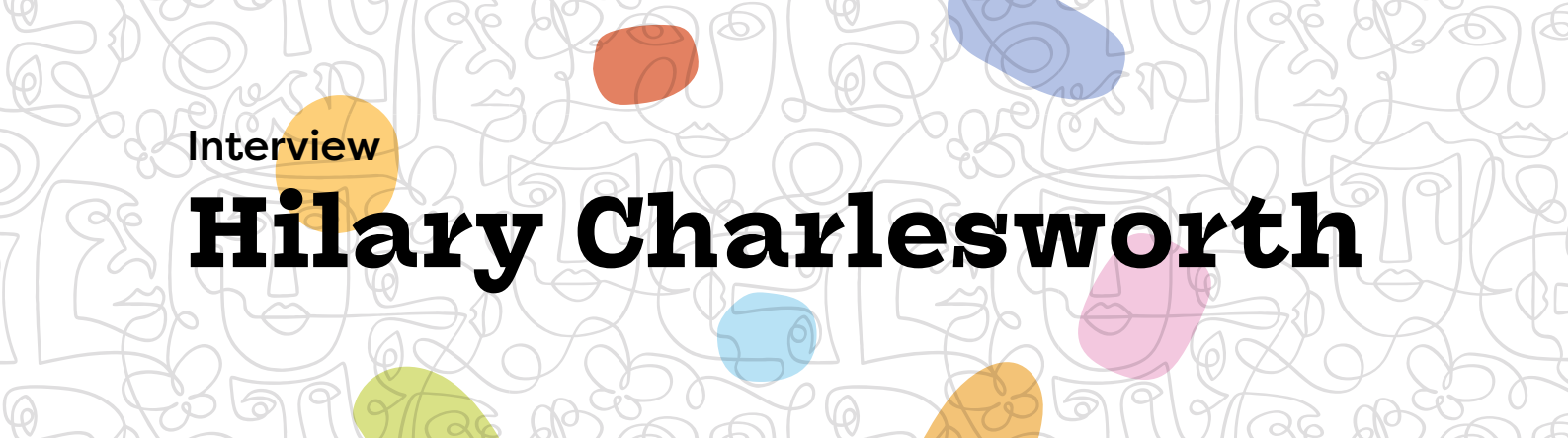




Interview

Hilary Charlesworth

Peace Palace, The Hague
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Portia Karegeya (PK):

Good afternoon, Judge Charlesworth, thank you so much for agreeing to do this interview with us today. We start all our interviews by just asking for a brief overview of your career and what led you basically to your position now as an ICJ judge.

Hilary Charlesworth (HC):

My career in international law has been almost entirely that of an academic.

I first became interested in international law when I was an undergraduate student. It was a fascinating subject and the reason I loved it, compared to the rest of my law degree, was that it was a legal subject that had to come to terms with its political context, whereas the way I was taught law in Australia many, many years ago, the law was presented as detached from any political context. It was just words on paper. We literally had to learn statutes off by heart. But with international law of course you couldn't do that because a lot of the principles and doctrines only made sense in a political context. And then after doing graduate study in the US, I had an academic career for over 30 years and I found that tremendously rewarding.

When you ask what led me to this career, I would [rather] say that I fell into it. I wasn't expecting a career as a judge. I expected to stay in academia all my career. I am only here at the Court because of the very sad fact that James Crawford, a brilliant Australian international lawyer who had been elected to the Court, died two-thirds of the way into his term [in 2021], a huge loss in many ways. And so the Australian government decided to put forward another candidate to fill the remainder of his term. I think all Australian international lawyers would have assumed that James would have stayed on at the Court for many years. But that's how I ended up here.

And so I arrived, I was surprised to be here. I'm still surprised to be here. And I still feel in some ways an academic, although obviously the judicial task is quite different.

PK:

Thank you. You joined us at the Geneva Graduate Institute in September of 2024 and you gave a really wonderful opening lecture for our academic year and it was titled '**Hopes and Fears for International Law: The Work of the ICJ**'. Could you tell us what are these hopes and fears and have your thoughts on this changed in the nearly two years since you gave that lecture?

HC:

Well, I deliberately pitched them in a slightly exaggerated way because that's what you do for a public lecture! You pitch one side and then another and then you find your way through them. As for the hopes --- I was struck by the fact that, especially at that time, the Court, because of the number of high-profile decisions that it has taken, would sometimes be depicted in the popular press, in the popular imagination, in an extremely elevated manner. So, for example, there was a blog post called '**International Courts as the Last Hope for Humanity**'.

When you read something like that, when you're inside the Court, you're thinking, "that can't possibly be right. I hope that's not the case". But I suppose it's an example of the hopes that often attach to a court -- perhaps inflated hopes.

Those hopes may be most obvious in the context of advisory opinion requests that the Court receives from the General Assembly or other authorised UN bodies. Sometimes a fairly general question, such as the request received by the Court in the context of the **climate change opinion**, the Court is asked very general questions, possibly because the United Nations, if that's the body requesting it, has come to the end of a set of policy options. And sometimes, perhaps an advisory opinion request of the Court might be one way to go. And, of course, that's an important role for the Court to play, the whole advisory jurisdiction.

I think that's true also of the request the Court received two or three years ago, made before the events of the 7th of October 2023, the attacks by Hamas on Israel, on **the legal issues surrounding the Occupied Palestinian Territory**. So you take a very vexed issue, legally, politically, and the UN then sends it to the Court, I imagine, in the hope of some resolution or inspiration. So we see a lot of hopes in the Court as almost, you feel, as a last resort when the political organs of the United Nations or other international bodies perhaps think, okay, we hope the Court will help us.

Those are examples of hopes. And the "fears" as I characterize them, are coming from a number of different angles. Some fears about the Court come from some States, fearing that, if the Court is seized of a case it might go too far, it might encroach in some ways on state sovereignty: You will sometimes find States, for example, arguing very strongly in the context of advisory opinions against the Court taking on these requests.

So saying: “Court, we recommend you don't go there, it's a very political question”, somehow these fears coalesce around the idea that the Court should remain resolutely within “legal” boundaries and not step into anything that could be coloured as politics. You also find these fears coming equally from civil society which might laud the Court in some ways, but perhaps you sometimes read civil society views of the Court expressing disappointment in the Court. For example, “the Court's going very slowly in this case, or why did the Court give such a narrow decision in that case?” And from the vantage point of being inside the Court, it's tempting to respond, “kindly read the Court's Statute and see what it's empowered to do”.

The reason why the Court couldn't start ordering this or that is it simply doesn't have this power. Sometimes I've noticed that the Court is criticised, for example, for not listening to the voices of civil society more. But, of course, we have a very limited pool of parties, essentially it's States who have to be parties to contentious cases, and by and large that's the same with advisory opinions. So I characterise some of this disappointment in the Court.

Well, I think in the lecture I characterised it as a fear, is the sense that, well, whatever the Court says, it doesn't have any enforcement functions, so it's a rather thin reed. That would be one of the fears. So you might have splendid arguments, and you might even get a “good” decision from the Court, but at the end of the day, is it really worth the paper it's written on? Because you see States facing a decision ordering them to act in this or that way, not doing so. So there may be a sense of the Court being disappointing.

What I tried to do in the lecture was to show that neither extreme [of hope or fear] really is very satisfactory. If we think about the Court in those rather dichotomous terms -- it's either the great hope for humanity or it's just a very disappointing, rather useless, white elephant sitting here in The Hague -- you're misunderstanding the role of the Court. And I argued in the lecture for an understanding of the Court as one thread in a regulatory fabric. If we understand the Court as an important thread in a fabric, and that thread is important but it only has regulatory capacity if it's woven with other forms of regulation, including publicity or pressure or civil society pressure and so on.

I think today I would say the situation is the same. Perhaps some of the cases before us have changed, but you tend to find that we still get these very stark views of the Court that are, I think, often misunderstandings of the Court's role.

PK:

Yes, that sounds like a lot of expectations and also a lot of projections at the same time.

Our research project, as you know, focuses on emotions and international law, but not as a gap critique. Rather, we see it as building on existing scholarship. And **with your work in feminist legal scholarship** in particular and the relationship between **art and international law**, do you see any connections between those perspectives that you've written about and researched and the recent surge of interest in emotions and the law?

HC:

I see many close connections, which is why I find your project's work on emotions and international law extremely rewarding because it picks up and theorises and says in a much more focused and articulate way some of the things I've been thinking about for a very long time.

With respect to feminist approaches to international law, as is often pointed out, the idea of emotions is often associated with feminism, certainly, and also with women more generally. The idea is that women are likely to be emotional and men are likely to be rational.

So the idea is that we can code those attributes in a gendered way. I recall one quite nice example written perhaps 20 years ago by Francis Fukuyama, the famous political historian, author of *The End of History and the Last Man*. **He wrote an article explaining why the call by international relations theorists to involve more women in international relations was a bad thing.**

I think he wrote it in *Foreign Affairs*, but it was syndicated in the Australian press, and I remember reading it and being a bit startled by it. It said basically "look, we don't want more women leaders in international politics because of all the different tensions in the world, if you produced a woman leader up against some of these other types of people from different parts of the world, the women won't be taken seriously. So the West would be foolish to start electing women leaders. This would be a bad way to go".

It was an extraordinary argument, but even though it was rather extreme, I think it caught something, this idea that we associate subjectivity and emotions with women. Somehow male rationality is assumed, so rationality becomes what men do. It's not something that is actually rational.

And perhaps when we look at international politics, we can see that there's no monopoly on any form of rationality. But this is still something that's deeply embedded. I began to then think after reading that article such a long time ago about the emotions that sustain ideas of rationality.

Where are the emotions that really underpin that? So what people call rationality, what is it actually? And, of course, there are many emotional judgments made in terms

of deciding what rationality actually is. This then, which of course I know your project has been very successful in pointing this out, is the big claim to fame of law. So what is law? Again, a very crude sort of roughly drawn distinction -- politics is subjective and law is objective. Politics is perhaps a realm of passion, but law is an area of objectivity.

Of course, anybody who studies law or works inside any legal system, at the national level, at the international level, knows that it's not. I mean, if it were completely objective then it could be done by a computer. We know that there is nothing truly objective, that there are many, many valid judgments that go into law. And I think that unites feminist scholarship in an attempt to sort of investigate all of the subjectivity that makes up these ideas of objectivity.

With respect to art and international law, I think, again, my interest in working in that area touches on the emotions that are involved in international law. So you could do something like, for example, choose one of the favoured images of international law, which is Picasso's picture of Guernica.

There was a **lovely book chapter some years ago by Jean d'Aspremont and Eric De Brabandere that pointed out how many book covers Guernica features on** -- It's many, many book covers. If we ask the question, "why are international lawyers so fascinated by the image of Guernica?", I assume the reason is, or the reason I'm interested in it, because it's an extraordinarily emotional, visceral account of war, of this ghastly bombing of this Spanish town.

Somehow Picasso, who did the painting in very short order, manages to capture the shock and horror of war. So international lawyers are drawn to that. And I think that's because of this extraordinary capturing of emotions.

So there are things that art shows us, not only the emotions that are behind international legal concepts, but also art and architecture, the visual, actively use emotions to achieve their effect. And one quite nice example here in our Court building is the windows in the Great Hall of Justice, which show (over four windows) a progression from the days of unregulated violence and then tell a story in very beautiful stained glass. The final window is the great success of adjudication.

We can see the use of emotions in the images. Warlike images are associated with the pre-law era, and then you work towards a calm and starry sky, peace in our time, and that's the triumph of adjudication. So we can see that international institutions deploy imagery and architecture because they work on the emotional level.

I think both those fields that I've been very interested in are trying to get at the idea of the emotional in different ways and to show how critical it is to international law. At the same time, as lawyers, we're not very skilled at decoding emotions. We don't know

how to work with them. We can sometimes recognize them, but we're not very skilled at navigating our way around these emotional things.

PK:

Yes, and that actually leads very well into our final question. So one intention of this particular interview series on the ICJ is to explore the role of emotions at the ICJ, and of course our starting point is that they matter at the ICJ, and you've already mentioned imagery and architecture, so we were wondering what are some of the other ways maybe in which emotions influence the work of the ICJ?

HC:

Well, I would say, I'd perhaps say this of all courts (I've worked in one other, national, court as a law clerk many, many years ago), that courts are highly emotional spaces, even perhaps more emotional than academia. I think any workplace is emotional, there's an emotional life that goes on in every workplace. When judges join the Court, as required by **Article 20 of the Statute**, we make a solemn declaration to fulfil our duties conscientiously, impartially, and so on. So we make this solemn declaration, and I think everybody who makes that solemn declaration takes it very, very seriously. I think in order to really live up to it, we should be more aware of the emotional life of law.

There are various ways that emotions come to the fore in the life of the Court. One way is certainly in the nature of the cases we get. They're particularly obvious, for example, when the Court is presented with an application for the indication of provisional measures.

This is when the Court's making, almost inevitably under quite a lot of time constraints, a decision about a request from a State coming to the Court and saying, "we want some action right now, there's something really urgent". To make the claim of urgency, often a lot of material is put to the Court. Of course, the party seeking the provisional measures will want to emphasise the urgency, and in order to do so, they will want to introduce and touch people's emotions. They do that, for example, through the deployment of imagery in the Court.

I haven't done a scientific study of this, but I think the increasing use of images in the Court is very striking, both still images and moving images. Often these images are not critical to a legal argument at all, but they are being used by the parties because of their emotional value.

One example I can recall, when I was an ad hoc judge in the **Whaling case, a case that Australia had taken against Japan about whaling in the Antarctic**, was how both Australia and Japan used utterly different images, clearly to reinforce different emotions. So the Australians, unsurprisingly, had very shocking images of whale deaths,

and then again, unsurprisingly, Japan presented images of the whaling boats as scientific laboratories, to reinforce the nature of their arguments.

Nothing rested on the images legally because the question was in the end the interpretation of a statutory provision, but there is a sense that the Court is being exposed to emotional arguments in that way.

Of course, we are a human institution; the Court is made up of 15 judges with very different backgrounds, so inevitably emotions come into the way that judges appraise facts. If every decision of the Court was unanimous, if we all agreed on everything, you might say, well, there is something objective going on here; but the fact that it's very rare for decisions of the Court to be unanimous, and the fact that, I would say, every member of the Court is a reasonable person, suggests that they're really different.

What explains our different appraisal of facts? I don't think it's a monopoly on being right or wrong, it's simply we're coming with our own human backgrounds that are clearly affected by emotions. So I see emotions being very much part of the legal arguments that are put to us.

The other arena for emotional life in the Court is, again, unsurprisingly, perhaps the process of deliberation.

I think, certainly compared to the Australian High Court where I was a legal clerk 40 years ago, [at the ICJ] we spend a long time in deliberations in person, sitting around a table, sometimes for three, four, five days over a week, six hours a day, discussing, debating, challenging; these are emotional events. People aren't sitting there cool and calm, without emotion. People are exhibiting emotions of all different sorts, and it seems to me that's actually critical and important.

So I think emotions are part and parcel of the work of the Court, but they are very rarely studied in any systematised way. I've often thought if you want a shortcut into the emotional life of the Court, the best place to start is always with the separate and dissenting opinions.

The Court's opinions generally (there's been some wonderful scholarship on this, examining the modes of writing) obeys certain rules. They are written in a detached way: "The Court finds that...", and so on. Whereas as soon as you get to a separate or dissenting opinion, judges regularly will say 'I', they will speak about themselves, and they will express emotions. They'll even express frustration sometimes with the majority of the Court.

They will speak in something that's approximately their own voice. And some judges have very, very distinctive judicial voices, and that comes out. So I think a rich study of

the emotional life of the Court could be tracked through separate and dissenting opinion.

PK:

Well, thank you so much. This is such a wonderful interview. Really appreciate it.

