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Decisions of the ICJ as Sources of International Law?

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Foreword

This second volume of the Morelli Series, collecting the courses and seminars given at the 2015 edition of the Lectures, deals with the role of the ICJ in the development of international law: an issue that is more and more attracting the attention of scholars and practitioners and touches upon fundamental conceptions about the process of international law-making.

This issue is looked at by three authors, from different angles, corresponding to their diverse theoretical approaches.

In the opening Chapter, focused on the ICJ and on its capacity to influence the development of international law, Alain Pellet offers a general conceptualisation of the topic and of its various ramifications.

In its view, individual decisions are not, by themselves, a source of law. Nonetheless, the ICJ has considerably contributed to the development of international law through its judgements, its advisory opinions and even, albeit not unreservedly, through the separate opinions of its members.

This effect is rooted in the broad logic of the system of international law, that evolves by implication. The ICJ participates to this process by determining rules that do not upset but are inherent in the logic of the system and rather constitute its natural inference. To the understanding of the current writer, this model includes a process of law-determining based on two phases: the de-composition of principles and values underlying pre-existing norms; the re-composition of these interests and values in a new normative balance, that more appropriately corresponds to the emerging needs of the international society.

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The second piece, by Christian Tams, leads us in a more complex legal environment, where the ICJ constitutes only one of the various organs that contribute to the development of international law.

While recognising the great contribution of the ICJ to this development, Tams underscores the asymmetry between the potentially infinite scope of its jurisdiction and its limited possibility to mould the legal regime of specific areas. On the basis of this palpable asymmetry, Tams has developed a model capable to determine the degree of the influence exerted by the ICJ in a given sector, based on a three pronged test: opportunity, namely the number of cases in a given area that come within the purview of its jurisdiction; receptiveness, namely the degree of "fertility" of that area for the seeding activity of the ECJ; interaction, namely the capacity of the ICJ to enter into relations, either competitive or cooperative, with other "agents of legal development", in particular with the ILC and with specialised tribunals.

Precisely on the interaction between the ICJ and other international judicial or quasi-judicial bodies is focused the third and last piece of the collection, by Paolo Palchetti.

The author approves the pick-and-choose approach followed by the ICJ, that selectively refers to decisions of specialised judicial bodies to enhance the persuasiveness of its decisions. By so doing, the ICJ relies on their judicial expertise without affecting, and perhaps even enhancing, its authority as the ultimate arbitrator. Conversely, he highlights the inappropriateness of a formal approach, that makes the degree of deference owed to decisions of a specialised tribunal dependent on the assessment of its competence. Not only such an approach would rise the vexed issue of the competence of the ICJ to determine the scope of the competence of other international judges. It would also affect its capacity to determine the development of international law, that is based not so much on the vindication of a competence but rather on the degree of persuasiveness of its decisions.

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In the end, the three contributions offer a wide and variegated set of opinions on one of the most controversial and fascinating issue of contemporary international law. The contribution of the ICJ to the development of international law is not, or not only, a technical field for scholarly analysis, but has theoretical implications. It prompts the further question of the role of judicial adjudication in the law-creating process; it challenges the traditional, and still persisting, idea that international law is the law made by the States for the States. It evokes a conception whereby judges are not only arbitrators of a dispute but rather organs of the international community, empowered to determine its law.

Enzo Cannizzaro[*]

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1. Decisions of the ICJ as Sources of International Law?

*Alain Pellet**

Although much honoured to have been invited to give this "General course" within the framework of the Morelli Lectures, whose first edition was a real success,[1] I have a source of embarrassment. I have been asked to deal with "The ICJ Decision as a Source of International Law". This is both the general title of this 2nd session of the Morelli Lecture and that of my course. But clearly, this general theme encompasses Professor Tams' lectures. Christian Tams will deal with "The Development of International Law by the ICJ" which clearly includes the question whether ICJ decisions are a source of international law. For his part, Professor Palchetti will introduce "The authority of the decisions of international judicial or quasi-judicial bodies in the case law of the International Court of Justice: dialogue or competition?" which is notably an illustration of the possible use of ICJ decisions as a source of international law.

However, the organizers of these Lectures have allayed my fears by explaining that our approaches would be quite different – which, I think, proved to be true; and, after all, truth emerges from the clash of ideas.

* Emeritus Professor, Université Paris Nanterre; former Chairperson, UN International Law Commission; President, French Society for International Law; Member, *Institut de Droit international* – with my deep appreciation to Benjamin Samson and Tessa Barsac for their assistance in respectively preparing the Morelli Lectures and finalizing the written text.

1 The first edition was held in the spring of 2014 on *The Present and Future of Jus Cogens*, (www.editricesapienza.it/node/7633).

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This being said, and speaking of clash of ideas, it must be acknowledged that inviting me to give a *Morelli Lecture* might have been quite risky: I have no doubt that Gaetano Morelli was an honourable gentleman and a most respectable scholar. But I must say that nothing is more alien to my way of thinking (except, maybe, Kelsen's "pure theory of law")[2] than Morelli's positivism, inherited from Anzilotti – of whom he was one of the most gifted pupils. Might the great master's manes forgive me for uttering blasphemous propositions within the framework of these Lectures dedicated to his memory.

Now, as a first step, I will attempt to clarify the definition of both elements of the topic assigned to me since neither the definition of "sources" nor that of "decisions of the ICJ" is self-evident. Then I will endeavour to answer the question implied by the title of these lectures: "Are the decisions of the ICJ sources [or a source?] of international law?". And – no need to prolong the suspense, I will explain why the answer is clearly "no" – although this "no" is more categorical when we speak of individual decisions of the ICJ than when we envisage them collectively, as a whole, or, to make it more technically correct, as part of the "jurisprudence"?

1. Definitions

Taking the two elements of the topic in the reverse order, I first intend to discuss what a "source of international law" is (1.1); then, I will deal, more briefly, with the definition of "ICJ decisions", a rather ambiguous word (1.2).

1.1. Sources of International Law

"Source" – in Latin *fons juris* – … This poetic word evokes the water springing up from the earth, a fountain. It covers two rather different notions. Any student in international law is familiar with the difference between a "for-

[2] Kelsen, *Pure Theory of Law*, 356. Even if not a "Kelsenian", Morelli was, as far as I know, influenced by Kelsen's views (see Cassese, *Five Masters of International Law: Conversations with R-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter*, 65, fn. 38; Cannizzaro, *Morelli, Gaetano*, in *Dizionario biografico degli italiani*, 76).

mal" source and a "material" source. A good example is given in the unfortunate – but most interesting in several "doctrinal" respects – ICJ Judgment of 1966 in the *South-West Africa* case:

> "49. The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of *moral principles* only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a *social need*; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.
> 50. *Humanitarian considerations* may constitute the *inspirational basis for rules of law*, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested – have an interest – in such matters. But the existence of an 'interest' does not of itself entai1 that this interest is specifically juridical in character.
> 51. It is in the light of these considerations that the Court must examine what is perhaps the most important contention of a general character that has been advanced in connection with this aspect of the case, namely the contention by which it is sought to derive a legal right or interest in the conduct of the mandate from the simple existence, or principle, of the 'sacred trust'. The sacred trust, it is said, is a 'sacred trust of civilization'. Hence all civilized nations have an interest in seeing that it is carried out. An interest, no doubt; – but in order that this interest may take on a specifically legal character, the sacred trust itself must be or become something more than a moral or humanitarian ideal. In order to generate legal rights and obligations, it must be given juridical expression and be clothed in legal form. One such form might be the United Nations trusteeship system – another, as contained in Chapter XI of the Charter concerning non-self-governing territories, which makes express reference to 'a sacred trust'. In each

> case the legal rights and obligations are those, and only those, provided for by the relevant texts, whatever these may be".[3]

As the Court excellently said in this rightly criticized (but for other reasons) Judgment, "moral principles", "social needs", "humanitarian considerations", are "inspirational basis for rules of law" but they are not legal norms in themselves, nor even are they parts of the legal process.

Similarly, the Court sometimes takes into account economic or environmental considerations, as shown, for example, by the 1997 Judgment in the *Gabčíkovo-Nagymaros Project* case:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[4]

In sum, even if sustainable development is not in the nature of a legal obligation, it does represent a policy goal or principle that can influence not only State practice but also the outcome of litigation, and it may lead to significant changes and developments in the existing law.[5]

These long quotes are quite telling. On the one hand, they show that law is not impervious to moral, social or economic considerations: "The judicial

3 *South West Africa, Second Phase*, Judgment, 18 July 1966, ICJ Reports (1966), paras. 49-51 – emphasis added. As far back as 1949 the Court referred to "elementary considerations of humanity", *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949), 22.

4 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997), para. 140.

5 Boyle, Chinkin, *The Making of International Law*, 224.

lodestar, whether in difficult questions of interpretation […], or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect".[6] On the other hand, law cannot be reduced merely to them. Conversely, this confirms that law is inseparable from form even though it is not purely formal: it must have a normative content.[7]

In these cases – but other examples could come to mind –[8] the World Court proved conscious of the origins of the rules it was called to apply. Of course these elements were of an explanatory nature; however, they were not entirely legally neutral: they provided assistance for the interpretation of treaties, although the famous Article 31 of the Vienna Convention does not mention them. It remains that moral or economic considerations are extra-legal. They will explain the reasons for the formation of legal norms but they are not normative, while law, by essence, is normative. While they are called "*material* sources" these considerations do not create legal norms.

By way of conclusion on this point, let me quote a short passage from the illustrious author in whose honour this lecture is given:

> "The sources we are dealing with are *sources within the formal or juridical meaning*. They must be distinguished from *sources within the substantial meaning* which

6 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Higgins, Advisory Opinion, 8 July 1996, ICJ Reports (1996), para. 41, referring to the "physical survival of peoples" as such a value.

7 Pellet, *Le droit international à l'aube du XXIème siècle (La société internationale contemporaine – permanences et tendances nouvelles)*; Pellet, *Cours Général: Le droit international entre souveraineté et communauté internationale – La formation du droit international*.

8 See e.g., *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports (1951); *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969), para. 95; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports (1970), para. 89; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996), para. 29; *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 13 December 1999, ICJ Reports (1999), para. 20; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010), paras. 101, 193-194, 204-205.

> consist of all the factors (such as concrete needs, justice, necessity, nature of things, etc.) which have an historical impact on the creation of legal rules".[9]

By contrast, the primary function of the *formal* sources – the only ones which are usually concerned when you speak of "sources" *tout court* – is to create legal norms or at least to prove the existence of such norms. In this respect, it is very important to distinguish between a legal norm and a source. A source is the process giving birth to a norm. The sources are concerned with the law-creating *process*; the norms with the *content* of the law. Acts in Parliament, decrees, treaties, customs and, although more controversially, resolutions of international organisations, are formal sources. "Thou shalt not kill", "high seas are free"; "smoking is prohibited in class rooms" are legal norms; they are supported by (or they come to existence in the legal world through) various sources (criminal laws, custom or treaties on the law of the sea, acts in Parliament or simple decisions of the Dean of the Faculty).

Last general remark on this first series of definitions: to exist as a legal rule, a norm does not need to be binding. It is enough that it aims at orienting the conduct of the addressees. To be normative, a text may simply induce the addressees to adopt a "normal" behaviour. This can be done in several ways. First, quite logically, through non-binding instruments like recommendations of international organisations when they have no decision-making power, as will be usually the case for the resolutions of the UN General Assembly (by contrast with the resolutions of the Security Council under Chapter VII of the Charter which are binding) or gentlemen's agreements. Another means to reach the same result is to include "soft obligations" in a "hard" text, a treaty for instance, which is the binding source *par excellence*. This will be the case when for example treaty provisions are drafted in the conditional mode – a technique which thrives in environmental law as

[9] Morelli, *Cours général de droit international public*, 450. Translation of the author from the original French text: "*Les sources dont on parle ici sont les sources au sens formel ou juridique. Il faut les distinguer des sources au sens matériel, qui consistent dans tous les facteurs (tels que les exigences concrètes, la justice, la nécessité, la nature des choses, etc.) qui agissent historiquement en déterminant la création des règles de droit*" – emphasis in the original text.

shown e.g. by the 1992 Framework Convention on Climate Change[10] and the recent Paris Agreement –[11] or are purely hortatory or exhortatory – such as in the field of economic and social development with notably the 1961 European Social Charter[12] or the 1966 International Covenant on Economic, Social and Cultural Rights[13] which merely advise the Parties to "promote" certain rights – or when the "obligations" are so vague and general that their non-respect can hardly be sanctioned – here again the Framework Convention on Climate Change provides a clear example[14] as well as the 1963 Treaty banning certain nuclear weapon tests.[15]

10 Article 3 notably provides that the Parties "should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities", "should take precautionary measures to anticipate, prevent, or minimise the causes of climate change and mitigate its adverse effects" and "should, promote sustainable development".

11 See e.g., Article 4(4): "Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances".

12 See e.g., Article 15.

13 Article 1(3): "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations"; Article 2(1): "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

14 As underlined by Alan Boyle and Christine Chinkin, "[t]his treaty imposes some commitments on the parties, but its core articles, dealing with policies and measures to tackle greenhouse gas emissions, are so cautiously and obscurely worded and so weak that it is uncertain whether any real obligations are created. The United States' interpretation of Articles 4 (1) and (2) was that 'there is nothing in any of the language which constitutes a commitment to any specific level of emissions at any time … '. Moreover, Article 4 (7) makes whatever commitments have been undertaken by developing states conditional on provision of funding and transfer of technology by developed states parties" (*The Making of International Law,* 220).

15 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, signed on 5 August 1963, Article IV: "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its

At the other extremity of the spectrum, it is now accepted that some binding norms are more binding than others. These are the "peremptory norms of general international law" (*jus cogens*) formally defined in Article 53 of the 1969 Vienna Convention:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

Article 38 of the ICJ Statute is said to enumerate the formal sources of international law – which it does incompletely – but it is not concerned with the "quality" of the norms included or *posed*[16] by the sources. In other words, it is indifferent to the content of the law as well as to its place in the normative hierarchy:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

country". See more generally on the vague character of some treaty provisions *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969), para. 72 questioning the "potentially norm-creating character" of Article 6 of the Geneva Convention of 1958 on the Continental Shelf, notably underlining the "unresolved controversies as to the exact meaning and scope" of the notion of special circumstances.

16 The nuance is an interesting legal issue: while it can certainly be accepted that treaties can "pose" new legal rules (*jus positum*), it seems to me that customs or general principles of law may demonstrate the existence of a rule, while it is highly controversial that these are means to "pose" new rules: it is quite artificial to detect the will of the States behind such law making processes. This is the eternal debate between objectivists and positivist voluntarists…

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto".

In fact, sub-paragraphs (a), (b) and (c) of paragraph 1 give an indication of when a norm is *potentially* binding – if it is drafted in such a way as to impose obligations (or grant permissions, though usually, a permission for one Party imposes an obligation on the other). Still, as shown by the examples given above, hard sources may create soft law. For its part, sub-paragraph (d) is drafted in a rather obscure way; but the word "subsidiary" can leave no doubt that jurisprudence ("judicial decisions") and doctrine ("teachings of the most highly qualified publicists of the various nations") are not placed on the same footing as the three other set of rules that the Court is bound to apply.

Leaving sub-paragraph (d) aside for a moment and focusing on the formal sources proper, Article 38 is strongly criticized first of all for being incomplete. It is certainly true that the list of Article 38 is not exhaustive: indisputably, unilateral acts of States may create obligations for the declaring State and rights for the addressees;[17] even more obviously the decisions of international organisations (by contrast with their recommendations) impose by definition binding obligations on the addressees. But this must be put in perspective: save minor drafting changes, the ICJ's Statute virtually dates back to 1920, a period when the international personality of international organisations was far from being established. Similarly, while the expression "civilized nations" causes pain in the ears of 21st century men or women, no specific meaning is attached to it today: all States are supposed to be "civilised" – debatable as this may seem. This being said, Article 38 gives a good sense of what sources are and, globally speaking, it is not that poorly drafted as sometimes alleged.[18]

[17] ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, 2006, *Yearbook 2006, Vol. II, Part Two*, 161, Principle 1. The leading case in this regard is *Nuclear Tests (Australia v. France; New Zealand v. France)*, Judgments, 20 December 1974, ICJ Reports (1974), paras. 43 and 46, paras. 46 and 49.

[18] See further Pellet, *Article 38*, 743.

Now, not all of the instruments or processes listed in this provision are "sources". It is certainly not the case concerning paragraph 2: when the parties to a dispute authorise the ICJ to decide *ex aequo et bono*, they precisely expect that it will depart, if need be, from applying legal rules or that it will correct them on the basis of equity. It is to be noted that there could be an intermediary situation when a treaty or a custom to be applied by the ICJ requests the latter to apply equity or equitable principles. Just think in this respect of the "equitable solution" imposed as an aim to any delimitation of the EEZ or the continental shelf by Articles 74 and 83 of the United Nations Convention on the Law of the Sea.[19] Another recent example is given by Article 4 of the 2009 Arbitration Agreement between Croatia and Slovenia which provides that, with respect to certain questions concerning the maritime dispute between the Parties, the Tribunal shall apply "the rules and principles of international law" as well as "equity and the principle of good neighbourly relations", reflecting their vital interests.[20]

Much more controversial is paragraph 1(d) on "judicial decisions" on the one hand and the "teachings of the most highly qualified publicists of the various nations" on the other hand "as subsidiary means for the determination of rules of law". Sources or not sources? That is the question.

Some preliminary remarks however:

- I will come back to Article 59 but you will notice that, if I may provisionally put it like this: Article 59 prevails over Article 38(1)(d) in that is more precise, less general;
- The doctrine and judicial decisions are put on the same footing;
- They are qualified as "subsidiary means for the determination of rules of law" which is hardly compatible with analyzing them as "subsidiary sources". If they were, at least certainly not at the same level or in the same way as treaties or customs.

[19] These Articles read: "The delimitation of the [exclusive economic zone/continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

[20] For the implementation of this provision, see the Final Award of 29 June 2017.

- Be it as it may, before elaborating on the answer to "the question", let me now try to define "judicial decisions".

1.2. Decisions of the ICJ

Defining the decisions of the ICJ deserves some attention since it is less self-evident than it looks.

1.2.1. Binding Decisions

There is no problem concerning judgments. As made clear by Article 59 of the Court's Statute they are binding. This does not solve all the issues raised by this provision but there is no doubt that judgments qualify as "decisions" including when they bear on preliminary objections. A glance at Article 36(6) suffices to remove any doubt in this regard: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".[21] Moreover, in *Cameroon v. Nigeria*, the Court accepted that

> "By virtue of the second sentence of Article 60, the Court has jurisdiction to entertain requests for interpretation of any judgment rendered by it. This provision makes no distinction as to the type of judgment concerned. It follows, therefore, that a judgment on preliminary objections, just as well as a judgment on the merits, can be the object of a request for interpretation".[22]

But judgments properly said are not the only "decisions" taken by the ICJ. It also adopts orders of various kinds. I leave aside the administrative or internal decisions relating for example to the other functions that Judges can assume (Article 16 of the ICJ Statute), to conflict of interests (Articles 17 and 24) or the designation of Judges *ad hoc* when several Parties are in the same interest (Article 31(5)).

[21] Or see the more striking formula in the French text: "En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide".

[22] *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, 25 March 1999, ICJ Reports (1999), para. 10.

A particular issue arose in respect of Article 41 on provisional measures, the drafting of which is extremely ambiguous since paragraph 1 provides that "[t]he Court shall have the power *to indicate*, if it considers that circumstances so require, any provisional measures which *ought to be taken* to preserve the respective rights" of the Parties, and paragraph 2 governs the "notice of the measures *suggested*". I will develop this further as an example of the Court's quasi-legislation,[23] but it can already be noted that this wording does not plead in favour of compulsory measures based on a binding decision. However in the *LaGrand* case, the Court decided that "orders on provisional measures under Article 41 have binding effect".[24] This is all the more interesting (and puzzling) that it is clearly *contra textum*…

1.2.2. Advisory Opinions

Prima facie, advisory opinions are not part of the ICJ's decisions – if only because of their nature: they are mere opinions and they are purely advisory. Nevertheless, it is clear that, when it decides on a point of law, the Court follows a procedure and a reasoning which are, in every respect, similar to that followed in contentious matters.[25] Indeed, while there is no adversarial debate properly said, there is a possibility for all States to present their views in conformity with Articles 66 of the Statute and 105 of the Rules. And when the Court refers to its jurisprudence it mentions indifferently its judgments and its advisory opinions.

It can then confidently be assumed that "international jurisprudence" and the expression "judicial decisions" as employed in article 38(1)(d) are equivalent. Indeed, until the very end of the discussion in the Committee of

[23] See below, 26.

[24] *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001), para. 109.

[25] See Article 102(2) of the Rules which provides for an application *mutatis mutandis* of the provisions applicable to contentious cases: "The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States"; or Article 107 enunciating the mentions which must be contained in the advisory opinion.

Jurists of 1920, the draft Statute referred to the former. In particular, the penultimate proposal by Baron Descamps mentioned, among others, rules which were "to be applied by the judge in the solution of international disputes", "international jurisprudence as a means for the application and development of law".[26] There is no clear reason explaining this change which appears to have been purely terminological.

Therefore, there can be no question that advisory opinions are covered by Article 38(1)(d) and must be seen as being part of "judicial decisions" in the plural, as offensive as it may seem to the plain or natural meaning of the word "decision".

This being said, I of course do not allege nor accept that judgments and advisory opinions play exactly the same role within the international jurisprudence.

As rightly underlined by Sir Franklin Berman, the more politicized and more general the legal questions referred to the ICJ under the advisory procedure, the more difficult it is to preserve the "judicial integrity" of the Court's function.[27] And indeed the *Nuclear Weapons* case illustrates this quite strikingly. According to the same author:

> "from the point of view not of process but of outcome, we have only to look at the somewhat farcical conclusion of the *Nuclear Weapons* case, where a moderately straightforward question by the General Assembly, virtually demanding a yes or no answer, produced a response by way of seven propositions of varying degrees of obscurity or precision, culminating in a declaration of inability to decide which, in the ultimate absurdity, could only be adopted through the casting vote of the then President!
> To draw attention to these inadequacies is not to point an accusatory finger at the Court, which bears only a small share of the true responsibility for them. The main blame rests with the failure of the majority in the General Assembly to understand and properly to respect the integrity of the international judicial function. The Court itself may come to regret it, if it finds that it has in practice surrendered its ability to decline to respond to an advisory request on grounds

[26] *Procès-Verbaux of the Proceedings*, PCIJ, Advisory Committee of Jurists, 16 June-24 July 1920, Annex 3, 306.

[27] Berman, *The International Court of Justice as an 'Agent' of Legal Development?*, 15. See also: Berman, *The Uses and Abuses of Advisory Opinions*, 809-828.

> of judicial propriety. The inverse linkage however remains: the more the advisory procedure is seen as the vehicle through which the Court can indeed exert a conscious and abstract influence on the 'progressive development' of international law, the more insistently will questions arise as to the judicial propriety of the process".[28]

I would nevertheless be less severe with the 1996 Opinion in that I find wholly acceptable that (i) the Court gives a nuanced answer, distinguishing between various hypotheses, to a not nuanced question and, (ii) precisely because it is called to deliver an advisory opinion and not to definitely settle a dispute between States, it recognizes that international law does not provide a general and abstract answer to the question – something the Court could not afford to do in a contentious case, where it is bound to decide according to the particular circumstances of the case. Additionally, my view is that the Court feels freer to look for "imaginative solutions" when it performs its advisory function than when it acts as a judge giving judgments which are *res judicata*.

Beside these differences, the fact remains that both advisory opinions and judgments influence the codification and progressive development process of international law:

- There are indeed multiple examples of the International Law Commission (ILC) basing itself indifferently on the Court's judgments or advisory opinions. For instance, the ILC had recourse to no less than ten PCIJ/ICJ advisory opinions in support of its cornerstone Draft Articles on Responsibility of States for Internationally Wrongful Acts. From the outset, it notably underlined that the

> "ICJ has applied the principle [of the Responsibility of a State for its internationally wrongful acts] on several occasions, for example in the *Corfu Channel* case, in the *Military and Paramilitary Activities in and against Nicaragua* case, and in the *Gabcíkovo-Nagymaros Project* case. The Court also referred to the principle in its

[28] Berman, *The International Court of Justice as an 'Agent' of Legal Development?*, 15-16.

advisory opinions on *Reparation for Injuries*, and on the *Interpretation of Peace Treaties (Second Phase)*".[29]

- Further, the Court has promoted more than once innovative solutions in advisory opinions which paved the way to the development of international law and rapidly crystallised into general customary rules. The example of the regime applicable to reservations to treaties is topical.[30]

1.2.3. Personal Opinions of the Judges

Including separate or dissenting opinions within the general category of the "decisions" of the ICJ is certainly much more debatable. Here again, I have to share Sir Franklin's views according to which:

> "A commonly painted picture is that, while the orders and judgments of the Court stay within the straight and narrow, you can look to the individual opinions for a more or less authoritative influencing of the current of future development. While I can follow the argument that the individual opinions, with their fuller and more fluent reasoning, can be a good source for understanding the more obscure or Delphic passages of the full Court's judgment, I entertain a healthy dose of skepticism as to whether the individual opinions do really represent an effective and accepted engine for shaping the future law".[31]

In fact,

- The personal opinions of the Judges are more analogous to doctrinal views than to Court's decisions; they belong to "the teachings of the most

[29] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook 2001, Vol. II, Part Two*, 32, para. 2) of the commentary of Article 1 (footnotes omitted) – see also, for another example among many: ILC, Draft Articles on Diplomatic Protection, with commentaries, *Yearbook 2006, Vol. II, Part Two*, 76, para. 13) of the commentary of Article 14 referring to the *Case concerning the Air Services Agreement of 27 March 1946 between the United States of America and France*, Decision, 9 December 1978, *UNRIAA*, Vol. XVIII; and to *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, Advisory Opinion, 26 June 1947, ICJ Reports (1988), para. 41 or *Interhandel (Switzerland v. United States of America)*, Judgment, 21 March 1959, ICJ Reports (1959), and *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 20 July 1989, ICJ Reports (1989).

[30] See below, p. 25.

[31] Berman, *The International Court of Justice as an 'Agent' of Legal Development?*, 12.

highly qualified publicists of different nations" mentioned in Article 38(1)(d) of the Court's Statute. As a reminder, the Court is supposed to "be composed of a body of independent judges, elected […] from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law"; at least in this last capacity they must be seen as corresponding to the definition given in Article 38(1)(d).

- I would however suggest that the Judges' personal opinions are exceptionally authoritative – not only because of the eminence of the Judges (accepting that, as a matter of postulated definition, all are eminent…) but also – and even more – because they have reached their position after having benefited from a double adversarial debate (between the Parties on the one hand and inside the Court, with (or against?) their colleagues, on the other hand); and
- In any case, the dissenting or individual opinions are always useful to appreciate the exact scope and meaning of the Judgment or of the Advisory Opinion to which they are attached.

To summarize, the expression "judicial decisions" under Article 38(1)(d) is synonymous to "jurisprudence" which *globally* includes all "instruments" whatever their names, adopted by the Court after an exchange of arguments by interested States (or international organizations) and resulting in a pronouncement concerning the conduct which must or ought to be followed by the entities concerned, based on international law.

Let me take again these elements one by one by way of conclusion for this part of the lecture:

- The name of the "instrument" in question does not matter; with a view to appreciate the role of the "decisions" of the ICJ as sources of international law, it is in order to retain a very extensive definition of the word "decision" which includes judgments, various orders and advisory opinions;
- The special value of the Court's decisions is that they are taken after a contradictory debate during which the parties have asserted opposed or,

at least, different theses usually based on lengthy and scholarly arguments;

- The very function of the ICJ "is to decide in accordance with international law such disputes as are submitted to it" which means that its decisions always have a legal basis – with the only exception of the possibility for the parties to entrust the Court to decide *ex aequo et bono* under Article 38(2) – a faculty which has never been used up to now;
- Last special character common to all ICJ's decisions: they are based on an expectation concerning the conduct of the entities concerned: either they are purely and simply legally binding – this is the case concerning judgments or orders "indicating" provisional measures – or they "advise" on the legally right conduct to be adopted under special circumstances or generally – this is the very purpose of advisory opinions.

2. Individual Decisions of the ICJ Are Not Sources of International Law

With this in mind, let's try – at last – to start answering the question. Are decisions of the ICJ thus defined, when considered individually, a source (a formal source) of international law?

2.1. The *Res Judicata* Principle

Now, I have already disclosed at the very beginning of this lecture that the answer is no – and it is indeed very firmly no if one envisages the decisions of the ICJ individually. Thus envisaged, the judgments and other legally binding decisions of the ICJ (as opposed to advisory opinions) impose obligations on the Parties. They might accordingly be seen as sources of obligations,[32] but not as sources of international law: they derive from a reasoning *based on sources* of international law and lead to a decision binding for the Parties only.

[32] Although this proposition itself is debatable since the real source of obligation resides in the source of international law which the judge is only intended to apply – see below, 11.

The point of departure is Article 59 of the Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case".[33]

Its drafting history indicates that it "was not intended merely to express the principle of *res iudicata*, but rather to rule out a system of binding precedent".[34] In other words, the Court "was intended to settle disputes as they came to it rather than to shape the law".[35] Accordingly, the principle expressed in Article 59 deprives earlier decisions of any automatic authority and implies that judgments are supposed to be based on pre-existing rules of law which the Court only applies to the particular dispute it is called to settle. This idea is reflected in the *chapeau* of Article 38, paragraph 1, of the Statute: "The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it…".

Article 59 is formulated in the negative and explains what a judgment does *not* do: it does *not* impose obligations on States other than the Parties to the dispute, even if they are Parties to the Statute. In positive terms, this means that the judgment *has* binding force between the Parties and that they must immediately comply, as confirmed by Article 60:

> "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party".

For its part, Article 61 reinforces the binding character of the Judgment by conditioning any request for revision to drastic substantial and procedural obligations:

[33] See further Pellet, *Article 38*; Brown, *Article 59*; Rosenne, *Article 59 of the Statute of the International Court of Justice Revisited*.

[34] Crawford, *Brownlie's Principles of Public International Law*, 38, referring to Advisory Committee of Jurists, *op. cit.* n. 24, 332, 336, 584 (Descamps). See also: Sørensen, *Les sources du droit international*, 161; Hudson, *The Permanent Court of International Justice*, 207; Waldock, *General course on public international law*, 91: "It would indeed have been somewhat surprising if States had been prepared in 1920 to give a wholly new and untried tribunal explicit authority to lay down law binding upon all States".

[35] Crawford, *ibid.*, 40.

> "1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
> 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
> 3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
> 4. The application for revision must be made at latest within six months of the discovery of the new fact.
> 5. No application for revision may be made after the lapse of ten years from the date of the judgment".

From the combined effect of Articles 59, 60 and 61 results the *res judicata* principle which ensures that "the matter is finally disposed of for good".[36] *Res judicata* however only applies to judgments satisfying the "triple identity test"; namely, that the "*persona, petitum, causa petendi*" are identical. Thus, in principle, ICJ decisions which are taken in a given case do not affect third States;[37] this is the "relative effect of the judged thing" to express it with a word by word translation of the French expression for *res judicata* ("*effet relatif de la chose jugée*").

2.2. The Court's Decisions and Third Parties

Nevertheless, as the Court itself recognized, "the protection afforded by Article 59 of the Statute may not always be sufficient".[38] There are indeed exceptions to the basic principle according to which third States may ignore

[36] *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain),* Preliminary objections, Judgment, 24 July 1964, ICJ Reports (1964), 20.

[37] See e.g. on this issue *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, ICJ Reports (2008), para. 52, quoted below.

[38] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening),* Judgment, 10 October 2002, Reports (2002), para. 238.

individual decisions. In particular: such decisions may create objective results, which third States cannot ignore (2.2.1); and States intervening in a case may be affected by the decision; but the Court has tried to limit such a consequence, notably by elaborating the principle of the "indispensable third parties" (2.2.2).

2.2.1. Objective Effects?

Concerning the first aspect, Professor Brown underlines,

> "It is clear that a judgment of the ICJ may produce objective results, and where this is the case, third States cannot ignore these results. To take one example: if a judgment has decided on the correct border line between two States, a third State – not claiming sovereign rights in the same area – must accept the result of the judgment; it cannot take the position that the formerly disputed area belongs to State A if a binding decision has found that this area falls under the sovereignty of State B. Similar considerations can apply in other fields, if, for instance, a certain nationality of a person has been recognized in a judgment, or if a judgment has recognized a status of neutrality. It is not possible to define in an abstract manner the exact line between non-binding statements and statements producing objective results in a judgment, for much will depend on the particular circumstances of the case. Here it is only necessary to mention the possibility that third States are bound to recognize or accept the objective results of a decision of the ICJ, irrespective of Art. 59".[39]

The Court itself has acknowledged that its findings could have implications in relations between third States in the *Aegean Sea* case:

> "Although under Article 59 of the Statute 'the decision of the Court has no binding force except between the parties and in respect of that particular case', it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may

[39] Brown, *Article 59*, 1439.

have implications in the relations between States other than Greece and Turkey".[40]

However, this objective effect of certain Court's rulings is not linked to the judicial origin of the situation thus created: the same is true when it results from a treaty between two (or more) States;[41] in those hypotheses, it is accepted that an exception must be made to the principle *pacta tertii nec nocent nec prosunt*. In this regard, the Court has for instance held that "[a] boundary established by treaty […] achieves a permanence which the treaty itself does not necessarily enjoy".[42] Similarly, the *Eritrea/Yemen* Tribunal recognised that "[b]oundary and territorial treaties made between two parties are *res inter alios acta vis-à-vis* third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*".[43] Whether the result of a bilateral treaty or of a judicial decision, a boundary is opposable to third States non-party to the treaty or not involved in the dispute.

2.2.2. The (Not So) Special Position of Intervening States

States intervening in a dispute pending before the ICJ are in a special position. The Statute distinguishes two types of interventions, namely intervention by a State party to a Convention when its construction is in question under Article 63, and intervention by a State which considers "that it has an interest of a legal nature which may be affected by the decision in the case" under Article 62. While Article 63(2) specifies that "the construction given by the judgment will be equally binding upon" the intervening State, the position under Article 62 is unclear.

In the case concerning the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras – the first case in which a third State has

40 *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, 19 December 1978, Reports (1978), para. 39.

41 See Salerno, *Treaties Establishing Objective Regimes*.

42 *Territorial Dispute (Libyan Arab Jamahiriya v. Chad*), Judgment, 3 February 1994, ICJ Reports (1994), para. 73.

43 *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award, 9 October 1998, *RIAA*, Vol. XXII, para. 153.

been permitted to intervene in accordance with Article 62, the Chamber declared that:

> "It is true that Nicaragua in its Application went on to state that it has 'the conservative purpose of seeking to ensure that the determinations of the Chamber did not trench upon the legal rights and interests of the Republic of Nicaragua…'. The expression 'trench upon the legal rights and interests' is language not to be found in Article 62 of the Statute, which refers to the possibility that an 'interest of a legal nature' might be 'affected' by the decision. If 'trench upon' was intended perhaps to go further than the language of the Statute, then it should be borne in mind that it would hardly be possible, given Article 59 of the Statute and indeed the decision in the case concerning *Monetary Gold Removed from Rome in 1943* […], for a decision of the Court to 'trench upon' the legal right of a third State. It seems to the Chamber however that it is perfectly proper, and indeed the purpose of intervention, for an intervener to inform the Chamber of what it regards as its rights or interests, in order to ensure that no legal interest may be 'affected' without the intervener being heard; and that the use in an application to intervene of a perhaps somewhat more forceful expression is immaterial, provided the object actually aimed at is a proper one. Nor can the Chamber disregard in this connection the indication by the Agent of Nicaragua […] that Nicaragua seeks to protect its legal interest solely in such way as the Statute allows".[44]

Then, in its (long) 1992 Judgment on the Merits in the same case, the Chamber went on to say:

> "The terms on which intervention was granted […] were that Nicaragua would not, as intervening State, become party to the proceedings. The binding force of the present Judgment for the Parties, as contemplated by Article 59 of the Statute of the Court, does not therefore extend also to Nicaragua as intervener.
> […]
> 423. The Chamber considers that it is correct that a State permitted to intervene under Article 62 of the Statute, but which does not acquire the status of party to the case, is not bound by the Judgment given in the proceedings in which it has intervened. As the Chamber observed in its Judgment of 13 September 1990:

[44] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras),* Application to Intervene, Judgment, 13 September 1990, ICJ Reports (1990), para. 90.

> 'the intervening State does not become party to the proceedings, and does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or the general principles of procedural law' (ICJ Reports 1990, pp. 135-136, para. 102).
> In these circumstances, the right to be heard, which the intervener does acquire, does not carry with it the obligation of being bound by the decision.
> 424. The question however remains of the effect, if any, to be given to the statement made in Nicaragua's Application for permission to intervene that it 'intends to submit itself to the binding effect of the decision to be given'. In the Chamber's Judgment of 13 September 1990, emphasis was laid on the need, if an intervener is to become a party, for the consent of the existing parties to the case, either consent *ad hoc* or in the form of a pre-existing link of jurisdiction. This is essential because the force of *res judicata* does not operate in one direction only: if an intervener becomes a party, and is thus bound by the judgment, it becomes entitled equally to assert the binding force of the judgment against the other parties. A non-party to a case before the Court, whether or not admitted to intervene, cannot by its own unilateral act place itself in the position of a party, and claim to be entitled to rely on the judgment against the original parties. In the present case, El Salvador requested the Chamber to deny the permission to intervene sought by Nicaragua; and neither Party has given any indication of consent to Nicaragua's being recognized to have any status which would enable it to rely on the Judgment. The Chamber therefore concludes that in the circumstances of the present case, this Judgment is not *res judicata* for Nicaragua".[45]

Thus, it would appear that "with regard to the final decision the intervening State would be in essentially the same position as any non-intervening State, in that under Article 59 of the Statute it would be entitled to consider the decision as *res inter alios acta*".[46] This is a questionable approach since it "arguably reduces the intervention to the right of the intervening State to participate in the proceedings without any consequential duties".[47]

45 *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Judgment, 11 September 1992, ICJ Reports (1992), paras. 421 and 423-424.
46 Quintana, *Litigation at the International Court of Justice*, 903.
47 Brown, *Article 59*, 1441.

Nevertheless, the Court's thinking[48] seemed rather clear and in any case preferable than its position in its Judgment of 4 May 2011 on Costa Rica's Application for permission to intervene in the first *Nicaragua v. Colombia* case where it considered (although this is not squarely said) that third States' interests are protected enough by Article 59.[49] If this is so, one can wonder in which circumstances the Court will accept intervention in the future, at least in maritime and, maybe, land boundary disputes – although tripoints on land probably raise slightly different issues.[50]

It should be noted however that in the other (and much more convincing) Judgment of that same day concerning Honduras' Application for permission to intervene, the Court rightly recalled that "[it] is a well-established and generally recognized principle of law that a judgment rendered by a judicial body has binding force between the Parties".[51] On this basis, the Court referred to its 2007 Judgment in *Nicaragua v. Honduras*, in which it had determined the course of the boundary between the Parties and which has the force of *res judicata*, and therefore concluded that Honduras did not have an interest of a legal nature that may be affected by the decision in the main proceedings.[52]

In its subsequent decision in the *Jurisdictional Immunities* case, the Court granted Greece permission to intervene in the proceedings as a non-party. Without commenting on Article 59, it declared that "in the judgment that it will render in the main proceedings, [it] might find it necessary to consider the decisions of Greek courts in the *Distomo* case, in light of the principle of State immunity, for the purposes of making findings with regard to the third

48 As a reminder: "A judgment given by any of the chambers provided for in Articles 26 and 29 shall be considered as rendered by the Court" (Article 27 of the Statute).

49 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene*, Judgment, 4 May 2011, ICJ Reports (2011), paras. 85-90.

50 See Pellet, *Land and Maritime Tripoints in International Jurisprudence*.

51 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Costa Rica for Permission to Intervene*, Judgment, 4 May 2011, ICJ Reports (2011), para. 67; referring to *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, 13 July 1954, ICJ Reports (1954), 53.

52 *Ibid*., paras. 68-70.

request in Germany's submissions".[53] Then the Court concluded that "this is sufficient to indicate that Greece has an interest of a legal nature which may be affected by the judgment".[54] In doing so, the Court appears to have reduced the position of an intervener to that of an *amicus curiae* without clarifying what could be the conditions to intervene either as a non-Party or as a Party (an alternative which seems rather forgotten in the recent ICJ's case law).

It is difficult to infer anything precise from this case law but one thing: non-parties to the case are not bound by the judgment; Parties are. In other words, it confirms that the ICJ judgments create obligations for the Parties only and, consequently, that they are not sources of general international law. As for the intervener, it will be bound if it is a party; it will not if it is not party. But whether it can become a party and, if yes, under which conditions, remains a mystery.

And there is another interesting dilemma: if the third State which has an interest of a legal nature is not ready to intervene (or the intervention is refused for one reason or another), the question arises whether the ICJ can proceed to determine the dispute. Professor Brown underlines that

> "A simple answer could be that Art. 59 of the Statute proclaims that third States are not bound by a judgment, and, therefore, the Court can always decide since its decision does not affect the third State. But, […] this answer is too simple, for even if a judgment is not binding for third States, it can legally or factually prejudice the position of the third State. Legally, a decision delimiting the border line at a point where the territory of a third State might also be affected, can prejudice the position of this State.[55] The decision might give considerable weight to the position of one party to the dispute and weaken the position of a third State".[56]

53 *Jurisdictional Immunities of the State (Germany v. Italy), Application for Permission to Intervene*, Order, 4 July 2011, ICJ Reports (2011), para. 25.

54 *Ibid*.

55 Fn. 139 in the original: "E.g., *Frontier Dispute (Burkina Faso v. Mali)*, Judgment, 22 December 1986, ICJ Reports (1986), paras. 44-50".

56 Brown, *Article 59*, 1441.

Yet, the ICJ has developed what is now known as the *Monetary Gold* principle according to which it lacks jurisdiction if the "legal interests" of a third State "would not only be affected by a decision, but would form the very subject-matter of the decision".[57] If, on the other hand, a decision on the rights or obligations of a third State is not required in order for the ICJ to decide the case, then the proceedings must not be discontinued. The rules contained in Article 59 and the non-binding force of a decision for third States do not preclude this result and thus, Article 59 alone does not always afford sufficient protection to third States.[58]

Nevertheless, since the solution, whatever its basis, is binding only for the Parties, my resolute "no" can be maintained: the judgments of the ICJ, considered individually, are not sources of international law. And this conclusion applies *a fortiori* to the other kinds of "decisions" taken by the Court:

- its procedural decisions have effect only for the time of the proceedings;
- its orders indicating provisional measures are provisional as a matter of definition: they "cease to have effect as from the date of the […] Judgment, since the power of the Court to indicate interim measures under Article 41 of the Statute of the Court is only exercisable pendente lite";[59] and
- its advisory opinions are just that: advisory.

3. Collectively, Decisions of the ICJ Are … "Means for the Determination of the Rules of Law"

The answer can be more nuanced when the decisions of the ICJ are considered not individually, but collectively. In this respect, as I have noted else-

[57] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America*), Preliminary question, Judgment, 15 June 1954, ICJ Reports (1954), 32.

[58] Brown, *Article 59*, 1441-1442.

[59] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits*, Judgment, 25 July 1974, ICJ Reports (1974), para. 70; see also: *Nuclear Tests (New Zealand v. France)*, Judgment, 20 December 1974, ICJ Reports (1974), para. 64; ICJ, *Yearbook 2013-2014*, 113.

where,[60] the reference to Article 59 in Article 38(1)(d) sounds like a warning: the Court is not bound by the common law rule of *stare decisis*, even if some judges of Anglo-Saxon origin seem to have somewhat ignored this guideline.[61] At the same time this reference clearly encourages the Court to take into account its own case law as a privileged means of determining the rules of law to be applied in a particular case.

3.1. Precedents and Jurisprudence Constante

3.1.1. "Determining", Not Creating the Rules of Law

Despite the criticisms expressed against the formula in Article 38(1)(d), this provision skillfully expresses the role played by the decisions of the Court considered collectively, that is by its jurisprudence: they are not a source of the law applied by the Court, in that, even collectively, they are not supposed to create new rules (artificial as this idea may be),[62] but they are "means for the determination of the rules of law" to be applied by the Court. Indeed, Article 38 assigns to the jurisprudence and the doctrine a role different from that of the three sources of international law previously mentioned therein: treaty and customary rules, as well as general principles of international law, are to be applied; by contrast, the doctrine and the jurisprudence are only means for the "determination" of the rules to be applied (that is for their formulation and interpretation).

It is also interesting to note that "judicial decisions" – an expression which includes the decisions of the ICJ but not exclusively –[63] are put by Article 38 on the same footing as "the teachings of the most highly qualified

60 Pellet, *Article 38*, 855.

61 See in particular *Anglo-Iranian Oil Co. (United Kingdom v. Iran), Dissenting Opinion of Judge Read*, Judgment, 22 July 1952, ICJ Reports (1952), 142-143. See also the Advisory Opinion of the PCIJ concerning the *Greco-Turkish Agreement* case, in which it decided to "follow […] the precedent afforded by its Advisory Opinion No. 3" – though the French authoritative text clarifies that the Court did not feel bound by the said precedent ("*en s'inspirant du précédent fourni par son Avis no. 3*"), *Interpretation of the Greco-Turkish Agreement of 1 December 1926*, Advisory Opinion, 28 August 1928, PCIJ Ser. B, No. 16, 15.

62 See above, 5.

63 The present lecture focuses on the Court's decisions, as is clear from its title; however, the ICJ, as all other international courts and tribunals may refer to judicial decisions other

publicists of the various nations", that is the doctrine. No one would think of asserting that the doctrine could, as such, be a source of international law, even though it certainly helps to discover and formulate the rules of law, at least when they are not expressed in a treaty or another formal instrument. This means that, like the doctrine, the jurisprudence of the Court and other judicial or arbitral bodies can be usefully resorted to, in particular to discover and formulate customary rules and general principles of law. As for treaties, both the doctrine and the jurisprudence can be of assistance to interpret their provisions, although the celebrated Article 31 of the 1969 Convention on the Law of Treaties does not refer to either of these two means for the determination of the rules of law.

This being said, it is indeed difficult to precisely appreciate how the jurisprudence can play this role.

3.1.2. The Ambiguous Role of the Precedents – The "Saga" of the Yugoslav Cases

What can be called the "saga" of the Yugoslav cases before the ICJ is a telling illustration of these difficulties. Let me recall the chronology – a first summary of which can be found at paragraph 94 of the Court's Judgment in the case concerning the *Legality of use of force*[64] and a more complete one at paragraph 52 of its 2008 Judgment on Preliminary Objections in the second *Genocide case*.[65]

In its 1993 Order in the first *Genocide* case, the Court accepted that, *prima facie*,

than their own although the Court has been most reluctant to do so. The situation has slightly changed in recent years (see Pellet, *Article 38*, *op. cit*. n. 18, pp. 858-860; for a more recent example: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Merits,* Judgment, 3 February 2015, accepting as "highly persuasive" ICTY findings of fact).

64 *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections,* Judgment, 15 December 2004, ICJ Reports (2004), para. 94.

65 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections*, Judgment, 18 November 2008, ICJ Reports (2008), para. 52.

> "proceedings may validly be instituted by a State against a State which is a party to […] a special provision in a treaty in force, but is not party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946 (*cf. S.S. 'Wimbledon'*, 1923, P.C.I.J., Series A, No. 1, p. 6); […] a compromissory clause in a multilateral convention, such as Article IX of the Genocide Convention relied on by Bosnia-Herzegovina in the present case, *could*, in the view of the Court, be regarded *prima facie* as a special provision contained in a treaty in force".[66]

However, in the further proceedings in that case,

> "this point was not pursued; the Court rejected the preliminary objections raised by the Respondent in that case, one of them being that the Republic of Bosnia and Herzegovina had not become a party to the Genocide Convention. The Respondent however did not raise any objection on the ground that it was itself not a party to the Genocide Convention, nor to the Statute of the Court since, on the international plane, it had been maintaining its claim to continue the legal personality, and the membership in international organizations including the United Nations, of the Socialist Federal Republic of Yugoslavia, and its participation in international treaties. The Court, having observed that it had not been contested that Yugoslavia was party to the Genocide Convention (ICJ Reports 1996 (II), p. 610, para. 17) found that it had jurisdiction on the basis of Article IX of that Convention".[67]

At paragraph 40 of its Judgment on the Preliminary Objections, the Court asserted, in support of its decision, that "it cannot decline to entertain a case simply […] because its judgment may have implications in another case".[68] In a robustly argued joint declaration, seven Judges strongly criticized this unusual position:

> "The choice of the Court [between several possible grounds for its decision] has to be exercised in a manner that reflects its judicial function. That being so, there are three criteria that must guide the Court in selecting between possible options.

66 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Provisional Measures, Order, 8 April 1993, ICJ Reports (1993), para. 19 – emphasis added.

67 *Legality of Use of Force (Serbia and Montenegro v. Belgium),* Preliminary Objections, Judgment, 15 December 2004, ICJ Reports (2004), para. 94.

68 *Ibid*., para. 40.

> First, in exercising its choice, it must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases. Second, the principle of certitude will lead the Court to choose the ground which is most secure in law and to avoid a ground which is less safe and, indeed, perhaps doubtful. Third, as the principal judicial organ of the United Nations, the Court will, in making its selection among possible grounds, be mindful of the possible implications and consequences for the other pending cases. In that sense, we believe that paragraph 40 of the Judgment does not adequately reflect the proper role of the Court as a judicial institution. The Judgment thus goes back on decisions previously adopted by the Court".[69]

In 2003, the Court rejected Serbia and Montenegro's Application for Revision and in 2004, it confirmed its 1993 *prima facie* interpretation of Article 35(2) of its Statute concerning its jurisdiction vis-à-vis States which are not member of the U.N.

But this was not the end of the story. When after a long period of hesitation – not to say indecisiveness (14 years after Bosnia and Herzegovina had filed its Application) – the Court gave its Judgment on the Merits in the first *Genocide* case, it first made a quite classical and, I think, well-founded analysis of the *res judicata* principle:

> "The fundamental character of that principle appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment. The Court stressed those limits in

[69] *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al Khasawneh, Buergenthal and Elaraby*, Judgment, 15 December 2004, ICJ Reports (2004), paras. 3 and 13.

> 2003 when it found inadmissible the Application made by Serbia and Montenegro for revision of the 1996 Judgment in the *Application for Revision* case (ICJ Reports 2003, p. 12, para. 17)".[70]

Then the Court reaffirmed its position exposed in *Cameroon v. Nigeria* according to which the principles applicable to judgments on the merits also apply to judgments on jurisdiction and that those principles included *res judicata*. The Court, after long digressive arguments proving not much, arrived at the conclusion that what had been decided in 1996 was *res judicata* and that this was the end of the question. To that end, the Court, after recalling the previous episodes of the saga,[71] made a very fine and convincing analysis of the situation which deserves a long quote:

> "While some of the facts and the legal issues dealt with in those cases arise also in the present case, none of those decisions were given in proceedings between the two Parties to the present case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the Statute of the Court). To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so. As the Court has observed in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, while '[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases' which do not have binding effect for that State, in such circumstances '[t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases' (Preliminary Objections, Judgment, ICJ Reports 1998, p. 292, para. 28)".[72]

70 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007), para. 115.

71 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, ICJ Reports (2008), para. 52.

72 *Ibid*.

And, in its Judgment of 3 February 2015 in the second *Genocide* case (between Croatia and Serbia), the Court simply referred back to this passage.[73]

This, I suggest, is the answer to our question (in fact already given in another form in Article 38(1)(d)): "while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so" – in other words, jurisprudence – *jurisprudence constante* at least – is not a source of international law properly speaking in that it remains open to challenge and change but there must be cause not "to follow the reasoning and conclusions of earlier cases".[74]

One of these causes can be that the relevant jurisprudence is founded on poorly justified grounds since exactly as "there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths",[75] there are judgments and judgments. Central to the question is the persuasiveness of the legal reasoning.[76]

Now, is it really the final end of the question and even in spite of this strong and clear views that *jurisprudence constante* can be challenged and abandoned or changed, can't it be argued that through this "*jurisprudence constante*", and sometimes maybe only through a single judgment (or, for that matter, an advisory opinion), the Court legislates?

And this takes us back to the core issue posed by the question to which this course is supposed to answer.[77]

[73] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Merits, Judgment, 3 February 2015, ICJ Reports (2015), para. 125.

[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, 18 November 2008, ICJ Reports (2008), para. 53.

[75] Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law*, 881.

[76] See Pellet, *Article 38*, 856.

[77] The developments which follow are largely based on two of my previous articles: Pellet, *Article 38*, and *Shaping the Future in International Law: The Role of the World Court in Law-Making*.

3.2. Not a Legislator, a "Progressive Developer" of International Law

3.2.1. Not a Legislator…

Once again, the starting point of the reasoning is Article 38 – not paragraph (1)(d) but the *chapeau*: "The Court, whose function is to decide in accordance with international law such dispute as are submitted to it, shall apply…". This defines the duty of the Court and would exclude, in principle, "legislative activism" (going beyond what Hugh Thirlway called "judicial activism").[78] However, I have always been impressed by Lord Balfour's premonition who, after receiving the Draft Statute of the PCIJ in 1920, declared that "the decisions of the Permanent Court cannot but have the effect of gradually moulding and modifying international law".[79] Although limited by the scarcity of cases brought before the Court, this prediction has, without any doubt, become reality, at least with regard to the development of certain fields of general international law on which some decisions have had an important, sometimes decisive, influence.[80]

In conformity with the clear intentions of its founders,[81] the Court has always denied that it could act as a legislator:

> "It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules

78 Thirlway, *Judicial Activism and the International Court of Justice*.

79 League of Nations, *Documents [concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court (1921)]*, 38. *Cf.* Shahabuddeen, 78.

80 See in particular its influence on the law of State responsibility, below, 23; the legal personality of international organisations, 24; the law of reservations to treaties, 25; and the law of the sea, 23.

81 See notably Advisory Committee of Jurists, *op. cit.* n. 24, 336 (Descamps): "Doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation".

> in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend".[82]

Such statement aims at reassuring some States anxious to ensure that the ICJ remains within the limits of its judicial function and does not slip into what they consider an improper law-making capacity.[83] In fact, the Court "has a vested interest in sustaining the view that it merely applies existing law"[84] since if it were to admit the contrary it "may bring about a drastic curtailment of its activity. Governments may refuse to submit disputes to it or to renew obligations of compulsory judicial settlement already in existence".[85] A radically opposed attitude has however been adopted by the General Assembly which affirmed as early as 1974 that it is "of paramount importance that the Court should be utilized to the greatest practical extent in

[82] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996), para. 18. In the same vein, the ICJ declared that "It is the duty of the Court to interpret the Treaties, not to revise them" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion, 18 July 1950, ICJ Reports (1950), 229, also quoted in *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, 27 August 1952, ICJ Reports (1952), 198 and in *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment, 18 July 1966, ICJ Reports (1966), para. 91). See also *Fisheries Jurisdiction (United Kingdom v. Iceland) (Federal Republic of Germany v. Iceland)*, Judgment, 25 July 1974, ICJ Reports (1974), para. 53 and 45; or *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005), para. 26. See also the firm statement in Sep. Op. Guillaume: "I should like solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator" (*ibid.*, para. 14); and further A. Pellet, *Article 38*, MN 65 and 147.

[83] See *ibid*. and e.g. Written Statement of the Government of Finland, 13 June 1995, 1; Written Statement of the Government of the French Republic, 20 June 1995, 19: "*la question posée […] tend à faire jouer à la Cour un rôle de législateur, qui n'est pas le sien*"; Written Statement of the Government of the Federal Republic of Germany, 20 June 1995, 4: "Because of its judicial function the Court is obliged to respect the law-making, in a sense 'legislative' prerogative of the states".

[84] Hernández, *The International Court of Justice and the Judicial Function*, 87.

[85] Lauterpacht, *The Development of International Law by the International Court*, 76.

the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation".[86]

3.2.2. … But a "Progressive Developer" of International Law

But these extreme positions probably come down to a subjective play on words in the international dictionary. While legislation is a dirty word forbidden by the judicial language, the expression "progressive development of international law" appears less offensive, if not soothing. Yet, what one might call an abusive exercise in legislation could be considered progressive development by others. This value judgment is further complicated by the fact that the distinction between progressive development of international law on the one hand and codification on the other hand is actually very narrow and cannot be strictly applied. Not only is it "difficult to say when, on any particular subject, codification stops and progressive development begins",[87] but as noted in the Lauterpacht Survey listing possible topics for codification by the ILC, "there are only very few branches of international law with regard to which it can be said that they exhibit such a pronounced measure of agreement in the practice of States as to call for no more than what has been called consolidating codification".[88]

And this precisely explains that, while the Court supposedly cannot act as a legislator who may change the law at good will with no other limits than a few rules of higher hierarchical status (i.e., the Constitution in domestic law; *jus cogens* at the international level), it is surely a "progressive developer".[89] In this respect, what I explained in relation with the ILC function to progressively develop international law also holds also true for the ICJ: "it is our duty to try to understand the logic of existing rules and to develop them in the framework of this logic, not to change the underlying logic. It's our duty to keep our ears and our eyes and our mind open to the changes in the

86 UN doc. GA Resolution 171 (II), 14 November 1947: Need for greater use by the United Nations and its organs of the International Court of Justice.

87 Watts, *The International Law Commission 1949-1998*, Vol. I, O.U.P., 1999, 9.

88 Survey of International Law in Relation to the Work of Codification of the International Law Commission, UN doc. A/CN. 4/1/Rev. 1, 10 February 1949.

89 Pellet, *Shaping the Future in International Law: The Role of the World Court in Law-Making*, 1077.

law of nations and to take note of new trends, not to invent them and certainly even less to impose them".[90] In fact, while staying within the existing legal framework, the Court constantly and consistently (even if rather prudently) adapts the law to the new circumstances and needs of the international society, notably when it is clear that a more orthodox interpretation would lead to a dead-end or is no longer acceptable by the international society, or because there appears to be gaps in the existing applicable rules. And I must say that even though I am extremely critical of some judgments of the Court such as the 1927 Judgment of the PCIJ in the *Lotus* case[91] or, more recently, the *Genocide I* Judgment,[92] as well as the infamous 2002 Judgment in the *Arrest Warrant* case,[93] I am globally rather positive on the role played by the ICJ in this respect.

Thus, Montesquieu's famous theory according to which the judge is "the mouth that pronounces the words of the law"[94] is largely fictitious. On the one hand, in order for the ICJ to apply the rules and principles of international law stemming from the sources listed in paragraph 1(a), (b) and (c) of Article 38 (plus some others),[95] it will need to interpret them. On the other hand, similarly to domestic tribunals,[96] it will not refuse to decide a case on the ground of the silence or obscurity of the law to be applied.[97] A contrary

90 Pellet, *Keynote Address, Responding to New Needs through Codification and Progressive Development*", 16.

91 *S.S. "Lotus" (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Ser. A, No. 10. See further Pellet, *Lotus, que de sottises on profère en ton nom!: remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale*.

92 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007).

93 *Arrest Warrant of 11 April 2000*, Judgment, 14 February 2002, ICJ Reports (2002).

94 Montesquieu, *The Spirit of Laws*, translated by T. Nugent *et alii*, 159.

95 See above, 5.

96 See e.g., Article 4 of the French Civil Code.

97 While the Court, in the framework of its advisory function, has at least on one occasion observed that "in view of the present state of international law viewed as a whole, [it could] not reach a definitive conclusion" with respect to one aspect of the question asked (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996), para. 97 and 105E), it has never done so in a contentious case, even though nothing in its Statute expressly precludes it from pronouncing a *non liquet*. Indeed, formal provisions excluding a *non liquet* are rare in international law, but *cf.* ILC, Model Rules on Arbitral Procedure, *Yearbook 1958, Vol. II*, 84, Article 11. It is true, however, that, in some

attitude would hardly be compatible with the Court's judicial character as defined in the *chapeau* of Article 38,[98] as well as with the very nature of international law: if the precise rules of general international law are, more often than not, incomplete and/or subject to debate as to their content, their scope and, sometimes, their very existence, the Court must nevertheless decide; and, for doing so, it will have to make a choice between the possible applicable rules – or between the defensible interpretations of a single norm.[99]

Thus, although the ICJ has stressed that "[i]t is the duty of the Court to interpret the Treaties, not to revise them",[100] it is actually quite common for the Court to formulate new rules under the cover of interpretation. As Dr Hernández points out,

> "Judges cloak their decisions through an outward show of judicial technique, behind which judges shield themselves from the accusation that they are engaging in law-creation rather than merely the interpretation of the law.
> It behoves legal scholars to dispense with this fallacy. Interpretation remains primarily a purposeful activity; anyone who engages in the interpretative process does so with a desire to achieve a certain outcome. Whether or not judgments are a *source of law* or merely a means for the *determination of the law*, a court's

cases, the Court has bypassed the question on the basis of a sometimes tortuous and debatable reasoning (see e.g., *Haya de la Torre (Colombia v. Peru)*, Judgment, 13 June 1951, ICJ Reports (1951), 79; *Northern Cameroons (Cameroon v. United Kingdom)*, Judgment, 2 December 1963, ICJ Reports (1963), 15 *et seq.*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits*, Judgment, 16 March 2001, ICJ Reports (2001), para. 205).

98 See further *Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Higgins*, ICJ Reports (1996), paras. 32 and 36: "The fact that […] principles are broadly stated and often raise further questions that require a response can be no ground for a *non liquet*. It is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations. […] It is […] an important and well-established principle that the concept of *non liquet* […] is no part of the Court's jurisprudence". See also Advisory Committee of Jurists, *op. cit.* n. 24, 323 (Descamps), 296 and 317 (Hagerup), 311-312 (Loder), 312 (Lapradelle).

99 See Pellet, *Shaping the Future in International Law: The Role of the World Court in Law-Making*, 1068.

100 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion, 18 July 1950, ICJ Reports (1950), 229; *South West Africa, Second Phase*, Judgment, 18 July 1966, ICJ Reports (1966), para. 91.

> interpretation nevertheless contributes to the creation of what it finds. This occurs through a process of 'normative accretion', through which law is not created as with legislative processes, but rather in a more modest, incremental fashion, clarifying ambiguities and resolving perceived gaps in the law".[101]

In other words – those of my commentary of Article 38,[102] it is precisely when specifying the scope of the applicable law that the Court has an opportunity to play a part in the shaping – or reshaping – of international law. Indeed, it must decide the disputes submitted to it, but the often uncertain content or scope of the applicable law leaves it wide latitude in its determination – less when it only has to apply and interpret a treaty, more when, in the absence of treaty law, it must find evidence of a customary rule or of general principles of law. In both cases, it plays a fundamental role in legitimizing the rules it enunciates, defines and applies and, quite often, the Court's pronouncement on the existence (and content) of a particular rule of customary law is seen as the final proof for it.

Boyle and Chinkin have given an interesting example illustrating the Court's audacity in this respect:

> "In the 1974 *Fisheries Jurisdiction* case the Court found two concepts to have crystallised as customary international law: the concept of a 12-mile exclusive fishing zone and that of preferential rights for coastal states beyond 12 miles. These concepts were said to have arisen out of the general consensus revealed at the 1960 Geneva Conference on the Law of the Sea – which had failed to reach agreement on the extent of fishery rights. Furthermore, UNCLOS III (which had commenced in 1973) had not yet reached any conclusions – as it would not for another eight years. Without citing any concrete instances of state practice the Court noted that it was 'aware that a number of States has asserted an extension of fishery limits'.[103] […] The Court was also 'aware' of the manifest desire of states to codify the law through UNCLOS III. While asserting that it could not usurp the legislator by anticipating the law, the Court did precisely that".[104]

101 Hernández, *Interpretative Authority and the International Judiciary*, 181-182 (footnotes omitted – emphasis in the original).

102 Pellet, *Article 38*, 864 (footnotes omitted).

103 *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), M*erits, Judgment, 25 July 1974, ICJ Reports (1974), para 53.

104 Boyle, Chinkin, *The Making of International Law*, 279-280.

This example undoubtedly pushes the limits of the Court's marked tendency to assert the existence of a customary rule more than to prove it, making it virtually impossible to objectively determine whether a particular rule applied by the World Court is customary or results from progressive development.

3.2.3. Progressive and Recessive Developments

This is by no means a new phenomenon. Suffice it to think of the PCIJ's crucial role in the fixing and development of the law of State responsibility. Quite instantly, formulas included in the World Court's judgments appeared as being rules set in stone, enunciating the fundamental principles in that central field of international law. Although the conception of State responsibility has deeply evolved under the influence of Ago and owe to the works of the ILC many of these formulas appear with only minor changes in the 2001 ILC Articles on the topic[105] and the Draft Articles on diplomatic protection adopted in 2006:[106]

The principle of the responsibility of a State for its internationally wrongful acts, codified in Article 1 of the 2001 Draft, was applied beforehand by the PCIJ in a number of cases.[107] For instance, in the *Phosphates in Morocco* case, it affirmed that when a State commits an internationally wrongful act against another State international responsibility is established "immediately as between the two States".[108]

105 UN doc. GA Resolution 56/83, 12 December 2001, taking note of the Articles on responsibility of States for internationally wrongful acts, the text of which is annexed to the resolution.

106 UN doc. GA Resolution 61/35, 4 December 2006, taking note of the Draft Articles on diplomatic protection, the text of which is annexed to UN doc. GA Resolution 62/67, 6 December 2007.

107 Draft Articles on Responsibility of States, *op. cit.* n. 27, 32, para. 2 of the commentary of Article 1.

108 *Phosphates in Morocco,* Judgment, 14 June 1938, PCIJ Ser. A/B, No. 74, 28. See also *S.S. "Wimbledon"*, Judgment, 28 June 1923, PCIJ Ser. A, No. 1, 30; *Factory at Chorzów, Jurisdiction,* Judgment, 26 July 1927, PCIJ Series A, No. 9, 21; and *ibid., Merits*, Judgment, 13 September 1928, PCIJ Ser. A, No. 17, 29.

In the same case, it also specified the elements of an internationally wrongful act of a State, encompassed today under Article 2, by explicitly linking the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[109]

On the other side of the coin, Article 3 on the characterization of an act of a State as internationally wrongful draws from the *Treatment of Polish Nationals* case which ruled that

> "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted ... [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".[110]

As to reparation under Article 31, the general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case in a rightly celebrated formula: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form".[111] In a subsequent phase of the same case, the Court went on to specify the content of this obligation: "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed".[112]

The "Mavrommatis formula", according to which "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law",[113] is approximately repeated in Article 1 of the 2006 Articles

109 *Ibid*.

110 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory,* Advisory Opinion, 4 February 1932, PCIJ Ser. A/B, No. 44, p. 4.

111 *Factory at Chorzów, Jurisdiction,* Judgment, 26 July 1927, PCIJ Ser. A, No. 9, 21.

112 *Factory at Chorzów, Merits*, Judgment, 13 September 1928, PCIJ Ser. A, No. 17, 47.

113 *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, PCIJ Ser. A, No. 2, 12.

with however an important inflection for taking into account the assertiveness of the rights of the injured individual, thus recognizing the legal personality of the individual in the international legal sphere.[114]

Without hesitation, the ICJ immediately followed the same path and took the leap of progressively developing international law. A striking example of dealing with the flaws of the law in force when new issues are faced is given by its 1949 Advisory Opinion in the *Count Bernadotte* case which definitely settled the uncertainties concerning the legal personality of international organizations. Although looking like a rather technical question, it must be recalled that at the start of the Cold War this was indeed a very delicate political issue opposing the communist countries of the Eastern Bloc – which claimed that international law was exclusively interstate and based on the sovereignty-centred, to the Western countries – which were of the view that the United Nations (as well as other international organisations) enjoyed a legal personality of their own. The Court has confirmed this last view in its extremely concise and fully convincing (at least on these general questions) Advisory Opinion:

> "the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is 'a super-State', whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[115]

[114] On this evolution, see e.g. Pellet, *La seconde mort d'Euripide Mavrommatis? Notes sur le projet de la C.D.I. sur la protection diplomatique*. See also Draft Articles on Diplomatic Protection, *op. cit.* n. 27, 25-26, commentary of Article 1.

[115] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949), 179.

Even more striking is the Court's reshaping of the law applicable to reservations to treaties.[116] Its famous Advisory Opinion on *Reservations to the Genocide Convention* clearly broke away from the traditional rule of unanimous acceptance of reservations and substituted a new "flexible" rule that of "the compatibility of a reservation with the object and purpose of the Convention".[117] In a purely abstract perspective, Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo were probably right in their well-known joint Dissenting Opinion to warn that "[t]he Court is not asked to state which is in its opinion the best system for regulating the making of reservations to multilateral conventions"[118] and their criticism of the Court's innovative solution could be persuasive if appreciated in the perspective of the "positive" (existing) law then in force. However, the majority was certainly much more in line with the situation and needs of the modern world (divided in many sovereign States with deeply divergent policies).[119] In spite of the reluctance of the ILC, which showed to be much more conservative than the ICJ, the 1951 principle was finally incorporated in Article 19 of the 1969 Vienna Convention on the Law Treaties and must today be seen, without any possible discussion, as a customary norm applying in the absence of a contrary rule inserted by the parties in the treaty.

But it is probably in the field of the law of the sea that the Court's contribution to the progressive development of international law has been the deepest – if not the most convincing – in particular with regard to the delimitation of the continental shelf (and consequentially of the exclusive economic zone) between States with opposite or adjacent coasts.

However, this evolution first took a bad start. In the *North Sea Continental Shelf* cases, the Court refused to consider the rule embodied in Article 6(2) of

116 See Pellet, *La C.I.J. et les réserves aux traités – Remarques cursives sur une révolution jurisprudentielle* or Pellet, *Article 19*, 411. See also e.g.: ILC, Second report on reservations to treaties, by Mr. A. Pellet, Special Rapporteur, *Yearbook 1996*, *Vol. II, Part One*, 62, paras. 130-131.

117 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951), 23-26.

118 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo, Advisory Opinion, 28 May 1951, ICJ Reports (1951), 31.

119 See Pellet, *Shaping the Future in International Law: The Role of the World Court in Law-Making*, 1069-1070.

the 1958 Geneva Convention on the continental shelf, according to which "the boundary of the continental shelf shall be determined by agreement […]. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance […]". While this principle was at the time clearly crystallising into a customary rule and realizing a suitable balance between the requirements of legal security and of flexibility, the Court decided to set it aside and literally "invented" the unfortunate principle according to which "delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles".[120] This solution was endorsed in Articles 74 and 83 of UNCLOS but proved unreasonably uncertain. By "successive strokes, without [the Court explicitly] recognizing its original mistake",[121] it thus progressively reintroduced elements of predictability, culminating 40 years later in its now firmly settled three-stage method consecrated by its unanimous Judgment in the *Black Sea* case:

> "115. When called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.
> 116. These separate stages, broadly explained in the case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment, ICJ Reports 1985, p. 46, para. 60), have in recent decades been specified with precision.
> […]
> 118. In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line.
> […]
> 120. The course of the final line should result in an equitable solution (Articles 74 and 83 of UNCLOS). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result *(Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports 2002, p. 441, para. 288).
> […]

120 *North Sea Continental Shelf*, Judgement, 20 February 1969, ICJ Reports (1969), para. 85.
121 Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 12.

> 122. Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line […]. A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths".[122]

And things have finally come full circle: after destroying an opportune rule which it could – and should – have seen as customary in 1969, the ICJ has not only re-established the principle "equidistance/relevant circumstances" as the basic binding rule in matters of maritime delimitation, it has also "hardened" the method to be applied (while keeping a wide margin of flexibility through the importance given to the rather subjective notion of relevant circumstances and the final test of non-gross disproportionality). And there can be no doubt about the appurtenance of this principle and this method to the sphere of positive law. The Court itself has reaffirmed their positivity in its subsequent case law;[123] and they have been applied by various arbitral tribunals[124] as well as by the ITLOS which considered that:

> "jurisprudence has developed in favour of the equidistance/relevant circumstances method. This is the method adopted by international courts and tribunals in the majority of the delimitation cases that have come before them".[125]

122 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, 3 February 2009, ICJ Reports (2009), paras. 115-122.

123 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, ICJ Reports (2012), para. 190; *Maritime Dispute (Peru v. Chile)*, Judgment, 27 January 2014, ICJ Reports (2014), para. 180.

124 See e.g., *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA, Award, 7 July 2014, para. 345.

125 *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, ITLOS, Judgment, 14 March 2012, para. 238 (see more generally paras. 225-240 of the Judgment).

The Court's position on the law of maritime delimitation is a remarkable example of quasi-legislation but it is quite acceptable since it stays within the margin of what can be called "progressive development of the law".

Thus, as has been observed, "[t]he malleability of the law in the hands of the Court has converted it into a powerful instrument for progress".[126] Instead of viewing jurisprudence as "a poor cousin" of the three main sources,

> "it is perhaps more accurate to recognise [that] its in-built limitations are a tribute to its potential potency. Treaties do not affect non-signatories, and 'customs' and 'general principles' evolve with glacial speed and, in most cases, at a level of considerable generality. The first three paragraphs of Art. 38(1) are therefore relatively unthreatening. Precedents, on the other hand, may provide immediate and bold answers to highly specific questions. That is why, no doubt, they are regarded with circumspection".[127]

In a few instances however, the Court's decisions have been an instrument of regress which consequences are exacerbated by their immediacy. Indeed, it can also happen that a judgment brutally stops, at least for some time, an ongoing and necessary evolution of the law. This has been the case of the *North Sea* cases but also, more recently, of the unfortunate *Arrest Warrant* Judgment in 2002. Adopting an interpretation cautious to the excess of the trends in favour of the absence of criminal immunities of political leaders for the most odious international crimes, the Court, by a most conservative interpretation of recent State practice, has clearly endeavoured to stop this promising process:

> "The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the

126 Rosenne, *Law and Practice of the International Court*, 1545.

127 Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law*, 880.

rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suggested of having committed war crimes or crimes against humanity".[128]

It can only be hoped that this will just cause a slowdown in the crystallisation of the contrary rule without durably halting this promising development. The ongoing progressive development and codification of the topic of immunity of State officials from foreign criminal jurisdiction by the ILC could contribute to its revival.[129] Fortunately such a recessive role is rather isolated.

While the above examples stay within the margin of the development of the law – whether progressive or regressive – I would think that this is not the case of the Court's so-called clarification of the meaning of Article 41(1) of its Statute according to which "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party". Under the guise of clarifies the meaning of this provision, the Court takes a

[128] *Arrest Warrant of 11 April 2000*, Judgment, 14 February 2002, ICJ Reports (2002), para. 58.

[129] Report of the ILC, Sixtieth session (5 May-6 June and 7 July-8 August 2008), UN doc. A/63/10, para. 311 where the Special Rapporteur, R. Kolodkin, stated that "[i]n his view, the 2002 Judgment of the International Court of Justice in the *Arrest Warrant* case was both a correct and also a landmark decision", see however para. 295 (footnotes omitted): "Some members further contended that the position of the International Court of Justice in the *Arrest Warrant case* ran against the general trend towards the condemnation of certain crimes by the international community as a whole (as exemplified by the position of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Blaškić* case), and that the Commission should not hesitate to either depart from that precedent or to pursue the matter as part of progressive development. According to some members, the Commission should further determine whether international law had changed since the said Judgment, notably in light of national legislation passed in the meantime for the implementation of the Rome Statute of the International Criminal Court". Compare ILC, Second report on immunity of State officials from foreign criminal jurisdiction, by R. Kolodkin, Special Rapporteur, UN doc. A/CN.4/631, 10 June 2010, paras. 54-93 (concluding that it is difficult to talk of exceptions to immunity as a norm of international law that has developed, in the same way as it cannot definitively be asserted that a trend toward the establishment of such a norm exists), with ILC, Fifth report on immunity of State officials from foreign criminal jurisdiction, by C. Escobar Hernández, Special Rapporteur, UN doc. A/CN.4/701, 14 June 2016 (proposing Draft article 7 entitled "Crimes in respect of which immunity does not apply").

most debatable position regarding the binding character of provisional measures. It played a shell game which assimilates "indicate" with "decide":

> "The Court will therefore now proceed to the interpretation of Article 41 of the Statute. It will do so in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties [...].
> In this text, the terms '*indiquer'* and '*l'indication'* may be deemed to be neutral as to the mandatory character of the measure concerned; by contrast the words '*doivent être prises*' have an imperative character [...].
> The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article [...].
> In short, it is clear that none of the sources of interpretation referred to in the relevant Articles of the Vienna Convention on the Law of Treaties, including the preparatory work, contradict the conclusions drawn from the terms of Article 41 read in their context and in the light of the object and purpose of the Statute. Thus, the Court has reached the conclusion that orders on provisional measures under Article 41 have binding effect".[130]

This is neither codification nor progressive development of the law: it is a very controversial interpretation of a treaty provision, irreconcilable with its wording. Yet, debatable and inconvenient as it may be in practice (since it encourages States to make abusive requests for reparation), there can be no doubt that this position, which has been endorsed with an apparent enthusiasm by various courts and tribunals, is now part of positive international law. Since then, the ICJ itself has constantly reiterated

> "that its 'orders on provisional measures under Article 41 [of the Statute] have binding effect' (*LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 506, para. 109) and thus create international legal obligations with which both Parties are required to comply (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, ICJ Reports 2011 (I), pp. 26-27, para. 84)".[131]

130 *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001), paras. 98-102 and para. 109.

131 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Provisional*

In this regard, ICSID decisions have evidenced a "blind adherence"[132] even though Article 47 of the ICSID Convention of 1945 provides that:

> "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, *recommend* any provisional measures which should be taken to preserve the respective rights of either party".[133]

While, the verb to "indicate" in Article 41 of the Court's Statute could possibly (although rather artificially) be interpreted as meaning to "decide", such an assimilation is clearly impossible for "recommend". Yet, a few months after the *LaGrand* Judgment, the ICSID *Pey Casado* Tribunal not only relied extensively on it but also concluded simplistically that, although the issue of the binding force of provisional measures "has long been controversial", it is now "considered resolved" in the light of the World Court's findings.[134]

This is not to say bluntly that the Court would have become a world legislator. However, in the absence of such a legislator, there is no exaggeration in thinking that the Court, limited as it is by the hazards of its seising, is one of the most efficient, if not the most efficient, vehicle for adaptation of general international law norms to the changing conditions of international relations.[135]

Measures, Order, 22 November 2013, ICJ Reports (2013), para. 57. See also *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor Leste v. Australia), Provisional Measures*, Order, 3 March 2014, ICJ Reports (2014), para. 53; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures*, Order, 7 December 2016, para. 97.

132 Pellet, *The Case Law of the ICJ in Investment Arbitration*. See also: Pellet, *La jurisprudence de la Cour internationale de Justice dans les sentences CIRDI – Lalive Lecture, 5 juin 2013*, 30.

133 Article 47 of the ICSID Convention.

134 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, Decision on provisional measures, 25 September 2001, ICSID Case No. ARB/98/2, para. 17 (Translation of the author from the original French text: "*Longtemps controversée dans la doctrine, cette question peut être considérée aujourd'hui comme résolue, à la lumière notamment de la jurisprudence […] d'un récent arrêt de la Cour Internationale de Justice*").

135 See Pellet, *Article 38*, 868 or Pellet, *L'adaptation du droit international aux besoins changeants de la société internationale*, 46.

As was aptly noted by Professor Alvarez-Jiménez, "the Court is moving in the direction of the mandate that the UN gave to the ILC"[136] in that the ICJ is participating to the 'progressive development' of international law, which confirms the difficulty met by the ILC in making a clear-cut distinction between the two parts of its mandate.[137] This is why it can also be sustained that the Court and, to a lesser degree, the other international tribunals, are the most effective law adapters of the international legal order.[138]

4. Conclusion

To summarise:

- The primary function of a formal source is to create or modify legal norms.
- By contrast, the very function of the ICJ, as described in Article 38 of its Statute, "is to decide in accordance with international law such disputes as are submitted to it".
- The expression "judicial decisions" under the said Article is synonymous to "jurisprudence" which globally includes all "instruments" – such as judgments, various orders and advisory opinions – adopted by the Court after an exchange of arguments by the interested States (or international organizations) and resulting in a pronouncement concerning the conduct

136 Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice's Jurisprudence: 2000–2009*, 709.

137 Article 15 of the ILC Statute provides that: In the following Articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". (UN doc. GA Resolution 174 (II), 21 November 1947). But the distinction is less clear-cut than this provision suggests: *cf*. Lauterpacht, *Codification and Development in International Law*; Mahiou, *Rapport general – Les objectifs de la codification*, 17-18; Pellet, *Keynote Address, Responding to New Needs through Codification and Progressive Development*, 13-23.

138 See Pellet, *L'adaptation du droit international aux besoins changeants de la société internationale*, 21. *Cf*. also Pellet, *Shaping the Future in International Law: The Role of the World Court in Law-Making*, or *Article 38*, 866.

which must or should be followed by the entities concerned, based on international law.

- Decisions of the ICJ are not sources of international law if envisaged individually since they impose obligations on the Parties only pursuant to Article 59. Article 59 accordingly deprives earlier decisions of any automatic authority and postulates that they are based on pre-existing rules of law which the Court only applies to the particular dispute it is called to settle. This holds true for judgments as well as to the other kinds of "decisions" taken by the Court, despite the existence of exceptions to the basic principle according to which third States are not affected by individual decisions, even if such decisions create objective results or are the object of an intervention by a third State as a party (a situation which has never concretely occurred up to now).
- The answer must be more nuanced when the decisions are considered not individually, but collectively – that is as forming the jurisprudence of the Court. Article 38 assigns to the jurisprudence and doctrine a very specific role from the one of the three sources of international law that it previously mentions: treaty and customary rules, as well as general principles of international law, are to be applied; by contrast, the doctrine and the jurisprudence are only means for the "determination" of the rules to be applied (that is for their formulation and for their interpretation, but not for their creation).
- Yet, while the system of binding precedent is ruled out and jurisprudence (even when constant) remains open to challenge and change, the Court will not depart from it unless it finds very particular reasons to do so.
- The Court cannot act as a legislator which may change the law at good will but it can be seen as a "progressive developer" of international law: in order for the Court to apply the rules and principles stemming from the "actual" sources of international law, it will need to interpret them and it will not refuse to decide a case on the ground of the silence or obscurity of the law to be applied.

A contrary attitude would hardly be compatible with the Court's judicial character as defined in the *chapeau* of Article 38, as well as with the very nature of international law: if the precise rules of general international law are,

more often than not, incomplete and/or subject to debate as to their content, their scope and, sometimes, their very existence, the Court must nevertheless decide. And it is precisely when specifying the scope of the applicable law that the Court has an opportunity to play a part in the shaping – or reshaping – of international law.

In sum, while, it is controversial that, individually, the decisions of the ICJ can be defined even as sources of obligations for the Parties, jurisprudence – that is the Court's decisions considered collectively – for its part, though not strictly speaking a formal source of international law, is a means not only for the determination but also for the progressive development of the rules of law.

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2. The Development of International Law by the International Court of Justice

*Christian J. Tams**

Do courts make law, or at least develop it? Should they? Can they? If so, how? These are big questions for any developed system of law. They touch the heart of the nature and role of the judicial function: the normative question, and they have been debated for centuries. In his *De l'esprit des lois*, Montesquieu adopted a cautious approach. In his view, judges were called upon to merely apply the law, which others had created – implementing the legislator's will, they were no more than a mouthpiece: "la bouche qui prononcent les paroles de la loi".[1] Others take a very different position. In England much of the law was developed by judges deciding individual cases, and it is from the principles underlying their decisions that a body of common law

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This contribution is based on two presentations delivered at La Sapienza, Rome, on 21/22 May 2015, as part of a series of lectures organised in honour of Professor Gaetano Morelli. While footnotes have been added, the format of the oral presentation has largely been retained. As the lectures, so this contribution offers a rather pragmatic, 'down to earth', assessment of the World Court's role as an agent of legal development – a pragmatic assessment that does not aim to rival the rigour of Professor Morelli's scholarship.
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1 Charles Louis de Secondat Baron de Montesquieu, *De l'esprit des lois*. "Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur". Book XI, chapter 6.

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emerged: English judges are clearly more than mouthpieces. In the United States, Charles Evans Hughes, who sat on both the United States (US) Supreme Court and the Permanent Court of International Justice (PCIJ), famously noted that "the US Constitution is what the judges say it is",[2] strongly suggesting that judges, having at one point received the constitution, had then seized control of it.

This wider discourse on the law-making potential of courts forms the backdrop to this contribution, which addresses the development of a particular body of law – viz. international law – and the influence of a particular international court – viz. the International Court of Justice (ICJ), including that of its predecessor, the PCIJ.[3] However, the views of Montesquieu, Hughes and others provide the backdrop only. They allow us to appreciate the extreme positions: that of judges as mere mouthpieces versus judges that are in control of law-making. But neither of these extreme positions reflects the reality within international law. The purpose of this contribution is to present a more accurate picture of the ICJ's influence on the development of international law – one that respects the special features of the international legal order and the particular features of the Court's position in it.

The discussion proceeds in four sections, each comprising three steps. Section 1 sets the stage: it spells out *three basic assumptions* that define the particular setting in which the ICJ operates. Section 2, comprising *three field studies*, illustrates the Court's impact on the development of international law in particular areas. Sections 3 and 4 take stock and seek to explain: they advance *three propositions* about the Court's role and identify *three factors* that determine its impact on the development of international law.

2 "We are under a Constitution, but the Constitution is what the judges say it is". Hughes, *Speech to the Chamber of Commerce*, 139.

3 While PCIJ and ICJ are formally separate institutions, it is generally accepted that there is "functional continuity between the two Courts": Rosenne, *The Law and Practice of the International Court*, 73. In line with that understanding, they are treated together here.

1. Setting the stage: three basic assumptions

Ever since permanent international courts were established, international lawyers have discussed whether and how court decisions could influence international law. A decade after the PCIJ had begun to operate, Hersch Lauterpacht wrote about its contribution to the development of international law in book-length form.[4] The literature published since then is voluminous –[5] so voluminous in fact, that at times, it has obscured three basic assumptions that should inform any assessment of the ICJ's impact on the development of international law. The subsequent sections spell out these three assumptions.

1.1. The Court cannot legislate, but it can contribute to legal development

The first assumption is Janus-faced, and it is this: the ICJ cannot legislate, but nothing stops it from contributing to the development of the law.

The idea that the Court cannot legislate is fairly straightforward, and in view of the regular references to "judicial law-making", it is worth putting the following in a straightforward manner: the ICJ Statute views the Court as an agent, not of legal development let alone law-making, but of dispute settlement. Pursuant to Article 59 of the ICJ Statute, the Court's decisions are

4 Lauterpacht, *The Development of International Law by the Permanent Court of International Justice*. Admittedly, it was a rather short book, subsequently much expanded to cover the early work of the ICJ: Lauterpacht, *The Development of International Law by the International Court*.

5 See e.g. Shahabuddeen, *Precedent in the World Court*; Abi-Saab, *De la jurisprudence, quelques réflexions sur son rôle dans le développement du droit international*, 2; Cahier, *Le rôle du juge dans l'élaboration du droit international*, 353; Condorelli, *L'autorité de la décision des juridictions internationales permanents*, 277; Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 5; Salerno, *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e communitario*; Pellet, *Shaping the Future of International Law: The Role of the World Court in Law-Making*, 1065; Lachs, *Some Reflections on the Contribution of the International Court of Justice to the Development of International Law*, 239; Roeben, *Le précédent dans la jurisprudence de la C.I.J.*, 382. For a detailed account of the Court's contributions to different areas of international law see the chapters in Tams, Sloan (eds). *The Development of International Law by the International Court of Justice*. Earlier analyses by the present author (on which the subsequent discussion draws) include *The ICJ as a Law-formative Agency*, 377; *The World Court's Role in the International Law-making Process*, 139; *The Development of International Law by the International Court of Justice*, 216.

only binding between the parties and only in respect of the particular dispute.[6] International law does not envisage any theory of precedent, and still less does it accord ICJ decisions any general legal validity. Quite to the contrary, pursuant to Article 38(1)(d) of the ICJ Statute, decisions of the ICJ are but "subsidiary means for the determination of rules of law", on the same par as writings of renowned publicists.[7] In light of these provisions, it is clear that the Court's Statute does not envisage the Court to make law. The ICJ itself has made the point frequently, most clearly in the *Nuclear Weapons* opinion, where it considered it to be "clear that the Court cannot legislate"[8] and further added, with echoes of Montesquieu, that it "states the law and does not legislate".[9]

This is not the end of the matter, though.[10] Even in the absence of formal law-making powers, there is room for influential judicial contributions to the process of legal development, and such contributions it seems to have made regularly. A quick glance at the textbook literature, or at International Law Commission (ILC) Yearbooks, is sufficient to understand that ICJ pronouncements are credited with having clarified or shaped the law on numerous points and are drawn upon as authority for general propositions about the state of the law, outside the case in which they were put forward. Who

6 In the words of Shahabuddeen: "Article 59 […] is directed to emphasising that the juridical force of a judgment *en tant que jugement* is limited to defining the legal relations of the parties only", *supra* note 5, 63.

7 As Alain Pellet notes in his comprehensive analysis of Article 38, "[i]t may […] be inferred from the – sometimes passionate – discussions among the members that the intention behind the final wording of this provision [now Article 38(1)(d)] was that jurisprudence and doctrine were supposed to elucidate what the rules to be applied by the Court were, not to create them": Pellet, *Commentary to Article 38*, 853.

8 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 18. According to Boyle and Chinkin, this is "the orthodoxy": Boyle, Chinkin, *The Making of International Law*, 268.

9 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 8, 18.

10 In the words of Terris, Romano and Swigart, when looking at whether international courts can, through their case law, influence legal developments, "[t]he formal nature of a judicial finding does not matter": Terris, Romano, Swigart, *The International Judge*, 121.

could envisage writing about diplomatic protection without mentioning *Barcelona Traction*?[11] Who would take seriously a book or an article on legal personality of non-State actors that did not mention the *Reparations* opinion?[12] It looks as if judicial dicta are simply too useful to be neglected; very often, they are "beacons of orientation"[13] in our quest for legal clarity. The *Nuclear Weapons* opinion, interestingly, affirms this. In the sentence immediately following its firm claim that it "states the law but does not legislate" the Court said: "This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend".[14] And it is precisely by specifying the law that the Court can contribute to legal development. In many instances the law requires to be explained, situated and interpreted before it is "pronounced".[15]

This first assumption then leaves us with a certain ambiguity regarding the Court's role. Legislation, or law-making, is not the intended effect and yet the Court specifies the law and in so doing, is generally perceived to have contributed to its development.

1.2. The line between legal development and law-making is fine

This ambiguity could easily be addressed if law-making and legal development were two different things. This in fact is often claimed. Many commen-

11 Namely, the ICJ's holding that a corporation is to be protected by the State of nationality of the corporation and not by the State or States of nationality of the shareholders: *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Reports (1970) 3. In the words of the ILC, this is "[t]he most fundamental principle of the diplomatic protection of corporations": see Draft Articles on Diplomatic Protection (2006), UN Doc. A/61/10, para. 1 of the commentary to draft article 11.

12 Namely the ICJ's recognition, in the *Reparations* opinion, that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims"; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, para. 185.

13 Berman, *The ICJ as an Agent of Legal Development*, 21.

14 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 8, para. 18.

15 See Waldock, *General Course on Public International Law*, 94: "once the judicial function is admitted in any legal system, it operates, even if within narrow limits, as a creative source of law".

tators are careful to distinguish between legal development on the one hand (which is considered acceptable), and law-making on the other (which is not a function of courts). By way of example, former Judge and President of the ICJ, José Maria Ruda in accepting legal development draws a clear line:

> "the word 'development' stands for the Court's contribution to the interpretation and application of *existing* rules of international law and not to the establishment of new rules. The work of any court, be it national or international, consists of the interpretation and application of existing law *and not the creation of new law*".[16]

Whilst this approach is appealing in its simplicity, it is difficult to maintain in practice. In the day-to-day judicial "business", Judge Ruda's distinction between interpreting existing rules (acceptable) and creating new law (not acceptable) easily becomes blurred.[17] One of Ruda's colleagues, Judge Alvarez, made the point more than six decades ago when noting that "in many cases it is quite impossible to say where the development of law ends and where its creation begins".[18] To illustrate, in the recent *Jurisdictional Immunities* case,[19] was it "legal development" or "law-making" when the ICJ determined that the territorial tort exception does not apply to German armed forces? Is it legal development or law-making to say *jus cogens* does not trump state immunity? Or, perhaps more interestingly, would it have been legal development or law-making for the Court to say that *jus cogens* did in fact trump immunity? Other examples prompt the same question. When the Court decided that the United Nations (UN) had legal personality,

16 Ruda, *Some of the Contributions of the International Court of Justice to the Development of International Law*, 35 (emphasis added).

17 It might work if the Court admitted whether it engaged in specifying, developing or even making law; but of course it tends to avoid to be drawn into such discussions. As Shahabbuddeen notes, "the Court itself, like all courts but perhaps more so in view of the fact that it is adjudicating between sovereign States, takes care to avoid expressions suggestive of judicial law-making; it prefers the use of terms indicating that all that is involved is a working out of the true meaning of existing legal principles": *supra* note 5, 90.

18 Sep. Op. Alvarez, *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 12, para. 190.

19 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99.

was it engaged in law-making or legal development?[20] In "discovering" the concept of obligations *erga omnes* (referring to existing rules against genocide and aggression) was the ICJ making law or engaging in legal development?[21] Or, to come back to the field of immunities, was the Court stating that the immunity of foreign ministers follows rules on personal immunity developed for heads of state and government law-making or legal development?[22] And finally, was the Court in dynamically interpreting a treaty, for example the Vienna Convention on Consular Relations in the various death penalty cases, creative of law?[23]

These examples serve to highlight that the perceived dichotomy between law-making and legal development is a false one. The line between the two is very fine indeed and often blurred. In fact, there is much force to Alain Pellet's view that it is typically used tactically: "you will name 'legislation' a legal reasoning you disapprove of but you will call that same reasoning 'progressive development' when you favour it".[24]

1.3. Judicial pronouncements are part of a broader process of legal development

This leads us to the third assumption, which situates the Court's contribution – whatever it is called – within a wider context, and which helps to address the ambiguity between law-making and legal development. A wider context is crucial to understanding its role precisely because the Court has no formal legislative mandate. Judicial dicta from the World Court can be relevant contributions, but outside the specific case in which they were made, they have

20 *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 12, para. 185.

21 *Barcelona Traction*, *supra* note 11, paras 33-34.

22 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, paras 51-55.

23 See e.g. *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Provisional Measures, 3 April 1998, ICJ Reports (1998) 248; *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001) 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Reports (2004) 16.

24 Pellet, *supra* note 6, 1075.

no binding force. Judicial *dicta* are not an autonomous source of law. Precisely because it is not binding outside the specific dispute, an ICJ pronouncement needs to persuade to have value, hence judgments have been described as "persuasive precedents".[25] Constrained by Articles 59 and 38(1)(d) of the Statute, the ICJ does not make law by *fiat*; it advances normative propositions about the scope of a treaty or the state of general international law. The *Jurisdictional Immunities* judgment binds Italy in relation to the specific measures at stake in the litigation, but not beyond it. More significantly, no other State, and no other law-applier, is bound by the Court's decision; they all need to be persuaded by the strength and weight of the Court's reasoning (or convinced that they, too, could be held accountable in separate ICJ proceedings).

Put differently, unlike a legislator, the ICJ can see its normative proposition rejected. Its judgments are not "sacrosanct tablets of stone",[26] and on occasion, they have been ignored. The 1952 Brussels Convention effectively overturned the PCIJ's *Lotus* holding on port state jurisdiction over collisions on the high seas.[27] And who knows whether one day, scholars studying the *jus ad bellum* will look back at our decade and consider that by increasingly using force against armed attacks by non-State actors, States had gradually "overruled" the ICJ's jurisprudence on self-defence?[28]

In other words, where the ICJ engages in legal development, it is part of a broader process. It is an agent of legal development, but one agent only, acting alongside others including the General Assembly, States and the ILC. These others will often gladly receive some normative guidance from the

25 See e.g. Shahabuddeen, *supra* note 5, xiv.

26 Berman, *supra* note 13, 20.

27 Contrast the PCIJ's holding in *Lotus* (*The case of "Lotus"*, Judgment, 7 September 1927, PCIJ Ser. A, No. 10) to Article 1 of the International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation. For a comment see Lowe, Tzanakopoulos, *The Development of the Law of the Sea by the International Court of Justice*, 184.

28 For more on this see Tams, *The Use of Force against Terrorists*, 378.

ICJ.[29] But where they do not, nothing stops them from ignoring ICJ pronouncements. The Court, to quote once more Alain Pellet, "does not have the last word".[30] And precisely because this is so, anyone wanting to find out about the impact of the ICJ on legal development needs to look at the fate of the Court's decisions. Section 2 does so.

2. Into clearer view: three field studies

The fate of ICJ decisions can of course not be assessed comprehensively. However, what can be provided is a representative analysis of sample areas, viz. of "fields" of international law on which the Court has pronounced. The present section offers three such field studies, covering human rights law, state responsibility and the law of the sea.[31] Each of these following sections looks at a broadly defined area of international law and tries to reconstruct the process of its legal development, with a particular emphasis on the Court's role in the process. As the areas are vast, the analysis is fairly condensed; but it does yield a number of general insights into the Court's role as an agent of legal development.

2.1. On the margins, exploring linkages: the Court and human rights law

Human rights law, the youngest of the three areas of study, has much to tell us about the ICJ's potential impact. The second half of the 20th century has been the "age of rights". It is difficult to think of a branch of international law that is as normatively dense as human rights law. If we reflect on the processes of law-making at play, we readily see that treaties have been the key instrument. The "age of rights" may have begun with a General Assembly Resolution (the celebrated Universal Declaration of Human Rights);[32]

[29] See Berman, *supra* note 13, 21. In the same vein, Sir Gerald Fitzmaurice observed more than fifty years ago, "[t]he international community is peculiarly dependent on its international tribunals for the development and clarification of the law": Fitzmaurice, *Hersch Lauterpacht, The Scholar as Judge: Part I*, 18.

[30] Pellet, *supra* note 7, 868.

[31] For a much fuller assessment, addressing thirteen different areas of international law, see chapters 3-15 in Tams, Sloan, *supra* note 5.

[32] UN doc. GA A/Res/3/217/A, 10 December 1948: Universal Declaration of Human Rights.

however, it has become an area dominated by treaties. These human treaties can be regional or universal. Some are general (such as the two Covenants,[33] or the main regional human rights conventions),[34] others are specialist, spelling out details of a particular right (such as freedom from torture),[35] or the rights of a particular category of right-holders (children; migrant workers, etc.).[36] While the values protected by international agreements have often been affirmed in subsequent practice (which facilitates claims that human rights norms also apply as custom),[37] human rights law primarily is a law of multilateral treaties.

Over time, these treaties have had to be applied and interpreted. The universe of human rights treaty law is full of courts, commissions, committees and expert bodies. These bodies engage in manifold processes of norm interpretation, norm application and legal development, through processes and instruments as diverse as judgments, reports, general comments and observations. Where successful, these treaty institutions may develop a sense of ownership of their respective treaty; the European Court of Human Rights and the Inter-American Court of Human Rights nowadays effectively run their respective treaties. So some courts clearly play a role in human rights law. But what has been the role of the ICJ?

At first glance, it seems that for the purposes of our survey, the ICJ's impact has been fairly limited.[38] Its contributions are few and they typically concern the margins of the field. The Court quite clearly is not a human rights

33 The 1966 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, respectively.

34 Such as the 1950 European Convention on Human Rights and Fundamental Freedoms, the 1969 American Convention on Human Rights, the 1981 African Charter on Human and Peoples' Rights, or the 2004 Arab Charter on Human Rights.

35 See e.g. the 1984 Convention against Torture.

36 See e.g. the 1989 Convention on the Rights of the Child and the 1990 Convention on the Protection of Rights of Migrant Workers and Their Families.

37 On which see Meron, *Human Rights and Humanitarian Norms as Customary Law*; Simma, Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General*, 82.

38 For other, and partly more optimistic, assessments see e.g. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*; Goy, *La Cour Internationale de Justice et les Droits de l'Homme*; and further Simma, *Human Rights Before the International Court of Justice: Community Interest Coming to Life?*, 301; Higgins, *The International Court of Justice and Human Rights*, 745; Crook, *The International Court of Justice and Human Rights*, 2.

court, if only because the "natural claimants" in human rights proceedings – namely individuals – have no standing before it.[39] Conversely, multilateral human rights treaties do not really enable the ICJ to play a prominent role: of the main human rights treaties, only the Genocide Convention relies on it as the main organ for the interpretation and application of the treaty.[40] By contrast, other human rights treaties either do not mention the ICJ at all (such as the two 1966 Covenants) or accord it a rather limited role (such as the Racial Discrimination Convention or the Convention against Torture).[41] While human rights law is clearly not short of institutions, including specialised courts, it is quite rare for the ICJ to have jurisdiction over a human rights claim.

Unsurprisingly, the list of proper human rights cases before the ICJ remains short.[42] It has grown somewhat in recent years, as States have used (or tried to use) the Court's jurisdictional potential by lodging proceedings on the basis of, *inter alia*, the Genocide Convention,[43] the Racial Discrimination Convention[44] and the Anti-Torture Convention.[45] However, any list drawn up remains short if measured against the dominant role of human rights in international relations.

To some extent, this is a cultural matter, and change may be underway. Bruno Simma makes this point, arguing that: "case law with human rights elements develop[ed] in tandem with the widening and thickening of international human rights as a growth industry within post-World War II international law". He further notes that "just as the development of human

39 See Article 34 of the Statute of the International Court of Justice.

40 See Article IX of the 1948 Genocide Convention.

41 See Article 22 of the 1963 Convention on the Elimination of Racial Discrimination and Article 30 of the 1984 Convention against Torture.

42 The subsequent discussion in significant measure draws on Simma, *supra* note 38.

43 See notably the Genocide cases: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, ICJ Reports (2015).

44 See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment, 11 April 2011, ICJ Reports (2011) 70, (which the Court dismissed for lack of jurisdiction).

45 See *Habré* case, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422.

rights as a body of law and institutions at the global (UN) level took several decades to develop beyond standard-setting and extend to – still very limited – implementation, the role of the Court as an interpreter and applier of human rights law unfolded gradually and in rather meandering ways".[46]

Instead of *proper* human rights litigation, the Court has seen a range of *indirect human rights cases* – cases in which human rights appear either incidentally or where the Court was provided an opportunity to address the linkages between human rights and other areas of international law. This is rather more common and the Court's *indirect contributions* are manifold and diverse.

The Court's jurisprudence on reservations provides an example in point. In its 1951 *Genocide Opinion* (later affirmed, against dissent, in *Congo v. Rwanda*),[47] the Court accepted that States could enter reservations against dispute settlement clauses contained in human rights treaties.[48] Just as significant are the Court's pronouncements on the relationship between human rights law and the general regime of law enforcement, e.g. in relation to standing in the public interest (rejected in *South West Africa* and revived in *Barcelona Traction*)[49] and the scope of military enforcement of human rights (rejected in *Nicaragua*).[50] As regards the Court's more recent jurisprudence, the decisions in *Arrest Warrant* and *Jurisdictional Immunities* similarly explored linkages between human rights and the law of immunities.[51]

Few would doubt the relevance of these *indirect contributions* to human rights law but, in perspective, they would seem to concern the *margins* of human rights law. Certainly the routine business of human rights law (the interpretation of rights, and their application to particular settings of facts)

46 Simma, *supra* note 38, 303-304.

47 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment, 3 February 2006, ICJ Reports (2006) 6, at para. 66.

48 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951) 15.

49 *See South-West Africa cases (second phase): South West Africa (Liberia v. South Africa)*, Judgment, 18 July 1966, ICJ Reports (1966) 6, at 47 (rejecting the idea of an *actio popularis* in general international law); and *Barcelona Traction*, *supra* note 11, at paras. 33-34 (recognising the concept of *erga omnes* obligations).

50 *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, at para. 268.

51 *Arrest Warrant*, *supra* note 23, and *Questions relating to the Obligation to Prosecute or Extradite*, *supra* note 45.

bypasses the ICJ. Put differently, the Court has not significantly contributed to, say, the interpretation of particular human rights (with the possible exception of the right to be free from genocide). The interpretation of rights is a matter for the treaty bodies, for specialist courts and for special rapporteurs, which over decades have spelled out the meaning of treaty provisions. Similarly, innovation in human rights law has typically come from bodies other than the ICJ, and processes other than judicial development. When thinking of progress and development of human rights law, we may think of UN initiatives, at times pushed by the UN's main political organs (such as the General Assembly's attempts to define the scope of *privacy in the digital age*[52] or the Security Council's recent focus on gender mainstreaming),[53] at times by dedicated human rights mechanisms (such as the Human Rights Council, or special rapporteurs, e.g. in developing the law on drones).[54] In many instances, such initiatives have resulted in the adoption of new human rights treaties enshrining new rights, or thickened versions of existing rights. Domestic courts no doubt also play a significant role; perhaps they are indeed the *natural judges* of human rights law.[55] And judging from its recent project on crimes against humanity, the ILC may also assume a greater role in the future development of human rights law.[56] In fact, it is telling that where the Court contributes to the interpretation of human rights treaties

52 See UN doc. GA Resolution 68/167, 18 December 2013: The right to privacy in the digital age.

53 See e.g. UN doc. SC Resolution 1325, 31 October 2000 on Women, Peace and Security; and UN doc. SC Res. 2242, 13 October 2015 to Improve Implementation of Landmark Text on Women, Peace, Security Agenda.

54 See e.g. the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, UN doc. A/HRC/25/59/Add.1, 10 March 2014; and Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN doc. A/HRC/14/24/Add.6, 28 May 2010.

55 *Cf*. Tzanakopoulos, *Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy*, 155.

56 See the First and Second Reports by the ILC's Special Rapporteur, Professor Sean Murphy: UN doc. A/CN.4/680 and A/CN.4/690.

proper, its impact is on broad, overarching issues such as extraterritorial application of treaties (in the *Wall* opinion).[57] But when it comes to the substance of human rights law, the core day-to-day business, multilateral treaties and their specialised treaty bodies dominate. The ICJ, by contrast, has been relatively cautious.

2.2. From pioneer to junior partner: the Court and State responsibility

Let us compare human rights law to the law of State responsibility, a very different area in which international law has developed quite differently.[58] The law of State responsibility is not dominated by major multilateral treaties. It has evolved incrementally, notably through international practice and jurisprudence;[59] according to Alain Pellet, it is "essentially judge-made".[60] Alongside practice and jurisprudence, for nearly a century, we have seen a long-standing attempt at codification – beginning with the League's Codification Conference, followed by the Harvard Draft, and then, after World War II, the patient efforts of the ILC, which themselves went through different phases.[61]

As is well known, in 2001 the ILC eventually completed the second reading of the *Articles on State Responsibility* (ASR, or Articles): a non-binding text comprising 59 provisions largely reflecting custom, and the obvious point of reference for contemporary debates about State responsibility.[62] As is equally well known, the ILC's codification – following the shift initiated by Roberto

57 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136.

58 The subsequent section draws on Tams, *Law-Making in Complex Processes. The World Court and the Modern Law of State Responsibility*, 287.

59 See Crawford, *The International Court of Justice and the Law of State Responsibility*, 81: "The rules of state responsibility have been derived from cases, from practice, and from often unarticulated instantiations of general legal ideas".

60 Pellet, *Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues*, 112.

61 For an excellent summary see Crawford, *State Responsibility: The General Part*, 20-43.

62 The Articles are reproduced, with commentaries, in the *Yearbook of the International Law Commission*, (2001-II/2), 31 *et seq*.

Ago and others in 1963 –[63] has shaped our thinking about responsibility as a system of secondary rules laying down "the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom".[64] In this sense, the ILC's work has certainly (as James Crawford has noted) "encoded the way in which we think about responsibility".[65]

For our purposes, it is important to note the very unusual features of the process of legal development of the law of State responsibility: its length (lasting, even on a conservative estimate that only begins with Ago, from 1963 to 2011); its openness (with changes of direction and major doctrinal debate) and its almost discursive character (with constant feedback loops between the ILC, governments and other actors of international law). These features go some way in explaining, and enabling, the Court's impact on the development of the law of State responsibility. Rather than operating on the margins, the Court's jurisprudence has left its mark on central aspects of our modern law of responsibility.

The PCIJ, more specifically, was influential in laying down the fundamentals; its jurisprudence prepared the ground for the ILC's subsequent attempt to codify the law. In judgments like *Phosphates in Morocco*, *Mavrommatis*, *Wimbledon*, *Brazilian Loans* and most importantly, in the various stages of the *Chorzow Factory* case, the PCIJ formulated propositions that would over time come to define the law of responsibility. Three such propositions were, and remain, particularly impactful, and deserve to be mentioned briefly.

63 For background information see the working papers and summary of debates in the *Yearbook of the International Law Commission (1963-II)*, 227 *et seq*.

64 See para. 1 of the *Introductory Commentary to the Articles on State Responsibility in the Yearbook of the International Law Commission (2001-II)*. Not expressly mentioned is the fact that the ASR should also set out modalities governing the invocation of responsibility. A remark by Higgins, made before the completion of even the first reading, captures the scope of the project very well: "One can now begin to see why a topic that should on the face of it take one summer's work has taken forty years. It has been interpreted to cover not only issues of attributability to the state, but also the entire substantive law of obligations, and the entirety of international law relating to compensation": Higgins, *Problems and Process. International Law and How We Use It*, 148.

65 Crawford, *supra* note 59, 81.

(i) A string of PCIJ decisions affirmed the autonomy of international responsibility from domestic laws. This meant that violations of domestic law did not render conduct *internationally* wrongful;[66] and, more importantly, that compliance with domestic law could not justify violations of international law.[67] A State, in the words of the *Treatment of Polish Nationals* case, "cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force".[68] From the 1960s onwards, that principle would be affirmed, with due reference to the PCIJ's formative jurisprudence, in the ILC's text.[69]

(ii) The second proposition derived from the PCIJ's jurisprudence is the concept of reparation, which "immediately aris[es]"[70] from responsibility and which requires a responsible State to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[71] Reparation, for the PCIJ, derived from "a principle of international law, and even a general conception of law".[72] It was primarily to be achieved through restitution in kind, or "if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear".[73] The impact of these statements has been no less than remarkable. Hardly supported by argument, they have become cornerstones of the regime of consequences of responsibility, having been relied upon to support the existence of a

66 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 4 February 1932, PCIJ Series A/B, No. 44, 24-25; *Lotus*, *supra* note 27, 24.

67 In addition to the statement made in *Polish Nationals*, *supra* note 66, see e.g. *Wimbledon*, Judgment, 17 August 1923, PCIJ Ser. A, No. 1, 29–30; *Greco-Bulgarian "Communities"*, Advisory Opinion, 31 July 1930, PCIJ Ser. B, No. 17, 32; *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)*, Judgment, PCIJ Series A/B, No. 46, 167.

68 *Treatment of Polish Nationals*, *supra* note 66, 24.

69 See Article 3 of the ASR, which provides as follows: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law".

70 See *Phosphates in Morocco*, Judgment, 14 June 1938, PCIJ Series A/B, No. 74, para. 28.

71 *Factory at Chorzów*, Merits, Judgment, 13 September 1928, PCIJ Ser. A, No. 17, 47. This was said to be an "essential principle contained in the actual notion of an illegal act".

72 *Factory at Chorzów*, Merits, *supra* note 71, para. 29.

73 *Factory at Chorzów*, Merits, *supra* note 71, para. 47.

general duty to make reparation[74] and the primacy of restitution over compensation.[75]

(iii) Equally foundational, but perhaps rather more controversial, was the Court's State-centred interpretation of diplomatic protection claims: instituted to protect rights of nationals, these were viewed as inter-State disputes, in which a State was "in reality asserting its own rights".[76] In the *Danzig* case,[77] the PCIJ would be open, at least in principle, to recognising self-standing rights of individuals. However, the state-centred reading of diplomatic protection remains with us even in our era of human rights. The topic itself was to be sliced off from the ILC's State responsibility project into a separate one –[78] but even that project still breathes the PCIJ's spirit.[79]

Taken together, the three instances show the remarkable role of the PCIJ in preparing the ground for the emergence of the modern law of State responsibility, which the ILC would clarify and codify between the 1960s and 2001.

The ICJ's work, too, has been influential, but its impact, reflecting the different environment, has typically been by a different mode. At least for the

74 See e.g. para. 1 of the commentary to Article 31, in the Commentary to the ASR, supra note 64: "The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the Factory at Chorzów case".

75 While the ILC's commentary, supra note 64, pragmatically emphasises that "[o]f the various forms of reparation, compensation is perhaps the most commonly sought in international practice" (commentary to Article 36, para. 2), Article 36 ASR does accept (in the words of para. 3 of the commentary) that restitution enjoys "primacy as a matter of legal principle".

76 *Affaire des Concessions Mavrommatls en Palestine*, Judgment, 30 August 1924, PCIJ Ser. A, No. 2, 12.

77 *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 3 March 1928, PCIJ Ser. B, No. 15, 17-24.

78 See the Draft Articles on Diplomatic Protection with commentaries, in the *Yearbook of the International Law Commissio*n (2006-II/2), 24 *et seq*.

79 See notably the ILC commentary of Article 2 (*supra* note 78), according to which "A State has the right to exercise diplomatic protection in accordance with the present draft articles". As noted in para. 1 of the commentary, "Draft article 2 is founded on the notion that diplomatic protection involves an invocation – at the State level – by a State of the responsibility of another State [...] It recognizes that it is the State that initiates and exercises diplomatic protection, that it is the entity in which the right to bring a claim vests".

last four decades,[80] the ICJ has decided State responsibility cases against the backdrop of the ILC's work. Rather than *discovering* general principles of responsibility (as the PCIJ had done), the ICJ, from the 1970s onwards, operated within the ILC's framework. The World Court went *from pioneer to junior partner* during this time and its impact became more specific.

This shift, rather than seeing the ICJ becoming less powerful or less influential, potentially has seen its impact become more tangible. Many of the ILC's Articles in one way or the other owe their existence or formulation to some form of ICJ pronouncement. Of course, operating within the ILC's *master plan*, the ICJ has not worked single-handedly to create new law, but in tandem with the ILC. Over the years the two institutions seemed to develop an almost symbiotic relationship or, to put it in slightly less grandiose terms, perhaps we can think of the cooperation as a game of *normative ping pong*.

There are three different modalities to this normative ping-pong. The first is best illustrated by the number of ICJ cases raising fairly novel responsibility issues that would be taken up in the ILC's work. An example of this is the *Tehran Hostages* case where the Court had to assess to what extent essentially *private conduct* (the occupation of the US embassy by students and militants) was attributable to a State.[81] In the view of the Court, the conduct could be attributable if the State had approved, endorsed and *exploited* it. The ILC's subsequent work essentially *acknowledged and adopted* the ICJ's position, which now is reflected in Article 11 ASR.[82]

80 As regards early ICJ pronouncements preceding the ILC's re-conceptualisation of responsibility see notably *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949) 4 and 244. The *Reparations* opinion, *supra* note 12, set the stage for the subsequent development of a regime of responsibility of international organisations (which would eventually result in the adoption, in 2011, of a set of Draft Articles on the Responsibility of International Organizations, UN doc. A/66/10, at 54 *et seq*.); as it does not concern State responsibility, it is left to the side here.

81 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, ICJ Reports (1980) 3, para. 74.

82 Article 11 runs as follows: "Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".

A second form this relationship has taken works in the reverse, with the ICJ consolidating or stabilising draft provisions put forward by the ILC whose fate seemed uncertain. The gradual recognition of a defence of necessity is the most prominent example in point. Originally adopted by the ILC in 1980 and featuring as draft Article 33 of the 1996 text, the provision was cautiously received as it seemed open to abuse.[83] In the *Rainbow Warrior* award, the tribunal specifically spoke of a "controversial" draft article.[84] Subsequently in the *Gabčíkovo Nagymaros* judgment, the Court, displaying less concern, held draft Article 33 to reflect customary international law.[85] This *imprimatur* was enough to ensure the relatively smooth passage of the provision during the second reading of the text.[86]

Finally, the ICJ's influence can also be felt at a more granular level. There are many instances where ICJ pronouncements delivered clarity regarding the scope of provisions that everyone agreed would feature in the ILC's text, but which still required some clarification. The famous debate about State responsibility for the conduct of foreign rebel movements illustrates this perfectly.[87] The ICJ had put forward a relatively narrow rule of attribution in the *Nicaragua* case, requiring control over the particular acts committed by rebels.[88] This was challenged by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in *Tadić*,[89] prompting significant debate about the requirements of "overall" *versus* "particular" control. Faced with the challenge, the ILC and ICJ responded in the 2001 Articles and the 2007 *Bosnian Genocide* case, respectively: without much serious engagement,

83 See Crawford, *supra* note 59, 80-81.

84 *Rainbow Warrior case (New Zealand v. France)*, Decision, 30 April 1990, RIAA, vol. XXX, 215, at 254.

85 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, para. 51.

86 See Article 25 of the ASR, whose wording was adjusted to "fit" the ICJ's pronouncements in *Gabčíkovo* (see e.g. at para. 14 of the commentary, *supra* note 64).

87 See e.g. de Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia*, 255.

88 *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 50, para. 115.

89 *Prosecutor v. Dusko Tadić, Appeal Chamber of the UN International Criminal Tribunal for the former Yugoslavia*, Judgment, 2 October 1995, IT-94-1-A, paras. 115 *et seq*.

they both robustly dismissed the ICTY's *Tadić* formulation.[90] As a result, it would seem far-fetched today to suggest that overall control is sufficient, under the general rules, to justify attribution of private conduct.[91] Working together, when faced with dissent, the ILC-ICJ "empire has struck back".

In short, the ICJ has continued to exercise an important influence on the law of State responsibility. Unlike the Permanent Court, its contribution has been on more specific aspects of the law of responsibility, typically working within the broader framework formulated by the ILC. However, it has done much to solidify the ILC's approach and, together, the two institutions have shaped the modern law of responsibility. To conclude on this second study, it seems fair to say that the World Court's impact on the law of responsibility has been highly significant. The Court has increasingly operated within the ILC's master plan, but the law of state responsibility to a significant extent has retained elements of its *praetorian* character.

2.3. Deep, but targeted, influence: the Court and the Law of the Sea

If State responsibility has a longer tradition than human rights law, compared to the law of the sea it is a *parvenu* on the international legal scene. The law of the sea has a century-long history, and its essential features (freedom of navigation, concepts like the high seas and zones of coastal state influence) are of foundational relevance to the discipline of international law.[92] That said, it is an area of law that is in constant readjustment; and it is worth inquiring to what extent the ICJ has contributed to this adjustment.

During the course of the 20th century, the adjustment of the law of the sea has largely been effected through multilateral codification conferences, begun by the League of Nations, and then through the major UN-sponsored

[90] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 43, paras. 402-406; and para. 5 of the commentary to Article 8 of the ASR, *supra* note 64.

[91] See Milanovic, *State Responsibility for Genocide: A Follow-Up*, 669; Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 649.

[92] In the words of a leading commentator, "[t]he law of the sea has developed in parallel with general international law": Treves, *Law of the Sea*, para. 4.

conferences on the law of the sea.[93] Unlike with respect to State responsibility, these exercises in codification have resulted in many international agreements, among which the Conventions of 1958[94] and 1982 stand out.[95] As a result, just as human rights law, the modern law of the sea is heavily "treatified"; in addition (and again, like human rights law), it has become heavily institutionalised.[96] Among its main actors are specialised international organisations like the International Maritime Organization (IMO) or Food and Agriculture Organization (FAO); special departments and working groups within the UN (DOALOS, the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, *etc*.); and conferences of treaty parties established under the 1982 Convention, and regional treaties. Importantly, for present purposes, the 1982 Convention also set up special dispute settlement institutions such as the International Tribunal for the Law of the Sea (ITLOS)[97] and the Continental Shelf commission[98] and a framework for international arbitration.[99] What role then is there for the ICJ in this complex regulatory arrangement?

The picture differs again from the legal regimes of both human rights law and State responsibility. Unlike in the field of human rights, the ICJ has exercised a significant influence on the law of the sea. But unlike in the field of State Responsibility, its influence has been felt mainly in one particular segment, or chapter, of the Law of the Sea – the law of maritime delimitation.[100] In a recent article, Bernardo Sepúlveda-Amor remarked that the Court's case law "has had a major impact on the clarification of the principles and rules

93 For useful assessments of this process see Harrison, *Making the Law of the Sea*; Kirchner, *Law of the Sea, History of*.

94 Convention on the Territorial Sea and the Contiguous Zone, 516 UNTS 205; Convention on the High Seas, 450 UNTS 11; Convention on the Continental Shelf, 499 UNTS 311; and Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 UNTS 285.

95 United Nations Convention on the Law of the Sea (UNCLOS), 1833 UNTS, 397.

96 Harrison, *Making the Law of the Sea*, offers a detailed and balanced account.

97 See UNCLOS, Annex VI.

98 See UNCLOS, Annex II.

99 See UNCLOS, Annex VII and VIII.

100 For detailed studies see Fietta, Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation*; Weil, *Perspectives du droit de la délimitation maritime*.

of delimitation".[101] Perhaps, in fact, one can go further. The law on maritime delimitation has, for better or worse, evolved very much along the (shifting) lines of ICJ jurisprudence: initially, in *North Sea Continental Shelf*, with an emphasis on equitable principles,[102] then gradually, in a string of cases, moving toward the three-step process characteristic of the contemporary approach of delimitation, based on a provisional equidistance line, which is adjusted if equity (or varying coast lengths) so require.[103]

This approach, forged by the ICJ, seems accepted by other dispute settlers today, notably arbitral tribunals that delimit maritime boundaries. It has effectively been read into treaty law, namely Articles 74 and 83 of UNCLOS. It has also informed negotiated outcomes reached between States in delimitation agreements. In short, just as the ILC has "encoded the way in which we think about responsibility",[104] so ICJ jurisprudence governs our approach to maritime delimitation. Maritime delimitation is "ICJ law".[105]

Outside the chapter on maritime delimitation, the ICJ's influence has been more limited. The big decisions shaping the contemporary law have been taken in other *fora*, through other processes of law-generation. Three examples may serve to illustrate the point.

101 Sepúlveda-Amor, *The International Court of Justice and the Law of the Sea*, 8.

102 *North Sea Continental Shelf (Federal Republic of Germany v. Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969) 3.

103 See e.g. *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, 14 June 1993, ICJ Reports (1993) 38; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment, 16 March 2001, ICJ Reports (2001) 40; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, ICJ Reports (2002) 303; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, 3 February 2009, ICJ Reports (2009) 61; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, 8 October 2007, ICJ Reports (2007) 659. In the latter case, the Court noted that "the equidistance method [...] has a *certain intrinsic value* because of its scientific character and the relative ease with which it can be applied" (emphasis added).

104 Crawford, *supra* note 59, 81.

105 In the words of Pellet, "[t]he law of the delimitation of maritime spaces is a fascinating example of the use by the Court of this de facto legislative power": *supra* note 7, 865.

The first example is of the various forms of creeping jurisdiction with the various extensions of coastal States' zones of influence over parts of the sea.[106] Especially after 1945, coastal States asserted various "maritime zones beyond the territorial sea, then usually of 3nm in breadth".[107] Over time, many of these (unilateral) claims found their way into the 1958 Conventions and – when these did not stop "[t]he spread of these extensive maritime claims […], as might have been hoped" – reshaped the contemporary regime of twelve-mile territorial sea, contiguous zone, exclusive economic zone (EEZ) and continental shelf set out in the 1982 Convention.[108] The 1982 Convention also established a process for determining claims of States to outer continental shelves (which are to be addressed by a specialised commission, not a court),[109] and it declared the deep seabed to be the "common heritage of mankind".[110] All these decisions were influenced by and taken in international practice and multilateral treaties; the ICJ's role in the process – the biggest (dare one say) "sea change" in the contemporary law of the sea – was limited.

Secondly, when looking to the uses and abuses of the sea (and their regulation), the ICJ has not been very influential either. As regards living resources, the Court in the 1973/1974 *Icelandic Fisheries* cases toyed with the concept of fisheries zones,[111] but once the 1982 Convention sanctioned the more comprehensive concept of an EEZ, fisheries zones lost much of their appeal.[112] Similarly, there is no significant ICJ jurisprudence detailing the scope and limits of marine scientific research, on deep seabed mining, on marine environmental law or on pollution. The prompt release of vessels is heavily regulated and subject to the special procedure of Article 292 of the

106 See Treves, *supra* note 92, paras. 8-9.
107 Nelson, *Exclusive Economic Zone*, 2.
108 Nelson, *supra* note 107, 6.
109 Namely the Commission on the Limits of the Continental Shelf: see UNCLOS, Annex II.
110 Article 136 UNCLOS.
111 See the judgments in the *Fisheries Jurisdiction* cases: *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, 25 July 1974, ICJ Reports (1974) 3, 23-24, 175, 192.
112 As Rothwell notes, "many previous claims to exclusive fishery zones have now been subsumed into claims to 200nm EEZs": Rothwell, *Fishery Zones and Limits*, para. 19.

1982 Convention – but that special procedure establishes the competence of ITLOS.[113]

Finally, it is worth noting that World Court decisions having a bearing on the law of the sea have on occasion been overruled. As noted above, *overruling* is not a common phenomenon in international law; but the law of the sea yields the most prominent example: the 1952 Brussels Collision Convention reversed the *Lotus* ruling on jurisdiction.[114] A number of other ICJ rulings have not fared much better: the Court's acceptance, in the *Anglo-Norwegian Fisheries* case, of straight baselines under exceptional circumstances (essentially for coastlines as unusual as that of Norway)[115] was generalised in Article 4 of the 1958 Convention on the Territorial Sea and Article 7 of the 1982 Convention, and is now applied liberally by a significant number of States.[116] And as noted above,[117] the 1982 Convention's recognition of the EEZ superseded the ICJ's earlier reference to fisheries zones.

These three points demonstrate the unbalanced nature of the ICJ's impact on the law of the sea. While one important issue, maritime delimitation, has been effectively *ICJ shaped*, elsewhere, the Court's role has been marginal in comparison to other law-generating processes.

113 While Article 292 permits recourse to the ICJ or arbitral tribunals, "in practice it is the International Tribunal for the Law of the Sea […] which receives applications for prompt release of vessels and crews as the residual or default mechanism": Anderson, *Prompt Release of Vessels and Crews*, 6. The ICJ, in particular, has not so far adopted rules of procedure to deal speedily with prompt release cases.

114 See references in note 27 and generally, *supra*, I.3.

115 *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports (1951) 116, 133. As readers and listeners of Adams know, the "lovely crinkly edges" of Norway's coastline won its designer an award: see Adams, *The Hitchhikers Guide to the Galaxy*, 163.

116 Describing the practice of States since the 1950s, Reisman speaks of "the promiscuous use of straight baselines largely to take bigger and bigger bites of waters proximate to the coastline"; already "by 1958", he notes, "the expansionists had largely prevailed": Reisman, *Straight Baselines in International Law: A Call for Reconsideration*, 260.

117 See text at notes 111, 112.

3. Taking stock: three propositions about the Court's influence

The three field studies just offered cover no more than a small percentage of contemporary international law, but they hopefully illustrate the power and limits of the judicial development of international law. Drawing on the three field studies, it is possible to distil a number of general propositions about the Court's record as a "law-formative agency".[118] The subsequent sections put forward three such propositions; they argue (i) that the Court has left a mark on nearly all of the traditional areas of international law, (ii) that its impact on the respective law-making processes varies considerably from area to area, and (iii) that in none of the major areas of international law "the law is what the Court says it is".[119]

3.1. The Court's pronouncements are relevant across the board

The first proposition concerns the breadth of the Court's influence on the development of international law. The discussion so far shows that, in one way or another, the Court has contributed to fields as diverse as human rights law, State responsibility, and the law of the sea. The point can be generalised. Ninety years of international jurisprudence have left traces on almost the entire spectrum of contemporary international law. Through judgments and advisory opinions, the Court has left an imprint on an extraordinarily large number of areas of international law: when looking beyond the three areas just discussed, its influence can be felt in the law of treaties, immunities, the *jus ad bellum*, UN law, international environmental law, and the law of diplomatic protection.[120] In fact, it seems difficult to think of broadly defined areas of international law in which ICJ or PCIJ holdings are of *no* relevance. As the Court (whose jurisdiction *ratione materiae* is potentially unlimited) has come to address questions relating to most areas of international law, its jurisprudence has become a general element of international legal

118 *Cf.* O'Connell, *International Law*, Vol. I, 31.

119 *Cf.* Hughes, *supra* note 2.

120 For in-depth assessments see the contributions by Gowland-Debbas, O'Keefe, Gray, Hernandez-Sloan, Fitzmaurice, Parlett to the volume edited by Tams and Sloan, *The Development of International Law by the International Court of Justice*.

development: the Court has left its mark *across the board* of contemporary international law.

3.2. The influence of the Court's pronouncements is sector-specific

While the preceding comment stresses the general relevance of the Court's jurisprudence, the impact of ICJ pronouncements on the diverse areas of international law varies considerably. This, in fact, may be the most obvious point to take from the three field studies offered in the preceding section: though *some* influence can be felt across the board, the ICJ's contributions to legal development is sector-specific. While no sector – and no area of international law – has developed in quite the same way, three levels of influence can be distinguished:[121] (i) significant contributions by the Court to core aspects of an area of international law; (ii) relevant, but targeted, contributions to selective aspects of an area; and (iii) a particular impact in exploring linkages between specialised areas of international law and related fields.[122]

Significant contributions. In a number of areas, the Court has made a *significant contribution* to legal development. As noted above,[123] this seems to be true of the law of State responsibility, on which decades of World Court jurisprudence have left its mark. Looking beyond the three field studies, the Court's jurisprudence has also been a significant factor in the legal development of the law on diplomatic protection, the law of treaties, the law of territory, and perhaps (though more controversially) the legal regime governing recourse to force. In these areas, PCIJ and ICJ pronouncements have contributed to the development of central aspects of the governing law.

To illustrate, on *diplomatic protection*, the PCIJ and ICJ have affirmed the *Vattelian* understanding of diplomatic protection as an inter-state claims

121 The following builds on Tams, *The ICJ as a 'Law-Formative Agency': Summary and Synthesis*, 381-384.

122 These distinctions are not categorical, if only because so much depends on how areas of international law are defined. But differences remain, and even if they are differences of degree, they can be discerned without much difficulty.

123 *Supra*, section 2.2.

mechanism,[124] shaped the interpretation of nationality, and clarified the interaction between general and special claims mechanisms.[125] The law of treaties is now largely set out in treaty form, but the codification process itself has drawn upon important judicial pronouncements (for example influencing core aspects of the general regime on reservations and interpretation), which also remain relevant in clarifying the meaning of the "Vienna regime".[126] Through its long-standing and regular involvement in boundary and border disputes, "the Court has come to be accepted as an authoritative guide" to the law of territory, e.g. clarifying the relationship between *effectivités* and legal title, the scope and nature of the right to self-determination, and the notion of *uti possidetis*.[127] Finally, the ICJ's more recent jurisprudence provides vital clues to understanding the concepts of "force" and "armed attack".[128]

Targeted influence. In the broader scheme of things, state responsibility and diplomatic protection, as well as the law of treaties, and the rules governing territory and recourse to force, are probably exceptional. In most areas of international law, the Court's footprint is visible, but restricted to discrete aspects of the law: its influence is targeted. The brief discussion of the law of the sea[129] is an example in point. The Court's jurisprudence on many other areas of international law would seem to follow a similar pattern.

As regards the law of immunities, recent cases such as *Arrest Warrant* and *Jurisdictional Immunities* have clarified highly contentious questions relating to potential immunity exceptions in case of grave breaches.[130] However important these contributions to legal development are, these are small aspects of a particular branch of law and the ICJ's involvement in the wider area has

124 On which see already *supra*, section 2.2., text at notes 76-79.

125 For a full account see Parlett, *Diplomatic Protection and the International Court of Justice*, 87.

126 For details see Gowland-Debbas, *The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties*, 25.

127 See Shaw, *The International Court of Justice and the Law of Territory*, 176.

128 See the detailed analyses offered by Kress, *The International Court of Justice and the "Principles on the Non-Use of Force"*, 561; and Gray, *The International Court of Justice and the Use of Force*, 261.

129 *Supra*, section 2.3.

130 *Arrest Warrant*, *supra* note 22, at paras. 52–61; *Questions relating to the Obligation to Prosecute or Extradite*, *supra* note 45, at paras. 81–102.

been limited (and has come late).[131] The law of immunities has been well established through other law-making process: private codification initiatives, regional treaties, more latterly through the UN-sponsored codification process, and most distinctively, through centuries of domestic decisions and statutes.[132] The development of rules on State succession reveals a similar pattern of fairly niche judicial contributions to a process of legal development dominated by other actors and methods.[133] The ICJ in the *Gabčíkovo* judgment *ratified* the principle of automatic succession to territorially-grounded treaties;[134] and in the *Croatian Genocide* case the ICJ may have allowed a more flexible approach to declarations of succession.[135] Both are important, and at least the latter would seem to be quite controversial.[136] However, on foundational questions of the law of State succession – automaticity versus clean slate, special claims of newly-independent States, continuity versus identity, and modes of succession – the Court has contributed very little.[137] Answers to these questions have been found in international practice (often *ad hoc*), in codification attempts (with limited impact), and in depositary practice.

The examples could be multiplied: United Nations law, international economic law, international humanitarian law – in all these areas, and many

131 See O'Keefe, *Jurisdictional Immunities*, 107.

132 For a survey of developments see Hafner, *Historical Background to the Convention*, 1.

133 As O'Keefe observes perceptively (note 131, at 146), "[t]he ICJ was a latecomer to the law of jurisdictional immunities. The customary international rules on state immunity in the context of civil jurisdiction have developed over centuries, with the evolution from the absolute to the restrictive doctrine over the past 120 years being driven both by unilateral moves on the part of national courts and legislatures and by states' contributions and reactions to more coordinated, international efforts, public and private, towards the progressive development and eventual binding codification of a new international law of state immunity".

134 *Gabčíkovo-Nagymaros Project*, *supra* note 85, at para. 123. See Article 12 of the 1978 Vienna Convention on the Succession of States in respect of Treaties, UNTS 1946, 3.

135 *Croatian Genocide case*, Preliminary Objections, ICJ Reports 2008, 412, at paras 108–111. According to a distinguished commentator, this is "[a]rguably the Court's most relevant clarification of the regime of treaty succession": see Zimmermann, *The International Court of Justice and State Succession to Treaties: Avoiding Principled Answers to Questions of Principle*, 66.

136 Zimmermann, *supra* note 135, 66-68.

137 Hence Zimmermann's claim that the Court had "Avoid[ed] Principled Answers to Questions of Principle": Zimmermann, *supra* note 135, 53.

more, ICJ decisions have had some impact, but they have typically affected rather specific, discrete aspects of the law.

Exploring linkages. Finally, it is possible to distinguish a third modality of the ICJ's work. It, too, consists of contributions to specific aspects of the law in a given area, so it could be seen as a sub-set of the second category of "targeted influence". It is peculiar, though, in that the Court's main contribution lies in clarifying the relationship between specialised branches and general international law, viz. in exploring linkages. The brief discussion of human rights law offered above, with its focus on the Court's "indirect contributions", is indicative: through its jurisprudence, the Court has sought to "integrat[e] [a specialised] branch of the law into both the fabric of general international law and its various other branches".[138] In other areas, too, and especially those that seemed initially to follow their own path, this exercise in *mainstreaming* seems to have been the Court's main contribution to legal development. As regards international environmental law, the Court is e.g. said to have contributed, through a number of broad statements of principle, "to the consolidation of international environmental law as a discipline" and to shaping "the relationship between environmental law and general concepts".[139] In the same vein, commentators have praised the Court for having "powerfully reconceptualized [international humanitarian law] in a humanitarian spirit", while noting that its "contribution to the detailed elaboration of this field of law remains limited".[140] A similar argument could probably be made with respect to international investment law, whose rapid rise to relevance as a separate discipline owes a lot to the ICJ's restrictive jurisprudence on shareholder protection (*Barcelona Traction*) and whose distinct character the Court affirmed in the *Diallo* case.[141] In all three areas, the Court has

138 As put by Simma, *supra* note 38, 323–324. See *supra*, section 2.1.

139 See Fitzmaurice, *The International Court of Justice and International Environmental Law*, 373-374.

140 Kress, *The International Court of Justice and the Law of Armed Conflict*, 296.

141 For details see Parlett, *supra* note 125, 99-105; Juratovich, *The Diplomatic Protection of Shareholders*, 281; Tams, Tzanakopoulos, *Barcelona Traction at 40: The ICJ as an Agent of Legal Development*, 781.

be seen as a gatekeeper exploring linkages between hitherto exotic[142] sub-disciplines and general aspects of international law.

3.3. No branch of international law is controlled by the Court

Finally, an important point must be re-emphasised at this point. It has been mentioned earlier by way of scene-setting, but as a substantive proposition it deserves to be explored further. As is clear from the three field studies set out above, while few areas of international law are entirely unaffected by the Court's jurisprudence, in none of the relevant areas of international law does the Court *control* the process of legal development. There is no equivalent, in international law, to the US Constitution (which "is what the judges say it is").[143] The ICJ's impact cannot be compared either to that of specialised courts or tribunals, which "systematic[ally] [contribute to] norm-elaboration" and in whose understanding "the resolution of the underlying conflict between the parties to litigation" has been said to "tak[e] a 'back seat' to the courts' norm-advancing mission".[144] The ICJ is a general court with potentially unlimited jurisdiction, but precisely because its contributions are so widespread, the Court does not control any particular area of international law in the way the regional human rights courts control the development of *their* treaties. By the same token, the Court's contributions, even in areas like State responsibility or diplomatic protection where it has had a great deal of influence, do not "mould and modify"[145] the law in the same way that the World Trade Organization Appellate Body shapes the interpretation of the covered agreements or investment tribunals (seen as an aggregate) develop standards of investment protection. While making relevant contributions for

142 *Cf*. the ILC's description (in 2006, more than forty years after the adoption of the ICSID Convention!) of international investment law in: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682, para. 8.

143 *Cf*. Hughes, *supra* note 2.

144 As noted by Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 81.

145 *Cf*. Balfour, *Note on the Permanent Court of Justice*, in *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court (1921)*, 38.

nine decades, the PCIJ and the ICJ have always been part of a broader process of legal development. The World Court has always been one agent among many.

4. An attempt at rationalisation: three factors shaping the Court's influence

The preceding sections provide insights into the nature, extent, and modalities of the Court's contribution to the development of international law. They also indicate which areas of international law have been particularly affected by the Court's jurisprudence, and where its influence has been limited. What has not been offered so far is an explanation of the Court's varied and variable influence on the development of international law. The final substantive section of this contribution seeks to offer such an explanation by identifying three factors that determine the Court's relevance as a "law-formative agency" – referred to, in shorthand terms, as "opportunity", "receptiveness" and "interaction".

4.1. Opportunity: the number of cases

The first factor is the most obvious, and yet one that is surprisingly often *not* mentioned. The Court's relevance as a law-formative agency crucially depends on opportunities provided by its "clients", i.e. States and/or UN agencies. Lacking the power to initiate proceedings and restrained by the *ne ultra petita* doctrine, the Court depends on applications, requests, and arguments made by others. It has no influence on whether proceedings are brought and limited freedom in shaping the subject matter of a dispute brought before it.[146]

This does not seem particularly controversial, and yet it is rare to find the implications on the relevance of courts as law-formative agencies spelled out clearly. Boyle and Chinkin formulate the basic point with refreshing clarity when noting that "[t]he impact of international courts and tribunals on the

[146] While on occasion, benches of the Court have been said to go out of their way to make or raise particular points of law, the typical pattern sees the ICJ addressing arguments of the parties.

evolution of international law largely depends upon how many cases are brought before them".[147] It explains that, over time, the Court has contributed to law-making processes in nearly all areas of international law – as over time, nearly all of them have come up in proceedings. It explains, too, in why the Court has made significant contributions to areas such as state responsibility, the law of treaties, diplomatic protection, the use of force and the law of territory. These are the areas of repeated PCIJ/ICJ involvement after all: treaty law and state responsibility cut across substantive areas of international law and come up regularly;[148] diplomatic protection is one of the traditional modes of settling inter-state claims, again cutting across areas of substantive law and with a veritable history of PCIJ and ICJ litigation. And, at least by the standards of ICJ litigation, on the use of force and territorial disputes, States have sought decisions with relative frequency.[149] By contrast, in other areas, the Court has typically not heard more than the occasional case, and this was bound to affect its impact.[150] In the words of Sir Franklin Berman,

> "the occasional and adventitious nature of the ICJ's caseload has the almost automatic consequence that the Court is unlikely to be given the opportunity to revisit successively particular areas of substantive international law."[151]

147 Boyle, Chinkin, *supra* note 8, 269. Lissitzyn had made the same point in 1951: "The performance of the Court's law-developing function […] depends on the member and organs of the international community which the Court serves. They must […] give the Court the opportunity to function by submitting disputes or requests for opinion to it": Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, 29.

148 Crawford notes that "[a]pproximately one-third of the Court's cases involve responsibility"; this "is one of the issues the Court engages with the most"; Crawford, *The International Court of Justice and the Law of State Responsibility*, 85-86.

149 As regards the use of force, one may e.g. think of *Corfu Channel*, *Nicaragua*, *Congo v. Uganda*, *Oil Platforms*, and, to a lesser extent, the *Wall* and *Nuclear Weapons* opinions. This makes for a considerable body of jurisprudence, given the overall number of ICJ cases, which as of late 2016, totals 164 (including many cases quickly withdrawn or dismissed).

150 See e.g. Kress, *supra* note 140, 296, who suggests the Court's limited impact on the details of international humanitarian law "is, of course, due primarily to the fact that the occasions on which the Court has had the opportunity to pronounce on questions of the law of armed conflicts have been fairly limited in number".

151 Berman, *supra* note 13, 20.

And indeed, it is very difficult to see how the Court, given its limited case law, should have made significant contributions to, e.g., international humanitarian law, immunities, or (at least until recently) human rights or international environmental law. In other words, if the Court's influence is sector-specific, its varying influence primarily reflects the different levels of "law-making opportunity" provided. As an agent of legal development (and not just as a dispute settler), the Court primarily depends on jurisdictional arrangements and the willingness of states and UN agencies to translate jurisdictional titles into actual cases.

4.2. Receptiveness: the different designs of areas of law

While *opportunities* are essential, they do not conclusively determine the Court's influence on the development of international law. For pronouncements to have an impact they need to fall on fertile grounds; for an area of law to be shaped in relevant measure by the ICJ, it needs to be receptive to judicial development. The decisions must concern questions or areas that are waiting (or at least open) to be shaped. Like *opportunity*, *receptiveness* seems a fairly straightforward factor, but is rarely discussed expressly.[152] When discussing it, two aspects would seem to matter.

Regime design. The first concerns the *design* of an area of law. In identifying which areas of international law are more or less *receptive* to judicial development, the density of legal regulation would seem to matter. Areas of law characterized by broad principles or open-textured rules are more likely to be influenced by the Court than areas in which the law is spelled out in meticulous, and perhaps technical, detail. None of this is unique to the development of international law: as a general rule, where courts have discretion and enjoy normative leeway, they are able to mould the law through their decisions. Where the law is dense, courts called upon to apply it can do no more than fine-tune; where it is highly diversified, courts with few cases are hardly ever able to exercise significant influence.[153]

[152] Boyle, Chinkin, *supra* note 8, 269, hint at one particularly relevant aspect when suggesting that, in addition to mere numbers, the impact of a court depends on whether cases brought before it "rais[e] new and contested legal issues".

[153] See further Berman, *supra* note 13, 21-22.

Looked at from this perspective, it is perhaps no coincidence that the Court's influence on the *jus ad bellum* and diplomatic protection should have been significant. Both areas are made up of a relatively small number of rules, and have been receptive to legal development through a rather small number of judicial decisions. The general law of State responsibility, too, has evolved from a limited number of normative propositions, which the Court has been able to shape through repeated pronouncements. By contrast, many of the particular areas of international law – among them human rights and the law of the sea, as addressed in the first and third field studies in Section 2, but also international humanitarian law or international environmental law – comprise vast numbers of detailed rules. In engaging with such densely regulated areas, the Court's contribution has typically been much more targeted.

Timing. There is also a temporal dimension: the *receptiveness* of an area may change over time. This second aspect concerns the stage of legal development at which the Court becomes involved in the process. Codification plays a major role in this respect. Both the PCIJ and ICJ have often been influential when pronouncing on areas of law in an early stage of their development (which are more likely to raise "new and contested legal issues"),[154] or during long-term codification attempts. In certain fields, the Court has been able to engage in on-going debates and decide them by throwing its weight behind a particular approach. The ICJ's continued impact on State responsibility was facilitated by the fact that over decades, this body of law was "under construction". As regards the law of territory, a handful of competing principles – *uti possidetis*, self-determination, *terra nullius*, effectiveness, *etc*. – would require to be balanced: this, perhaps, was a suitable task for a Court, which could establish a reputation as an authoritative guide to the law.[155] By contrast, where the Court faces completed codification attempts, its role is likely to be more limited: hence its rather marginal role in relation to international humanitarian law (which by the time of *Nicaragua* had seen a century of permanent codification attempts) and the law of the

[154] Boyle, Chinkin, *supra* note 8, 269, see also *supra* note 152.
[155] See Shaw, *The International Court of Justice and the Law of Territory*, 176.

sea (equally shaped by successive waves of deliberate multilateral treaty-making).[156]

4.3. Interaction: competition and cooperation in legal development

Finally, the Court's relevance also depends on its interaction with other "agents of legal development". This interaction can be looked at, first of all, as one of competition for influence. And indeed, the preceding discussion suggests that the Court's influence depends on the existence, or non-existence, of specialized mechanisms of legal development. Put simply, where an area of international law possesses specialized mechanisms that regularly engage in the interpretation and application of the law, the ICJ's impact is likely to be felt less.

The point may be illustrated by reference to the development of international human rights law, which – as noted above – is not only treatified, but also heavily institutionalised. In the field of human rights law, and to a similar degree also in international economic law (broadly understood), specialised institutions do the *heavy lifting*. Through their jurisprudence, they have come to be accepted by most as authoritative interpreters of the law. Over time, at least some of them seem in fact to have developed a sense of *ownership* of the treaties they supervise – to the point where one might be tempted to accept that certain regional human rights treaties are effectively "what their courts say they are".[157]

Two other areas – the law on territory and even more so diplomatic protection – present counter-examples; they illustrate the greater potential for the ICJ if it does not face competition. Both fields lack specialised and organised processes of norm application and interpretation. No specialised monitoring bodies exist; *ad hoc* international practice dominates the field.

[156] See also Lowe, Tzanakopoulos, *The Development of the Law of the Sea by the International Court of Justice*, 193: "as the codifiers, whether the ILC or the states in conference, cover whole areas of the law, either through treaties or merely as sets of articles, the ICJ will fall more and more into deciding cases rather than 'making' the law" (footnote omitted).

[157] *Cf*. Hughes, *supra* note 2.

In regimes lacking specialised institutions, it is the ICJ that the international community looks to for guidance on the law.

Not all is a question of competition, of course; the presence of other agencies can also empower the Court. As the brief discussion of State responsibility suggests,[158] the Court has quite often been able to strike up fruitful *law-making partnerships* and position itself as an arbiter whose eventual decision would sanction or halt a process of legal development. Beyond State responsibility, the Court has often lent its "essential stamp of authority and legitimacy"[159] to normative developments begun within the United Nations. More recently, in a case involving the interpretation of treaty-based human rights, the ICJ has expressly noted that it "should ascribe great weight to the interpretation adopted by [an] independent body that was established specifically to supervise the application of that treaty",[160] viz. to take on board the jurisprudence of specialised bodies.[161] All this suggests that cooperation and competition in legal development exist side by side – and that they can constrain as much as empower the Court.

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None of these three factors can conclusively explain why, or when, ICJ pronouncements contribute to the development of international law. However, it is submitted that they go a good way towards explaining the variable nature of the Court's impact on the development of particular areas of international law. The broader argument emerging from the discussion is that the

158 *Supra*, section 2.2.

159 See Shaw, *supra* note 127, 176.

160 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, ICJ Reports (2010) 639, para. 66; and further Zimmermann, *Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice*, 5.

161 A similar point can be made with respect to the Court's acceptance, in the *Bosnian Genocide case*, of ICTY findings (as long as these concerned international criminal law proper – and not rules of attribution): "the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute", Judgment of 26 February 2007, *supra* note 43, para. 403.

Court's role as a law developer depends less on factors internal to its jurisprudence than on external variables: the Court is influential where it is being provided with an opportunity (repeatedly and regularly) to pronounce on a particular area of law; where its pronouncements concern areas of law receptive to judicial development; and where it faces little or no competition or has a high degree of cooperation with other agencies of legal development. Determined by these external factors, the Court's role is *context specific*. ICJ case law can be a powerful factor in some areas and of negligible influence in others.

5. Concluding observations

In concluding this discussion of the World Court's influence on the development of international law, we are left with relatively few firm results. At one level, the main lesson is that the Court's contribution to the development of international law eschews a clear-cut answer. As so often in law, it depends: the Court's role in law-making is a question of degree. While the Court has made many contributions to developing international law, its role is sector-specific and often dependent upon external factors beyond its control – the number of cases brought before it, the receptiveness of areas of law to judicial law-making and the presence or absence of other agents of legal development, and its relationship with particular agents.

As this is so, it is difficult to verify or falsify Jennings and Watts' prediction that "international tribunals will in the future fulfil, inconspicuously but efficiently, a large part of the task of developing international law".[162] What can be said is that, compared to specialised courts and tribunals, the PCIJ's and ICJ's impact has been wider, but typically less intense. And this seems only natural: as these other courts typically engage with one regime only, their contributions are clustered on a particular area of international law. By contrast, the ICJ lacks a *home turf*. It is the guardian of no particular treaty, and while it is sometimes said to be the guardian of international law, it can pursue that function only relatively rarely. This suggests that concerns about activist and robust judicial law-making in international law are misplaced.

[162] See Jennings, Watts, *Oppenheim's International Law*, 41.

With relatively few cases brought, the Court – with rare exceptions – has been denied the opportunity to mould the law through regular, sequential contributions. On the other hand, it is the only international court that can engage with international law in its entirety. The international community (one might say, adapting Sir Gerald Fitzmaurice's observation)[163] may no longer be *peculiarly dependent* on the Court's clarification and development of international law, but it is typically rather appreciative of it. As an agent of legal development, the World Court has been active on many fronts and occasionally "all over the place"; but for nearly a century, its jurisprudence has yielded useful "beacons, guides and orientation points",[164] which facilitate the everyday application of international law.

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163 *Cf*. Fitzmaurice, *supra* note 29.
164 Berman, *supra* note 14, 21.

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3. The Authority of the Decisions of International Judicial or Quasi-judicial Bodies in the Case Law of the International Court of Justice: Dialogue or Competition?

*Paolo Palchetti**

It is frequently observed that the International Court of Justice occupies a special position among international courts and tribunals because of the authority generally recognized to its decisions. This observation is recurrent in the views expressed by individual judges of the Court, and particularly in speeches delivered over the time by different Presidents.[1] Most recently, this view has found explicit recognition in the work of the International Law Commission on the identification of customary international law. Draft conclusion 13, adopted on first reading in 2016, provides that "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules". As

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1 In a speech delivered in 2000, President Guillaume stated: "the International Court of Justice remains the 'principal judicial organ of the United Nations' and, as a result, occupies a privileged position in the international judicial hierarchy. Moreover, it is the only court with a universal general jurisdiction. Lastly, its age endows it with special authority". In a speech delivered in 2006, President Higgins came back to the question of the relationship between the Court and other tribunal, stressing that "[t]he authoritative nature of ICJ judgments is widely acknowledged". Both statements are available at the Court's website (www.icj-cij.org).

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the draft commentary makes clear, "[e]xpress mention is made of the International Court of Justice, the principal judicial organ of the United Nations […], in recognition of the significance of its case law and its particular authority as the only standing international court of general jurisdiction".[2]

The Court's awareness of its special role in the determination of international law has not prevented it from lending significant weight to the decisions of other international courts and tribunals. The most tangible evidence of the Court's attitude in this respect is its reliance on these decisions to support its arguments on points of law. It is a fact that the recent case law of the Court frequently contains references and citations from decisions of other courts and tribunals.[3]

The use of external precedents by the Court is the object of this brief work. Its focus is less on the broader systemic implications of this communicative practice between courts and tribunals than on the Court's specific approach to it.[4] In particular, it is submitted that a notable feature of this approach lies in the fact that the Court does not limit itself to make use of external precedents; the Court seems also interested in establishing criteria for assessing the different weight and significance to be attached to these precedents. To put it otherwise, the Court does not simply engage in a dialogue; it also seeks to establish the "rules of this dialogue". This attitude may be assessed in different ways: it may be commended as a laudable attempt to put some order in the dialogue between international courts; but it may also be seen as a disguised way by which the Court seeks to reserve for itself a special role in the determination of the law. As it will be shown, the criteria emerging from the Court's case law does not appear entirely immune from criticism.

2 See the Commentary to the Draft Conclusions on the identification of customary international law, adopted by the ILC in 2016, UN Doc. A/71/10, 110.

3 For a general overview see Pellet, *Article 38*; De Brabandere, *The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea*; Sienho, *Article 38 of the ICJ Statute and Applicable Law: selected issues in recent cases.*

4 For a recent and exhaustive examination of the systemic implications of this communicative practice, see Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*.

Before entering into the analysis of the Court's case law, two remarks have to be made in order to better clarify and delimit the scope of the present work. In the first place, a distinction is to be made between findings of other courts and tribunals on questions of fact and findings on questions of law. While the Court frequently referred to findings of fact made by other tribunals as evidence which may be relied upon to prove facts relevant to the case before it, the present work will only address the use of external precedents on questions of law, on the assumption that different criteria preside over, and justify, the possibility of referring to decisions of other courts and tribunals in these two cases.[5] Secondly, reference to other international courts and tribunals is to be regarded as including quasi-judicial bodies, particularly monitoring bodies established by human rights treaties. This appears to be justified in the light of the Court's attitude. Not only did the Court rely in several cases on the judicial practice of these bodies; it always treated the precedents of these bodies in substantially the same manner as the precedents from other international courts and tribunals.[6]

1. Setting the context: the evolution of the Court's attitude

Under Article 38(1)(d), the International Court of Justice, in deciding disputes submitted to it, may rely on judicial decisions as "subsidiary means for the determination of rules of law". Until recently, however, the Court has rarely availed itself of this possibility. It has constantly cited its own precedents but only exceptionally the decisions of other courts.[7]

The importance of establishing a communicative practice between international courts only became an issue as a consequence of the growing awareness of the risks associated to the proliferation of international courts. In a

5 On the difficulties of separating issues of law and issues of fact in the Court's reliance on external precedent, see however, Gattini, Cortesi, *Some New Evidence on the ICJ's Treatment of Evidence: The Second Genocide Case*.

6 However, for the view that "Court's policy of precedent essentially aims to assure a constructive dialogue with arbitration tribunals dealing with interstate disputes, primarily in border dispute", see Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 20.

7 See Guillaume, *supra* note 5, 19.

speech delivered to the Sixth Committee of the General Assembly in 2000, President Guillaume observed that "the International Court of Justice keeps careful track of the judgments rendered by other courts and tends increasingly to make reference to them". He "noted, in all, some 15 Judgments of the Court containing such references".[8] In President Guillaume's speech, cross-citation was clearly regarded as a possible antidote against systemic concerns about coherence in determining the law. Yet, if one considers the Court's case law at the time of the speech, it seems an overstatement to say that the Court was giving relevance to external precedents. References to such precedents were only occasional and in most cases related to questions which had marginal importance in the Court's overall reasoning.

The Court's change in attitude only occurred in the immediately following years. Symbolically, the turning point is frequently identified in the advisory opinion in the *Wall* case, where the Court, *inter alia*, gave ample relevance to the practice of the Human Rights Committee in addressing the question of the extraterritorial scope of application of the International Covenant on Civil and Political Rights.[9] Be that as it may as to the identification of the starting point, reference to external precedents has since become a recurrent feature of the Court's case law.

In many respect, this new practice appears to reflect a change in attitude within the Court itself towards the phenomenon of the proliferation of international law. As it appears from the views expressed by individual judges, for many years there was a growing feeling that the proliferation of international tribunals could have implied less work for the Court and, at the same time, undermined its leading role, thereby increasing the risk of a fragmentation of international law. This concern, which also emerged from the abovementioned speech of President Guillaume in 2000, may have guided the Court's decision, in 1993, to establish a Chamber for Environmental Matters. As noted by Judge Oda, "the proposed establishment of a World Court

8 See *supra* note 1.

9 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 69, para. 109. See Andenas, Leiss, *Article 38(1)(d) ICJ Statute and the Principle of Systemic Institutional Integration*, 4, note 6.

for Environmental Questions might have encouraged the parallel establishment of a Special Chamber for environmental questions in the ICJ itself, in order to prevent proliferation of jurisprudence concerning environmental questions and to invite more cases of this nature".[10] After the turn of the millennium, the scenario appears to have considerably changed. The fear of a risk of "fragmentation" seems to have been attenuated. Significantly, in a speech to the General Assembly delivered in 2006, the then President, Higgins, remarked that the concerns generated by the growth in the number of new courts about the potential for a lack of consistency in the enunciation of legal norms and the attendant risk of fragmentation "have not proved significant". She then stressed the importance of establishing a communicative practice as a systemic tool for tackling with the risk of lack of consistency in case law. She noted in this respect that "newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ with respect to questions of international law and procedure", and that "[t]he International Court, for its part, has been following the work of these other international bodies closely".[11]

2. The different uses of the decisions of international judicial or quasi-judicial bodies by the International Court of Justice

A brief overview of the last fifteen years of Court's case law shows that external precedents have been taken into account for a variety of purposes. In several cases, the question at stake concerned the interpretation of treaties. Thus, for instance, in addition the abovementioned opinion in the *Wall* case, the judgment on the merits in the *Diallo* case provides another example of the Court relying on the practice of the Human Rights Committee for the purpose of interpreting the 1966 Covenant;[12] in the same case it referred to

[10] Oda, *The International Court of Justice Viewed from the Bench*, 55.

[11] See *supra* note 1. According to Murphy, *What a Difference a Year Makes: The International Court of Justice's 2012 Jurisprudence*, 540: "the Court's reliance on such a wide range of jurisprudence from other tribunals might be viewed as a counter-argument to concerns about the 'fragmentation' of international law".

[12] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, ICJ Reports (2010) 66, para 66.

the case law of the African Commission on Human and Peoples' Rights to support its interpretation of Article 12 of the African Charter.[13] In other cases, external precedents were taken into account to support the Court's determination of customary international law. Thus, in its judgment in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, it stressed that "the applicable law in the present case is customary international law reflected in the case law of this Court, the International Tribunal for the Law of the Sea (ITLOS) and international arbitral courts and tribunals".[14] In Jurisdictional Immunities of a State, due relevance was given to the fact that "[t]he European Court of Human Rights has not accepted the proposition that States are no longer entitled to immunity in cases regarding serious violations of international humanitarian law or human rights law".[15] External precedents have also been used to determine the content of general principles. In its Judgment on compensation in *Diallo*, the Court widely relied on the practice of other tribunals, courts and commissions "which have applied general principles governing compensation".[16] In the 2012 advisory opinion in the *IFAD* case, two General Comments of the Human Rights Committee were referred to in order to show the development of the content of the principle of equality of access to courts and tribunals.[17]

Different views have been put forward in legal literature about the possible legal basis which can support and explain judicial dialogue in the determination of the law. Some authors made reference to the rules of interpretation, and in particular to the principle of systemic integration set out in Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[18] According to a different view, Article 38(1)(d) of the Statute is to be interpreted to the

13 *Ibid*., 67, para 67.

14 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 19 November 2012, ICJ Reports (2012) 666, para. 114.

15 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 139, para. 90.

16 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, ICJ Reports (2012) 331, para. 13.

17 *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, 1 February 2012, ICJ Reports (2012) 27, para. 39.

18 Brown, *A Common Law of International Adjudication*, 52–55.

effect that it imposes on international courts an obligation to take into account the case law of other courts when determining international rules; in this sense it is suggested that Article 38(1)(d) is to be regarded as a "positive codification" of the use of other judicial decisions.[19] On a different perspective, it has been held that the relevance of judicial findings of a court in judicial proceedings before another judicial body could be explained by treating decisions previously rendered by one court as rules of international law in force between the parties to a case.[20] In contrast to the richness of the scientific debate on this point, it is hard to find in the Court's case law an attempt to explain in legal terms the use of external precedents in the determination of the law. The most that this case law seems to offer by way of explicit explanation can be found in the judgment on the merits in the *Diallo* case. Here the Court justified the weight accorded to the practice of the Human Rights Committee by referring to the need "to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[21] For the rest, the Court has been careful not to convey the message that it was under some form of duty to take external precedents into account. It has also avoided to accord to them a decisive weight in justifying a finding of law. With the possible exception of the judgment on compensation in the *Diallo* case, where decisions of other courts appear frequently as the only element providing support to the Court's findings, in general the Court has made use of external precedents simply to confirm its own conclusions as to the interpretation to be given to a treaty or to the content of a customary rule. Taking all these elements into account, the overall impression is that the Court's attitude in respect to the use of external precedents have been mainly dictated by practical considerations based on the need to enhance the persuasiveness of its decisions, on the one hand, and

19 Andenas, Leiss, *supra* note 9.

20 Cannizzaro, *Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ*.

21 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, *cit*., para. 66.

on the willingness to coordinate its own activity with that of other judicial bodies in order to counteract the risk of inconsistency, on the other.[22]

3. Establishing the 'rules of the dialogue': the different authority accorded to decisions of other judicial bodies

As it has already been noted, in some cases the Court did not limit itself to simply citing findings of law made by other courts or tribunals. The Court found also appropriate to make it clear the weigh to be accorded to these precedents in the determination of the law, as well as the reasons for treating these precedents differently from other precedents. On the basis of these statements, it is therefore possible to identify some general criteria that could potentially be applied by the Court also in future cases.

In its Judgment on the merit in the *Diallo* case, the Court acknowledged the importance of the practice of the Human Rights Committee in the following terms: "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".[23] By this statement the Court, first, recognizes that 'great weight' must be accorded to the practice of the Human Rights Committee. Secondly, it specified that great weight must be assigned to the "interpretation of the Covenant" adopted by the Committee, and not on any question of law addressed by this body in its practice. Finally, it justified the importance assigned to that practice by relying on the fact that that body "was established specifically to supervise the application of that treaty". In other words, in the Court's view the weight to be ascribed to that

[22] According to de Brabandere, *supra* note 3, p. 44, "while external case law is used as material support for the Court's argumentation, the wording used hints towards a form of search for consistency with external case law". See also Ulfstein, *Awarding Compensation in a Fragmented Legal System: The Diallo Case*, 479. According to Boisson des Chazournes, *supra* note 3, 77, "these trends are scarcely grounded in principles of international law. Their development is mainly due to the attitude of international courts and tribunals".

[23] See *supra* note 12.

practice appears to be strictly linked to the functions and competences assigned to the Human Rights Committee by the States party to the Covenant.

A similar statement was then made by the Court as regards the importance to be attached to the practice of the African Commission on Human and Peoples' Rights for the purposes of interpreting the African Charter: "Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question".[24] It is notable that in this statement the Court used the expression "must take due account", instead of "should ascribe great weight". It is not clear whether, by using this expression, the Court's intention was that of downplaying the importance to be attached to the practice of regional bodies, as compared to that of bodies set up by universal treaties. This would be hardly justifiable. For the purposes of weighing the practice of a judicial or quasi-judicial body, what seems to count is not the regional or the universal nature of the body in question; it is the fact that this body has been specifically set up by the parties to supervise the application of the treaty. Be that as it may, it is significant that here again the Court relied on the competences and functions assigned to a quasi-judicial body to explain the importance attached to the practice of that body.

The link between the value of an external precedent and the competence of the body which adopted that precedent also emerges from the Court's judgment in the *Bosnian Genocide* case. This time, however, the Court relied on this criterion to justify its departure from the precedent.[25] When considering the threshold of control which is required under customary international law to attribute the conduct of a de facto organ to a State – whether the "overall control" set out by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case or the "effective control" employed by the Court in the Nicaragua judgment – the Court first observed that "the ICTY

[24] See *supra* note 13.

[25] For the Court's approach towards the possibility of using the case law of the ICTY, see De Brabandere, *supra* note 3, p. 47.

was not called in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal; and extends over persons only". It then noted that while it accorded the "utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it", "[t]he situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it".[26]

It is apparent that two different tests are at work here. The first test centers around the question of whether a finding of law is necessary for deciding the case. This test is a rather traditional one, based as it is on the idea that, in principle, obiter dicta should be given less weight than that accorded to findings of law that are essential for the decision of the case. The second test is more innovative. It relies on the question of whether the position of a tribunal on issues of international law lies within the purview of the jurisdiction of that tribunal. This test is substantially the same employed by the Court in *Diallo*. However, the use of this test to justify the departure from an external precedent, as the Court did in the *Bosnian Genocide* case, shows the problematic side of it. In particular, it raises two delicate questions: how to determine whether an issue of international law lies within the purview of a tribunal's jurisdiction? And above all, who should decide upon such question?

4. Dialogue or competition?

As the inter-judicial dialogue reflected in the use of the external precedents is mainly conducted in an informal way and depends on the discretion and sensibility of each court, the identification of some general criteria for assessing the weight to be given to such precedents may be regarded as a positive development. It introduces a measure of predictability and transparency in the case law of a court, thereby reducing the risk of that court being

[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, para. 403.

perceived as selective, or even arbitrary, in its reliance on external precedents. At the same time, however, determining the "rules of the dialogue" is a delicate exercise that may affect the very possibility of a meaningful dialogue between courts. In this respect, it is one thing for a court to ascribe great weights to the decisions rendered by another court because of the competence assigned to that court on a specific issue of law. This form of deference, which amounts to a recognition of the authority of the other courts, may stimulate reciprocation and facilitate a genuine dialogue between courts.[27] It is an entirely different situation when a court downplays the importance to be attached to a finding of law made by another court by relying on the argument that the issue of law in question does not fall within the other court's jurisdiction. While a court remains free to disregard the precedent of another court, moving the confrontation to the terrain of the respective competences of different courts and tribunals is a dangerous shift. It raises the question of the authority of one tribunal to determine the limits of the competence of another tribunal.[28] This shift is even more dangerous since in most cases it will be difficult to say which issues of law fall within the specific purview of the jurisdiction of a court and which do not. In sum, such an approach risks to generate a competition between courts as to the scope of their respective competences, rather than favouring the coordination of their activity.

The Court's assessment of the "overall control" criterion in the *Bosnian Genocide* case illustrates the limits inherent in an approach of this kind. Admittedly, in its reasoning the Court did not rely exclusively on the "competence" test to justify its departure from the finding of law made by ICTY in

[27] Sometimes, the Court's deference may stem from its awareness that "where an area of international law possesses specialized mechanisms that regularly engage in the interpretation and application of the law, the ICJ's impact is likely to be felt less". On this issue see Tams, *The Development of International Law by the International Court of Justice*, in this volume.

[28] As noted by Treves, *Fragmentation of International Law: The Judicial Perspective*, 253: "the assessment of whether a statement of law is necessary for a certain decision and whether it is within a court or tribunal's jurisdiction is undoubtedly delicate if made by another court or tribunal. It would seem that this is a ground on which prudence is of the utmost importance and that only the most evident cases of lack of necessity or lack of jurisdiction should be relevant".

Tadić. Moreover, the Court did not use the test to deny any authority to that finding; it simply denied to such finding the same authority that it attached to findings of law made by the ICTY in ruling on the criminal liability of the accused before it.[29] It remains, however, that the Court's attempt to diminish the importance to be attached to the ICTY's finding by relying on that tribunal's competence is unpersuasive. While it is true that the jurisdiction of the ICTY is criminal and extends over persons only, this does not mean that the ICTY, in the exercise of its jurisdiction, may not be called upon to apply rules of State responsibility or to determine the validity of the resolution of the Security Council establishing it, if this is necessary as a preliminary matter for addressing questions of criminal responsibility falling within its competence. Likewise, while the competence of human rights tribunals or monitoring bodies relates to the interpretation and application of the treaties establishing them, they are frequently called upon to make findings on issues of general international law relating to questions as varied as the validity of treaty reservations or the exceptions to State immunity. In its judgment, the Court took care to show that there was no need for the ICTY to address the question of the attribution of State conduct in order to solve the question of the nature of the conflict. However, it is one thing for the Court to express its disagreement with the reasoning followed by the Tribunal; it a different matter to say that the Tribunal, when addressing the preliminary question concerning the content of the rule of attribution, was acting outside the scope of its jurisdiction, a conclusion that the Court itself refrained from drawing. The Court also emphasized that the ICTY is not in general called upon to rule on questions of State responsibility.[30] It is not clear, however, what implications one should draw from this. Admittedly, a tribunal's specific "expertise" may be an element to be taken into account when weighing the relevance of its precedent. At the same time, however, issues of general international law such as those relating to the law of international responsibility or the law of

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *cit*., para. 403.

[30] *Ibid*.

treaties appear to fall naturally into the expertise of any international tribunal applying international law, including international criminal tribunals.[31]

There is another reason why the Court's assessment of the precedent of the ICTY appears far from being satisfactory. While it insisted on the question of the ICTY's specific competence, the Court said little about the legal argument developed by the ICTY to support its conclusion that overall control is the threshold of control required under customary international for the purposes of attributing to a State the conduct of a group of individuals. This is particularly surprising since in *Tadić* the ICTY had conducted a wide examination of the relevant practice to support its conclusion about the content of the customary rule in question. Irrespective of whether one agrees or not with the conclusion drawn by the ICTY,[32] one would have expected from the Court greater attention to the assessment of the practice. Instead, on this point the Court simply reaffirmed the continuing validity of the "effective" control test set out in the *Nicaragua* case, without taking care to support its conclusion by an examination of the practice highlighted by the Tribunal.

This prompts a last consideration. While ultimately international courts remain free to depart from an external precedent, when doing so they should justify their move by seeking to demonstrate that their determination of the law is based on a more rigorous and systematic approach than that of the other court. Persuasiveness, rather than competence, should be the key for determining the authority of a finding of law.[33]

31 As noted by Kohen, *"Considerations about what is common": the ICJ and specialised bodies*, 477: "questions of interpretation of treaties or matters of international responsibility are two largely codified matters that any judicial or quasi-judicial body is in a position to address".

32 On this issue see Palchetti, *L'organo di fatto nell'illecito internazionale*, 163-171.

33 See, on this point, Abi-Saab G., *La métamorphose de la function juridictionnelle internationale*, 391.

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2. *Decisions of the ICJ as Sources of International Law?*, in *Gaetano Morelli Lectures Series* Vol. 2 – 2018, Rome: International and European Papers Publishing, 2018 (crde.unitelmasapienza.it)

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