

## 2. 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,<sup>1</sup> I have a first 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’ and Professor Gattini’s 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 Gattini will introduce “Decisions of the ICJ in the Case Law of Other International Courts and Tribunals” which is notably an illustration of the possible use of ICJ decisions as a source of international.

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.

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”)<sup>2</sup> 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 [as defined] 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 (or, better, the World Court – I’ll come back to this) than when we envisage them collectively, as a whole, or, to make it more technically correct, when they are envisaged as part of the “jurisprudence” – or is it the “case law”?

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\* 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.

<sup>1</sup> The first edition was held in the spring of 2014 on the Present and Future of *Jus Cogens* (<http://digilab-epub.uniroma1.it/index.php/GMLS/issue/view/29/showToc>).

<sup>2</sup> Kelsen, *Pure Theory of Law*, 356. 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*).

## 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 “formal” 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 entail 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.”<sup>3</sup>

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

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<sup>3</sup> *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).

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.”<sup>4</sup>

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.<sup>5</sup>

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 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”.<sup>6</sup> 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.<sup>7</sup>

In these cases – but other examples could come to mind,<sup>8</sup> 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 the 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 – this comes from Judge (and Professor) Morelli’s General Course at The Hague Academy:

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

<sup>5</sup> Boyle, Chinkin, *The Making of International Law*, 224.

<sup>6</sup> *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.

<sup>7</sup> 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*.

<sup>8</sup> See e.g., *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports (1951); *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Reports (1969), para. 95; *Barcelona Traction, Light and Power Company, Limited (Belgium/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/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.

“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 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.”<sup>9</sup>

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.

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 even without binding them. 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) 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 shown by the 1992 Framework Convention on Climate Change<sup>10</sup> and the recent Paris Agreement –<sup>11</sup> or are purely hortatory or exhortatory – such as in the field of economic and social development with notably the 1961 European Social Charter<sup>12</sup> or the 1966 International Covenant on Economic, Social and Cultural Rights<sup>13</sup> 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

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<sup>9</sup> 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.

<sup>10</sup> 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”.

<sup>11</sup> 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.”

<sup>12</sup> See e.g., Article 15.

<sup>13</sup> 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”.

Change provides a clear example<sup>14</sup> as well as the 1963 Treaty banning certain nuclear weapon tests.<sup>15</sup> 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*<sup>16</sup> by the sources, in other terms, 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.  
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

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<sup>14</sup> 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.” (*op. cit.*, n. 5, p. 220).

<sup>15</sup> 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 country.” See more generally on the vague character of some treaty provisions *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/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.

<sup>16</sup> 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...

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;<sup>17</sup> 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: leaving aside 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.<sup>18</sup>

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 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. Another recent example is given by Article 4 of the 2009 Arbitration Agreement between Croatia and Slovenia which provides that, in 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.

The other big question concerns 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);
- The doctrine and judicial decisions are put on the same footing;
- and qualified as “subsidiary means for the determination of rules of law” which is hardly compatible with analysing them as “subsidiary *sources*”. If they were, at least certainly not at the same level or in the same way as treaties or customs.

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

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<sup>17</sup> ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, 2006.

<sup>18</sup> See further Pellet, *Article 38*.

## 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

Indeed, 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."<sup>19</sup> 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."<sup>20</sup>

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 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)).

A particular issue arose in respect of the wording of Article 41 on provisional measures, the drafting of which is extremely ambiguous since it 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. Paragraph 2 mentions "measures *suggested*". I will develop this further as an example of the Court's quasi-legislation.<sup>21</sup> 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."<sup>22</sup> This is all the more interesting (and puzzling) that it is clearly *contra textum*...

For the moment, I wish to draw your attention on two other issues: advisory opinions (1.2.2); and the personal opinions of the Judges (1.2.3).

### 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,

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<sup>19</sup> 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.*"

<sup>20</sup> *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.

<sup>21</sup> See below, paras. 96-97.

<sup>22</sup> *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001), para. 109.

similar to that followed in contentious matters.<sup>23</sup> 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.

Therefore, there can be no question that, although not “decisions” properly said, advisory opinions are covered by the expression “judicial decisions” as used in Article 38(1)(d).

This expression was adopted at the very end of the discussion in the Committee of Jurists of 1920. Until this last minute decision, the expression used by the members of the Committee was “international jurisprudence.” 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”.<sup>24</sup> There is no clear reason explaining this change which appears to have been purely terminological. Thus, it probably can confidently be assumed that both expressions are equivalent, which resolves any ambiguity raised by “judicial decisions”. Moreover, in spite of the apparent meaning of the terminology used in the Statute, it is appropriate to qualify the advisory opinions of the World Court as part of the “international jurisprudence”.

This being said, I 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.<sup>25</sup> 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 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.”<sup>26</sup>

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<sup>23</sup> See Article 102(2) of the Rules of the Court 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 which enunciates the mentions which must be contained in the advisory opinion.

<sup>24</sup> *Procès-Verbaux of the Proceedings*, PCIJ, Advisory Committee of Jurists, 16 June-24 July 1920, Annex 3, 306.

<sup>25</sup> Sir Franklin Berman, *The International Court of Justice as an ‘Agent’ of Legal Development?*, 15. See also: F. Berman, *The Uses and Abuses of Advisory Opinions*, 809-828.

<sup>26</sup> Sir Franklin Berman, *The International Court of Justice as an ‘Agent’ of Legal Development?*, 15-16.



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 more free to look for “imaginative solutions” when it performs its advisory function than when it acts as a judge giving judgments which are *res judicata*. But certainly in relation with Article 38(1)(d) of the Court’s Statute, advisory opinions 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”.

A clear expression of this belonging of advisory opinions to the jurisprudence – or, for that matter, the “decisions” – of the Court can be found in the progressive development and codification process by the International Law Commission (ILC). I see at least two good reasons in support of these assertions:

- *First*, there are indeed multiple examples of the ILC basing itself indifferently on the Court’s judgements 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

“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 *Gabcikovo-Nagymaros Project* case. The Court also referred to the principle in its advisory opinions on *Reparation for Injuries*, and on the *Interpretation of Peace Treaties (Second Phase)*.”<sup>27</sup>

- *Second*, the Court has promoted more than once innovative solutions which paved the way to the development of international law rapidly crystallised into general customary rules. The example of the regime applicable to reservations to treaties is topical as we will see later. In this respect, there is no difference between advisory opinions and judgments: both can be the point of departure of a codification or customary process.

### 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:

“I come, however, at this point to two further elements that have a certain relevance

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<sup>27</sup> 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 very many: See also 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, UNRIIA, 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 *Interbandel (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).

in this context. One of them is the separate and dissenting opinions that almost invariably accompany a judgment or reasoned order of the Court. 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 scepticism as to whether the individual opinions do really represent an effective and accepted engine for shaping the future law."<sup>28</sup>

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 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 even 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 (against?) their colleagues, on the other hand); and
- Besides this, 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; again, 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 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 the judgments or the orders "indicating" provisional

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<sup>28</sup> Sir Franklin Berman, *The International Court of Justice as an 'Agent' of Legal Development?*, 12.

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 principle *res judicata*

Now, I have already disclosed at the very beginning of this lecture that the answer is no – and 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,<sup>29</sup> 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.

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”.<sup>30</sup>

The drafting history of Article 59 indicates that it “was not intended merely to express the principle of *res iudicata*, but rather to rule out a system of binding precedent”.<sup>31</sup> In other words, the Court “was intended to settle disputes as they came to it rather than to shape the law”.<sup>32</sup> 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:

“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

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<sup>29</sup> 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, para. 41.

<sup>30</sup> See further Pellet, *Article 38*; Brown, *Article 59*; Rosenne, *Article 59 of the Statute of the International Court of Justice Revisited*.

<sup>31</sup> 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; Sir 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”.

<sup>32</sup> Crawford, *ibid.*, 40.

- 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 has as a consequence that “the matter is finally disposed of for good”.<sup>33</sup> *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;<sup>34</sup> 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”.<sup>35</sup> There are indeed exceptions to the basic principle according to which third States may ignore 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 nevertheless 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.”<sup>36</sup>

<sup>33</sup> *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium/Spain)*, Preliminary objections, Judgment, 24 July 1964, ICJ Reports (1964).

<sup>34</sup> 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, para. 70.

<sup>35</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 10 October 2002, Reports (2002), para. 238.

<sup>36</sup> Brown, *Article 59*, 1439.

The Court itself has acknowledged that its findings could be implemented 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 have implications in the relations between States other than Greece and Turkey.”<sup>37</sup>

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;<sup>38</sup> in those hypotheses, it is accepted that an exception must be made to the principle *pacta tertiū 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”.<sup>39</sup> 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*.”<sup>40</sup> 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 “whenever the construction of a Convention ... 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 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* (paragraphs 54-55 above), 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

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<sup>37</sup> *Aegean Sea Continental Shelf (Greece/Turkey)*, Judgment, 19 December 1978, Reports (1978), para. 39.

<sup>38</sup> See Salerno, *Treaties Establishing Objective Regimes*.

<sup>39</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, 3 February 1994, ICJ Reports (1994), para. 73.

<sup>40</sup> *Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen)*, Award, 9 October 1998, *RIAA*, Vol. XXII, para. 153.

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, quoted in paragraph 86 above, that Nicaragua seeks to protect its legal interest solely in such way as the Statute allows.”<sup>41</sup>

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:

‘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.”<sup>42</sup>

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*”.<sup>43</sup> This is a questionable

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<sup>41</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, Judgment, 13 September 1990, ICJ Reports (1990), para. 90.

<sup>42</sup> *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, 11 September 1992, ICJ Reports (1992), paras. 421 and 423-424.

<sup>43</sup> Quintana, *Litigation at the International Court of Justice*, 903.

approach since it “arguably reduces the intervention to the right of the intervening State to participate in the proceedings without any consequential duties”.<sup>44</sup>

Nevertheless, the Court’s thinking<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.”<sup>48</sup> 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.<sup>49</sup>

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 request in Germany’s submissions.”<sup>50</sup> 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”.<sup>51</sup> 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, in 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

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<sup>44</sup> Brown, *Article 59*, 1441.

<sup>45</sup> 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).

<sup>46</sup> *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.

<sup>47</sup> See Pellet, *Land and Maritime Tripoints in International Jurisprudence*.

<sup>48</sup> *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.

<sup>49</sup> *Ibid.*, paras. 68-70.

<sup>50</sup> *Jurisdictional Immunities of the State (Germany v. Italy), Application for Permission to Intervene*, Order, 4 July 2011, ICJ Reports (2011), para. 25.

<sup>51</sup> *Ibid.*

“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.<sup>52</sup> The decision might give considerable weight to the position of one party to the dispute and weaken the position of a third State.”<sup>53</sup>

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”.<sup>54</sup> 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.<sup>55</sup>

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*”;<sup>56</sup> 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 elsewhere,<sup>57</sup> the reference to Article 59 of the Statute in paragraph 1(d) of Article 38 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.<sup>58</sup> 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

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<sup>52</sup> Fn. 139 in the original: E.g., *Frontier Dispute (Burkina Faso/Mali)*, Judgment, 22 December 1986, ICJ Reports (1986), paras. 44-50.

<sup>53</sup> Brown, *Article 59*, 1441.

<sup>54</sup> *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).

<sup>55</sup> Brown, *Article 59*, 1441-1442.

<sup>56</sup> *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.

<sup>57</sup> Pellet, *Article 38*, 855.

<sup>58</sup> Cf. in particular *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Dissenting Opinion of Judge Read, Judgment, 22 July 1952, ICJ Reports (1952). 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.



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 skilfully 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),<sup>59</sup> 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 doctrine a role different 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” (that is for their formulation and for their interpretation) of the rules to be applied.

It is also interesting to note that “judicial decisions” – an expression which includes the ICJ’s decisions but not exclusively<sup>60</sup> – are put by Article 38 on the same footing as “the teachings of the most highly qualified 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 the two means for the determination of the rules of law mentioned in Article 38 of the Statute.

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*<sup>61</sup> and a more complete one at paragraph 52 of its 2008 Judgment on Preliminary Objections in the second *Genocide case*.<sup>62</sup>

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

“proceedings may validly be instituted by a State against a State which is a party to

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<sup>59</sup> See above, paras. 39-41.

<sup>60</sup> 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 than its own although, until recently, the Court was most reluctant to do so. The situation has slightly changed during the last years (see A. 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).

<sup>61</sup> *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections*, Judgment, 15 December 2004, ICJ Reports (2004), para. 94.

<sup>62</sup> *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.

such 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); whereas 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.”<sup>63</sup>

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.”<sup>64</sup>

In support of its decision, the Court asserted that “it cannot decline to entertain a case simply [...] because its judgment may have implications in another case”.<sup>65</sup> 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. 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”.<sup>66</sup>

In 2003, the Court rejected Serbia and Montenegro’s Application for Revision and in its 2004

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<sup>63</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order, 8 April 1993, ICJ Reports (1993), para. 19 – emphasis added.

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

<sup>65</sup> *Ibid.*, p. 296, para. 40.

<sup>66</sup> *Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al Khasanbeh, Buergenthal and Elaraby*, Judgment, 15 December 2004, ICJ Reports (2004), paras. 3 and 13.

Judgment, the Court 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 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).”<sup>67</sup>

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 to 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,<sup>68</sup> 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).”<sup>69</sup>

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<sup>67</sup> *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.

<sup>68</sup> *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.

<sup>69</sup> *Ibid.*

And I note that in its Judgment of 3 February 2015 in the second *Genocide* case (between Croatia and Serbia), the Court simply referred back to this passage.<sup>70</sup>

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.”<sup>71</sup>

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”,<sup>72</sup> there are judgments and judgments. Central to the question is the persuasiveness of the legal reasoning.<sup>73</sup>

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.<sup>74</sup>

### 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 I think that it excludes “legislative activism” (going beyond what Hugh Thirlway called “judicial activism”).<sup>75</sup> However, I have always been impressed by Lord Balfour’s premonition who, after receiving the Draft Statute of the Permanent Court in 1920, declared that “the decisions of the Permanent Court cannot but have the effect of gradually moulding and modifying international law”.<sup>76</sup> Although limited by the scarcity of cases brought to 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 the Court has had an important, sometimes decisive, influence.<sup>77</sup>

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<sup>70</sup> *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.

<sup>71</sup> *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.

<sup>72</sup> Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law*, 881.

<sup>73</sup> See Pellet, *Article 38*, 856.

<sup>74</sup> 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*.

<sup>75</sup> Thirlway, *Judicial Activism and the International Court of Justice*.

<sup>76</sup> 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 Statute of the Permanent Court (1921)]*, 38. Cf. Shahabuddeen, 78.

<sup>77</sup> See in particular its influence on the law of State responsibility, below, para. 86; the legal personality of international organisations, below, para. 87; the law of reservations to treaties, below, para. 88; and the law of the sea below, paras. 89-91.

In conformity with the clear intentions of its founders,<sup>78</sup> 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 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.”<sup>79</sup>

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.<sup>80</sup> In fact, the Court “has a vested interest in sustaining the view that it merely applies existing law”<sup>81</sup> 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.”<sup>82</sup> 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 the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation”.<sup>83</sup>

### 3.3.2. ... 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

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<sup>78</sup> 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”.

<sup>79</sup> *Legality of the Threat or Use of Nuclear Weapons* case, 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), 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), and in *South West Africa cases* (*Ethiopia v. South Africa; Liberia v. South Africa*), Judgment, 18 July 1966, ICJ Reports (1966), para. 91). *Cf.* 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. *Cf.* 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*, *op. cit.* n. 18, MN 65 and 147.

<sup>80</sup> 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.”

<sup>81</sup> Hernández, *The International Court of Justice and the Judicial Function*, 87.

<sup>82</sup> Lauterpacht, *The Development of International Law by the International Court*, 76.

<sup>83</sup> 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.

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”,<sup>84</sup> 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”.<sup>85</sup>

And this precisely explains that, while the Court supposedly cannot act as a legislator who may change the law at good will, being only restrained by a few rules of higher hierarchical status (the Constitution in domestic law; international *jus cogens* at the international level), it is surely a “progressive developer”.<sup>86</sup> In this respect, what I tried to explain in relation with the ILC function to progressively develop international law, probably 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 law of nations and to take note of new trends, not to invent them and certainly even less to impose them”.<sup>87</sup> In fact, while staying within the general 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 on some judgments of the Court such as the 1927 Judgment of the Permanent Court in the *Lotus* case<sup>88</sup> or, more recently, the *Genocide I* Judgment,<sup>89</sup> or also the infamous 2002 Judgment in the *Arrest Warrant* case,<sup>90</sup> I am globally rather positive on the role played by the ICJ in this respect.

Accordingly, Montesquieu’s famous theory according to which the judge is “the mouth that pronounces the words of the law”<sup>91</sup> 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),<sup>92</sup> it will need to interpret them. On the other hand, similarly to domestic tribunals,<sup>93</sup> it will not refuse to decide a case on the ground of the silence or obscurity of the law to be applied.<sup>94</sup> A contrary attitude would hardly be compatible

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<sup>84</sup> A. Watts, *The International Law Commission 1949-1998*, Vol. I, O.U.P., 1999, 9.

<sup>85</sup> 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.

<sup>86</sup> Pellet, *Shaping the Future in International Law: The Role of the World Court in Law-Making*, 1077.

<sup>87</sup> Fn. 64 in the original: Pellet, *Keynote Address, Responding to New Needs through Codification and Progressive Development?*, 16.

<sup>88</sup> *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*.

<sup>89</sup> *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).

<sup>90</sup> *Arrest Warrant of 11 April 2000*, Judgment, 14 February 2002, ICJ Reports (2002).

<sup>91</sup> Montesquieu, *The Spirit of Laws*, translated by T. Nugent *et alii*, 159.

<sup>92</sup> See above, para. 17.

<sup>93</sup> See e.g., Article 4 of the French Civil Code.

<sup>94</sup> 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,

with the Court's judicial character as defined in the *chapeau* of Article 38,<sup>95</sup> 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.<sup>96</sup>

Thus, although the ICJ has stressed that “[i]t is the duty of the Court to interpret the Treaties, not to revise them”,<sup>97</sup> 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 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.”<sup>98</sup>

In other words – those of my commentary of Article 38,<sup>99</sup> 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:

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however, that, in some 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); *Northern Cameroons (Cameroon v. United Kingdom)*, Judgment, 2 December 1963, ICJ Reports (1963); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar/Bahrain)*, Merits, Judgment, 16 March 2001, ICJ Reports (2001), para. 205).

<sup>95</sup> 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).

<sup>96</sup> See Pellet, *Shaping the Future in International Law: The Role of the World Court in Law-Making*, 1068.

<sup>97</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion, 18 July 1950, ICJ Reports (1950); *South West Africa, Second Phase*, Judgment, 18 July 1966, ICJ Reports (1966), para. 91.

<sup>98</sup> Hernández, *Interpretative Authority and the International Judiciary*, 181-182 (footnotes omitted – emphasis in the original).

<sup>99</sup> Pellet, *Article 38*, 864 (footnotes omitted).

“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’.<sup>100</sup> [...] 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.”<sup>101</sup>

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 a 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 and, although the conception of State responsibility has deeply evolved under the influence of Ago’s approach and owe to the works of the ILC many of these formulas appear with only minor changes in the 2001 ILC Articles<sup>102</sup> or in the Draft Articles on diplomatic protection adopted in 2006:<sup>103</sup>

- The PCIJ applied the principle of the responsibility of a State for its internationally wrongful acts set out in Article 1 of the 2001 Draft in a number of cases.<sup>104</sup> 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”.<sup>105</sup>

- In the same case, it also specified the elements of an internationally wrongful act of a State codified under Article 2. The Court explicitly linked 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”.<sup>106</sup> In the *Factory at Chorzów* case, it also held that “it is a principle of international law, and even a general conception of law, that any breach of an engagement

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<sup>100</sup> *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Merits, Judgment, 25 July 1974, ICJ Reports (1974), para 53.

<sup>101</sup> Boyle, Chinkin, *The Making of International Law*, 279-280.

<sup>102</sup> 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.

<sup>103</sup> 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.

<sup>104</sup> Draft Articles on Responsibility of States, *op. cit.* n. 27, 32, para. 2) of the commentary of Article 1.

<sup>105</sup> *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.

<sup>106</sup> *Ibid.*



involves an obligation to make reparation”.<sup>107</sup>

- On the other side of the same 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”.<sup>108</sup>

- 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. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.”<sup>109</sup>

In a subsequent phase of the same case, the Court went on to specify the content of the obligation of reparation: “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”.<sup>110</sup>

- 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”,<sup>111</sup> is approximately repeated in Article 1 of the 2006 Articles with however an important inflection for taking into account the assertiveness of the legal personality of the individual in the international legal sphere.<sup>112</sup>

Without hesitation, the ICJ immediately followed the same path. A striking example of dealing with the flaws of international law 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 as 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 supported the theory of international law being exclusively interstate and based on the sovereignty of the State, to the Western countries which were of the view that the United Nations (as well as other international

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<sup>107</sup> *Factory at Chorzów, Merits*, Judgment, 13 September 1928, PCIJ Ser. A, No. 17, 29.

<sup>108</sup> *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.

<sup>109</sup> *Factory at Chorzów, Jurisdiction*, Judgment, 26 July 1927, PCIJ Ser. A, No. 9, 21.

<sup>110</sup> *Factory at Chorzów, Merits*, Judgment, 13 September 1928, PCIJ Ser. A, No. 17, 47.

<sup>111</sup> *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, PCIJ Ser. A, No. 2, 12.

<sup>112</sup> 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.

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.”<sup>113</sup>

Even more striking is the Court’s reshaping of the law applicable to reservations to treaties.<sup>114</sup> 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”.<sup>115</sup> 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”<sup>116</sup> 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).<sup>117</sup> 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 of Treaties and must today be seen, without any possible discussion, as a customary rule 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 set aside the principle of equidistance, which, at the time, was clearly crystallising into a customary rule realising a suitable balance between the requirements of legal security and that of flexibility in order to take into account the specific circumstances in each case. But the Court refused to consider the rule embodied in Article 6(2) of 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

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<sup>113</sup> *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949).

<sup>114</sup> 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.

<sup>115</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951).

<sup>116</sup> *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).

<sup>117</sup> See Pellet, *Shaping the Future in International Law: The Role of the World Court in Law-Making*, 1069-1070.

special circumstances, the boundary shall be determined by application of the principle of equidistance [...]” Instead, the Court literally “invented” the unfortunate principle according to which such “delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles”.<sup>118</sup> 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”,<sup>119</sup> 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. First, the Court will establish a provisional delimitation line, using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place.

[...]

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).

[...]

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.”<sup>120</sup>

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 its positivity in its subsequent case law;<sup>121</sup> and they have been applied by various

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<sup>118</sup> *North Sea Continental Shelf*, Judgement, 20 February 1969, ICJ Reports (1969), para. 85.

<sup>119</sup> Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 12.

<sup>120</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, 3 February 2009, ICJ Reports (2009), paras. 115-122.

<sup>121</sup> *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.

arbitral tribunals<sup>122</sup> as well as by the ITLOS which considered that:

“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.”<sup>123</sup>

The Court’s position on the law of maritime delimitation is a remarkable example of quasi-legislation by the Court but it is, I think, quite acceptable. In this example, we stay 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”.<sup>124</sup> Instead of viewing jurisprudence as “a poor cousin” of the three main sources:

“it is perhaps more accurate to recognise 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.”<sup>125</sup>

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 the 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 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.”<sup>126</sup>

It can only be hoped that this will only 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

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<sup>122</sup> See e.g., *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, PCA, Award, 7 July 2014, para. 345.

<sup>123</sup> *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, ITLOS, Judgment, 14 March 2012, para. 238 (see more generally paras. 225-240 of the Judgment).

<sup>124</sup> Rosenne, *Law and Practice of the International Court*, 1545.

<sup>125</sup> J. Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty, Arbitration and International Law*, 880.

<sup>126</sup> *Arrest Warrant of 11 April 2000*, Judgment, 14 February 2002, ICJ Reports (2002), para. 58.

the ILC could contribute to its revival.<sup>127</sup> 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.” I have already mentioned this episode which looks as a counter-example: indeed, it clarifies the meaning of this provision but the Court takes a 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.”<sup>128</sup>

This is neither codification nor progressive development of the law: it is a very controversial interpretation of a treaty provision. Yet, debatable and inconvenient as it may be in practice, 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

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<sup>127</sup> 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”).

<sup>128</sup> *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001), paras. 98-102 and para. 109.

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).<sup>129</sup>

In this regard, ICSID decisions have evidenced a “blind adherence”<sup>130</sup> 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.”<sup>131</sup>

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 to “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.<sup>132</sup>

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.<sup>133</sup>

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”<sup>134</sup> 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.<sup>135</sup> 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

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<sup>129</sup> *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 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.

<sup>130</sup> 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.

<sup>131</sup> Article 47 of the ICSID Convention.

<sup>132</sup> *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.”).

<sup>133</sup> See Pellet, *Article 38*, 868 or Pellet, *L’adaptation du droit international aux besoins changeants de la société internationale*, 46.

<sup>134</sup> Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000–2009*, 709.

<sup>135</sup> 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 général – Les objectifs de la codification*, 17-18; Pellet, *Keynote Address, Responding to New Needs through Codification and Progressive Development*, 13-23.

adapters of the international legal order.<sup>136</sup>

#### 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 interested States (or international organizations) and resulting in a pronouncement concerning the conduct 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 judgments are based on pre-existing rules of law which the Court only applies to the particular dispute it is called to settle. This applies to judgments as well as to the other kinds of “decisions” taken by the Court, and it holds true despite the existence of exceptions to the basic principle according to which third States are not affected by the Court’s decisions when 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 of the ICJ are considered not individually, but collectively – that is as forming the jurisprudence of the Court. Article 38 assigns to the jurisprudence and the doctrine a role different 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 is not a source of international law since its 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, being only restrained by a few rules of higher hierarchical status, but the ICJ can, nevertheless, be seen as a “progressive developer” of international law: in order for the Court to apply the rules and principles of international law 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

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<sup>136</sup> 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.

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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