CHAPTER 12

The Contribution of the ICJ to the Modern International Law of the Sea

Alain Pellet

As the dedicatee of these lines pointed out more than thirty years ago, "[t]he ICJ has passed a number of important judgments which have served as landmarks in the development of the law of the sea and international law as a whole".[1] This observation remains as valid as ever, even if, despite the contribution of the Court's case law, some grey areas still persist.

Until the turn of the century, the law of the sea was one of the main areas in which the ICJ was called upon to exercise jurisdiction. Actually, the very first case to be decided by the World Court – both the ICJ but also the PCIJ – concerned ships and their rights of passage.[2] And since 1967 (when the *North Sea Continental Shelf* cases were first brought), the ICJ has decided nearly 20 maritime delimitation cases – out of around 100 contentious cases.

Recourse to the Court remains quite exceptional, especially as it faces stimulating 'competition' from other courts and tribunals. In fact, forum shopping is an integral element of the so-called 'cafeteria' system established by UNCLOS for the settlement of disputes. During the UNCLOS III negotiations, the fierce defiance from a number of States to the ICJ meant that it could not be the only – nor the primary – forum for the settlement of law of the sea disputes; the compromise eventually enshrined in Article 287 is that each party may choose from four possibilities: ITLOS – established in accordance with Annex VI of the Convention; the ICJ; arbitration by a tribunal established under Annex VII – which is the default procedure; and 'special' arbitration – in accordance with Annex VIII. The advantage of the ICJ is that it tends to be particularly conscious of the need for consistency of its jurisprudence, which it builds through repetition and citation of its earlier decisions, to maintain its authority. As the

1 Hisashi Owada, "New Challenges to the International Order of the Sea", in *The Role of the Oceans in the 21st Century: Proceedings, the Law of the Sea Institute, Twenty-seventh Annual Conference, Seoul, Korea, July 13–16, 1993*, Law of the Sea Institute, 1995, p. 17.

2 ICJ, Judgment, 9 April 1949, *Corfu Channel* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), *Reports* 1949, p. 4 and PCIJ, Judgment, 28 June 1923, *SS 'Wimbledon'* (*UK, France, Italy, Japan, Poland* (*Intervening*) *v. Germany*), Series A, No. 1, p. 15.

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Court itself emphasized in the *Libya/Malta* case, "the justice of which equity is an emanation […] should display consistency and a degree of predictability".[3] Unlike arbitration, it is in fact the very *raison d'être* of any permanent court to "assure the continuity and progress of international jurisprudence".[4] Most of the cases filed pursuant to Article 287 however come either before ITLOS (usually provisional measures) or Annex VII arbitral tribunals. Some notable examples include the 2014 *Arctic Sunrise Arbitration* (*Netherlands v. Russia*), the 2015 *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), the 2016 *South China Sea Arbitration* (*Philippines v. China*) or the 2020 *'Enrica Lexie' Incident* (*Italy v. India*).

In his 1993 article, Judge Owada had warned that "the relationship between the ICJ and the Tribunal is going to be a delicate problem, with regard to a possible overlap in the respective membership of judges, a possible conflict of judgments passed by ICJ and the Tribunal on an identical or similar case brought separately to each, and the maintenance of harmony in jurisprudence on these issues, which are all highly politically charged".[5] However, despite the fears of fragmentation raised by this wide choice of procedure, the judicial and arbitral case law on maritime delimitation is globally consistent – and constant – and very usually the ITLOS or arbitral tribunals follow the jurisprudence of the ICJ.[6]

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3 ICJ, Judgment, 3 June 1985, *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), *Reports 1985,* p. 39, para. 45. See also Judgment, 14 June 1993, *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark v. Norway*), *Reports 1993*, p. 64, para. 58.

4 *Procès-verbaux of the Proceedings of the Committee*, 1920, p. 354 (Descamps). See also in special relation with the law of the sea: Vaughan Lowe and Antonios Tzanakopoulos, "The Development of the Law of the Sea by the International Court of Justice" in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice*, OUP, 2013, p. 186.

5 See H. Owada, "New Challenges to the International Order of the Sea", *op. cit.* note 1, p. 17.

6 See e.g., Arbitral Award, 7 July 2014, *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, *UNRIAA*, Vol. XXXII, p. 105, para. 339; see also Alina Miron, "The A*cquis Judiciaire*, a Tool for Harmonization in a Decentralized System of Litigation?: A Case Study in the Law of the Sea" in C. Giorgetti and M. Pollack (eds.), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals*, CUP, 2022, pp. 128–161. Expressions of respect for the Court's jurisprudence can even sometimes seem excessive, as shown by the analysis of the ICJ's Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (see ITLOS, Special Chamber, Judgment, 28 January 2021, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*), in particular, paras. 203, 205 and 345).

While the first part of this *Festschrift*, as well as other books,[7] testify to the many fields in which the Court has exerted its influence, such as the law on the use of force or State responsibility, the law of the sea is indeed among those, if not the one, it has shaped most profoundly – if not always most convincingly. This is true predominantly for the delimitation of maritime areas – most famously with regard to the delimitation of the continental shelf (and consequentially of the exclusive economic zone) between States with opposite or adjacent coasts – but also, incidentally, navigation or conservation interests.

This evolution however first took a most regrettable start. In the *North Sea Continental Shelf* cases, the Court set aside the principle of equidistance twined with the taking into consideration of special circumstances, which, at the time (the late 1960s), 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 as customary 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 special circumstances, the boundary shall be determined by application of the principle of equidistance". Instead, the Court literally "invented" the unfortunate – and certainly non-self-sufficient – 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".[8]

In my opinion, the 1969 Judgment was a disaster, but it was very much in the spirit of the times: a period of challenge, often fruitful, of the old international legal order imposed by the "Western" powers, a call for equity against law. As was noted by Judge Owada,

> [t]his change in the rule was a result of the compromise between the developed countries which possess the technological advantage for seabed mining and the developing countries which seek for a new regime under which such resources be placed under international management.[9]

7 See e.g., Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice*, OUP, 2013, 430 p.; Nerina Boschiero (ed.), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*, Asser, Springer, 2013, 951 p. – without forgetting the formidable book by Hersch Lauterpacht, *The Development of International Law by the International Court*, Stevens, 1958, 407 p.

8 ICJ, Judgment, 20 February 1969, *North Sea Continental Shelf*, *Reports 1969*, p. 46, para. 85.

9 H. Owada, "New Challenges to the International Order of the Sea", *op. cit.* note 1, p. 15.

Even if law is supposed – at least presumed – not to be contrary to equity, it cannot be reduced to it if one considers that law is a reducer of uncertainty and a "limiter" of subjectivity (whereas equity is an eminently subjective feeling).

Whatever the case may be, the Court's position was endorsed in Articles 74 and 83 of UNCLOS but proved unreasonably uncertain, almost incapable of any predictable or otherwise consistent application. In the words of Judge Owada, "neither Articles 83 nor 74 specifies a set of rules to be applied to each case; precise rules constituting an equitable solution must be developed through State practice and international jurisprudence".[10] However, as a large majority of States had applauded the Court's position, it was difficult for it to backtrack immediately. It is also true that, as President Owada noted in a speech before the Sixth Committee of the General Assembly,

> even in classical areas of international law in which the Court has long-established jurisprudence, such as the law on the delimitation of land and maritime boundaries [...], the tangible change in the context of the international milieu surrounding the law has made the task of the Court to ascertain the law much more complex.[11]

Concomitantly with the adoption of the Convention, the Court appeared to regret, in the *Tunisia/Libya* case, that "any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded" from the text.[12] Glimmers of hope for clarification appeared over time and the Court, prodding along by a particularly important and timely arbitration award,[13] reverted to adopting the equidistance/special circumstances method as the preferred or presumptive method of delimitation, all the while refining the 'corrective' principles which would help to lead to an equitable result: it did so notably in *Libya/Malta* in 1985,[14] in *Jan Mayen* in 1993[15] and in *Qatar/Bahrain* in 2001.

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10 *Ibid.*

11 Speech by H.E. Judge Hisashi Owada, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 30 October 2009.

12 Judgment, 24 February 1982, *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*), *Reports 1982*, p. 49, para. 50.

13 Decision, 30 June 1977, *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic,* UNRIAA, Vol. XVIII, paras. 75 and 249.

14 Judgment, 3 June 1985, *op. cit.* note 3, p. 37, para. 43.

15 Judgment, 14 June 1993, *op. cit.* note 3, p. 38, para. 51.

In this latter Judgment, the Court noted that "the equidistance/special circumstances rule, which is applicable in particular to the delimitation of the territorial sea, and the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case-law [so much for the 1969 Judgment] and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated".[16] It is at last in 2007, in the *Territorial and Maritime Dispute between Nicaragua and Honduras*, that the Court clearly recognised that "the equidistance method [...] has a certain intrinsic value because of its scientific character and the relative ease with which it can be applied",[17] and it pointed that, unless "facing special circumstances in which it cannot apply the equidistance principle [...] equidistance remains the general rule".[18]

By "successive strokes, without [the Court explicitly] recognizing its original mistake",[19] 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, bringing together the two judges *ad hoc* and without any separate opinion:

> 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.
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> 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.
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> 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.
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> [...]

16 Judgment, 16 March 2001, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), *Reports 2001*, p. 40, para. 231.

17 Judgement, 8 October 2007, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua v. Honduras*), *Reports 2007*, p. 659 para. 272.

18 *Ibid*., para. 281.

19 G. Guillaume, "The Use of Precedent by International Judges and Arbitrators", *Journal of International Dispute Settlement*, 2011, p. 12.

> 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.[20]

This *is* the law. And finally the circle is completed: after destroying an appropriate 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 strengthened and clarified the method the method to be applied (while keeping a wide margin of flexibility through the importance given to the rather subjective notion of relevant circumstances and the final test of non-gross disproportionality). And there can be no doubt about the appurtenance of this principle and this method to the sphere of positive law.

The Court itself has reaffirmed their positivity in its subsequent case law;[21] and they have been applied by various arbitral tribunals[22] as well as by the

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20 ICJ, Judgment, 3 February 2009, *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), *Reports 2009*, pp. 101–103, paras. 115–122.

21 ICJ, Judgment, 19 November 2012, *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*), *Reports 2012*, p. 695, para. 190; Judgment, 27 January 2014, *Maritime Dispute* (*Peru v. Chile*), *Reports 2014*, p. 65, para. 180; Judgment, 2 February 2018, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v. Nicaragua*) *and Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica v. Nicaragua*), *Reports 2018*, p. 190, para. 135; Judgment, 12 October 2021, *Maritime Delimitation in the Indian Ocean* (*Somalia v. Kenya*), *Reports 2021*, p. 250, para. 122.

22 See e.g., PCA, Award, 7 July 2014, *op. cit.* note 6, para. 345.

ITLOS. Seized of its first maritime delimitation case, the Tribunal recalled the "body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end",[23] and, quoting the ICJ, it concluded 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.[24]

Although the Court affirms that its mission is to state "the existing law and [...] not [to] legislate", it also admits that "[t]his is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend".[25] And indeed, one cannot help but see in the Court's reconstruction of the law of maritime delimitation a remarkable example of quasi-legislation, participating in what might be referred to as the "progressive development of the law". In the words of the arbitral tribunal in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, "[t]he ensuing – and still developing – international case law constitutes [...] an *acquis judiciaire*, a source of international law, under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the Convention".[26]

While the qualification as "source of international law" is questionable, if only in view of the wording of Article 38, paragraph 1(d), of the Statute of

23 ITLOS, Judgment, 14 March 2012, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (*Bangladesh/Myanmar*), para. 226.

24 *Ibid*., para. 238 (see more generally paras. 225–240 of the Judgment).

25 ICJ, Advisory Opinion, 8 July 1996, *Legality of the Threat or Use of Nuclear Weapons*, *Reports 1996*, p. 237, para. 18. In his separate opinion, Judge Guillaume called the Court "solemnly to reaffirm in conclusion that it is not the role of the judge to take the place of the legislator" (*ibid.*, p. 293, para. 14). See also ICJ, Advisory Opinion, 18 July 1950, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*Second Phase*), *Reports 1950*, p. 229; Judgment, 25 July 1974, *Fisheries Jurisdiction* (*United Kingdom v. Iceland*)*, Merits, Reports 1974*, pp. 23–24, para. 53, and p. 192, para. 45; or Judgment, 19 December 2005, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*)*, Reports 2005*, p. 190, para. 26.

26 Award, 7 July 2014, *op. cit.* note 6, para. 339.

the ICJ,[27] there can be no doubt that, nowadays, any maritime delimitation must take the utmost account of the positions taken by the Court, which could only be set aside, by it or by other courts or tribunals, for serious reasons duly explained.[28] Thanks to its uncontested authority as *primus inter pares*, the ICJ has made an exceptional contribution to the development of maritime delimitation law.

The approach of the Court with regard to emerging maritime delimitation issues is however more debatable. In this respect, the Court was first called upon to rule on a claim for delimitation of a continental shelf extending beyond 200 nautical miles in the *Territorial and Maritime Dispute* between Nicaragua and Columbia, which was submitted to it in 2001. In its Judgment on the merits of 19 November 2012, the Court observed that Nicaragua "has not established that it has a continental margin that extends far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast"[29] since

> Nicaragua submitted to the Commission [on the Limits of the Continental Shelf] only 'Preliminary Information' which [...] falls short of meeting the requirements for information on the limits of the continental shelf beyond 200 nautical miles which 'shall be submitted by the coastal State to the Commission' in accordance with paragraph 8 of Article 76 of UNCLOS.[30]

This was in line with the position as sketched out in passing by the Court in its 2007 Judgment in the *Territorial and Maritime Dispute between Nicaragua and Honduras*[31] but in sharp contrast with earlier decisions by other tribunals.

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27 See the Angers Resolution of the Institut de Droit international on "Precedents and case law (jurisprudence) in interstate litigation and advisory proceedings", guideline 2: Case law (jurisprudence) is a subsidiary means for the determination of rules of law and not an autonomous source of international law. It plays a significant role in the identification, interpretation and evolution of international law".

28 See *ibid.*, guideline 5: "Established case law (*jurisprudence constante*) may be set aside for a legal reason duly stated, notably in light of the evolution of international law".

29 ICJ, Judgment, 19 November 2012, *op. cit.* note 21, p. 669, para. 129. This conclusion was criticised by Judge Owada who emphasised "the differences that exist in the legal nature of the two different issues involved in relation to the regions of the continental shelf" (Dissenting Opinion, p. 729, para. 26).

30 *Ibid.*, para. 127.

31 ICJ, Judgment, 8 October 2007, *op. cit.* note 17, p. 759, para. 319: "any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder".

In the 2006 *Arbitration between Barbados and the Republic of Trinidad and Tobago*, the Tribunal ignored the question of potential overlap between its functions and those of the Commission and it concluded that it had jurisdiction to delimit the maritime boundary of the continental shelf beyond 200 nautical miles since, in particular, "there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf".[32] As for the ITLOS, in its Judgment of 14 March 2012in the *Bay of Bengal* case, it invoked that arbitration and observed that "the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf";[33] therefore, "the exercise of its jurisdiction [...] cannot be seen as an encroachment on the functions of the Commission";[34] on the contrary, "not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention".[35]

The ICJ justified its refusal to follow that solution by emphasising, somewhat artificially, the specific geomorphological features of the Bay of Bengal.[36] Subsequently, as aptly noted by Professor Oral,

> in the second request made by Nicaragua, the Court, in somewhat of a *volte face*, decided it did have jurisdiction to delimit the continental shelf beyond 200 nm between Nicaragua and Columbia.[37] In this case, the Court decided that it did not have to wait for the report of the CLCC which was concerned only with the delineation of the outer limits of the continental shelf, and not delimitation. The Court took into account that Article 76(1) of UNCLOS expressly stated its provisions were without prejudice to the question of delimitation of the continental shelf between States with

32 Award, 11 April 2006, *RIAA*, Vol. XXVII, pp. 208–209, para. 213.

33 ITLOS, Judgment, 14 March 2012, *op. cit.* note 23, p. 100, para. 379.

34 *Ibid.*, p. 102, para. 393.

35 *Ibid.*, p. 102, para. 391. In its Judgment of 23 September 2017, in the case concerning the *Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), the Special Chamber of the ITLOS, "associate[d] itself with this finding".

36 ICJ, Judgment, 19 November 2012, *op. cit.* note 21, p. 668, para. 125.

37 Fn. 98 in the original: *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*), *Preliminary Objections*, Judgment, *ICJ Rep 2016*, p. 100.

> opposite or adjacent coasts.[38] The decision of the Court in the second case can be viewed as a reflection of the Court ensuring coherence among itself and other international tribunals thereby strengthening the predictability of international law in the field of maritime boundary delimitation and avoiding problems of fragmented decisions.[39]

On the same matter, the Court's Judgment of 13 July 2023 is yet again quite striking. First, it is extremely short compared with the usual practice of the Court – 37 pages, but only 14 pages of argument. Certain points are thus unsurprisingly left in the dark[40] – perhaps as a deliberate tactic (or a necessity to allow consensus among the 12 judges of the majority). Second, it is completely unorthodox: as pointed out by Judge Tomka: "[t]he Judgment is not based on the application of international law but on a rule that the Court simply 'invented'. […] It is perplexing that, in its 2012 Judgment, the Court did not dismiss Nicaragua's claim to a continental shelf beyond 200 nautical miles on the basis of what the Court now asserts to be a 'customary rule of international law'".[41] Moreover, there appears to be no basis for such an assertion since the Court simply relies on a "vast majority" of State practice,[42] thus accepting that it is not constant nor uniform.

This series of "back and forth" on a problem of great importance, unresolved by the UNCLOS, shows that the Court is capable of retracting its position, perhaps in order to preserve the unity of the case law and because it has been sensitive to the disastrous practical implications of its initial position.

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38 Fn. 99: *Ibid*., para. 110: ["Because the role of the CLCS relates only to the delineation of the outer limits of the continental shelf, and not delimitation, Article 76 of UNCLOS states in paragraph 10 that '[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts'"]. The Court also rejected the other four preliminary objections made by Columbia.

39 Nilüfer Oral, "The Law of the Sea", in Carlos Espósito Massicci, Kate Parlett, Callista Harris (eds.), *The Cambridge Companion to the International Court of Justice*, CUP, 2023, p. 377. See also Nienke Grossman, "International Decisions: Territorial and Maritime Dispute (Nicaragua v. Colombia)", *American Journal of International Law*, Vol. 107(2), 2013, p. 402.

40 See notably the Separate Opinion of Judge Nolte, para. 4: "the Court […] leaves the Parties in the dark about the 'precise course' of the maritime boundary. Contrary to its statement in paragraph 100 of the Judgment, the Court does not 'settle the dispute submitted by Nicaragua in its Application'".

41 Judgment, 13 July 2023, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (*Nicaragua v. Colombia*), Dissenting opinion of Judge Tomka, paras. 3 and 4. See also Separate opinion of Judge Xue, paras. 10 *et seq*.

42 *Ibid.*, para. 77.

Besides multiple maritime boundary delimitation disputes, there have been very few law of the sea disputes on other issues before the World Court.

Two have involved navigation but have not much contributed to the modern international law of the sea. The first one was dealt with the PCIJ in its famous – or infamous – Judgment in the case of the *Lotus*, involving "a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offence, whilst the victims were on board the other".[43] Failing "a special permissive rule", the Permanent Court concluded that Turkey, by instituting criminal proceedings against the French offender, "has not acted in conflict with the principles of international law".[44] This precedent has not prospered, either in state practice or in case law:

- The Brussels Convention for the Unification of Certain Rules relating to Penal Jurisdiction in matters of Collisions and Other Incidents of Navigation of 10 May 1952 goes distinctly against the solution retained in the 1927 Judgment;[45]
- Building on this precedent,[46] the ILC did the same in Article 35 of its 1956 Draft Articles concerning the Law of the Sea.
- This draft provision was the precursor to Article 97, paragraph 1, of the UNCLOS according to which:

In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

- And the Arbitral Tribunal in the *Enrica Lexie* case, referred to these precedents which it seems to accept as law[47] but did not apply them

43 PCIJ, Judgment, 7 September 1927, *S.S. "Lotus"* (*France v. Turkey*), Series A, No. 10, p. 22. See also, the summary of the *Lotus* case in Arbitral Award of 21 May 2020, *The 'Enrica Lexie' Incident* (*Italy v. India*), para. 644.

44 *Ibid.*, p. 32.

45 Article 1 of the Brussels Convention provides: "In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation".

46 *ILC Yearbook 1956*, vol. II, commentary of draft article 35, p. 281, par. (1).

47 See also Arbitral Award, 21 May 2020, *The 'Enrica Lexie' Incident* (*Italy v. India*), para. 644.

> in that case since it considered that "no collision occurred between" the two ships.[48]

Even if it remains to be seen what the ICJ would decide if it were seized of a case of this kind, as things stand at present, it can be considered that the Lotus solution has been ruled out by treaty practice.

Still concerning navigation, but on another matter, the *Corfu Channel* case remains the first and only instance truly engaging with the concept of innocent passage,[49] which also underwent several twists in view of subsequent State practice. First, in its 1949 Judgment, the Court treated the manner of passage as the decisive criterion for its innocence,[50] rather than focusing on the activities during passage and whether these are prejudicial to the interests of the coastal State, thus diverging from the position adopted at the 1930 Hague Conference.[51] The ILC however subsequently reverted to the latter in its 1956 Draft Articles.[52] And while the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone overall incorporated the position adopted in the 1949 Judgment,[53] innocence was again re-conceptualized in the more complex regime of UNCLOS.[54] Yet, as noted by Judge – at the time Vice-Minister of Foreign Affairs – Owada in 1993, "a greater precision on the right of innocent

48 *Ibid.*, para. 652; see also paras. 655–656.

49 For stimulating considerations on these points, see V. Lowe and A. Tzanakopoulos, *op. cit.* note 4, pp. 191–192.

50 ICJ, Judgment, 9 April 1949, *op. cit.* note 2, pp. 30–32.

51 See: League of Nations Doc. C 351(b). M. 145(b).1930, p. 213, reproduced in Shabtai Rosenne ed., *League of Nations Conference for the Codification of International Law* (1930), 1975, p. 1415: "Passage is not innocent when a vessel makes use of the territorial sea of a coastal State for the purpose of doing any act prejudicial to the security, to the public policy or to the fiscal interests of that State".

52 See: Article 15(3) of the Articles concerning the Law of the Sea, *ILC Yearbook* 1956, Vol. II: "3. Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law"". The ILC also contradicted the Judgment in Article 24 providing that the coastal State could make the passage of warships through the territorial sea subject to its prior authorization.

53 See in particular Article 16(4): "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State".

54 See notably Article 19(2) which has reintroduced the activities during passage as the decisive criterion. This is further supported and clarified by the Joint Statement by the United States of America and the Union of Soviet Socialist Republics on the 'Uniform Interpretation of Norms of International Law Governing Innocent Passage', Jackson Hole, Wyoming, 23 September 1989 (1989) 14 Law of the Sea Bull 12. para 3.

passage in the territorial sea and the right of transit passage through the straits used for international navigation as embodied in the Convention [on the law of the sea] would seem to acquire an increasing importance for the stability of the global maritime order";[55] this remains entirely true thirty years later. Indeed, "[g]reat strategic interests are at stake since the ability of States to project military power around the world hinges, to a considerable degree, on the free movement of warships around the world's seas and straits".[56]

Another pressing contemporary challenge pertains to the protection of marine natural resources which the Court has not had many opportunities to address, and when it was given such an opportunity, it did not take it as far as it could have. The first occasion[57] was in the 1974 *Fisheries Jurisdiction* cases where the Court expressed concern for conservation. It recognized, controversially at the time, the existence of a right of preferential access for coastal states to fisheries under customary law, especially in the case of coastal States with special dependence on coastal fisheries.[58] The Court stated that "the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all".[59] The potential impact of the pronouncement was great, as was its criticisms, but it was eventually subsumed by the emergence of the regime of the EEZ.[60]

The 1998 *Fisheries Jurisdiction* (*Spain* v. *Canada*) case was also inconsequential as it failed to reach the merits, although the underlying dispute was one of the factors leading up to the adoption of the 1995 Straddling Fish Stocks Agreement.

Most important for conservation was the *Whaling in the Antarctic* case in which Australia and New Zealand challenged the lawfulness of Japan's whale

55 H. Owada, "New Challenges to the International Order of the Sea", *op. cit.* note 1, p. 13.

56 Michael Waibel, "Corfu Channel Case", *Max Planck Encyclopedia of International Law*, 2013, MN 24.

57 Despite its name, the 1951 *Anglo-Norwegian Fisheries* case did not really deal with fisheries at all.

58 Judgments, 25 July 1974, *Fisheries Jurisdiction* (*Federal Republic of Germany* v. *Iceland*), *Merits, Reports 1974*, p. 195, para. 50; *Fisheries Jurisdiction* (*United Kingdom* v. *Iceland*), p. 26, para. 58.

59 *Ibid.*, p. 200, para. 64, and p. 31, para. 72.

60 For the debatable impact of these cases compare Robin Churchill, "The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights", *ICLQ*, Vol. 24, 1975, p. 87; V. Lowe and A. Tzanakopoulos, *op. cit.* note 4, pp. 190–191; Tullio Treves, "Historical Development of the Law of the Sea" in *The Oxford Handbook of the Law of the Sea*, OUP, 2015, p. 21; N. Oral, *op. cit.* note 39, pp. 383- 384.

research program (JARPA II) which allowed for the exceptional killing of whales for purposes of scientific research under the exception provided under Article VIII(1) of the International Whaling Convention, otherwise prohibited by the moratorium in the Southern Ocean. One of the issues raised by Australia involved defining "scientific research".[61] The Court found that JARPA II activities could "broadly be characterized as 'scientific research'", and there was therefore "no need [...] to examine generally the concept".[62] Such 'judicial economy' undermines the contribution of the Judgment to the development of the law; but it is at the same time understandable: as Judge Owada underlined,

> in all frankness [...] this Court, as a court of law, is not professionally qualified to give a scientifically meaningful answer, and should not try to pretend that it can, even though there may be certain elements in the concept that the Court may legitimately and usefully offer as salient from the viewpoint of legal analysis.
>
> What is 'scientific research' is a question on which qualified scientists often have a divergence of opinion and are not able to come to a consensus view.[63]

Still, the differentiation between marine scientific research and other activities, such as commercial activities, is becoming increasingly important.[64]

On the other hand, in the same Judgment, the Court demonstrated its willingness to take a progressive stance in adopting the standard of reasonableness in reviewing the implementation of discretionary State conduct in that matter although, as pondered by Judge Owada, the question arises as to whether this standard should apply in the context of law or science.[65] The Court ultimately decided the case in favour of Australia, finding that the design and implementation of the programme were not reasonable in relation to achieving its stated objectives and decided that Japan was required to revoke any authorisation, permit or licence granted under the program.[66] As has been noted, "[i]t might be that the ICJ was indirectly swayed by arguments relating to the

61 Judgment, 31 March 2014, *Whaling in the Antarctic* (*Australia v. Japan: New Zealand intervening*), p. 255, para. 74.

62 *Ibid.*, p. 267, para. 127.

63 Dissenting opinion of Judge Owada, *Reports 2014*, p. 310, paras. 24–25. Judges Sebutinde (Separate Opinion, paras. 7–9, and Xue (Separate Opinion, paras. 14–16, also supported Judge Owada's position on this point.

64 See N. Oral, *op. cit.* note 39, p. 385.

65 Opinion, *op. cit*. note 63, para. 25.

66 *Ibid*., p. 293, para. 227.

general conservation trend and the need for precaution in adopting an objective standard of reasonableness and in formulating the requirements for the assessment of the design and implementation of JARPA II".[67]

It has also happened that, while it had some opportunities to take positions about lacunas or uncertainties of the law of the sea, the Court has avoided providing guidance on those issues. This is strikingly the case concerning the clarification of the meaning of Article 121 of UNCLOS. Yet, "the importance of understanding Article 121 has taken on new importance because of sea level rise from climate change and its possible consequences on the legal status of inhabited islands, an issue currently studied by the International Law Commission.[68,69]

The first detailed but "very fragile"[70] examination of Article 121, paragraph 3, was provided by the 2016 Award in the *South China Sea Arbitration*.[71] For its part, "[d]espite the lively scholarly debate generated" by the vague language used in this provision,[72] "the Court has shied away from directly identifying features under Article 121".[73] The Court missed the opportunity to clarify the meaning of paragraph 3 in its 2001 Judgment in *Qatar* v. *Bahrain* in which the Court confined itself to paraphrasing the text of paragraph 2 (recognising it as having customary value).[74] Similarly in *Romania v. Ukraine* and *Nicaragua v. Colombia* the Court, while providing some guidance on ancillary issues, did

67 Michaela Young, "Whaling in the Antarctic (*Australia v. Japan: New Zealand intervening*): progressive judgment or missed opportunity for the development of international environmental law?", *Comparative and International Law Journal of Southern Africa*, Vol. 48(1), 2015, p. 81.

68 Fn. 158 in the original: See A/CN.4/740, *First issues paper by Bogdan Aurescu and Nilüfer Oral, Co-Chairs of the Study Group on sea-level rise in relation to international law* (2020).

69 N. Oral, *op. cit.* note 39, p. 387.

70 Gilbert Guillaume, "Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award", *EJIL Talk*, 2021, ejiltalk.org/ricks-in-the-law-of-the-sea-some-comments-on-the-south-china-sea-arbitration-award/.

71 Award, 12 July 2016, *The South China Sea Arbitration* (*The Republic of Philippines v. The People's Republic of China*), pp. 175 *ff*.

72 The author of the quote refers to: Prescott and Schofield, *Maritime Political Boundaries of the World*, 61–63; J. R. V. Prescott, C. H. Schofield, J. Wu, and H. Zhang, *Maritime Political Boundaries of the World* (Brill, 2004), 19–37". (N. Oral, *op. cit.* note 39, p. 378, note 105). *Adde*: Gilbert Guillaume, « Îles, rochers et hauts-fonds découvrants en droit de la mer », *Annuaire français de droit international*, Vol. 65, 2019. pp. 513–526.

73 *Ibid.*, p. 378.

74 Judgment, 16 March 2001, *op. cit.* note 16, p. 97, para. 185, see also: Judgement, 8 October 2007, *op. cit.* note 17, p. 696, para. 113. However, the 2001 Judgment helpfully clarified the legal rules applicable to low tide-elevations (see para. 201).

not offer any clarification avoided addressing the core issue of the definition of "rocks" in paragraph 3.[75]

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Beyond the debate of whether judicial and arbitral decisions are only "means for the determination of rules of law" – as provided for under Article 38, paragraph 1(d), of the Statute of the ICJ – or whether they can in fact be means for the progressive development of international law, the Court's contribution to the modern international law of the sea is indisputable. However, its influence should not be exaggerated. Seminal decisions by the Court are now decades old and its influence is indeed diminishing as other tribunals such as the ITLOS or arbitral tribunals share part of the task of applying the law of the sea. Besides, others actors are also important for the development of the latter. In particular, learned societies such as the *Institut de Droit international* and the International Law Association went a long way towards establishing some of the basic principles of the law of the sea.[76] Most important are of course the institutionalized "codifiers", whether the ILC or the States in conferences, which are the actual makers of international law. It remains that, in so doing, they use the "bricks" produced by the Court when it decides specific cases to "create a structure, and see the areas where bricks are missing and fill in the gaps in the light of the design of the overall structure".[77] They may also decide not to use these bricks and reverse some rules pronounced by international courts, including the ICJ.[78] Eventually, the more they "make" the law, the more the contribution of the ICJ will be limited to detailed aspects rather than shaping the law in any fundamental manner. This does not mean however that the ICJ contribution is becoming less important: even if it is subject to the vicissitudes of its seizure, the Court's contribution remains irreplaceable in ensuring

75 V. N. Oral, *op. cit.* note 39, pp. 378–379. In its Judgment of 19 November 2012, the Court took care to discuss in some details the entitlements generated by Quitasueño but it seems to take it for granted that this feature is a rock within the meaning of Article 121, par. 3 (*op. cit.* note 21, p. 688, para. 170, and pp. 181–183, paras. 181–183).

76 Recent committees of the International Law Association have focused on the 'Outer Continental Shelf' (2000–2010), 'Baselines under the International Law of the Sea' (2008–2018), 'Submarine Cables and Pipelines under International Law' (current), or 'International Law and Sea Level Rise' (current). See also the 2023 Resolution of the *Institut* on 'Piracy, Present Problems'.

77 V. Lowe and A. Tzanakopoulos, *op. cit.* note 4, p. 187.

78 See e.g., above the reversal by treaty of the rule on exclusive flag State jurisdiction in the aftermath of the Permanent Court's *Lotus* decision, notes 43 *ff*.

the cohesion of the case law in this field and in adapting, incrementally, the applicable rules to the changing requirements of international life.[79]

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79 For a more general view, see: A. Pellet, "L'adaptation du droit international aux besoins changeants de la société internationale", R.C.A.D.I., vol. 329, 2007, pp. 9–47.