

## Chapter 51

# Shaping the Future of International Law: The Role of the World Court in Law-Making

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Among his very many, and most various, interests Michael Reisman has shown a marked interest in international law-making, including the role of the World Court in this regard.<sup>1</sup> As he has very aptly noted, “[a] substantial body of international law has not derived from formal law-making institutions,”<sup>2</sup> a category to which the International Court of Justice or its predecessor do not belong. However, the dedicatee of this volume also asserts that “the Court seems particularly ill structured for a progressive development role. Lawmaking is not a philosophical or scientific exercise. It is quintessentially political, requiring knowledge of the diverse interests and the intensity of demand of the political actors engaged, and then skill in trading support and forming coalitions. The Court cannot do this, and even trying would compromise its judicial character.”<sup>3</sup>

However, while this apparently categorical view seems, with all due respect, debatable, the learned author himself qualifies it and makes it much easier to be understood when he writes: “To be sure, the judicial function involves ‘supplementing and policing’ the application of inherited law, which becomes particularly urgent in periods of rapid transition. This is not judicial activism but an appropriate discharge of the judicial function, and it is quite distinct from an active lawmaking role that deems itself entitled to ignore expressions of authoritative policy and assumes a competence to determine itself, case-by-case and ‘progressively,’ what the law should be.”<sup>4</sup> In other

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1 In this short essay, I will use the expression “World Court” to name both the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ).

2 W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15 (Rüdiger Wolfrum & Volker Röben eds., 2005).

3 W. Michael Reisman, *Judge Shigeru Oda: A Tribute to an International Treasure*, 16 LEIDEN J. INT’L L. 57, 63 (2003).

4 W. Michael Reisman, *Judge Shigeru Oda: Reflections on the Formation of a Judge*, in 1 LIBER AMICORUM JUDGE SHIGERU ODA 66 (Nisuke Ando et al. eds., 2002).

words—and with this presentation the present writer fully agrees—while the Court can certainly not “legislate” “against” existing legal rules, it may—and must—contribute to elucidating existing norms and, if need be, supplement and complement them (within the general framework of the international legal system). But this seems to me to simply amount to progressive development of international law.<sup>5</sup>

### I. Progressive Development of International Law by the World Court

As is well known, the notion of progressive development is difficult to precisely grasp. Although it is recognized in Article 15 of the Statute of the International Law Commission (ILC),<sup>6</sup> the distinction between progressive development of international law on the one hand and codification on the other hand has never been strictly applied by the Commission—and it could not. Not only “[i]t is difficult to say when, on any particular subject, codification stops and progressive development begins,”<sup>7</sup> but also, as noted as early as 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>8</sup> And the Survey concluded on this point: “It is clear that if the task of the International Law Commission were confined to fields with regard to which there is a full measure of agreement among States, the scope of its task would be reduced to a minimum.”<sup>9</sup>

But this has an impact, too, in relation to the limited but undisputable and unavoidable law-making role that the International Court may be called to play. “However theoretical assertions that deny law-making power to international judicial bod-

5 For a more restrictive definition, see José Maria Ruda, *Some of the Contributions of the International Court of Justice to the Development of International Law*, 24 N.Y.U. J. INT'L L. & POL. 35, 35 (1991).

6 G.A. Res. 174 (II) (Nov. 21, 1947).

7 Arthur Watts, *Introduction to THE INTERNATIONAL LAW COMMISSION 1949-1998*, at 9 (Arthur Watts ed., 1999).

8 Memorandum submitted by the Secretary-General [in fact prepared by Hersch Lauterpacht], *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, ¶ 10, delivered to the General Assembly, U.N. Doc. A/CN.4/1/Rev. 1 (Feb. 10, 1949) [hereinafter *Survey*], reproduced in *THE INTERNATIONAL LAW COMMISSION AND THE FUTURE OF INTERNATIONAL LAW*, 74 (Michael Anderson et al. eds., 1998) [hereinafter *THE ILC AND THE FUTURE OF INTERNATIONAL LAW*]; see also H. Lauterpacht, *Codification and Development in International Law*, 49 AM. J. INT'L L. 17 (1955); Ahmed Mahiou, *Rapport général—Les objectifs de la codification*, in SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, COLLOQUE D'AIX-EN-PROVENCE, LA CODIFICATION DU DROIT INTERNATIONAL, 11, 17-18 (1999).

9 *Survey*, para. 11, in *THE ILC AND THE FUTURE OF INTERNATIONAL LAW*, *supra* note 8, at 75.

ies ignore the reality that ... international courts—in particular the ICJ—do play a major law-making role.”<sup>10</sup>

This paper is not the proper place to re-open the endless debate concerning the possibility for the Court to declare *non liquet*;<sup>11</sup> suffice it to say that the present writer has no doubt that, in its contentious function at least, it cannot,<sup>12</sup> as recalled by Judge Higgins in her Dissent appended to the Court’s 1996 Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, “It is also ... an important and well-established principle that the concept of *non liquet*—for that is what we have here—is no part of the Court’s jurisprudence.”<sup>13</sup> This conclusion clearly stems from the debates in the 1920 Committee of Jurists of the League of Nations which elaborated the Statute of the Permanent Court of International Justice (PCIJ)<sup>14</sup> and is reinforced by the well known formula introducing Article 38 of the Statute of the ICJ as amended in 1945<sup>15</sup>

10 ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 268 (2007).

11 See, e.g., Julius Stone, *Non Liquet and the Function of Law in the International Community*, 35 BRIT. Y.B. INT’L L. 125-161 (1959) (a reply to Sir Hersch Lauterpacht’s *Some Observations on the Prohibition of Non Liquet and the Completeness of the Legal Order*, in SYMBOLAE VERZIIL 196-221 (Frederik Mari van Asbeck et al. eds, 1958)); LUCIEN SIORAT, *LE PROBLÈME DES LACUNES EN DROIT INTERNATIONAL—CONTRIBUTION À L’ÉTUDE DES SOURCES DU DROIT ET DE LA FONCTION JUDICIAIRE* (1958); J. Salmon, *Quelques observations sur les lacunes en droit international public*, 3 REVUE BELGE DE DROIT INTERNATIONAL 440-58 (1967); J. Salmon, *Le problème des lacunes à la lumière de l’avis internationale de Justice*, in MÉLANGES EN L’HONNEUR DE NICOLAS VALTICOS—DROIT ET JUSTICE 197 (René-Jean Dupuy ed., 1999); H. Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989, Part One*, 60 BRIT. Y.B. INT’L L. 4, 77-84 (1989); Prosper Weil, *‘The Court Cannot Conclude Definitely ...’—Non Liquet Revisited*, in POLITICS, VALUES AND FUNCTIONS—INTERNATIONAL LAW IN THE 21ST CENTURY; ESSAYS IN HONOR OF PROFESSOR LOUIS HENKIN 105 (Jonathan I. Charney et al. eds., 1997); Daniel Bodansky, *Non Liquet and the Incompleteness of International Law*, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 153 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999); Kati Kulovesi, *Legality or Otherwise?: Nuclear Weapons and the Strategy of Non Liquet*, 10 FINNISH Y.B. INT’L L. 55 (2002); Ige F. Dekker & Wouter G. Werner, *The Completeness of International Law and Hamlet’s Dilemma: Non Liquet, the Nuclear Weapons Case and Legal Theory*, in ON THE FOUNDATIONS AND SOURCES OF INTERNATIONAL LAW 5 (Ige F. Dekker & Harry H.G. Post eds., 2003).

12 See Alain Pellet, *Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE—A COMMENTARY* 677, 703-04 (Andreas Zimmermann et al. eds., 2006).

13 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 591, at para. 36 (July 8) (dissenting opinion of Judge Higgins); see also *id.* at 311 (dissenting opinion of Vice-President Schwebel).

14 For an overview, see Vice-President Schwebel’s dissenting opinion, *id.* at 323, or Pellet, *supra* note 12, at 685-88.

15 This formula did not appear in Article 38 of the PCIJ Statute and was added by the San Francisco Conference, following an amendment introduced by Chile. See Pellet, *supra*

according to which the Court's "function is to decide in accordance with international law such disputes as are submitted to it." It then *must decide*, failing which it would not perform the mission that the member states of the United Nations have entrusted to it.

And here is the link with the very nature of international law: if, as accepted above, 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. This is precisely what can be called progressive development of international law and, more or less avowedly, this is, in effect, what it quite usually does.

It is quite revealing in this respect that the Court has never declined to decide on the ground of the silence or obscurity of the law—while it has overtly shown hesitation as to the existence of an applicable rule at least in one occasion<sup>16</sup> when complying with its advisory function. In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ declared that "in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."<sup>17</sup> Had the same matter been before the Court in a contentious case, it could certainly not have left the question undecided and it would have had to "reach a definitive conclusion" in this respect. To that aim, it would necessarily have "progressively developed" the existing law—probably without openly recognizing that it was doing so.

The role that the ICJ has to play "in the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation" was recognized by the General Assembly as early as 1947<sup>18</sup> and has been performed by the Court with success since then. As a former President of the ICJ put it, "the Court has never hesitated to recognize 'new situations' or the evolutionary

note 12, at 690.

16 However, see also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11), where the Court affirmed that there was no priority between the State's right of diplomatic protection and the organization's right of functional protection: "In such a case, *there is no rule of law* which assigns priority to one or to the other, or which compels either the State or the Organization from bringing an international claim" (emphasis added). Cf. also the *dispositif*, *id.* at 188.

17 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 263, at para. 97; *id.* at 266, at para. 105E (July 8); see also *id.* at 247, at para. 52.

18 G.A. Res. 171 (II) (Nov. 14, 1947).

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18 G.A. Res. 171 (II) (Nov. 14, 1947).

aspect of the law which it administers" and "it has gone a long way to remove lacunae and to clear up obscurities and doubts."<sup>19</sup> Just to take some striking examples:

- There can be no doubt that, in some of its most (rightly) celebrated Judgments, like the *Mavrommatis*<sup>20</sup> or the *Chorzów Factory*<sup>21</sup> cases, the PCIJ has gone further than simply consolidating the pre-existing *law of State responsibility* resulting from the "Latin-American arbitrations" of the nineteenth century and the first part of the twentieth century,<sup>22</sup> which it also contributed to make more precise and more responsive to the contemporary needs of the international society of its time.
- Similarly, the elucidation by the ICJ of the international personality of the UN and, more generally, of international organisations in the *Reparation Advisory Opinion*,<sup>23</sup> certainly went further than a pure application of existing rules and greatly contributed to the development of international law. I would go as far as asserting that, in so doing, the Court has put an (happy) end to the traditional restricted conception of international law as a purely inter-states system.
- Even more striking is the Court's reshaping of the *law applicable to reservations to treaties*.<sup>24</sup> Its famous 1951 Advisory Opinion on *Reservations to the Genocide Convention* clearly breaks away from the traditional rules of unanimous acceptance of reservations and substitutes a new "flexible" rule<sup>25</sup>—on the fragile basis of a disputable "precedent" at the Pan-American level. In a purely abstract perspective, Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo were probably right in their well-known joint Dissenting Opinion<sup>26</sup> 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>27</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 sync with the situation and needs of the modern world (divided in

19 Judge Nagendra Singh, *Codification and Progressive Development of International Law: The Role of the International Court of Justice*, 18 INDIAN J. INT'L L. 1, 8 (1978).

20 See, e.g., *Mavrommatis Palestine Concessions*, 1924 P.C.I.J. (Ser. A) No. 2, at 12 (Aug. 24).

21 See, e.g., *Factory at Chorzow (Merits)*, 1928 P.C.I.J. (Ser. A) No. 17, at 29 or 47 (Sept. 13).

22 See Alain Pellet, *La codification du droit de la responsabilité internationale: Tâtonnements et affrontements*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY, LIBER AMICORUM GEORGES ABI-SAAB 285, 286, 287-88 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001).

23 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).

24 See Alain Pellet, *La C.I.J. et les réserves aux traités - Remarques cursives sur une révolution jurisprudentielle*, in LIBER AMICORUM JUDGE SHIGERU ODA 481-514 (Nisuke Ando et al. eds., 2002).

25 1951 I.C.J. 15, 23-26 (May 28).

26 1951 I.C.J. 31, 38-51 (May 28) (dissenting opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo).

27 *Id.* at 31.

many sovereign states with deeply divergent policies). In spite of the rear-guard action of the ILC until 1962,<sup>28</sup> the principle accepted by the Court in 1951 was finally incorporated in Article 19 of the 1969 Vienna Convention on the Law of Treaties.

- 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<sup>29</sup>—if not the most convincing. A first example of the ICJ's quasi-normative role in this field is given by its acceptance of straight base-lines in its Judgment of 18 December 1951 in the *Fisheries* case between the United Kingdom and Norway,<sup>30</sup> a method which was then recognized in Article 4 of the 1958 Geneva Convention on the Territorial Sea, then in Article 7 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>31</sup> The influence of the ICJ has been even more spectacular in respect to the delimitation of the continental shelf (and consequentially of the exclusive economic zones) between states with opposite or adjacent coasts since the Court literally “invented,” in its 1969 Judgment in the *North Sea Continental Shelf* case, the most 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>32</sup>

Transposed to Articles 74(1) and 83(1) of the UNCLOS, this principle proved in practice to be highly debatable in that it jeopardized the predictability of the delimitation to be decided and offered insufficient basis for negotiated solutions. But, by trial and error, the Court itself found a convincing remedy to the disorder it had initiated by

28 Sir Humphrey Waldock came around to the Court's solution in his *First Report on the Law of Treaties*, reprinted in [1962] 2 Y.B. INT'L L. COMM'N 59-68. His predecessors had opted for the maintenance of the “unanimity rule” (see Hersch Lauterpacht—who, nevertheless proposed alternatives *de lege ferenda*, *First Report on the Law of Treaties*, reprinted in [1953] 2 Y.B. INT'L L. COMM'N 90-136; *Second Report*, reprinted in [1954] 2 Y.B. INT'L L. COMM'N 131-33; Sir Gerald Fitzmaurice, *First Report*, reprinted in [1956] 2 Y.B. INT'L L. COMM'N 115, 125-27).

29 See José Maria Ruda, *supra* note 5, at 58 (1991): “The Court's judgments regarding the law of the sea have been important and influential ... Furthermore, the Court's consideration of the recent evolution of customary law has substantially *modified* this branch of public international law” (emphasis added); this remark is all the more notable given that the eminent author in principle denies the possibility for the Court to establish new rules of international law (*see supra*, note 5).

30 1951 I.C.J. 116, 129-30 (Dec. 18).

31 In their comment on the *Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)*, Bernard H. Oxman and W. Michael Reisman complained that the ICJ ignored “exorbitant straight baselines [claims] in cases before” it, thus depriving “the straight baseline regime of judicial controls”; but they added that, “the Tribunal, to its credit, assumed a more active judicial role and has enriched the jurisprudence of straight baselines in a number of ways.” 94 AM. J. INT'L L. 721, 732 (2000).

32 *North Sea Continental Shelf* (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, 46-47 (Feb. 20).

progressively reintroducing some elements of certainty and predictability. In its Judgment of February 3, 2009, in the case concerning *Delimitation in the Black Sea*, the ICJ explained:

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.

These separate stages, broadly explained in the case concerning Continental Shelf (Libyan Arab Jamahiriya/Malta) (Judgment, I.C.J. 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. ... .

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. ... .

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, I.C.J. Reports 2002, p. 441, para. 288). ...

This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

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>33</sup>

It can be securely affirmed that the passages quoted above reflect the law in force in respect of maritime delimitation and a State which would neglect these guidelines when arguing its case not only before the ICJ, but in front of any international tribunal,<sup>34</sup> would be most imprudent. This *is* the law in spite of its purely praetorian origin.

This is a welcomed and balanced solution, which combines rather harmoniously the demands for predictability (equidistance) on the one hand and for flexibility (relevant/special circumstances) on the other hand, together with the preservation of the general principle embodied in the UNCLOS (requirement of an "equitable result"

33 *Delimitation in the Black Sea (Rom. v. Ukr.)*, paras. 115-122 (Feb. 3, 2009), available at <http://www.icj-cij.org/docket/files/132/14987.pdf>.

34 Several recent arbitral awards in this field strictly follow the ICJ three stages approach. See, e.g., *Barbados v. Trinidad and Tobago*, paras. 242-44 and 284 (Perm. Ct. Arb. Apr. 11, 2006), 45 I.L.M. 800, 839, 847 (2006); *Guyana/Suriname*, paras. 335-342 (UN Law of the Sea Annex VII Arb. Trib. Sept. 17, 2007).



reflected, for example,<sup>35</sup> in the “non-disproportionality test”). And the process followed to reach this result is quite exemplary of a reasonable approach by the Court in its role in the progressive development of international law:

- In a first stage, in its 1969 Judgment in the *North Sea Continental Shelf* case where “the ICJ laid the groundwork for the modern international law of maritime boundary delimitation,”<sup>36</sup> the Court noted that, while the equidistance rule did not constitute a customary norm, “in the present case it is not the fact either that rules are lacking, or that the situation is one for the unfettered appreciation of the Parties.”<sup>37</sup> Consequently, the Court had to endeavour to find some kind of rules enabling it “to decide in accordance with international law” the dispute which the Parties had submitted to it in those given case. And it thought to find them in a rather complex set of considerations, the core one being that “the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied”<sup>38</sup> since “[i]t emerges from the history of the development of the legal regime of the continental shelf ... that that 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>39</sup>
- Artificial as this reasoning could have been, this new (or newly “found” or formulated) principle was well received—maybe because of its insignificance—by a number of states, which hasten to try to have it formalized in the UNCLOS; but this was still too much for the Law of Sea Conference, which watered the principle down even more, since, instead of mentioning “equitable principles” (as both the Truman Declaration and the Court’s Judgment of 1969 had done), Articles 74(1) and 83(1) of the UNCLOS only impose on states “to achieve an equitable solution” for the delimitation of the exclusive economic zone as well as of the continental shelf. As Judge Gros rightly stressed, “It is difficult to discern any rule in such a formula: to say that due application of international law should give rise to an equitable result is a truism. Necessity for an agreement between the States concerned, application of international law, equity—yes, but by what means?”<sup>40</sup>

35 During the second stage of the process “the adjustment or shifting of the provisional equidistance line” also aims at achieving “an equitable result” *Delimitation in the Black Sea*, *supra* note 33, para. 120.

36 Oxman & Reisman, *supra* note 31, at 731.

37 *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 46, para. 83 (Feb. 20).

38 *Id.* at 47, para. 85(b).

39 *Id.* at 46, para. 85. The Court prevailed itself in particular of the 1945 Truman Declaration on the Continental Shelf which provided for the recourse to agreements concluded “in accordance with equitable principles” *Id.* at 32-33, para. 47.

40 *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 365, para. 8 (Oct. 12) (dissenting opinion of Judge Gros); *see also* *Continental*

- “Because the Third Law of the Sea Conference did not establish a precise legislative standard regime for delimiting exclusive economic zones and continental shelves, the development of this very important sector of international law continues to be preeminently an international judicial responsibility ... .”<sup>41</sup> As the Chamber of the Court noted in the case concerning the *Gulf of Maine*, “[a]lthough the text [of Articles 74 and 83 of the UNCLOS] is singularly concise it serves to open the door to continuation of the development effected in this field by international case law”<sup>42</sup>—a development that the Court realized in several stages which finally arrived to the balanced approach described in *Romania v. Ukraine*,<sup>43</sup> which largely remedies the non-operational character of the relevant treaty law as well as of the ineffective customary principles that its 1969 Judgment had greatly contributed to manufacture; but, as Oxman and Reisman have aptly noted, “[i]n a variety of experiments since then, the Court has adjusted, or subtly reduced the effect of, some of the factors it had incorporated into its original decision calculus.”<sup>44</sup> At the end of the process, a legal framework governing the methods of delimitation<sup>45</sup> that Prosper Weil advocated in his superb book on *The Law of Maritime Delimitation*<sup>46</sup> has been judicially manufactured and, now, fully answers the needs of the international community.

After receiving the Draft Statute of the PCIJ in 1920, Balfour declared that “the decisions of the Permanent Court cannot but have the effect of gradually moulding and modifying international law.”<sup>47</sup> This prediction has, without any doubt, become reality, at least in certain fields of general international law on the development of which

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Shelf (*Tunis. v. Libya*), 1982 I.C.J. 18, 246, para. 143 (Feb. 24) (dissenting opinion of Judge Oda).

41 Oxman & Reisman, *supra* note 31, at 731-32.

42 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 294, para. 95 (Oct. 12). Curiously, in that case the Chamber made a distinction between the principles of delimitation (which could be the object of customary principles) and practical methods for determining the boundary (which could not—*id.* at 290, para. 81). As noted by Robin Churchill and Vaughan Lowe, “[t]his distinction has not been pursued by either the Court or the tribunals in later cases.” ROBIN CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* 185 n.5 (3d ed. 1999). On the contrary, the Court mainly developed rules defining the methods of delimitation.

43 *See supra* note 33.

44 Oxman & Reisman, *supra* note 31, at 731.

45 “*juridicisation des méthodes de délimitation*” PROSPER WEIL, *PERSPECTIVES DU DROIT DE LA DÉLIMITATION MARITIME* 198-200 (1988).

46 PROSPER WEIL, *THE LAW OF MARITIME DELIMITATION: REFLECTIONS* (Maureen MacGlashan trans., 1989).

47 League of Nations, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court* 38 (1921); cf. MOHAMED SHAHABUDEEN, *PRECEDENT IN THE WORLD COURT* 78 (2007).

the Court has had an important, sometimes decisive, influence. Although limited by the scarcity of cases brought to the Court, its influence on the evolution of international law has been all the more efficient and successful that it has carefully confined itself to progressively developing existing principles and rules without ever legislating *de novo*.

## II. Distinguishing between Progressive Development and Legislation

It is important to note that, at each stage of this complex process, the Court tried—more or less convincingly—to keep the balance between the necessity to decide the case before it, even when it was rather obvious that no clear legal rule applied, and its concern not to “legislate” *ex novo*. Thus, in its seminal 1969 Judgment, it took great care to explain that “it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles.”<sup>48</sup> More generally, the Court has constantly recalled that “[a]s is implied by the opening phrase of Article 38, paragraph 1, of its Statute, the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it”<sup>49</sup> and that “it states the existing law and does not legislate.”<sup>50</sup> In the same vein, the ICJ declared that “[i]t is the duty of the Court to interpret the Treaties, not to revise them.”<sup>51</sup>

But, indeed, the margin between progressive development on the one hand and legislation on the other hand is narrow. So narrow that it could happen that what I call “progressive development” in a particular case could be considered as an abusive exercise in legislation by others (for example Michael Reisman) or reciprocally. All depends on our respective views of whether the decision reasonably aims at “supplementing and policing’ the application of inherited law supplement,”<sup>52</sup> or unreasonably engages in a legislative exercise which would “inescapably take on a shabby character,

48 North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 47, para. 85 (Feb. 20).

49 South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. 6, 48, para. 89 (July 18).

50 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 237, para. 18 (July 8); see also *id.* at 293, para. 14 (separate opinion of Judge Guillaume); *id.* at 372-73, para. 53 (dissenting opinion of Judge Oda); Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, 1950 I.C.J. 221, 244 (July 18) (dissenting opinion of Judge Read); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 72, para. 4 (June 27) (separate opinion of Vice-President Ammoun). See also the warnings in H. Thirlway, *Reflections on Lex Ferenda*, 32 NETH. Y.B. INT’L L. 3 (2001).

51 Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, 1950 I.C.J. 221, 229 (July 18) (also quoted in *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 198 (Aug. 27), and in *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. 6, 48, para. 91 (July 18)).

52 Reisman, *supra* note 4, at 66.

involving legal tricks, gimmicks, and gambits, and forced interpretations ..." requiring "subterfuge and misstatement" in Michael Reisman's harsh words.<sup>53</sup> Since nothing is more subjective and personal than reasonableness, I would suggest that you will name "legislation" a legal reasoning you disapprove of but you will call that same reasoning "progressive development" when you favor it.

When we are confronted with a rule applied by the Court (or any other tribunal), the basis of which is uncertain, the real question is: when is legal development "progressive"? When does it amount to legislation? There is certainly no clear, indisputable threshold; and there is nothing strange in that: law in general, and international law in particular, is not a "hard" science; it is an "art," *ars juris*.<sup>54</sup> This being said, there must be some criterion or, at least, some clue which could help distinguishing between abusive legislation on the one hand and sensible progressive development on the other hand—even if subjectivity cannot be entirely neutralized. But this also confirms that adjudicating implies at least some moral courage, a courage which should go as far, in extreme cases, as abandoning obsolete rules and substituting new rules based on a more realistic assessment of the circumstances—and this, I would think could be accepted by Michael Reisman, who praised Judge Florentino Feliciano for believing "that the judge may, in some circumstances, be obliged to postulate values for the community and apply them even if they are inconsistent with the other more conventional sources."<sup>55</sup>

In a way the issue of the distinction between (i) *stricto sensu* codification, (ii) progressive development of international law, and (iii) legislation *de novo* arises in a similar way before the ILC.<sup>56</sup> For sure, there are important differences. As rightly underlined by Michael Reisman, "[a]s for the International Law Commission, which has an explicit 'progressive development' competence, it can engage in this only *ad referendum*, with the ultimate decision in the hands of the General Assembly or an international diplomatic conference, both explicitly political institutions. Could a court—indeed, any court—render judgments *ad referendum*?"<sup>57</sup>—and the obvious answer to the last question must be in the negative. However, things are not as cut-and-dried as it seems.

There are, of course, obvious differences between the explicit mandate of the ILC to progressively develop international law and the implicit need to do so for the World Court, randomly, if and when it has to complement, supplement or adapt existing rules in a particular case for which no "ready-made" legal rule is available.

53 *Id.* at 66-67; see also Reisman, *supra* note 3, at 64.

54 See Alain Pellet, *Keynote Address, Responding to New Needs through Codification and Progressive Development*, in MULTILATERAL TREATY-MAKING: THE CURRENT STATUS OF CHALLENGES TO AND REFORMS NEEDED IN INTERNATIONAL LEGISLATIVE PROCESS 16 (Vera Gowlland-Debbas ed., 2000).

55 W. Michael Reisman, *A Judge's Judge: Justice Florentino P. Feliciano's Philosophy of the Judicial Function*, in LAW IN THE SERVICE OF HUMAN DIGNITY—ESSAYS IN HONOUR OF FLORENTINO FELICIANO 3, 10 (Steve Charnovitz et al. eds., 2005).

56 See *supra* text accompanying notes 6-9.

57 Reisman, *supra* note 3, at 63.

However, as shown in the first part of this paper, denying to the World Court the possibility to have recourse to the progressive development of international law in such cases would amount to impeding it to properly perform its primary function which is to decide disputes submitted to it in accordance with international law.

It is also certainly true that the formal process of "progressive development/codification" through the ILC vastly differs from the more mysterious and empirical alchemy which leads the Court to "discover" a rule before applying it in a concrete case. However, in a way, finding a customary rule is not that much different for one or the other body—and, in both cases, such an operation requires the same skill, a recourse to the same technical means and analytical tools, a similar combination of the practice observed with the *opinio juris* attributed to the international community (of states?), although the Court has a marked tendency to assert the existence of a customary rule more than to prove it; in this respect, the ILC work is probably more careful.<sup>58</sup> Only the "product" differs. The ILC elaborates Draft Articles supposedly covering a topic in its entirety; most of these Drafts are expected to become international conventions and such a transformation is subject to the political appreciation of states in the framework of the General Assembly of the United Nations—and this is the "*referendum*" alluded to by Michael Reisman. For its part, the Court finds the customary rules applicable to a particular dispute on a case by case basis; only the Judgment resulting from the application of the rules in question will be binding, and only between the Parties.<sup>59</sup>

But even in this respect, the difference between both processes must not be exaggerated. *First*, exactly as there is no clear-cut distinction between codification in the strict sense on the one hand and progressive development on the other hand,<sup>60</sup> it is virtually impossible to objectively determine whether a particular rule applied by the World Court is customary or results from a progressive development: in all cases the Court will take great care to present it as being customary if only to avoid being blamed for legislating. As noted by Judge Shahabuddeen with his usual perceptiveness, "[i]dentification of instances of judicial law-making is complicated by the fact that the Court itself, like all courts but perhaps more so in view of the fact that it is adjudicating between sovereign States, takes care to avoid expressions suggestive of judicial law-making; it prefers the use of terms indicating that all that is involved is a working out of the true meaning of existing legal principles, as, indeed, is broadly true."<sup>61</sup> But, as seen above, when going from general principles to precise rules applicable to a particular case, this often appears as purely cosmetic defence: clearly the "object and purpose" as the main criterion for the validity of reservations to treaties

58 See Pellet, *supra* note 12, at 749-62.

59 Cf. I.C.J. Statute art. 59.

60 See *supra* text accompanying notes 6-9.

61 SHAHABUDEEN, *supra* note 47, at 90; see also SIR HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 368 (1958) ("Many an act of judicial legislation may in fact be accomplished under the guise of the ascertainment of customary international law.").

did not pre-exist the 1951 Advisory Opinion;<sup>62</sup> nor did the “straight baselines” system pre-exist the Court’s Judgment in the *Anglo-Norwegian Fisheries case*.<sup>63</sup>

But, certainly, there are limits. In particular, while a legislator 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), a “progressive developer” must stay within the general existing legal framework. 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>64</sup> As Michael Reisman recalled: “*Cessat ratio, cessat ipse lex*.”<sup>65</sup> This probably is the difference between “lawyers’ law” and “politicians’ law”: politicians can change the reasons for law; when progressively developing existing law, lawyers cannot.

*Second*, not more than an ILC Draft will stand by its own as a binding set of rules, the simple fact that the Court relies on a particular rule to decide a dispute will confer it the “status” of a generally binding norm. In both cases, the authoritativeness of the respective findings of both bodies will depend on a multiplicity of factors. The care with which the existence and scope of the rule in question will have been established—which in turn depends, in the ILC, on the reliability of the Special Rapporteur’s work and of the ensuing debates in the Commission, and, in the ICJ, on the seriousness of the Parties’ pleadings and of the Court’s reasoning—is fundamental. But maybe even more important: the responsiveness of the “proposed” rule to the needs of the international community at the time of its codification or “development.”

The ICJ Judgment is no more the ultimate stage in the World Court law-making process than the ILC Draft Articles constitute the end of the progressive development/codification of international law by the ILC. Both are only milestones in a more complex process. In this (important) respect, both processes are less remote from each other than it could seem at first glance, in that the “final outcome” (Draft Articles or Draft Guidelines for the ILC; Judgment or Advisory Opinion for the ICJ) of either organs is not the ultimate stage in the law-making process in which they take part—sometimes together. Once available on the play-ground of the law-making process this outcome will be tested against the needs of the international society. Exactly like the binding nature of the ILC Draft, that of the ICJ-made law is subject to some kind of “*referendum*”—but a different kind.

The ILC process is based on a constant back and forth between the experts level (Commission) and the political instance (General Assembly) which, at least formally,

62 See *supra* text accompanying notes 24-28.

63 See *supra* text accompanying notes 29-32.

64 See Pellet, *supra* note 54, at 16.

65 W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANSNAT’L L. 745 (2002).

has the last word since it belongs to the General Assembly to decide the final step.<sup>66</sup> However, this is only the tip of the iceberg. In reality the ILC Drafts will play a role by themselves. As explained in an introduction to "The Achievement of the International Law Commission" by the Codification Division of the United Nations, the contribution of the ILC to international law-making goes beyond the transformation of some of its Drafts (the majority of them) "into major global treaties within the fields to which they relate," some of which "have assumed a structural or foundational position" within their respective domains;<sup>67</sup> the Commission has also succeeded in integrating itself into the process of custom-formation, including, most strikingly of all, the process for the creation of new rules of customary international law.<sup>68</sup>

For its part, the efficiency of the Court's "law-making" too will depend on various factors and can only be assessed in the long run: not more than "instant custom" exists, can "instantaneous judicial law-making" be accepted. The Court's Judgments (or Advisory Opinions) are but an (important) step in a much more complex process, starting before the Judgment and extending afterwards. This will have been apparent in several of the examples of progressive development of international law rules given above.<sup>69</sup>

- the law of State Responsibility has its roots in the pre-existing practice of states and international arbitral tribunals; it was fixed in strikingly coined formulas by the World Court; the ILC drew the consequences from these very general principles in its Articles on The Responsibility of States for Internationally Wrongful Acts, which, in turn were abundantly "applied" by international (and national) tribunals,<sup>70</sup> including the ICJ itself;<sup>71</sup>
- in spite of the reluctance of a majority of the doctrine (including of the ILC for more than ten years), the Court's views on the (indisputably) new law of reservations to treaties was at the origin of a Copernican change in this most practically important part of the law of treaties; after their endorsement by the ILC first, by

66 See ILC Statute art. 23(1) ("The Commission may recommend to the General Assembly: (a) To take no action, the report having already been published; (b) To take note of or adopt the report by resolution; (c) To recommend the draft to Members with a view to the conclusion of a convention; (d) To convoke a conference to conclude a convention.").

67 ILC, INTERNATIONAL LAW ON THE EVE OF THE TWENTY-FIRST CENTURY—VIEWS FROM THE INTERNATIONAL LAW COMMISSION 1-2 (United Nations Publication, 1997, Sales N° E/F 97.V.4).

68 *Id.* at 2. The ICJ may play a major role in this process by sanctioning an ILC draft Article as evidencing the contemporaneous state of the law in the relevant field. See *id.* at 14-17; Pellet, *supra* note 12, at 757-58, 792.

69 See *supra* text accompanying notes 18-32.

70 See The Secretary General, *Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies, Report of the Secretary-General*, U.N. Doc. A/62/62 (Feb. 1, 2007); and Add.1 (Apr. 17, 2007).

71 See, in particular, *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.) 1997 I.C.J. 7 (Sept. 25), citing from the ILC Draft adopted on first reading not less than seven times, at 38-42 (paras. 47 and 50-54) and 46 (para. 58).

- the 1968-1969 Vienna Convention, the new rules were included in the Convention on the Law of Treaties—which even aggravated their “relativism”; and
- similarly, the innovations introduced by the ICJ in the law of the sea could only be consolidated into indisputable legal rules through a convoluted process involving the Third UN Conference on the Law of the Sea and, anew, the Court itself which, in the absence of agreed practical methods of delimitation, had to manufacture new rules in order to fill in the gaps in the treaty law.

It can also happen that the Court, instead of progressively developing international law, makes its best—unfortunately sometimes with some success—to impede or, at least, to slow down the process.

An example of such a rear-guard fight—fortunately a lost fight at the end of the day—is given by the Court’s odd attitude towards the notions of *jus cogens* and *erga omnes* obligations. Although sometimes accepting that “elementary considerations of humanity” could be taken into consideration as part of the applicable law<sup>72</sup> or applying “intransgressible principles of international customary law,”<sup>73</sup> it was not before 2006 that the ICJ explicitly took up the expression “peremptory norms of general international law (*jus cogens*)” and accepted that the norm prohibiting genocide was assuredly “a norm having such a character.”<sup>74</sup> Whatever the reasons for this long defiance,<sup>75</sup> it created a serious confusion since in guise of *jus cogens* the Court had recourse to the neighbouring—but distinct—notion of obligations *erga omnes*. This was in particular the case when the Court, eager to dissipate the disastrous impression created by its 1966 Judgment in the *South-West Africa* case paid lip service to the newly formalized concept of *jus cogens*,<sup>76</sup> included its famous *dictum* in its 1970 Judgment in the *Barcelona Traction* case:

72 See, e.g., *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9); see also *Reservation to Convention on Prevention and Punishment of Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 112-14 (June 27).

73 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257, at para. 79 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 199, at para. 157 (July 9).

74 *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, 2006 I.C.J. 6, 31-32, at para. 64 (Feb. 3); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Mont.)*, at para. 161 (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

75 It is difficult to help to see in that defiance the imprint of some influential Judges hostile to the very concept of *jus cogens* and to note that the belated use of this expression coincided with President Guillaume’s resignation. The French Judges who had sat on the Bench before him were as hostile to this concept as he was (and still is—see, e.g., Gilbert Guillaume, *Jus cogens et souveraineté*, in *L’ÉTAT SOUVERAIN DANS LE MONDE D’AUJOURD’HUI—MÉLANGES EN L’HONNEUR DE JEAN-PIERRE PUISSOCHET* 127-36 (2008).

76 In Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties.



... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.<sup>77</sup>

The confusion thus created was most unfortunate and it is far from sure that it is completely dissipated with the Court belated rallying both the concept and the expression of "peremptory norms (*jus cogens*)."<sup>77</sup> However, the partial "happy end" of this regrettable story shows that the World Court itself cannot stop the progress of international law when the external constraints are too strong—and, in the case of *jus cogens*, it was apparent that the notion was in keeping with the demands for a minimum degree of integration of the international community.

In a relatively proximate field, the ICJ's Judgment in *Arrest Warrant Case* shows that the Court can also slow down and maybe go as far as durably jeopardizing highly desirable evolutions in the law in force. 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>78</sup>

77 *Barcelona Traction, Light and Power Company Limited (Belg. v. Spain)*, Preliminary Objections, 1964 I.C.J. 3, 32, at paras. 33-34 (July 24). The examples given by the Court can leave no doubt that it was, in fact, dealing with peremptory norms. See also *East Timor (Port. v. Austl.)* 1995 I.C.J. 90, 102, at para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, 199, at paras. 155-157 (July 9).

78 *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)* 2002 I.C.J. 3, 24, at para. 58 (Feb. 14). For strong criticisms of this most conservative approach, see *id.* at 98, at para. 7 (dissenting opinion of Judge Al-Khasawneh); *id.* at 151, para. 23 (dissenting opinion of

The same could be said of the Court's reading of the abundant contemporary practice concerning the diplomatic protection of shareholders in the *Diallo* case:

The Court, having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of *associés* and shareholders, is of the opinion that these do not reveal—at least at the present time—an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.<sup>79</sup>

Apparently it would be preferable for the progress of international law that the Court refrains from “carefully examining” the practice ... But, at least, in its 2007 Judgment (and contrary to its 2002 “careful examination of the practice”), it took some care to expressly preserve the possibility of an evolution.<sup>80</sup>

There can be no doubt that when such a stark halt is put to an on going trend, the best way to neutralize the Court “negative law-making” is for the states to adopt a treaty going in the opposite direction. This was what happened, for example, after the PCIJ Judgment in the *Lotus* case in 1927. It is well known that the most unfortunate motivation of that Judgment gave rise to bitter doctrinal debates<sup>81</sup> which have somehow concealed the more concrete issue concerning the criminal jurisdiction of states in case of collision in the high seas. In this respect, the Court concluded that “[t]he conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.”<sup>82</sup> While not a *non-liquet* properly said, since the Court deduced from this first conclusion that “[i]t is therefore a case of concurrent jurisdiction,”<sup>83</sup> this was not a very welcomed solution from practical or political points of view. Therefore, Article 1 of the 1952 Brussels Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or other Incidents of Navigation decided that:

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

Judge *ad hoc* Van Den Wyngaert). For a less critical approach, see *id.* at 87-88 at paras. 80-85 (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal).

79 Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objections, at para. 89 (May 24, 2007), available at <http://www.icj-cij.org/docket/files/103/13856.pdf>.

80 By stressing that its finding is only valid “at the present time.”

81 See Alain Pellet, *Lotus que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour mondiale*, in *L'ÉTAT SOUVERAIN DANS LE MONDE D'AUJOURD'HUI—MÉLANGES EN L'HONNEUR DE JEAN-PIERRE PUISSOCHET* 215-30 (2008).

82 1927 P.C.I.J. (ser. A) No. 10, at 30 (Sept. 7).

83 *Id.* at 31.

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.<sup>84</sup>

In that case, the “*referendum*” was negative and the Court’s try was not scored.

In his tribute to Judge Oda, Michael Reisman wrote that “[i]n domestic courts, and certainly in the United States, contingent lawmaking competences are accepted as legitimate, if not mandatory, functions of the courts concerned; the quality of the work of the courts engaged in this function is, in large part, judged by the quality of its legislative creativity. However, these various courts operate in domestic political contexts in which this contingent judicial lawmaking is accepted.”<sup>85</sup> While this view does not square with the continental tradition where courts and tribunals are supposed<sup>86</sup> to be “the mouth that pronounces the words of the law;”<sup>87</sup> it comes as a surprise that, by contrast, the learned author does not accept that international judicial bodies and, in the first place, the ICJ, enjoy a measure of “legislative creativity.”

With respect, such a (reasonable) law-making power is, on the contrary, particularly indispensable in a highly decentralized society as is the international society,<sup>88</sup> where the competence to make the law is shared between a great number of actors—mainly the more than 190 existing sovereign states, but also in a lesser measure, international governmental and non-governmental organisations, and, more generally, private actors.<sup>89</sup> In such a society, the adjustment of the law to new needs is highly uncertain and could be made impossible for a very long time, during which the uncertainties of the inappropriate legal rules or the challenges directed against them could be at the origin of serious inter-states disputes. It is in these kinds of situations that an adaptation of the law to the new needs—or a clear supplement to existing too wide principles—by an international court or tribunal can be most effective and appropriate.

And this does not go without some paradox. The international society is no longer a society without a judge (as it used to be); however, it remains that “[i]n the international field, the existence of obligations that cannot in the last resort be enforced by

84 May 10, 1952, 439 U.N.T.S. 233, 235.

85 Reisman, *supra* note 3, at 63.

86 From the point of view of the present writer, this supposition is widely fictitious.

87 « La bouche qui prononce les paroles de la loi » Montesquieu, *DE L'ESPRIT DES LOIS*, livre XI, chap. VI, para. 49—*translated in* CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989).

88 W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 *AM. J. INT'L L.* 82 (2003); *see also* Reisman, *supra* note 2, *passim*.

89 “As the, so-called, ‘New Haven School of International Law’ argues, the process of international lawmaking involves the pressures by representatives of various interest groups and participants in the decision making process.” Jonathan I. Charney, *International Lawmaking—Article 38 of the ICJ Statute Reconsidered*, in *NEW TRENDS IN INTERNATIONAL LAWMAKING—INTERNATIONAL ‘LEGISLATION’ IN THE PUBLIC INTEREST* 171 n.2 (Jost Delbrück ed., 1997).

any legal process, has always been the rule rather than the exception.”<sup>90</sup> As a result, law-making by the ICJ is highly chancy and uncertain; it will only be possible on a consensual basis and nothing can guarantee that it will be in a position to usefully exercise its secondary—but important—function of progressively developing international law when needs be. However, this inconvenience must not be exaggerated: this law-making role is only necessary when a dispute arises between states as to the existence, the scope or the content of a rule and, in conformity with Article 38(1) of its Statute, the Court is available to decide on such disputes. Moreover, even though the Court’s *dicta* and findings as to the content of the legal rules it applies are but a milestone in international law-making, the very scarcity of its Judgments or Advisory Opinions make them exceptionally authoritative. As a result, whatever legal theories and doctrinal objections, the World Court probably is the best and most efficient organ capable of adapting legal rules to the evolving needs of the international community. Let me just express the hope that it does it less shyly in the future than it has done all these past years, and thus revive the traditional uninhibited approach of the PCIJ and of the pre-1970s present Court.

90 South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. 6, 46, para. 86 (July 18).