

# 1. The Development of International Law by the International Court of Justice

*Christian J. Tams*

Do courts make law, or at least develop it? Should they? Can they? If so, how? These are big questions for any developed system of law. They touch the heart of the nature and role of the judicial function: the normative question, and they have been debated for centuries. In his *De l'esprit des lois*, Montesquieu adopted a cautious approach. In his view, judges were called upon to merely apply the law, which others had created – implementing the legislator's will, they were no more than a mouthpiece: “la bouche qui prononcent les paroles de la loi”.<sup>1</sup> Others take a very different position. In England much of the law was developed by judges deciding individual cases, and it is from the principles underlying their decisions that a body of common law emerged: English judges are clearly more than mouthpieces. In the United States, Charles Evans Hughes, who sat on both the US Supreme Court and the PCIJ, famously noted that “the US Constitution is what the judges say it is”,<sup>2</sup> strongly suggesting that judges, having at one point received the constitution, had then seized control of it.

This wider discourse on the law-making potential of courts forms the backdrop to this contribution, which addresses the development of a particular body of law – *viz.* international law – and the influence of a particular international court – *viz.* the International Court of Justice (ICJ), including that of its predecessor, the Permanent Court of International Justice (PCIJ).<sup>3</sup> However, the views of Montesquieu, Hughes and others

---

*This contribution is based on two talks delivered at La Sapienza, Rome, on 21/22 May 2015, as part of a series of lectures organised in honour of Professor Gaetano Morelli. While footnotes have been added, the format of the oral presentation has largely been retained. As the lectures, so this contribution offers a rather pragmatic, 'down to earth', assessment of the World Court's role as an agent of legal development – a pragmatic assessment that does not aim to rival the rigour of Professor Morelli's scholarship.*

*The author would like to thank the organisers of the lecture series, Professors Enzo Cannizzaro, Paolo Palchetti and Beatrice I. Bonafè, for the invitation, and Gail Lythgoe (University of Glasgow) for valuable research assistance.*

<sup>1</sup> Charles Louis de Secondat Baron de Montesquieu, *De l'esprit des lois*. “Mais les juges de la nation ne sont, comme nous avons dit, que la bouche qui prononce les paroles de la loi ; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur”, Book XI, chapter 6.

<sup>2</sup> “We are under a Constitution, but the Constitution is what the judges say it is”, C.E. Hughes, *Speech to the Chamber of Commerce*, 139.

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

provide the backdrop only. They allow us to appreciate the extreme positions: that of judges as mere mouthpieces versus judges in control of law-making. But neither of these extreme positions reflects the reality within international law. The purpose of this contribution is to present a more accurate picture of the ICJ's influence on the development of international law – one that respects the special features of the international legal order and the particular features of the Court's position in it.

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

## **1. Setting the stage: three basic assumptions**

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

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

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

The idea that the Court cannot legislate is fairly straightforward, and in view of the regular references to “judicial law-making”, it is worth putting in a straightforward manner: the ICJ Statute views the Court as an agent, not of legal development let alone law-making, but of dispute settlement. Pursuant to Article 59 of the ICJ Statute, the Court's decisions are only binding between the parties and only in respect of the particular dispute.<sup>6</sup> International law does not envisage any theory of precedent, and still less does it accord ICJ decisions any general legal validity. Quite to the contrary, pursuant to Article 38(1)(d),

---

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

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

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

ICJ are but “subsidiary means for the determination of rules of law”, on the same par as writings of renowned publicists.<sup>7</sup> In light of these provisions, it is clear that the Court’s Statute does not envisage the Court to make law. The ICJ itself has made the point frequently, most clearly in the *Nuclear Weapons* opinion, where it considered it to be “clear that the Court cannot legislate”<sup>8</sup> and further added, with echoes of Montesquieu, that it “states the law and does not legislate”.<sup>9</sup>

This is not the end of the matter, though.<sup>10</sup> Even in the absence of formal law-making powers, there is room for influential judicial contributions to the process of legal development, and such contributions it seems to have made regularly. A quick glance at the textbook literature, or at International Law Commission (ILC) Yearbooks, is sufficient to understand that ICJ pronouncements are credited with having clarified or shaped the law on numerous points and are drawn upon as authority for general propositions about the state of the law, outside the case in which they were put forward. Who could envisage writing about diplomatic protection without mentioning *Barcelona Traction*?<sup>11</sup> Who would take seriously a book or an article on legal personality of non-State actors that did *not* mention the *Reparations* opinion?<sup>12</sup> It looks as if judicial dicta are simply too useful to be neglected; very often, they are “beacons of orientation”<sup>13</sup> in our quest for legal clarity. The *Nuclear Weapons* opinion, interestingly, affirms this. In the sentence immediately following its firm claim that it “states the law but does not legislate” the Court said: “This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend”.<sup>14</sup> And it is precisely by specifying the law that the Court can contribute to legal development. In many instances the law requires to be explained, situated and interpreted before it is “pronounced”.<sup>15</sup>

---

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

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

<sup>9</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 9, 18.

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

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

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

<sup>13</sup> Berman, *The ICJ as an Agent of Legal Development*, 21.

<sup>14</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 9, para. 18.

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

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

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

This ambiguity could easily be addressed if law-making and legal development were two different things. This in fact is often claimed. Many commentators are careful to distinguish between legal development on the one hand (which is considered acceptable), and law-making on the other (which is not a function of courts). By way of example, former Judge and President of the ICJ, José María Ruda in accepting legal development draws a clear line:

“the word ‘development’ stands for the Court’s contribution to the interpretation and application of *existing* rules of international law and not to the establishment of new rules. The work of any court, be it national or international, consists of the interpretation and application of existing law *and not the creation of new law*.”<sup>16</sup>

Whilst this approach is appealing in its simplicity, it is difficult to maintain in practice. In the day-to-day judicial “business”, Judge Ruda’s distinction between interpreting existing rules (acceptable) and creating new law (not acceptable) easily becomes blurred.<sup>17</sup> One of Ruda’s colleagues, Judge Alvarez, made the point more than six decades ago when noting that “in many cases it is quite impossible to say where the development of law ends and where its creation begins”.<sup>18</sup> To illustrate, in the recent *Jurisdictional Immunities case*,<sup>19</sup> was it “legal development” or “law-making” when the ICJ determined that the territorial tort exception does not apply to German armed forces? Is it legal development or law-making to say *jus cogens* does not trump state immunity? Or, perhaps more interestingly, would it have been legal development or law-making for the court to say that *jus cogens* did in fact trump immunity? Other examples prompt the same question. When the Court decided that the UN had legal personality was it engaged in law-making or legal development?<sup>20</sup> In “discovering” the concept of obligations *erga omnes* (referring to existing rules against genocide and aggression) was the ICJ making law or engage in legal development?<sup>21</sup> Or, to come back to the field of immunities, was Court stating that the immunity of foreign ministers follows rules on personal immunity developed for heads of state and government

---

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

<sup>17</sup> It might work if the Court admitted whether it engaged in specifying, developing or even making law; but of course it tends to avoid to be drawn into such discussions. As Shahabuddeen notes, “the Court itself, like all courts but perhaps more so in view of the fact that it is adjudicating between sovereign States, takes care to avoid expressions suggestive of judicial law-making; it prefers the use of terms indicating that all that is involved is a working out of the true meaning of existing legal principles”: *supra* note 6, 90.

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

<sup>19</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgement, 3 February 2012, ICJ Reports (2012) 99.

<sup>20</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, *supra* note 13, para. 185.

<sup>21</sup> *Barcelona Traction*, *supra* note 12, paras 33-34.

law-making or legal development?<sup>22</sup> And finally, did the Court in dynamically interpreting a treaty, for example the Vienna Convention on Consular Relations in the various death penalty cases, become creative of law?<sup>23</sup>

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

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

This leads us to the third assumption, which situates the Court's contribution – whatever it is called – within a wider context, and which helps address the ambiguity between law-making and legal development. A wider context is crucial to understanding its role precisely because the Court has no formal legislative mandate. Judicial dicta from the World Court can be relevant contributions but outside the specific case in which they were made, they have no binding force. Judicial dicta are not an autonomous source of law. Precisely because it is not binding outside the specific dispute, an ICJ pronouncement needs to persuade to have value, hence judgments have been described as "persuasive precedents".<sup>25</sup> Constrained by Articles 59 and 38(1)(d) of the Statute, the ICJ does not make law by *fiat*; it advances normative propositions about the scope of a treaty or the state of general international law. The *Jurisdictional Immunities* judgment binds Italy in relation to the specific measures at stake in the litigation, but not beyond it. More significantly, no other State, and no other law-applier, is bound by the Court's decision; they all need to be persuaded by the strength and weight of the Court's reasoning (or convinced that they, too, could be held accountable in separate ICJ proceedings).

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

---

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

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

<sup>24</sup> Pellet, *supra* note 6, 1075.

<sup>25</sup> See e.g. Shahabuddeen, *supra* note 6, xiv.

<sup>26</sup> Berman, *supra* note 14, 20.

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

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

In other words, where the ICJ engages in legal development, it is part of a broader process. It is an agent of legal development, but one agent only, acting alongside others including the General Assembly, States and the ILC. These others will often gladly receive some normative guidance from the ICJ.<sup>29</sup> But where they do not, nothing stops them from ignoring ICJ pronouncements. The Court, to quote once more Alain Pellet, “does not have the last word”.<sup>30</sup> And precisely because this is so, anyone wanting to find out about the impact of the ICJ on legal development needs to look at the *fate* of the Court’s decisions. Section 2 does so.

## 2. Into clearer view: three field studies

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

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

Human rights law, the youngest of the three areas of study, has much to tell us about the ICJ’s potential impact. The second half of the 20<sup>th</sup> century has been the “age of rights”. It is difficult to think of a branch of international law that is as normatively dense as human rights law. If we reflect on the processes of law-making at play, we readily see that treaties have been the key instrument. The “age of rights” may have begun with a General Assembly Resolution (the celebrated Universal Declaration of Human Rights);<sup>32</sup> however, it has become an area dominated by treaties. These human treaties can be regional or universal. Some are general (such as the two Covenants,<sup>33</sup> or the main regional human rights conventions),<sup>34</sup> others are specialist, spelling out details of a particular right (such as freedom from torture),<sup>35</sup> or the rights of a particular category of right-holders (children; migrant workers, *etc.*).<sup>36</sup> While the values protected by international agreements have often

---

<sup>29</sup> See Berman, *supra* note 14, 21. In the same vein, Sir Gerald Fitzmaurice observed more than fifty years ago, “[t]he international community is peculiarly dependent on its international tribunals for the development and clarification of the law”: Fitzmaurice, *Hersch Lauterpacht – The Scholar as Judge: Part I*, 18.

<sup>30</sup> Pellet, *supra* note 8, 868.

<sup>31</sup> For a much fuller assessment, addressing thirteen different areas of international law, see chapters 3-15 in Tams, Sloan, *supra* note 6.

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

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

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

<sup>35</sup> See e.g. the 1984 Convention against Torture.

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

been affirmed in subsequent practice (which facilitates claims that human rights norms *also* apply as custom),<sup>37</sup> human rights law primarily is a law of multilateral treaties.

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

From first glance, it seems that for the purposes of our survey, the ICJ's impact has been fairly limited.<sup>38</sup> Its contributions are few and they typically concern the margins of the field. The Court quite clearly is not a human rights court, if only because the "natural claimants" in human rights proceedings – namely individuals – have no standing before it.<sup>39</sup> Conversely, multilateral human rights treaties do not really enable the ICJ to play a prominent role: of the main human rights treaties, only the Genocide Convention relies on it as the main organ for the interpretation and application of the treaty.<sup>40</sup> By contrast, other human rights treaties either do not mention it at all (such as the two 1966 Covenants) or accord it a rather limited role (such as the Racial Discrimination Convention or the Convention against Torture).<sup>41</sup> While human rights law is clearly not short of institutions, including specialised courts, it is quite rare for the ICJ to have jurisdiction over a human rights claim.

Unsurprisingly, the list of proper human rights cases before the ICJ remains short.<sup>42</sup> It has grown somewhat in recent years, as States have used (or tried to use) the Court's jurisdictional potential by lodging proceedings on the basis of, *inter alia*, the Genocide

---

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

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

<sup>39</sup> See Article 34 of the Statute of the International Court of Justice.

<sup>40</sup> See Article IX of the 1948 Genocide Convention.

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

<sup>42</sup> The subsequent discussion in significant measure draws on Simma, *supra* note 39.

Convention,<sup>43</sup> the Racial Discrimination Convention<sup>44</sup> and the Anti-Torture Convention.<sup>45</sup> However, any list drawn up remains short if measured against the dominant role of human rights in international relations.

To some extent, this is a cultural matter, and change may be underway. Bruno Simma makes this point, arguing that: “that case law with human rights elements develop[ed] in tandem with the widening and thickening of international human rights as a growth industry within post-World War II international law”. He further notes that “just as the development of human rights as a body of law and institutions at the global (UN) level took several decades to develop beyond standard-setting and extend to – still very limited – implementation, the role of the Court as an interpreter and applier of human rights law unfolded gradually and in rather meandering ways”.<sup>46</sup>

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

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

---

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

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

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

<sup>46</sup> Simma, *supra* note 39, 303-304.

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

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

<sup>49</sup> See *South-West Africa cases (second phase): South West Africa (Liberia v. South Africa)*, Judgment, 18 July 1966, ICJ Reports (1966) 6, at 47 (rejecting the idea of an *actio popularis* in general international law); and *Barcelona Traction*, *supra* note 12, at paras. 33-34 (recognising the concept of *erga omnes* obligations).

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

<sup>51</sup> *Arrest Warrant*, *supra* note 23, and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 99.



Few would doubt the relevance of these *indirect contributions* to human rights law but, in perspective, they would seem to concern the *margins* of human rights law. Certainly the routine business of human rights law (the interpretation of rights, and their application to particular settings of facts) bypasses the ICJ. Put differently, the Court has not in significant measure contributed to, say, the interpretation of particular human rights (with the possible exception of the right to be free from genocide). The interpretation of rights is a matter for the treaty bodies, for specialist courts and for special rapporteurs, which over decades have spelled out the meaning of treaty provisions. Similarly, innovation in human rights law has typically come from bodies other than the ICJ, and processes other than judicial development. When thinking of progress and development of human rights law, we may think of UN initiatives, at times pushed by the UN's main political organs (such as the General Assembly's attempts to define the scope of *privacy in the digital age*<sup>52</sup> or the Security Council's recent focus on gender mainstreaming),<sup>53</sup> at times by dedicated human rights mechanisms (such as the Human Rights Council, or special rapporteurs, e.g. in developing the law on drones).<sup>54</sup> In many instances, such initiatives have resulted in the adoption of new human rights treaties enshrining new rights, or thickened versions of existing rights. Domestic courts no doubt also play a significant role; perhaps they are indeed the *natural judges* of human rights law.<sup>55</sup> And judging from its recent project on crimes against humanity, the ILC may also assume a greater role in the future development of human rights law.<sup>56</sup> In fact, it is telling that where the Court contributes to the interpretation of human rights treaties proper, its impact is on broad, overarching issues such as extraterritorial application of treaties (in the *Wall* opinion).<sup>57</sup> But when it comes to the substance of human rights law, the core day-to-day business, multilateral treaties and their specialised treaty bodies dominate. The ICJ, by contrast, has been relatively cautious.

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

Let us compare human rights law to the law of State responsibility, a very different area in which international law has developed quite differently.<sup>58</sup> The law of State responsibility is not dominated by major multilateral treaties. It has evolved incrementally, notably through

---

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

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

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

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

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

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

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

international practice and jurisprudence;<sup>59</sup> according to Alain Pellet, it is “essentially judge-made”.<sup>60</sup> Alongside practice and jurisprudence, for nearly a century, we have seen a long-standing attempt at codification – beginning with the League’s Codification Conference, followed by the Harvard Draft, and then, after World War II, the patient efforts of the ILC, which themselves went through different phases.<sup>61</sup>

As is well known, in 2001 the ILC eventually completed the second reading of the *Articles on State Responsibility* (ASR, or Articles): a non-binding text comprising 59 provisions largely reflecting custom, and the obvious point of reference for contemporary debates about State responsibility.<sup>62</sup> As is equally well known, the ILC’s codification – following the shift initiated by Roberto Ago and others in 1963 –<sup>63</sup> has shaped our thinking about responsibility as a system of secondary rules laying down “the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom”.<sup>64</sup> In this sense, the ILC’s work has certainly (as James Crawford has noted) “encoded the way in which we think about responsibility”.<sup>65</sup>

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

The PCIJ, more specifically, was influential in laying down the fundamentals; its jurisprudence prepared the ground for the ILC’s subsequent attempt to codify the law. In judgments like *Phosphates in Morocco*, *Mavrommatis*, *Wimbledon*, *Brazilian Loans* and most

---

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

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

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

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

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

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

<sup>65</sup> Crawford, *supra* note 60, 81.

importantly, in the various stages of the *Chorzow Factory case*, the PCIJ formulated propositions that would over time come to define the law of responsibility. Three such propositions were, and remain, particularly impactful, and deserve to be mentioned briefly.

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

(ii) The second proposition derived from the PCIJ’s jurisprudence is the concept of reparation, which “immediately aris[es]”<sup>70</sup> from responsibility and which requires a responsible State to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>71</sup> Reparation, for the PCIJ, derived from “a principle of international law, and even a general conception of law”.<sup>72</sup> It was primarily to be achieved through restitution in kind, or “if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear”.<sup>73</sup> The impact of these statements has been no less than remarkable. Hardly supported by argument, they have become cornerstones of the regime of consequences of responsibility, having been relied upon to support the existence of a general duty to make reparation<sup>74</sup> and the primacy of restitution over compensation.<sup>75</sup>

---

<sup>66</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion, 4 February 1932, PCIJ Series A/B, No. 44, 24-25; *Lotus*, *supra* note 28, 24.

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

<sup>68</sup> *Treatment of Polish Nationals*, *supra* note 67, 24.

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

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

<sup>71</sup> *Factory at Chorzów (Merits)*, Judgment, 13 September 1928, PCIJ Ser. A, No. 17, 47. This was said to be an “essential principle contained in the actual notion of an illegal act”.

<sup>72</sup> *Factory at Chorzów (Merits)*, *supra* note 72, para. 29.

<sup>73</sup> *Factory at Chorzów (Merits)*, *supra* note 72, para. 47.

<sup>74</sup> See e.g. para. 1 of the commentary to Article 31, in the Commentary to the ASR, *supra* note 65: “The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów case*”.

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

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

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

The ICJ's work, too, has been influential, but its impact, reflecting the different environment, has typically been by a different mode. At least for the last four decades,<sup>80</sup> the ICJ has decided State responsibility cases against the backdrop of the ILC's work. Rather than *discovering* general principles of responsibility (as the PCIJ had done), the ICJ, from the 1970s onwards, operated within the ILC's framework. The world court went *from pioneer to junior partner* during this time and its impact became more specific.

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

There are three different modalities to this normative ping-pong. The first is best illustrated by the number of ICJ cases raising fairly novel responsibility issues that would be taken up in the ILC's work. An example of this is the *Tebran Hostages* cases where the Court had to assess to what extent essentially *private conduct* (the occupation of the US embassy by

---

<sup>76</sup> *Affaire des Concessions Mavrommatis en Palestine*, Judgment, 30 August 1924, PCIJ Ser. A, No. 2, 12.

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

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

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

<sup>80</sup> As regards early ICJ pronouncements preceding the ILC's re-conceptualisation of responsibility see notably *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, 9 April 1949, ICJ Reports (1949) 4 and 244. The *Reparations* opinion (*Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports (1949) 174) set the stage for the subsequent development of a regime of responsibility of international organisations (which would eventually result in the adoption, in 2011, of a set of *Draft Articles on the Responsibility of International Organizations*, UN doc. A/66/10, at 54 *et seq.*); as it does not concern State responsibility, it is left to a side here.

students and militants) was attributable to a State.<sup>81</sup> In the view of the Court, the conduct could be attributable if the State had approved, endorsed and *exploited* it. The ILC's subsequent work essentially *acknowledged and adopted* the ICJ's position, which now is reflected in Article 11 ASR.<sup>82</sup>

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

Finally, the ICJ's influence can also be felt at a more granular level. There are many instances where ICJ pronouncements delivered clarity regarding the scope of provisions that everyone agreed would feature in the ILC's text but which still required some clarification. The famous debate about State responsibility for the conduct of foreign rebel movements illustrates this perfectly.<sup>87</sup> The ICJ had put forward a relatively narrow rule of attribution in the *Nicaragua* case, requiring control over the particular acts committed by rebels.<sup>88</sup> This was challenged by the ICTY Appeal Chamber in *Tadić*,<sup>89</sup> prompting significant debate about the requirements of “overall” *versus* “particular” control. Faced with the challenge, the ILC and ICJ responded in the 2001 Articles and the 2007 *Bosnian Genocide* case, respectively: without much serious engagement, they both robustly dismissed the ICTY's *Tadić* formulation.<sup>90</sup> As a result, it would seem far-fetched today to suggest that overall control is sufficient, under the general rules, to justify attribution of private

---

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

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

<sup>83</sup> See Crawford, *supra* note 60, 80-81.

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

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

<sup>86</sup> See Article 25 of the ASR, whose wording was adjusted to “fit” the ICJ's pronouncements in *Gabčíkovo* (see e.g. at para. 14 of the commentary).

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

<sup>88</sup> *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 51, para. 115.

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

<sup>90</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 44, paras. 402-406; and para. 5 of the commentary to Article 8 of the ASR.

conduct.<sup>91</sup> Working together, when faced with dissent, the ILC-ICJ “empire has struck back”.

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

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

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

During the course of the 20<sup>th</sup> century, the adjustment of the law of the sea has largely been effected through multilateral codification conferences, begun by the League of Nations, and then through the major UN-sponsored conferences on the law of the sea.<sup>93</sup> Unlike with respect to State responsibility, these exercises in codification have resulted in many international agreements, among which the Conventions of 1958<sup>94</sup> and 1982 stand out.<sup>95</sup> As a result, just as human rights law, the modern law of the sea is heavily “treatified”; in addition (and again, like human rights law), it has become heavily institutionalised.<sup>96</sup> Among its main actors are specialised international organisations like the International Maritime Organization (IMO) or Food and Agriculture Organization (FAO); special departments and working groups within the UN (DOALOS, the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, *etc.*); and conferences of treaty parties established under the 1982 Convention, and regional treaties. Importantly, for present purposes, the 1982 Convention also set up special dispute settlement institutions such as International Tribunal for the Law of the Sea (ITLOS)<sup>97</sup>

---

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

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

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

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

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

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

<sup>97</sup> See UNCLOS, Annex VI.

and the Continental Shelf commission<sup>98</sup> and a framework for international arbitration.<sup>99</sup> What role then is there for the ICJ in this complex regulatory arrangement?

The picture differs again from the legal regimes of both human rights law and State responsibility. Unlike in the field of human rights, the ICJ has exercised a significant influence on the law of the sea. But unlike in the field of State Responsibility, its influence has been felt mainly in one particular segment, or chapter, of the Law of the Sea – the law of maritime delimitation.<sup>100</sup> In a recent article, Bernardo Sepulveda Amor remarked that the Court's case law "has had a major impact on the clarification of the principles and rules of delimitation".<sup>101</sup> Perhaps, in fact, one can go further. The law on maritime delimitation has, for better or worse, evolved very much along the (shifting) lines of ICJ jurisprudence: initially, in *North Sea Continental Shelf*, with an emphasis on equitable principles,<sup>102</sup> then gradually, in a string of cases, moving toward the three-step process characteristic of the contemporary approach of delimitation, based on a provisional equidistance line, which is adjusted if equity (or varying coast lengths) so require.<sup>103</sup>

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

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

---

<sup>98</sup> See UNCLOS, Annex II.

<sup>99</sup> See UNCLOS, Annex VII and VIII.

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

<sup>101</sup> Sepulveda Amor, *The International Court of Justice and the Law of the Sea*, 8.

<sup>102</sup> *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgement, 20 February 1969, ICJ Reports (1969) 3.

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

<sup>104</sup> Crawford, *supra* note 60, 81.

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

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

Secondly, when looking to the uses and abuses of the sea (and their regulation), the ICJ has not been very influential either. As regards living resources, the Court in the 1973/1974 *Icelandic Fisheries cases* toyed with the concept of fisheries zones,<sup>111</sup> but once the 1982 Convention sanctioned the more comprehensive concept of an EEZ, fisheries zones lost much of their appeal.<sup>112</sup> Similarly, there is no significant ICJ jurisprudence detailing the scope and limits of marine scientific research, on deep seabed mining, on marine environmental law or on pollution. The prompt release of vessels is heavily regulated and subject to the special procedure of Article 292 of the 1982 Convention – but that special procedure establishes the competence of ITLOS.<sup>113</sup>

Finally, it is worth noting that World Court bearing on the law of the sea have on occasion been overruled. As noted above, *overruling* is not a common phenomenon in international law; but the law of the sea yields the most prominent example: the 1952 Brussels Collision Convention reversed the *Lotus* ruling on jurisdiction.<sup>114</sup> A number of other ICJ rulings have not fared much better: the Court's acceptance, in the *Anglo-Norwegian Fisheries case*, of straight baselines under exceptional circumstances (essentially for coastlines as unusual as

---

<sup>106</sup> See Treves, *supra* note 93, paras. 8-9.

<sup>107</sup> Nelson, *Exclusive Economic Zone*, 2.

<sup>108</sup> Nelson, *supra* note 108, 6.

<sup>109</sup> Namely the Commission on the Limits of the Continental Shelf: see UNCLOS, Annex II.

<sup>110</sup> Article 136 UNCLOS.

<sup>111</sup> See the judgments in the *Fisheries Jurisdiction cases: Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Judgment, 25 July 1974, ICJ Reports (1974) 3, 23-24, 175, 192.

<sup>112</sup> As Rothwell notes, "many previous claims to exclusive fishery zones have now been subsumed into claims to 200nm EEZs": Rothwell, *Fishery Zones and Limits*, para. 19.

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

<sup>114</sup> See references in n. 27 and generally, *supra*, I.3.



that of Norway)<sup>115</sup> was generalised in Article 4 of the 1958 Convention on the Territorial Sea and Article 7 of the 1982 Convention, and is now applied liberally by a significant number of States.<sup>116</sup> And as noted above,<sup>117</sup> the 1982 Convention's recognition of the EEZ superseded the ICJ's earlier reference to fisheries zones.

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

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

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

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

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

---

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

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

<sup>117</sup> See text at n. 111, 112.

<sup>118</sup> Cf. O'Connell, *International Law*, Vol. I, 31.

<sup>119</sup> Hughes, *supra* note 2.

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

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

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

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

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

---

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

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

<sup>123</sup> *Supra*, section 2.2.

<sup>124</sup> On which see already *supra*, section 2.2., text at n. 76-79.

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

<sup>126</sup> For details see Gowlland-Debbas, *The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties*, 25.

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

<sup>128</sup> See the detailed analyses offered by Kress, *The International Court of Justice and the “Principles on the Non-Use of Force”*, 561; and Gray, *The International Court of Justice and the Use of Force*, 261.

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

As regards the law of immunities, recent cases such as *Arrest Warrant* and *Jurisdictional Immunities* have clarified highly contentious questions relating to potential immunity exceptions in case of grave breaches.<sup>130</sup> However important these contributions to legal development are, these are small aspects of a particular branch of law and the ICJ's involvement in the wider area has been limited (and has come late).<sup>131</sup> The law of immunities has been well established through other law-making process: private codification initiatives, regional treaties, more latterly through the UN-sponsored codification process, and most distinctively, through centuries of domestic decisions and statutes.<sup>132</sup> The development of rules on State succession reveals a similar pattern of fairly *niche* judicial contributions to a process of legal development dominated by other actors and methods.<sup>133</sup> The ICJ in the *Gabčíkovo* judgment *ratified* the principle of automatic succession to territorially-grounded treaties;<sup>134</sup> and in the *Croatian Genocide* case the ICJ may have allowed a more flexible approach to declarations of succession.<sup>135</sup> Both are important, and at least the latter would seem to be quite controversial.<sup>136</sup> However, on foundational questions of the law of State succession – automaticity versus clean slate, special claims of newly-independent States, continuity versus identity, and modes of succession – the Court has contributed very little.<sup>137</sup> Answers to these questions have been found in international practice (often *ad hoc*), in codification attempts (with limited impact), and in depositary practice.

---

<sup>129</sup> *Supra*, section 2.3.

<sup>130</sup> *Arrest Warrant*, *supra* note 23, at paras. 52–61; *Questions relating to the Obligation to Prosecute or Extradite*, *supra* note 23, at paras. 81–102.

<sup>131</sup> See O'Keefe, *Jurisdictional Immunities*, 107.

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

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

<sup>134</sup> *Gabčíkovo-Nagymaros Project*, *supra* note 86, at para. 123. See Article 12 of the 1978 Vienna Convention on the Succession of States in respect of Treaties, UNTS 1946, 3.

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

<sup>136</sup> Zimmermann, *supra* note 136, 66-68.

<sup>137</sup> Hence Zimmermann’s claim that the Court had “Avoid[ed] Principled Answers to Questions of Principle”: Zimmermann, *supra* note 136, 53.

The examples could be multiplied: United Nations law, international economic law, international humanitarian law – in all these areas, and many more, ICJ decisions have had some impact, but they have typically affected rather specific, discrete aspects of the law.

*Exploring linkages.* Finally, it is possible to distinguish a third modality of the ICJ’s work. It, too, consists of contributions to specific aspects of the law in a given area, so it could be seen as a sub-set of the second category of “targeted influence”. It is peculiar, though, in that the Court’s main contribution lies in clarifying the relationship between specialised branches and general international law, *viz.* in exploring linkages. The brief discussion of human rights law offered above, with its focus on the Court’s “indirect contributions”, is indicative: through its jurisprudence, the Court has sought to “integrat[e] [a specialised] branch of the law into both the fabric of general international law and its various other branches”.<sup>138</sup> In other areas, too, and especially those that seemed initially to follow their own path, this exercise in *mainstreaming* seems to have been the Court’s main contribution to legal development. As regards international environmental law, the Court is e.g. said to have contributed, through a number of broad statements of principle, “to the consolidation of international environmental law as a discipline” and to shaping “the relationship between environmental law and general concepts”.<sup>139</sup> In the same vein, commentators have praised the Court for having “powerfully reconceptualized [international humanitarian law] in a humanitarian spirit”, while noting that its “contribution to the detailed elaboration of this field of law remains limited”.<sup>140</sup> A similar argument could probably be made with respect to international investment law, whose rapid rise to relevance as a separate discipline owes a lot to the ICJ’s restrictive jurisprudence on shareholder protection (*Barcelona Traction*) and whose distinct character the Court affirmed in the *Diallo case*.<sup>141</sup> In all three areas, the Court has been seen as a gatekeeper exploring linkages between hitherto *exotic*<sup>142</sup> sub-disciplines and general aspects of international law.

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

Finally, an important point must be re-emphasised at this point. It has been mentioned earlier by way of scene-setting but as a substantive proposition it deserves to be explored further. As is clear from the three field studies set out above, while few areas of international law are entirely unaffected by the Court’s jurisprudence, in none of the relevant areas of international law does the Court *control* the process of legal development. There is no equivalent, in international law, to the US Constitution (which “is what the judges say it is”).<sup>143</sup> The ICJ’s impact cannot be compared either to that of specialised courts or tribunals, which “systematic[ally] [contribute to] norm-elaboration” and in whose

---

<sup>138</sup> As put by Simma, *supra* note 39, 323–324. See *supra*, section 2.1.

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

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

<sup>141</sup> For details see Parlett, *supra* note 126, 99-105; Juratovich, *The Diplomatic Protection of Shareholders*, 281; Tams, Tzanakopoulos, *Barcelona Traction at 40: The ICJ as an Agent of Legal Development*, 781.

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

<sup>143</sup> Cf. Hughes, *supra* note 2.

understanding “the resolution of the underlying conflict between the parties to litigation” has been said to “tak[e] a ‘back seat’ to the courts’ norm-advancing mission”.<sup>144</sup> The ICJ is a general court with potentially unlimited jurisdiction, but precisely because its contributions are so wide-spread, the Court does not control any particular area of international law in the way the regional human rights courts control the development of *their* treaties. By the same token, the Court’s contributions, even in areas like State responsibility or diplomatic protection where it has had a great deal of influence, do not “mould and modify”<sup>145</sup> the law in the same way that the WTO Appellate Body shapes the interpretation of the covered agreements or investment tribunals (seen as an aggregate) develop standards of investment protection. While making relevant contributions for nine decades, the PCIJ and the ICJ have always been part of a broader process of legal development. The World Court has always been one agent among many.

#### **4. An attempt at rationalisation: three factors shaping the Court’s influence**

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

##### **4.1. Opportunity: the number of cases**

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

This does not seem particularly controversial, and yet it is rare to find the implications on the relevance of courts as law-formative agencies spelled out clearly. Boyle and Chinkin formulate the basic point with refreshing clarity when noting that “[t]he impact of international courts and tribunals on the evolution of international law largely depends upon how many cases are brought before them”.<sup>147</sup> It explains that, over time, the Court

---

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

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

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

<sup>147</sup> Boyle, Chinkin, *supra* note 9, 269. Lissitzyn had made the same point in 1951: “The performance of the Court’s law-developing function [...] depends on the member and organs of the international community which the Court serves. They must [...] give the Court the opportunity to function by submitting disputes or requests for opinion to it”: Lissitzyn, *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*, 29.

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

“the occasional and adventitious nature of the ICJ’s caseload has the almost automatic consequence that the Court is unlikely to be given the opportunity to revisit successively particular areas of substantive international law.”<sup>151</sup>

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

#### **4.2. Receptiveness: the different *designs* of areas of law**

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

---

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

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

<sup>150</sup> See e.g. Kress, *supra* note 141, 296, who suggests the Court’s limited impact on the details of international humanitarian law “is, of course, due primarily to the fact that the occasions on which the Court has had the opportunity to pronounce on questions of the law of armed conflicts have been fairly limited in number”.

<sup>151</sup> Berman, *supra* note 14, 20.

<sup>152</sup> Boyle, Chinkin, *supra* note 9, 269, hint at one particularly relevant aspect when suggesting that, in addition to mere numbers, the impact of a court depends on whether cases brought before it “rais[e] new and contested legal issues”.

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

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

*Timing.* There is also a temporal dimension: the *receptiveness* of an area may change over time. This second aspect concerns the stage of legal development at which the Court becomes involved in the process. Codification plays a major role in this respect. Both the PCIJ and ICJ have often been influential when pronouncing on areas of law in an early stage of their development (which are more likely to raise “new and contested legal issues”),<sup>154</sup> or during long-term codification attempts. In certain fields, the Court has been able to engage in on-going debates and decide them by throwing its weight behind a particular approach. The ICJ's continued impact on State responsibility was facilitated by the fact that over decades, this body of law was “under construction”. As regards the law of territory, a handful of competing principles – *uti possidetis*, self-determination, *terra nullius*, effectiveness, etc. – would require to be balanced: this, perhaps, was a suitable task for a Court, which could establish a reputation as an authoritative guide to the law.<sup>155</sup> By contrast, where the Court faces completed codification attempts, its role is likely to be more limited: hence its rather marginal role in relation to international humanitarian law (which by the time of *Nicaragua* had seen a century of permanent codification attempts) and the law of the sea (equally shaped by successive waves of deliberate multilateral treaty-making).<sup>156</sup>

### 4.3. Interaction: competition and cooperation in legal development

---

<sup>153</sup> See further Berman, *supra* note 14, 21-22.

<sup>154</sup> Boyle, Chinkin, *supra* note 153, 269.

<sup>155</sup> See Shaw, *The International Court of Justice and the Law of Territory*, 176.

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

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

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

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

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

\*\*\*

---

<sup>157</sup> Cf. Hughes, *supra* note 2.

<sup>158</sup> *Supra*, section 2.2.

<sup>159</sup> See Shaw, *supra* note 128, 176.

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

<sup>161</sup> A similar point can be made with respect to the Court's acceptance, in the *Bosnian Genocide case*, of ICTY findings (as long as these concerned international criminal law proper – and not rules of attribution): "the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute", Judgment of 26 February 2007, *supra* note 44, para. 403.



None of these three factors can conclusively explain why, or when, ICJ pronouncements contribute to the development of international law. However, it is submitted that they go a good way towards explaining the variable nature of the Court's impact on the development of particular areas of international law. The broader argument emerging from the discussion is that the Court's role as a law developer depends less on factors internal to its jurisprudence than on external variables: the Court is influential where it is being provided with an opportunity (repeatedly and regularly) to pronounce on a particular area of law; where its pronouncements concern areas of law receptive to judicial development; and where it faces little or no competition or has a high degree of cooperation with other agencies of legal development. Determined by these external factors, the Court's role is *context specific*. ICJ case law can be a powerful factor in some areas and of negligible influence in others.

## 5. Concluding observations

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

As this is so, it is difficult to verify or falsify Jennings and Watts' prediction that "international tribunals will in the future fulfil, inconspicuously but efficiently, a large part of the task of developing international law".<sup>162</sup> What can be said is that, compared to specialised courts and tribunals, the PCIJ's and ICJ's impact has been wider, but typically less intense. And this seems only natural: as these other courts typically engage with one regime only, their contributions are clustered on a particular area of international. By contrast, the ICJ lacks a *home turf*. It is the guardian of no particular treaty, and while it is sometimes said to be the guardian of international law, it can pursue that function only relatively rarely. This suggests that concerns about activist and robust judicial law making in international law are misplaced. With relatively few cases brought, the Court – with rare exceptions – has been denied the opportunity to mould the law through regular, sequential contributions. On the other hand, it is the only international court that can engage with international law in its entirety. The international community (one might say, adapting Sir Gerald Fitzmaurice's observation)<sup>163</sup> may no longer be *peculiarly dependent* on the Court's clarification and development of international law, but it is typically rather appreciative of it. As an agent of legal development, the World Court has been active on many fronts and occasionally "all over the place"; but for nearly a century, its jurisprudence has yielded useful "beacons, guides and orientation points",<sup>164</sup> which facilitate the everyday application of international law.

---

<sup>162</sup> See Jennings, Watts, *Oppenheim's International Law*, 41.

<sup>163</sup> Cf. Fitzmaurice, *supra* note 30.

<sup>164</sup> Berman, *supra* note 14, 21.

## Bibliography

- ABI-SAAB G., "De la jurisprudence, quelques réflexions sur son rôle dans le développement du droit international", in PEREZ GONZALES M. (ed.), *Hacia un Nuevo Orden Internacional y Europeo. Estudio en homenaje al Profesor Don Manuel Diez de Velasco Vallejo*, 19-26. Madrid: Tecno, 1993.
- ADAMS D., *Hitchhikers Guide to the Galaxy*. New York: Later Printing, 1989.
- ANDERSON D., "Prompt Release of Vessels and Crews", in *Max Planck Encyclopedia of Public International Law* ([www.mpepil.com](http://www.mpepil.com)).
- BEDI S., *The Development of Human Rights Law by the Judges of the International Court of Justice*. Oxford, Portland Oregon: Hart Publishing, 2007.
- F. BERMAN, "The ICJ as an 'Agent' of Legal Development", in TAMS C.J., SLOAN J. (eds), *The Development of International Law by the International Court of Justice*, 7-21. Oxford: Oxford University Press, 2013.
- BOYLE A., CHINKIN C., *The Making of International Law*. New York: Oxford University Press, 2008.
- CAHIER P., "Le rôle du juge dans l'élaboration du droit international", in J. MAKARCZYK (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, 353-366. The Hague: Kluwer Law International, 1996.
- CASSESE A., "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", in *European Journal of International Law*, 18 (2007): 649-668.
- CONDORELL L., "L'autorité de la décision des juridictions internationales permanentes", in SOCIÉTÉ FRANÇAISE DE DROIT INTERNATIONAL (ed.), *Les juridictions internationales permanentes. Colloque de Lyon*, 277-313. Paris: Pedone, 1987.
- CRAWFORD J., *The International Court of Justice and the Law of State Responsibility*, in C.J. TAMS, J. SLOAN (eds), *The Development of International Law by the International Court of Justice*, 71-86. Oxford: Oxford University Press, 2013.
- CRAWFORD J., *State Responsibility: The General Part*. Cambridge: Cambridge University Press, 2013.
- CROOK J., "The International Court of Justice and Human Rights", in *Northwestern Journal of International Human Rights* 1 (2004): 1-50.
- DE HOOGH A., "Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia", in *British Yearbook of International Law* 72 (2001): 255-292.
- FIETTA S., CLEVERLY R., *A Practitioner's Guide to Maritime Boundary Delimitation*. Oxford: Oxford University Press, 2015
- FITZMAURICE G., "Hersch Lauterpacht-The Scholar as Judge: Part I", in *British Yearbook of International Law* 37 (1961): 1-72.
- FITZMAURICE M., "The International Court of Justice and International Environmental Law", in C.J. TAMS, J. SLOAN (eds), *The Development of International Law by the International Court of Justice*, 353-372. Oxford: Oxford University Press, 2013.
- JENNINGS R.Y., WATTS A., *Oppenheim's International Law*, vol. I/1. London: Longman, 1992.
- JURATOVICH B., "The Diplomatic Protection of Shareholder", in *British Yearbook of International Law* 81 (2010): 281-323.
- GOY R., *La Cour Internationale de Justice et les Droits de l'Homme*. Bruxelles: Bruylant, 2002.
- GOWLLAND-DEBBAS V., "The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties", in C.J. TAMS, J. SLOAN (eds), *The Development of International Law by the International Court of Justice*, 25-52. Oxford: Oxford University Press, 2013.
- GRAY C.G., "The International Court of Justice and the Use of Force", TAMS C.J., SLOAN J. (eds), *The Development of International Law by the International Court of Justice*, 237-260. Oxford: Oxford University Press, 2013.

GUILLAUME G., “The Use of Precedent by International Judges and Arbitrators”, in *Journal of International Dispute Settlement* 2 (2011): 5-23.

HAFNER G., “Historical Background to the Convention” in O’KEEFE R., TAMS C.J., TSANAKOPOULOS A. (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, 1-12. Oxford: Oxford University Press, 2013.

HARRISON, J. *Making the Law of the Sea*. Cambridge: Cambridge University Press, 2011.

HERNANDEZ G., SLOAN J., “The Role of the International Court of Justice in the Development of the Institutional Law of the United Nations”, in C.J. TAMS, J. SLOAN (eds), *The Development of International Law by the International Court of Justice*, 197-234. Oxford: Oxford University Press, 2013.

HIGGINS R., *Problems and Process. International Law and How We Use It*, Oxford: Oxford University Press, 1995.

HIGGINS R., “The International Court of Justice and Human Rights”, in *Leiden Journal of International Law* 20 (2007): 745-751.

KIRCHNER A., “Law of the Sea, History of”, in *Max Planck Encyclopedia of Public International Law* ([www.mpepil.com](http://www.mpepil.com)).

KRESS C., “The International Court of Justice and the ‘Principles on the Non-Use of Force’”, in WELLER M. (ed.), *The Oxford Handbook on the Use of Force and International Law*, 561-604. Oxford: Oxford University Press, 2015.

LACHS M., “Some Reflections on the Contribution of the International Court of Justice to the Development of International Law”, in *Syracuse Journal of International and Comparative Law* 10 (1983): 239-278.

LAUTERPACHT H., *The Development of International Law by the Permanent Court of International Justice*. London: Pinter, 1934.

LAUTERPACHT H., *The Development of International Law by the International Court*. Cambridge: Cambridge University Press, 1958.

LISSITZYN O., *The International Court of Justice: Its Role in the Maintenance of International Peace and Security*. New York: Carnegie Endowment for International Peace, 1951.

LOWE V., TZANAKOPOULOS A., “The Development of the Law of the Sea by the International Court of Justice”, in C.J. TAMS, J. SLOAN (eds), *The Development of International Law by the International Court of Justice*, 177-193. Oxford: Oxford University Press, 2013.

MERON T., *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press, 1989.

MILANOVIC M., “State Responsibility for Genocide: A Follow-Up”, in *European Journal of International Law* 18 (2007): 669-694.

NELSON D., “Exclusive Economic Zone”, in *Max Planck Encyclopedia of Public International Law* ([www.mpepil.com](http://www.mpepil.com)).

O’CONNELL D.P., *International Law*, vol I. London: Stevens, 1970.

O’KEEFE R., “Jurisdictional Immunities”, in TAMS C.J., SLOAN J. (eds), *The Development of International Law by the International Court of Justice*, 107-148. Oxford: Oxford University Press, 2013.

PARLETT K., “Diplomatic Protection and the International Court of Justice”, in TAMS C.J., SLOAN J. (eds), *The Development of International Law by the International Court of Justice*, 87-105. Oxford: Oxford University Press, 2013.

PELLET A., “Shaping the Future of International Law: The Role of the World Court in Law-Making”, in ARSANJAN M. I *et al.* (eds), *Looking to the Future. Essays on International Law in Honor of W. Michael Reisman*, 1065-1083. The Hague: Martinus Nijhoff, 2010.

PELLET A., “Some Remarks on the Recent Case Law of the International Court of Justice on Responsibility Issues”, in *International Law – A Quiet Strength. Miscellanea in memoriam Geza Herczegh*, 111-133. Budapest: Pazmany Press, 2011.

PELLET A., “Commentary to Article 38”, in ZIMMERMANN A., OELLERS-FRAHM K., TOMUSCHAT C., TAMS C.J. (eds.), *The Statute of the International Court of Justice. A Commentary*, 677-792. Oxford: OUP, 2012.

REISMAN W.M., “Straight Baselines in International Law: A Call for Reconsideration”, in *American Society of International Law Proceedings* 82 (1988): 260-276.

ROSENNE S., *The Law and Practice of the International Court, 1920–2005*, vol. 1. Leiden, Boston: Martinus Nijhoff, 2006.

ROTHWELL D., “Fishery Zones and Limits”, in *Max Planck Encyclopedia of Public International Law* ([www.mpepil.com](http://www.mpepil.com)).

RUDA J.M., “Some of the Contributions of the International Court of Justice to the Development of International Law”, in *New York Journal of International Law and Politics* 24 (1991): 35-68.

SALERNO F. (ed.), *Il ruolo del giudice internazionale nell'evoluzione del diritto internazionale e comunitario*. Padova: Cedam, 1995.

SEPULVEDA AMOR B., “The International Court of Justice and the Law of the Sea”, in *Anuario Mexicano de Derecho Internacional* (2012): 3-26.

SHAHABUDEEN M., *Precedent in the World Court*. London, New York: Cambridge University Press, 1996.

SHANY Y., “No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary”, in *European Journal of International Law* 20 (2009): 73-91.

SHAW M., “The International Court of Justice and the Law of Territory”, in C.J. TAMS, J. SLOAN (eds), *The Development of International Law by the International Court of Justice*, 151-176. Oxford: Oxford University Press, 2013.

SIMMA B., ALSTON P., “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles”, in *Australian Year Book of International Law* 12 (1988-1989): 82-108.

SIMMA B., “Human Rights Before the International Court of Justice: Community Interest Coming to Life?”, in TAMS C.J., SLOAN J. (eds), *The Development of International Law by the International Court of Justice*, 301-325. Oxford: Oxford University Press, 2013.

SLOAN J., TAMS C.J., “The Development of International Law by the International Court of Justice”, in LAVRANOS N., KOK R. *et al.*(eds), *Hague Yearbook of International Law*, 216-238. The Hague: Brill Nijhoff, 2013.

TAMS C.J., “The Use of Force against Terrorists”, in *European Journal of International Law* 20(2009): 359-397.

TAMS C.J., “The ICJ as a Law-formative Agency”, in TAMS C.J., SLOAN J. (eds), *The Development of International Law by the International Court of Justice*, 377-397. Oxford: Oxford University Press, 2013.

TAMS C.J., “The World Court’s Role in the International Law-making Process”, in DELBRÜCK J. *et al.* (eds), *Aus Kiel in die Welt. Essays in Honour of the 100th Anniversary of the Walter Schücking Institute for International Law*, 139-166. Berlin: Duncker & Humblot, 2014.

TAMS C.J., “Law-Making in Complex Processes. The World Court and the Modern Law of State Responsibility”, in CHINKIN C., BEATENS F. (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, 287-306. Cambridge: Cambridge University Press, 2015.

TAMS C.J., TZANAKOPOULOS A., “Barcelona Traction at 40: The ICJ as an Agent of Legal Development”, in *Leiden Journal of International Law* 23 (2011): 781-800.

TZANAKOPOULOS A., “Domestic Courts as the “Natural Judge” of International Law: A Change in Physiognomy”, in CRAWFORD J., NOUWEN S. (eds), *Select Proceedings of the European Society of International Law*, 155-168. Oxford: Hard Publisher, 2010.

TERRIS D., ROMANO C.P.R., SWIGART L. (eds), *The International Judge*. Oxford: Oxford University Press, 2007.

TREVES T., “Law of the Sea”, in *Max Planck Encyclopedia of Public International Law* ([www.mpepil.com](http://www.mpepil.com)).

WALDOCK C.H.M., “General Course on Public International Law”, in *Recueil des cours* 106 (1962): 1-251.

WEIL P., *Perspectives du droit de la délimitation maritime*. Paris: Pedone, 1988.

ZIMMERMANN A., “The International Court of Justice and State Succession to Treaties: Avoiding Principled Answers to Questions of Principle”, in TAMS C.J., SLOAN J. (eds), *The Development of International Law by the International Court of Justice*, 53-69. Oxford: Oxford University Press, 2013.

ZIMMERMANN A., “Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice”, in *Law and Practice of International Courts and Tribunals* 12 (2013): 5-29.