Foreword

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

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

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

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

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

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

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

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

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

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

Enzo Cannizzaro[*]

[*] Professor of International and EU Law, University of Rome "La Sapienza".