Precedent in the World Court

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Effect and scope of the Court's case law

Some practical effects

The jurisprudential importance which the Court attaches to its previous decisions was discussed in chapter 2. The practical consequences have to be borne in mind in considering the proper scope of its case law. New cases sometimes influence the development of State practice. As illustrations, D. J. Harris[1] cites the *Fisheries* case,[2] the *Reservations* case[3] and the *Reparation* case.[4] The speed with which the jurisprudence of the *Fisheries* case was translated into the provisions of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone[5] may be recalled. The development had been anticipated in a general sense; in his speech before the Court, Attorney General Sir Frank Soskice had observed:

It is common ground that this case is not only a very important one to the United Kingdom and to Norway, but that the decision of the Court on it will be of the very greatest importance to the world generally as a precedent, since the Court's decision in this case must contain important pronouncements concerning the rules of international law relating to

[1] D. J. Harris, *Cases and Materials on International Law*, 3rd edn (London, 1983), p. 48. And see Condorelli, 'L'Autorité', pp. 307–308.
[2] *ICJ Rep 1951*, p. 116.
[3] *Ibid.*, p. 15. And see Section 2 (Reservations) of the Vienna Convention on the Law of Treaties, 1969. Correspondingly, a holding of the Court may be reversed conventionally. See the '*Lotus*' and Article 1 of the Brussels Convention on Penal Jurisdiction in Matters of Collision, 1952.
[4] *ICJ Rep 1949*, p. 174.
[5] Herbert Thierry, 'L'Evolution du droit international', *Hag R*, 222 (1990–III), p. 42.

coastal waters. The fact that so many governments have asked for copies of our Pleadings in this case is evidence that this is the general view.[6]

A common lawyer might be more easily disposed to see it that way. But judges of different legal traditions have spoken likewise. In his individual opinion, Judge Alvarez cited the Attorney General's statement with evident approval, adding, 'The present litigation is of great importance, not only to the Parties to the case, but also to all other States.'[7] In the *Asylum* case, Judge Azevedo, dissenting, said:

It should be remembered, on the other hand, that the decision in a particular case has deep repercussions, particularly in international law, because views which have been confirmed by that decision acquire quasi-legislative value, in spite of the legal principle to the effect that the decision has no binding force except between the parties and in respect of that particular case (Statute, Art. 59).[8]

Referring to the *Aerial Incident of 27 July 1955*,[9] Judge Tanaka observed:

Although this Judgment was given in consideration of the particular circumstances of the case and its binding force was limited to the parties and to this particular case (Article 59 of the Statute), it has exercised tremendous influence upon the subsequent course of the Court's jurisprudence and the attitude of parties vis-à-vis the jurisdictional issues relative to this Court.[10]

Another judge from a non-common law tradition was equally clear about the effect of the Court's decisions. Speaking on the question of the right of intervention in pending proceedings, Judge Morozov remarked:

This is the first time in the administration of international justice and, more particularly, in the experience of the International Court of Justice, that the Court has been obliged to take a decision on a request invoking Article 62. Therefore the impact of this decision unavoidably goes far beyond the specific request of Malta and may in future be considered as a precedent which, from my point of view, could be used for justification

[6] *ICJ Rep 1951*, p. 145.
[7] *Ibid.*
[8] *Asylum, ICJ Rep 1950*, p. 332, Judge Azevedo.
[9] *ICJ Rep 1959*, p. 127.
[10] *Barcelona Traction, Light and Power Company, Limited, ICJ Rep 1964*, p. 67, Judge Tanaka, separate opinion.

of a practice which is not consistent with the Statute and might, moreover, undermine the guiding principle of the consent of States.[11]

Thus, the fear was that such a decision might be considered as a precedent justifying a practice even though this was thought not to be consistent with the Statute.[12]

One consequence of the influence exerted by decisions of the Court is interesting. Continuity of language does not always betoken continuity of meaning or practice.[13] However, as was recognised by Judge Read, 'draftsmen, in deciding upon the language to be used in a treaty provision, e.g., The Disputes Article, have constantly in mind the principles of interpretation as formulated and applied by the Permanent Court and by this Court'.[14] The tendency to follow language tested by settled principles is a general one in the practice of the law, even though sometimes subject to important qualifications.[15]

In view of the possible repercussions of a decision, in maintaining consistency the Court not only looks backwards to its previous decisions; it may look forward with a view to forecasting the more general implications of the decision which it is called upon to make in the case before it, even if not controlled by those implications.[16] This is apart from the 'forward reach' which a judgment, particularly of a declaratory character, may have on future developments relating to the particular matter decided.[17] Adverting to the wider possibilities, in *Barcelona Traction, Light and Power Company, Limited*, the Court observed:

[11] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, ICJ Rep 1981*, p. 22, para. 3. On the question of the right to intervene, see the later case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, ICJ Rep 1990*, pp. 3 and 92.

[12] See also his separate opinion in *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, ICJ Rep 1984*, p. 30.

[13] For a significant example, see Rosenne, *Law and Practice* (1985), p. 56, relating to the election of judges of the Court.

[14] *Peace Treaties, ICJ Rep 1950*, p. 233.

[15] See, generally, *Maxwell on the Interpretation of Statutes*, 12th edn (London, 1969), p. 24; *Craies on Statute Law*, 7th edn (London, 1971), pp. 136, 167–168; Cross and Harris, *Precedent*, pp. 177 ff; and *Halsbury's Laws of England*, 4th edn, XXVI, p. 293, para. 573.

[16] Common law judges also consider the future relevance of their decisions and their implications. See J. G. Deutsch, 'Precedent and Adjudication', *Yale Law Journal*, 83 (1974), p. 1584.

[17] *Northern Cameroons, ICJ Rep 1963*, p. 37.

[A]ny decision of the Court, relative to Article 37, must affect a considerable number of surviving treaties and conventions providing for recourse to the Permanent Court, including instruments of a political or technical character, and certain general multilateral conventions of great importance that seem likely to continue in force. It is thus clear that the decision of the Court in the present case, whatever it might be, would be liable to have far-reaching effects. This is in no way a factor which should be allowed to influence the legal character of that decision: but it does constitute a reason why the decision should not be regarded as already predetermined by that which was given in the different circumstances of the *Israel* v. *Bulgaria* case.[18]

A decision of the Court may also influence international organisational arrangements. In *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*[19] the Court considered that the General Assembly was not entitled to refuse to give effect to awards of compensation made by the United Nations Administrative Tribunal properly constituted and acting within the limits of its statutory competence. It went on to speak of possible arrangements under which a challenge might be brought to the validity of an award on grounds of excess of competence or other defect capable of vitiating it. Having also held that the Tribunal was a judicial body, it said:

In order that the judgments pronounced by such a judicial tribunal could be subjected to review by any body other than the tribunal itself, it would be necessary, in the opinion of the Court, that the statute of that tribunal or some other legal instrument governing it should contain an express provision to that effect. The General Assembly has the power to amend the Statute of the Administrative Tribunal by virtue of Article 11 of that Statute and to provide for means of redress by another organ. But as no such provisions are inserted in the present Statute, there is no legal ground upon which the General Assembly could proceed to review judgments already pronounced by that Tribunal. Should the General Assembly contemplate, for dealing with future disputes, the making of some provision for the review of the awards of the Tribunal, the Court is of opinion that the General Assembly itself, in view of its composition and functions, could hardly act as a judicial organ – considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them – all the more so as one party to the disputes is the United Nations Organization itself.[20]

[18] *ICJ Rep 1964*, pp. 29–30.
[19] *ICJ Rep 1954*, p. 47.
[20] *Ibid.*, p. 56.

Here then was a suggestion by the Court, guardedly made, that what was desired was a system of judicial review in which appeals would not lie to the General Assembly. Provision for this purpose was made in 1955. Judge Jiménez de Aréchaga later remarked:

> The basic purpose of the 1955 amendments to the Statute of the Administrative Tribunal thus appears to have been to deal with the question raised in the general observations of the Court which have been cited above in the way suggested therein. This explains why the system of judicial review established in 1955 is confined to certain specific grounds upon which the validity of a judgment may be challenged: excess of or failure to exercise jurisdiction or a fundamental error in substantive law or in procedure. This also explains why the amendments adopted exclude the possibility that the General Assembly may itself pronounce on the validity of an award which has been challenged.[21]

Mention may also be made of certain observations made by Judge Lachs in his separate opinion in *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*[22] on the desirability of uniformity of procedure as between the ILO Administrative Tribunal and the United Nations Administrative Tribunal. Although uniformity has not been achieved, some initiatives in that direction were taken. Referring to these, he later remarked:

> I welcome these developments, not only in themselves but because observations made by a Member of the International Court of Justice have been taken up by the United Nations General Assembly with a view to enacting some legislative measures in their respect. This indicates that, in its functioning, the principal judicial organ of the United Nations may not only decide contentious issues or give advisory opinions, but also contribute in practical terms to the improvement or operation of the law within the United Nations system.[23]

The influence of case law on the litigation strategy of parties

As a matter of course, arguments at the bar of the Court habitually draw on decided cases, the effort being to show that the legal

[21] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, ICJ Rep 1973*, p. 243.
[22] *ICJ Rep 1973*, p. 214.
[23] *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal, ICJ Rep 1987*, p. 75.

structure of the case fits, or does not fit, into some relevant pattern established by the Court's case law. But there have also been instances in which substantive elements of the litigation strategy of a party were directly inspired by a decided case. In the view of Vice-President Badawi, the *Norwegian Loans* case had 'been presented by the French Government as a reproduction of the two cases on the *Serbian and Brazilian Loans*'.[24] In *Barcelona Traction* Judge Tanaka observed, 'There is not the slightest doubt that this objection denying the Court's jurisdiction in the present case has been motivated and inspired by the existence of two precedents, namely the Judgments in the *Aerial Incident* case of 26 May 1959 *(ICJ Reports 1959*, p. 127), and the *Temple of Preah Vihea*r case of 26 May 1961 (*ICJ Reports 1961*, p. 17).'[25] A little later he added:

> The first repercussion of the Judgment in the *Aerial Incident* case may be seen in the Judgment in the *Temple of Preah Vihear* case delivered on 26 May 1961, precisely two years after the delivery of the Judgment in the *Aerial Incident* case.
>
> It is to be noted that the repercussion is found not in the conclusion of the Judgment itself, but in the argument of the party raising a preliminary objection to the Court's jurisdiction, and in the reasoning of the Court in disposing of this objection.[26]

And, referring specifically to Thailand's objection in the *Temple of Preah Vihear*, he said, 'It is not unreasonable to suppose that this objection of Thailand was encouraged by the Judgment in the *Aerial Incident* case'.[27]

In the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene*,[28] referring to the *Nuclear Tests*[29] and the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*,[30] Judge Mbaye observed that

> in neither case did the Court have to consider the problem of whether or not a jurisdictional link must exist between the intervening State and the original States parties.
>
> The position is quite different in the present case, where the instigator (Italy) was inspired by past experience, especially by the Judgment of the Court in 1981 in which it stated:

[24] *Norwegian Loans*, *ICJ Rep 1957*, p. 31, separate opinion.
[25] *ICJ Rep 1964*, p. 66.
[26] *Ibid.*, p. 67.
[27] *Ibid.*, p. 68.
[28] *ICJ Rep 1984*, p. 3.
[29] *ICJ Rep 1974*, pp. 253 and 457.
[30] *ICJ Rep 1981*, p. 20, para. 35, and p. 10, para. 34.

> 'If in the present Application Malta were seeking permission to submit its own legal interest in the subject-matter of the case for decision by the Court, and to become a party to the case, another question would clearly call for the Court's immediate consideration. That is the question mentioned in the Nuclear Tests cases, whether a link of jurisdiction with the Parties to the case is a necessary condition of a grant of permission to intervene under Article 62 of the Statute.'[31]

Italy seemed to be in the very situation envisaged by the Court in its Judgment.[32]

Thus, in the view of Judge Mbaye, Italy's Application had been 'inspired' by a previous judgment by the Court.

It is possible too that the position taken by a party may be based on views expressed in a separate opinion or dissenting opinion. In the *Nuclear Tests (Australia* v. *France)*,[33] France, though not appearing, let it be known that it was of the view that the terms of its 1966 optional clause declaration prevailed over the jurisdictional provisions of Article 17 of the General Act for the Pacific Settlement of International Disputes of 1928 on the ground that the optional clause declarations of itself and Australia were equivalent to a later treaty relating to the same subject-matter as the 1928 Act, to which both States were parties. As remarked in the joint dissenting opinion, this proposition seemed 'probably to take its inspiration from the dissenting opinions of four judges in the *Electricity Company of Sofia and Bulgaria* case,[34] although the case itself is not mentioned in the French Government's letter of 16 May 1973'.[35] The joint dissenting opinion proceeded, however, to observe that quite 'apart . . . from any criticisms that may be made of the actual reasoning of the opinions, they provide very doubtful support for the proposition advanced by the French Government'.[36]

Judicial self-restraint

'Careful as it is to keep its pronouncements "in accordance with international law", as required by its Statute, the Court does not

[31] *Ibid.*, pp. 18–19, para. 32.
[32] *ICJ Rep 1984*, pp. 36–37.
[33] *ICJ Rep 1974*, p. 253.
[34] *PCIJ, Series A/B, No. 77.*
[35] *ICJ Rep 1974*, p. 352, para. 87.
[36] *Ibid.*

shrink, when confronted with situations that are clearly new, from a certain boldness in striking out a path towards new developments in the law.'[37] However, the fact that the Court appreciates the use to which its decisions may be put in other cases as well as their wider repercussions within the international community tends to impose some restraint on its holdings. Sometimes it is possible to argue that this restraint has led it to miss an opportunity to develop the law in a desirable direction. Speaking on the question of the right to intervene in pending proceedings in the *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene*, Judge Mbaye considered that the Court should 'take advantage of the excellent opportunity provided by the case before it to breathe life into Article 62 of its Statute, and make a clear pronouncement on the very important question of the "jurisdictional link" which may or may not be required between the intervening State and the main parties, and in respect of which there are so many queries'.[38] There, in effect, the thought was that the Court should deliberately create a precedent on the point in question.

A similar approach was taken by Judge Tanaka in the *Barcelona Traction* case, in which he was not persuaded by the distinction sought to be drawn by the Court between the position under Article 36, paragraph 5, and Article 37 of the Statute. Even though the *Aerial Incident* case might have lost all practical value by reason of the possible disappearance of relevant optional clause declarations, he considered

> that the Court should have dealt primarily with the Judgment in the *Aerial Incident* case as this involved the same legal question as the present issue rather than evade it because it was an inconvenient obstacle. General international law might have benefited by such an attitude of the Court by finding a common solution to the jurisdictional question which has arisen or might arise concerning Articles 36, paragraph 5, and 37.[39]

But the Court may have sound reason for caution. In *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)*, the Permanent Court of International Justice said that the 'obligation incumbent upon

[37] De Visscher, *Theory and Reality*, p. 397; and see Lauterpacht, *Development*, pp. 77 and 83.
[38] *ICJ Rep 1984*, pp. 35–36, separate opinion.
[39] *ICJ Rep 1964*, pp. 71–72.

the Court under Article 60 of the Statute to construe its judgments at the request of any Party, cannot be set aside merely because the interpretation to be given by the Court might possibly be of importance in another case which is pending'.[40] The particular situation which gave rise to that statement does not remove an implication that, in principle, the reasoning out of a case should not fail to consider a point merely because of possible repercussions on another pending or possible case. At the same time, the expression of the Court's reasoning may properly take account of its more general future consequences; it may make an express reservation on a point which, though seemingly related, does not have to be decided. In *Certain German Interests in Polish Upper Silesia, Merits*, the Permanent Court of International Justice, in referring to the guarded position which it had taken in a previous advisory case, wrote:

> The Court has already been confronted with the problem of the scope of the Armistice Convention and of the Protocol of Spa in relation to the Polish law of July 14th, 1920, in connection with the question which formed the subject of Advisory Opinion No. 6. In that affair, however, the Court had only to consider certain less important aspects of the problem: in particular, it had not to decide the question whether Poland is entitled to rely on the two instruments in question. For the purposes of that affair, it sufficed to observe that the Armistice Convention did not possess the importance which Poland attempted to attribute to it; but the Court was careful to make an express reservation in regard to the point above mentioned.[41]

Likewise, the Court may tailor its decision in such a way as expressly to exclude its application to other cases presenting significantly different features, even though there may be no necessity to do this. Thus, the advisory proceedings in *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* were set in train by a staff member's application to the Committee on Applications for Review of Administrative Tribunal Judgments. Distinguishing proceedings of this kind from similar proceedings instituted on the application of a Member State, the Court stated that it was not to be understood as 'expressing any opinion in regard to

[40] *1927, PCIJ, Series A, No. 13*, p. 21.
[41] *1926, PCIJ, Series A, No. 7*, p. 27. And see Sørensen, *Les Sources*, p. 167.

any future proceedings instituted under Article 11 by a member State'.[42] The point of that caution became evident in 1982, when the Court observed:

> Hence the Advisory Opinion given by the Court on the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* is relevant to its approach to the present request on two main counts: because that Opinion recognized that it would be incumbent upon the Court to examine the features characteristic of any request for advisory opinion the Committee decides to submit at the prompting of a member State, and because it indicated that the Court should bear in mind during that examination not only the considerations applying to the review procedure in general but also the 'additional considerations' proper to the specific situation created by the interposition of a member State in the review process.[43]

An allied situation arose in the case of *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints made against the United Nations Educational, Scientific and Cultural Organisation*. There, reviewing the particular circumstances of the case relating to the hearing procedure, the Court said that it was 'not bound for the future by any consent which it gave or decisions which it made with regard to the procedure thus adopted'.[44] That could only mean that the special characteristics of the case would have to be borne in mind in considering whether, on the points in question, it would exert precedential influence in later cases; it could not mean that the Court was assuming a power to divest a particular opinion of any precedential influence which it would normally be capable of exerting. It is, however, consistent with the view that possible implications for other cases should be taken into account, as far as reasonable, in the formulation of a decision on the point in question.

In the *Aegean Sea Continental Shelf* case the Court took the position that, even if the General Act for the Pacific Settlement of International Disputes of 1928 was in force as between Greece and Turkey, a Greek reservation operated to exclude jurisdiction thereunder. The Court did not therefore find it necessary to determine whether the Act was still in force as between the parties. Giving the reasons for its abstention, it observed:

[42] *ICJ Rep 1973*, p. 178, para. 31.
[43] *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, ICJ Rep 1982*, p. 332, para. 17.
[44] *ICJ Rep 1956*, p. 86.

Although under Article 59 of the Statute 'the decision of the Court has no binding force except between the parties and in respect of that particular case', it is evident that any pronouncement of the Court as to the status of the 1928 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey.[45]

Judge *ad hoc* Stassinopoulos disagreed. It was precisely because of the possible implications for other States that he considered that in 'an organized international society ... the settlement of this question, after the three cases already submitted to the Court (*Nuclear Tests* and *Trial of Pakistani Prisoners of War*), would present a more general interest'.[46] Arguing in favour of the continuance in force of the 1928 Act as between the parties, he made an interesting use of the cases referred to, contending that, in the light of the publicity given in them to the existence of the Act, it was 'inconceivable that Turkey could have forgotten to take any action needed to manifest its desire to be bound by that instrument no longer'.[47] This view did not prevail over the understandable prudence of the Court.

A careful policy of not deciding a point until the necessity arises is consequently observable. An example is furnished by the *Status of Eastern Carelia*, in which the Permanent Court of International Justice said that there 'has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties. It is unnecessary in the present case to deal with this topic.'[48] Thus, the Court explicitly refrained from deciding the point. Curiously, the opposite assumption was to be made for some time to come.[49]

The Court's policy of self-restraint is well known. It will not decide a point which 'can have only an academic interest'.[50] Judge Ammoun remarked on the policy in *Barcelona Traction, Light and Power Company, Limited*. He was dealing with the question 'whether diplomatic protection derives from a general principle of law

[45] *ICJ Rep 1978*, pp. 16–17, para. 39.
[46] *Ibid.*, p. 72, para. 1.
[47] *Ibid.*, p. 73, para. 3.
[48] *1923, PCIJ, Series B, No. 5*, p. 27.
[49] See p. 112 above.
[50] *Northern Cameroons, ICJ Rep 1963*, p. 35.

recognized by the nations (Article 38, para. 1*(c)*, of the Court's Statute) or from an international custom (para. 1*(b)* of that Article)'.[51] His comment ran:

The Judgment of the Permanent Court of International Justice of 1924 in the *Mavrommatis Palestine Concessions* case does not seem to have taken any stand on this point, when it stated, with some emphasis, in an axiomatic form that diplomatic protection 'is an elementary principle of international law'. One cannot hazard a guess as to the sense in which the expression 'elementary principle' was taken, given as it is without any other qualification. And when other judgments have referred to this precedent, they do not seem to have been any more explicit. The terminology of the two international Courts does not permit of there being attributed to them, on this point, an opinion which they seem designedly to have kept *in petto*, following a prudent practice which has already been remarked on.[52]

Another illustration is furnished by the *Fisheries Jurisdiction* case. The Court was directing its mind to 'a possible objection based on views expressed by certain authorities to the effect that treaties of judicial settlement or declarations of acceptance of the compulsory jurisdiction of the Court are among those treaty provisions which, by their very nature, may be subject to unilateral denunciation in the absence of express provisions regarding their duration or termination'. However, finding that 'those views cannot apply to a case such as the present one', it considered that it did 'not need to examine or pronounce upon the point of principle involved'.[53]

This policy of judicial self-restraint runs in parallel with the general view that it is inappropriate for the Court to over-crystallise the law. In *Panevezys-Saldutiskis Railway* Judge van Eysinga cited a statement by Borchard reading: 'An extensive jurisprudence has established and crystallized the rule to the effect that a claimant must have possessed the nationality of the claimant State where the claim originated.' The judge then observed:

It may be that this jurisprudence has *crystallized* the rule which Borchard has in mind. But it may be observed that 'crystallize' implies the idea of rigidity. When the Court has to apply unwritten law, of course it often encounters difficulties. But there are also advantages, in particular the

[51] *ICJ Rep 1970*, p. 300, para. 10.
[52] *Ibid.*, pp. 300–301, para. 10.
[53] *ICJ Rep 1973*, pp. 16–17, para. 29.

advantage that such rules of law, not being written, are precisely not rigid. It will suffice to read, *inter alia*, the observations of M. Politis (*Year Book, 1931,* II, pp. 206–209) to see that it is a happy thing that the rule adduced by Lithuania, which may be binding in a certain number of cases, is by no means crystallized as a general rule. And in this connection the question also arises whether it is reasonable to describe as an unwritten rule of international law a rule which would entail that, when a change of sovereignty takes place, the new State or the State which has increased its territory would not be able to espouse any claim of any of its new nationals in regard to injury suffered before the change of nationality. It may also be questioned whether indeed it is any part of the Court's task to contribute towards the crystallization of unwritten rules of law which would lead to such inequitable results.[54]

The jurisprudence of the present Court also contains warnings against 'over-systematisation'.[55] These warnings are particularly important in situations in which the law is in a state of motion. Referring in 1974 to the evolution of the law relating to fisheries jurisdiction, the Court remarked that to 'declare the law between the Parties as it might be at the date of expiration of the interim agreement (was) a task beyond the powers of any tribunal'.[56]

The caution observed by the Court is not, of course, a limitation on the value of case law; it is an indication of the Court's concern to preserve that value and not to dissipate it through extravagance. Of importance too is the need to safeguard the judicial character of the Court; the ultimate danger is that, as Judge Singh observed, 'a tribunal indulging in unnecessary pronouncements, by making them when not legally required to do so, could easily undermine its judicial character. This would particularly apply in the context of administering inter-State law.'[57]

The scope of the Court's developmental function

The question of the authority and value of the Court's pronouncements may also be considered on the basis of the view

[54] *1932, PCIJ, Series A/B, No. 76*, at pp. 34–35.

[55] *North Sea Continental Shelf Cases, ICJ Rep 1969*, p. 53, para. 100; *Fisheries Jurisdiction, ICJ Rep 1974*, p. 143, para. 27, Judge Gros, dissenting opinion; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ Rep 1982*, p. 92, para. 132; C. H. M. Waldock, review article, *BYBIL*, 32 (1955–1956), p. 348; and De Visscher, *Theory and Reality*, preface, pp. vii–viii.

[56] *Fisheries Jurisdiction, ICJ Rep 1974*, p. 19, para. 40.

[57] *Aegean Sea Continental Shelf, ICJ Rep 1978*, pp. 47–48. And see the reference to 'judicial restraint' in *ICJ Rep 1982*, p. 347, para. 45.

taken of the extent of its developmental responsibilities. The Court has a power, and, arguably, a corresponding duty, to develop the law.[58] As is well known, Judge Alvarez devoted some thought to this responsibility: the Court should not only state, or restate, the law but should also develop it to meet the new requirements of a dynamic international society, that dynamism appearing to him to be particularly urgent as a result of the upheavals connected with the Second World War and its aftermath.[59] Arguing for a new international law, in 1952 he said:

> [T]he present Court is, according to its Statute, a Court of *justice* and, as such, and by virtue of the dynamism of international life, it has a double task: to *declare* the law and *develop* the law. Its first task includes the *settlement of disputes* between States as well as the *protection of the rights* of those States as recognized by the law of nations. As regards the Court's second task, namely, the development of law, it consists of deciding the existing law, modifying it and even creating new precepts, should this be necessary. This second mission is justified by the great dynamism of international life. The Third Session of the General Assembly of the United Nations has recognized the Court's rights to develop international law in its Resolution No. 171. The Institute of International Law has on its side in the recently held Session at Siena expressly recognized this right of the Court. In creating a commission, the Institute unanimously adopted the following Resolution: *[Translation]* 'The Institute of International Law, keenly aware of the growing importance of the International Court of Justice and of its rôle in the development of international law . . .' In discharging this task the Court must not proceed in an arbitrary manner, but must seek inspiration in the great principles of the new international law.[60]

Judge Alvarez's views on the need for a new international law have occasioned discussion; there could be little dispute, however, as to his central point concerning the Court's developmental func-

[58] As to the distinction between development and codification, see Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn (Manchester, 1984), p. 11. The distinction is not always clear. See J. Monnier, 'Observations sur la codification et le développement progressif du droit international', in Bernard Dutoit (ed.), *Mélanges Georges Perrin* (Lausanne, 1984), pp. 239–241.

[59] *Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Rep 1950,* pp. 12–13, dissenting opinion; *Status of South West Africa, ICJ Rep 1950*, p. 177, dissenting opinion; and the *Fisheries* case, *ICJ Rep 1951*, p. 146, separate opinion.

[60] *Anglo-Iranian Oil Company*, *ICJ Rep 1952*, p. 132, dissenting opinion.

tions.[61] The 1947 General Assembly resolution, to which he referred, was also cited by Judge Elias.[62] The General Assembly is coordinate in legal status with the Court, both being principal organs of the United Nations; it could not competently confer on the Court powers not confided, at any rate *in globo*, to the latter by the Charter or the Statute.[63] The Resolution of the Assembly could, however, recognise, and even stress, the existence of the Court's power to develop the law. It is possible that the Court had that power in mind when it said in the *Reparation* case, 'Throughout its history, the development of international law has been influenced by the requirements of international life.'[64] The requirements of contemporary international life would seem to be moving, on the one hand, in the direction of a limitation of earlier notions of relatively unbridled sovereignty,[65] and, on the other, in the direction of growing recognition of the responsibility of individual States as members of an increasingly cohesive international community. These ideas lay at the centre of Judge Alvarez's views. He might have been somewhat forceful and insistent in his statements;[66] but the substance of his thesis would not appear to have been markedly at variance with the actual course of developments.[67]

The Court, though a place of learning, is not a learned scientific institute.[68] Addressing the Permanent Court of International Justice in *Nationality Decrees Issued in Tunis and Morocco*, Professor de Lapradelle observed:

[61] See *Guardianship Convention* case, *ICJ Rep 1958*, p. 102, Judge Moreno Quintana; and *Military and Paramilitary Activities in and against Nicaragua, ICJ Rep 1986*, p. 332, para. 155, Judge Schwebel, dissenting.

[62] *Aegean Sea Continental Shelf, ICJ Rep 1976*, p. 29.

[63] Georg Schwarzenberger, 'Trends in the Practice of the World Court', *Current Legal Problems*, 4 (1951), pp. 5–8; Rosenne, *Law and Practice* (1985), p. 48; and Dharma Pratap, *The Advisory Jurisdiction of the International Court* (Oxford, 1972), pp. 261–262.

[64] *ICJ Rep 1949*, p. 178; and see *Barcelona Traction, Light and Power Company, Limited, ICJ Rep 1964*, p. 56, Judge Koo, separate opinion.

[65] There was always some limitation on sovereignty. See James Crawford, 'The Criteria for Statehood in International Law', *BYBIL*, 48 (1976–1977), p. 146.

[66] See, too, Alejandro Alvarez, *Le Droit international nouveau – son acceptation, son étude* (Paris, 1960).

[67] See Keith Highet, 'Reflections on Jurisprudence for the "Third World": The World Court, the "Big Case", and the Future', *Virg JIL*, 27 (1987–II), p. 296; and Charles Rousseau, 'Alejandro Alvarez (1868–1960)', *RGDIP*, 64 (1960), pp. 690–691.

[68] See also *Western Sahara, ICJ Rep 1975*, p. 108, Judge Petrén, separate opinion, stating that 'it is not an historical research institute'.

[I]f at certain moments, exchanging as we hope courtesy for courtesy and English citation for French citation, our arguments take the character of a technical controversy which we may perhaps be allowed to call an academic controversy, we must never allow ourselves to fall into a misconception. This is not an abstract controversy; this is not science for the sake of science; it is not law for law's sake. It is law applied to political issues, law upon which life itself depends.[69]

In the *Northern Cameroons* case, Judge Fitzmaurice put it this way:

[C]ourts of law are not there to make legal pronouncements in *abstracto*, however great their scientific value as such. They are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford concrete reparation if a wrong has been committed, or to give rulings in relation to existing and continuing legal situations. Any legal pronouncements that emerge are necessarily in the course, and for the purpose, of doing one or more of these things. Otherwise they serve no purpose falling within or engaging the proper function of courts of law as a judicial institution.[70]

Thus, uncalled for intellectual excursions are misguided. The duty of the Court is to decide the case; to do that, it is not necessary for it to respond to every argument.[71]

But a superior abstention can be pedantic too. To what extent, if any, should the Court go beyond the strict duty to decide the case so as to take account of the possibility that the parties may have an interest in learning its reaction to their main legal positions? The idea that the Court could properly move some way in that direction is not without support. In 1937 Judge Anzilotti said:

The operative clause of the judgment merely rejects the submissions of the principal claim and of the Counter-claim. In my opinion, in a suit the main object of which was to obtain the interpretation of a treaty with reference to certain concrete facts, and in which both the Applicant and the Respondent presented submissions indicating, in regard to each point, the interpretation which they respectively wished to see adopted by the Court, the latter should not have confined itself to a mere rejection of the submissions of the Applicant: it should also have expressed its opinion on the submissions of the Respondent; and, in any case, it should have declared what it considered to be the correct interpretation of the Treaty.

[69] *PCIJ, Series C, No. 2*, p. 58.
[70] *ICJ Rep 1963*, pp. 98–99, separate opinion.
[71] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, ICJ Rep 1973*, p. 210, para. 95.

It is from the standpoint of this conception of the functions of the Court in the present suit that the following observations have been drawn up.[72]

Speaking on the same theme, Judge Lauterpacht later stated:

In my opinion, a Party to proceedings before the Court is entitled to expect that its Judgment shall give as accurate a picture as possible of the basic aspects of the legal position adopted by that Party. Moreover, I believe that it is in accordance with the true function of the Court to give an answer to the two principal jurisdictional questions which have divided the Parties over a long period of years and which are of considerable interest for international law. There may be force and attraction in the view that among a number of possible solutions a court of law ought to select that which is most simple, most concise and most expeditious. However, in my opinion such considerations are not, for this Court, the only legitimate factor in the situation.[73]

In 1957 he wrote:

The administration of justice within the State can afford to rely on purely formal and procedural grounds. It can also afford to disregard the susceptibilities of either of the parties by ignoring such of its arguments as are not indispensable to the decision. This cannot properly be done in international relations, where the parties are sovereign States, upon whose will the jurisdiction of the Court depends in the long run, and where it is of importance that justice should not only be done but that it should also appear to have been done.[74]

Similar views may be found in separate opinions given by him in 1955 and 1956.[75] Not to be overlooked too is the fact that a case may involve aspects of the law of special interest to the relevant region; the question is a delicate one, but it raises considerations which may be difficult to ignore in the case of a judicial body with a global mandate.[76]

In 1964 Judge Tanaka had occasion to observe that the 'more important function of the Court as the principal judicial organ of

[72] *Diversion of Water from the Meuse, 1937, PCIJ, Series A/B, No. 70*, p. 45, Judge Anzilotti, dissenting opinion.

[73] *Certain Norwegian Loans, Judgment, ICJ Rep 1957,* p. 36.

[74] Lauterpacht, *Development*, p. 39; and see, *ibid.*, pp. 37, 61 and 75.

[75] *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, ICJ Rep 1955*, pp. 90 ff; and *Admissibility of Hearings of Petitioners by the Committee on South West Africa, ICJ Rep 1956*, p. 57.

[76] See *Arbitral Award Made by the King of Spain on 23 December 1906, ICJ Rep 1960*, pp. 217–218, declaration of Judge Moreno Quintana; and see *Asylum, ICJ Rep 1950*, p. 290, Judge Alvarez, dissenting opinion.

the United Nations is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the development of international law'.[77] Judge Jessup spoke to the like effect. Citing Lauterpacht's views and a number of cases favouring a liberal approach, he said:

> The specific situations in each of the cases cited can be distinguished from the situation in the instant case, but all of the quoted extracts are pervaded by a certain 'conception of the functions of the Court' which I share but which the Court does not accept. Article 59 of the Statute indeed provides: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. But the influence of the Court's decisions is wider than their binding force.[78]

As a matter of general practice, the 'conception of the functions of the Court' favoured by Judge Jessup, and also by Judge Lauterpacht, is not followed by the Court; but to the extent that the Court occasionally expresses *obiter dicta* it is permissible to suppose that the essence of the conception is not rigidly excluded. What might be the proper balance between the opposed positions?

Referring to the liberal view favoured by Lauterpacht and comparing it with a narrower if more cautious one preferred by others, Fitzmaurice says:

> If it be asked which of these two attitudes is the better, the answer may well be 'both', or at any rate that each is defensible; but clearly much depends on the circumstances. The sort of bare order or finding that may suit many of the purposes of the magistrate or county court judge will by no means do for the Court of Appeal, the House of Lords or the Judicial Committee of the Privy Council, and their equivalents in other countries. International tribunals at any rate have usually regarded it as an important part of their function, not only to decide, but, in deciding, to expound generally the law having a bearing on the matters decided.[79]

Some judges are remarkable for the lapidary quality of their compositions; some are less terse. As observed by Fitzmaurice, 'many if not most judges achieve a position of balance between the two pos-

[77] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, ICJ Rep 1964,* p. 65, separate opinion.

[78] *Barcelona Traction, Light and Power Company, Limited, ICJ Rep 1970*, p. 163, para. 9, Judge Jessup, separate opinion.

[79] Fitzmaurice, *Law and Procedure*, II, p. 648. And see his separate opinion in *Barcelona Traction, Light and Power Company, Limited, ICJ Rep 1970,* p. 64, para. 2.

sibilities'.[80] And for good reason. Brevity has its virtues; but it has limitations also. Speaking of the Court, Schwarzenberger said, 'The persuasive character of its judgments and advisory opinions depends on the fullness and cogency of the reasoning offered. It is probably not accidental that the least convincing statements on international law made by the International Court of Justice excel by a remarkable economy of argument.'[81]

The difficulty, therefore, is one of harmonising the need for full reasoning with the Court's established position that it is only concerned with the decision of the particular issues before it and eschews any further pronouncement. On the one hand, as Judge Carneiro remarked, 'the Court should not reduce its decision to a doctrinal, abstract or theoretical assertion; it must necessarily relate its decision to the specific case'.[82] Or, as it was put by Judge Gros, 'A court only decides the case before it without being able to deliver judgments of principle with a general scope.'[83] On the other hand, however limited may be the particular issue, the decision has to be justified by reference to more general norms. The Court recognised this when, speaking of the application of equitable principles in the field of maritime delimitation, it said:

> Thus the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.[84]

So the task of formulating general norms cannot always be escaped. But care needs to be used. The 'complex jurisprudential problem', as observed by Judge Dillard, is one of 'knowing how best to reconcile the need for general norms in the interest of some degree of predictability versus the need to avoid them in the interest of the particularistic and individualistic nature of the subject-matter to which the norms are applicable'.[85] The problem may

[80] Fitzmaurice, *Law and Procedure*, II, p. 648.
[81] Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 3rd edn (London, 1957), I, p. 32.
[82] *Ambatielos* case, *ICJ Rep 1952*, p. 52, para. 6, separate opinion.
[83] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), ICJ Rep 1982*, p. 152.
[84] *Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Rep 1985*, p. 39, para. 45.
[85] *Fisheries Jurisdiction, ICJ Rep 1974*, p. 61, separate opinion.

present itself in terms of a distinction between principles and rules. Lauterpacht put it this way:

It is in relation to the problem of judicial caution that the Court has been constantly confronted with the question whether in deciding the issue before it the Court must not only act on legal principle but also state that principle; whether it ought to state not only the legal rule which it applies but also the wider legal principle underlying the rule; and whether in stating that principle it must limit itself to the exigencies of the case before it or state the principle in all its generality, and by reference to all qualifying exceptions, against the background of relevant international doctrine and practice. It is possible to hold that in its capacity as an organ which may be expected to develop international law, in addition to deciding cases before it, and to secure the requisite degree of certainty in the administration of justice, the Court ought to give a wider interpretation of the scope of its task. On the other hand, there is room for the view, frequently acted upon by the Court, that the systematic generalisation of the rules applied by it or of its decisions not accompanied by a statement of the underlying rules is the function of writers – a function which has occasionally been fulfilled with signal success and authority.[86]

In 1929 M. Fromageot was reported to have stated the position thus:

The Court of Justice was a judicial body, and its task was not to attempt the scientific solution of legal questions, but to judge disputes between States and decide upon their cases and claims. It would be for the experts in doctrine, by a study and analysis of the judicial decisions, to extract from them general principles, and subsequently, by a synthetic study, to elaborate universal rules of international law.[87]

No doubt, it was for all of these reasons that both Judge Dillard and Charles De Visscher referred with approval to Brierly's view that the 'nature of international society does not merely make it

[86] Lauterpacht, *Development*, pp. 82–83, footnote omitted. And see Oscar Schachter, 'Creativity and Objectivity in International Law', in Rudolf Bernhardt and others (eds.), *Festschrift für Hermann Mosler* (Berlin, 1983), pp. 820–821. Possibly because of these reasons, it has been 'frequently argued that on matters of great importance law is less precise while on other, minor matters it contains much more detail'. See *Military and Paramilitary Activities in and against Nicaragua, ICJ Rep 1986*, p. 168, Judge Lachs, separate opinion. For 'problems of grand theorizing,' see also Friedrich Kratochwil, 'The Limits of Contract', *EJIL*, 5 (1994), p. 486.

[87] League of Nations, Committee of Jurists on the Statute of the Permanent Court of International Justice, *Minutes of the Session held at Geneva, March 11th–19th, 1929,* (Geneva, 1929), p. 24.

difficult to develop rules of international law of general application, it sometimes makes them undesirable'.[88]

It has also to be remembered that, unlike a legislature, the Court has no general legislative mandate; it is not creating a new rule out of whole cloth. This is no less true in the case of a common law judge; he may make law, but he may not do so as if he were a 'law-giver'.[89] Far from being able to act as if it were initiating legislation,[90] the Court at The Hague is narrowly restricted by the framework of the particular case before it.[91] The process of development was put by Fitzmaurice thus:

> It is axiomatic that courts of law must not legislate: nor do they overtly purport to do so. Yet it is equally a truism that a constant process of development of the law goes on through the courts, a process which includes a considerable element of innovation. Without it, the common law of England would never have come into being, as the record clearly shows. Nor, for that matter, would the civil law of ancient Rome; for the great codifications came only after a long legal evolution, much of which resulted from the action of the magistrature. Modern experience shows that even in fully developed legal systems this process is necessary, and goes on all the time; for it is beyond the normal capacity of any legislature to provide in advance for all the subtleties, the twists, the turns and the by-ways resulting from novel and constantly changing conditions. Only through the day-to-day action of the courts can these be handled. Nor can the legislature anticipate great issues of principle which may arise suddenly, and indeed for the first time, through the medium of a litigation. In practice, courts hardly ever admit a *non liquet*. As is well known, they adapt existing principles to meet new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept, or by invoking doctrines in the light of which an essentially innovatory process can be carried out against a background of received legal precept.[92]

In response to the proposition that the Court has no legislative mandate, it may be argued that the absence on the international

[88] Brierly, 'Règles générales du droit de la paix', pp. 17–18; and *ICJ Rep 1974*, p. 61.
[89] See Jennings, 'General Course', p. 341.
[90] See, as to common law courts, J. A. Hiller, 'The Law Creative Roles of Appellate Courts in the Commonwealth', *ICLQ*, 27 (1978), p. 92.
[91] See, generally, Sørensen, *Les Sources*, p. 156; and Cross and Harris, *Precedent*, pp. 34 ff, and 216 ff, in relation to a common law court.
[92] See Gerald Fitzmaurice, 'Judicial Innovation – Its Uses and its Perils – As exemplified in some of the Work of the International Court of Justice during Lord

plane of anything corresponding to a national legislature competent to keep the law adjusted to changing social requirements is a reason for the Court to take a liberal view of the scope of its pronouncements.[93] But, the argument can cut both ways; for the presence of a legislature at the national level also means that an agency is constantly available to amend the law as formulated by the municipal court, if necessary.[94] Again, depending on the circumstances, legislative inactivity at the national level may or may not be interpreted as indicative of a warrant for compensating judicial lawmaking.[95] Even though municipal courts can at times introduce important legal changes, they are not equipped to undertake law reform of the kind which needs to be supported by appropriate institutional and administrative procedures;[96] legislative inactivity would not justify that. As it was put by Lord Devlin, a judge should not 'be the complete lawmaker'.[97] The remark is no less applicable to the International Court of Justice. The Court is not a legislature and should not be astute to creep into the habits of one.

No doubt, as it is said in the jurisprudence, 'the judicial settlement of international disputes . . . is simply an alternative to the direct and friendly settlement of such disputes between the Parties'.[98] There are indeed times when recourse to the Court has the advantage of enabling a State to accept a solution which, unaided by independent adjudication, it may find politically difficult to countenance though otherwise willing to contemplate. But governments do not in fact always consider it as an expression of friendly regard to be arraigned before the Court,[99] even on the basis of consensual

McNair's Period of Office', in *Cambridge Essays in Honour of Lord McNair* (London, 1965), pp. 24–25, footnote omitted.

[93] *South West Africa, Preliminary Objections, ICJ Rep 1962*, p. 363, Judge Bustamante, separate opinion; and *Barcelona Traction, Light and Power Company, Limited, ICJ Rep 1970*, p. 64, para. 2, Judge Fitzmaurice, separate opinion. And see W. Friedmann, 'The International Court of Justice and the Evolution of International Law', *Archiv des Völkerrechts*, 14 (1969–1970), pp. 317–318.

[94] Röben, 'Le précédent', p. 400.

[95] See W. Friedmann, 'Limits of Judicial Law-Making and Prospective Overruling', *MLR*, 29 (1966), p. 593.

[96] *Ibid.*, p. 602.

[97] Lord Devlin, 'Judges and Lawmakers', *MLR*, 39 (1976), p. 5.

[98] *Free Zones of Upper Savoy and the District of Gex, 1929, PCIJ, Series A, No. 22*, p. 13. The principle is reflected in the Manila Declaration on the Peaceful Settlement of International Disputes, adopted on 15 November 1982 by General Assembly Resolution A/37/590.

[99] P. C. Jessup, 'International Litigation as a Friendly Act', *Col LR*, 60 (1960), pp. 24 ff; and Guy de Lacharrière, in Garry Sturgess and Philip Chubb, *Judging the*

jurisdiction, and more particularly where there is a risk of losing the case through newly-made case law.

However, as observed by Judge Lauterpacht, 'Reluctance to encroach upon the province of the legislature is a proper manifestation of judicial caution. If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute.'[100] And, to recall the words of Fitzmaurice, the Court does not fulfil its responsibilities by limiting itself to the 'sort of bare order or finding that may suit many of the purposes of the magistrate or county court judge'; that, as he says, 'will by no means do for the Court of Appeal, the House of Lords or the Judicial Committee of the Privy Council, and their equivalents in other countries'.[101] It will not do for the International Court of Justice. Further, while, as mentioned above, it is possible that sovereign States litigating before the Court may conceive a sense of dissatisfaction about losing a case because of new law made by the Court for the purpose of deciding it,[102] it is possible that the character of its case may be such as to discourage a State from agreeing to litigate before a Court which is incapable of a reasonable degree of flexibility to accommodate the changing expectations of the international community.[103]

The case for steering a middle course between caution and boldness is obvious.[104] The task is not easy. It could get bogged down in 'Polonius-like homilies' about balancing the need for development against the importance of stability and certainty.[105] Inactivity invites charges of judicial timidity; activism invites charges of judicial legislation. This has led to restrained statements on the functions of the Court, as by President Winiarski and Judge

World: Law and Politics in the World's Leading Courts (Sydney, 1988), p. 455. Cf. the *Aegean Sea Continental Shelf, ICJ Rep 1978*, p. 52, Judge Lachs, separate opinion.

[100] *Admissibility of Hearings of Petitioners by the Committee on South West Africa, ICJ Rep 1956*, p. 57.

[101] Fitzmaurice, *Law and Procedure*, II, p. 648.

[102] See Sir Robert Jennings, in *Judicial Settlement of International Disputes* (Max Planck Institute, Berlin, 1974), pp. 37–38.

[103] See Sir Gerald Fitzmaurice, 'Judicial Innovation – Its Uses and Its Perils – As exemplified in some of the Work of the International Court of Justice during Lord McNair's Period of Office', in *Cambridge Essays in International Law* (London, 1965), p. 26.

[104] For the differential pull of these two factors, see Lauterpacht, *Development*, Pt II.

[105] Oscar Schachter, 'The Nature and Process of Legal Development in International Society', in R. St J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law* (Dordrecht, 1986), p. 768.

Tanaka.[106] More recently, the matter was put this way by Judge Jennings:

> [T]he primary task of any court of justice is not to 'develop' the law much less to 'make' it, but to dispose in accordance with the law of the particular dispute between the particular parties before it. This is not to say that it is no part of the Judge's task to develop the law. It clearly is, not least in international law. But it *is* to say that any 'development' must be necessary for, and incidental to, the disposal of the actual issues before the court. For the strength of 'case law' is supposed to be precisely that it arises from actual situations rather than conceived *a priori*.[107]

He added:

> [T]he Court must – and this is perhaps the most important requirement of the judicial function – be seen to be applying existing, recognized rules, or principles of law. Even where a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction, the decision must be seen to emanate reasonably and logically from existing and previously ascertainable law. A court has no purely legislative competence. Naturally the court in probably most difficult cases – and for the most part it is only difficult cases that are brought before international tribunals – may have to make a choice between probably widely differing solutions. It may even choose a course which has elements of novelty. But whatever juridical design it decides to construct in its decision, it must do so, and be seen to do so, from the building materials available in already existing law. The design may be an imaginative artifact, but the bricks used in its construction must be recognisable and familiar.[108]

These wise caveats do not deny, but impliedly recognise, that the Court has a faculty of limited creativity. There is little doubt that in the course of its acknowledged function of developing the law, it has created law. It is prudent to speak in terms of the Court having 'enriched the law by developing it and making it progress'; but the real meaning of the observation is clear when it is followed by the question 'whether by so doing the Court has acted *ultra*

[106] *ICJ Pleadings, Temple of Preah Vihear*, II, p. 122, President Winiarski; and *South West Africa, ICJ Rep 1966*, p. 277, Judge Tanaka.

[107] Judge Jennings, 'The Judicial Function and the Rule of Law in International Relations', in *International Law at the Time of its Codification, Essays in Honour of Roberto Ago*, 4 vols. (Milan, 1987), III, pp. 141–142.

[108] *Ibid.*, pp. 144–145.

vires'.[109] If, as it seems, its mission has not been exceeded, this is due to the fact that its law-making activity, in cases going beyond the marginal, has been confined to developments almost certain to enjoy consensus support within the international community.[110]

The experience of the Court tempts comparison with the municipal process. 'In a changing society', said Lord Devlin, 'the law acts as a valve. New policies must gather strength before they can force an entry: when they are admitted and absorbed into the consensus, the legal system should expand to hold them, as also it should contract to squeeze out old policies which have lost the consensus they once obtained.'[111] However, the nature of international society, based as it is on relations between sovereign States, imposes limits on the extent to which this elegant portrait can be transported to the functioning of the International Court of Justice. In practice, the position of the Court would appear to lie closer to Lord Wright's cautious view of judges navigating 'from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science'.[112]

[109] Manfred Lachs, 'Some Reflections on the Contribution of the International Court of Justice to the Development of International Law', *Syracuse Journal of International Law and Commerce*, 10 (1983), p. 277, and, also by him, 'Thoughts on the Recent Jurisprudence of the International Court of Justice', *Emory International Law Review*, 4 (1990), p. 92.

[110] See Oscar Schachter, 'The Nature and Process of Legal Development in International Society', in R. St J. Macdonald and D. M. Johnston (eds.), *The Structure and Process of International Law*. (Dordrecht, 1986), p. 772; and, also by him, 'Creativity and Objectivity in International Law', in Rudolf Bernhardt and others (eds.), *Festschrift für Hermann Mosler* (Berlin, 1983), p. 820. Possibly for these reasons, it has been remarked that the Court has had a disappointingly modest role in the evolution of contemporary international law. See W. Friedmann, 'The International Court of Justice and the Evolution of International Law', *Archiv des Völkerrechts*, 14 (1969–1970), p. 305.

[111] Lord Devlin, 'Judges and Lawmakers', *MLR*, 39 (1976), p. 1.

[112] Lord Wright, 'The Study of the Law', *LQR*, 54 (1938), p. 186, cited in Lord Devlin, 'Judges and Lawmakers', *MLR*, 39 (1976), p. 5.