

# International Court of Justice

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## ARTICLE

# Is the International Court of Justice an Emperor Without Clothes?

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## INTRODUCTION

There has been a remarkable vitalization of the activities of the International Court of Justice (ICJ) toward the end of the twentieth century. First, the Court has dramatically increased the number of cases it considers. Between the 1950s, when the ICJ was fairly active in settling disputes between Western European countries, and 1990s, no decade saw more

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\* This is an abridged version of "The ICJ: An Emperor without clothes?" that I contributed to N. Ando et al., eds., *Liber Amicorum Judge Shigeru Oda* (Kluwer Law International, 2002). For a full text of the article, please refer to it. I am grateful to the editors for the permission to use my manuscript for the *International Legal Theory*, vol. 8.1.

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than ten formal judgments of the Court. During the final decade of the 20<sup>th</sup> century, however, the ICJ already rendered twelve judgments. As many as twenty-four cases were pending in December 2000.

The vitalization of the ICJ can also be seen in the increased political significance of the cases brought before it. Until the 1970s, most cases brought to the ICJ had almost nothing to do with the front pages of the major newspapers. Although the judgment of the *North Sea Continental Shelf Case* of 1967 and that of the *Barcelona Traction Case* of 1970 were tremendously important from the perspective of international law, they were not so important from the perspective of international affairs in general. Since the end of the 1970s, however, a number of politically important cases have come before the ICJ. The *Iranian Hostage Case* and the *Nicaragua Case* are leading examples. The ICJ also gave advisory opinions on such politically sensitive issues as the legality of nuclear weapons under international law. Recently, the ICJ has dared to give judgments and advisory opinions that attracted the attention not only of international lawyers, but also of a much wider segment of the public.

The status of the ICJ as an authoritative interpreter of international law has greatly increased. The writings of certain publicists, such as Oppenheim, still enjoy a high reputation, but carry much less

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authority than they did before the Second World War. Compared with former periods, the relative significance of ICJ judgments as the major source of the authoritative interpretation of international law has constantly increased during the latter half of the twentieth century. This is true even of advisory opinions. Most international lawyers, while citing leading publicists, now rely heavily on the judgments and advisory opinions of the ICJ when they seek to establish the most authoritative interpretation of international law.

Despite this apparent increase in the significance of the ICJ, some commentators are seriously concerned with the present and future status of the ICJ. In his article published in 2000, Judge Oda expressed concern about the growing number of cases brought to the ICJ, which satisfy the formal requirements for jurisdiction, but lack the genuine will of the parties to obtain a settlement from the Court.<sup>1</sup> What concerns him most, in my understanding, is an over-estimation of the ICJ's capability as a conflict-resolution organ in international society. His argument seems to go as follows: The ICJ is a refined and extremely fragile construction based on a delicate balance among sovereign states. Once this delicate balance is lost, its power will fall into pieces.

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<sup>1</sup> S. Oda, "The Compulsory Jurisdiction of the International Court of Justice: A Myth?" 49 ICLQ 251, 264 (2000).

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The ICJ is the most important of the various agents that can settle international conflicts by means of law. It is the only agent that can give authoritative interpretations of international law in an international society made up of sovereign states holding fast to their own conceptions of international law. However fragile the status and restricted the power of the ICJ may be, this institutional asset is too important to be used carelessly, since carelessness would threaten the very existence of the ICJ. The Court should use its authority cautiously, and limit its role strictly to settling juridical questions, which parties actually want to solve through the ICJ. The Court should avoid dealing with questions, which the ICJ, as a conflict resolution organ, cannot properly settle, such as political questions, or questions that one of the parties does not really want to solve through the ICJ.

Judge Oda's concern is not without basis. When Hersch Lauterpacht and others advocated the settlement of all international problems through judicial means and arbitration, E.H. Carr severely criticized their utopianism.<sup>2</sup> Carr was not a simple realist, as he has often been misunderstood to be. He was fully aware of the power of norms, including those of international law, in international politics. Yet he could not help criticizing a dangerous

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<sup>2</sup> E.H.Carr, *The Twenty Years Crisis*, pp. 193-207, 2 ed., 1945.

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tendency to over-estimate the significance of judicial settlement and arbitration in international society. His views are still applicable today. To promote the increase in the number of cases brought before the ICJ and the expansion of the range of its jurisdiction as something desirable or as “progress” in international law overlooks crude realities of contemporary international society. Such a simplistic view must be rejected.

The role that the ICJ should play in conflict resolution contributes to a broader and more comprehensive global, political, social, economic and cultural process. Seen from this perspective, the judgments and advisory opinions of the ICJ constitute only a part, or an element, of this global process. As such, they exert a certain influence upon final settlements. In some cases they can bring about a final settlement to a conflict. But in many cases, the ICJ's power is limited to a certain degree of influence over a problem that has significant non-judicial aspects. Therefore, judgments and advisory opinions of the ICJ should be assessed only in concert with the other operative elements of this comprehensive global process. These elements include the claims and actions of states, especially those of great powers and those of the majority members of international society; decisions of the United Nations Security Council; resolutions adopted by the United Nations General Assembly; and so forth.

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Seen from this perspective, judgments and advisory opinions given by the ICJ inevitably assume a certain political nature in the comprehensive global process, even if the ICJ claims that it gives them from a purely juridical perspective. At the same time, the very act of avoiding political questions and refraining from rendering judgments and advisory opinions also assumes a certain political nature. Inaction in a political context is also a form of action. Even if it refrains from rendering a judgment or giving an advisory opinion in a politically sensitive case, the ICJ cannot avoid playing a certain political role and exerting a certain influence by the very act of inaction.

Moreover, it is not only in the case of “political questions” that the rendering of a judgment by a court does not necessarily bring about a final settlement of the conflict. A dispute, which can be defined as a conflict contested in normative terms between parties, may be settled by a judgment of a court, which has a binding force on the parties. However, the conflict which underlies the dispute is not necessarily settled by the judgment of a court. Although the conflict is submitted to a court as a juridical question, this does not mean that it ceases to have political, economic, historical, sociological and emotional dimensions. Even though a government might understand that the settlement given by a

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judgment of the ICJ should be final and ought to be respected, this understanding may not be shared by rivals in the ruling party, the opposition parties, media institutions, non-governmental organizations and the public of its country. And, if the public of the losing state are not satisfied with the settlement given by the Court, there is always a possibility that opposition politicians will manipulate this dissatisfaction to undermine the government that agreed to settle a dispute through the ICJ. Although this possibility is relatively smaller in the case of “juridical questions” than it would be with “political questions,” there is no categorical difference between the two, as seen from a political or sociological perspective. The difference is one of degree, not of category.

The ICJ has the image of being the most important judicial organ in international society. This image has a legitimate basis in the UN Charter and the Statute of the ICJ. The ICJ itself has repeatedly emphasized its character as a judicial organ. In the *Northern Cameroons Case* of 1963, the ICJ stated: “There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore.” This characterization of the ICJ as a judicial organ has been naturally associated with the perception of the ICJ as an important agent of dispute resolution in international society. However, most international lawyers have

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not distinguished the concept of dispute from that of conflict, and have failed to pay sufficient attention to the fact that even if the ICJ settles a dispute, the underlying conflict often remains. They tend to assume that once the ICJ renders the judgment, this will settle the conflict, tacitly equating the legal dispute with the substantial conflict. Whether the judgment is actually realized has been regarded as almost irrelevant to the study of international law.

Because the ICJ has tremendously enhanced its significance as an agent of the authoritative interpretation of international law, many international lawyers have begun to confuse the significance of the ICJ as the most important agent of authoritative interpretation of international law, with the significance of the ICJ as an agent of international conflict resolution. Although they know in the abstract that the ICJ is not such an important agent in the comprehensive global process of conflict resolution, they have treated the ICJ as if it were.

PROBLEMATIC FEATURES IN THE  
RELIANCE ON ARTICLE 38 OF THE ICJ  
STATUTE AS INDICATING THE  
“SOURCES” OF INTERNATIONAL LAW

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The failure to understand realistically the significance of the ICJ has influenced the attitude of international lawyers toward the question of the “sources” of international law. When discussing the problem of the “sources” of international law, most lawyers begin their argument by referring to Article 38 of the ICJ Statute. Even those who do not explicitly refer to Article 38 generally assume that discussion of the categories of international law should start with, the list of “sources” provided in Article 38(1). Although many leading international lawyers such as Jennings, Cheng, McDougal, Higgins, Falk and Abi-Saab have recognized that using Article 38 for the purpose of explaining the categories of contemporary international law has “an element of absurdity”,<sup>3</sup> a tacit reliance on Article 38 still prevails. This fact suggests that most international lawyers tacitly and unconsciously equate the norms of conduct among states with the norms of adjudication to be applied by the ICJ. This further suggests that most international lawyers tacitly accept a domestic analogy and base their argument on this analogy when arguing about the sources of international law.<sup>4</sup>

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<sup>3</sup> See R.Y. Jennings, “The Identification of International Law”, in: B. Cheng (ed.), *International Law*, 1982, 1 et seq. (9).

<sup>4</sup> See Y. Onuma, “Kokusaihogaku ni okeru kokunai model shiko (The Domestic Model Approach I the Study of International Law), in *Kokusaiho to kokunaiho (International Law and Domestic Law)*, pp. 57 et seq., K. Horobe and T. Tanaka, eds., 1991.

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In most domestic societies, the judiciary has compulsory jurisdiction. In some developed societies, courts enjoy a high degree of independence from other powers and a high reputation as an authoritative organ for settling social conflicts. The judgment of a court is usually implemented in such societies by the enforcement mechanism of a state, even when the losing party is not willing to abide by the judgment. Citizens in such societies generally share the legalistic culture and tend to settle conflicts on the assumption that they can rely on the judiciary as a final arbiter of their dispute. Under such circumstances, one may be able to assume reasonably that a member of the society who has conflicts with others will negotiate with the opposing party “in the shadow” of the court. Each party can either tacitly or explicitly send a message to the opposing party that “if you do not accept my demand, I will sue you. I am confident that my argument will prevail in court; therefore it is better for you to give in, or at least to compromise, in this negotiation.” This means that one can reasonably equate norms of conduct with norms of adjudication. Domestic lawyers can study the law applied by the judiciary (norms of adjudication) with some confidence that it will determine actual disputes.

The situation in international society is very different from this domestic model. The ICJ does not have

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compulsory jurisdiction. The number of states that accept the jurisdiction of the ICJ under Article 38 is only 63 out of some 190 states as of July 1999. Even those states that do accept the Court's jurisdiction do so with various qualifications. States are generally reluctant to settle international conflicts by means of the ICJ. This is especially the case with politically important issues. Moreover, there is no guarantee of enforcement of the judgment, once given. There have been conspicuous cases in which the losing party has not complied with the judgments. Therefore, the shadow of the court can influence the bargaining process between states much less in international society than it would in domestic disputes. States cannot expect to influence others very much by threatening recourse to the ICJ. Under such circumstances, one can hardly presume to equate norms of conduct with norms of adjudication. States, especially those concerned with their reputation of compliance with international law, may generally seek to behave in accordance with norms of international law, without considering how their conduct will be judged by the ICJ.

One must therefore identify binding international norms of conduct independently of the norms of adjudication of the ICJ. Even if a certain rule is not included in Article 38 of the ICJ Statute, this rule may be binding among states as a norm of conduct. In fact, when we discuss the binding force of the

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rules and principles of international law, we generally assume that we are dealing with the whole range of international legal norms regulating its subjects. The binding force of international law as it relates to the norms to be applied by the ICJ constitutes only a part of this range. For example, when we discuss the problem of whether the resolutions or declarations adopted by the General Assembly of the United Nations have binding force, the scope of this discussion is not limited to the problem of whether they can be applied by the ICJ as a binding norm. The discussion covers the whole problem of whether states are bound by these resolutions or declarations in their actual behavior in international society. Even if a rule promulgated in a UN declaration has no chance of being applied by the ICJ, the rule in question may still be binding upon the states in their actual behavior. There is no need to consider whether the ICJ might apply the rule. The demonstration that the states concerned treat the rule in question as legally binding will suffice. The only remaining question is how to demonstrate it.

Many international lawyers, including those discussing the “sources” of international law, refer to classical writers such as Hugo Grotius and Emerich de Vattel, without recognizing that these classical writers seldom considered international law as the norm of adjudication between nations. Grotius

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argued that judicial settlement is impossible between nations.<sup>5</sup> For precisely this reason, he regarded just war as a means of enforcement of the rights of nations.<sup>6</sup> When the classical writers discussed the problem of law among nations, what they had in mind was the law among nations as a norm of conduct, not as the norms to be applied by an international court, which did not exist in their time.

Major provisions of the ICJ statute, including those of Article 38, were made in 1920, when the PCIJ was established. It is understandable, if not totally justified, that international lawyers at that time were so enthusiastic about the new court that they mistakenly equated its norms of adjudication with the norms of international conduct. Some international lawyers even advocated settling all international conflicts by judicial means or arbitration.<sup>7</sup> Since then, most international lawyers have relied heavily on Article 38 of the ICJ Statute when they deal with the question of the “sources” of international law. According to the predominant view, a rule must fall within the category of law provided in Article 38 of the ICJ Statute in order to

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<sup>5</sup> H. Grotius, *De jure belli ac pacis*, 1646 ed., I, ch.1, 1; ch.3, 2(1); II, ch.1, 1(3)(4), 2(1). See also Y. Onuma, “War”, in id. (ed.), *A Normative Approach to War—Peace, War, and Justice in Hugo Grotius*, 1993, 57,78-79, 99.

<sup>6</sup> *Id.* 77-93, esp. 78-79.

<sup>7</sup> This argument was severely criticized by E. H. Carr as a sheer utopianism (E. H. Carr, see note 5, 193-207).

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be a binding norm of law. If a certain norm is not characterized as one of the categories provided in Article 38, it cannot be a binding norm of international law. Why has this argument prevailed? Why do the norms of adjudication applied by the ICJ claim such a far-reaching status as the ultimate measure of the binding quality of the entire body of international law regulating the behavior of states? Why can an Article, which was made 80 years ago, still enjoy such a preeminent status as the most authoritative criterion for judging the legal nature of international law?

The following points may answer these questions. First, and most fundamentally, the predominant view has, either consciously or unconsciously, adopted the domestic model of law. Although most international lawyers know very well that international society differs in many respects from domestic societies, they nevertheless have tacitly assumed that the law to be applied by the court is the same as the law regulating the conduct of the addressees. This assumption may be valid in some domestic societies with a legalistic culture and a highly developed judicial mechanism, but certainly not in international society, which lacks such characteristics. However, most leading international lawyers have lived in a limited number of developed countries, where norms of conduct may reasonably be equated with the norms of adjudication. They

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have also regarded international law as “underdeveloped” and sought to establish institutions and attitudes that would mirror the domestic law.

More specifically, the failure to distinguish between norms of conduct and norms of adjudication has prevented most international lawyers from questioning the appropriateness of relying on Article 38 when discussing the sources of law in international society. Had they recognized the fact that norms of conduct are not necessarily the same as norms of adjudication, they would have been aware that it is inappropriate to rely on Article 38 when discussing the whole range of binding norms of international law. Although all of the binding norms of international law are expected to regulate the behavior of states, the ICJ does not necessarily apply them. Few have been alert to this difference.

Third, international lawyers have paid little attention to the fact that existing forms of international law change over time. Many assume that the “two major sources (or forms)” of international law are treaties and customs, and that Article 38 expresses this formula in positive law. However, this has become the case only in the twentieth century. Until the late nineteenth century, customary international law occupied only a marginal place. For Vitoria, Suarez and Grotius, natural law occupied the most

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important place as a source of law. For Vattel, natural law was still nominally what mattered, although “voluntary” international law had gained in significance. According to his theory, customary law was secondary. Even among the nineteenth century “positivists”, the notion that treaties and customs are the two major sources of international law was not as prevalent as it is usually thought to be. This is evident if we actually identify the “sources” of international law in the textbooks of the major 19<sup>th</sup> century publicists such as Wheaton, Klüber, Heffter, Phillimore, Pradier-Fodérer, and Hall. These historical facts have seldom been acknowledged. Thus, the widespread perception that treaties and customs have always been major sources of international law and that Article 38 expresses this unquestionable truth persists.

Finally, it must be admitted that it is not easy to identify the whole range of binding rules and principles of international law as actual norms of conduct on an empirical basis. Even if it is inappropriate to rely wholly upon Article 38, it is still useful as a clue to the identification of the binding norms of international law. With the increase of cases brought before the ICJ during the last decades, the number of rules whose binding force is reviewed by the ICJ has also increased. At least with regard to the rules and principles that are actually applied by the ICJ, the equation of the norms of conduct with

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the norms of adjudication creates few problems, because the latter generally presumes the former.

These factors explain why Article 38 has been used, and is still used today, by most international lawyers as the sole measure of the “sources” of international law. But even as norms of adjudication, the rules provided in Article 38 are outdated 80 years after their enactment. As norms of conduct, where law is expected to regulate the actual behavior of states acting on very different assumptions and in response to very different expectations, interests and aspirations from those of 1920, the list of “sources” in the ICJ statute is dangerously incomplete. Thus, the global norm-creating mechanisms after World War II have suggested more legitimate processes of creating international law with universal validity, than the mythical formative process of “customary” international law, as described in Article 38. What has been lacking is a correct characterization of these new processes from a perspective not confused by the domestic model approach.

EQUATION OF CUSTOMARY  
INTERNATIONAL LAW WITH GENERAL  
INTERNATIONAL LAW AND ITS PROBLEMS

It is well known that the ICJ has used the notion of customary international law in a highly flexible manner. The ICJ has blurred the distinction between

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state practice and *opinio juris* in demonstrating norms of general customary international law. It has also become more inclined to rely on United Nations General Assembly declarations and resolutions as well as multilateral treaties to demonstrate the customary rules and principles of general international law.<sup>8</sup> Further, the ICJ has relaxed the time requirement in the formation of general customary international law.<sup>9</sup> Many international lawyers support this, but others criticize such deviations from the traditional doctrine of customary international law. Such deviations are the unavoidable and understandable methods through which the ICJ identifies binding norms within the framework of Article 38 of the ICJ Statute. Because there is no treaty binding all states in international society, the ICJ is compelled to apply either rules of “customary” law or “general principles of law recognized by civilized nations”, when it is required to apply norms with universal validity. Because the latter has many disadvantages, the ICJ has chosen the former. As a consequence, the ICJ is compelled to demonstrate norms of universal validity in terms of customary law even in situations where it is difficult to do so according to the traditional, “rigid” doctrine of customary law. Thus, the ICJ has sought to re-characterize the concept of customary law so as

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<sup>8</sup> See e.g., in the Nicaragua Case of 1986 (ICJ Reports, 1986, 14 et seq. 99-100.

<sup>9</sup> North Sea Continental Shelf Case, ICJ Reports, 1969, 3 et seq. 42.

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to apply norms of general international law under the name of customary international law. Seen from this perspective, reliance on UNGA declarations and multilateral treaties in the general-international-law-creating process has some advantages.

The resort to UNGA declarations has been controversial, though some consider it impossible to identify the legal consciousness of a state from votes in the United Nations General Assembly, because voting is a political act of a state, not a juridical one. In many cases, had the state known that the resolution would be binding, it would not have voted in the affirmative. Precisely because states know that the UNGA resolution or declaration has only hortatory force, they vote in the affirmative when otherwise they would not.

Yet the traditional notion of state practice shares similar, or even worse problems. For example, many regard statements or declarations by an executive organ such as the president, prime minister or foreign minister as an expression of state practice or *opinio juris*. However, these also are typically political acts. Even a concrete, non-verbal, act by the executive organ of a state is not a purely juridical act. Most concrete executive acts are discretionary and have political aspects as well as juridical aspects. If one argues that the act of the executive is constrained by law and therefore should be characterized as

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juridical, then the same argument should apply to voting in the UNGA. Representatives of states do not vote independently from the laws of their states. Although they do have a discretionary competence, they act within the framework of their domestic laws. In this respect, there is no difference whether a concrete act of a state is performed in the international organization or elsewhere. Unless the concrete acts to be used in indicating “state practice” and *opinio juris* are limited to domestic laws and judgments of the domestic courts, one cannot be sure whether the state agent in question really acts with a sense of law, or a sense of “hortatory force”, or some other sense. It is only through interpretation by international lawyers or courts that certain elements within the concrete act of state are characterized as juridical, as no act of state is inherently purely political or purely juridical.

Once this common nature of acts of states, including verbal acts such as statements and declarations, is recognized, then the comparative merits of relying on the UNGA declarations, as practiced by the ICJ, becomes evident as an important element of the general international law-creating process. First, not all resolutions and declarations adopted by the UNGA should be used as evidence or an element of the process that creates general international law. Only those limited number of important declarations that can be construed as expressing the norms of

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general international law by their wording should be used. They are far clearer and more elaborate in articulating the normative consciousness than the verbal or non-verbal acts of political organs of individual states, which have been used in the traditional doctrine of customary law as evidence of *opinio juris*.

Second, the UNGA process of adopting resolutions or declarations satisfies the requirement of quasi-universal participation of states for the creation of general international law far more concretely and explicitly than the traditional theory of customary law. In the latter case, norms of general international law are demonstrated through “custom”. Actually, most of these “customary” norms have been posited by leading international lawyers in their treatises or textbooks. These international lawyers relied heavily on the acts and statements of the executive branch of the government, domestic laws, and domestic court decisions as major materials of state practice. Basically, the same materials have been used as evidence of *opinio juris*. However, because it is substantially impossible to identify such materials in all states, international lawyers have sought to identify the practice of a relatively few, powerful and influential states, and to regard these tacitly or explicitly as representative of general practice. Rules and principles characterized as “customary” through this method have usually enjoyed a high degree of

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effectiveness, precisely because they have been formulated on the basis of the practice of powerful states. As such, the effectiveness of “customary” law has actually eclipsed its lack of generality.

Because the study of international law has been West-centric, the lack of state practice and *opinio juris* of a large number of non-Western nations has not been seriously considered. The fact that non-Westerners constitute the overwhelming majority of the human species has been ignored: first by the argument that they were not subjects of international law; and then, after the attainment of their independence, by the continued preeminence of the mythical theory of customary international law. Theoretically, the notions of acquiescence and tacit, or inferred, consent have often been used to camouflage the lack of generality. However, because there was no international forum openly revealing legislative processes, both acquiescence and tacit consent inevitably assumed a highly fictitious and discriminatory character.

In contrast, in the case of the UNGA norm-creating process, this fictitious character can be minimized, because this process is far more centralized and transparent through the organizational mechanism of the United Nations. Because the UNGA is an organ composed of virtually all states, its norm-creating process satisfies the requirement of global

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participation far better than the traditional “customary” international law-making process does. Even in terms of traditional doctrine respecting the sovereign will of individual states, the UNGA norm-creating process is far more legitimate, because it actually gives a voice to all members of the UNGA, whether or not they agree with the proposed norms. Thus, UNGA-generated norms can claim a high degree of legitimacy in terms of global participation, identification of the sovereign will of the states, transparency, and other substantive and procedural requirements in the creation of norms, which are extremely important to universal applicability.

These characteristics are closely related to another problem, that of general norms of conduct in international law. As described earlier, one of the problems created by excessive reliance on Article 38 of the ICJ Statute is the equation of customary international law with general international law. As long as we rely on Article 38, the only feasible candidate for general international law remains customary international law. Consequently, all norms that claim universal validity must take the form of customary international law. This equation of general international law with customary international law still prevails today. From a theoretical perspective, this is very strange. The category of customary law is concerned with the cognitive or existential form of law. The category of

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general international law is concerned with the range of validity or applicability of law. These are different categories. In fact, there are norms of special customary law that lack universal validity. Simply demonstrating that a certain norm is customary law does not guarantee its universal validity. Yet, most international lawyers and the ICJ have, in many cases, tacitly equated customary international law with general international law. In the case of the ICJ, this is understandable because the ICJ must apply rules that are provided in Article 38. However, international lawyers are not bound in this way. They have freedom to think of general international law independently of Article 38, and should do so. Lack of imagination and creativity has contributed to many problems and helped to prolong the prevalence of a mythical theory of customary law beyond its proper lifespan.

The most awkward example of this failure is the concept of “instant” customary international law.<sup>10</sup> Bin Cheng was quite right when he pointed out that there may be norms of general international law regulating the conduct of states in outer space, and claimed that such norms might be created almost instantly because of the shared legal consciousness of the members of international society. However,

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<sup>10</sup> B. Cheng, “United Nations Resolutions on Outer Space: ‘Instant’ Customary Law?” *Indian JIL* 5 (1965), 23 et. seq.

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Cheng sought to explain this new phenomenon within the traditional framework of Article 38 of the ICJ Statute. Thus, he was urged to invent a term that he, himself, did not particularly like: instant customary law.<sup>11</sup> The term itself is, of course, a contradiction, and clearly reveals how inappropriate and outdated it is to think of general international law within the framework of Article 38.

Moreover, if we consider the problem of the binding force of international law in terms of the norms of adjudication as provided in Article 38, we are inevitably led to another highly fictitious theory: that all norms of international law regulating states' behavior are norms of adjudication to be applied by the ICJ. This is simply not true. Let us consider concrete situations where international law actually works as norms of conduct.

When an organ of state A, such as the executive, the legislature, or the judiciary, wants to take an action which involves some norms of international law, it usually considers whether its action is compatible with these norms. It generally acts in accordance with norms of international law. However, in certain cases, organs of the state act in violation of international law, or in such a way that their acts'

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<sup>11</sup> B. Cheng, "On the Nature and Sources of International Law", in B. Cheng (ed.), *International Law*, 1982, 203 et seq. (223).

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compliance with international law is dubious. In those cases, however, the state organ seldom publicly admits that it is acting in violation of international law. On the other hand, many actors would argue that state A has acted illegally under international law. It is here that international law as norms of conduct is taken up and discussed.

The various actors who should participate in the discussion of international law as norms of conduct include: (1) other states, actually governments, who claim that their rights are violated by the alleged illegal act of state A; (2) political rivals in the ruling party or opposition parties in state A, who seek to use any inappropriate acts by the government as a means to criticize the present government; (3) NGOs, media institutions and activists, either in state A or elsewhere, who regard the observance of the norm in question as important and are ready to criticize any government who violates it; (4) governments requested to participate by actors in the third category to take a tough position with respect to state A; (5) international organizations whose mandate includes securing compliance with the norm in question; and (6) individuals who claim that their rights are violated by the act of state A. Among these cases, only actors in the first category are generally concerned with international law as norms of adjudication to be applied by the ICJ. However, even in cases in which the offended state participates,

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if state A does not accept the jurisdiction of the ICJ on the issue in question, the argument as to the lawfulness of the act of state A cannot be settled by the ICJ. Because only 63 out of some 190 states accept the compulsory jurisdiction of the ICJ, most of which accept it with a wide range of reservations and qualifications, the possibility that the norms of adjudication will play a substantive role is extremely low. Under these circumstances, the shadow of the court can hardly play an important role in the argumentative or bargaining process between state A and the offended state.

It is thus evident that in most cases, forums where international law as norms of conduct is discussed are outside the ICJ. Arguments on the lawfulness of the act of state A center on the interpretation of international law as a norm of conduct.

Governments, political rivals, opposition parties, NGOs, media institutions and activists resort to various sources of interpretation of the norm of conduct in question in order to secure a favorable interpretation. These sources include, but are not limited to, the provisions of treaties; judgments and advisory opinions of the ICJ; arbitral awards, judgments of international courts other than the ICJ; resolutions or declarations of the UNGA; decisions of the UN Security Council; reports of the panels and the appellate body of the World Trade Organization; views, opinions and recommendations of the

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monitoring bodies of various multilateral treaties; resolutions of various international organizations and important international conferences; judgments of municipal courts; and the views of leading international lawyers. If there is a judgment or advisory opinion that gives a decisive interpretation of the norm in question, this interpretation has a high degree of authority and persuasive power. However, such cases are not the rule, but rather an exception, as indicated above.

In this way, the situation in which international law as norms of conduct is taken up and actually discussed is the argumentative process resorted to by parties with a conflict. In such a process, both parties use a rule of international law as a means of justifying their claims. This is common to the rule of international law used by the parties before the ICJ. However, arguments made in forums other than the judiciary do not end in the form of a judgment by a court. Under such circumstances, an argument concerning the binding force of law tends to assume a character reflective of its degree of persuasiveness.<sup>12</sup> The debate involves arguments concerning the procedural and participatory legitimacy in the promulgation of the rule, intergovernmental, transnational and intercivilizational substantive

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<sup>12</sup> See, M. Sorensen, "Theory and Reality in International Law," Proc. ASIL, 75(1981), 140, 148.

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legitimacy, relative strength in terms of effective realization of the rule in question, and so on.

Seen from this perspective, the persuasive power of the traditional theory of customary international law is not as great as it appears to be. Neither “state practice” nor *opinio juris* advocated by the traditional theory of customary international law can provide more convincing evidence of the sufficiently general and wide coverage of states than, for example, multinational treaties of a universal nature such as the Geneva Convention of 1949, the UN Charter and the Convention on the Right of the Child, or the UNGA resolutions and declarations, adopted unanimously or by consensus. Thus, the legitimacy of “customary” law in terms of the global participation of states in the creation of global norms, transparency and the identification of the sovereign will of nations, is far inferior to that of the general international law-creating process based on multinational treaties of a universal nature or UN declarations.

Naturally, neither multilateral treaties nor UNGA resolutions are immune from defects as evidence that a norm holds universal validity. In the former case, how to assess the normative consciousness of the states that do not ratify or accede to the treaty creates a difficult question. One might be able to say that because the overwhelming majority of states express

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their commitment either in the form of ratification, accession or signature, the flaw of inferred consent is minimized, at least if compared with the traditional doctrine of customary law. However, if a powerful state persistently objects to certain rules in the treaty or the UN declaration, this factor must be considered seriously. Likewise, the whole process of enforcement must be examined. In the case of UNGA declarations or resolutions, whether they are phrased to declare or elaborate the existing or emerging law must be closely examined.

However, the critical point is that these are problems of degree in comparison with “general” rules formulated as “customary” rules of international law under the traditional doctrine. It is not fair at all to allow camouflaging the lack of generality by the abuse of “tacit” or “inferred” consent, “acquiescence” and other fictitious notions for the traditional theory of customary international law on the one hand, and to set an excessively high threshold for an alternate theory seeking to formulate the notion of general international law on the basis of the actual norms of conduct among nations, on the other. Such a double standard is a product of the myth that the “sources” of international law should be found in Article 38 of the ICJ Statute and nowhere else.

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The ICJ is certainly an important organ of international law and international society at large. It is handsomely dressed when it is engaged in its proper roles. However, like all other existing institutions, it has limitations. International lawyers tend to over-estimate the significance of the International Court of Justice because they unconsciously like to consider the rules and principles that they deal with as norms to be applied by courts, tacitly following the domestic model. In international society, this assumption has only limited validity. The ICJ may appear to us as an emperor, but its empire does not extend to all of international law. Identifying the whole range of international law with norms of conduct needed to regulate the actual behavior of states is one of these areas where the emperor has only a limited role. In such a case we must have the courage to shout: "The emperor has no clothes."

# COMMENTS

## The Curious Condition of Custom

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The point of the old story of the emperor and his clothes is, no doubt, that pretentiousness will not go unnoticed. With this in mind, Professor Onuma's metaphor of the International Court of Justice as an emperor without clothes is deeply misguided, for at least two reasons. First, and foremost, because the ICJ is not all that pretentious to begin with. It may be true, as Professor Onuma states, that many international lawyers regard the ICJ as "an important agent in the comprehensive global process",<sup>1</sup> although somehow I doubt that this is indeed the case. But, even if many lawyers overestimate the importance of the ICJ as a political actor, this is not necessarily due to any pretentiousness on the part of the ICJ.

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<sup>1</sup> Onuma Yasuaki, "Is the International Court of Justice an Emperor without Clothes?", *International Legal Theory*, Vol. 8.1, p. 1.

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A second reason why Professor Onuma's metaphor is misguided resides in the curious circumstance that he does not really have any complaint with the ICJ. Instead, his complaint is about the relations between law and power. The ICJ only comes into this by sometimes presenting *dicta*, *obiter* or otherwise, which may have a bearing on that relationship. But, to suggest, as the beginning of his contribution seems to do, that the ICJ is solely responsible for the relations between power and the law, puts too much emphasis on an institution that suffers in a state of perpetual existential angst, confronted, as it is, with constant competition from other courts and tribunals.

The ICJ is, of course, by no means an emperor without clothes; rather, if it must be thought of as an emperor at all, the better image would be of an emperor without an empire: of Napoleon banished to some deserted island; of some lady (looking uncannily like Ingrid Bergman) claiming to be Anastasia, heiress to the czar's throne; of Albanian or Bulgarian or Greek kings living in exile and occasionally claiming publicly that really, Albania or Bulgaria or Greece should be theirs and that their rightful place is in the royal palace. This image of an emperor without an empire, would be a far more accurate depiction of the ICJ than the emperor without clothes.

#### I

### *The Curious Condition of Custom*

Professor Onuma makes a good point in observing that the formation and recognition of customary international law is somewhat unbalanced, tilting too much in favour of a handful of traditionally powerful states and towards the views of international lawyers that live in the most powerful nations. Few will contest that western states and western international lawyers dominate the discipline of international law. This makes international law's claim of universal validity somewhat problematic.

There is nothing particularly new about this situation. International law has traditionally been a western affair, if only because the West, through the institution of colonialism, at one point actually embraced sizeable parts of the globe.<sup>2</sup> Some of the classic decisions on customary international law, going back even to the days before the creation of the ICJ's predecessor, were limited in the scope of their methodology. In *Paquete Habana*, for example, the United States Supreme Court found a customary rule of law to exist based on the practice of a mere handful of western European states.

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<sup>2</sup> The impact of colonialism on the development of international law has only recently become the subject of study among international lawyers. See, e.g., Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", 40 *Harvard International Law Journal* (1999), 1-80; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002), ch. 2.

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Ironically, the ICJ itself has always been reluctant to embrace western conceptions as universal. While it is possible, as Professor Onuma has done, to read a lot into the general statements that the ICJ has made in cases such as those concerning the North Sea Continental Shelf, it is also worth pointing out that in the *North Sea Continental Shelf* cases, the Court concluded that Germany had not become bound by the equidistance rule through custom.<sup>3</sup> In other words, while it is possible to accuse the ICJ of pandering to powerful states because customary law inevitably reflects power, the Court has been sensitive to this in its rulings. The same is true of the *Asylum* case, where no rule of customary international law, regional or otherwise, was found to exist.<sup>4</sup> The ICJ may be generous about customary law in the abstract, but can be quite stingy in concrete cases.

There are, of course, exceptions. In the *Nicaragua* case, the ICJ famously relaxed the requirements for establishing customary international law, by claiming that if there is sufficient *opinio juris*, state practice can be disregarded.<sup>5</sup>

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<sup>3</sup> *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands), 1969 I.C.J. 3, esp. para. 81.

<sup>4</sup> *Asylum* case (Colombia/Peru), 1950 I.C.J. 266, esp. 276-78.

<sup>5</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua/USA), merits 1986 I.C.J. 14, in particular para. 186.

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Yet, even this is not as unequivocal as it may sound. The *Nicaragua* decision is one in an impressive line of cases where what seems at first to be a reference to custom is, in fact, not a reference to custom at all, but rather to morality or something like it.<sup>6</sup> Perhaps the clearest example is the *Corfu Channel* case, decided eventually on the basis of "elementary considerations of humanity".<sup>7</sup> Indeed, the positivist looking for a clear-cut rule of law in the *Corfu Channel* case will be disappointed: Albania's duty to inform passing ships could not be traced back to any particular legal rule, conventional or customary.

Another example is the advisory opinion on Reservations to the Genocide Convention, in which the Court famously held that the provisions of the Genocide Convention were binding even without conventional obligation.<sup>8</sup> Many<sup>9</sup> have taken this as a reference to custom, but how plausible would it really have been to stipulate, half a decade after Auschwitz and in the midst of Stalinist terror, that genocide had been outlawed as a matter of

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<sup>6</sup> See generally Jan Klabbers, *The Concept of Treaty in International Law* (The Hague: Kluwer, 1996) esp. at 146-47.

<sup>7</sup> *Corfu Channel* case (Merits) 1949 I.C.J. 4, at 22.

<sup>8</sup> *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) 1949 I.C.J. 15, at 23.

<sup>9</sup> An example is Gennadi M. Danilenko, *Law-making in the International Community* (Dordrecht: Martinus Nijhoff, 1993), at 151-53.

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customary international law? The opinion makes a lot more sense as an affirmation by the Court that some things are simply improper, regardless of whether or not a rule of law exists to that effect.

In the *Nicaragua* case, the Court did something similar by finding that Nicaragua could not violate human rights with impunity, even in the absence of a legal obligation to respect human rights.<sup>10</sup> This only makes sense as a reference to morality.<sup>11</sup> Relaxing the criteria for the use of force was made easier by the circumstance that aggression is morally difficult to excuse. One wonders whether the Court would have come to the same conclusion in circumstances with less serious moral overtones.

Indeed, the Court's relaxation of the standards may well have been inspired precisely by the problem that with respect to prescriptions of moral relevance (think in particular of human rights), the traditional concept of custom had lost plausibility.<sup>12</sup> Surely, it is

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<sup>10</sup> *Nicaragua*, *supra* note 5.

<sup>11</sup> Note also that the *Nuclear Weapons* opinion owes much to the Martens clause, which itself contains an open-ended reference to morality. *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), 1996 I.C.J. 226.

<sup>12</sup> As Lijnzaad forcefully put it in one of the propositions accompanying her doctoral thesis: practice as a condition for the creation of customary international humanitarian law is obscene. See Liesbeth Lijnzaad, propositions accompanying *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Dordrecht: Martinus Nijhoff, 1994), proposition no. 7.

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awkward to conclude that if and when states commit torture, torture can become legally justified as customary international law. Surely, it is awkward to condone arbitrary detentions, or widespread disappearances, simply because they happen to occur on a large scale. While the traditional concept of custom, insisting as it does on state practice and *opinio juris*, might not actually lead to an approval of torture or genocide, as long as those acts take place they would be difficult to prohibit through the traditional process of generating customary law.

It is not without irony that the Court, in *Nicaragua*, seemed first and foremost to upgrade the legal status of resolutions adopted by the General Assembly. This is precisely what Professor Onuma would wish them to do. It has been cogently argued that loosening the standards of custom will result in a loosening of the very concept of custom and perhaps, eventually, in a delegitimization of the law. This has been pointed out not only by hard-nosed (or apparently hard-nosed) positivists, but also by lawyers whose positivism is more overtly tempered by concerns for justice and fairness.<sup>13</sup>

Others have made the more radical claim that there is no customary international law at all. In her erratic but interesting, brief work "The Concept of

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<sup>13</sup> See, e.g., Bruno Simma & Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens and General Principles", 12 *Australian Yearbook of International Law* (1992), 82-108.

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International Law,” Ingrid Detter de Lupis claimed that there really is no such thing as customary law. Custom, as Detter’s preface unabashedly states, is but “a nebulous fiction.”<sup>14</sup> At best, Detter is prepared to recognize bilateral historic or prescriptive rights, claimed by A and accepted by B, and she points out that the “bulk of the cases before the International Court of Justice where one has spoken unequivocally of customary law have, indeed, concerned precisely such cases.”<sup>15</sup> Indeed, Detter ends up concluding that customary law “has become the carpet under which any unidentified act or rule is swept, often with ensuing conviction that because the carpet now covers it, it must be valid ‘law’.”<sup>16</sup>

## II

Detter has a point, although it may not be the point that she herself thinks she has. There is indeed a lot of normative material floating about whose legal status, under any accepted version of sources doctrine, is unclear. The legal relevance of many questionable acts may very well depend on what exactly, if anything, qualifies as customary law. Sir Robert Jennings has rightly observed that not all of

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<sup>14</sup> See Ingrid Detter de Lupis, *The Concept of International Law* (Stockholm: Nordstedts Forlag, 1987), at 13.

<sup>15</sup> *Ibid* at 116.

<sup>16</sup> *Ibid*

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what passes as custom these days ought properly to be called “custom” at all.<sup>17</sup>

Yet, all this is somehow a debate in the margins. The more fundamental reality is that we are bound to quibble about sources doctrine, and thus about customary law, precisely because we quibble about the point of law.<sup>18</sup> We cannot seem to agree on what law is to begin with; we cannot seem to agree on what purpose law ought to serve. Should law serve justice? Or order? Should it contribute to change, or to stability? Sources doctrine in particular is deeply political, which is no wonder given the circumstance that sources are what stands between naked politics and whatever substantive point we might wish to make. As Koskenniemi gracefully observed, a “clause in a formally valid treaty is an extremely powerful practical legal argument”,<sup>19</sup> and *mutatis mutandis* the same applies with respect to references to a rule of customary international law. As a consequence, debates on what exactly constitutes custom are bound to be perennial, and unsolvable: there simply may be too much at stake.

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<sup>17</sup> See Sir Robert Jennings, “What is International Law and How Do We Tell it When We See It?”, 37 *Schweizerisches Jahrbuch für Internationales Recht* (1981), 59-88.

<sup>18</sup> See also Martti Koskenniemi, “Introduction”, in Martti Koskenniemi (ed.), *Sources of International Law* (Aldershot: Ashgate, 2000) xi-xxviii.

<sup>19</sup> *Ibid.*, at xxiv.

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This is, in the end, the debate in which Professor Onuma would like to engage. The prevailing concept of custom is tilted towards the powerful, western states, and should therefore be amended so as better to reflect the interests and attitudes of non-western states. This is a widely shared view. Professor Onuma surely has good grounds for complaining that the “hesperocentric study” of international law has ignored non-westerners, “first by the argument that they were not subjects of international law, and then, after the attainment of their independence, by the continued preeminence of the mystical theory of customary international law.”<sup>20</sup>

Whether it is actually the mystical theory of customary law that is responsible for the under-representation of the non-western viewpoints is doubtful. As noted earlier, the International Court of Justice has been much more generous in the abstract than in concrete cases. Other courts and tribunals, both local and international, have demonstrated a very different understanding of some of the intricacies of sources doctrine.

Professor Onuma's contribution to this debate has a certain timeless quality about it. Omitting the references to recent cases, his piece could have been written in the 1950s; and it may be expected that

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<sup>20</sup> Onuma, *supra* note 2.

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pieces similar in tone and tenor can and will still be written in the 2050s, simply because sources doctrine is so intractable. That is, some might say, cause for concern: if we do not know with certainty where exactly the law comes from, then how can we ever know with certainty what it is that the law requires? On the other hand, it is precisely the uncertainties surrounding sources doctrine that enable scholars and politicians to make the type of argument that Professor Onuma makes. It is precisely the intractable nature of the doctrine of customary international law that makes it so receptive to political considerations, and so renders it able to serve both justice and order, change and stability, as circumstances may demand.

Of course, the question whether circumstances demand order or justice, supposing for the moment that those are opposites, or whether circumstances demand an insistence on change or stability, is in the end the subject of political assessment. Law cannot take the place of politics.<sup>21</sup> The everlasting debates about customary international law simply illustrate that truth of  
this unavoidable reality.

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<sup>21</sup> See generally also Martin Loughlin, *Sword & Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart Publishing, 2000).



# The Authority of the International Court of Justice

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Recently some lawyers and statesmen have begun to cite judgments of the International Court of Justice as if they were decisive evidence of the content of international law. This trend, if it continues, will tend to diminish the influence of international law on the actions of states and others, by arrogating the authoritative determination of the content of international law to a tribunal that was never intended to generate rules of universal application, is ill-equipped to do so, and ought not usually be viewed as having done so, except in very exceptional circumstances.

## WHY PEOPLE EXAGGERATE THE COURT'S AUTHORITY

The tendency to view the judgments of the International Court of Justice as if they were decisive evidence of the content of international law arises by analogy with the role of courts in certain western democracies, and particularly with that of the Supreme Court of the United States of America, which gives final and decisive interpretations of the

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constitution and laws of the United States, including international law and treaties.<sup>1</sup> Collectively, these constitute the “supreme law of the land”, and are binding throughout the Union.<sup>2</sup> As Chief Justice John Marshall explained on behalf of a unanimous court in *Marbury v. Madison* (1803) - - although “the people collectively have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness” as “supreme and paramount law”, it is “emphatically the province and duty of the judicial department to say what the law is” and therefore to “expound and interpret” the law of the land.<sup>3</sup>

The doctrine of the separation of powers, as embodied in the many written constitutions that have developed in the two-hundred years since Marshall wrote his famous opinion, have confirmed the judiciary in most such regimes as the ultimate arbiter of the content of law. Legislatures draft statutes, according to this theory, but the judiciary says what the law is. So long as the executive power in the state remains willing to enforce and to respect the courts’ decisions, then law will be whatever the courts say it is. Oliver Wendell Holmes expressed the view of many advocates accustomed to litigating under separation-of-powers constitutionalist regimes

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<sup>1</sup> Constitution of the United States of America (September 17, 1787) Article III.

<sup>2</sup> *Ibid.*, Art. VI.

<sup>3</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

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when he said that the business of lawyers is “the prediction of the incidence of the public force through the instrumentality of the courts.” Since “in societies like ours” the “whole power of the state will be put forth to carry out their judgment and decrees.” A strictly practical man, a “bad man” as Justice Holmes put it, living under the rule of law and the separation of powers of a modern constitutional state, will pay attention to what courts say, and treat this as “law”, or suffer the consequences.<sup>4</sup>

The United Nations Charter was drafted in the same style and structure as the Constitution of the United States of America, using much of the same vocabulary. “We the Peoples of the United Nations”<sup>5</sup> echoed “We the People of the United States”<sup>6</sup> in seeking to establish conditions under which “justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”<sup>7</sup> Both establish a “House of Representatives” (United States)<sup>8</sup> or “General Assembly” (United Nations).<sup>9</sup> Both establish a “Senate” (United States)<sup>10</sup> or “Security Council”

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<sup>4</sup> Oliver Wendell Holmes, Jr., “The Path of the Law”, 10 *Harvard Law Review* 457 (1897).

<sup>5</sup> *Charter of the United Nations* (June 26, 1945), Preamble.

<sup>6</sup> *Constitution of the United States of America*, Preamble.

<sup>7</sup> *Charter of the United Nations*, Preamble. *Cf. Constitution of the United States*, Preamble and Article VI.

<sup>8</sup> *Constitution of the United States*, Article I.

<sup>9</sup> *Charter of the United Nations*, Chapter IV.

<sup>10</sup> *Constitution of the United States*, Article I.

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(United Nations).<sup>11</sup> Both establish an “executive” (United States)<sup>12</sup> or “secretariat” (United Nations).<sup>13</sup> And both establish a “Supreme Court” (United States)<sup>14</sup> or “International Court of Justice” (United Nations).<sup>15</sup> The United States Supreme Court holds the ultimate “judicial power of the United States”<sup>16</sup> and the International Court of Justice is “the principal judicial organ of the United Nations.”<sup>17</sup>

THE ICJ WAS NEVER INTENDED TO  
DETERMINE THE LAW

Notwithstanding its many similarities with ordinary democratic constitutions, the Charter of the United Nations did not create a new system of laws, and was not intended to do so. The primary purpose of the United Nations Charter was to “save succeeding generations from the scourge of war”<sup>18</sup> by “maintaining international peace and security”<sup>19</sup> based on the “sovereign equality of all its members.”<sup>20</sup> While the United Nations will “adjust” or “settle” those international disputes that might lead to a breach of the peace “in conformity with the

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<sup>11</sup> *Charter of the United Nations*, Chapter V.

<sup>12</sup> *Constitution of the United States of America*, Article II.

<sup>13</sup> *Charter of the United Nations*, Chapter XV.

<sup>14</sup> *Constitution of the United States of America*, Article III.

<sup>15</sup> *Charter of the United Nations*, Chapter XIV.

<sup>16</sup> *Constitution of the United States of America*, Article III.

<sup>17</sup> *Charter of the United Nations*, Chapter XIV.

<sup>18</sup> *Ibid.*, Preamble.

<sup>19</sup> *Ibid.*, Article 1.1.

<sup>20</sup> *Ibid.*, Article 2.1.

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principles of justice and international law,”<sup>21</sup> the Organization does not exist for the purpose of enforcing international law, and will not always do so. The General Assembly and Security Council are not the world’s legislature, the Secretary-General is not the world’s president, and the International Court of Justice is not the world’s court, or the ultimate arbiter of international law, even under the terms of its own statute.

The Statute of the International Court of Justice creates a body of fifteen judges,<sup>22</sup> elected by majority vote in the United Nations General Assembly and Security Council,<sup>23</sup> for nine-year terms, and eligible for re-election.<sup>24</sup> In this, the International Court of Justice differs from the supreme courts of modern constitutional democracies such as the United States, where Justices are selected by democratically elected officials<sup>25</sup> and hold their seats *quam diu se bene gesserint*, which is to say, for life.<sup>26</sup> The judges of the International Court of Justice are selected with the significant participation of the many non-liberal, non-democratic governments that hold seats in the United Nations General Assembly and Security Council, and inasmuch as the judges are eligible for periodic re-election, they remain subject to the

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<sup>21</sup> *Ibid.*, Article 1.1.

<sup>22</sup> *Statute of the International Court of Justice*, Article 33.

<sup>23</sup> *Ibid.*, Articles IV, VIII, and X.

<sup>24</sup> *Ibid.*, Article 13.

<sup>25</sup> *Constitution of the United States of America*, Article II, cl. 2.

<sup>26</sup> *Ibid.*, Article III, cl. 1.

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continuing influence of non-democratic and illiberal regimes. This deprives the International Court of Justice of the democratic legitimacy and independence necessary before any court can deserve the deference of its subjects. The International Court of Justice lacks the basis in the people, collectively, that gave John Marshall's court its decisive authority.

The Court's own Statute recognizes this shortcoming, by extending the jurisdiction of the International Court of Justice only to those cases "which the parties refer to it", either directly, or by treaty.<sup>27</sup> Many cases are not heard by the full court, but rather by smaller chambers of judges approved by the parties to a particular dispute.<sup>28</sup> In any case, the statute of the International Court of Justice makes it clear that the decisions of the Court have "no binding force except between the parties and in respect of that particular case."<sup>29</sup> According to the terms of its own statute, the International Court of Justice will refer to judicial decisions, including its own, only as "a subsidiary means for the determination of rules of law," on the same level of authority as the teachings of publicists, and inferior to international conventions, custom, and the general principles of law accepted by civilized nations.<sup>30</sup>

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<sup>27</sup> *Statute of the International Court of Justice*, Article 36.

<sup>28</sup> *Ibid.*, Article 26.2.

<sup>29</sup> *Ibid.*, Article 59.

<sup>30</sup> *Ibid.*, Article 38.

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THE ICJ IS ILL-EQUIPPED TO DETERMINE  
THE CONTENT OF INTERNATIONAL LAW

The International Court of Justice is ill-equipped to determine the content of international law for precisely the same reasons that it is so well designed to “adjust” or to “settle” international disputes, which is to say, because it is subject to the political control and oversight of interested states. As part of the United Nations System, the Court’s primary emphasis is on the peaceful settlement of disputes, and not on the enforcement of justice. Cases come before the Court only when parties to a dispute have agreed that they should do so. This implies a general willingness in advance to abide by its decisions, but creates no actual mechanism for imposing unwelcome decisions of the International Court of Justice on recalcitrant parties, unless the Security Council makes an independent decision to do so, in response to a threat to the peace.

The International Court of Justice is subservient in the first instance to the Security Council<sup>31</sup> and in the second instance to those states that use it to resolve their disputes. While the Court should arbitrate such disputes “on the basis of international law,” it may also decide them *ex aequo et bono*, or on the basis of other stipulations made by the

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<sup>31</sup> *Charter of the United Nations*, Article 94(2).

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parties.<sup>32</sup> The settlement of disputes within the United Nations System seeks solutions “by peaceful means in such a manner that international peace and security . . . are not endangered.”<sup>33</sup> This requires the International Court of Justice to consider the particular situation and relative power of the parties, rendering all decisions of the Court too idiosyncratic to be decisive “except between the parties and in respect of that particular case.”<sup>34</sup>

Determining the content of law requires procedures designed to elicit the objective requirements of justice with greater accuracy and stability than would be possible through the separate and independent judgment of the law’s own subjects, acting without legal control. Domestic legal systems within states claim this authority, which they actually deserve only to the extent that states maintain the liberal and democratic institutions that justify political power. The International Court of Justice makes no claim to decisive authority to determine the content of international law, because it lacks the democratic and liberal foundations that would support such a claim. Instead, the International Court offers a useful forum for the peaceful settlement of disputes between consenting states. Extending this authority to restrict the independent legal judgments of democratic and

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<sup>32</sup> *Statute of the International Court of Justice*, Article 38.

<sup>33</sup> *Charter of the United Nations*, Article 2(3).

<sup>34</sup> *Statute of the International Court of Justice*, Article 59.

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liberal states would undermine international law, by separating the law from its ultimate foundation in justice.

CONCLUSION

The authority of the International Court of Justice has a limited scope, which does not extend beyond settling those disputes that states decide to set before it. These settlements have no precedential value, and should play no more than a subsidiary role even in the court's own subsequent judgments, let alone anyone else's. The International Court of Justice exists to settle disputes, not to declare or to create international law. Capacious claims for the court's decisive authority undermine this useful function, by giving the court's settlements an imperial power, which will dissuade many just and law-abiding states from bringing their disputes before it.

# ICJ: Guardian of Sovereignty or Catalyst for Integration?

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If the International Court of Justice is an “Emperor Without Clothes”, will the institution be able to reform itself and endure the tidal waves of change in the international system, or will it sink, sooner or later, into irrelevance? Prof. Onuma accurately describes the crisis, but offers no satisfactory solution. He makes a good point in distinguishing between norms of conduct and norms of adjudication, but his proposal to determine the former, mainly on the basis of multilateral treaties of universal application or UNGA resolutions, does not take account of the real forces shaping contemporary international society. The limited number of states effectively accepting the Court’s jurisdiction is not the disease itself, but the symptom; the main question is, how the Court should identify the content of international law. The dilemma for the Court is either to continue pursuing a traditionalist conception based on the preservation of sovereignty, or to transform “progressive” norms of conduct into norms of adjudication through the “reception” of innovative state practice.

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To propose a remedy, we should first localize the structural deficits of the Court's case-law, which are apparent in four important "political" decisions: the *South West Africa* cases of 1966; the *Nicaragua* case of 1986; the *Nuclear Weapons* advisory opinion of 1996; and the *Arrest Warrant* case of 2002. Human rights, the use of force and the notion of peace are at the center of the difficulties of that jurisprudence.

#### HUMAN RIGHTS

The ICJ judgment in the consolidated *South West Africa*<sup>1</sup> cases was perhaps the most unfortunate in its history. Although the Court used another opportunity to correct this misstep five years later in the *Namibia*<sup>2</sup> advisory opinion, the weaknesses of the *South West Africa* cases judgment reveals some more permanent features of its thinking. The Court followed a legalistic interpretation of the mandates regime, in a travesty of legal positivism. For example, the judgment stipulated that humanitarian considerations were not sufficient by themselves to generate legal rights and obligations. The Court then added:

[this] is a court of law, and can take account of moral principles only in so far as these are given

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<sup>1</sup> 1966 I.C.J. 6.

<sup>2</sup> 1971 I.C.J. 16.

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a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline.<sup>3</sup>

No legally trained person would disagree with this passage. However, as Judge Jessup observed, the question is, which moral ideals were actually “given juridical expression” and “clothed in legal form”.<sup>4</sup> The Court has practically minimized the capacity of the legal system to communicate with other social systems and to incorporate political and societal values or assessments. This is incompatible with the essence of legal positivism, which represents the capacity of law to give expression to any decision the legislative or otherwise competent bodies make, irrespective of their content.<sup>5</sup>

The judgment’s reasoning was founded on an anachronistic interpretation of international law. Although the Court attached particular importance to the specific circumstances of the emergence of the mandates system, the dissenting opinion of Judge Jessup<sup>6</sup> demonstrated how poorly the Court understood the foundations of the mandate system and the *travaux préparatoires* that gave rise to it. The Court wholly neglected the possibility of

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<sup>3</sup> 1966 I.C.J. 6, para. 49.

<sup>4</sup> 1966 I.C.J. 441.

<sup>5</sup> cf. N. Luhmann, *Rechtssoziologie*, 2. Auflage, Westdeutscher Verlag, Opladen 1983, 207-217

<sup>6</sup> 1966 I.C.J. 325 et seq.

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dynamic or teleological legal interpretation and “froze” the legal framework of the mandate in the practice of the 1920s and 1930s, notwithstanding the evolution of the institution over more than four turbulent decades.

The Court also ignored the increasing legal and political weight of human rights and self-determination, including the principles of equality and non-discrimination. The Court not only refused to apply these rights and principles directly to the cases under consideration, but it even avoided applying them as standards of interpretation.<sup>7</sup> As a consequence, the policy of apartheid was not found to be in breach of the fundamental interests of the international community. More striking, is the fact that the Court neglected the obvious relationship of the “sacred trust of civilization” as the purpose of the mandates system with fundamental human rights, and with the fundamental legal interest of the UN Charter in the maintenance of international peace and security.<sup>8</sup>

Finally, the judgment rejected the existence of a “legal right or interest” of the applicants – Liberia and Ethiopia – in the proper administration of the mandate. In fact, an eventual right to apply to the

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<sup>7</sup> See the dissenting opinions of Judges Padilla Nervo, 455 et seq., Tanaka, 284 et seq.

<sup>8</sup> See the dissenting opinion of Judge Padilla Nervo, 463-464.

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Court could have been the “proto-structure” of interstate applications in the field of human rights, and its recognition by the Court could have contributed to the developing recognition of *erga omnes* or *jus cogens* rights and obligations. Instead of supporting the emerging new trends, the Court preferred to reject them. The two *South West Africa* cases strengthened an authoritarian version of state sovereignty at the expense of the international interests in safeguarding human rights and in promoting the cause of stability and change in the international system.

The institutional “mistrust” of the Court towards human rights is also apparent in the *Nicaragua* case.<sup>9</sup> This judgment was adopted on June 27, 1986, fifteen months after the reformers had taken power in the Kremlin and four months after the first signs of perestroika and glasnost had already become visible during the XXVII Congress of the CPSU in February 1986.<sup>10</sup> The Court examined, *inter alia*, whether Nicaragua was bound by international law to maintain a democratic system of governance and to respect human rights. The judgment stated that the protection of human rights is a “strictly humanitarian objective”<sup>11</sup> and that “where human rights are protected by international conventions, the

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<sup>9</sup> *Merits*, 1986 I.C.J. 14.

<sup>10</sup> M. Gorbatschow, *Erinnerungen*, Siedler Verlag, Berlin 1995, 282-89.

<sup>11</sup> 1986 I.C.J. 14, para. 268.

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protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.”<sup>12</sup> As a consequence, it did not address the issue, whether human rights have any customary normative force, and whether protection via countermeasures not involving the use of force would be legitimate. The Court apparently overlooked its own judgment in the *United States Diplomatic and Consular Staff in Tehran*<sup>13</sup> case that had affirmed the customary character of fundamental human rights:

[w]rongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.<sup>14</sup>

Although the Sandinista movement had made a formal commitment towards the OAS to govern the country democratically, and, following that, the new regime had been recognized prematurely by the Organization, the Court again refused any normativity to that commitment. The following passage speaks for itself:

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<sup>12</sup> *Id.* at para. 267.

<sup>13</sup> 1980 I.C.J. 3.

<sup>14</sup> *Id.* at para. 91.

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[n]or can the Court take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature....<sup>15</sup> The finding of the United States Congress also expressed the view that the Nicaraguan Government had taken 'significant steps towards establishing a totalitarian Communist dictatorship'. However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.<sup>16</sup>

It would be too easy to justify the *Nicaragua* judgment with the argument that the positive law of the time required the outcome. The Court was not compelled by any standard "to slam the door" in the face of the democratic principle. Taking into account that on March 12, 1980 Nicaragua had acceded to the International Covenant on Civil and Political Rights, which guarantees the right to free elections,<sup>17</sup> the Court could have taken a minor step to

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<sup>15</sup> 1986 I.C.J. 14, para. 261.

<sup>16</sup> *Id.* at para. 263.

<sup>17</sup> See <http://www.unhchr.ch>.

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strengthen the democratic principle by referring to the ratification of the Covenant as evidence, under the circumstances, of the legal nature of the old Nicaraguan regime's commitment to the OAS. The cautious approach of Judge Schwebel, which did not formulate any customary rule of democratic governance, but established Nicaragua's responsibility to respect a binding commitment freely entered into, is instructive in that respect.<sup>18</sup> The Court also missed the opportunity to emphasize the significance of premature recognition of democratic revolutionary governments as a means to accelerate the overthrow of authoritarian regimes. It could only do so if the commitment to hold free elections would be taken seriously by the international community. Instead, it supported the most authoritarian version of self-determination and acknowledged the claim by any dictatorship to represent "its" people.

The recent *Arrest Warrant* judgment of 14 February 2002 demonstrated, once more, the difficulties the court faces in striking a fair balance between sovereignty and the rights of a human person. In this case, the conflict was between the immunity of Ministers for Foreign Affairs and the prosecution of war crimes and crimes against humanity. After examining the relevant state practice, the Court concluded, with respect to third country jurisdiction, that it "has been unable to deduce . . . that there

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<sup>18</sup> See paras. 241-248 of the dissenting opinion.

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exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”<sup>19</sup>

The judgment further stipulated that a court of a third state having jurisdiction, “may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity,”<sup>20</sup> whatever the term “private capacity” might mean. Finally, the Court decided that the mere existence of an arrest warrant, even after the person concerned has ceased to be Foreign Minister, constituted a violation of the immunity law.<sup>21</sup>

Focusing on the element of national interest, the Court underscored the importance of the immunity of Foreign Ministers to “the effective performance of their functions on behalf of their respective States.”<sup>22</sup> In fact, a general, unqualified immunity exception based on a broadly defined principle of universal jurisdiction would be disastrous to communication among states. However, the point of a well-founded

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<sup>19</sup> Para. 58.

<sup>20</sup> <sup>20</sup> *Id.* at para. 61.

<sup>21</sup> *Id.* at para. 76.

<sup>22</sup> *Id.* at para. 53.

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criticism lies elsewhere. By adopting a rigid interpretative scheme, the ruling of the Court overemphasized the weight of sovereign immunity rights vis-à-vis the international interest in prosecuting war crimes and crimes against humanity.

The separate opinion of Judges Higgins, Kooijmans and Buergenthal expressed this criticism from the standpoint of the international interest as follows:

These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity.<sup>23</sup>

Instead, the Court conferred the immunity law a higher rank in the hierarchy of “legal regimes”

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<sup>23</sup> *Id.* at para. 75 of the opinion.

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in comparison to the “permissible jurisdiction” for international crimes. As a consequence, the *Arrest Warrant* case failed to describe accurately this normative “pendulum” and took a rather “reactive” stance towards innovative state practice in that area.

#### USE OF FORCE

The use of force was the central issue in the *Nicaragua* case.<sup>24</sup> The judges in that instance followed two completely divergent approaches: the one followed by the Court; and the other developed by Judge Schwebel in his dissenting opinion. Although both approaches need to be reassessed in the post-Cold War era, Schwebel deserves merit for unveiling the major legal-political deficit of the Court’s approach.

The cardinal point of the judgment was the legal standard determining the relationship between rebel forces and the supporting state. In order to decide whether the acts of the Nicaraguan contras could be imputed to the United States, the Court had to identify the rules of attribution, and adopted the “effective control criterion”:

All the forms of United States participation mentioned above, and even the general control by the respondent State over a force

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<sup>24</sup> 1986 I.C.J. 14, Merits.

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with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>25</sup>

Based on the “effective control” criterion, the Court made a sharp distinction between armed attack and armed intervention. It considered that the customary right of individual or collective self-defense could be exercised only if an armed attack occurs, but not if the aggrieved state faces an armed intervention. The judgment left open the question of the permissibility of forcible countermeasures exercised by the victim itself, but it considered that no collective armed response, corresponding to collective self-defense, against the intervening state would be lawful.<sup>26</sup>

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<sup>25</sup> *Id.* at para. 115; see also para. 110.

<sup>26</sup> *Id.* at paras. 210-211.

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The judgment concluded that even if Nicaragua had intervened, for a short period of time, in the civil conflict of El Salvador, by supporting the insurgents, this intervention did not amount to an armed attack.<sup>27</sup> The court also concluded that the United States was not entitled to invoke the right of collective self-defense in favor of El Salvador<sup>28</sup> and that it was responsible for breaching the principle of non-intervention by supporting the *contras*.<sup>29</sup>

Judge Schwebel criticized the judgment for misconceiving fundamental notions of international law. In particular, he rejected the “effective control” criterion and considered that if a state is “substantially involved” in the activities of irregulars in another state, this conduct constitutes a breach of the prohibition of the use of force, justifying recourse to the right of collective self-defense on the part of the victim state and its allies. He contended that the participation of Nicaragua in the subversive activities of leftist rebels in El Salvador activated the victim’s right of individual and collective self-defense, so that the intervention of the United States was lawful.<sup>30</sup>

Schwebel described the implications the judgment might have on the maintenance of stability in the bipolar system as follows:

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<sup>27</sup> *Id.* at paras. 160, 230.

<sup>28</sup> *Id.* at paras. 248-249.

<sup>29</sup> *Id.* at para. 242.

<sup>30</sup> *Id.* at paras. 154 et seq. of the dissenting opinion.

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Let us further suppose that State A acts against State B not only on its behalf but together with a Great Power and an organized international movement with a long and successful history of ideology and achievement in the cause of subversion and aggrandizement, and with the power and will to stimulate further the progress of what that movement regards as historically determined. If the Court's *obiter dictum* were to be treated as the law to which States deferred, other Great Powers and other States would be or could be essentially powerless to intervene effectively to preserve the political independence of State B and all other similarly situated States, most of which will be small. . . . In short, the Court appears to offer – quite gratuitously – a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival.<sup>31</sup>

The sharp distinction between armed intervention and armed attack offers the important advantage to major powers that wish to foment or encourage strife within another state with limited risk. This was true during the Cold War in the relationship between the two superpowers; it is

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<sup>31</sup> *Id.* at para. 177 of the dissenting opinion.

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equally true in the different environment of the post-Cold War era, because it can facilitate subversive activities of any kind. States that are victims of intervention would be deprived of the right of individual or collective self-defense against neighbors “substantially involved” in, and continuously fuelling, ethnic conflicts or terrorist activities directed against them.

Moreover, if we take the “effective control” criterion seriously, the Federal Republic of Yugoslavia could escape responsibility for the activities of the Bosnian Serb entity during the war in Bosnia. The terrorist attacks of September 11 against the United States would certainly not constitute an armed attack and even not an armed intervention; they should be characterized merely as acts of individual violence. Governments threatened by nationalist or terrorist subversion would have limited capacity to respond lawfully to the threats.

International practice changed in the 1990s and was formulated as radical criticism of the *Nicaragua* standard. The *Tadic* judgment of the ICTY Appeals Chamber<sup>32</sup> reinterpreted past practice, rejected the “effective control” criterion as being “at variance with judicial and state practice,” and introduced the “overall control” criterion, along with other criteria, depending on the circumstances.<sup>33</sup> In

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<sup>32</sup> IT-94-1-A/15.07.1999.

<sup>33</sup> *Id.* at paras. 124-145.

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the *Loizidou* case, the European Court of Human Rights adopted the “effective overall control” criterion.<sup>34</sup> The *ILC Commentary* on state responsibility stated that, “it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State.”<sup>35</sup>

Although this practice does not specifically address the armed attack/intervention issue, it is clear that, if the criterion of imputability of acts of non-state actors to a state depends on the circumstances, the distinction between armed attack and armed intervention loses its conceptual clarity and, therefore, the invocation of the right of self-defense is eased.

The legal-political assessment of the *Nicaragua* judgment on the use of force is ambiguous. On the one hand, it is arguable that the Court missed the broader systemic picture and construed international law with the main purpose of protecting a small state against an allegedly ruthless superpower, in line with its refusal to recognize Nicaragua’s commitment to free elections. This was a clear reflex of the sovereignty tradition. On the other hand, the limitation of the right of collective self-defense had the additional rationale of putting some limits on the

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<sup>34</sup> *Merits*, Judgment of 18.12.1996, para. 56.

<sup>35</sup> Report to the UNGA, A/56/10, art. 8, para. 5; see also para. 7.

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potential for confrontation between the two Cold War blocks, although it improved the “terms of conflict” for one side. Here too, the Court followed a “defensive” stance and chose not to introduce the component of “deterrence” into the law of the use of force. Whatever the reasons might have been, it seems that core elements of the judgment do not successfully withstand the test of time. The post Cold War ethos requires an increased alertness for the preservation of global stability.

The advisory opinion for the UN General Assembly on the *Legality of the Threat or Use of Nuclear Weapons* of July 8, 1996<sup>36</sup> has clarified important aspects of international environmental law and of the law of armed conflict, in particular concerning the content and function of the Martens clause. The Court also made an assessment of the normative value of the UNGA resolutions as *opinio juris* contributing to the emergence of international custom. Nonetheless, it failed to give a definite answer to the fundamental question of the compatibility of the eventual threat or use of nuclear weapons with the question of what would be *jus ad bellum* and *jus in bello*. In the opinion’s terms, adopted by seven votes to seven by the casting vote of the President:

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<sup>36</sup> 1996 I.C.J. 226.

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[i]n view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.<sup>37</sup>

The *non-liquet* proclaimed by the Court bears grave consequences for the law of the use of force in the era of globalization. Despite the end of the Cold War, the advisory opinion re-nationalized the question of nuclear weapons by inserting the hidden justification clause of the “very survival of the State”. Thus, it “de-politicized” the discourse on the international interest, because it neglected the eventuality of recourse to nuclear strategy for the safeguard of the fundamental interests of the international community. There is no doubt that nuclear terrorism, as well as fervent nationalism, destabilize states and the international system. By raising the legal significance of national fears, the Court implicitly confers legitimacy on a policy of maximization of tension and on “victimization syndromes”. By ignoring international terrorism as a major systemic threat, it limits the response capacities of the

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<sup>37</sup> Oper. part, para. 2E; among the “critical voices”, see in particular the dissenting opinion of Judge Higgins.

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“community of mankind” and of the states acting on its behalf.

A second major shortcoming of the advisory opinion is that it established inconsistent normative expectations for the addressees. The relationship between *jus ad bellum* and *jus in bello* remains undisclosed. The advisory opinion permits strongly diverging interpretative alternatives for the relationship between the two areas of law. By doing so, the Court abandons the “guiding function” that any judicial act is expected to perform. The opinion also leads to the neutralization of conflicting normative expectations, given that the addressees rely on the interpretation that is more advantageous for their cause or policy. At bottom, serious doubts arise about the “normative density” of international humanitarian law.

It is asked, what then should be the alternative to the Court’s approach? Taking into consideration that the total prohibition of the threat or use of nuclear weapons under any circumstances, including the elimination of all nuclear weapons possessed by “rogue states” and terrorist non-state actors, would remain largely ineffective, the alternative seems to be the recognition of a conditional entitlement to have recourse to nuclear strategy against threats to the international community as a whole, with full respect to *jus ad bellum* and *jus in bello*. This interpretation is based on the assumption that a legal-technical

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analysis of the principle of proportionality would reveal the enormous legal risks incurred by decision-makers who envisage a lawful nuclear strike, but it preserves, at the same time, the preventive and deterrent effect of nuclear planning vis-à-vis any potential major threat to global stability.<sup>38</sup> However, the Court chose to rest its analysis, once again, on the well-known and “secure” ground of state sovereignty at the expense of the international interest in the maintenance of peace and security.

#### NOTION OF PEACE

These cases and their reasoning confirm that the ICJ understands itself as the guardian of state sovereignty rather than as a catalyst for the integration of international society. This may please legal conservatives, but it certainly does not promote the Court’s authority. The question is, whether it would be appropriate for the Court to trace another path, as the “enlightened” minorities of judges have proposed, without overstepping its judicial function. Two recent decisions show that the Court may be moving in this direction. In the advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* of April 29, 1999 the Court reaffirmed the privileges and immunities of

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<sup>38</sup> See A. Skordas, “Epilegomena to a Silence: Nuclear Weapons, Terrorism and the Moment of Concern”, 6 *Journal of Conflict and Security Law* 191-224 (2001).

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the Special Rapporteur, including his or her right to have contact with the media and to keep the general public informed about human rights violations.<sup>39</sup> In the *LaGrand* case of June 27, 2001 the Court strengthened the protection of the individual under international law and demonstrated the deficiencies of procedures leading to the death penalty.

The ICJ is the main judicial organ of the United Nations and should apply interpretative techniques advancing the purposes and principles of the Charter.<sup>40</sup> The UN Charter is founded on two pillars, law and peace/justice. Peace and justice are meta-legal terms, which should be distinguished from the main body of “international law” *stricto sensu*. Peace in particular does not mean “utopian harmony”, but is a concept with strongly “political” and “combative” semantics. It has two aspects, negative peace, defined as absence of armed activities or generalized violence destabilizing the foundations of the international system; and positive peace, interpreted as action for development, protection of the environment, economic cooperation, respect for human rights, democratic governance and friendly relations among nations. The two aspects of peace portray the Charter’s fundamental orientation towards the political, economic and social integration of international society. In that sense, “the maintenance of peace and stability” not only

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<sup>39</sup> 1999 I.C.J. 62, paras. 53-56.

<sup>40</sup> See UN Charter, preamble, Arts. 1 and 2.

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confers specific competences to the UN organs,<sup>41</sup> but, also, constitutes a general interpretative clause of international law.

Instead of focusing on shortsighted compromises of state interests, the Court should pursue a more thoroughly dynamic-evolutionary interpretation and contribute, through the appropriate application of international law, to the “systemic stability” of the “international community as a whole”. Its jurisprudence needs to consider that state and societal powers constitute major factors in determining the definition of peace and threats to the peace, and are narrowly correlated with the emerging, but real, norms of conduct. The protection of human rights and the cautious broadening of the legitimate recourse to the use of force for the prevention, suppression and deterrence of systemic crises, represent the two fundamental “stability guarantees” of the contemporary international legal order. Because of this, the theory of sources of international law should be reviewed and re-evaluated to take into account the new realities of the international system.

The International Court of Justice has vacillated between claiming to formulate the fundamental principles of the operation of international society, and simple reliance on the assumptions of the old

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<sup>41</sup> See UN Charter, chapters VI and VII.

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Westphalian system. In an era of globalization, the ICJ faces a clear-cut choice: It will either take the risk to promote integration and redesign the new order along with other actors; or marginalize itself into a court of arbitration. In the latter eventuality, as Professor Onuma has so accurately observed, the Court would truly be an “Emperor Without Clothes.”



The lead article for *International Legal Theory* 9(1) (Spring 2003) will be: "International Crimes as Group-Based Crimes" by Larry May. The text may be found at <http://law.ubalt.edu/cicl/ilt/index.html>. Comments should be submitted by June 15, 2003.

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