

THE DANGER OF FRAGMENTATION OR
UNIFICATION OF THE INTERNATIONAL LEGAL
SYSTEM AND THE INTERNATIONAL
COURT OF JUSTICE

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*“No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State.”*¹

I. INTRODUCTION

As asked by the organizers of this Symposium, these observations will focus, in large part, on the International Court of Justice (ICJ). Of course, this does not mean that the whole scheme of our common work should be reduced to the dimension of a review of the ICJ's current situation. We should certainly not limit the scope of our investigations to considering the ways in which the World Court should or could react, during the decade to come or more, to the increasing competition which it is probably about to face due to the proliferation of international tribunals.

The ICJ, nevertheless, provides us with a good starting point. It was, during a long period of time, the *only* international court in existence. It is still the judicial body that, at the universal level, possesses the largest jurisdiction. Its creation, after the First World War, under the name of the Permanent Court of International Justice (PCIJ), was rightly considered a decisive path towards the submission of sovereign States' activities to the international rule of law.² The mere existence of *one* international court was then viewed as a crucial element in the identification of *one* body of international rules and princi-

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1. HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 430-31 (1933).

2. *See generally id.*

ples receiving the same interpretation at a universal level. This remained true even if, as stated by the PCIJ in the *Eastern Carelia Case*, "it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."³

Now, this single court system, already somewhat threatened by the persistent creation of arbitration tribunals and the multiplication of specialized regional international courts, such as the Court of Justice of the European Communities (CJEC), the European Court of Human Rights, and the Inter-American Court of Human Rights, is about to undergo a radical change. New judicial institutions have been created, such as the International Tribunal for the Law of the Sea, the World Trade Organization (WTO) Dispute Settlement System, and, still to come, the International Criminal Court. All of them have, or will have, a narrow function, but they are, or will be, established at the universal level, as is the ICJ.⁴

This change is magnified by the development of new "non-compliance bodies." Like the Implementation Committee under the Montreal Protocol on Substances that Deplete the Ozone Layer, these bodies are not strictly juridical in nature. Nevertheless, their function is, among other things, to settle any potential dispute with regard to the implementation of a specific conventional body of norms.

Consequently, the proliferation of international courts and tribunals raises the issue of whether this phenomenon will lead to the fragmentation of the international legal system or, at least, to the fragmentation of the interpretation of its norms. Such a result would prejudice the basic unity of the international legal order. This brings us to the question of *what*, in legal terms, this unity means, if it really exists. After all, unity is an assumption that could be challenged somewhat, considering that sovereign States retain the inherent power to determine, or at least to interpret, the content of the law binding on them.

3. Status of Eastern Carelia Case (Fin. v. U.S.S.R.), 1923 P.C.I.J. (ser. B) No. 5, at 27 (Advisory Opinion of July 23).

4. See generally *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution* (AM. SOC'Y INT'L L. BULL. 9, 1995).

II. DEFINITION AND CONSISTENCY OF THE UNITY OF THE INTERNATIONAL LEGAL ORDER

Here, a bit of elementary legal theory is needed. A “legal order” may be defined as a system of norms binding on determined subjects which trigger some pre-established consequences when the subjects breach their obligations. Two conclusions follow from this definition: first, that the existence of the international legal order should not be challenged, and second, that this legal order possesses two kinds of unity. The first kind of unity is what will be called *formal unity*. This unity is basically composed of what Hart calls “secondary rules” in his book *The Concept of Law*. As opposed to “primary rules,” by which human beings are required to do or abstain from certain actions:

secondary [rules] . . . provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. Rules of the first type impose duties; rules of the second type confer powers⁵

Contrary to what Hart contended, public international law is endowed with a full set of secondary rules.⁶ It is endowed in particular with rules of change, which enable it to create, modify, or extinguish international norms. It is also equipped with “norms of adjudication,” which, for instance, provide it with rules of international responsibility for wrongful acts, or establish the conditions under which an injured State may have recourse to countermeasures.⁷

These international secondary norms are fundamentally the same whatever the object of the international primary rules. For instance, the negotiation, adoption, and implementation of a treaty is the same regardless of the treaty’s aim and content.⁸ This identity of international secondary rules is ce-

5. H.L.A. HART, *THE CONCEPT OF LAW* 78-79 (1961).

6. *See id.* at 209.

7. Some such “norms of adjudication” are of a “primary” nature, in the sense defined by Hart himself. *See also* Georges Abi-Saab, *Cours général de droit international public*, 207 *RECUEIL DES COURS* 122 (1987).

8. Of course, the States may always establish their own rules as to the specific regime of the treaty, a fact that explains the subsidiary nature of the general rules codified by the Vienna Convention of 1969. Vienna Conven-

mented in the most classical, formal part of international law as it already prevailed at the time of “the international law of co-existence” (to use the terminology introduced by Wolfgang Friedmann).⁹

It is absolutely essential, precisely for the reasons brought up by Friedmann and other authors of the same generation, not to maintain the classical view that international law finds its unity only in the formal techniques it uses. Since the adoption of the Charter of the United Nations (U.N.)—which may, in some respects, be seen as “constitutional” in character¹⁰—general international law also has been composed of some general substantial rules.

At the time of the *S.S. Lotus Case* in 1927, some of these rules already existed, such as, for instance, the basic principle of the sovereign equality of States.¹¹ But the number of substantial rules was very limited indeed, since the main function of international law was to organize, in the lightest way possible, the concurrent exercise by each State of its full sovereignty. These norms are “primary” rules under the Hart definition: they establish a body of general customary principles, some even of a peremptory nature. They then may be qualified as *erga omnes* rules, as the ICJ itself stated in the *Barcelona Traction Case*:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States.¹²

This second set of rules, composed of *substantial*, not formal ones, provides international law with another kind of unity. I propose to name it, as opposed to *formal unity*, the

tion on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, reprinted in 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

9. WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

10. See Pierre-Marie Dupuy, *The Constitutional Dimension of the UN Charter Revisited*, 1 MAX PLANCK Y.B. U.N. L. 1 (1997).

11. See *S.S. Lotus Case* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

12. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32, para. 33 (Feb. 5).

substantial unity of public international law. For instance, the rules prohibiting the use of force, outlawing genocide, and establishing non-intervention, the rights of people, and the basic rights of the human person are parts of this substantial set of unifying rules. The most recent trends in the field of international criminal law focus on the essential rights of the human being.¹³

This development in modern international law is part of a larger phenomenon which should be called the “expansion” of international law, characterized by at least three features:

(1) an enlargement of the material scope of operation of international law. Due to the growing necessity of international cooperation, international law now covers almost every field of human activity—political, social, economic, and scientific and technical. Most recently, this enlargement includes the development of international criminal law.

(2) a multiplication of actors, with a growing role played by non-State actors, such as non-governmental organizations (NGOs). Their role has become one of necessity for some of the major international intergovernmental organizations.

(3) an effort to improve the efficiency of public international obligations, with the establishment of some conventional and sophisticated “follow-up machineries,” in particular in the fields of human rights, international economic law, international trade law, and international environmental law.

III. ADVANTAGES AND POTENTIAL DANGERS OF THE MULTIPLICATION OF INTERNATIONAL TRIBUNALS

In the broad context of expansion of the international legal order, it seems perfectly normal that the development of new networks of obligations generates at the same time new bodies to control the fulfillment of these obligations by States. It would be wrong to look at the multiplication of jurisdictional and quasi-jurisdictional institutions and assume that they will have a negative impact on the international legal system. On the contrary, as demonstrated by the increasing complexity of legal orders at the municipal level, the establishment of new jurisdictions and systems of control improves efficiency

13. See Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 18 (1998).

by helping in the implementation of obligations and by generating a more refined and precise system of interpretation of norms.

Generally speaking, it could also be argued that the international legal order as a whole is moving towards the affirmation of a complex system of control.¹⁴ The development of this new generation of judicial and quasi-judicial institutions should be looked at in the long term as a powerful element in favor of the reduction and elimination of international domains, staying outside any sphere of legal control by third entities. In other words, the multiplication of jurisdictions enlarges the scope of the *justiciability* of international disputes, a factor which has often been cited by scholars as a decisive one for appreciating the value, if not even the very existence, of any legal order.¹⁵ It helps in the process of making international law *objective*, since it is less and less characterized by a self-appreciation of legality by its subjects and authors, the sovereign States. This amounts to saying that the growing number of international jurisdictions and international institutions of control should be seen, from a technical point of view at least, as a decisive step in the evolution of the international legal system as it develops a real judicial function.

At the same time, the creation of new jurisdictions and institutions of control entails some inherent dangers. For example, one danger can be said to be the danger of creating the illusion of completely autonomous sub-systems, each equipped with its own judicial or controlling system. These sub-systems operate as if they are independent from the general international legal order, which would no longer be needed to apply the basic principles. This tendency has developed for a long time within the European Community due to

14. See Pierre-Marie Dupuy, *International Control and State Responsibility*, in *VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT: FESTSCHRIFT FÜR KARL ZEMANEK* 307 (1994).

15. See Charles Leben, *La juridiction internationale*, 9 *DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE* 143 (1989); HERMANN KANTOROWICZ, *THE DEFINITION OF LAW* 79-80 (1958); ALEXANDRE KOJÈVE, *ESQUISSE D'UNE PHÉNOMÉNOLOGIE DU DROIT* 191 (1981); JEAN CARBONNIER, *SOCIOLOGIE JURIDIQUE* 135 (1972); Noberto Bobbio, *Kelsen et Les Sources du Droit*, 27 *ARCHIVES DE PHILOSOPHIE DU DROIT* 135, 141 (1982) (“[L]a juridiction n’est pas seulement une source du droit . . . elle est la condition nécessaire pour l’existence d’un ordre juridique.”).

a jurisprudence by the CJEC which insisted too much, at least during the first decades, on the radical autonomy of the European legal order as opposed to the international legal order which, in many respects, is much less sophisticated.¹⁶

The same trend is likewise encouraged within some circles of specialized technical experts and diplomats, such as in the international protection of the environment. Due to their lack of solid background in public international law, some of these rather narrowly specialized “experts” do not necessarily see the implications, connections, and legal relationships between some newly-established machineries and the norms of general international law which are still applicable, with respect, for example, to the international responsibility of States for breach of treaty obligations. Such a biased perspective even has been encouraged by the misleading doctrine of “self-contained regimes,” which was introduced (and then abandoned) by the International Law Commission on the basis of an erroneous interpretation of the position taken by the ICJ in the *Hostage Case*.¹⁷

A second possible danger covers a wide range of issues, all of them related to the fact that the new and old international bodies, courts, and tribunals do not stand in hierarchical relation to one another. This raises potential problems of conflicting jurisdiction, such as conflicts between the International Tribunal for the Law of the Sea and the ICJ.¹⁸ Another threat is that of divergent jurisprudence emanating from different international jurisdictions, but dealing with the same rules or legal notions. Such is already the case at the regional level, for instance between the CJEC and the ICJ as regards the conditions required for the exercise by one State of its diplomatic

16. See David Ruzié, *Nationalité, effectivité et droit communautaire*, 97 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 107 (1993).

17. See Willem Riphagen, Special Rapporteur, *Second Report on the Content, Forms and Degrees of International Responsibility*, paras. 51-60, U.N. Doc. A/CN.4/344, reprinted in [1981] 2 Y.B. INT'L L. COMM'N 79, 85-86, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part 1). But see Gaetano Arangio-Ruiz, Special Rapporteur, *Fourth Report on State Responsibility*, paras. 97-126, U.N. Doc. A/CN.4/444 & Add.1-3, reprinted in [1992] 2 Y.B. INT'L L. COMM'N 1, 35-42 U.N. Doc. A/CN.4/SER.A/1992/Add.1 (Part 1); Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT'L L. 111 (1985).

18. See Carl-August Fleischhauer, *The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg*, in 1 MAX PLANCK Y.B. U.N. L. 327 (1997).

protection, or between the European Court of Human Rights and the ICJ with regard to the opposability of reservations. From a material point of view, it is still not certain that the scope and interpretation of the definition of "genocide" adopted by the International Criminal Tribunal for the Former Yugoslavia will match the one adopted by the ICJ in the genocide case between Bosnia-Herzegovina and the Federal Republic of Yugoslavia.¹⁹ In the future, a discrepancy between the ICJ and the Appellate Body of the WTO Dispute Settlement System could arise as to principles of interpretation of international conventions or more substantial rules, such as those dealing with environmental law.

It is evident that such situations create dissatisfaction for the States concerned because they introduce a measure of legal insecurity. This should be avoided as much as possible.

IV. THE REQUEST FOR A CENTRAL ROLE FOR THE INTERNATIONAL COURT OF JUSTICE

The international community is well aware of the necessity of a central role for the ICJ, as evidenced by the Agenda of the 1999 Centennial of the First International Peace Conference, organized within the U.N. Decade of International Law, pursuant to U.N. General Assembly Resolution 52/154. The preliminary report prepared by two eminent scholars, professors Francisco Orrego Vicuña and Christofer Pinto, called *The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century*,²⁰ reviewed the history of efforts made to ensure the peaceful settlement of international disputes and focused on what it called "a central role for the International Court of Justice in the new structure of international law."²¹ The fundamental approach developed by the authors may be qualified as an integrationist, perhaps even centralist, one: "Because inter-

19. See Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325 (Sept. 13); Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 3 (Apr. 8).

20. Francisco Orrego Vicuña and Christofer Pinto, *The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century, Preliminary Report Prepared for the 1999 Centennial of the First International Peace Conference*, C.E. Doc. CAHDI (98) 15 [hereinafter *Peaceful Settlement of Disputes*].

21. *Id.* at Part III.

national society is becoming more decentralized, the need to identify the basic governing principles of international law becomes more evident since it is this element that ensures its integration and coherence.”²²

The Report explains that the Charter of the United Nations does not suffice for assuring “the supremacy of law” and that “there is a need for a broader undertaking in the matter which for the time being would seem to be rather a judicial than a legislative function.”²³ The authors then express the opinion that:

[B]ecause the International Court of Justice has not developed its guiding role in respect of the basic principles of international law, the legal order governing international society is every passing day less structured and even a minimal hierarchy of its rules is beginning to fade, a situation that will only become worse as new tribunals enter the international scene.²⁴

The authors further insist on the need “to strengthen the Court’s functions in respect of its role as the central judiciary body of the international community.”²⁵

A wide range of means and procedures for reaching such a goal is then reviewed as they have been already proposed by individual scholars and various institutions.²⁶ An expansion of the advisory functions of the ICJ is envisaged, in particular by authorizing the U.N. Secretary General to request advisory opinions from the Court on legal questions connected with the discharge of the Secretary General’s responsibilities,²⁷ a power that eventually could be extended to other entities, such as additional organs of the U.N., specialized agencies, or

22. *Id.* at para. 103.

23. *Id.*

24. *Id.* at para. 108.

25. *Id.* at para. 110.

26. See Shabtai Rosenne, *Lessons of the Past and Needs of the Future*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 466 (Connie Peck & Roy S. Lee eds., 1997); Louis B. Sohn, *Important Improvements in the Functioning of the Principal Organs of the United Nations That Can Be Made Without Charter Revision*, 91 AM. J. INT’L L. 652 (1997).

27. See *Peaceful Settlement of Disputes*, *supra* note 20, at para. 121. See also Stephen M. Schwebel, *Fifty Years of the World Court: A Critical Appraisal*, 90 AM. SOC’Y INT’L L. PROC. 339, 347 (1996).

even States. The central role envisaged for the ICJ is also achievable, the authors suggest, by the Court's greater participation in institutionalized arrangements for dispute settlement, an aspect which may refer to both advisory functions and contentious jurisdiction, as the case may be. Orrego Vicuña and Pinto also propose broadening access to the Court by international organizations, eventually including NGOs, corporations, and individuals.²⁸ In so doing, they echo a stream of opinions from some ICJ judges.²⁹

Other supplementary lines of thought have been advanced to strengthen the role of the ICJ. One such suggestion is the referral by other international tribunals or by domestic courts of issues of general international law that are not within the sphere of their specialized jurisdiction, following a procedure inspired by Article 177 of the 1957 Treaty of Rome establishing the European Community.³⁰

Each of these proposals is theoretically interesting. In practice, however, very few seem realistic because most of them would require a formal revision of the Statute of the ICJ. This could only take place under the very strict conditions set forth in Articles 108 and 109 of the U.N. Charter.³¹ It is very doubtful that a two-thirds majority of U.N. members would accept, first, a major revision of the statute and, second, its ratification. Even the extension to the U.N. Secretary General of the capacity to ask the Court for an advisory opinion most probably would create some political difficulties among the members. It would particularly create controversy among some of the permanent members of the Security Council, beginning with the United States. For a long time, the U.S. has demonstrated its willingness to keep under control, as much as possible, any important initiative taken by the Secretary Gen-

28. See *Peaceful Settlement of Disputes*, *supra* note 20, at paras. 134-37.

29. See Mohammed Bedjaoui, *Presentation on the International Court of Justice at Fifty*, in *INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 27* (Connie Peck & Roy S. Lee eds., 1997); Schwebel, *supra* note 27, at 347.

30. See Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 *INT'L & COMP. L.Q.* 848, 862 (1995); Sir Robert Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in *IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION 2, 7* (Am. Soc'y Int'l L. Bull. No. 9, 1995).

31. U.N. CHARTER arts. 108-09.

eral, whether by Mr. Kofi Annan or his predecessor Mr. Boutros Boutros-Ghali, in particular, as is evident in the periodic crises breaking out between Iraq and the U.N.

As for the referral to the ICJ by other international tribunals or by domestic courts of such issues of general international law that are not within the sphere of their specialized jurisdiction, it could eventually be organized by way of a special convention independent from the Charter. Nevertheless, such a solution would not necessarily have a practical effect. After all, a procedure of such kind is already open to the States Parties to the 1969 Convention on the Law of Treaties. Under Article 66 of this Convention, the Court can be asked whether a principle of general international law invoked by one Party against another is part of *jus cogens*.³² However, this procedure has never been used since the Vienna Convention entered into force almost twenty years ago.

V. THE FUNCTION OF THE COURT AND ITS JUDICIAL POLICY³³

It has been suggested by Professors Orrego Vicuña and Pinto that the conclusion to be drawn from their systematic survey is that whatever their inherent rationality, these various institutional or procedural suggestions with respect to strengthening the function of the ICJ as a real world court confront a hard political context which makes their feasibility highly problematical. As the authors rightly point out, it is necessary to revitalize the ICJ's role as the central judicial body of the international community, "a role that reaches beyond mere dispute settlement and puts the Court in a position to

32. See Vienna Convention, *supra* note 8, art. 66.

33. The term "judicial policy" of the ICJ should be interpreted as the general orientations which underlie the jurisprudence of the Court with regard to some basic legal issues connected with the way the Court understands its judicial function. Pierre-Marie Dupuy, *The Judicial Policy of the International Court of Justice*, in *IL RUOLO DEL GIUDICE INTERNAZIONALE NELL'EVOLUZIONE DEL DIRITTO INTERNAZIONALE E COMUNITARIO* 61 (F. Salerno ed., 1995). Alternatively, and in a broader exception, the term "judicial policy" could be interpreted as pointing to "the way by which the Court tends to apply international law, in order to adapt the interpretation and contents of the applicable rules to the necessities which it considers to be implied by the general evolution of the international legal order." *Id.*

contribute to the development of the principles of international law governing the international society generally.”³⁴

It is not absolutely impossible that some technical improvements may influence the Court’s functioning in the future. Yet it seems that the best way for improving the role of the ICJ as a world court rests in the hands of the judges themselves, and in the way they view the true function of the Court within the international legal system. It is more a matter of judicial policy than of technical efficiency improvements, even if it is true that some such improvements could be achieved.³⁵

An important differentiation should be recalled between two interconnected aspects of the same judicial function. The distinction between the exercise by the Court of its *jurisdictio* and the mere resolution of a dispute between two States. Once a judicial body has been seized and thereby called upon to exercise its contentious jurisdiction over a dispute, a judge will invariably have to compare the subjective conduct of the States Parties to the case at issue with some pre-established objective norms which are supposed to regulate their respective behavior in such a situation. In other words, to settle a particular dispute, the judge must “state the law” to be applied—the correct meaning of the *jurisdictio* the judge practices. In the case of an international legal order, characterized by the absence of judicial intervention or the flexibility of a number of its unconventional rules, this *jurisdictio* amounts, in some respect, to the exercise of a residual legislative function.

Article 59 of the Statute of the ICJ, which limits the binding nature of the Court’s decision to the particular case at hand, only partly affects the magnitude of its control. As a matter of fact, this restriction applies to the final decision, but it does not affect to the same degree the underlying reasoning of the decision, particularly when such reasoning is drafted in broad terms projecting general rules, on which the Court may rely in future findings. As pointed out by Sir Robert Jennings, “the *ratio decidendi* will comprehend the decision in the *dispositif* but also the determinative argument which led to that decision.”³⁶ Referring to the opinion of Judge Shahabuddeen in

34. *Peaceful Settlement of Disputes*, *supra* note 20, at para. 110.

35. *See Dupuy*, *supra* note 33.

36. Sir Robert Jennings, *The Judiciary, International and National, and the Development of International Law*, 45 INT’L & COMP. L.Q. 1, 11 (1996).

his Lauterpacht Memorial Lectures, Jennings makes the point that:

[I]f the purpose of Article 59 were “to prevent decisions of the Court from exerting precedential effect with binding force”, it would follow that “the decisions of other courts and tribunals presumably stand on higher ground, not being caught by the Article 59 limitation. The consequence of this is so improbable as to suggest that the interpretation on which it rests cannot be correct.”³⁷

As noted by Sir Gerald Fitzmaurice, who took an example from the *Anglo-Norwegian Fisheries Case*,³⁸ “[i]n practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general *principle* of straight base-lines, at any rate in any legal proceedings, even (in all probability) before a tribunal other than the International Court.”³⁹

The evolution of the Court’s judicial policy is framed between, on the one hand, the important protean development of the law and, on the other hand, the mere settlement of a dispute between two States Parties. It could be said that, in the 1986 *Nicaragua/United States Case*, the Court exercised its *jurisdictio* (i.e., its normative potentiality) broadly.⁴⁰ But, as if scarred by its own audaciousness in that case, the Court has since restricted the exercise of its contentious jurisdiction by settling disputes on purely empirical bases.⁴¹ This is not the

37. *Id.* at 6.

38. *Anglo-Norwegian Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 8 (Jan. 10).

39. Sir Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIJL* 153, 170 (1958) (emphasis in original).

40. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

41. See Georges Abi-Saab, *De l'évolution de la Cour internationale: Réflexions sur quelques tendances récentes*, 96 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 273 (1992); Luigi Condorelli, *La Cour internationale de justice: 50 ans et (pour l'heure) pas une ride*, 6 *EUR. J. INT'L L.* 388-94 (1995). There is one exception (although not a real one because it took place within an advisory opinion) provided by the 1996 opinion of the Court on the legality of the threat or use of nuclear weapons in international law. The conditions under which the Court reached its conclusions and the structure of the votes showed that not all of its members shared the same view, in particular as to

place for a systematic review of the Court's judgments since the *Nicaragua/United States Case*. It is enough to say that, when confronted with a difficult question of law, very often the Court prefers to avoid the issue as much as possible by referring to the specific features of the case. When the Court does deal with a difficult question of law, it does so not by concisely clarifying the state of the law through general formulations, but often through *obiter dicta*.⁴² Regarding the usefulness of this last approach, it has been pointed out recently that "legal principles expounded on or referred to by the Court in an *obiter dicta* sense may in the appropriate circumstances constitute stepping stones to the development of further norms or the application of existing norms in other areas."⁴³

Few people would refer to the *Mavrommatis Palestine Concessions Case* today if it did not contain the famous formula, "[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its rights to ensure, in the person of its subjects, respect for the rules of international law."⁴⁴ Of course, not every case provides the Court with an opportunity to clarify the law, but many cases do. Moreover, since 1986, the Court could have used these cases to make international law richer and more precise.

the opportunity of developing the logical implications of existing rules of international law in the field of humanitarian law. See *Legality of the Threat or Use of Nuclear Weapons* (U.N. General Assembly), 1996 I.C.J. 226 (July 8).

42. Many examples of this trend in favor of a minimalist approach could be found in recent judgments. Let us take one, which is the way in which the Court looked at the argument of "approximate application of treaties" in the case when one party to it is reputed by the other to have breached its obligations. This argument was used by Slovakia against Hungary in the *Gabcíkovo-Nagymaros Case*. *Gabcíkovo-Nagymaros Project Case* (Hung. v. Slov.), 1997 I.C.J.3 (Feb. 5). For a commentary by the present author, who served as Counsel for Hungary in that case, see Pierre-Marie Dupuy, *On the "Doctrine" of Approximate Application of Treaties in International Law*, in *LIBER AMICORUM: PROFESSOR IGNAZ SEIDL-HOHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY* 97 (1998).

43. Malcolm N. Shaw, *A Practical Look at the International Court of Justice*, in *REMEDIES IN INTERNATIONAL LAW: THE INSTITUTIONAL DILEMMA* 11, 13 (Malcolm Evans ed., 1998).

44. *Mavrommatis Palestine Concessions Case* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

Sixty-five years ago, at a time when the Permanent Court of Justice existed as the only body with universal jurisdiction, Hersch Lauterpacht said:

[L]ike courts within the State, so also international tribunals, by the very nature of the judicial function, are not confined to a purely mechanical application of the law. When applying the necessary abstract rule of law to the concrete case, they create the legal rule for the individual case before them. The actual operation of law in society is a process of gradual crystallization of the abstract legal rule. . . .⁴⁵

It would be error to presume that this very phenomenon does not exist at the international level, due to the existence of a society of equal and sovereign states. On the contrary, as pointed out by the same illustrious scholar:

In international law the scope of this aspect of judicial activity is much wider; for, in international society, conscious law-making by legislation is in a rudimentary stage, the creation of customary law is slow and difficult of ascertainment, [and] judicial precedent is relatively rare and of controversial authority. . . . Accordingly, in international law judicial law-making is of special importance for the purpose of disposing of disputes by developing and adapting the law of nations, within the orbit of existing law, to the new conditions of international life through a process of equitable judicial interpretation and reasoning.⁴⁶

Even more than at the time when Lauterpacht expressed his views, today there is reason for the ICJ to share his dynamic vision of the international judiciary function.⁴⁷ Some of these reasons derive from the evolution of normative international

45. Lauterpacht, *supra* note 1, at 255.

46. *Id.* at 256. For a presentation of Sir Hersch Lauterpacht's doctrine, see Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT'L L. 215 (1997), and Iain G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, 8 EUR. J. INT'L L. 264 (1997).

47. See Christopher Weeramantry, *Expanding the Potential of the World Court*, in PERSPECTIVES ON INTERNATIONAL LAW 309 (Nandasiri Jasentuliyana ed., 1995).

law.⁴⁸ The affirmation of norms having an *erga omnes* bearing and the recognition of imperative obligations inaccessible to conventional derogation logically leads to the conclusion that the international community needs a judge to identify these norms and to show their implications to the States. As seen earlier, this is the assumption underlying Article 66 of the Vienna Convention. More generally, the very fact that the docket of the Court is rather full shows that States have such a need for judicial authority. The more evolved and sophisticated the legal system becomes, with competing or even conflicting sets of obligations, the more the subjects of international law need the help of an independent third-party. This perception of the judicial function does not mean that the Court should ignore the consensual basis of its jurisdiction.⁴⁹ It only signifies that the Court probably has no choice but to adopt a more creative judicial policy if it wants to remain what it is at present: *the world court*.

In addition, the Court should consider itself responsible for respecting the basic principles providing the grounds for public international law as a legal order. This should result in its members sharing a legal philosophy according to which there is some kind of international legal order that should be respected, under any circumstances, by each and every subject of that law. This vision, for the time being, seems very odd to the current majority of judges within the ICJ, even when it comes to respect for its own Statute by States recognizing its jurisdiction through a declaration.⁵⁰ More generally, the Court maintains a persistent ambiguity as to its exact role in regard to the *corpus juris* embodied in the U.N. Charter. At times, the Court uses Article 103 of the Charter to delimit its jurisdiction, or more precisely, to pronounce on the admissi-

48. See Pierre-Marie Dupuy, *Le juge et la règle générale*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 569 (1989).

49. See Pierre-Marie Dupuy, *La pratique de l'article 38 du Statut de la Cour internationale de justice dans le cadre des plaidoiries écrites et orales*, in COLLECTION OF ESSAYS OF LEGAL COUNSELS OF STATES AND INTERNATIONAL ORGANIZATIONS (U.N. Secretariat, forthcoming 1999).

50. For a very recent illustration, see the appraisal by the Court of the validity of the Canadian reservation to its jurisdiction in the Fisheries Jurisdiction Case. See Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.C.J. 96 (Dec. 4), and its pertinent criticism in the dissenting opinion of Judge Mohamed Bedjaoui. As a matter of fairness, the present author indicates that he was counsel for Spain in this case.

bility of a determined request.⁵¹ However, at other times, when confronted with the invocation of the same article of the Charter by one of the Parties to a litigation, the Court moves aside any reference to Article 103 without even indicating *why* it considers this provision irrelevant in the particular case. Nevertheless, the Court should indicate whether it has a clear and coherent view of the scope of its own role as the “principal judicial organ of the U.N.,” both within and outside the direct application of the Charter. Several answers are possible, but the Court should at least indicate one answer if it pretends to consolidate its overall authority as the preeminent judge within the international legal system. The Court was able to avoid this clarification as long as it was the sole international jurisdiction, but such is no longer the case.

Other reasons for adopting a more dynamic vision of the international judiciary function are of an organic nature. Since the number of international jurisdictions is increasing, not just the States, but also the new, specialized judicial bodies need guidance from the ICJ in interpreting the substance and scope of the basic principles of international law. For example, in the 1998 Case on EC Measures Concerning Meat and Meat Products (Hormones), the Appellate Body of the WTO was confronted with the issue of whether the precautionary principle already constituted part of general international law. The Appellate Body looked back to the recent judgment given by the ICJ in the *Gabcikovo-Nagymaros Project Case* to note that “the Court did not identify the precautionary principle as one of those recently developed norms,” which the Court had cited before in the context of the developing law of the environment.⁵² This initiative of the WTO Appellate Body clearly demonstrates that the ICJ has been invited to play a role which seems within its scope of jurisdiction since, as pointed out by Judge Manfred Lachs in the *Lockerbie Case*, the Court is “the guardian of legality for the international community as a whole, both within and without the United Nations.”⁵³

51. See, e.g., Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1992 I.C.J. 3, 26 (April 14) [hereinafter *Lockerbie Case*].

52. EC Measures Concerning Meat and Meat Products (Hormones), Jan. 16, 1998, W.T.O. Doc. WT/DS26/AB/R, at 50, § 123, n.93.

53. *Lockerbie Case*, *supra* note 51 (separate opinion of Judge Lachs).