

SOME REFLECTIONS ON THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF INTERNATIONAL LAW*

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I am happy to be in the company of professors and students. I do not share the view once expressed by Sir Henry Maine, who, when called "professor" some years after his retirement from Cambridge, said "beside the absurdity of the appellation, I think it helps to make people associate me exclusively with the class of purely speculative thinkers." Instead, I find that professors are, as a group, truly in touch with life's events. I am particularly happy to be in the company of students because I have been a student all my life. I am honored to have been invited by your university to deliver this important lecture and I am grateful for it.

I. Introduction

Courts have as their function the application of law. Judges are not meant to create law but to interpret it. In applying the law they interpret it, and in interpreting it they apply it. They find the law. But what, I suggest, is the difference between interpreting and finding the law? It may seem fundamental, but on closer analysis one may find each very close to the other.¹

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1. This syllogistic definition of the judicial function is properly attributed to Dean Wigmore. He developed its underlying principles most eloquently in his preface to a collection of essays on comparative law in 1921:

[T]he person whose duty it is to apply the words of a statute must reexpand the thought when applying it. And thus arise unlimited opportunity and necessity for

Courts pass judgment. The process of judgment have been shrouded in mystery since time immemorial.² Whether the judges were elder sages of ancient cities,³ or Roman Senators,⁴ or, in the modern era, whether they are judges at *nisi prius*,⁵ Justices of the Supreme Court of the United States,⁶ or Judges of the International

the judiciary to reconstruct the thought by its own standard of experience, which may and must often differ from that of the legislators. If we recollect the differences of personality and community, and add to those differences caused by lapse of times and change of environment, we shall realize that words are far from fixed things; they are the most fluent and indefinite of things.

WIGMORE, *Preface to SCIENCE OF LEGAL METHOD* at xxxv (1921).

2. *Cf.* Justice Frankfurter in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring), and in this context:

[A judgment] is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of . . . history and civilization, [it] cannot be imprisoned within the treacherous limits of any formula. [It] is *not a mechanical instrument*. . . . It is not a yardstick. *It is a process*. It is a delicate process of adjustment inescapably involving the exercise of judgment by those . . . entrusted with the unfolding of the process. (emphasis added)

3. Sir Henry Maine's description of ancient adjudication captures the timeless mystery of judgment: "The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication." H. MAINE, *ANCIENT LAW* 5 (1861). "A person aggrieved complains not of an individual wrong but of the disturbance of the order of the entire little society . . . [and] the sole certain punishment would appear to be universal disapprobation." H. MAINE, *VILLAGE COMMUNITIES* 68 (1872). *See also* H. MAINE, *EARLY LAW AND CUSTOM* 24-25 (1886).

4. *See generally* J. DAWSON, *ORACLES OF THE LAW* 100-221 (1968); Kunkel, *Legal Thought in Greece and Rome*, 65 *JURID. REV.* 1 (1953); F. DECOULANGES, *THE ANCIENT CITY: A CLASSIC STUDY OF THE RELIGIOUS AND CIVIL INSTITUTIONS OF ANCIENT GREECE AND ROME* (W. Small trans. 1873).

5. *See* Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *CORNELL L.Q.* 274 (1929). On *nisi prius* courts on the American frontier, it was said that the judge "paid no attention to the statute" and "merely 'decided according to his own idea of right and wrong.'" L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 141 (1973). *cf. also* Chancellor Kent:

I saw where justice lay, and the moral sense decided the court half the time; and I then sat down to search the authorities until I had examined my books. I might once in a while be embarrassed by a technical rule, but I most always found principles suited to my view of the case.

W. KENT, *MEMOIRS AND LETTERS OF JAMES KENT* 158-59 (1898).

6. *Cf.* Justice Holmes:

The language of the judicial decision is mainly the language of logic . . . [But] behind that logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.

Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 465-66 (1897). *See also* Frankfurter, *John Marshall and the Judicial Function*, 69 *HARV. L. REV.* 217, 229 (1955) ("Of course, individual judgment and feeling cannot be wholly shut out of the judicial process.")

Court of Justice,⁷ their judgments may have been looked upon as no less complex processes.

Judgment is a process of mind that some claim to know and others continue to discover. Each judgment is either a step forward or a step backward in the development of law.⁸ As a result, since each judgment is the product of the minds of several individuals—*how each understands and interprets the law*—judges cannot avoid being a vital force in the life of the law.⁹ Although this aspect of the judicial function often leads people to view judges as suspect or even dangerous,¹⁰ and even though courts of justice in the international context are still but nascent,¹¹ judges and courts

7. Cf. Judge Dillard's opinion in the Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), 1972 I.C.J. 46, 107-08 n.1. Institutional aspects of the Court also functionally effect the processes of judgment. See M. LACHS, *THE TEACHER IN INTERNATIONAL LAW*, 183-87 (1983).

8. Recognition of the dynamic nature of judicial decisions is particularly important in international law. See G.A. Res. 3232, 29 U.N. GAOR Supp. (No. 31) at 141, U.N. Doc. A/9631 (1974). (General Assembly urges the Court to consciously develop international law through its decision making; cf. progressive development of international law in general, Art. 13, para. 1(a) of the U.N. CHARTER.)

9. "Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be a human and strips himself of all predilections, [and] becomes a passionless thinking machine." J. FRANK, *LAW AND THE MODERN MIND* at xx (1949). Referring to wider aspects of the development of law in historical perspective, I suggested:

[O]ne essential point has to be made which, though obvious once attention has been drawn to it, is habitually overlooked or given insufficient weight. It is that our overall view of the history of law—or of any other branch of culture, for that matter—is entirely dependent on the record which has come down to us personally. Hence if the recorded facts known to us are confined by particular regions and civilizations of the world, it is impossible, assuming that the human activity in question was pursued in other regions, other societies, for our picture and account to be complete and universal. This is acutely true of international law.

LACHS, *supra* note 7, at 30. Cf. Judge Lauterpacht in his *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 203 (1933).

10. See generally Rovine, *The National Interest and the World Court*, in 1 *FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 313-35 (L. Gross ed. 1976) [hereinafter cited as *FUTURE OF COURT*]. International tribunals are also not unique targets of this antagonism.

11. The protocol that created the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 379 (effective Sept. 1, 1921), reprinted in *Acts & Documents concerning the Organization of the Court*, 1922 P.C.I.J., ser. D, No. 1, at 7. For a detailed history and analysis of these events, see generally M. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942* at 93-129 (1943). Cf. Moore, *The Organization of the Permanent Court of International Justice*, 22 *COLUM. L. REV.* 497 (1922) [hereinafter cited as Moore, *The Organization of the Court*]; on the present International Court of Justice cf. Tunkin, *International Law in the International System*, 147 *COLLECTED COURSES, HAGUE ACADEMY OF INTERNATIONAL LAW*, 98 (1975). Although the Permanent Court was, strictly speaking, the first international court of justice, its underlying principles were rooted in substantial experience. In addition

have for a long time performed constructive functions in society and international relations.¹²

Paradoxically, at the same time that States hesitate to seek

to proposals advocating establishment of permanent tribunals for resolution of international disputes that were periodically advanced from the 14th century onward, LACHS, *supra* note 7, at 21-28, and some limited regional attempts which were made, e.g., the Central American Court of Justice, HUDSON, *supra* at 45-62, the widespread and generally successful experience with arbitration provided a firm foundation for the Permanent Court. Cf. Moore, *The Organization of the Court, supra*, at 497. Moreover, by 1920, over 150 arbitrations were already recorded in the history of international law. Beginning with the Jay Treaty of 1794, see Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, United States-United Kingdom, 8 Stat. 116, T.S. No. 105, this formative experience included the *Alabama* arbitration, see Treaty of Washington, May 8, 1871, United States-United Kingdom, 17 Stat. 863, T.S. No. 133, and, in 1899, culminated in the establishment of the Permanent Court of Arbitration at The Hague. See Convention for Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, T.S. No. 392, modified by Convention for Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536. Judge Lauterpacht characterized the importance of this experience:

[I]f the Jay Treaty marks the beginning of modern arbitration, the proceedings and the awards in the case of the *Alabama* revealed the full political potentialities of judicial settlement among States and the inaccuracy of the widely accepted view that international arbitration is necessarily confined to minor issues and that it must stop short of questions that matter.

2 H. LAUTERPACHT, INTERNATIONAL LAW 123 (E. Lauterpacht ed. 1975). Cf. also Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4, Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y. B. INT'L L. 1, 26 (1958). The experience with ad hoc arbitration fostered a general consensus for the establishment of a permanent court. Even if the Permanent Court of Arbitration was only progress "from an evolutionary point of view" (as pointed out by P. JESSUP, THE PRICE OF INTERNATIONAL JUSTICE 34 (1971)) this experience is confirmed by the present Court's analysis that "throughout its history, the development of international law has been influenced by the requirements of international life. . . ." Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 178 (Advisory Opinion of Apr. 11) [hereinafter cited as *Reparation*]. (Only disagreement over organizational structure delayed establishment of a permanent court of justice from 1907 until after World War I. J. MOORE, *The Permanent Court of International Justice*, in 6 COLLECTED LEGAL PAPERS 82-83 (1944) [hereinafter cited as MOORE, LEGAL PAPERS]).

12. The very existence of the Court . . . must tend to be a factor of importance in maintaining the rule of law. For what matters in this connection is not the number of disputes actually decided by the Court, but the fact that a contemplated wrong was not proceeded with or that controversies have been settled without its intervention in conformity with justice for the reason that, in the absence of a satisfactory solution, one party was at liberty to bring the dispute before the Court.

H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 3-4 (1958). See also Claude, *States and the World Court: The Politics of Neglect*, 11 VA. J. INT'L L. 344, 350 (1971) ("the dearth of litigation is indicative of the health, not the pathology of the legal system"). The North Sea Continental Shelf Case, (Ger. Fed. Rep. v. Den., Ger. Fed. Rep. v. Neth.), 1969 I.C.J. 3, (Judgment), was referred to as an example of the constructive function because the Court's determination of the controlling principles of law guided the States in question to a satisfactory resolution of the dispute. Baxter, *Introduction, The International Court of Justice*, 11 VA. J. INT'L L. 291, 292-93 (1971).

the Court's resolution of international disputes,¹³ critics accuse the Court of inefficiency,¹⁴ infrequent intervention in interstate affairs, and of having a minimal impact on events.¹⁵ The parameters of the Court's role in international relations are determined, however, not by the jurisprudential inclinations of its members,¹⁶ but mainly by

13. For example, it is argued that adjudication frustrates the "function of a system of international relationships . . . by imposing a legal strait-jacket upon it [because international] law is too abstract, too inflexible, too hard to adjust to the demands of the unpredictable and the unexpected." G. KENNAN, *AMERICAN DIPLOMACY 1900-1950*, at 98 (1951). "And in many parts of the world, it is thought to be particularly praiseworthy not to resort to litigation or to the machinery of the law at all, but to resolve differences through negotiation and adjustment." Baxter, *supra* note 12, at 293.

In this context, the observation of J. L. Brierly remains valid: "The most difficult disputes, those that endanger international peace, are never likely to be settled by courts; the disputes which endanger civil peace inside the state are not settled in that way either." J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 124 (1944). Against this background, recent efforts to encourage resort to the Court and expand its jurisdiction are positive indications.

14. Recent developments lead to the conclusion that criticism of the Court's efficiency are of historical character, and even those are misdirected. Comprehensive reforms of the Court's procedures, undertaken since 1968 and completed in 1978 improved its rules and internal judicial practice. *Cf.* Address of President Sir Muhammad Zafrulla Khan, 1971-1972 I.C.J.Y.B. 138-40 (1972); Jimenez de Arechaga, *The Amendments to the Rules of the International Court of Justice*, 67 AM. J. INT'L L. 1 (1973). On the duration of litigation before the Court, *cf.* Gross, *The Time Element in the Contentious Proceedings in the International Court of Justice*, 63 AM. J. INT'L L. 74 (1969). Finally, when confronted by extensions of time that exceeded four years in *Barcelona Traction Light & Power Co., Ltd. (Belg. v. Spain)* 1970 I.C.J. 3 (Second Phase) (Judgment), the Court directly addressed the issue and confirmed the assessment that the cause of delays rests primarily with the parties before the Court. The Court noted "with regret" that the "written proceedings had been considerably prolonged" by the numerous extensions requested by the parties. *Id.* at 6. *Cf.* the pertinent comment of Judge Jessup: "[F]ault lies with governments and not with the Court . . . [since] quite apart from the possible use of the standing Chamber of Summary Procedure . . . if the governments concerned desired a prompt decision, the Court could meet their request." *Id.* at 221 n.*. *Cf. also* Fitzmaurice, J., *id.* at 113 & n.**. It is certainly not uncommon to find that the parties themselves actively encourage delay.

15. Since the Court can legally act only when its jurisdiction is invoked pursuant to the Charter and its Statute, these charges are misdirected. Even if a court's judicial function is broad enough to undertake the duties of a revisory council, a role generally eschewed by common law courts, Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1003 (1924), important principles underpinning the structure of international life are still implicated. Primary responsibility remains with States to develop the primary sources of international law. *See generally* LACHS, *supra* note 7, at 187-89.

16. Various members of the Court, including this author, have repeatedly expressed support for various efforts to expand the Court's role. *See, e.g.*, Lachs, *Problems of the World Court: A Member's Perspective*, 3 N.Y.U. CENTER FOR INT'L STUDIES POLICY PAPERS, No. 4 at 14 (1970); Jessup, *The International Court of Justice Revisited*, 11 VA. J. INT'L L. 299 (1971). Fitzmaurice, *Enlargement of the Contentious Jurisdiction of the Court*, in 2 *FUTURE OF COURT*, *supra* note 10, at 461. Furthermore, the willingness of the Court to meet its task is clearly shown by individual judges' efforts in the development of international law.

the dynamics and structure of contemporary international life.¹⁷ Thus, the fault lies with neither the Court nor its judges.¹⁸ Yet, despite its limited function,¹⁹ and considering how rarely it is called upon,²⁰ the Court sitting at The Hague, a historic, if remote and quiet town,²¹ has and does play a significant part in international relations.²²

I wish to concentrate on how the International Court of Justice

17. See *supra* note 13. It is also necessary to recognize the very different context of international life faced by the present Court in contrast to the Permanent Court. Widely-held assumptions necessarily permeate decision-making processes. See, e.g., C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 1 (1962) ("the jurisdiction . . . of the International Court present[s] different epochs in the development of international adjudication"); Larschan & Brennan, *The Common Heritage of Mankind: Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305, 308-10, 334-37 (1983).

18. The Court has responded to the varying needs of the parties appearing before it. In addition to the essentially declaratory judgment given in the *North Sea Continental Shelf Cases*, the Court formulated its judgment in *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18 (Judgment of Feb. 24), to maximize the available options of the parties within the rules of international law. In that context, the Court gave the parties an appropriate time limit to accomplish the sought delimitation. *Id.* at 40-41. Cf. also the *Constitution of a Chamber (U.S. v. Canada)*, 1982 I.C.J. 3 (Order of Jan. 20). See 1981-1982 I.C.J.Y.B. 139-41 (1982).

19. Consideration of the Court's ability to act must also take into account the various reservations filed by States accepting the Court's jurisdiction. See generally 1981-1982 I.C.J.Y.B. 59-94 (1982). Of course, these reservations further circumscribe the jurisdiction conferred by the Charter. See, e.g., Humphrey, *The United States, the World Court and the Connally Amendment*, 11 VA. J. INT'L L. 310 (1971). "The Court," he said, "is necessarily weakened, since its power to review certain cases is limited to those instances when a self-judging clause is not invoked by one party or the other." *Id.* at 312. This restraint on the Court's exercise of the judicial function seems to support this author's view that advisory opinions provide the agency for "a real breakthrough in the present approach to the Court. . . . [T]he real problem is in instigating initiatives to this end." Lachs, *supra* note 16, at 14-19. See also *infra* notes 43-54.

20. Since it first sat on April 1, 1946, the Court has had a total of 67 cases before it. Judgments were rendered in 42 cases and 18 advisory opinions were given. Cf. 1981-1982 I.C.J.Y.B. 3-6 (1982).

21. Although some commentators, including Judge Jessup have considered the effect of the Court's location at The Hague as part of its problem, see, e.g., JESSUP, *supra* note 11, at 61-65, this contention is functionally related to the argument that the Court's jurisprudence is Eurocentric and is part of the larger thesis that Castaneda would characterize as "a garb that served to cloak and protect the imperialistic interests of the international oligarchy." Castaneda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38, 39 (1961). In fact it is much more: it is the Court's composition that plays the leading part in its jurisprudence.

22. "The Court's docket tends to be light, but judgments of the Court are generally accepted and carried out by the parties." RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES, Introductory Note, at 20 (Tent. Draft 1980). Judge Baxter cogently identified another facet of the Court's decision-making that paradoxically adds to its significance: "The very scarcity of its opinions leads the profession to scrutinize them with particular care and to distill from them the last drop of legal wisdom." Baxter, *supra* note 12, at 293.

has contributed to the development of international law. Some contend that to speak of effective rules of law, while strife and conflict are witnessed on each continent, seems unrealistic, abstract, or simply irrelevant.²³ Yet reality demonstrates the inadequacies of these arguments. Law is a vital and essential part of the daily affairs of nations: trains cross borders, planes leave airfields and land in remote countries, ships sail under many flags, States trade with one another, and people travel to foreign lands, make overseas telephone calls, send letters around the globe, and tune to radio and television broadcasts beamed from foreign stations. All this is law. Without it these routine events would be impossible. International law, though imperfect and inadequately developed in some respects, is thus more than an abstract theory honored in the breach; instead, it plays an important role in the daily lives of nations and individuals alike.²⁴

In the development of international law, the International Court of Justice plays a special role. The fifteen judges represent the world's principal legal systems and main forms of civilization.²⁵ Each time they hand down a decision they make a definitive and authoritative impact on the development of law.²⁶ Moreover, it is

23. See my earlier consideration of these criticisms in "Deniers and Utopians," LACHS, *supra* note 7, at 13-28.

24. The vital importance of international law in this context is directly evidenced by the very interesting recent decision of the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Holding that torture inflicted under the color of law was a violation of customary international law that supported the jurisdiction of the United States district court over "a civil action by an alien for a tort only, committed in violation of the law of nations", 28 U.S.C. § 1350 (1976), the *Filartiga* court wrote: "Indeed, for purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humanis generis*, an enemy of all mankind." 630 F.2d at 890 (emphasis in original).

25. I.C.J. STATUTE art. 9. See generally the interesting comments of the late Judge Elerian, *The International Court of Justice and the Concept of Universality*, 19 COLUM. J. TRANSNAT'L L. 197 (1981); Rosenne, *The Composition of the Court*, in 1 FUTURE OF COURT, *supra* note 10, at 377-444; LACHS, *supra* note 7, at 186-87. See also L. PROTT, *THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE* (1979).

26. "[T]he International Court's Advisory Opinion . . . clearly merits attention here not only as background for the International Law Commission's system . . . but also because it represents the historical moment at which the rhetoric and reasoning of all discussion of reservations fundamentally changed." Comment, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L. J. 71, 84-85 (1982). Cf. Falk's analysis in the context of the South West Africa Cases (*Ethiopia v. S. Afr.*, *Liberia v. S. Afr.*), 1966 I.C.J. 6 (Second Phase) (Judgment), Falk *Realistic Horizons for International Adjudication*, 11 VA. J. INT'L L. 314, 315-19 (1971). Cf. also Reisman, *Revision of the South West Africa Cases*, 7 VA. J. INT'L L. 1 (1966).

a rather distinctive court because it is called upon to give advice, as well as to conclusively determine conflicting claims.

II. *The Advisory Opinion: The Emergence of a New Judicial Function—A Subsidiary Source of Law*

It is unusual for a court to give advice.²⁷ Legal advice is generally sought from lawyers and other legal institutions.²⁸ Hence, the very concept of the advisory opinion was questioned from the outset because the power of the Court to issue those advisory opinions differed sharply from the conventional, common law understanding of the judicial function.²⁹ Thus John Bassett Moore, in his famous

27. "[E]ven where advisory opinions are constitutionally authorized, tribunals are reluctant to pronounce in situations that are hypothetical or abstract or otherwise not conducive to judicial disposition." Frankfurter, *supra* note 6, at 234. Holdsworth, in fact, dates this reluctance from the days of Coke, 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 350, 428, 438 (1924) and Borchard characterized the attitude of the British judiciary to advisory opinions "hostile." I. BORCHARD, DECLARATORY JUDGMENTS 72 (rev. ed. 1941). See also Veeder, *Advisory Opinions of the Judges of England*, 13 HARV. L. REV. 358 (1900). But see Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970 (1924). It is also appropriate to recognize that judicial attitudes on this issue clearly differed from those held by members of the executive and legislative branches of governments. See, e.g., *Muskat v. United States*, 219 U.S. 346 (1911) (Congress authorized named Cherokee citizens to bring an action to determine the validity of federal acts); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3529 (1975); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 595-97 (1926).

28. Cf. Hudson:

In general, it may be true that the giving of legal advice is not to be considered a discharge of the judicial function, but much depends upon the circumstances under which it is given and the way in which the result is arrived at. The Court might have developed its procedure with regard to advisory opinions in such a way that it would have lacked the usual safeguards of judicial action; the actual developments have been in the contrary direction. . . .

HUDSON, *supra* note 11, at 511. From the beginning, the Permanent Court and its successor, the ICJ have recognized the clear distinction between legal counselling provided by partisan advocates to their clients, and the judicial duty inherent in the advisory jurisdiction. Cf. also Alexander Fachiri:

It can be confidently stated that the principles laid down and points decided in advisory opinions have the same effect by way of precedent as the judgments of the Court, and are of equal importance to the development of international law . . . it is the established practice of the Court not to discriminate in any way between advisory opinions in this respect.

FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 81-82 (2d ed. 1932). Further, the decision of the Permanent Court declining to provide the League with secret advice avoided a "death-blow to the Court as a judicial body," 1922 P.C.I.J., ser. D, No. 2, at 160.

29. "In view of the history of Article 14 of the Covenant, it cannot be said that the provision relating to advisory opinions was due to the experience of national courts. HUDSON, *supra* note 11, at 485. Goodrich confirmed this view. Cf. Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AM. J. INT'L L. 738 (1938). National experience with advisory opinions led to widespread criticism: not surprisingly

memorandum, *The Question of Advisory Opinions*,³⁰ argued that the obligation to issue opinions that lack elements of authority of finality was incompatible with both the Court's inherent judicial function and "the design to cultivate and enlarge the application between nations of the principle and method of judicial decision," which inspired the establishment of the Court.³¹ Concerns also focused on the extent to which interested States should participate in the decision-making process.³² Moreover, the possibility was raised that

if one recalls the American attitude dating to 1793 when Chief Justice Jay declined to advise President Washington on aspects of international law involved in the Genet affair, 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-89 (Johnston ed. 1891); cf. 1 Warren, *supra* note 27, at 108. The Court informally declined to advise the President on the organization of the federal judiciary. Thus advisory jurisdiction was subject to rigorous criticism mainly from U.S. commentators. Moore, *The Organization of the Court*, *supra* note 11, at 507. Frankfurter would claim: "Advisory opinions are not merely advisory opinions. They are ghosts that stay." Frankfurter, *supra* note 15, at 1004. Against this view, cf. Lord Haldane in *Att'y Gen'l of British Columbia v. Att'y Gen'l of Canada*, [1914] A.C. 153, 162 (P.C. 1913). For early opponents of the advisory jurisdiction, cf. the comments of Senator Borah in Wright, *The United States and the Permanent Court of International Justice*, 21 AM. J. INT'L L. 1, 3 (1927), and E. ROOT, MINUTES OF THE ADVISORY COMMITTEE OF JURISTS 584-85 (1920) (Root's opposition was limited in character). HUDSON, *supra* note 11, at 107-08, 483-524. Cf. further development on the subject: Interpretation of Peace Treaties with Bulgaria, Hungary and Romania 1950 I.C.J. 65, 101 (Advisory Opinion of Mar. 30) (Zoricic, J., dissenting). See also WRIGHT, *supra* note 27, at 478-80; Goodrich, *supra*.

30. Cf. Judge Moore (the first American judge on the Permanent Court) who described the advisory jurisdiction as "obviously not a judicial function." 1922 P.C.I.J., ser. D, No. 2 (Annex 58a) (Memorandum by Judge Moore presented Feb. 18, 1922), reprinted in 5 MOORE, LEGAL PAPERS *supra* note 11, at 329.

31. *Id.* at 383, reprinted in 5 MOORE, LEGAL PAPERS *supra* note 11, at 329. Despite his apprehensions, the drafters of the Covenant conceived the Court's advisory jurisdiction as fundamentally judicial and to insure that the Court would not act as "the legal adviser of the Council and of the Assembly, a duty which its function of rendering advisory opinions does not involve," they revised article 14 using "the expression 'advisory opinion' . . . instead of the word 'advise' [to] indicat[e] that the function to be exercised is a judicial one." 1 D. MILLER, THE DRAFTING OF THE COVENANT 391-92, 406. This distinction, was characterized by Hudson as the difference between the Court acting as an "academy of jurists" and a "responsible magistrature." HUDSON, *supra* note 11, at 511. The evolution of this institution must be seen as the perspective of the dynamic interdevelopment of international law. Finally, it had to be accepted that more than a single appropriate resolution of most legal questions is possible and that the correctness of a court's decision and its authoritativeness, in the coercive and binding sense, are separable. See, e.g., Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A.J. 334 (1944). Thus no one could claim today that the role of the Court as the principal organ of the United Nations is compromised or denigrated by rendering judicial decisions, whether or not binding, in the proper exercise of the judicial function.

32. From the outset, the Court recognized the obvious requirement of justice that all interested States have an opportunity to be heard. See, e.g., I.C.J. STATUTE art. 66; P.C.I.J. STATUTE art. 66. The right to be heard — "a right to his day in court" — are basic to any system of jurisprudence. In *re Oliver*, 33 U.S. 257, 273 (1948). The Court was scrupulous from the first exercise of its advisory jurisdiction in 1922 to give notice to all interested parties, whether or not Members of the League or signatories of the Court's Protocol. "Clearly the

advisory opinions would essentially become judgments in disguise.³³

Once the drafters of the Covenant of the League of Nations had decided to introduce the institution of advisory opinions, the Court, despite the initial criticisms, accepted it.³⁴ The passage of time and the Court's successful experience ultimately convinced most critics of the jurisdiction's utility.³⁵ It is worth recalling that

object of the notice to States required by Article 73 of the 1922 Rules was to enable them to ask to be heard and to enable the Court to be as completely informed as possible." *Id.* at 506. Moreover, this notice has been extended to international organizations "considered . . . as likely to be able to furnish information. . . ." *Id.* at 507. The record in *Namibia* is illustrative. In addition to representatives of the United Nations and South Africa, seven States made statements before the Court. *See* 1971 I.C.J. Pleadings (2 Namibia) 64-87 (Finland), 107-20 (India), 122-30 (Netherlands), 131 (Nigeria), 132-46 (Pakistan), 280-86 (Rep. of Viet-Nam), 497-505 (United States). The Organization of African Unity was notified and made a statement before the Court. *See id.* at 88-106. Written statements by other interested States further supplemented the Court's record. *See id.* (1 Namibia).

33. This argument was inherently unpersuasive. All judicial decisions, relying on voluntary compliance only, are unenforceable. Their authority is solely intrinsic. Otherwise, law would truly be a "brooding omnipresence in the sky." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting), a principle as inapplicable in international relations as in any system of municipal law. *See, e.g., Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.)*, 1972 I.C.J. 46, 107-08 n.1 (Judgment of Oct. 18).

34. The Permanent Court's first advisory opinion, in fact its first judicial act, was given on July 31, 1922, less than two months from the commencement of its first session. *See Designation of the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference*, 1922 P.C.I.J., ser. B, No. 1 (Advisory Opinion of July 31). Two additional advisory opinions were rendered less than one month subsequently on August 22, 1922. *See Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, 1922 P.C.I.J., ser. B, No. 2 (Advisory Opinion of Aug. 12); *Competence of the ILO to Examine Proposals for the Organization and Development of the Methods of Agricultural Production*, 1922 P.C.I.J., ser. B, No. 3 (Advisory Opinion of Aug. 12). In fact not until August 17, 1923, did the Permanent Court first exercise its contentious jurisdiction in *S.S. "Wimbledon"*, 1923 P.C.I.J., ser. A, No. 1 (Merits) (Aug. 17).

35. Writing for the fiftieth anniversary issue of the HARVARD LAW REVIEW in 1937, Judge Moore conceded that many of the apprehensions expressed in his 1922 Memorandum were unfounded:

The statement sometimes made that I opposed the giving of advisory opinions is hardly correct. I was the only member of the Court who submitted a memorandum on the subject; and in this paper, I strongly insisted that advisory opinions, if given, should be strictly judicial in character, and that to this end, the Court must in each instance decide for itself whether it should give the desired opinion.

Moore, *Fifty years of International Law*, 50 HARV. L. REV. 395, 416 (1937). Only on one occasion has the Court declined to render an advisory opinion. *See Status of Eastern Carelia*, 1923 P.C.I.J., ser. B, No. 5 (Reply of July 23 to Request for Advisory Opinion). It was confirmed as a general principle that "[a] reply to a request for an opinion should not . . . be refused." *Cf.* advisory opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 27 (Advisory Opinion of June 21) [hereinafter cited as *Namibia*] (quoting advisory opinion on Reservations to the Convention on the Prevention and Punish-

less than two decades later another American authority argued forcefully that advisory opinions are sometimes more important than judgments, in international relations, because the persuasive nature of advice is frequently superior to force and coercion.³⁶

Thus, advisory opinions have emerged as recognized and important parts of international jurisprudence.³⁷ Advisory opinions offer the Court a much greater potential to further develop the law than do judgments in contentious proceedings: the former, unlike the latter, are not limited to a strict analysis of the facts and submissions that are presented to the Court.³⁸ An advisory opinion may

ment of the Crime of Genocide, 1951 I.C.J. 15, 19 (Advisory Opinion of May 28) [hereinafter cited as *Reservations*]). However, while retaining the discretionary right, the Court stated in its first advisory opinion that it must determine its own competence because "being a Court of Justice, [it] cannot even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court." *Eastern Carelia*, 1922 P.C.I.J., ser. B, No. 5, at 29. This principle has been rigorously and consistently adhered to.

36. Even though agreements in force may provide for the compulsory jurisdiction of the Court, the States interested in the dispute may prefer to have an advisory opinion which by a clarification of legal questions will aid them in reaching a settlement on broader grounds and which will not have the binding effect of a judgment.

HUDSON, *supra* note 11, at 524. Cf. a similar view of Judge Baxter, *supra* note 12, at 292-93. As I observed on several occasions, the Court's advisory jurisdiction provides a unique agency for a "real breakthrough in the present approach to the Court. . . ." (Cf. *e.g.*, Lachs *supra* note 16, at 14-19). Moreover, frequently, the Court's advisory jurisdiction offers the best means to implement the Court's function.

37. Even Judge Moore conceded their relevance to the work of the League of Nations:

It is obvious that the point at which the Court most directly touches the work of the League is in the giving of advisory opinions, and it therefore is not strange that the Court has from the beginning shown its consciousness of the fact that it was just at this point that its independence might, if at all, be popularly brought into question, and that its freedom from influence should be clear and unmistakable.

J. MOORE, *The Permanent Court of International Justice*, in INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS 130 (1924). I have frequently stressed the importance of this function of the Court and its impact on the development of international law. Cf. LACHS, *supra* note 7 and Lachs, *The Revised Procedure of the International Court of Justice*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 44 (1980); See also Application for Review of Judgment No. 273 of the U.N. Administrative Tribunal, 1982 I.C.J. 325, 417 (Advisory Opinion of July 20). In my dissenting opinion I referred particularly to the "possibility of the Court performing interpretative functions serving a similar purpose, acting upon the request of the Assembly or other organ desiring legal guidance as to its own activities." (Cf. numerous commentators, including members of both the Permanent and present Courts.) K. KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE (1971); D. PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT (1972). See also Szasz, *Enhancing the Advisory Competence of the World Court*, in 2 FUTURE OF COURT, *supra* note 10, at 499; Sohn, *Broadening the Advisory Jurisdiction of the International Court of Justice*, 77 AM. J. INT'L L. 124 (1983); Recent Development *Nascent Proposal for Expanding the Advisory Opinion Jurisdiction of the International Court of Justice*, 10 SYR. J. INT'L L. & COM. 215 (1983).

38. Cf. M. POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERA (1973).

be broader in scope, focusing on issues indirectly related to the fact pattern, so long as the goal of providing an answer to the question is achieved. Consequently, the drafting of an advisory opinion gives greater liberty to write persuasively and enter a wider domain of law. This broader appeal is of particular value at a time when States remain reluctant to submit disputes for judicial resolution. An advisory opinion better serves the needs of the parties by preventing the development of an adversarial relationship, and by providing persuasive guidelines for peaceful settlement of the dispute.³⁹ It may be worth recalling that the U.N. Charter empowers the Court to give advisory opinions on legal questions⁴⁰ submitted by the General Assembly, the Security Council, and other international organizations as authorized by the General Assembly.⁴¹ These questions in-

39. See, KEITH, *supra* note 37; POMERANCE, *supra* note 38.

40. In its first advisory opinion, Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), 1948 I.C.J. 57, the present Court gave an extensive interpretation of its jurisdictional powers, holding: "[T]he Court may give an advisory opinion on any legal question, abstract or otherwise," *id.* at 61, and squarely answered a question previously undecided by the Permanent Court. See HUDSON, *supra* note 11, at 496-97 ("No case has arisen in which the Court has been requested to give an opinion on a purely hypothetical question."). By uniformly rejecting "the magic 'solving words' of traditional jurisprudence," F. COHEN, THE LEGAL CONSCIENCE 45 (1960), the Court pursued a functional approach to its advisory jurisdiction. Cf. LAUTERPACHT, *supra* note 9. The Court has scrupulously adhered to its true vocation: that it must act as a "responsible magistrature" rather than as an "academy of jurists." Cf. HUDSON, *supra* note 11, at 511. The first advisory opinion requested by the Security Council provided an opportunity for the Court to develop its functional approach to advisory jurisdiction. In *Namibia*, the Court squarely rejected efforts to draw distinctions between its competence to decide questions of law or fact:

The reference to this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted and, take into account and, if necessary, make findings as to the relevant factual issues. The limitation of the powers of the Court contended for by the Government of South Africa has no basis in the Charter or the Statute.

Namibia, 1971 I.C.J. 16, 27. In short, the Court's frank recognition that its "objective is to ensure that decisions taken are correct: that all elements of fact and law have been brought to the notice of the Court, and that the judges are fully aware of them." Lachs, *supra* note 37. As I pointed out in another context—"in an international court overly sophisticated rules, overly detailed provisions can create many more problems than solve them, and therefore may become an obstacle in the search for justice and the proper adjudication of a case." *Id.* Otherwise, as one of the legal realists colorfully wrote: "Law's present classification of human activities compels us to sit in places where life's game is no longer played [because] [in] pondering many of our long prized abstractions, we study dead bodies from which the life we would know has departed." Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J., 71, 76 (1928). See also Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986 (1981).

clude, for example, legal issues confronting the organization, the effect of Charter and treaty provisions, and resolution of internal disputes arising from organization activities.⁴² While the Court has generally been able to exercise the requisite flexibility in contentious proceedings, it clearly has more freedom to analyze and address issues from a broader perspective in its advisory capacity.

This distinction is illustrated by the limitations imposed on the Court if two States seek delimitation of a frontier and each makes specific submissions and claims. In this hypothetical setting, the Court is bound, to a very large extent, by the issues as framed by the parties. In contrast, in rendering an advisory opinion, the Court may not only interpret but also reformulate the question, and go beyond its literal terms to facilitate the fullest exposition of its reasoning and the appropriate development of the relevant legal issues. The substantial impact of the Court's advisory jurisdiction is reflected by the enduring impact of its jurisprudence.

An illustration of the impact of the Court's advisory jurisdiction arose from the issue of reparation for injuries suffered in the service of the United Nations. Great urgency surrounded the resolution of arrangements to insure agents of the United Nations the fullest measure of protection following the Bernadotte assassination.⁴³ Although the principle raised little doubt,⁴⁴ the legal capacity of the United Nations to make a claim for reparation was unclear, and, as a result, the General Assembly requested the Court's opinion on the question.⁴⁵ The Court addressed this issue in the 1949 case.⁴⁶

41. At present, nineteen international organizations have standing to request an advisory opinion from the Court. See 1981-1982 I.C.J.Y.B. 50-58.

42. U.N. CHARTER, art. 96, paras. 1 & 2.

43. Count Bernadotte was assassinated on Sept. 17, 1948. As will be recalled, intense debates surrounded efforts to formulate an appropriate course of action that would provide adequate protection for agents of the United Nations. See Memorandum of the Secretary General, U.N. Doc. A/674 (1948).

44. To make an international claim, there was no underlying question about the availability of reparation in cases of violation of the law. This issue was well settled. See e.g., *Chorzow Factory (Ger. v. Pol.)*, 1927 P.C.I.J., ser. A, No. 9, at 21 (Jurisdiction) (Judgment No. 8 of July 26), 1928 P.C.I.J., ser. A, No. 17, at 27 (Merits) (Judgment No. 13 of Sept. 13) (Reparation is the "corollary of the violation of the obligations resulting from an engagement between States."); *Spanish Zone of Morocco Claims (Report III)*, 2 R. Int'l Arb. A. 615, 641 (1924) (Huber, J.) ("Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.")

45. G.A. Res. 258, 3 U.N. GAOR, U.N. Doc. A/674 (1948).

46. *Reparation, 1949 I.C.J. 174.*

The Court chose not to limit its opinion to a bare affirmative response to the question.⁴⁷ Instead, it went beyond the literal terms of the question and comprehensively addressed the underlying legal issues.⁴⁸ In reaching its conclusion that the United Nations was legally competent to make an international claim, the Court determined that the United Nations was a subject of international law and capable of assessing international rights and duties.⁴⁹ This represented the culmination of a long development of international law. "Throughout its history, the development of international law has been influenced by the requirements of international life and the progressive increase in the collective activities of States."⁵⁰ Relying on provisions of the Charter, the Court concluded that the United Nations "occupies a position in certain respects in detachment from its Members and is under a duty to remind them, if need be, of certain obligations."⁵¹ The Court recognized that the United Nations was organized to exercise and enjoy "functions and rights which can only be explained on the basis of its possession of a large measure of international personality, and its capacity to operate upon the international plane."⁵² While the Court decisively stated that the United Nations was not a "super-State,"⁵³ the United Nations was recognized as an international person. Thus, for the first time in history, an institution other than a State was recognized as a subject of international law.

A whole series of political and legal consequences followed from this statement.⁵⁴ Today, it remains among the most important

47. "To answer this question, which is not settled by the actual terms of the Charter, we must consider what characteristics it was intended to give to the organization." *Id.* at 177.

48. More on this approach in his later Separate Opinion in Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1956 I.C.J. 23 (Advisory Opinion of June 1).

49. "It can maintain its rights by bringing an international claim." 1949 I.C.J. 174, 179. Such claims could be brought for "damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to the interests of which it is the guardian." *Id.* at 180.

50. *Reparation*, 1949 I.C.J. 174, 178.

51. *Id.* at 179. Moreover, the Court noted, "fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone. . . ." *Id.* at 185.

52. *Id.* at 179.

53. *Id.*

54. Of overarching significance, the Court recognized that "[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implications as being essential

statements of the Court.⁵⁵ Its significance is closely related to the fact that the *Reparations* opinion was decided during the formative years of the United Nations. In 1949, States were still unsure what

to the performance of its duties." 1949 I.C.J. 174, 182. In this context, the Court wrote:

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State.

1949 I.C.J. 174, 183-184.

55. Hence, my view that *Reparation* (and *Namibia*) rank as "landmarks in the development of international law." Lachs, *supra* note 37, at 44. *Reparation* constitutes a major underpinning of the entire *corpus juris gentium* even extending beyond the "strengthening of international organizations, the clarification of the law by which they are guided, and their status. . . ." Lachs, *supra* note 37, at 44. Foremost, its frank holding: "[t]he capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary *intendment out of the Charter*." *Reparation*, 1949 I.C.J. 174, 184 (emphasis added). *Reparation* squarely established the Charter as a constitutive document whose interpretation must ultimately "be guided by what we know to be [the drafters'] most general objective . . . to provide a structure within which the future may settle its own problems." Hurst, *The Process of Constitutional Construction*, in *SUPREME COURT AND SUPREME LAW* 57-58 (E. Cahn ed. 1954). *Reparation* gave effect and authority to Justice Holmes' eloquent exegesis in the international context: "[W]hen we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being, the development of which could not have been foreseen completely by the most gifted of its begetters." *Missouri v. Holland*, 252 U.S. 416, 433 (1920). "Provisions of the [Charter] . . . are organic living institutions . . . [whose] significance is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers v. United States*, 233 U.S. 604, 610 (1914) (Holmes, J.) In short, *Reparation* teaches, as Judge de Castro observed in his separate opinion: "The text breaks away from its authors and lives a life of its own." *Namibia*, 1971 I.C.J. 16, 184.

Second, its luminous reasoning is especially instructive because "[j]udicial lawmaking in any field requires not only the usual rigorous objectivity but the fortitude to abandon formula and to construct anew." Traynor, *No Magic Words Could Do It Justice*, 49 CALIF. L. REV. 615 (1961). As befits a court whose jurisprudential impact rests ultimately on the consent of States, individually and collectively in the international community, *Reparation*, shorn of the "protective veil of adjectives such as . . . 'reasonable', 'inherent', 'fundamental' . . . whose office usually . . . disguise(s) what they are doing and impute(s) to it a derivation far more impressive," L. HAND, *THE BILL OF RIGHTS* 70 (1962), properly "depend[ed] upon its societal effects rather than upon the language and the theory employed in support of its promulgation" for its acceptance. Leflar, *Honest Judicial Opinions*, 74 N.Y.U.L.R. (1979) at 739.

Third, beyond merely illustrating the Court's courage in breaking new ground when faced with a novel situation, *see, e.g.*, C. VISSCHER, *THE THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 179 (1957), *Reparation's* decisive rejection of nationality as pertinent to the admissibility of an international claim was truly momentous. For even in those instances when the agent was a national of the defendant State, by refusing to condition state responsibility on the coincidence of nationality, *Reparation* insured the availability of a remedy to any agent (or successor in interest). *See* D. VISSCHER *supra*, at 174, 184.

standing the United Nations would have and what relationships would exist between the organization and its members. Thus the principles laid down in the opinion have unquestionably both influenced the development of other international organizations that have emerged as a result of "the progressive increase in the collective activities of States," and limited a State's unrestricted freedom of action to further international cooperation. The opinion, arguably, made little impression on the general public. Nevertheless, it was a milestone in the extraordinary development of international law that was underway, nearly unnoticed, in the midst of the gloom and confusion of the post-war years. For the first time, an institution created by States acquired independence and became almost an equal: a subject of international law, it could enter into relationships with States and concomitantly conclude binding "agreements" with them.⁵⁶

The Court continued to develop the law in various fields. A further important step was taken in its opinion on Reservations to the Genocide Convention.⁵⁷ It was an important contribution to the development of the Law of Treaties.⁵⁸ Previously, the use of reservations was characterized by differing practices, disputes, and controversies.⁵⁹ The *Reservations* opinion clarified this situation by recognizing reservations as valid, subject to compatibility with the

56. *Reparation*, 1949 I.C.J. 174, 188.

57. 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

58. "The International Court's Advisory Opinion . . . clearly merits attention . . . because it represents the historical moment at which the rhetoric and reasoning of all discussion of reservations fundamentally changed." Comment, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L. J. 71, 84-85 (1982).

59. Prior to the creation of the League of Nations, it was established that a reservation to a multilateral convention had to be accepted by all the signatory states for the reserving state to be considered a party to the treaty. Ruda, *Reservations to Treaties*, 146 RECUEIL DES COURS 95, 112 (1975). In 1931, the Assembly of the League of Nations adopted a resolution which declared that "a reservation can only be made at the moment of ratification if all the other signatory States agree or if such a reservation has been provided for in the text of the Convention." LEAGUE OF NATIONS O.J. Spec. Suppl. 93, at 139 (1931). The pre-League practice set no substantive limits on reservations and thus contained no permissibility criterion. Under the League system the reserving State had to demonstrate that its reservation was covered by the terms of the convention's provision on reservations. A third system of rules concerning the juridical effects of reservations was provisionally accepted in 1932 in 1932 by the Governing Board of the Pan-American Union. It favored the principle safeguarding state sovereignty over integrity of a treaty. By taking a liberal view on reservations, each State, whether making a reservation, consenting, or objecting to it, retained freedom of action. The relationship between parties to multilateral conventions relied on their attitude to a reservation, recorded by one of them.

object and purposes of the treaty.⁶⁰ This principle has become part of the general law of treaties.⁶¹

Other issues considered by the Court in its advisory capacity are now of historical significance. The functioning of the trusteeship system and termination of the mandate system have been addressed in some opinions.⁶²

The advisory opinion on Namibia in 1971, the first such opinion given at the request of the Security Council,⁶³ depicts the parameters of the Court's work in developing and clarifying the law on the liquidation of the colonial system.⁶⁴ Before directly replying to the questions posed by the Security Council concerning the legality of South Africa's presence in Namibia after the termination of the mandate, the Court addressed itself to eleven questions formulated in its analysis.⁶⁵ In so doing, the Court considerably expanded the area of inquiry.⁶⁶

First, the Court analyzed the effect of an abstention, by a per-

60. *Reservations*, 1951 I.C.J. 15, 22-25. The Court advised that with respect to the validity of reservations under the Genocide Convention:

[A] State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention: otherwise, that State cannot be regarded as being a party to the Convention.

Id.

61. *Cf.* Convention on the Law of Treaties, Vienna, 1969 (which contains detailed provisions on the subject; arts. 19-23) *Id.* at 29.

62. *Cf. inter alia* International Status of South West Africa, 1950 I.C.J. 128 (Advisory Opinion of July 11).

63. *Namibia*, 1971 I.C.J. 16.

64. Although this was the sixth time that the Court dealt with the issues involved in the mandate for South West Africa, (by GA Resolution 2372 (XXII), June 12, 1968, the territory of South West Africa was renamed "Namibia"), it was the one in which it analyzed the key provisions of the law on self-determination, mandates and trusteeships.

65. The opinion deals with a number of complex and often intertwined issues related to the law of the United Nations Charter, the powers and functions of the political organs of the United Nations (and of its predecessor, the League of Nations), the nature of the Mandate, the powers and functions of the Court itself, and general international law. Lissitzyn, *International Law and the Advisory Opinion on Namibia*, 11 COLUM. J. TRANSNAT'L L. 50, 51 (1972).

66. *Namibia*, 1971 I.C.J. 17. Specifically, the Security Council put the following question to the Court: "What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?" *Id.*; 25 U.N. SCOR (1550th mtg.) at 4 (1970). On the formation of the Mandates system, *cf.* South West Africa Cases, Preliminary Objections (Ethiopia v. S. Afr., Liberia v. S. Afr.) 1962 I.C.J. 319, 592. Note, *Limitations of the International Legal Mechanism: Namibia (South West Africa) A Case Study*, 17 How. L. J. 637 (1972). Under this system, former enemy territories were divided into three categories to be administered by a sovereign nation as mandatory under the League of Nation's supervision. *Id.*

manent member of the Security Council, upon the legal character of that body's decision.⁶⁷ As is well known, decisions of the Security Council require the affirmative votes of all five permanent members on matters which do not have a procedural character.⁶⁸ An affirmative vote generally corresponds to a "yes" vote, but there have been numerous instances when permanent members have abstained.⁶⁹ In fact, twenty-one States have been admitted to the United Nations without the concurring votes of all the permanent members of the Security Council.⁷⁰ The question, as placed before the Court, was particularly delicate because the construction of the Charter urged by South Africa implied that these States were improperly admitted as members of the organization. The admission relied, of course, on the practice actually followed by the permanent members as it developed over the preceding quarter century.⁷¹

67. South Africa had contended that the Security Council resolution requesting the Court's opinion was invalid. The claim was based upon the fact that during the voting on the resolution two members of the Security Council—the Soviet Union and the United Kingdom—abstained.

68. U.N. CHARTER art. 27, para. 3. The Charter specifies five nations as being permanent members of the Security Council: [t]he Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. . . . *Id.* art. 23, para. 1. The Security Council is the only principal organ of the United Nations where this system of voting is adopted. At the time the Charter was drafted the voting mechanism was justified on the grounds that a special responsibility was assumed by and placed upon the major powers for the maintenance of international order. *Cf.* L. GOODRICH, E. HAMBRO & A. SIMONS, CHARTER OF THE UNITED NATIONS 216 (1969).

69. The Charter explicitly provides for abstention only in the case of Security Council decisions under Chapter VI (Pacific Settlement of Disputes) and article 52(3), when a party to the dispute must abstain from voting. U.N. CHARTER art. 27, para. 3. Neither the Charter nor the Council's Provisional Rules of Procedure contain any explicit provisions defining the effect to be given to an abstention. Nonetheless, permanent members have often voluntarily abstained from voting and have been willing that this abstention should not be interpreted as a lack of concurrence. This has resulted in a relaxation of the rule requiring unanimity of the permanent members on nonprocedural questions. For a list of cases in which permanent members have voluntarily abstained, see *REPertoire OF THE SECURITY COUNCIL* 170-73, (Supp. 1, 67-68; Supp. 2, 64; Supp. 3, 95-96); see also Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27, paragraph 3, of the Charter of the United Nations*, 61 AM. J. INT'L L. 744 (1967); see generally, Liang, *Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council*, 44 AM. J. INT'L L. 694-708 (1950).

70. See 2 U.N. Repertory 97-103; *id.*, Supp. 1, Vol. I, 276; *id.*, Supp. 2, Vol. II, 314. Illustrative of this trend is the abstention of the United Kingdom in the Security Council vote concerning the admission of Israel to membership in the United Nations. 17 U.N. SCOR (414th mtg.) at 8-15.

71. *Namibia*, 1971 I.C.J. 22.

The proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly

Nevertheless, until the practice was legally sanctioned by the Court in *Namibia* and an abstention was interpreted as an affirmative vote, the possibility theoretically existed that a previously abstaining permanent member could have embarked on a new practice: claiming that abstention would be tantamount to a negative vote.⁷²

Second, the Court addressed itself to one of the most controversial questions in contemporary international law: the significance of some General Assembly resolutions.⁷³ It found that a resolution terminating the mandate was not *ultra vires*, was legally effective, and thus more than a recommendation.

Further, the Court evaluated the legal effect of Security Council resolutions enacted pursuant to articles 24 and 25 of the Charter. The distinction between them is one of important legal interest and called for what was then a new approach to the interpretation of the powers of the Security Council under article 25.⁷⁴ This paved

interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions . . . This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.

Id. The majority of the Court viewed this practice as a valid interpretation of the Charter and as evidence of a new customary rule of law "modifying" the Charter. *Id.* at 117, 185-87. The Court's refusal to distinguish sharply between "interpretation" and "custom" is correct for it has been suggested that "subsequent practice" in reality "covers two concepts, first treaty interpretation by the parties, and second, developing custom." Higgins, *The Development of International Law by the Political Organs of the United Nations*, PROC. AM. SOC'Y INT'L L. 119 (1965). See generally Dugard, *Namibia (South West Africa): The Court's Opinion, South Africa's Response, and Prospects for the Future*, 11 COLUM. J. TRANSNAT'L L. 32-33 (1972).

72. *Namibia*, 1971 I.C.J. 22. "By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote." *Id.*

73. *Id.* at 45-50. This issue was the result of objections advanced by the governments of France and South Africa alleging that the General Assembly acted *ultra vires* in adopting Resolution 2145 (XXI). *Id.* at 45. Paragraph 3 of the operative part of that resolution declared "that South Africa has failed to fulfill its obligations in respect of the administration of the Mandated Territory and to ensure that moral and material well-being and security of the indigenous inhabitants of South West Africa and has, in fact, disavowed the Mandate." As a consequence of this the General Assembly stated that "the Mandate conferred upon His Britannic Majesty to be exercised on his behalf by the government of the Union of South Africa is therefore terminated. . . ." *Id.* at 46. The Court dealt with the resolution by finding that "the United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly." *Id.* at 49-50.

74. *Id.* at 51-53. The Court found that Resolution 276, in which the Security Council declared that "the continued presence of the South African authorities is illegal" and called upon all States "to refrain from any dealings with the government of South Africa," was

the way for one of the central issues: the definition of the legal implications for other states resulting from the continuing presence of South Africa in Namibia.⁷⁵

But before reaching its conclusions the Court dealt with other legal issues. The issue of treaty interpretation posed one of the most interesting questions in the case and resulted in the Court's significant development of the law. It may be recalled that, following World War I, the Allied and Associated Powers collectively assumed governance of former colonies of the enemy powers, which, as the Covenant stated, were "not yet able to stand by themselves under the strenuous conditions of the modern world."⁷⁶ At the same time, they expressly recognized that their obligation for the "well-being and development of such peoples form[ed] a sacred trust of

legally binding upon States. The legal basis of the Resolution was article 24(1) of the Charter, which confers implied "general powers" upon the Security Council to discharge its primary responsibilities which are limited only by the fundamental principles and purposes of the Charter. The Court reasoned that the Security Council wa exercising its primary responsibility, the maintenance of international peace and security, when it adopted Resolution 276. But, finding that the resolution was binding, the Court stressed also the importance of article 25:

Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.

Namibia, 1971 I.C.J. 53. Furthermore:

It would be an untenable interpretation to maintain that, once . . . a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. *Id.* at 52.

75. *Id.* at 54-56. "By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of its international obligations, or of the rights of the people of Namibia." *Id.* at 54. Having found South Africa responsible for creating and maintaining an illegal situation in Namibia, the Court found it "under obligation to withdraw its administration from the Territory of Namibia." *Id.* Additionally, member States of the United Nations are obliged to recognize the illegality of South Africa's presence in Namibia and to refrain from acts which might imply recognition of the legality of South Africa's presence. Nonmember States are required, but not legally obliged, to recognize the illegality of South Africa's presence. *Id.* at 54-56.

76. LEAGUE OF NATIONS COVENANT art. 22, para. 1. "[T]hose colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States." *Namibia*, 1971 I.C.J. 28; see LEAGUE OF NATIONS COVENANT art. 22, para. 1.

civilization. . . ."⁷⁷ Interpretation of this obligation was squarely at issue in the *Namibia* case, as well as the decision that this responsibility would best be carried out by individual States acting as Mandatory Powers on behalf of the League.⁷⁸ Specific issues arose from the distinction made between various mandates, Namibia having been a so-called C Mandate; due to its sparse population, remoteness from civilization, and proximity to the Mandatory Power. The Covenant's drafters sanctioned the virtual assimilation of Namibia's administration by the administration of South Africa as the most appropriate means for South Africa to satisfy its obligations under the mandate.⁷⁹

In *Namibia*, South Africa contended that the "sacred trust of civilization" was merely a kind of "legal fiction" and argued, instead, that the administrative provisions of article 22 amounted to what

77. *Namibia*, 1971 I.C.J. 28; LEAGUE OF NATIONS COVENANT art. 22, para. 1. In reviewing the establishment of the mandate system the Court deemed two principles to be of paramount importance—"the principle of non-annexation and the well-being and development of such peoples forms 'a sacred trust of civilization.'" *Namibia*, 1971 I.C.J. 28-29. The Court further found that it was "self-evident that the 'trust' had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to possess a potentiality for independent existence on the attainment of a certain stage of development. . . ." It stressed the concept of "the sacred trust of civilization" and in determining its present scope and meaning adopted a dynamic view of international law. Lissitzyn, *supra* note 65, at 57; see generally Alexandrowicz, *The Juridical Expression of the Sacred Trust of Civilization*, 65 AM. J. INT'L L. 149-59 (1971).

78. *Namibia*, 1971 I.C.J. 28. The Court's interpretation of this obligation required an examination of the scope and substance of article 22 of the League Covenant. According to the League Covenant:

The best method of giving practical effect to this principle (of a sacred trust) is that tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

LEAGUE OF NATIONS COVENANT art. 22, para. 2, cited in *Namibia*, 1971 I.C.J. 29.

79. The League Covenant states that "[t]he character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances." LEAGUE OF NATIONS COVENANT art. 22, para. 3. Paragraphs 4 through 6 in Article 22 of the Covenant set forth and drew distinctions between three separate entities classified as "A", "B", and "C" mandates. The "C" mandate referred to territories such as South West Africa:

There are territories, such as South-West Africa . . . which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

LEAGUE OF NATIONS COVENANT art. 22, para. 6.

may have been almost an annexation, foreclosing any possibility of Namibia's eventual independence.⁸⁰ This thesis relied on the claim that, despite the textual unity of article 22, the drafters of the Covenant viewed the C mandates as different from the other mandates and tacitly acquiesced in South Africa's annexation plans. This argument was based, in part, on the memoirs and records of some of the statesmen who participated in drafting the Covenant.⁸¹ On the whole, however, the extant materials reflect sharply differing perceptions of the events at Versailles and were contradicted by the clear meaning of treaty provisions.⁸²

Even if South Africa's account of the events of 1919 and 1920 were correct and the "sacred trust" of article 22 was a "misleading" concept, excluding Namibia from its terms, the question remained before the Court: could an interpretation sanctioning complete control (i.e. *de facto* annexation), having its origins in events of 1920, be maintained in 1970? This question, of course, squarely raised the critical issue of intertemporal law, and the Court decided to face it, and by so doing, made an important contribution to the development of law. The problem had been previously addressed by Judge Max Huber in the *Island of Palmas* arbitration.⁸³ In *Namibia* the court wrote:

That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the

80. *Namibia*, 1971 I.C.J. 28. South Africa appears to have espoused the view that C mandates were "in their practical effect not far removed from annexation." *Id.*

81. General Smuts of South Africa, the originator of the mandate system, stated in 1920 that, in his view, the C Class Mandates constituted a situation almost equivalent to annexation. He further declared in a 1937 speech:

When I was Prime Minister, we assured our position as far as South West Africa (Namibia) was concerned. I made an argument with Germany and did not leave the matter on a basis of force and victory. There is a formal agreement whereby Germany acknowledges that the future of South West Africa is with the Union (of South Africa), and whereby Germany undertakes to advise her subjects in South West Africa to become Union subjects. Our claim to South West Africa is therefore based not merely on force or victory, but on an agreement with Germany.

COCKRAM, SOUTH WEST AFRICA MANDATE 81-82, 101 (1976). Conversely, however, other Mandatory nations approached the annexation controversy with an entirely different viewpoint. The Australian administration, for example, specifically declared it would not countenance the notion of annexation of C Class Mandates. *Id.* at 81-82.

82. They may have been viewed as "inconclusive." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 72 S.Ct. 686, 98 L.Ed. 873 (1954) (Warren, C.J.) (relating to the Board's arguments concerning the drafting of the 14th Amendment).

83. *Island of Palmas*, (U.S. v. Neth.) Hague Ct. Rep. (Scott) 83 (Perm. Ct. Arb. 1928). Cf. R. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 29 (1963).

supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of interpretation.⁸⁴

Obviously, a treaty concluded in another era, if it has to be interpreted today, cannot be applied as it might have been on the date of its making.⁸⁵ Thus the Court recognized that law is dynamic, that "'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned — were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust.'"⁸⁶ Hence the Covenant of the League of Nations must be applied in the spirit of the law, as we live it today.⁸⁷ The Court rejected the claim that law can stand still and stressed the close relationship between law and life. (While Lord Mansfield had freed James Sommerset in *Sommerset v. Stewart* because the positive law of England no longer permitted the institution of slavery, he had conceded the authority of contrary law in the colonies.)⁸⁸ In the *Namibia* opinion the Court went further and recognized that even the authority of positive law could not be separated from life. Articulation of this principle was a singular contribution to the *corpus juris gentium*. In addition to concluding that South Africa was in Namibia illegally, the Court held that this illegality was *erga omnes*.⁸⁹ Having determined that Namibia was entitled to independence, the Court concluded that all States, including those not members of the United Nations, were obligated

84. *Namibia*, 1971 I.C.J. 31.

85. This approach to treaty interpretation has subsequently been referred to as the "revolutionary method." As it was said: "Special rules of interpretation apply designed to adapt the letter of the treaty to circumstances of the time and contemporary expectations." Cf. COCKRAM, SOUTH WEST AFRICAN MANDATE at 410-11 citing, *The Opinion on South West Africa (Namibia): The Teleologists' Triumph*, 88 S. AFRICAN L.J. 463 (1971).

86. For example, the Charter of the United Nations confirmed and expanded the principle of the sacred trust to include all territories whose peoples have not yet attained a full measure of self-government. Cf. the Declaration on the Granting of Independence to Colonial Countries and Peoples (G.A. Res. 1514 (XV) (1960), that embraced all peoples and territories which have not yet attained independence. *Namibia*, 1971 I.C.J. 31.

87. *Namibia*, 1971 I.C.J. 31-32.

88. "Slavery," held Lord Mansfield, "is of such a nature that it is incapable of being introduced into this country, on any reason, moral or political, and can no farther be considered in this country than is supported by positive law." *Somerset v. Stewart* Loftt. 1 (1772).

89. *Namibia*, 1971 I.C.J. 32.

to refuse recognition of South Africa's continued illegal occupation of Namibia due to the overarching principle of illegality *erga omnes*.⁹⁰

I mentioned earlier that in one advisory opinion only, the Court dealt with twelve issues before replying to the question put to it. Those analyzed may serve as major illustrations not only of one opinion, but of the advisory function in general. Thus, advisory opinions allow the Court to further, in a broad fashion, the development of international law.

III. Contentious Cases: Continuing Importance in the Development of Law

I turn now to the Court's contribution in what is its main activity: rendering judgments in contentious cases. Here again some illustrations may suffice. In 1970, in the *Barcelona Traction Case*,⁹¹ it formulated a clear distinction between bilateral obligations and obligations *erga omnes*.⁹²

90. *Id.* at 56.

91. Case concerning the Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Second Phase) (Judgment of Feb. 5) [hereinafter cited as *Barcelona Traction*]. The Court's 1970 decision culminated litigation dating back to 1948. Prior "to the filing of the Belgian application [before the ICJ in 1958], 2736 orders had been made in the case and 494 judgments given by lower and 37 by higher courts" in Spain. *Id.* at 10. Belgium voluntarily discontinued the first proceeding in 1961, as it was hoped that the dispute could be resolved by negotiations. See *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1961 I.C.J. 9 (Order of Apr. 10). These efforts, however, failed and Belgium submitted a new application on June 19, 1962. The Spanish government subsequently filed four preliminary objections, contending (1) Belgium's 1961 discontinuance equalled a dismissal on the merits, (2) the ICJ had not succeeded to the compulsory jurisdiction that Spain conferred on the Permanent Court by treaty in 1927, (3) Belgium was without *jus standi* to make an international claim on behalf of its shareholders, and (4) local remedies were not exhausted. In *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1964 I.C.J. 6 (Preliminary Objections) (Judgment of July 24), the Court rejected the first two objections, holding, *inter alia*, that the 1961 discontinuance did not go to the merits and could not constitute an estoppel, *id.* at 17-19, and the 1927 Hispano-Belgian Treaty of Conciliation, Judicial Settlement and Arbitration, established a "basic obligation to submit to compulsory adjudication . . . not necessary making the Permanent Court the only possible" forum. *Id.* at 37-38. The Court declined to rule on the third and fourth objections and joined them to the merits. *Id.* at 46. Nearly six years intervened, however, before the litigation ended. As previously noted, this prolonged delay sparked procedural reforms in the Court. See also Lachs, *The Revised Procedure of the International Court of Justice*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 21 (1980).

92. The Court significantly developed the concept of *erga omnes* duties and obligations by clarifying and clearly identifying its broad applicability and relevance in modern international law in *Barcelona Traction*. See Lachs, *supra* note 7, at 1971. One of the earliest illustrations of acts affecting the international community as a whole was piracy which has been uniformly recognized in international law as a universal crime. See, e.g., *United States v. Furlong (The Pirates)*, 18 U.S. 86, 97, 5 Wheat. 184, 197 (1820) ("Robbery on the seas is

Suffice it to say, the case involved the Barcelona Traction, Light, and Power Company, Ltd., a company that was incorporated in Toronto in 1911 as a holding company for various Canadian and Spanish subsidiaries.⁹³ The company was declared bankrupt subse-

... within the criminal jurisdiction of all nations. It is against all, and punished by all. ...") *In re Piracy jure gentium*, [1934] A.C. 586 (P.C.); cf. *Beak v. Thyrwhit*, 3 Mod. 194, 87 Eng. Rep. 124 (K.B. 1689); *Lotus (Fr. v. Turk.)*, 1927 P.C.I.J., ser. A, No. 10 (Judgment of Sept. 7); see generally 4 W. BLACKSTONE, COMMENTARIES 71 ("The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there."); 2 HAWKINS, PLEASE OF THE CROWN 515, 517, 522 (8th ed. 1824); J. BRIERLY, THE LAW OF NATIONS 189-94 (2d ed. 1936); Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335 (1925) ("As it is an international crime it is within the jurisdiction of all maritime states whosoever or by whomsoever committed."); R. PERKINS & R. BOYCE, CRIMINAL LAW 602-04 (3d ed. 1982). See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 34 (1965). Subsequently, the right of any State to punish trafficking in slaves was also recognized, albeit with varying degrees of unanimity during the 19th century. See, e.g., *Lemmon v. People*, 20 N.Y. 562 (1860). In *Lemmon*, which one commentator appropriately characterized as "the uttermost expansion of the libertarian implications of *Sommerset*," D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 61 (1978), see 2 WARREN, *supra* note 30, at 360-61. The N.Y. Court of Appeals affirmed issuance of a writ of habeas corpus to liberate eight slaves whose presence in the state was, at most, only momentary. *Lemmon*, 20 N.Y. at 599-600, 630-31. While holding that the writ properly issued under the authority of local law, the Court made passing reference to the relevant application of international law and noted:

[Slavery is] a status which the law of nations treats as resting on force against right, and finding no support outside the municipal law which establishes it. (citations omitted) Why should not the State be able to utterly suppress it within her jurisdiction? She is not required by the rule of the law of nations . . . to uphold it. Men are not the subject of property by such law, nor by any law. . . . The public law exacts no obligation from this State to enforce the municipal law which makes men the subject of property; but by that law the strangers stand upon our soil in their natural condition as men.

Id. at 631. In *Creole*, the Chief Justice of the Bahama Islands held that the blacks who had mutinied and brought the ship, bound from Virginia to New Orleans, into Nassau, could not be tried as pirates. See *Protest of Zephaniah C. Gifford*, 61 NILES' NAT'L REG. 323 (1842); *McCargo v. New Orleans Insurance Co.*, 10 Rob. 202 (La. 1845) (slavetraders not entitled to indemnification); D. WEBSTER, DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 83-94 (1848). See also Jones, *The Influences of Slavery on the Webster-Ashburton Negotiations*, 22 J.S. HIST. 48 (1956); Jones, *The Peculiar Institution and National Honor: The Case of the Creole Slave Revolt*, 21 CIV. WAR HIST. 28 (1975). From even this cursory analysis, the conclusion may be drawn that *erga omnes* may be viewed as the witness and external deposit of our moral life.

93. *Barcelona Traction*, 1970 I.C.J. 3, 7. For a detailed exposition of the factual events underlying the litigation in *Barcelona Traction*, see Kearney, *Sources of Law and the International Court of Justice*, in 2 FUTURE OF COURT, *supra* note 10, at 665-81. The Court's decision in *Barcelona Traction* has engendered considerable commentary, (both positive and negative). See, e.g., Higgins, *Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.*, 11 VA. J. INT'L L. 327 (1971); Tammes, *Means of Redress in the General International Law of Peace*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER, 1, 13-14 (1980); Seidl-Hohenveldern, *The Social Function of Property and Prop-*

quent to a proceeding commenced by company bondholders. Belgium appeared before the Court to claim reparation for the injuries suffered by its nationals,⁹⁴ while Canada, the place of incorporation, refused to appear.⁹⁵ The central issue before the Court was jurisdictional—the competence of Belgium to extend protection to Belgian shareholders when the company was a juridical entity incorporated in Canada.⁹⁶ Thus, the case involved diplomatic protection and bilateral relationships.⁹⁷ On this point, the Court determined

erty Protection in Present-day International Law, in *id.* at 77, 84-87; Briggs, *The Jus Standi of Belgium*, 65 AM. J. INTL L. 327 (1971).

94. Belgian nationals owned approximately 88 percent of the company's capital in 1962. See generally Kearney, *Sources of Law and the International Court of Justice*, in 2 FUTURE OF COURT, *supra* note 10, at 665-66.

95. The Canadian government ceased diplomatic efforts to foster a negotiated settlement after 1955 and subsequently declined to appear in the proceedings before the Court. The Court, however, held that "the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised. . . ." *Barcelona Traction*, 1970 I.C.J. 3, 49. To deny the force of this conclusion would undermine the security of international agreements. *Id.*

96. On this point, the Court directly addressed the argument that there was a denial of justice:

The Court fully appreciates the importance of the legal problems raised by the allegation, which is at the bottom of the Belgian claim for reparation, concerning the denials of justice allegedly committed by organs of the Spanish State. However, the possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. Since no *jus standi* before the Court has been established, it is not for the Court in its Judgment to pronounce upon any other aspect of the case, on which it should take a decision only if the Belgian Government had a right of protection in respect of its nationals, shareholders in *Barcelona Traction*.

1970 I.C.J. 4, 51.

97. This led to the distinction made (and referred to above) between "the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection." 1970 I.C.J. 4, 32. Noting that "no legal impediment prevent[s] the Canadian Government from protecting *Barcelona Traction*," *id.* at 44, and "since Spain is not the national State of *Barcelona Traction*," *id.* at 48, no equitable considerations required departure from the prevailing rule, the Court recognized that the relationship of the shareholder to the company "remain[s] limited, this being, moreover, a corollary of the limited nature of their liability." *Id.* at 35. Although the corporation is one of the "municipal institutions, which have transcended frontiers and have begun to exercise considerable influence on international relations," *id.* at 33, this hardly changes the reality of its own structure and the conclusion that necessarily followed: "Not a mere interest affected, but solely a right infringed involves responsibility. . . ." *Id.* at 36. In this context, the Court's conclusion seems particularly cogent, if related to the realities of international life.

If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it . . . In referring

that Belgium had no *jus standi*.⁹⁸ The Court, however, formulated a principle of major importance:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between 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.⁹⁹

Thus it identified two distinct types of obligations: obligations owed to the international community, as a whole, and those owed solely to individual states. This distinction, though not technically part of the Court's *ratio decidendi*, was drawn to emphasize the distinction and had some influence on the law.¹⁰⁰

to such [municipal] rules, the Court cannot modify, still less deform them.

Id. at 37. Although, in many instances, foreign investments are protected by various treaties and special agreements (see, e.g., Juillard, *Les Conventions Bilatérales d'Investissement Conclues par la France*, 2 JOURNAL DU DROIT INTERNATIONAL 274 (1979) (extensive discussion of French practice); Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474 (1977); Rossi-Guerrero, *The Transition from Private to Public Control in the Venezuelan Petroleum Industry*, 9 VAND. J. TRANSNAT'L L. 475 (1976); Muller, *Compensation for Nationalization: A North-South Dialogue*, 19 COLUM. J. TRANSNAT'L L. 35 (1981)), the Court found that "no such instrument is in force between the Parties to the present case." 1970 I.C.J. 3, 47. Moreover, "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality." *Id.*

98. "[T]he possession by the Belgian Government of a right of protection is a prerequisite for the examination of these problems. . . ." 1970 I.C.J. 3, 51. In the absence of a "rule of international law which expressly confers such a right on the shareholders' national State," *id.* at 37, "no *jus standi* before the Court has been established. . . ." *Id.* at 51.

99. 1970 I.C.J. 3, 32.

100. *Cf.* the general comments on the Court's decision in South West Africa (Ethiopia v. S. Afr.; Liberia v. S. Afr.), 1966 I.C.J. 6 (Second Phase) (Judgment of July 18), Memorial of South Africa (Advisory Opinion of June 21), 1971 I.C.J. Pleadings (1 Namibia) 427-37, 451-73. A distinction between holding and dicta should be borne in mind to avoid the perils lurking behind the fallacies a decision-making that Oliphant aptly termed the "org[ies] of over generalization" and "stare decisis." Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 74 (1928). Yet "the orthodox wild goose chase . . . after a formula which will determine the 'real' *ratio decidendi* of a case," Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 844 n.82, is often unnecessary, as it may frustrate the court's affirmative duty to develop international law. *Cf.* H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW* 23-24 (1934) ("[i]t is impossible to apply to the work of the Court the supposedly rigid delimitation between *obiter dicta* and the *ratio decidendi* applicable to a legal system based on the strict doctrine of precedent." Moreover, the willingness of the Court to go beyond the limits of formal logic in *Barcelona Traction* and explicitly identify the two distinct international obligations has contributed immeasurably to a more comprehensive protection of basic human rights, particularly in the international context.

The Court also stated in this context:

By their very nature, the former obligations concerning the community as a whole are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; there are obligations *erga omnes*. Such obligations derive, for example in contemporary international law, from the outlawing of acts of aggression and genocide, as also from the principles and rules concerning basic rights of the human person, including protection from slavery and racial discrimination. All these constitute obligations *erga omnes*.¹⁰¹

The enumeration of these rights also has an interesting history. Although the International Law Commission introduced the notion of *jus cogens* as a major component in the 1966 draft of the Vienna Convention of the Law of Treaties, the Convention ultimately adopted in 1969 did not include any specific examples of peremptory rules of international law.¹⁰² One may suggest that such examples may be deduced from the *Barcelona Traction*¹⁰³ and *Namibia*¹⁰⁴ cases. Moreover, the reliance of the International Law Commission on this formulation in its subsequent work on state responsibility is a clear demonstration of the Court's contribution to the development of the law.¹⁰⁵ Thus recognition of certain rights and obligations *erga omnes*, whether *jus cogens* or not, forms a firm foundation for the effective development of the law corresponding to the needs of the international community.

Another interesting development may be found in 1974, when the Court considered the validity of unilateral declarations in the

101. 1970 I.C.J. 3, 32. M. LACHS, THE TEACHER IN INTERNATIONAL LAW 197. This clear articulation of a duty to protect basic rights has been particularly helpful providing focus for the evolving notion of *jus cogens* and the work of the International Law Commission on state responsibility.

102. VIENNA CONVENTION ON THE LAW OF TREATIES, May 23, 1969, art. 58, U.N. Doc. A/CONF. 39/27 (1969).

103. Cf. cited above acts of aggression, genocide, 1970 I.C.J. 4, 185.

104. Such as apartheid, *Namibia*, 1971 I.C.J. 56; "To establish . . . and to enforce distinctions, exclusions, restrictions and limitations, exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter." *Id.* at 57.

105. See, Report of the International Law Commission on the Work of its Thirty-second Session (1980), Doc. A/CN.4, Draft article on State Responsibility where it was observed that: "Such legal relationships [among nations] would depend on the source of the international obligation breached, which could be a bilateral or multilateral agreement, a special multilateral agreement establishing an international regime, a rule of *jus cogens* or a rule of customary international law." *Id.* at 4.

*Nuclear Test Cases.*¹⁰⁶ While this case was before the Court, the President of France made a public statement indicating that the nuclear tests to be conducted during the summer of 1974 were to be the last atmospheric tests contemplated by the French government.¹⁰⁷ Because Australia and New Zealand contended that previous French statements were inadequate and sought a finding that France was legally obligated to cease further testing,¹⁰⁸ the Court sought to determine whether the President's statement affected the resolution of the case.¹⁰⁹

The Court relied on the French President's declaration in its decision.¹¹⁰ Of course, care is necessary when assessing unilateral statements in general because they may not imply binding obligations.¹¹¹ Political officials may indicate their readiness to perform certain acts in ostensibly inadvertent remarks. In those circumstances, the State seeking to give the statement binding effect must show that the statement was made with a binding intent.¹¹² One must consider both the status of the speaker, whether it is a secretary of an embassy, an official of the ministry of foreign affairs, or the head of State,¹¹³ and the circumstances in which the statement is made.

There are well-known precedents in which unilateral

106. The Australian government instituted an action in the International Court of Justice against the government of France seeking an order from the Court that atmospheric testing of nuclear devices by France was contrary to international law. *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253 (Judgment of Dec. 20).

107. *Id.* at 256.

108. *Id.* at 265.

109. *Id.* at 266.

110. The Court observed that France, in announcing that the 1974 series of atmospheric tests would be the last, had conveyed its intentions to the world. Consequently, other States were apt to rely on this announcement. The Court noted that: "[t]he validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States." The Court concluded that because the objects of the statements made by the French President were clear and addressed to the international community, they had legal effect. *Id.* at 269.

111. A unilateral statement becomes a binding obligation if the maker of the statement is a person capable of binding his government and intends the statement to be binding. *See, e.g., VON GLAHN, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 503-04 (1981)* (for an explanation of the binding effect of an unilateral statement).

112. *Id.*

113. The validity of an international agreement, or, as in this case, of a binding unilateral statement, depends also on the authority of the party making the statement. Normally, statements made by, or treaties negotiated through, unauthorized agents cannot be considered binding, in the absence of detrimental reliance. *Id.* at 499.

statements of Foreign Ministers were held binding. In the *Eastern Greenland* case, the Permanent Court of International Justice considered the famous "Ihlen Declaration" made by the Foreign Minister of Norway.¹¹⁴ The Minister had conceded to the Ambassador of Denmark that Norway made no claims on Eastern Greenland. The Permanent Court concluded that this statement was binding. It relied on the functions of a foreign minister, and, since a foreign minister is presumed to be aware of a statement's impact, the State he represents must be bound by that statement.¹¹⁵

In the *Nuclear Test Cases*, the Court state that "[t]he unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*. . . ."¹¹⁶ The Court held that:

[t]he general nature and characteristics of these statements are decisive for the evaluation of the legal implications. . . . In announcing that the 1974 series of atmospheric tests would be the last, the French government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. [France] was bound to assume that other States might take note of these statements and rely on their being effective.¹¹⁷

To reach this conclusion, the Court proceeded to a wider analysis of changing trends in the conduct of foreign relations:

The validity of these statements and their legal consequences must be evaluated within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substances of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced.¹¹⁸

114. On July 22, 1919, M. Ihlen, the Minister of Foreign Affairs of Norway, stated to the Representative of Denmark that Norway would not object to Denmark's plans over Eastern Greenland. This declaration was recorded in the minutes of the meeting and was certified by the Norwegian Foreign Minister. Denmark took the position that the declaration was a binding agreement by which Norway had acquiesced in the extension of Danish sovereignty over East Greenland. Norway maintained that the declaration was not binding, but was instead an expression of the attitude that Norway would assume in future negotiations with Denmark. Additionally, Norway argued that the declarations of its foreign minister could not have binding effect since it was outside the scope of his constitutional authority. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J., serv. A/B, No. 43, at 38 (Judgment of Apr. 5).

115. *Id.*, at 71-73.

116. *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 213, 269.

117. *Id.*

118. *Id.*

Thus it recognized that public statements of a head of State are not made lightly, and as a matter of law, such statements must be considered binding.

This judgment, like many others, was subject to conflicting comments. Some argued that the Court's holding went too far and bound the French government to a conduct that it had not intended.¹¹⁹ The French President's statement, however, was made at a press conference; thus it was *erga omnes*¹²⁰ and arguably, it was unnecessary to address the statement specifically to Australia or New Zealand. Moreover, the nuclear tests in the Pacific affected other States as well. Relying on these facts, the Court held that the statement constituted a binding undertaking of the French government and the case, therefore, was moot.¹²¹

It may be claimed that this conclusion contributed to the development of yet another area of the Court's jurisprudence. It manifestly stressed its role of resolving disputes and not artificially prolonging those that have ceased to exist. Such is the Court's role once a case has been found moot.¹²² Simultaneously, the Court resolv-

119. One writer has criticized the Court for attributing binding character to France's unilateral declaration on the principle of good faith. See Elkind, *Footnote to the Nuclear Test Cases: Abuse of Right—A Blind Alley for Environmentalists*, 9 VAND. J. TRANS. L. 57 (1976). He observed that the Court was able to dismiss the action brought by the applicant States for lack of jurisdiction. He admitted, however, that situations in which the Court has applied the principle of good faith to give binding effect to unilateral declarations involve contractual relations between the contesting parties. (For example, in the Lake Lanoux Affair (Spain v. Fr.), 12 U.N.R.I.A.A. 281 (1957), where the French government attempted to establish a hydroelectrical power plant along its border with Spain. Water for the power plant was to be diverted from the lake, and France had made guarantees to Spain that waters so diverted would be restored. The border between the two countries had been settled by the Treaty of Bayonne of May 26, 1866.) In the *Nuclear Test Case* no such contractual relation existed. Consequently, it was argued that the use of the principle of good faith was unwarranted and "was used to shield France from an action seeking to bar it from conducting atmospheric nuclear tests in the Pacific, an activity which it had been conducting in defiance of an Interim Order of Protection." Elkind, *supra*, at 61. On the other hand, the Court's decision has been likened in importance to the United States Supreme Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Franck, *World made Law: The Decision of the International Court of Justice in the Nuclear Test Cases*, 69 AM. J. INT'L L. 612 (1975). Franck shared the Court's view because as he concludes: "each State must now recognize that what it solemnly says it will do, or more important, what it says it will *not* do becomes a part of that trellis of reciprocal expectations on which the fragile international system grows." *Id.* at 616. Cf. Lellouche, *The Nuclear Test Cases: Judicial Silence v. Atomic Blasts*, 16 HARV. INT'L L. J. 614 (1975), and other comments on the judgment, Stern, *L'affaire des essais nucléaires français devant la Cour internationale de Justice*, ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL 299 (1974).

120. *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 269.

121. *Id.* at 271.

122. *Id.* at 270-71.

ed the claims of the parties who invoked the question of its jurisdiction.

Three conclusions may be drawn from the Court's judgment in the *Nuclear Tests Cases*. First, in a world where we move toward greater simplification of international relations, where treaties are no longer solemn, sealed agreements signed at ceremonies but are instead concluded by letters, telegrams, or even orally, the lack of formality equally affects the validity of unilateral statements. The large quantity of rights acquired, and obligations assumed, encourages States to dispense with traditional formalities. Presently, in comparison to the practice of a century or even two decades ago, treaties are concluded less formally: approximately three-quarters of today's treaties are concluded in a simplified manner. To deny them the same flexibility accorded other international transactions that are frequently concluded by telephone or letter would amount to ignoring the needs of international life.¹²³

This move toward greater simplification also leads to the conclusion that a unilateral declaration, such as one involving the subject of a pending dispute, may be binding. At a press conference, reporters asked the French Minister of Defense whether Australia and New Zealand were informed of the statements made by the French President.¹²⁴ He replied that because those States were advised by the press, no direct communication was necessary. From this answer, the parties were given the indication that they could rely on the press, a circumstance that clearly supports the Court's conclusion that the statement was binding.

This trend toward simplification of international relations makes good faith an increasingly important element: their mutual interdependence is self-evident, less formality requires more trust. The Court recognized this interdependence in the *Nuclear Test Cases*.

IV. Development of Equitable Principles in International Law

In contentious cases, the Court, though charged with deciding the legal issues and applying the relevant rules of law by the terms of article 38 of its Statute, has looked to the equities to render a

123. See, GRIEG, INTERNATIONAL LAW 450-520 (2d ed. 1976); C. RHYNE, INTERNATIONAL LAW 96-102 (1971). Cf. Lachs, *Developpement et les fonctions des traites multilateraux*, 92 COLLECTED COURSES, HAGUE ACADEMY OF INTERNATIONAL LAW 243 (1957).

124. *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 270.

just judgment.¹²⁵ Decisions in two cases may be of special interest: the *North Sea Continental Shelf Cases*¹²⁶ and the *Case Concerning the Continental Shelf*.¹²⁷ Although framed in terms of delimiting the continental shelf and maritime boundaries, in plain language these cases concerned oil.

In the *North Sea Cases*, the Court concluded that no conventional rule bound the parties,¹²⁸ and as a result it dealt with questions of customary law.¹²⁹ In this context it may be appropriate to dwell on the Court's place in the definition of its role. This subject is of particular interest, but in view of its dimensions I may leave it for another occasion and turn to another subject that was addressed in this and other cases. It is the subject of equity.¹³⁰ The Court made an attempt to define its main function:

125. The International Court of Justice, as was pointed out by the late Judge El-Erian, displayed, in general, sensitivity to changing ideas and policies governing state behavior and responsibility, *supra* note 25, at 205-10. The practical importance of the Court's role in the international arena lies primarily not in the application of international law—for the Court is not the sole law applying organ—but rather in the special technique chosen for this end. Thus, the mandate of the Court is not limited to its enumerated powers and the existing rules of decision, but is extended to the logical consequence of dispute settlement by the application of the judicial technique. *See, e.g.*, I.C.J. STATUTE, art. 38, para. 2. ("This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.") The task of the Court is "not to apply but to deduce principles which it may apply from custom, from general principles of law, and from judicial precedents." M. HUDSON, INTERNATIONAL TRIBUNALS, PAST AND FUTURE 102 (1944). In *Serbian Loans (Fr. v. Serbia)*, 1919 P.C.I.J. ser. A, No. 20 (Judgment of July 12), the Permanent Court held that Article 38 (in its amended form) cannot be regarded as excluding the possibility of the Court's dealing with disputes which do not require the application of international law. *Id.* at 20. In *Right of Passage (Port. v. India)*, 1960 I.C.J. 6 (Judgment of Apr. 12), the Court held that the day-to-day exercise of the right formulated by Portugal with the correlative obligation upon India "may give rise to delicate questions of application," but that it is not sufficient ground for holding that the "right is not susceptible of judicial determination with reference to Article 38(1)". *Id.* at 37.

126. *Cf.* the *North Sea Continental Shelf Cases (Ger. Fed. Rep. v. Den.; Ger. Fed. Rep. v. Neth.)*, 1969 I.C.J. 3 (Judgment of Feb. 20), *reprinted in* 8 I.L.M. 340 (1969).

127. *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamhiriya)*, 1982 I.C.J. 18 (Judgment of Feb. 23), *reprinted in* 21 I.L.M. 225 (1982).

128. *North Sea Continental Shelf Cases* 1969 I.C.J. 3, 27-28.

129. In this case, the application of the equidistance principle as customary law was involved. The Court observed that in order for a customary rule to develop, it must at some stage be possible that States have created a legal obligation between them emanating from their sufficiently uniform conduct. "The States concerned must therefore feel that they are conforming to what amounts to a legal obligation." *Id.* at 44. *Cf.* my dissenting opinion on the process of shaping customary law, *supra* note 37, at 225.

130. The question has frequently been addressed in both theory and practice. "The majority of international lawyers seem to agree that [law and equity] are to be understood to mean general principles of justice as distinguished from any particular system or jurisprudence of the municipal law of any state." *Norwegian Claims Case (U.S. v. Nor.)*, Per-

Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy.¹³¹

Accepting that the object of equity is not to reverse nature, its main purpose remains to temper the inequality created by nature and by man. Nature has divided its wealth very unevenly; States find themselves, by coincidence, in very different situations that create a gap between wealth and poverty.¹³²

manent Court of Arbitration (Award of Oct. 13, 1922), *reprinted in* 17 AM. J. INT'L L. 362, 384 (1922). In this respect equity has developed as part and parcel of the modern international system of administration of justice. Indeed, it was observed that: "[E]quity in general [is] a yardstick, a way of measuring and interpreting legal rights and obligations . . . equity . . . can contribute to the evolution of a new balance of rights and duties in many fields of international law." Friedman, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 289-90 (1963). *Cf.* equity applied in important decisions: the Cayuga Indian Case (Gr. Brit. v. U.S.), 1926 Nielsen Rep. 203, 307; the Diversion of Waters from the Meuse, (Neth. v. Belg.), 1937 P.C.I.J., ser. A/B, No. 70, at 7 (Judgment of June 28). Hudson reiterated, on that occasion, the early English maxim that "he who seeks equity must do equity." *Id.* at 76. *Cf. also* Briery's observation that equity has developed as a "principle which is found to be generally accepted by civilized legal systems [and] may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system." J. BRIERLY, *THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 63 (H. Waldock ed. 1963).

131. North Sea Cases, 1969 I.C.J. 3, 50-51.

132. The abyss between the developed and developing world has remained. This has not helped to decrease distrust of foreign economic intervention. This is particularly linked with issues of sovereignty over natural resources and nationalization. *See Note, Creating a Framework for the Re-Introduction of International Law to Controversies over Compensation for Expropriation of Foreign Investments*, 9 SYR. J. INT'L L. & COM. 163, 166 (1982). By its decisions the International Court of Justice has stressed the role of equity in order, *inter alia*, to build sound legal relations in worldwide dimensions, particularly between the North and the South.

The United Nations added impetus to the development of a new international economic order by three well-known resolutions. In the Declaration on the Establishment of New International Economic Order, the General Assembly proclaimed a "united determination to work urgently for [an order] based on equity. . . ." G.A. Res. 3201, 6 (Special) U.N. GAOR Supp. (No. 1) at 3, U.N. Doc. A/9556 (1974), *reprinted in* 13 I.L.M. at 715-16. This was followed by the Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, 6 (Special) U.N. GAOR Supp. (No. 1) at 5, U.N. Doc. A/9556 (1974), *reprinted in* 13 I.L.M. 720 (1974). Finally, the Charter of Economic Rights and Duties of States declared its purpose to promote a new international economic order based, *inter alia*, on equity. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 252.

In 1982, the Court had the opportunity to update the concept of equity. After eight years, Libya and Tunisia requested the Court to determine the controlling principles and rules of international law for delimitation of the continental shelf between them. Both States specifically referred to trends in international law recognized in the Third Conference of the Law of the Sea (UNCLOS III), and equitable principles, as relevant factors for the Court to consider in its judgment.¹³³ Despite the fact that the Convention was not yet in force, it represented the view of the overwhelming majority of States and was rather specific concerning the method for the delimitation of continental shelf areas,¹³⁴ particularly regarding the relevance of "equitable principles." Moreover, in light of these clear indications, the Court was able to develop a much broader definition of equity:

Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in the light of the circumstances of the case, to be closest to the requirements of justice.¹³⁵

133. The Special Agreement between Libya and Tunisia submitting this dispute to the Court, outlined the following question: "What are the principles and rules of international law which may be applied for the delimitation of the area of the continental shelf appertaining to the Republic of Tunisia and the area of the continental shelf appertaining to the Socialist People's Libyan Arab Jamahiriya."

Special Agreement between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya, signed June 10, 1977, *quoted in Continental Shelf*, 1982 I.C.J. 18, 21, para. 2. Neither State was party to Article 83(1) of the Convention of the Law of the Sea adopted by UNCLOS III which stipulates: "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, *in order to achieve an equitable solution*".

Continental Shelf, 1982 I.C.J. 18, 49, para. 50. Since the parties requested that the "trends" accepted by UNCLOS III incorporated in the provisions of the Draft Convention of the Law of the Sea be considered, the Court agreed to examine these factors when interpreting the state of existing law. *Id.* at 37-38, 47-48. *See generally*, K. SIMMONDS, U.N. CONVENTION ON THE LAW OF THE SEA 1982 *passim* (1983) (compilation of basic text, dealing with the Law of the Sea).

134. *Continental Shelf*, 1982 I.C.J. 18, 60.

135. *Id.*

To ensure that this general concept did not lead to distortion of the judicial function, the Court was careful to indicate that "[w]hile it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case, this is very far from being an exercise of discretion or conciliation; nor is it an operation of distributive justice."¹³⁶

This new appreciation of the mutual relationship between law and equity, which defines the latter by making it directly applicable as law, should be viewed as an important step forward in the development of both law and equity.¹³⁷ This new definition has far-reaching implications for the future interpretation of the law. It assures that, if equity lacks independent existence, it is built into international law. In this respect, even a rule of law which does not refer to equity must be applied in an equitable manner.¹³⁸ Otherwise, the application of positive law may lead to undesirable, unjust, and even absurd conclusions. Contrary to Anglo-American legal tradition, where parties sought law in courts, and to temper the rigidities of the common law, sought justice in equity;¹³⁹ in international law, equity is actually built into the law.¹⁴⁰ By giving effect to equitable principles to ensure fair administration of justice, the Court advanced and broadened international jurisdiction. The Court

136. *Id.* Cf. also the critical comments by the dissenting judges and some comments identifying the decision as "verging on an unauthorized determination *ex aequo et bono*." Feldman, *The Tunisia-Libya Continental Shelf Case: Geographic Justice or Judicial Compromise?* 77 AM. J. INT'L L. 219 (1983).

137. Although in the *Continental Shelf* case the Court was reluctant to establish a precise formula defining the equitable principles that may apply to maritime delimitation, the judgment does provide several significant indications in this context. First, in stating the differences between equity as "a general principle directly applicable as law" and a decision *ex aequo et bono*, which would not be based on legal rules, the Court concluded that equitable sharing of resources is inapplicable here. *Continental Shelf*, 1982 I.C.J. 18, 60, 77. Second, the Court concluded that delimitation in accordance with equitable principles must be sensitive to the relationship between the coasts of the parties and the maritime areas to be delimited. *Id.* at 75-91. Lastly, equitable delimitation must incorporate relevant factors emanating from the behavior of the parties whether by affirmative action or by a prolonged acquiescence or absence of protest. *Id.* at 70.

138. So it was suggested that the ambiguous nature of equity could be harnessed by recognizing that "each particular case is to be settled with reference to its own special characteristics." Janis, *The Ambiguity of Equity in International Law*, 9 BROOKLYN J. INT'L L. 7, 33 (1983).

139. One may recall Grotius:

In judging of the will by natural reason, Aristotle, who has treated the subject with great accuracy, makes the *mind* the seat of judgment and the *will* the seat of equity, which he nobly defines to be the correction of that, wherein the law, by reason of its universal nature is defective. And upon this principle all wills and treaties ought to be interpreted.

H. GROTIUS, *THE RIGHTS OF WAR AND PEACE*, 190 (Campbell trans. 1901).

brought its jurisdiction into a closer relationship with, and adapted to it, the requirements of life.

V. *The Court as a Review Tribunal*

In addition to its contentious and advisory jurisdiction, the Court also acts as a review tribunal for the United Nations Administrative Tribunal and the Administrative Tribunal of the International Labor Organization (ILO). This special procedure is intended to resolve disputes arising between international organizations and their personnel.¹⁴¹ The Court's jurisdiction may also be invoked when a party is dissatisfied with the decision of the appropriate administrative organ of a specialized agency.¹⁴² The

140. American jurisprudence has in recent years exhibited strong support for the incorporation of equity into international law. For example, the Tentative Draft No. 1 of the RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED), in the section on *Sources of International Law*, comment m states: "Resort to principles of equity, in the sense of accepted notions of what is fair and just, is a general principle of law common to major legal systems and as such it may be invoked as incorporated into international law." RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 29-30 (Tent. Draft No. 1, 1980). The comment distinguished this form of equity from the "power, conferred on the International Court of Justice in Article 38 (2) of the Statute . . . to decide cases *ex aequo et bono*." *Id.*

141. G.A. Res. 957, 10 U.N. GAOR Supp. (No. 19) at 30, U.N. Doc. A/2909 (1955). Art. 11 lays down the possibility of challenging judgments of the Tribunal before the ICJ through request for advisory opinions. In addition, a similar procedure is provided by the Statute of the Administrative Tribunal of the International Labor Organization (established as early as 1919 and which later became the first specialized agency related to the United Nations). In the leading case of Administrative Tribunal of I.L.O. (Judgments of the Administrative Tribunal of the I.L.O. upon Complaints made against the UNESCO), 1956 I.C.J. 77 (Judgment of Oct. 23), the Court quoted article XII of the Statute of the Administrative Tribunal authorizing a request for an advisory opinion when the organization "challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a Fundamental Fault in the procedure followed. . . ." *Id.* at 84. The Court concluded that:

[T]here would appear to be no compelling reason why the Court should not lend its assistance in the solution of a problem confronting a specialized agency of the United Nations authorized to ask for an Advisory Opinion of the Court. Notwithstanding the permissive character of Article 65 of the Statute in the matter of advisory opinions, only compelling reasons could cause the Court to adopt in this matter a negative attitude which would imperil the working of the regime established by the Statute of the Administrative Tribunal for the judicial protection of officials.

Id. at 86.

142. *Cf.* Appeals from Decisions of the Council of ICAO by virtue of Article 84 of the Chicago International Civil Aviation Convention (1944), Art. II, Sec. 2 of the International Air Services Transit Agreements of 1944, and the Council's Rules for the Settlement of Differences. A party may appeal "to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the I.C.J." *Id. cf. e.g.*, the case of Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), 1972 I.C.J. 46 (Judgment of Apr. 18).

possibility of resorting to the International Court of Justice in disputes between the Secretary-General of the United Nations and heads of other organizations and their personnel, is a novelty which could have paved the way to new fields of jurisprudence. Nevertheless, difficulties have hindered its further development.¹⁴³

The matter calls for a special analysis in both matters of procedure and substance, but for the purpose of this survey it may suffice to state that the procedure is rather unsatisfactory and calls for serious improvement.¹⁴⁴ The same applies to the scope of competence of the Administrative Tribunals and the applicable substantive law.¹⁴⁵ The most unsatisfactory feature of the protections and safeguards afforded by the two tribunals, however, is the marked difference in regard to officials subject to the jurisdiction of the ILO Tribunal and those subject to the U.N. Administrative Tribunal's jurisdiction. This difference prompted me to appeal for an improved procedure but particularly for the unification of the systems of review—in brief, the establishment of *one* administrative tribunal for all organizations in the United Nations family.¹⁴⁶ The goal would be equal protection of personnel employed by all organizations.

I am gratified to note that the Secretary-General and the Administrative Committee on Co-ordination were requested to "study the feasibility of establishing a single administrative tribunal for the entire system."¹⁴⁷ This request led to further consultations and, though the task is not an easy one in view of the special interests of each organization, it is to be hoped that in the long run one administrative tribunal will be established as the result of the same idea which led to the creation of the International Civil Service Commission.¹⁴⁸ Thus, in this domain too, the Court and its members

143. Cf. Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, 1973 I.C.J. 166, 172 (Judgment of July 12).

144. Cf. Application for Review of Judgment No. 273 of the U.N. Administrative Tribunal, 1982 I.C.J. 325, 342 (Judgment of July 20).

145. Cf. *id.* at 351, the Statute of the ILO Administrative Tribunal particularly with reference to its Article XII, and Article 11 of the U.N. Administrative Tribunal.

146. Cf. my Declaration as President of the Court, Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), *supra* note 142, at 214.

147. G.A. Res. 119, 33 U.N. GAOR Supp. (No. 45) at 201, U.N. Doc. A/34/495 (1978); G.A. Res. 438, 34 U.N. GAOR Supp. (No. 46) at 274, U.N. Doc. A/34/771 (1979). Cf. also, Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, *supra* note 144, at 423-33.

148. This offered me an opportunity to stress the need for a revision of the whole system of regulations guiding UN internal activities and I stated that "it may be timely on that occasion to review and consolidate the internal law of international organizations in view of the conflicts and inefficacy of a number of regulations and rules in the systems." *Id.* at 434.

proved helpful in shaping the development of the law or even the creation of new branches of it.

VI. Conclusion

This brief survey has demonstrated how the Court has gone beyond the parameters initially drawn for it in 1945, or earlier in 1922, in its efforts to develop the law and apply it to a wider, more universal international community.¹⁴⁹ The Court has done far more than administer justice,—it has enriched the law by developing it and making it progress.

The question is occasionally posed whether by so doing the Court has acted *ultra vires*.¹⁵⁰ After all, the Court is charged with deciding, applying, and interpreting the law. In the process, the procedure and practices of the Court have been subjected to criticism. It may be that on some occasions, the Court's decisions, instead of developing the law, actually moved it a step backward, but these occasions were undoubtedly exceptions.

In developing the law, the Court has not acted *ultra vires*. Despite protests to the contrary, every judge sitting on the bench applies the law and necessarily develops it. By making his contribution to a judgment, he may cause the law to take a step backward. Nevertheless, he does not, nor is he meant to, read the law mechanically; he is a thinking judge. The mere process of thinking and of understanding the law requires synchronizing the law with the dynamics of international life. The mere existence of the Court, and other institutions for judicial settlement of disputes, implies the necessity of judges interpreting the law and construing it as they understand it. In this manner, the Court has made substantial contributions to the development of the *corpus juris gentium*.¹⁵¹ Thus, no reasons exist why the Court should not continue to develop

149. In this development, the law has found it necessary to adapt to the current blurring of international borders, which has resulted in a more universal international community. Cf. Jessup, *supra* note 11; Tunkin, *International Law in the International System*, 147 COLLECTED COURSES HAGUE ACADEMY OF INTERNATIONAL LAW, 56 (1975).

150. In *Namibia*, for example, the court held its actions clearly were not *ultra vires*, in that the United Nations, through its competent organs, including the ICJ, must be seen above all as an institution competent to pronounce, in that capacity, on the conduct of States with respect to their international obligations and *competent to act accordingly*. (emphasis added). *Namibia*, 1971 I.C.J. 16, 49-50.

151. Advisory opinion on *Reparations, Reservations and Namibia*; the decisions on the formation of customary law and several other decisions of the Court. The *Barcelona Traction* opinion's impact upon the subsequent development of the law on State responsibilities as elaborated by the International Law Commission is a clear demonstration of the Court's impact on *corpus juris gentium*.

the law and move it forward in a closer relationship with international life. The image of the Court as one living in splendid isolation has virtually disappeared, and the communication gap between the Court and the international community has been gradually overcome. It is the Court's jurisprudence that offers ample evidence to this effect. This should, in turn, have the necessary impact on States.

By common effort the rule of law should be ensured in the interest of every State and the international community as a whole. We must make law a rational instrument of rational beings. The Court's success or failure is conditioned by commitment to the judicial resolution of international disputes. In the final analysis, the lawmakers' and the Court's ultimate clients determine the Court's influence on the development of international law. It is their task, in the interests of themselves and of the international community as a whole, to implement and ensure the rule of law. Thus, they would enhance the role of the Court and its stature.