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# DEVELOPMENTS AND LIMITS IN INTERNATIONAL JURISPRUDENCE<sup>1</sup>

PETER KOVACS\*

## I. INTRODUCTION

Today, it is hardly possible to deny the important role that the judicial decisions of international tribunals play in the promotion and execution of states' treaty law commitments, as well as those of international custom. It is commonly admitted that modern international law cannot be understood without acknowledging the paramount importance that scholars, judges, politicians (and students during their exams) attribute to international courts.

But do we know exactly why courts choose to be innovative in certain cases and why they are hesitant to do so in others? The reasoning of individual judges is, in some respects, explained in their individual opinions, dissents, or advisory opinions. Yet how can we reconstruct *ex post facto* a set of common jurisprudential principles?

Interesting and deep analyses of individual cases are available in all the important reviews of international law, and case-law-based commentaries are often prepared on the proper interpretation of a major treaty or even on a particular article of a given convention. That is why this article has no ambition to give an exhaustive description of all the roots and paths of the evolution of international jurisprudence. This article modestly summarizes only those which are most often referred to in judgments and opinions.

Several different approaches can be chosen for the presentation of the most important factors of jurisprudential development and limitations. I have chosen to begin with legal sources (both written and unwritten) to arrive at an analysis of reasoning beyond traditional legal factors.

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1. The paper is a shortened summary of a larger report presented at the 36th annual conference of the French Society for International Law organized under the somewhat odd title: *La Juridictionnalisation du Droit International* (Jurisdictionalization of International Law). The collected proceedings of the conference will be published by the Editions Pedone (Paris).

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## II. DEVELOPMENTS IN INTERNATIONAL JURISPRUDENCE

A. *Legal Factors in Jurisprudential Development*

Jurisprudential development is engaged in, first and foremost, on a volunteer basis. The will of the state, for example, may be manifested in contractual or ad hoc public documents, but sometimes also in the act of only one of the state-parties, and the international judge will usually take note of such expressions of intent.

The statute of an international tribunal, a given article of a convention, or the uncertain or contradictory nature of the terms of a treaty, can all be considered as treaty-law bases for jurisprudential developments.

More specifically, a mandate contained in a treaty authorizing a tribunal to deliver advisory opinions can a priori function as a good tool for jurisprudential development. The Permanent Court of International Justice,<sup>2</sup> the International Court of Justice,<sup>3</sup> and the Inter-American Court of Human Rights<sup>4</sup> have often used treaty mandates for this purpose. A specific example is the Commission of Arbitration of the International Conference for Peace in Yugoslavia, chaired by the president of the French Constitutional Court, Robert Badinter, which delivered a good dozen advisory opinions during its brief existence.<sup>5</sup> Judges may also be pushed towards jurisprudential development by the material, rather than by procedural, clauses of a treaty, especially when it is thought necessary for judicial decision-making.<sup>6</sup>

The *elasticity* of the terms of a treaty offer a good starting point. This elasticity can be the product of a deliberate decision (the inclusion, for example, of terms such as “economically reasonable efforts,” or “in accordance with environmental standards.” French scholars refer to this as *renoi mobil*—literally, “mobile reference”) but it can also emerge *nolens volens*.<sup>7</sup> It is obvious that the inherent contradictions in treaty texts require a jurisprudential choice between the hypothetically possible contents. There are a number of famous examples of a

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2. The Permanent Court of International Justice has delivered twenty-seven advisory opinions. See World Courts, Statistics on the Permanent Court of International Justice, available at <http://www.worldcourts.com/pcij> (last visited Mar. 3, 2003).

3. As of 2003, the International Court of Justice has issued twenty-two advisory opinions. See *id.*

4. Sixteen advisory opinions were issued from 1981 to 2000. See Interamerican Court of Human Rights, Judgments and Opinions, available at <http://www.corteidh.or.cr> (last visited Mar. 1, 2003).

5. Fifteen advisory opinions and one “decision before jurisdiction.”

6. See *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1962 I.C.J. 319, at 336 (Dec. 21). The International Court of Justice need not limit itself to mere grammatical interpretation because “[t]his rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or the instrument in which the words are contained, no reliance can be validly placed on it.” *Id.*

7. The use of such terms is generally the result of diplomatic compromises made during multilateral negotiations in order to create mutually acceptable agreements.

conflict between languages, and the International Court of Justice<sup>8</sup> and the European Court of Human Rights<sup>9</sup> have both encountered such problems and both resolved the issues according to the same general principles.

Treaty terms are often interpreted by recourse to preparatory documents (*travaux préparatoires*), as described in the 1969 Vienna Convention on the Law of Treaties,<sup>10</sup> and most jurisdictions generally consider this to be an important method for arriving at a clearer vision regarding obscure treaty terms.<sup>11</sup> The International Court of Justice, for example, has often profited from this method.<sup>12</sup>

At the other end of the spectrum, the precise formulation of a given convention does not necessarily eliminate the possibility of competent and evolving interpretations in various jurisdictions. For example, in the context of the Balkan tragedy, the International Court of Justice was faced with the task of formulating the precise relationship between the crime of genocide as defined in the 1948 Geneva Convention, and the national or international character of the particular armed conflict in which the genocide occurred. The Court concluded that the convention applied to the signatories regardless of the political backdrop behind such crimes.<sup>13</sup>

8. See, e.g., *LaGrand (Germany v. United States)* 2001 I.C.J. (June 27), available at [http://www.icjci.org/icjwww/idocket/iqqa/iqusjudgment/ijus\\_ijudgment\\_20010625.html](http://www.icjci.org/icjwww/idocket/iqqa/iqusjudgment/ijus_ijudgment_20010625.html). In the *LaGrand* case, the International Court of Justice had to decide whether provisional measures adopted according to article 41 of its Statute have a legally binding character (as suggested by the French text “doivent être prises” or the English text “ought to be taken”) or not. The Court interpreted the provision to be compulsory in nature, and closed a long doctrinal debate with its decision. *Id.* at §§ 100-09.

9. See, e.g., *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 1 Eur. Ct. H.R. (ser. A) at 252, 284-85 (1968) (merits) [hereinafter *Belgian Linguistic case*, merits]. In the *Belgian linguistic case*, the European Court of Human Rights had to pass on whether the English (“without any discrimination”) or the French version (“sans distinction aucune”) of article 14 of the European Convention of Human Rights better reflects the actual content of the non-discrimination rule.

10. The 1969 Vienna Convention on the Law of Treaties, article 32, available at <http://www.un.org/law/ilc/text/treaties> (last visited Mar. 1, 2003). Article 32 states: “Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion . . .” *Id.*

11. See *infra* note 12.

12. *LaGrand case*, *supra* note 8, at §§ 105-07. An important aspect of the case concerned the legal value (i.e., compulsory or only recommendatory) of the provisional measures ordered by the International Court of Justice. The judgment explains extensively in these paragraphs how the corresponding article of the Statute of the Permanent Court of International Justice was formulated; Fifty lines are devoted to the presentation of the history of this formula and the metamorphosis of the original proposal. *Id.*

13. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.)*, 1996 I.C.J. 595, 615 (July 11). The Court explained:

[T]he Convention is applicable without reference to the circumstances linked to the domestic or international nature of the conflict provided the acts to which it refers in Article II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical.

*Id.*

*B. Jurisprudential Development Beyond Treaty Law Bases*

It happens quite often that jurisprudence benefits from the existence of a *custom* (or from the mere postulation of its existence) which is interpreted to enlarge the spectrum of international law. The International Court of Justice, developed, in part, from an analysis of certain terms of the 1969 treaty leading to a presumption of the general representative nature of heads of state—a presumption of their ability to act on behalf of a state concerning its international relations which extends beyond mere treaty-making.<sup>14</sup> However, as Judge Jiménez de Aréchaga noted not only positive customary law, but crystallizing custom can also exercise a considerable influence on tribunals.<sup>15</sup>

One could cite several examples of the influence of customs on treaties and vice versa, but the best-known instance of a comprehensive development is the confirmation of the applicability of the story of *Sleeping Beauty* on codified custom. For example, without the recognition of the autonomous existence of codified customary rules, the International Court of Justice would hardly have been able to decide the dispute between Nicaragua and the United States.<sup>16</sup>

Do other such considerations constitute sufficient bases for a judge to formulate new jurisprudential development? It is undeniable that international jurisprudence—as well as international doctrinal approaches—does not necessarily ignore factors like philosophy, even if they appear to be of importance only rarely. The use of principles of equity provides a well-recognized exception.<sup>17</sup>

Obviously, the less someone is limited, the freer he is. Consequently, judges feel the greatest freedom where a decision is to be taken *ex aequo et bono*.<sup>18</sup>

14. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.), 1996 I.C.J. 595, 622 (July 11). The Court observed that “[a]ccording to international law, there is no doubt that every Head of State is presumed to be able to act on behalf of the State in their international relations.” *Id.*

15. See, e.g., Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 20 (1978). Aréchaga observes a willingness, in the International Court of Justice, to rely on generally accepted principles of international law existing outside textual circumscription:

[I]t may be asserted that the International Court of Justice has, in the last decade made a significant contribution to the evolution of a more flexible concept of the source of customary international law, based on the recognition of an established consensus of State and irrespective of the formal requirements of adoption of a text, signature and ratification of a convention. The Court gave considerable weight to what it termed “the general consensus revealed” at the Second United Nations Conference on the Law of the Sea “which had crystallized as customary law in recent years,” on the basis of subsequent practice of States.

*Id.*

16. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 96 (June 27). In this case, the Court explained, “[i]t will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.” *Id.*

17. See *infra* note 25 for examples of the International Court of Justice discussing the concept of equity.

18. See Wolfgang Friedmann, *General Course in Public International Law*, 127 RECUEIL DES

However, neither the Permanent Court of International Justice, nor the International Court of Justice have ever felt such freedom in delivering a judgment,<sup>19</sup> and the same can be said of most international tribunals.<sup>20</sup> The very few examples to the contrary are not very convincing. In these cases, the existence of a mandate to pass a decision *ex aequo* was never truly clear and certainly not express.<sup>21</sup> Indeed, the related decisions are very short and their formulation is often lacking a proper legal argument, or even a written opinion. As such, they seem not to be judicial decisions so much as amalgams of social, sociological, geographical and ethnic considerations.

*Grosso modo*, the same considerations can be evoked in order to explain why states are reluctant when deciding upon a mandate in favor of an international tribunal for a transactional decision. This theoretical possibility apparently does not avail too much of a chance for jurisprudential development.<sup>22</sup>

However, the use of *analogy* and *general principles of law* has contributed largely to jurisprudential development.<sup>23</sup> Though it is sometimes criticized in academic circles because of its seemingly indefinable character,<sup>24</sup> *equity* has not been abandoned as a component of jurisprudence. Scholars have observed and appreciated the presence of equity in the reasoning of tribunals and consequently,

COURS 159 (1969). Friedmann explains the concept in holistic terms:

What *ex aequo et bono* means is that the Court should, by agreement of the parties, look at the whole matter in the light of the appropriate economic, geographical, racial, religious and other circumstances which would seem conducive to a fair and lasting solution. And such a decision may involve the modification of legal rights, e.g., of boundaries established by previous treaties or annexations, or colonial occupations.

Friedmann, *supra*, at 159.

19. See Robert Yewdall, *General Course on Principles of International Law*, 121 RECUEIL DES COURS 343-44 (1967). Yewdall has observed, "[i]t is not surprising, therefore, that this is a much underworked provision of the Statute; for it is inherently unlikely that in any case *both* parties will be found willing to seek a decision which may be at odds with the legal rights of a party." *Id.*

20. See *infra* note 21 and accompanying text.

21. See *generally* the text of the Vienna Award of August 30th, 1940, ceding the territory of Transylvania to Hungary, reprinted in *Rumanian-Hungarian Frontier*, 3 Whiteman DIGEST § 12, at 138-39. See also the very short text of the Ribbentrop-Ciano awards in *Hungarian-Czechoslovak Frontier*, 3 Whiteman DIGEST § 13, at 145-47.

22. See *generally* the Arbitral Tribunal for Dispute over Inter-Entity Boundary in the Brcko Area, Final Award, Mar. 5, 1999, available at [http://www.state.gov/www/regions/eur/bosnia/990305\\_arbiter\\_brcko.html](http://www.state.gov/www/regions/eur/bosnia/990305_arbiter_brcko.html) (last visited Feb. 27, 2003).

23. See, e.g., *Chorzow Factory (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 at 29 (Sept. 13). Here, the Court explained, "It is a general conception of law that every violation of an engagement involves an obligation to make reparation." *Id.* See also *Advisory Opinion No. 6, German Settlers in Poland*, 1923 P.C.I.J. (ser. B) No. 6, at 36. In this case, the Court observed, "[i]t can hardly be maintained that although the law survived, private rights acquired under it perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice." *Id.* See also *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 18 (Apr. 9) ("Indirect evidence is admitted in all systems of law and its use is recognized by international decisions."); *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, 1954 I.C.J. 47, 53 (July 13) ("According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute.").

24. See, e.g., PROSPER WEIL, *PERSPECTIVES DU DROIT DE LA DELIMITATION MARITIME* 147 (1988). Weil has characterized equity as a "jeu de hazard" (hazardous game). *Id.*

an impressive jurisprudential construction [concerning equity?] has been created, particularly in the law of sea.<sup>25</sup>

Yet it is without any doubt that the simplest and most often observed method of rendering progressive, activist developments in international law is through the cascade of *successive jurisprudential decisions*.

To refer to formerly pronounced *dicta*, and to profit from their existence in order to go a bit further is a well known and maybe the most often employed method of jurisprudential development. It is rooted also in *inherent judicial functions*, recognized in the European literature by the German phrase "*Kompetenz-Kompetenz*" or the more or less similar Latin principle *jura novit curia*. The judgments passed in *Nicaragua v. United States*<sup>26</sup> and the *Fisheries Competencies*<sup>27</sup> cases provide examples. The same doctrine can also play an important role in the field of advisory opinions; from their larger circle, let us cite only the opinion on the legality of the use of nuclear weapons in order to demonstrate the International Court of Justice's adoption of this prerogative.<sup>28</sup>

May it sound exaggerated to call it a *stricto sensu* development, it is worth noting that a tribunal can *proprio motu* pass a decision on issues or aspects of

25. See *North Sea Continental Shelf (Ger. v. Den.)*, 1969 I.C.J. 3, 49 (Feb. 20) ("Equity does not necessarily imply equality."); *Continental Shelf (Tunis. v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 60 (Feb. 24) ("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."); *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 I.C.J. 13, 39 (June 3) ("Thus the justice of which equity is an emanation, is not an abstract justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability . . .") [hereinafter cases concerning continental shelves].

26. *Military and Paramilitary Activities (Nicr. v. U.S.)*, 1986 I.C.J. 14, 24 (June 27) ("For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law . . .").

27. *Fisheries Jurisdiction (U.K. v. Iceland)*, 1974 I.C.J. 3, 9 (July 25). The Court explained: The Court, however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all the rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

*Id.* See also *Fisheries Jurisdiction (Ger. v. Ice.)*, 1974 I.C.J. 175, 181 (July 25) (employing the same language).

28. See *Legality of the Use or Threat of Nuclear Weapons*, 1996 I.C.J. 226, 237 (July 8). In section 18 of the opinion, the Court explained:

It is clear that the Court cannot legislate and in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris [sic] is devoid of relevant rules in this matter. The Court could not accede to this argument. It states the existing international law and does not legislate. This is so even if in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.

*Id.*

minimal importance even when the question is not explicitly mentioned in the compromise.<sup>29</sup>

Additionally, the *statutory position of a tribunal* within the structure of an international organization can have a considerable effect on its reasoning, as judges must place the legal dispute or the legal problem in the general framework of an international organization, either universal or regional. The due consideration of the functional interests of the organization as well as its capacities can exercise an important influence on the procedure of judicial decision-making as well. For example, the *functional interests* of the United Nations and in particular the role and the position of the International Court of Justice in this context were pointed out by Elihu Lauterpacht.<sup>30</sup> The determination of the legal personality of the United Nations in the *Bernadotte* case,<sup>31</sup> the capacities of its organs in the *Certain Expenses* case,<sup>32</sup> and the assessment of its organs in the *South West African* and *Namibia* cases<sup>33</sup> are all examples of the phenomenon.

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29. CHARLES CHENEY HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES*, Vol. 2 1631-32 (2d. rev. ed., 1945). In the context of an arbitral award, Hyde observes that collateral matters may be determined by the tribunal, even where there is no explicit authorization to do so from the parties. For example:

It is perhaps unnecessary that the agreement to arbitrate should prescribe the currency in which the terms of an award are to be expressed, even though it be highly important that the amount thereof be fixed with precision and set forth in terms that leave no room for doubt as to the extent of the fiscal burden imposed upon the respondent.

*Id.*

30. Elihu Lauterpacht, 152 *RECUEIL DES COURS* 466 (1976). Lauterpacht explains:

We are bound to ask whether the treatment by the Court of questions relating to international organizations—and especially the interpretation of their constitutions—represents a deliberate or consistent attempt to develop a systematic approach to the law of international organization as such. Or, is it, on the other hand, nothing more than an accumulation of judicial episodes which share the common feature of being founded upon facts of an “organizational” character and which happens only accidentally or haphazardly to shed light on the legal system of international organization?

*Id.*

31. *See generally* *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 185-87 (Apr. 11).

32. *See, e.g.*, *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (July 20). In this advisory opinion, the Court observed:

[W]hen the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* . . . [I]f the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not the expense of the organization.

*Id.*

33. *See generally* *International Status of South West Africa*, 1959 I.C.J. 128 (July 11); *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, 1956 I.C.J. 23 (June 1); *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, 1955 I.C.J. 67 (June 7). *See also* *Legal Consequences for States of the Continued Presence of South Africa and Namibia Notwithstanding Security Council Resolution 276*, 1971 I.C.J. 16 (June 21). In this case the Court assessed the competency of the United Nations to supervise its own various organs. The Court observed, “[T]he 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



In order to respect the principle of *res judicata*, great attention must be paid to the scrupulous observance of prior decisions passed in the same case. However this does not mean that mathematical errors should not be corrected<sup>34</sup>—even if a pure arithmetical correction cannot really be taken as a true jurisprudential development. The Permanent Court of International Justice was formally mandated to correct *ex officio* minor mistakes, and the existence of an analogous competence is presumed for the International Court of Justice, despite silence on the issue in the statute creating the court.<sup>35</sup>

The phenomena of individual jurisprudential developments can be viewed as bricks used in the *progressive construction* of a building. This happened most obviously in the development the jurisprudence of the International Court of Justice concerning the law of sea, the crime of genocide, or the norms *erga omnes* (*jus cogens*).<sup>36</sup> Often, a judgment can finalize the slow, continuous and consequent evolution of international custom—a custom eventually linked to a particular treaty law question.

Clearly, previous *dicta* enjoy an irrefutable authority in the formulations of later judgments by the same court. It is interesting, however, to observe not only a tribunal's utilization of its own historical jurisprudence, but also the effects on an international tribunal of the judgments of *other* international tribunals. For purposes of the present article, I will call this phenomenon *jurisprudential interactions*, mindful that in reality we cannot speak about truly *mutual* interactions, the general feeling among tribunals being a certain unilateralism accompanied by judicial aristocracy. Still, this phenomenon merits a closer look.

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obligations, and competent to act accordingly. *Id.*

34. HYDE, *supra* note 29, at 1635. Hyde quotes Arbitrator Roberts:

I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and applicable legal rules.

*Id.*

35. See Richard Plender, *Procedure in the European Court: Comparisons and Proposals*, 267 RECUEIL DES COURS 304 (1997). Plender notes that despite the lack of an explicit delineation of its power to correct simple errors, the Court is, nevertheless, presumed to be able to do so. He observes:

It is a curiosity that between 1931 and 1936 the Permanent Court (or the President if the Court was not sitting) was formally provided with a power to correct any error in any judgment, opinion or order arising from a slip or accidental omission. Although thereafter neither the Rules of the Permanent Court nor those of the International Court of Justice expressly stipulated such a power, there is no doubt that the International Court of Justice has an inherent power to rectify clerical errors or slips of the hypothetical pen without invoking its revision jurisdiction under article 61 of the Statute.

*Id.*

36. See generally *North Sea Continental Shelf*, 1969 I.C.J. 3 (Feb. 20); *Continental Shelf (Tunis. v. Libyan Arab Jamahiriya)* 1982 I.C.J. 18 (Feb. 24); *Continental Shelf (Libyan Arab Jamahiriya v. Malta)* 1951 I.C.J. 15 (May 28); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15 (May 28); *Barcelona Traction, Light, and Power Company (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

In the jurisprudence of the European Court of Human Rights we can find a good dozen references to cases decided by the Permanent Court of International Justice<sup>37</sup> or the International Court of Justice.<sup>38</sup> It is true however that the *ratio* of such references compared to the total number (over three thousand) of judgments from the European Court of Human Rights is very low.<sup>39</sup>

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37. See, e.g., *Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 1 Eur. Ct. H.R. (ser. A) at 241, 247 (1970) (preliminary objections) [hereinafter *Belgian Linguistic case*, preliminary objections] (“[H]aving regard to the decisions of the Permanent Court of International Justice and the International Court of Justice, the Belgian Government contends that the European Court has no jurisdiction to pronounce on the merits of this case . . .”); *Belgian Linguistic case*, merits, *supra* note 9. In the decision on the merits, the Court referred expressly to the jurisprudence of both the Permanent Court of International Justice and the International Court of Justice:

In its opinion of 24th of June 1965, the Commission expressed the view that although Article 14 is not at all applicable to the rights and freedoms not guaranteed by the Convention and Protocol, its applicability “is not limited to cases in which there is an accompanying violation of another Article.” In the view of the Commission “such a restrictive application” would conflict with the principle of effectiveness established by the case law of the Permanent Court of International Justice and the International Court of Justice, for the discrimination would be limited to the aggravation “of the violation of another provision of the Convention.”

*Id.* at 277.

See also *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A) at 1, 7 (1960) (preliminary objections) (“The Commission has invoked various precedents drawn from advisory opinion procedure at the Permanent Court of International Justice and subsequently at the International Court of Justice . . .”); *Stran Greek Refineries v. Greece*, App. No. 13427/87, 19 Eur. H.R. Rep. 293, 329. (1994) (Court report). Here, to support its proposition that the unilateral termination of a contract cannot effect certain clauses of that contract (such as an arbitration clause) the court cited the *Losinger* decision of the Permanent Court of International Justice (*Losinger & Co. v. Yug.*, 1935 P.C.I.J. (ser. C) No. 78, at 110 (Oct. 11)). See also *Papamichalopoulos v. Greece*, App. No. 14556/89, 21 Eur. H.R. Rep. 439, 452 (1996) (Commission report) (citing the *Chorzow Factory case*, *infra* note 40).

38. See, e.g., *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A), *supra* note 37, at 7; *Belgian Linguistic case*, preliminary objections, *supra* note 37, at 247 (“[H]aving regard to the decisions of the Permanent Court of International Justice and the International Court of Justice, the Belgian Government contends that the European Court has no jurisdiction to pronounce on the merits of this case . . .”); *Belgian Linguistic case*, merits, *supra* note 10, at 277 (“In the view of the Commission, ‘such a restrictive application’ would conflict with the principle of effectiveness established by the case law of the Permanent Court of International Justice and the International Court of Justice . . .”); *Ringeisen v. Austria*, 23 Eur. Ct. H.R. (ser. A) at 455, 498 (1971) (“Like the International Court of Justice, ‘it is the duty’ of our Court ‘to interpret the Treaties, not to revise them.’”); *Cruz Varas v. Sweden*, App. No. 15576/89, 14 Eur. H.R. Rep. 1, 40-41 (1991) (Commission report) (“The European Movement, which first proposed the drafting of a European Convention on Human Rights, originally included in a draft Statute of the European Court of Human Rights an interim measures provision (Article 35) based in substance on Article 41 of the Statute of the International Court of Justice.”); *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. H.R. Rep. 99, 103 (1995) (Commission report) (discussing both differences and similarities in the nature of the two courts); *Agrotexim v. Greece*, App. No. 14807/89, 21 Eur. H.R. Rep. 250, (1995) (Court report) (“The Supreme Courts of certain Member States of the Council of Europe have taken the same line. The principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice.”); *Cyprus v. Turkey*, 35 Eur. H.R. Rep. 731, 737 (2001) (“Moreover, recognising the effectiveness of those bodies for the limited purpose of protecting the rights of the territory’s inhabitants does not, in the Court’s view and following the Advisory opinion of the International Court of Justice, legitimise the TRNC in any way.”).

39. The European Court of Human Rights counts 3,499 judgments as of February 2003. See the European Court of Human Rights, list of recent judgments, at <http://hudoc.echr.coe.int> (last visited

The European Court of Human Rights refers namely to the *Chorzow*<sup>40</sup> and *Losinger*<sup>41</sup> cases of the Permanent Court of International Justice and some famous arbitral awards.<sup>42</sup> From the jurisprudence of the International Court of Justice, Strasbourg judges cited, for example, the judgment in the *Barcelona Traction* case<sup>43</sup> and the 1971 advisory opinion on Namibia.<sup>44</sup>

It is also interesting to observe that several times, the European Court of Human Rights has refused to follow the direction of the Permanent Court of International Justice or of the International Court of Justice, usually in cases containing differences between the important aspects of the affairs.<sup>45</sup>

When the European Court of Human Rights refers *proprio motu* to the jurisprudence of the Permanent Court of International Justice or to that of the International Court of Justice, it usually follows their direction. On occasion, the plaintiff, the respondent government or the European Commission of Human Rights has suggested that the court follow this or that *dictum*. In such instances, the European Court of Human Rights has scrupulously examined the relevance of the work of other tribunals before adopting any of their positions.<sup>46</sup>

Concerning the Inter-American Court of Human Rights, we can refer *inter alia* to its recent judgments in the *Last Temptation of Christ* case (after the 1988 Martin Scorsese film of the same title, which was banned from release in Chile), and the *Ivcher Bronstein* cases. In the first case, the judges of the court made reference to the well-developed jurisprudence of the European Court of Human Rights in the field of freedom of expression.<sup>47</sup> In the second, the Inter-American

Feb. 17, 2003).

40. See, e.g., *Papamichalopoulos v. Greece*, App. No. 14556/89, 21 Eur. H.R. Rep. 439, 452 (quoting the holding of the *Chorzow* Factory case).

41. See, e.g., *Stran Greek Refineries v. Greece*, App. No. 13427/87, 19 Eur. H.R. Rep. 293, 329 (1994) (Court report) (referring to the *Losinger* decision).

42. See *Stran Greek Refineries v. Greece*, 19 Eur. H.R. Rep. at 329 (referring to *Lena Golfields v. Soviet Government and Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic*).

43. See *Agrotexim v. Greece*, App. No. 14807/89, Eur. H.R. Rep. 250, 271 (1995) (Commission report) (citing the rules of diplomatic protection for shareholders and societies).

44. See *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. H.R. Rep. 99, 113 (1995) (Commission report).

45. See e.g., *Akdivar v. Turkey*, App. No. 21893/93, 23 Eur. H.R. Rep. 143, 182 (1996) (Court report) (declining to follow principles enunciated in the *Interhandel* and *Ambatielos* judgments concerning exceptions from the rule requiring exhaustion of local remedies).

46. For examples of the Court accepting principles delineated by other tribunals see the *Belgian Linguistic* case, preliminary objections, *supra* note 37, at 247; *Belgian Linguistic* case, merits, *supra* note 9, at 284-85. For an example of the Court refusing, despite the urging of the respondent government, to adopt the jurisprudence of the International Court of Justice see *Akdivar v. Turkey*, *supra* note 46.

47. See *The Last Temptation of Christ Case (Olmedo Bustos v. Chile)*, available at <http://www.corteidh.or.cr> (last visited Feb. 18, 2003). In section 69 of the judgment, the Court quoted the European Court of Human Rights itself:

[The] supervisory function [of the Court] signifies that [it] must pay great attention to the principles inherent in a "democratic society." Freedom of expression constitutes one of the essential bases of such a society, one of the primordial conditions for its progress

Court of Human Rights recalled the jurisprudence of the International Court of Justice with an apparent allusion to the *Barcelona Traction* case, though without mentioning the case expressly.<sup>48</sup>

And vice versa?

The European Court of Human Rights appears to have adopted the jurisprudence of the Inter-American Court of Human Rights in order to find support for its thesis on the responsibility of the plaintiff concerning the burden of proof of the nonexistence or inefficacy of a remedy existing *ex lege*.<sup>49</sup> In another case, the plaintiff's explicit reference to an Inter-American case was not addressed.<sup>50</sup>

If we examine the tendency of the International Court of Justice to cite the *dicta* of other international tribunals, we can conclude that the attention of the judges of the World Court is focused mostly on the jurisprudence of the Permanent Court of International Justice and some arbitral awards. Apparently, the International Court of Justice was more reluctant to profit from the *dicta* of the European Court of Human Rights, the Inter-American Court of Human Rights or the International Criminal Tribunal of Yugoslavia. Three judges have referred, however, to the Strasbourg jurisprudence in their dissenting opinions.<sup>51</sup>

Importing the principle *uti possidetis juris* to Europe, the Commission of Arbitration for Peace in Yugoslavia also profited from the heritage of the

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and for the development of man. Article 10.2 [of the European Court of Human Rights] is valid not only for the information or ideas that are favorably received or considered inoffensive or indifferent but also for those that shock, concern or offend the State or any sector of the population. Such are the requirements of pluralism, tolerance and the spirit of openness without which no "democratic society" can exist. This means that any formality, condition, restriction or sanction imposed in that respect, should be proportionate to the legitimate aim sought. Also, those who exercise their freedom of expression assume "obligations and responsibilities," the scope of which depends on the context and the technical procedure used.

*Id.*

48. The text of the Ivacher Bronstein decision is available at <http://mitglied.lycos.de/harueckner/art21achr>. In section 121 of the judgment, the Court explained, "[t]he International Court of Justice has made a distinction between the rights of a company's shareholders from those of the company itself." *Id.*

49. See, e.g., *Akdivar v. Turkey*, App. No. 21893/93, 23 Eur. H.R. Rep. 143, 182 (1996) (Court report). The European Court of Human Rights referred to both the *Velasquez Rodrigues* case (1987) and the Advisory Opinion of 10 August 1990 on the Exceptions to the Exhaustion of Domestic Remedies, though not explicitly.

50. See *Ergi v. Turkey*, App. No. 23818/94, 32 Eur. H.R. Rep. 388, 426 (1998). The plaintiff referred to sections 136 and 140-41 of the judgment in *Godinez Cruz v. Honduras*, decided by the Inter-American Court of Human Rights in 1989.

51. See *Fisheries Jurisdiction, (Spain v. Can.)*, 1998 I.C.J. 432 (Dec. 4). Judge Bedjaoui, in his dissenting opinion, referred to the *Interhandel* case when emphasizing the importance of the principle of divisibility of the reservations. *Id.* at 539-40. Similarly, Judge Torres Bernardez referred to the *Loizidou* case in his dissent. *Id.* at 637. See also *Ariel Incident of 10 August 1999 (Pak. v. India)*, 2000 I.C.J. 12, 85 (June 21) (citing *Belilos v. Switzerland*, decided by the European Court of Human Rights in 1988, and *Loizidou v. Turkey*).

International Court of Justice<sup>52</sup> when it pronounced on the borders of the ex-Yugoslav states.<sup>53</sup>

However surprising it may be, the International Tribunal for the Law of Sea has referred rarely to the decisions of the International Court of Justice. Among its references, we can find classical *dicta*<sup>54</sup> (as well as well known arbitral awards<sup>55</sup>) and newly pronounced judgments,<sup>56</sup> but surprisingly none of these decisions concerned the law of the sea. The Tribunal generally cited its own *dicta*<sup>57</sup>—which is not really surprising.

Another example presents itself in the decisions of international criminal tribunals. Referring instead to the Nuremberg jurisprudence,<sup>58</sup> the International

52. See, e.g., *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 565 (Dec. 22). The Court explained the principle as follows:

[T]he principle is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles.

*Id.*

For an in-depth discussion on the Badinter Commission, see generally STEVE TERRETT, *THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST-COLD WAR WORLD*.

53. See *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 I.L.M. 1448, 1500 (1992). The Commission referred explicitly to the jurisprudence of the International Court of Justice concerning the principle of *uti possidetis*:

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and in particular from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its judgment of 22 December 1986 in the case between Burkina Faso and Mali.

*Id.*

54. See, e.g., *Saiga Case (St. Vincent v. Guinea)*, 38 I.L.M. 1323, 1349 (1999). In section 120 of the judgment the International Tribunal for the Law of the Sea cited the Permanent Court of International Justice's decision in the case concerning Certain German interests in Polish Upper Silesia. *Id.* Additionally, in section 170 of the judgment, the Tribunal refers to the *Chorzow case*. See also *Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan)*, 38 I.L.M. 1624 (1999). Here, the International Tribunal for the Law of the Sea characterized a legal dispute according to the terminology adopted by the Permanent Court of International Justice in the *Mavromattis Palestine Concessions* judgment of 1962 (“[A] dispute is a ‘disagreement on a point of law or fact, a conflict of legal views or of interests.’”). See also *Grand Prince, (Belize v. Fr.)*, available at [http://www.itlos.org/start2\\_eng.html](http://www.itlos.org/start2_eng.html) (last visited Feb. 18, 2003). The Tribunal referred to the *dictum* of the case concerning the Competencies of the Council of the ICAO, explaining, “[t]he Court must however always be satisfied that it has jurisdiction and must if necessary go into that matter, *proprio motu*.” *Id.*

55. See *Saiga Case (St. Vincent v. Guinea)*, 38 I.L.M. 1323, 1355 (1999). Section 156 of the judgment refers to the *I am Alone* (1935) and *Red Crusader* (1962) cases. *Id.*

56. See *id.* at 1351-52. Section 133 of the judgment refers to the case concerning the Gabcikovo-Nagymaros Project. *Id.*

57. See, e.g., *Camouco Case (Pan. v. Fr.)* 39 I.L.M. 666 (2000) (citing the *Saiga* case); *Monte Confunco (Sey. v. Fr.)*, available at [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html). (citing the *Comouco* case in sections 41 and 63).

58. See, e.g., *International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment*

Criminal Tribunal of Yugoslavia, for example, not only failed to observe the jurisprudence of the International Court of Justice in the dispute between Nicaragua and the United States,<sup>59</sup> but purposefully distanced itself from the International Court of Justice.<sup>60</sup>

We cannot say that recourse to *auxiliary documents* of compromises or to the memoranda of the parties to the dispute has contributed in a consistent or decisive manner to jurisprudential development. On the contrary, the picture is quite contradictory especially concerning the value attributed to *geographical maps*. But only due to the *factum concludens* of the parties, the International Court of Justice can take note of maps even if “in [their] inception and at the moment of [their] production, [they] had no binding character.”<sup>61</sup> The Court seems to reason that “maps merely constitute information . . . [and] by virtue solely of their existence they cannot constitute a territorial title . . . [though] in some cases, maps may acquire . . . legal force . . . [as] physical expressions of the will of the State or States concerned.”<sup>62</sup> However, in the case of the “uncertainty and inconsistency of the cartographic material submitted,” the International Court of Justice can decline to give weight to such materials.<sup>63</sup> Arbitral practice is slightly more open.<sup>64</sup>

*Soft law*—the resolutions adopted by the organs of different organizations—has also fermented international jurisprudence. By opening the door to the possible contribution of such resolutions to the formation of general norms of international law, the International Court of Justice has manifested its willingness

in *Prosecutor v. Dusko Tadic*, and Dissenting Opinion, 36 I.L.M. 908, 936 (1997) (“the Trial of the Major War Criminals before the International Military Tribunal (‘Nürnberg Judgment’) does not delve into the legality of the inclusion of crimes against humanity in the Nürnberg Charter . . .”).

59. See *id.* at 927.

60. See *id.* at 927-28. The Commission was careful to distinguish the facts of the Nicaragua case from the case before it:

However, the facts of the *Nicaragua* case and this case are very different . . . thus, unlike the *Nicaragua* case in which the Court considered whether the *contra* forces had, over time, fallen into such a sufficient state of dependency and control *vis-à-vis* the United States that the acts of one could be imputed to another, the question for this Trial Chamber is whether the Federal Republic of Yugoslavia (Serbia and Montenegro), by its withdrawal from the territory of the Republic of Bosnia and Herzegovina and notwithstanding its continuing support for the VRS, had sufficiently distanced itself from the VRS so that those forces could not be regarded as *de facto* organs or agents of the VJ and hence of the Federal Republic of Yugoslavia (Serbia and Montenegro). Consequently, the Trial Chamber must consider the essence of the test of the relationship between a *de facto* organ or agent, as a rebel force, and its controlling entity or principal, as a foreign Power. It must also be shown that the VJ and Federal Republic of Yugoslavia (Serbia and Montenegro) exercised the potential for control inherent in that relationship of dependency.

International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment in *Prosecutor v. Dusko Tadic*, and Dissenting Opinion, *supra* note 58, at 927-28.

61. *Temple of Preah Vihear*, (Cambodia v. Thailand), 1962 I.C.J. 6, 21 (June 15).

62. *Frontier Dispute* (Burkina Faso v. Mali) 1986 I.C.J. 554, 581 (Dec. 22).

63. See *Kasikili/Sedudu Island* (Botswana v. Namibia), 1999 I.C.J. 1045, 1100 (Dec. 13) (“[I]n light of the uncertainty and inconsistency of the cartographic material submitted to it, the Court considers itself unable to draw conclusions from the map evidence produced in this case.”).

64. See *generally* *Rann of Kutch Arbitration* (India v. Pakistan), 7 I.L.M. 633 (1968).

to take into account changes implied by the new world-order. The reference to United Nations Resolution 2625 on the principles of co-existence and friendly relations adopted by the General Assembly is a good example.<sup>65</sup> The *soft law* of the protection of the environment has also contributed to a new jurisprudential response to contemporary challenges, as is reflected by the inclusion of terms used in the 1972 Stockholm Declaration in one of the orders of the International Court of Justice.<sup>66</sup>

The contribution of *the acts of parties* to jurisprudential development can be found in several judgments as well. The International Court of Justice has explained that "the views of the parties to a case as to the law applicable to their dispute are very material, particularly . . . when those views are concordant."<sup>67</sup> For example, in the *Kasikili-Sedudu* case,<sup>68</sup> the International Court of Justice concurred with the observation by Namibia and Botswana, of the jurisprudential line concerning the boundaries as was formulated in the *Preah Vihear* case.<sup>69</sup> *Mutatis mutandis* this can be seen also in the advisory opinions vis-à-vis the position-papers submitted by states.<sup>70</sup>

### *B. Non-legal reasons of jurisprudential development*

*Social necessity or changes in global context* can also influence international

65. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 99-100 (June 27). The Court explained:

*[O]pinio juris* may, though with all due caution, be deduced from, *inter alia* the attitude of the Parties and of the States towards certain General Assembly Resolutions and particularly resolution 2625 (XXV) . . . The effect of consent to the text of such resolutions cannot be understood as merely that of 'reiteration or elucidation' of treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves.

*Id.*

66. See *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 (N.Z. v. Fr.)*, 1995 I.C.J. 288, 306 (Sept. 22) ("Whereas moreover [sic] the present order is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment . . .").

For a deep analysis of the environmental issue in the Court's jurisprudence see SANDS, PHILIPPE: *L'AFFAIRE DES ESSAIS NUCLEAIRES II (NOUVELLE-ZELANDE C. FRANCE): CONTRIBUTION DE L'INSTANCE AU DROIT INTERNATIONAL DE L'ENVIRONNEMENT* RGDIP 1997/2 473-74.

67. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 25 (June 27).

68. *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045 (Dec. 13)

69. See *id.* at 1073 ("The Court stated in the *Temple of Preah Vihear Case* . . . this was 'an obvious and convenient way of describing a frontier line objectively, though in general terms.'").

70. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 45 (June 21)*. The Court explained:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations' organs concerned . . . However, in the exercise of its judicial function and since objections have been advanced, the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions. *Id.*

tribunals to refine their jurisprudence.<sup>71</sup>

We sometimes have the feeling that a tribunal in a given case was answering a *historical challenge*, though it is true that courts acknowledge this kind of reasoning with exceptional rarity. These are, however, very important moments in the history of mankind—moments when the courts do not merely deliver justice, but also reaffirm the notion that justice is triumphant. In these instances, the tribunal cannot afford to be criticized for having allegedly committed an abuse of power or denial of justice. Quite plainly, this feeling is perceptible in the work of international criminal tribunals. The International Military Tribunal of Nuremberg, for example, scrupulously summarized the number of witnesses, affidavits, and testimonies (with a special regard to those advocating for the defense) in the introductory portion of the judgment.<sup>72</sup> The Tribunal pointed out that “from the beginning of the War in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity.”<sup>73</sup> In the context of the tragedy of the Balkans, the International Criminal Tribunal for the Former Yugoslavia was confronted with the same challenge and it referred, logically, to the heritage of the Nuremberg judgment.<sup>74</sup>

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71. See, e.g., Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226. In this advisory opinion, the Court considered the overarching social context surrounding the law governing nuclear weapons:

Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context. In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

*Id.*

72. See The Avalon Project at Yale Law School: Judgment of the International Military Tribunal for the Trial of Major War Criminals, at <http://www.yale.edu/lawweb/avalon/imt/proc/judgen.htm> (last visited Mar. 5, 2003). The prosecution offered the testimony of thirty-three witnesses, and the defense sixty-one witnesses. The defense also offered additional testimony in the form of 143 written answers to interrogatories. Specially appointed Commissioners heard the testimony of another 101 witnesses, and a total of 1,809 affidavits were submitted.

73. “Nürnberg Judgment,” *infra* note 82, at 254.

74. See International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion, 36 I.L.M. 908, 936 (1997). The Tribunal acknowledged the reasoning behind the inclusion, in the Nürnberg charter, of jurisdictional provisions allowing authorities to deal with nontraditional crimes against humanity:

The decision to include crimes against humanity in the Nürnberg Charter and thus grant the Nürnberg Tribunal jurisdiction over this crime resulted from the Allies’ decision not to limit their retributive powers to those who committed war crimes in the traditional sense but to include those who committed other serious crimes that fall outside the ambit of traditional war crimes, such as crimes where the victim is stateless, has the same nationality as the perpetrator, or that of a state allied with that of the perpetrator. The origins of this decision can be found in assertions made by individual governments, the London International Assembly and the United Nations War Crimes Commission.

*Id.*



International tribunals are not separated artificially from the social realities which influence and develop their jurisprudence. In other words, we must examine the underlying exigencies of the times in order to gain a complete understanding of the work of such tribunals.<sup>75</sup>

The question is, of course, how to identify the moment when international tribunals should feel the necessity to react to such exigencies. Arguably, both national and international judges should pay due attention to the social acceptability of their decisions. This dilemma is similar—according to Reisman, who addressed the influence of social forces on the advisory opinion concerning the 1947 peace treaties—to “navigating *Scylla* and *Charybdis*.”<sup>76</sup>

The issue of the objective legal personality of the United Nations,<sup>77</sup> the law of the sea,<sup>78</sup> or the growing importance attributed nowadays to environmental protection<sup>79</sup> are also representative examples of that judicial phenomenon in the

75. See *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 178 (Apr. 11). The International Court of Justice took the same view, arguing that “[t]hroughout its history, the development of international law has been influenced by the requirements of international life.” *Id.*

76. Michel Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 135 (1996).

77. See, e.g., *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11) (“[F]ifty States, representing the vast majority 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.”).

78. See, e.g., *Continental Shelf (Tunis. v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 47 (Feb. 24) (“The Court must thus turn to the question whether principles and rules of international law . . . may be derived or may be affected by the ‘new accepted trends’ which have emerged at the Third United Nations Conference on the Law of the Sea.”).

79. See, e.g., *Legality of the Use or Threat of Nuclear Weapons*, 1996 I.C.J. 226, 237 (July 8). In its advisory opinion on the use of nuclear weapons, the Court explicitly recognized the importance of environmental considerations:

The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. *Id.*

See also *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 67-68 (Sept. 25). The Court, in this case, emphasized environmental concerns in its assessment of the treaty governing certain aspects of the plan to develop and operate the Gabcikovo Nagymaros dam:

[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan . . . the Treaty is not static, and is open to adapt to emerging norms of international law.

*Id.*

jurisprudence of the International Court of Justice. The *dicta* of the Commission of Arbitration of the Peace Conference of Yugoslavia about the *jus cogens* nature of the principle of the protection of minorities<sup>80</sup> were pronounced in a particular period of history when several famous diplomatic and political brainstorming centers were working to advocate the principles of preventative rather than curative law. Governmental offices suggested that direction in order to avoid the outbreak of a bloody conflict. With the pronouncement of their thesis on *jus cogens*, Robert Badinter and his co-arbiters certainly made a historical step forward, even if the court's decision did not fully embrace their ideals.

The *expectations of the public* also show some similarities with the phenomenon of the exigencies of the times explored above. These expectations were certainly perceptible in the condemnation of nazi war criminals and were undoubtedly present in the creation of two contemporary penal tribunals—the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda—and the litigation before them.<sup>81</sup> Even if one can find a huge complex of considerations formulated *sine ira et studio*, one cannot help but observe a profound indignation in some of the language used by the International Military Tribunal of Nuremberg.<sup>82</sup>

The judicial policy of the International Criminal Tribunal for the Former Yugoslavia follows the same line, if perhaps somewhat more austere.<sup>83</sup> In Africa, in the *Kambanda* case, the International Criminal Tribunal for Rwanda considered it important to emphasize that the crimes against humanity particularly shocked the conscience of mankind.<sup>84</sup>

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80. See Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488, 1496 (1992) (“[T]he peremptory norms of general international law and in particular respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all parties to the succession.”). See generally Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178 (1992).

81. For example, the indictments and the current proceedings against Milosevic, Milutinovic, and others for crimes against humanity committed in the former Yugoslavia.

82. “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” NURNBERG JUDGMENT Vol. 1 223

83. See, e.g., International Criminal Tribunal for the Former Yugoslavia: Prosecutor v. Furundzija, 38 I.L.M. 317, 346 (1999). The Tribunal clearly expressed a distaste for the criminal acts of the defendant and for torture in general:

The treaty and customary rules referred to above impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts.

*Id.*

84. See International Criminal Tribunal For Rwanda: Prosecutor v. Kambanda, 37 I.L.M. 1411, 1417 (1998) (“The Chamber holds that crimes against humanity, already punished by the Nuremberg and Tokyo Tribunals, and genocide, a concept defined later, are crimes which particularly shock the

As Judge Bedjaoui noted, judicial decisions express law but they do not completely neglect the moral climate.<sup>85</sup> A universal *community of values* definitely exists in certain fields and the *jus cogens* is the quintessence of these supreme, peremptory principles. Common values are born more easily and may have more of an impact of judicial decision making when the number of the countries concerned is limited, and especially when history and certain cultural characteristics are shared among those countries. This factor is, then, generally more developed and influential on a regional basis—namely European or Inter-American. A shared community of values can be found, for example, behind the affirmation of an absolute ban on the practice of torture,<sup>86</sup> or in the tolerance of some behaviors earlier considered to be criminal in nature, or to stem from mental health problems.<sup>87</sup>

What is the role played by the *science of international law* in the phenomenon of jurisprudential development? Without going into depth on this question it is appropriate to observe that the contribution of the doctrine is mostly manifested in *abstracto*<sup>88</sup> and rarely *ad hominem*.<sup>89</sup>

Do *other scientific branches* contribute to jurisprudential development? The cases concerning the delimitation of continental shelves were impregnated with geomorphologic and other scientific data,<sup>90</sup> and in the case of the dispute over the

collective conscience.”).

85. BEDJAOUI, MOHAMMED: L'OPPORTUNITE DANS LES DECISIONS DE LA COUR INTERNATIONALE DE JUSTICE in BOISSONS DE CHAZOURNES, L – GOWLAND-DEBBAS, V (EDS): THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY / L'ORDRE JURIDIQUE INTERNATIONAL, UN SYSTEME EN QUETE D'EQUITE ET D'UNIVERSALITE, LIBER AMICORUM GEORGES ABI-SAAB, KLUWER 580 (2001).

86. See, e.g., International Criminal Tribunal for the Former Yugoslavia: Prosecutor v. Furundzija, 38 I.L.M. 317, 346 (discussing various aspects of both customary and treaty law prohibiting torture); Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1 (ser. A) at 14 (1978) (“[T]he prohibition contained in article 3 is absolute and . . . the Contracting States may not derogate from article 3 even in the event of war or other public emergency threatening the life of the nation.”).

87. See, e.g., Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. (ser. A) at 149, 167. The Court considered evolving social attitudes, particularly as reflected in domestic legislation, in its determination that:

As compared with the era when that legislation [criminalizing homosexual behavior] was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.

Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. (ser. A) at 149, 167.

88. See, e.g., Manfred Lachs, *Teachings and Teaching of International Law*, 151 RECUEIL DES COURS 218 (discussing the role of scholarship in international law).

89. See The Allusions of Arbitrator René-Jean Dupuy on the Teachings of Paul Guggenheim, Charles de Visscher, Prosper Weil, Michel Virally, Eduardo Jimenez de Arechaga, Sir Gerald Fitzmaurice, Georg Schwarzenberger et Sir Hersch Lauterpacht, *Texaco-Calasiatic v. Libya*, 19 January 1977, J.D.I. 1977

90. See generally the cases concerning continental shelves, *supra* note 25. (discussing the exact

Gabcikovo-Nagymaros dam,<sup>91</sup> a considerable part of the memoranda (and the replicas) as well as the oral pleadings were devoted to the presentation of scientific research and the testimony of experts in the natural sciences.<sup>92</sup> Similarly, in the jurisprudence on the law of sea, the International Court of Justice has taken scientific evidence into account<sup>93</sup> probably because of the ambiguity of the legal rules. In the case of the Gabcikovo-Nagymaros dam, however, the same tribunal largely avoided such evidence because it was possible for the judges to decide the dispute on the sole basis of the law of treaties, thus conforming to the rules of procedure.<sup>94</sup>

### III. LIMITS ON INTERNATIONAL JURISPRUDENCE

#### A. *Limits of a Legal Nature*

The *explicit* limitations posed by *treaty law* should be considered first. The existence of pertinent international treaties often prevents judges from formulating jurisprudential developments. We can consider these types of treaties as *a priori* imposed limits on jurisdictions. The actual applied formulae of decision-making, whether precise or vague, can also be considered as limits of jurisprudential development.

In its first judgment delivered in the *Lawless* case, the European Court of Human Rights approved, without any hesitation, the theory of "*acte claire*".<sup>95</sup>

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extension and direction of continental shelves, the importance of submarine canyons, the issue of geographical contiguity of the coast, and other scientific data).

91. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7.

92. See *id.* at 8. The list of technical experts is particularly illustrative. *Id.*

93. See Mohammed Bedjaoui, *The "Manufacture" of Judgments at the International Court of Justice*, 3 PACE Y.B. INT'L L. 29, 46 (1991). While Bedjaoui recognizes the difficulties inherent in the voluminous pleadings of the parties, he also recognizes their potential benefits:

Would it then have been normal for the Court to have told the parties at a given point in the oral arguments, "enough of geology and geomorphology!?" Perhaps, if the Court had been absolutely sure of itself. But it has no right to certainties before hearing the parties out. Listening has, after all, one very important function, which is to sow doubt, to generate the philosophical "skepsis" which cleans out all preconception from the Judge's mind before he embarks upon his ultimate function of decision.

*Id.*

94. See Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 122 (2001) ("[A]s both the Gabcikovo-Nagymaros Project (Hungary/Slovakia) and the Spain-Canada Fisheries cases have shown, what one party terms an overriding environmental issue, another sees as rather relating to treaty obligations, or the law of State responsibility, or the law of the sea.").

95. See *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. A) at 1, 28 (1960). Vis-à-vis the habeas corpus rule of the European Convention of Human Rights, the European Court of Human Rights emphasized that:

The meaning thus arrived at by grammatical analysis is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest . . . [T]he Court cannot deny Article 5(1)(c) and (3) the plain and natural meaning which follows both from the precise words used and from

Elsewhere, recourse to the preparatory documents of a treaty (*travaux préparatoires*) was felt appropriate—essentially in cases of obscure treaty language.<sup>96</sup> In the very first period of its practice, the European Court of Human Rights rejected, under these limitations, the application of the European Convention of Human Rights to problems of national or linguistic minorities.<sup>97</sup> (We have to add however, that the European Court of Human Rights later revised that position, and its attitude became much more open as witnessed by the judgments in the *Buckley, Chapman, Serif, and Hassan & Chaush* cases).<sup>98</sup> A theoretical openness alone is already a considerable step forward, and is generally the product of changed social and inter-social attitudes, but it cannot furnish an absolute guarantee for a change *in merito* of jurisprudential policy—certainly not if the consensus of states is precarious or more political than legal, as can be observed a series of judgments in Roma issues.<sup>99</sup>

To find and to define a set of uniform European morals seems to be an impossible mission. Without a common denominator at hand, States seek mostly to preserve their margin of appreciation for other values, and the European Court of Human Rights has often refused to go forward and build new jurisprudential pillars. For example, in controversial cases such as those concerning the gay and lesbian community, the European Court of Human Rights has been highly cognizant of the moral climate and has taken pains to respect the limits imposed by the diverging opinions of the states concerning minorities of different sexual orientation.<sup>100</sup> In Europe, only one common principle exists in this field—a

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the impression created by their context.

*Id.*

96. See Belgian Linguistic case, merits, *supra* note 9, at 282 (referring to the preparatory work of the European Convention on Human Rights).

97. See *id.* (rejecting the application of the Convention).

98. See generally *Buckley v. United Kingdom*, App. No. 203848/92, 23 Eur. H.R. Rep. 101 (1996) (Court report); *Chapman v. United Kingdom*, App. No. 27238/94, 33 Eur. H.R. Rep. 399 (2001) (Court report); *Serif v. Greece*, App. No. 38178/97, 31 Eur. H.R. Rep. 561 (1999) (Court report); *Hasan and Chaush v. Bulgaria*, App. No. 30985/96 34 Eur. H.R. 55 (2000) (Court report).

99. See, e.g., *Chapman v. United Kingdom* App. No. 27238/94, 33 Eur. H.R. Rep. 399, 428 (2001) (Court report). Whether the adoption of the Framework Convention for the protection of national minorities should give an impetus for the Court to go towards a renewal of its jurisprudential policy, the judges emphasized:

[T]he Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The Framework Convention, for example, sets out general principles and goals but signatory states were unable to agree on means or implementation. This reinforces the Court's view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection and the interests of a minority with possibly conflicting requirements, renders the Court's role a strictly supervisory one.

*Chapman v. United Kingdom*, 33 Eur. H.R. Rep. at 428.

See also *Lee v. United Kingdom*, App. No. 25289/94, 33 Eur. H.R. Rep. 677, 702-03 (Court report); *Beard v. United Kingdom*, App. No. 24882/94, 33 Eur. H.R. Rep. 442, 470 (2001) (Court report) (employing the same wording).

100. See generally *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. (ser. A) at 149, 163-64 (1981)

respect for the right to be different. Out of the application of this principle emerges the jurisprudential concept that individual States are generally the best positioned to determine the extent of gay rights within their own borders.<sup>101</sup>

Limits can also be found in the principles of *compromise*, as can be observed in the huge bodies of arbitral<sup>102</sup> and permanent jurisprudence. The Permanent Court of International Justice expressed this rule for the first time in the *Lotus* case<sup>103</sup> and the International Court of Justice has done so as well.<sup>104</sup>

*Grosso modo* the same principle can be found vis-à-vis advisory opinions. The International Court of Justice is not bound to pronounce on questions which are not raised in the original pleadings—even where certain states would like to push the court to give an opinion on a particularly important but collateral issue.<sup>105</sup>

(Court report); *Cossey v. United Kingdom*, App. No. 10843/84, 13 Eur. H.R. Rep. 622, 631 (1990) (Court report).

101. See, e.g., *Frette v. France*, merits (2002), available at <http://hudoc.echr.coe.int/hudoc> (last visited Mar. 5, 2003). In section 41 of the judgment, the European Court of Human Rights addressed, among other issues, the legal rights of gays and lesbians to adopt children, and largely differed to the judgment of individual States:

It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.

*Id.*

102. See, e.g., HYDE *supra* note 29, at 1626. Hyde observes that arbitrators have often limited themselves to deciding only those questions explicitly put to them:

Secretary Bayard was correct in declaring in 1877, that an arbitrator should not assume to decide any question other than that submitted to him by the States seeking his judgment, or to take cognizance of any collateral issues between either of them and a third State which was not expressly submitted to him by the States directly concerned.

*Id.*

103. See *Lotus* case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 12 (Sept. 27) (“[T]he Court, having obtained cognizance of the present case by notification of a special agreement concluded between the Parties, it is rather to the terms of the agreement than to the submissions of the Parties that the Court must have recourse establishing the precise points which it has to decide.”).

104. See, e.g., *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246, 266 (Oct. 12).

105. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 236 (July 8). In the nuclear context, for example, the court has found it unnecessary to consider some principles of international humanitarian law, despite the urging of the parties:

It has been maintained in these proceedings that these principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part

There are, of course, also *legal limits other than treaty law*, such as the *inherent powers of the judiciary*.

International tribunals (as well as national ones) try to follow the shortest and the most logical path to a decision—at least according to their own theories. In their judgments, judges may ignore those issues which have no direct connection to the object of the dispute. They can do this despite the length of the memoranda or the exhaustiveness of the pleadings submitted by the parties; courts can and do often limit their considerations to issues which are dispositive to the outcome of the dispute. No answer need be given to impertinent questions, and the court is not obliged to follow the parties in all the directions suggested by them.<sup>106</sup> The *dictum* in the *Gabcikovo-Nagymaros* case provides a good example.<sup>107</sup> In the same manner, the answer to sterile questions having a purely scientific interest<sup>108</sup> can be economized, as was pointed out by Judge Shahabudden.<sup>109</sup>

Jurisdictions also avoid passing judgment on documents having an uncertain probative value or documents which are highly contradictory if the judges are not convinced by either of the positions.<sup>110</sup> This is especially true if the dispute can be settled without such documents, or when such a decision would have a negligible effect on the merits of the case.<sup>111</sup>

Courts prefer to develop the rule of the case—and their jurisprudence—slowly and carefully. Courts are not bound to answer any preliminary questions if there is enough time to deal with them during the procedure on the merits and a

of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

*Id.*

106. *See, e.g.*, *Gabcikovo-Nagymaros Project (Hung. v. Slov.)* 1997 I.C.J. 7, 39 (Sept. 25) (“Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct.”).

107. *See id.* at 45-46.

108. *See id.* at 71 (“The Court does not find it necessary . . . to enter into a discussion of whether or not Article 34 of the 1978 Convention [on the succession of States in treaties] reflects the state of customary international law.”). *See also* *Northern Cameroons (Cameroon v. U.K.)*, 1963 I.C.J. 15, 35 (“The Court does not find it necessary to pronounce an opinion on these points which, in so far as concerns the operation or administration of the trusteeship is no longer in existence, and no determination reached by the court could be given effect to by the former administering authority.”).

109. *See* MOHAMMED SHAHABUDDEN, *PRECEDENT IN THE WORLD COURT* 219 (1990).

110. *See, e.g.* *Application of the Convention on the Prevention and Punishment of the Crime of Genocide 1996 I.C.J. 595, 619 (July 11)*; *Serif v. Greece*, App. No. 38178/97, 31 Eur. H.R. Rep. 561, 570 (1999) (Court report).

111. *E.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide 1996 I.C.J. 595, 619 (July 11)*; *Serif v. Greece*, App. No. 38178/97, 31 Eur. H.R. Rep. 561, 570 (1999) (Court report). In both of these cases, the Courts avoided pronouncing on the eventual legal validity of the minority protecting instruments of the League of Nations. *Id.*

decision on that particular point is not a *sine qua non* condition of the provisory measures.<sup>112</sup> Even the principle *Kompetenz-Kompetenz* has been used by international tribunals in order to avoid highly political issues<sup>113</sup> or questions not vital to a resolution of the issues.<sup>114</sup>

We can also find good examples of a *statutory approach* to self-limitation in interstate disputes<sup>115</sup> as well as in advisory opinions.<sup>116</sup> There are especially good examples in the United Nations staff litigation cases.<sup>117</sup>

Another jurisprudential limitation can be observed in the fact that tribunals

112. See, e.g., *Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.)*, 1992 I.C.J. 3, 15. The International Court of Justice declined to decide upon certain questions which it saw as non-dispositive:

[T]he Court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction to entertain the merits of the case; and whereas the decision given in these proceedings in no way prejudices any such question, and leaves unaffected the rights of the Government of Libya and the Government of the United Kingdom to submit arguments in respect of any of these questions . . . the Court finds that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. *Id.*

See also *Legality of the Use of Force (Yug. v. Fr.)*, 1999 I.C.J. 363, 374 (June 2) (assessing the separability of the jurisdictional issues from the merits of the case).

113. See, e.g., *Advisory Opinion No. 5, Status of Eastern Carelia*, 1923 P.C.I.J. (ser. B) No. 5 at 27, 29 (“[T]he Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.”).

114. See *Agean Sea Continental Shelf (Greece v. Turk.)*, 1978 I.C.J. 3, 16-17. The Court managed to avoid pronouncing on the legal validity of the 1928 General Act of the Pacific Settlement of International Disputes because “it is evident that any pronouncement of the Court as to the status of the 1928 Act whether it were found to be a Convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey.” *Id.*

115. See *Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.)* 1993 I.C.J. 325, 344 (Sept.13). The Court implicitly refused to adjudge the legality or the opportunity of the Security Council’s arms embargo, hampering Bosnia from exercising self-defense:

The Court may, for the preservation of those rights, indicate provisional measures to be taken by the parties, but not by third States or other entities who would not be bound by the eventual judgment to recognize and respect those rights; whereas consequently the Court cannot, in the exercise of its power to indicate provisional measures, indicate by way of “clarification” that those States or entities should take, or refrain from, specific action in relation to the acts of genocide which the Applicant alleges are being committed in Bosnia-Herzegovina.

*Id.*

116. See, e.g., *International Status of South-West Africa*, 1950 I.C.J. 128, 140 (July 11) (“The Court is however, unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such [trusteeship] agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.”).

117. See, e.g., *Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints made Against the United Nations Educational, Scientific and Cultural Organization*, 1956 I.C.J. 77, 99 (Oct. 23). This phenomenon is manifested much more often in the United Nations staff litigation cases in order to preserve the respective roles of the administrative tribunals and the International Court of Justice. The Court has said, for example, that “a challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision.” *Id.*



are generally rather reluctant to pronounce on the *decisions of another tribunal*, particularly when the object of a dispute is to nullify or to maintain an arbitral award.<sup>118</sup>

*Judicial caution*, the reluctance of judges, or a desire to preserve the coherence of a firmly established jurisprudence often operates as a well-founded theoretical obstacle to development.<sup>119</sup> Despite the aesthetic beauty of a logical construction, we cannot forget the underlying consideration that preserving jurisprudential coherence is the best way to maintain the states' confidence—a necessary condition for bringing future disputes before the courts.<sup>120</sup> Even in cases of the compulsory jurisdiction of certain courts—for example, the reform of the European Convention of Human Rights—the preservation of jurisprudential heritage remains particularly important.<sup>121</sup>

The influence of *auxiliary* documents is limited; the International Court of Justice, for example, generally refuses to base a decision on geographical maps.<sup>122</sup>

118. See, e.g., *Arbitral Award Made by the King of Spain (Hond. v. Nicar.)*, 1960 I.C.J. 192, 214 (Nov. 18). The Court explained, "the [arbitral] award is not subject to appeal and the Court cannot approach the considerations of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce whether the arbitrator's decision was right or wrong." *Id.*

119. See, e.g., *Northern Cameroons, (Cameroon v. U.K.)*, 1963 I.C.J. 15, 29 (Dec. 2) ("There are inherent limitations on the exercise of the judicial function which the Court, as a Court of Justice, can never ignore . . . the Court itself, and not the parties, must be the guardian of the Court's judicial integrity.")

120. See, e.g., Leo Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS 341 (1967) ("[T]he Court may refuse to give an opinion if the question is not a legal one and even refuse to give an opinion if 'the circumstances of the case are of such a character as should lead it to decline to answer the Request.'"). But see, Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 466 (1976). Lauterpacht questions whether the body of decisions by the International Court of Justice concerning international organizations amounts to any coherent jurisprudence:

[W]e are bound to ask whether the treatment by the Court of questions relating to international organizations—and especially the interpretation of their constitutions—represents a deliberate or consistent attempt to develop a systematic approach to the law of international organization as such. Or, is it, on the other hand nothing more than an accumulation of judicial episodes which share the common feature of being founded upon facts of an "organizational" character and which happens only accidentally or haphazardly to shed light on the legal system of international organization?  
*Id.*

121. See, e.g., Franz Matscher, *Quarante Ans D'activités de la Cour Européenne des Droits de L'Homme*, 270 RECUEIL DES COURS 283 (1997).

122. See, e.g., *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 582 (Dec. 22). The court made clear that maps are usually regarded only as *prima facie* evidence and are rarely dispositive:

Maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability

However, in some cases, it has considered such maps where both parties have submitted them. On other occasions, it has refused to invalidate an arbitral award because one of the parties simply lacked a map to support its argument.<sup>123</sup>

*Acts and behavior of the parties* can also serve as limits for on the development of jurisprudence. If the parties do not ask the Court to provide an explanation on a given legal question, despite the fact that the question is important to the merits of the case, the judges are not bound to address the issue.<sup>124</sup> In the Gabcikovo-Nagymaros case, for example, the International Court of Justice could avoid pronouncing on the eventual jus cogens nature (or at least the current stage of the metamorphosis of a norm of jus cogens in statu nascendi) of environmental protection.<sup>125</sup> Despite the logic in such a deduction, one cannot forget the suddenly proclaimed examples of erga omnes norms in the Barcelona Traction case.<sup>126</sup>

### B. Non-Legal Limitations

The *absence of information* and the *inaccessibility of information* thought necessary for the background of a judgment have also been evoked as motives for refusing to make a decision, or refusing to extrapolate decisions with major legal consequences from incomplete facts, or to use such information to take a new and delicate direction. The advisory opinion on the legality of the use of nuclear weapons<sup>127</sup> and some aspects of the case concerning military activities in

which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.

*Id.*

*But see*, Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1099 (Dec.13). In this case, the court pointed out that the parties themselves had treated maps as evidence of little value:

The Court considers that, in the light of that disagreement, there cannot be any question of the authorities concerned having accepted the maps then available in a manner capable of constituting "subsequent practice in the application of the [1890] treaty," still less recognition of the boundary shown on those maps. To the contrary, it appears to the Court that the parties largely ignored the maps, which they regarded as either accurate or inaccurate according to their respective positions on the course of the boundary.

*Id.*

123. *See, e.g.*, Arbitral Award of July 3, 1988 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53, 74 ("In the circumstances of the case, the absence of a map cannot in any event constitute such an irregularity as would render the [arbitral] Award invalid."); Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1071 (Dec. 13) (finding no viable conclusions could be drawn from the cartographic evidence offered by the parties).

124. *See* LaGrand case (Germany v. United States) 27 June 2001 ICJ Reports § 98.

125. *See* Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 67 (Sept. 25) ("Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties."); LaGrand case, *supra* note 124, at § 98.

126. *See* Barcelona Traction, Light, and Power (Belg. v. Spain), 1979 I.C.J. 3, 32 (Feb. 5). The case is well known for its characterization of slavery and genocide as criminal acts *erga omnes*, though the pronouncement had nothing to do with the merits of the case, which centered on diplomatic protection of corporation.

127. *See* Legality of the Use or Threat of Nuclear Weapons, 1996 I.C.J. 226, 237 (July 8). The

Nicaragua are examples of such jurisprudential behavior.<sup>128</sup>

*Major social changes* also encourage international tribunals to curb their jurisprudential developments, and a particular legal heritage can have a similar effect. Despite the philosophy developed in *Tyrer v. United Kingdom*, the European Court of Human Rights has considered some local particularities—namely historical ones—in some of its decisions.<sup>129</sup> For example, in refusing to apply the theory professed by some schools that a policeman is only a man in uniform, the European Court of Human Rights recognized the importance of maintaining a distance between police and political parties because of the historical role, particularly in Central and Eastern Europe, of the police and army within totalitarian communist regimes.<sup>130</sup>

Does the *science of international law* have any restrictive influence on the decision-making of international tribunals? As Judge Bedjaoui noted, the existence and the attention of the academic community of international lawyers considerably limit the subjectivism of tribunals.<sup>131</sup> The manifest preference of the

Court felt unable to rule on the legality of the use of nuclear weapons in all circumstances:

Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict . . . the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

*Id.*

128. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 125. (“Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the contras, it will limit itself to a declaration as to how the law applies in this respect.”).

129. See *Tyrer v. United Kingdom*, 2 Eur. Ct. H.R. 1 (ser. A) at 13-14 (1978).

130. See, e.g., *Rekvenyi v. Hungary*, App. No. 25390/94 30 Eur. H.R. Rep. 519, 522 (1999) (Court report). The Court recognized that:

In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.

*Id.*

131. See MOHAMMED BEDJAOUI, *L'OPPORTUNITE DANS LES DECISIONS DE LA COUR INTERNATIONALE DE JUSTICE* 569. Bedjaoui asserts:

Ce qui limite grandement la part non pas de “subjectivité”, même au meilleur sens, mais de “particularisme acquis de ses origines et de son éducation, c’est le regard attentif et critique des “transmetteurs de normes” (“*rule-transmitters*”): les collègues de travail d’abord, les Etats parties au procès ensuite, et enfin toute la profession juridique internationale. Il demeure aussi sous le regard de l’élite juridique de son pays d’origine, qui attend confusément de lui d’être le promoteur de sa culture juridique nationale; mais cela se mêle et se croise aussi avec le regard des autres juristes du monde, fréquentés dans les forums internationaux et auprès desquels il tient à conserver sa réputation. Il est aussi à l’écoute des Académies savantes, des Organisations internationales, des hauts fonctionnaires internationaux et des membres des corps diplomatiques, particulièrement ceux du Siège de la Cour et ceux du Siège des Nations Unies.

*Id.*

International Court of Justice to the notion of *erga omnes* norms instead of *jus cogens* can be explained by the division of the scientific community on the utility and operability of the theory of *jus cogens*.<sup>132</sup>

The International Court of Justice has often distanced itself from *non-judicial sciences* in order to avoid that exterior considerations should exercise too great an influence on its decision-making. This is reflected, for example, in the court's attitude towards geography and ecology.<sup>133</sup> For example, though the parties submitted a considerable number of calculations and analyses on the safety or potentially dangerous character of the Gabcikovo-Nagymaros dam, the International Court of Justice explained that "it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded."<sup>134</sup>

Reading scientific articles and books written by judges, one can often be left with the impression of their authors' conviction that masses of technical dossiers often have a counter-productive effect.<sup>135</sup> The European Court of Human Rights has also been rather hesitant to come down on either side when it observes a division in the views of scholars on a particular issue.<sup>136</sup>

132. Elisabeth Zoller, *Elisabeth L'Affaire du Personnel Diplomatique et Consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran) Arrêt du 24 mars 1980 RGDIP 1980/4 1024*. Zoller notes: "La question de savoir si les principes du droit international qui régissent les relations diplomatiques et consulaires participent de la notion de *jus cogens*, ne trouve pas de solution dans l'arrêt. Il est possible que la Cour ait préféré laisser le problème en l'état, le contenu de cette notion étant trop imprécis." *Id.*

133. *See Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1068 (Dec. 13) ("The Court is not in a position to reconcile the figures submitted by the Parties, who take a totally different approach to the definition of the channels concerned.").

134. *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 7, 42 (Sept. 25).

135. *See Bedjaoui, supra* note 93, at 37 ("The weight of documentation does not necessarily correspond to the weight of the arguments, for at least two-thirds of the bulk consists of annexes, that is, texts produced in support of the contentions sustained in the pleadings."); *See also Higgins, supra* note 94, at 129. Higgins argues:

In recent years, the dossier for each case has undoubtedly got larger and larger. In technical cases, understandably, long and detailed technical reports are appended (*Gabcikovo-Nagymaros Project* and *Botswana/Namibia* afford recent examples). Moreover, there has been a tendency to append every possible scrap of paper, however marginal to the outcome. The translation costs for the Court were becoming prodigious and indeed the necessity to translate these thousands of pages of documentary annexes was beginning to dictate the pace at which cases could be heard.

*Id.*

136. *See, e.g., Frette v. France*, merits (2002), available at <http://hudoc.echr.coe.int/hudoc> (last visited Mar. 5, 2003). In section 42 of the judgment, the Court declined, to make any findings as to the consequences of being adopted by homosexual parents based on the scientific evidence presented, noting that "[i]t must be observed that the scientific community—particularly experts on childhood, psychiatrists and psychologists—is divided over the possible consequences of a child's being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date." *Id.*

## IV. CONCLUSIONS

As a conclusion to the above presentation—however rudimentary—of the most often used reasons for jurisprudential development or jurisprudential limitation, it can be observed that in the practices of international tribunals as a whole, the same considerations are evoked as justifications for both expanding and keeping in check jurisprudential evolution.

Thus, the judges' freedom may be based on reasons derived from the *ex ante* will of states, manifested at different points in international conventions, submitted for adjudication before an international tribunal. Or that freedom can be linked to the acts of states or parties to the dispute. This freedom may also be recognized by judges on the basis of the theory, practice, or functionality at work in a particular jurisdiction. We can refer also to Bedjaoui's words comparing judicial opportunity to the effect of *yeast* in cooking.<sup>137</sup>

What are the reasons judges give to explain their reluctance to formulate new jurisprudence? These reasons can be found in the will of states, reflected in conventions, treaties, or in procedural acts. The perception of proper judicial functions is equally important, not only vis-à-vis usages and customs but, first and foremost, according to the requirements of the position enjoyed by a given international organization.

Apparently, there are other—probably less frequently occurring—motives as well.

Was the eighteenth century French grand chancellor Henri-François d'Aguesseau right or wrong when exclaiming, "judges of the Earth, you are Gods!" long before the creation of international tribunals?

Who is, in the final analysis, an international judge? An administrator or a creator? A serf, a professor or a prophet? Can he be all of them at the same time?

In conclusion, we may observe that the developments and limits of international justice can be conceived in a quadrangular system where the corners are the following:

*primo*: judicial logic;

*secundo*: organic-functional imperative;

*tertio*: social necessity; and

*quarto*: the ambiguous "plus," or incalculable factor of irrationality that we can call also a divine sparkle.

The order of their enumeration also reflects, however, the importance that we should attribute to these factors. International jurisdiction and international jurisprudence are neither automatisms, nor a lottery—they are a complex of social phenomena, activity and science with all the precisions and lacunas, certainties and uncertainties, that such a statement presumes.

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137. See BEDJAOUI, *supra* note 131, at 583.

This dialectic interrelation—the faculty of limited creativity, according to Judge Shahabuddeen’s observations<sup>138</sup>—was well described by former President of the International Court of Justice, Gilbert Guillaume, when he observed, “[I]nternational law is our common heritage from the nineteenth through the twentieth centuries. It should evolve with the time. It must be adapted to local and regional needs. But it must not be broken.”<sup>139</sup>

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138. MOHAMMED SHAHABUDDEN, PRECEDENT IN THE WORLD COURT 232 (1990).

139. Guillaume, Gilbert: La Cour internationale de Justice - Quelques propositions concrètes à l’occasion du cinquantenaire RGDIP 1996/2 331-32 (“Le droit international est l’héritage commun que nous avons reçu du XIXe siècle et du XXe siècle. Il doit à l’évidence évoluer avec le temps. Il doit aussi s’adapter aux besoins locaux et régionaux. Mais ne doit pas être brisé.”).

