# The Transformation of Extralegal Principles into Legal Principles by the International Court of Justice in The Hague: Illustrated by a Peaceful Delimitation of «the Promised Land»

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## ABSTRACT

Social norms are mixtures of extralegal and legal principles. The International Court of Justice' in The Hague's (ICJ) adjudication subtracts normative structures from different sources, moral, ethical, religious etc. dogmas amplifying its case law. The failing Israel-Palestine reconciliation that results from *"power asymmetries"* and *"supreme emergency exception"*, illustrates how absence of concomitant social norms fosters extremists destined to wage war. War is not the answer to the two-state talks' collapse but civilized methods of dispute settlement. Neither negotiations nor "Gods divine plan" for Jews has solved the Israel-Palestine boundary conflict. Prayers, pronouncements etc. may ease tensions, but has failed to bring peace. Since territorial demarcation is a secular event, religious leaders should request ICJ adjudication. Other peaceful mechanisms, i.a. ICJ-justification, is however imminent. The courts frames are well-known legal and extralegal principles i.a. religious morals incorporated into general principles of law. Thus, i.a. the World Council of Religious Leaders (WCRL) should trust that ICJ not only propels "world peace" but also the "work of the United Nations (UN) in our common quest for peace". Such attainments assume Council's diplomatic pressure on Security Council (SC).

***Keywords*:** ICJ-justification, cross-cultural and religious norms, practical rationality-theory, Israel-Palestine negotiation failure.

## I. The topics at issue, backdrop and puzzles

This article addresses the following issue. The implication of religious-morals and other social-, non-codified rules in the International Court of Justice in The Hague's (ICJ) case law. A possible platform for narrowing the gap between legal- and extra-legal norms is the WCRL', World Council of Churches or other universal religious societies' (hereinafter "Councils" or "World Councils") subscription to the UN Charter basic principles (Chapter II). Possibly, these Councils should take action to challenge i.a. the Israel-Palestinian negotiations "deadlock". While I doubt that prayers, kerygma, worship, pronouncements, etc. are adequate, I am optimistic about other means such as political initiatives and diplomatic leadership.

My aim is to bridge the gap between "ideal theory focusing on the moral foundations of laws and policies" and legal "realistic or pragmatic approach",[1] that is exemplified by court justification i.e. «a theory of justice that can serve as the basis of practical reasoning»,[2] and which is elucidated in "the discourse model".[3] We here move into more or less "virgin territory" that under certain circumstances practices "Order without law",[4] without ending up in the state of chaos.

Chapter III reveal the non-self-contained system of international law. The ICJ and predecessor, Permanent Court of International Justice (PCIJ) case law reveal a system of borrowing from ethical-, moral- and religious norm-structures. Thus, Councils should trust ICJ unbiased interpretation and application of law on facts. Since most civilized nations appeal to courts as the ultimate solution, the conundrum is what is so special with the Israel-Palestine delimitation conflict deferring to bring the case to ICJ?

## II. World Councils and United Nation's quest for peace

"Behold, I send you out as sheep in the midst of wolves. Therefore be wise as serpents and harmless as doves". Matthew 10:5

What is to expect from World Council considering their long-standing and compelling strive for peace? My answer is; a reliable mediator that advances the Isaiah II.4 message; "Nation shall not lift up sword against nation. Neither shall they learn war anymore". This thesis has massive support; "the Lord wishes to spread His kingdom … of justice, love and peace".[5] Politicians has since long[6] been affiliate with the need for "an adequate body of international law which can be administered so as to secure justice … Without law power is despotism".[7] Thus, what is a better option for Councils as initiating- and implementing rule of law.

I anticipate that most denominations trust ICJ's balanced and just decision to settle the delimitation dispute. Is the pressure from interfaith alliances' on directly and indirectly involved national states a doorway to peace? The basis for my position is this declaration:

> "As religious and spiritual leaders of the world forming the WCRL, we believe that religion *can serve as a positive force for achieving world peace that* conflicts among religious and spiritual groups are avoidable, and that harmony amongst them is to be consistently promoted through active discussions and dialogues …
>
> WITH THESE ENDS IN VIEW, the World Council of Religious Leaders is formed … *to strengthen the United Nations* and other international and national organizations that are dedicated *to promoting world peace*, harmony, tolerance, mutual respect among humans, and social and economic justice" (italics added).[8]

As envisaged (Chapter III), religious morality is dominant extralegal norms generating non-conventional international law. Thus, most professions of faith may easily approve the ICJ-solution as an instrument of hope, advancing "the message of

peace [that] may enter the world". World-Councils subscribe – not only to the accomplishment of "world peace … among religious and spiritual groups" – but to "… promoting world peace".[9]

While the results of prayers etc. seems futile, Councils diplomatic initiative to advance ICJ-adjudication in the Israel-Palestine delimitation-dispute, hits virgin soil and is ripe for examining. My hypothesis is that ICJ is well suited to deal with this conflicts as illustrated by numerous decisions on the topic, see i.a. Cameroon vs. Nigeria, 2002, [10] with further references.

The ICJ transformation of religious moral into general principles of law brings ICJ into the center of events. Scripture has a place in decision-making[11] of which ICJ adjudication is one important instance. Basis is Habermas' theory on practical rationality, "the discourse model", connects the theory of social action to discourse ethics in an effort to reach the ultimate objective of "right or just" as interpreted in international politics.[12]

The effects of the Councils' role have not reached the level of expectations due to the meager outcome. Because present measures do not fulfill its purpose, Councils should try new means. Perhaps Councils' diplomatic initiative could unshackle the Gordian knot of the Israel-Palestine stalemate. Crucial to the successful fulfillment of this pragmatic toil, is a critical debate and free communication in real democratic situations.[13] Since "Persons of high moral character" form the ICJ-court,[14] these moral agents welcomes applied norms as universal: "what sort of world he would create under the guidance of practical reason… a world into which, moreover, he would place himself as a member".[15]

While pragmatic thinking, mutual recognition, contradiction etc. is part of practical reasoning, it is insufficient in itself. Decision-making related to the Israeli-Palestinian puzzle imply impartial views of norms application to conflicting interests. As Habermas states, every beneficial solution includes not only the ethically wise, but also morally correct. Immanuel Kant would have added; it is a question of religion within the limits of practical reason.[16] In this sense, too the Habermas theory closely connects to theology.

Pope avowals make little awareness; i.a. we "cannot expect anything greater … from the new Vicar of Christ than … he will strive with all his might to propagate the doctrine of the Gospel among all men, and that he will bring peoples together in a spirit of true peace and strengthen them therein". Albeit defensive war is no legally valid option, it arose in 1967.[17] I thus claim that, Councils' mediator-role is vital; cf. "the great commission",[18] and a strong incentive for action: As religious morals is an important part of the general principles of law, this very fact should prompt Councils – through consular channels – to advance ICJ-adjudication. One cannot rule out the likelihood of war if conflicts remain unsettled. Since UN-Charter Articles 36.3 and 37.2 call for court justification, the obvious question is, why has the "relentless logic, induced to plead their causes at the bar"[19] slipped the minds of i.a. Palestinian-Israeli antagonists?

## III. ICJ-justification: converting extralegal- to legal rules

"It is not just the balance of power that provides order and stability and keeps anarchy at bay, but also a common set of values and international practices appropriate to them". Ramesh Thakur[20]

As people "may supplement, and indeed preempt, the state's rules with rules of their own",[21] national states may subscribe to a similar ideology: International case law ensues intertwined structures of ethical, religious and moral dogmas, as law. While Christian Scripture dominated before the 1890s, Islam, Hindu and Buddhist Scriptures gradually gained ground (Sec. C-E).[22]

Why should the World-Councils support ICJ-justification as the ultimate solution to the delimitation-puzzle? The court's pragmatism results from applying international law correctly interpreted to obtain individual to the situation adaptive, solutions. As revealed in this article religious morals play a vital role in ICJ justification. The courts main endeavor is to obtain a delimitation-line; "in order to achieve an equitable result"[23] between Israel and Palestine.

### A. The influx of extralegal norms in UN general provisions

"Statements about law are systemically relativized, but the systems in question are partially open. It would be a mistake to try to close these systems – it would be a theoretical and practical mistake. The theoretical mistake is made by legal positivism which takes norms as "given in advance", the transformation from teleology to normativity being for it final … and complete".[24]

Member States (MS) should abide by the UN-Charter preamble; "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained". The UN consider that UN-MS is liable to actively construe working conditions that advance not only legal- but also extralegal obligations; "other sources". Thus, conventional law incorporates extralegal norms by references to such norms.

Another illustration is Charter Article 1. "The Purposes of the United Nations are … to bring about by peaceful means and in conformity with the principles of justice and international law …" Similarly the Statute of the International Court of Justice, Article 38 (2): "shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto". The Latin phrase means "equity law" and is extralegal principles of justice.

These intertwined norms are referential frames – often called "preeminent good"[25] – upon which duties derive and subsequently an action evaluates as exemplary if according to "law and right", or "right or just". Some authors say that the distinction between a legal obligation and a moral duty goes between obligations exposing legal rights and those

> "Which do not give birth to any right? I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations

> of morality […] Justice implies something which it is not only right to do, and wrong not to do, but which some individual can claim from us as his moral right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practice those virtues towards any given individual".[26]

### B. UN special provisions – emphasizing the Israel-Palestine conflict

"They rightly single out the kernel of the League, the so-called "moratorium clauses," by the action of which the nations bind themselves not to go to war till time has been allowed for the submission of the dispute to arbitration." Sir Geoffrey Butler[27]

This section introduces UN-decisions addressing the Israel-Palestine conflict. These provisions exhibit the legal frame upon which a possible ICJ-adjudication takes place. The section C-E forthcoming case law is supplementing the Section A and B codifications.

United Nations (GA) Res.181 (1947) calls for the partitioning of Palestine into two states; one Jewish and one Arab. During the years, a long list of both SC and GA-resolutions supplement the Res. 181-platform.

The second move came by the SC confirmation of the proxy of a cease-fire agreement by the armistice pursuant to SC Res.50 and SC Res.54 of May 29 and July 15, 1948. Neither one of the resolutions signals any change of directions of politics, nor does either one mention Res.181. These subsequent resolutions thus supplement Res. 181 and do not replace it.

The SC reference to Res.194/1948 requires the parties to resolve conflicts through either bilateral effort or mediation, *in case* the UN Conciliation Board, which was set up especially for the parties to take advantage of it. Res. 194 does not invalidate Res.181. On the contrary, GA Res.194 refers to GA Res.186 (S-2), which in turn refers to Res.181 (III). GA Res. 194 makes *only one* change to Res.181: it abolishes the Palestine Commission. Thus, the viable interpretation is that the rest of the resolution remains intact and is valid. Clearly, a small group of MS cannot abandon a UN decision, neither in a formal, legal sense, nor explicitly or tacitly.

SC decided subsequent resolutions, 242(1967) and 338(1973). The Charter does not permit the SC to deviate from GA-decisions, as set forth in numerous provisions of Chapter II of the UN Charter, Art.4, para.2; Art.5; and Art.6. The SC is superior to the GA only in instances of concrete and acute disputes under the direct Charter power, grants provided in Charter Chapters VI, VII, VIII, and XII. Article 24.2 sets this forth explicitly. Since the SC is not entitled to derogate from Res.181, SC cannot repeal or modify it.

UN does not demand that a MS bring a dispute before the court, nor is a MS required to abide by the ICJ's decisions in cases to which it is not a party. Pursuant to ICJ Statute Article 36.2, a MS "may at any time declare" that it recognizes the court's jurisdiction in a certain case: "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases".[28] Israel claims that the ICJ's advisory opinions are limited to the contentious cases. "Because the request [on the construction

of the wall] concerns a contentious matter between Israel and Palestine, in respect of which Israel has not consented to the exercise of that jurisdiction," Israel claims that the ICJ overstepped its jurisdiction.[29] This claim is baseless, c.f.: "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States"[30].

Because Palestine is not yet a MS to the UN, it is *per se* excluded from taking part in a future dispute settlement before the ICJ (Art. 34.1). Article 93.1 of Charter does not provide Palestine with *ipso facto* membership in the ICJ Statute. Its unilateral Declaration of Independence (1988) may help it to bypass this roadblock, however. Thus, GA should recognize Palestine as MS to bring its boundary dispute before the ICJ.

In any case, if the UN decides to have the ICJ solve the dispute, formalistic hurdles will not defeat its decision. First, the ICJ may provide "advisory opinions" pursuant to its advisory jurisdiction in arts. 65-68 of the ICJ Statute and resolution.[31] Instead, the disputants could refer the case to an arbitrational Court to solve what the "unwilling men" cannot. This is what Israel and Palestine agreed to do: "the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration".[32]

Optional solutions have failed. The creation and subsequent disintegration of the "Conciliation Commission"[33] and the "United Nations Mediator on Palestine" (GA Res. 186, S-2), both of which were dysfunctional, makes this evident. Only compulsory dispute settlement remains. Res.181 imposes a duty on Israel to participate in a dispute settlement before the ICJ. "Any dispute relating to the application or the interpretation of this declaration shall be referred, at the request of the either party, to the International Court of Justice, unless the parties agree to a1nother mode of settlement".[34]

As Res.181 Part II envisages, boundaries are within the meaning of "any dispute". One position is that Israel is legally bound to engage in ICJ dispute settlement according to Res.181. Because of Israel's past position, I would argue, it has a present duty to recognize future ICJ decisions. This position is not unanimous, however.[35]

The disputants might agree that Res.181 is insufficient to impose legally binding obligations on MS to act.[36] Even if that is true, MS are not the only parties involved. First, the SC has clearly defined duties: "The Security Council [is asked to] "take the necessary measures as provided for in the plan for its implementation".[37] Secondly, Israel has specific responsibilities. Res.181 preceded Israel's Declaration of Independence and application for UN membership. That is not all. The Israel application for UN membership explicitly stated that Res.181 is one of the foundations of its right to exist as a nation and is part of Israel's basic laws. Israel was established "by virtue of our natural and historic right and on the strength of the Resolution of the United Nations General Assembly". The "Resolution" referenced is Res.181. However,

the Israeli tribute of Res.181 as a core legal source goes even further. As case law reveals the Israeli Supreme court has construed Knesset acts and language relying on Res.181.[38]

Thus, Israel has arguably acquiesced in its obligation to obey legal decisions relevant to Res.181, *in casu* the draft Israeli-Palestine boundary (Part III). "The right of the Jewish people to national rebirth in its own country… was recognized … in the Mandate of the League of Nations." The political goodwill was not the one and only foothold for the declaration because it expressly referenced its legal obligations outlined in Res.181:

> "the United Nations General Assembly passed a resolution [Res.181] calling for the establishment of a Jewish State in Eretz-Israel; the General Assembly required the inhabitants of Eretz-Israel to take such steps as were necessary on their part for the implementation of that resolution. This recognition by the United Nations of the right of the Jewish people to establish their State is irrevocable…"[39]

Having benefited from Res.181 Israel subsequently rejects it,[40] legally and morally.[41] Israel's position appears premised on the further claim that international rules have slipped into *desuetude* due to its neglect. Is this a valid position?

The legal basis for the two-state solution is two-fold. First, it provides for the succession of power from the mandatory state – Great Britain – to the Independent Arab and Jewish States. Second, it embodies the UN plan for peaceful coexistence. Res.181 lists all conditions for the establishment of the nation states. As I shall demonstrate, the UN mandate provisions and Res.181 frame the jurisdiction. The UK mandate that later became the UN mandate was granted by the League of Nations.

> "The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home … and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion".[42]

The mandatory's duty was to transfer its sovereignty to the UN Commission, no later than August 1, 1948, which was the British termination date for the League of Nations mandate (Res.181, Part I A, §1). "The administration of Palestine shall, as the mandatory Power withdraws its armed forces, be progressively turned over to the Commission." (Part I. B §2.). The final goal was to create an Israeli and Palestine "Economic Union" (Part I. D).[43]

The two-state solution provides for Freedom of Transit and Visit (GA Res.181:1D), Jerusalem included. (GA Res.181:III.A.12e) Arabs living in Israel have the right to become Israeli citizens and to "enjoy full civil and political rights" thereunder (GA Res.181:1C,3.1). "The Provisional Council of Government of each State shall enter into an undertaking with respect to Economic Union and Transit" (I.D). Its leading principles are open access to markets. Israel declared to codify choice

of language, either Hebrew or Arabic, in private conversations, trade, religion and public meetings (Israeli Declaration, C, 2).

Israel cannot expropriate land owned by Arabs, and vice-versa for State of Palestine re Jewish possessions, unless done for "public purposes", if duly compensated (Res.181, Ch.2.9).

Neither Israel nor Palestine may unilaterally amend Res.181 (Chapter 4, Part 1, Section C). The language is definite. "The provisions of chapters 1 and 2 [Holy Places, Religious Buildings and Sites, Religious and Minority Rights] of the declaration shall be under the guarantee of the United Nations, and no modifications shall be made in them without the assent of the General Assembly of the United Nations." Thus, only the GA can repeal or amend the following rights: The right to use native language (Chapter 2 § 8). The right to establish and attend schools that use Arabic as language (§7). Full compensation for expropriated land (§9). The unfettered right to religious life (§5). The right to be governed by own family law with respect to family life, rules and minority interests (§4). Equality under the law (§3). No discrimination based on religion, race, language or sex (§2); and freedom of conscience and religious freedom (§1).

The regime of Holy Places, grants the Governor of Jerusalem the right to decide whether Israeli laws governing holy places and cites comply with Res.181 and 194 duties . Cf. his right to decide "disputes which may arise between the different religious communities or the rites of a religious community with respect to such places, buildings and sites" (GA Res.181, III.C:14c).

The lesson learned from the UN follow-up on the Israel-Palestine puzzle is that decisions built on good intentions fails if the antagonists subscribe to weaponry and military force, due to *"power asymmetries"* and *"supreme emergency exception"*. Oslo Accords nearly solved the Res.181 remaining disputes. However, an Israeli nationalist assassinated Prime Minister Yitzhak Rabin after signing the Accord. Thus, «messianic zealotry» overruled the *practical rationality of half way solution or other grand bargains.*

### C. ICJ case law (1): law ex tunc or ex nunc – positivism versus judicial legislation

The focus in the following sections is on the role of ICJ case law. The ICJ decision-making builds on a three-pillar platform: *First*, affirming the main purpose of the law, which is nothing but the art of being followed. *Second;* interpreting codifications or conventional law the purpose of which is to correct the living fabric of life to obtain "justice". *Third;* the objective of courts justification is to forwarding a "right or just" decision to the parties involved. If the result turns out unjust, the application and/or interpretation are wrong.

My position is that the legal system is complete, maintaining norms embracing every possible conflict, which subsequently generates legal solutions. Sources of law is both written, conventional law, and unwritten; general principles of law and customary

law. ICJ cannot refuse to adjudicate. ICJ is law-abiding, the obligation of which is to apply international law in dispute settlement. One position is to renounce from "judicial legislation",[44] Judge Rosalyn Higgins, though, is at variance stating that 'the judge's role is …to decide which of two… norms is applicable … As these rules indubitably exist, there can be no question of judicial legislation'[45]. Judge Higgins mentions existing norms, which refers to the notion of "general principle of equity", and written and unwritten law, combined. I side with Higgins offsetting *Vereshchtin's* strong positivist declaration, due to the fact that international law comprises of more than conventional law – *in casu* of customary- as well as general principles of law.

This no-loop-hole position builds on the understanding that the relevant sources of law exists *ex tunc,* ready to revive by an ICJ judgment's *ratio decidendi*. As of this practice, international law reveals the amalgamation of legal- and extralegal norms (see in the continuation) as valid legal sources at the time of justification. The ICJ apply these sources of law, ICJ does not conceive the law *ex nunc*.

Another prerequisite is the transformation of practices into norms, i.e. customary law. It illustrates "Die Normative Kraft des faktischen".[46] Despite practices vital role in the composition of customary laws, the mere *de facto* usage is insufficient. Valid customary laws require that "not only must the acts concern "amount to a settled practice", but they must be accompanied by the *opinio juris sive necessitatis.* Either the States taking such action or other States in a position to react must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[47]

To meet these prerequisites the extralegal- and legal norms are indistinguishable – or at least harmonized. Some scholars contest this position, i.e. "the possibility of a rational transformation of teleology into normativity".[48] I refrain from taking position on this issue.

Today, ICJ case law addresses not only Christian nations, but also the international societies of states *in toto*.[49] Since the old "Family of Nations" until early 19-hundred, consisted of Christian nations only, Christian Scripture originally served the purpose of filling in the loopholes of law.

> "The old Christian States of Western Europe are the original members of the Family of Nations, because the Law of Nations grew up gradually between them through custom and treaties… With the reception of the Turkish Empire into the Family of Nations International Law ceased to be a law between Christian States solely".[50]

Concomitantly to the increased group of legal subjects, Buddhist, Hindu and Islamic Scriptures – i.a. norms like *Noble Eightfold Path*, the *Five Pillars* etc. – paved their way into the ICJ courtroom. Thus, the platform for the modern international society of states now fully adjusts to religious-moral norms. Studies in legal history make this extended reach clear.

This extended out-reach *jurisdictione ratione personae* – from the "Family of Nations" to the "International Society of States" – forces ICJ to change focus, from the

advancing of basic Christian dogmas – mostly – to all-embracing adaptation to "elementary considerations of humanity".[51] The "World law"[52] and "cosmopolitan principles of law"[53] typifies the current international legal regime. The succeeding texts display these transformation mechanics and the material content of these principles, which – incorporated into international customary law or general principles of law– address all the international societies of states.

### D. ICJ case law (2): Filling the lacunas – no sign of contra legem "takeover"

The starting point is the non-self-contained system of international law. The topic for discussion in this section is "the process by which the law takes in, assimilates and uses matter from without and by so doing gathers the energy for its own growth",[54] i.e. if not taking it all in "lock, stock and barrel", [55] so at least by subtracting an overall principle from the original legal source.

The salient point is whether the existence of legal rule is premature – a *de scentential ferenda* – until the court decision, in which case ICJ does not construe the norm, but only pick up on a normative, non-written structure that is already "there", followed by the most national states. It is however the judgment that confirms and defines the norms' material content. Thus, the ICJ adjudication does not limit itself to incorporating extralegal rules. As stated by ICJ case law, domestic law may fill inn *lacunas* :

> "International law is called upon to recognize institutions of municipal law… This does not … imply drawing any analogy… all it means is that international law has had to recognize the corporate entity as an institution created by states in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to relevant rules of municipal law".[56]

Besides domestic law GA-decisions reflects the link between UN provisions and religion:

> "Freedom of religion should contribute to the attainment of the goals of world peace, social justice, and friendship among peoples . . . The use of religion or belief for ends inconsistent with the Charter of the U.N. and the purpose and principles of the present declaration is inadmissible. . ."[57]

Thus, religion endorses the UN ultimate goal of world peace.[58] This is also verified by the "Dogmatic Constitution on the Church" claiming that the:

> "laity also by their combined efforts remedy the customs and conditions of the world, if they are an inducement to sin, so that they all may be *conformed to the norms of justice* and may favor the practice of virtue rather than hinder it. By so doing they will imbue culture and human activity with genuine moral values; they will better prepare the field of the world for the seed of the Word of God; and at

the same time they will open wider the doors of the denomination by which *the message of peace* may enter the world".[59]

This basic text provides that laypeople's effort is to contribute to customs and conditions that coincide "to the norms of justice".[60] Thus, UN provisions connect to extralegal norms and amplifies a perception of "Christ as the Head of humanity,[61] the creator of divine universal law[62] and the categorical imperative.[63] Through UN-codification and ICJ-justification, an amalgamation of positive law, justice, virtue, and intertwined norms, will appear under the concept of *de lege lata*.

### E. ICJ case law (3): the extralegal norms' transformation – some illustrations

Could ICJ wipe out the Israel-Palestine conflict? Is case law revealing principles of universal law? To succeed in settling disputes mediators should contribute with the very best of intention, knowledge and skills.[64] What more is needed?

Universal divine law – *lex naturalis*[65] – protects humanity. Modern natural law is however not static but dynamic; fully linked to the living fabric of life. As professor Klami states; "legal security (and foreseeability) and justice … are in the light of legal anthropology so universally valid values that they can without exaggeration be called Natural law".[66]

Thus, despite the stable hard core of the general principles of law, normative rudiments slightly changes according to facts.[67] The "living fabric of life" tints the current natural law.

To me "the law is not at any time completed but is always being modified in the process of judicial decision. Not only is the common law what the judges have made it but this is also largely the case with our statutory law, of which constitutional law is a special instance".[68] Illustrations of basic principles is found in holy books; i.a. The Golden Rule. Thus; Aspirations, religious understandings, cultural, moral and legal attitudes are linked. If antagonists and mediators subscribe to the principle of reciprocity and *prohibiting double standards,* I expect that harmony and peace will come to humanity. Often this normative structure denotes as equity law, "righteousness" or "justice". Since the ICJ is a world court, it neither can – nor *de facto* do – subscribe to Christian dogmas only. Other Scriptures or divine belief often shares identical exigencies. I.a. the holiness of life; the *Right to life (Hinduism),* requirements to social life; i.a. *be tolerant: (The Coran),* reject to acquire others belongings *(The Bible), be sympathetic to, have sympathy with* (Confucius) or the subscription to *"The golden rule"*, do not do to others what you do not want others to do to you (*Talmud).*

To avoid *lacunas* ICJ-justification "borrows" norms from domestic law. International law incorporates not only religious and moral principles, but notice domestic law as well. "International law recruited … many of its rules and institutions

from private systems of law. …The way in which International law borrows from the source is not by means of importing private law institutions. … The true view … is to regard any features or terminology which is reminiscent of the rules … of private law as an indication of policy or principle rather than as directly importing these rules and institutions".[69]

Extralegal norms broadly recognized, play a similar role. A rather common understanding is that parties referring a case to the court, does not intend to have a *non liquet* (what the law is, is unclear) in return.[70] Clearly ICJ's responsibility is "to confirm and endorse the most elementary principles of morality", which subsequently ranks as recognized general principles of international law.[71]

To the influx of Scriptures: The principles of no-double-standards and the process of mutual acknowledgment are amid basic rules i.e. the religious dogma of "do onto others that you would like others do onto you".[72] The international the societies of states meet similar dogmas in non-Christian religious faiths, *i.a.* the Golden rule as found not only in Talmud but also in Buddhism, which according to Buddhist scripture belongs to the "Four Noble Truths".

> "If people want to live an ultimately happy life with no harms toward them at all, the Buddha teaches, they should start with avoiding causing harm to others, physically and verbally».[73]

The "half-way-solution" relates closely to the no-double-standard: "Buddhism postulates the principle of Middle Way as a criterion in making decisions on all levels of activities and encourages frugality as a positive virtue".[74] Other connections occur: The principle of equity goes hand-in-hand with the *ban on double standards*. The equity position is the infallible principle of good faith.

> "One of the basic principles governing… legal obligations… [is] the principle of good faith. Trust and confidence are inherent in international co-operation … Just as the rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of international obligation assumed by unilateral declaration".[75]

Good faith renounces the "race towards the bottom": "if one seeks retribution for vengeance through vengeance, the chain can never be broken".[76] We therefore cannot subscribe to nothing but the game of "mutual reliable players" at the international stage.

The principle of *"pacta sunt servanda"* is fundamental in international relations. It is well known since ancient time; i.e. the Athenian Constitution, and even the older Code of Hammurabi, both of which refer to the art of keeping promises, equality before the law and contractual obligations: "Thus might and right were yoked in harmony, since by the force of law I won my ends and kept my promise. Equal laws I gave to evil and to good, with even hand drawing straight justice for the lot of each".[77]

The art of keeping promises derives from divine universal law: "My covenant I will not break, nor alter the word that has gone out of My lips".[78]

What is this norm's rationality? Well-functioning societies require faith the failing of which brings ruin to all. As Hannah Arendt told, promises are the "uniquely human way of ordering the future".[79] Foreseeability depends upon the likelihood of trust among fellow citizens.

Case law not only confirms this principle, but also refines it. Thus, the *"pacta sunt servanda"* modifies, i.e. balances against the principle of "*rebus sic stantibus"* now part of international law.[80] This illustrates the discretionary power and the strengths of *practical rationality*.

Thus – according to Habermas – a valid normative structure must satisfy all parties involved. In a Grand-bargain situation, the two antagonists – i.e. Israel and Palestine – could neither of them, "pick the raisins out of the sausages".

'Comity of nations' is a reality:[81] It "is a political, not a legal, solution. Comity balancing leaves the effects principle intact as a basis of jurisdiction: it merely states that the court, having jurisdiction, should use its jurisdictional power wisely by answering the additional question of whether it should exercise such jurisdiction, based on a consideration of the legitimate concerns of foreign countries. Interest-balancing is rather a political- than a legal concept'.[82]

Decency and *savoir-faire* is the cornerstone of diplomatic notification. Tolerance and goodwill for other international players is among the bedrock principles of international relations.[83] This platform materializes valid principles of law. Because states are 'equal' (U.N. Charter, art. 1.2) and because 'equality' directs international societies, double standards must capitulate. Comity and international law is closely connected; "there can be no doubt that many a rule that were comity only, is nowadays a rule of International Law".[84] Thus, comity principles *praeter legem* converts to *infra legem*.

ICJ-premises establish equity principle as a basic stepping stone underlying international law: "The Court's reasoning in fact amounted to an application of the principle that 'He who seeks equity must do Equity', which is certainly in itself an equitable principle".[85] From this premises, these perceptions derive: *First*, the religious dogma of "Do onto others that you want others do onto you" incorporates into law. *Secondly*, Intra-state relations abandon double standards. However, this unbalanced situation cannot last:

> "The emergence of a polycentric global order represents a serious challenge to the post-1945 liberal international order not so much because the rising powers reject the ethical underpinnings of the order, but because the status quo powers have subjected others to while exempting themselves from 'global' norms. The West is losing its ability to impose policy preferences, values and double standards on the rest". [86]

Secondly, no state is "more equal" than others: "The Organization is based on the principle of the sovereign equality of all its Members" (equal footing principle, Charter Article 2.1). The SC deviates from this principle as "permanent members" (WWII- triumphant powers supplemented by Peoples Republic of China) enjoy

vetoing rights. Lack of basic change imperils universal stability because the "rising powers show increasing reluctance to take part in institutions and processes in which their voice and vote are sidelined and underrepresented". [87]

The *inter partes* equality based relations find its root in Christian belief: "There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus".[88] Similar faith is part of "Sikhism" which teaches all peoples' equality in the eyes of God. "Those who sing the Praises of the Lord… look upon all with equality, and recognize the Supreme Soul, the Lord, pervading among all".[89]

Another justification platform is the principle of good faith: «One of the basic principles governing … legal obligations … [are] the principle of good faith. Trust and confidence are inherent in international co-operation … Just as the rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of international obligation assumed by unilateral declaration".[90]

Thus, attaining peaceful cooperation between war-torn nations, extralegal norms come into play. Obtaining Israel and Palestine peaceful coexistence one cannot neglect the fact that God is peace and peace is the name of God's intention for the reconciliation of all things.[91]

## IV. Conclusion – paving the way to "the promised land"

*ICJ C*ase law incorporates extralegal principles, and it is room for it: ICJ is entitled, c.f. ICJ-Statute Article 38, to consider not only international treaties, but also case law, customary- and general principles of law, the origin of which is often religious moral. As PCIJ told: «…a principle [of restitution in kind] which seems to be established by international practice and in particular by the decisions of arbitral tribunals …» is binding upon the court.[92]

As revealed in Chapter III, UN resolutions do however not capture the entire picture. Legal- and extralegal norms supplement conventional law and SC declarations. International law is not a self-contained system. ICJ deducts legal principles from extralegal sources filling in loopholes of law – *lacunas* – among which religious morals is leading. Thus, holy Scriptures are an international law basic structure – often called cosmopolitan principles of law. [93]

Given this religious-moral normative basis, the Councils support to UN peacekeeping instruments should generate interests in promoting an ICJ-solution that presumably ends the Israel-Palestine hostilities. Dr. Feinberg was right regarding the UN-MS competency; all nations were during British mandate, competent to bring Britain before ICJ if disregarded the Mandate over the Jewish National Home.[94] The Palestine-Mandated Territory – was in a similar situation.

The Councils have a special responsibility due to the religious-moral-principles' often dominant position in the ICJ decision-making. ICJ, applying extralegal- and legal norms, may evade extremist Jewish-Muslim hostilities; finally generating peace

between these two war-torn peoples. ICJ-decision is the ultimate "scapegoat". While often-condemned envoys escape the blame for non-acceptable compromises, the Councils' devotions may ease conflicts.[95] Viable solutions cannot escape court justification.

Which principles should bring a peaceful solution? We have seen that Councils subscribe to the "work of the United Nations (UN) in our common quest for peace". Since ICJ is the conflict solving instrument of the UN and since ICJ's normative base include i.a. religious moral as incorporated in the general principles of law, I recommend that these Councils . *In concreto;* I side with the 2008 General Assembly chair – and Nicaraguan catholic priest – Miguel Brockmann observing that the platform is "the United Nations act in order to implement UN Res.181 established in 1947 that calls for the partitioning of Palestine into two states; one Jewish and one Arab"[96].

## References

[1] Workshop paper: Philosophy, Law and Environmental Crisis. Workshop at the University of Lausanne, September 12-13, 2014, p. 1-2.
[2] Amartya Sen, *The Idea of Justice*, (Allen Lane, 2009), ix
[3] Jürgen Habermas (1971), *Knowledge and Human Interests* (Beacon Press) pp. 113-160.
[4] Robert C. Ellickson, Order without law: how neighbours settle disputes (First Harvard University Press 1994)
[5] *Lumen Gentium*, Chapter IV, paragraph 36.
[6] The Kellogg-Briand Pact (1928), World Treaty of the Outlaw of War.
[7] John Foster Dulles, *War or Peace* (London: George G. Harrap & Company, 1950) p. 198
[8] Charter World Council of Religious Leaders. An Outcome of The Millennium World Peace Summit (Bankok, Thailand June 2002), Chapter 1 Preamble.
[9] Lumen Gentium, Chapter IV, paragraph. 36.
[10] Cameroon vs Nigeria 2002 p. 448, n. 19
[11] Michael J. Perry (1991), Love and Power: The Role of Religion and Morality in American Politics.
[12] Daniel Thürer, Irak-Krise: Anstoss zu einem Neuüberdenken der völkerrechtlichen Quellenlehre ?, 41(3) AdV (2003), pp. 320.
[13]Jürgen Habermas (1971), *Knowledge and Human Interests* (Beacon Press) pp. 113-160.
[14] Statute of the International Court of Justice, Article 2.
[15] Immanuel Kant, *Religion Within the limits of Reason Alone*, transl.Theodore M.Greene and Hoyt H. Hudson. (Harper Torchbooks, 1960). p. 5.
[16] L.c.
[17] Nadav Safran, *From War to War. The Arab-Israeli Confrontation 1948-1967* (Macmillan Pub Co 1969).
[18] Matthew 28:19.
[19] Geoffrey Butler, Sovereignty and the League of Nations, 1920-21 *Brit. Y.B. Int'l L.*at p.39.
[20] Thakur (2016) at p. 371, n.10.
[21] Robert C. Ellickson, Order without law: how neighbours settle disputes (First Harvard University Press 1994) p. 5.
[22] L.Oppenheimer International Law. A Treatise. Volume I. Peace. Second Edition, Longmans, Green & Co (1912) 2 n. 31, p. 32.
[23] Cameroon vs Nigeria 2002 p. 448, n. 19.

[24] Hannu Tapani Klami, The Rules of Man (Vammala 1984) p.40.
[25] Immanuel Kant (1724-1804), *Fundamental Principles of Metaphysic of Morals*, Ch. Second Section, (Will and Law). https://ebooks.adelaide.edu.au/k/kant/immanuel/k16prm/
[26] John Stuart Mill (1931), *Utilitarianism, Liberty & Representative Government*, London & Toronto, Basic Books, p. 46.
[27] Geoffrey Butler, 1920-21, at n.20.
[28] Interpretation of' Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30) p. 71.
[29] See The Wall ICJ Advisory Opinion 2003. p. 136, 138.
[30] See Mill (1931) note 68.
[31] A/RES/ES-10/14(A/ES-l0/L-16.
[32] See The Wall, at n.30, p. 136.
[33] SC Res. 194, III.
[34] (Pt.1.C, Chapter 4.2)
[35] Eli E. Hertz, *UN Resolution 181 – The Partition Plan November 29, 1947*, 1 (Myths and Facts Inc. 2008).
[36] Jean Allain, *International Law in the Middle East. Closer to Power than Justice* 97 (2004)..
[37] UN Charter. Preamble.
[38] Melville Nimmer, The Uses of Judicial Review in Israel's Quest for a Constitution, *70 Colum. L. Rev.* at 1243 n. 107 (1970).
[39] Israel Declaration 1948.
[40] Letter from Israel's Ambassador to FN, Dore Gold to UN of 30. March 1999, SC A/54/77 S/1999/365.
[41] Prime Minister David Ben-Gurion, speech to the Knesset, Dec. 3, 1949.
[42] League of Nations, 1922.
[43] For further studies on these issues, see Michael J. Cohen, *Palestine: Retreat from the Mandate. The Making of British Policy, 1936-45* (New York: Holmes and Meier 1978).
[44] *Judge Vereshchtin*, in Nuclear Weapons Advisory opinion, ICJ Rep.1996 p. 583, at p. 279-80.
[45] Judge Rosalyn Higgins, at n. 45, p. 592.
[46] Georg Jellinek, Die *allgemeine* Staatslehre, «Allgemeine Soziallehre des Staates» (Berlin 1915) p. 338.
[47] Military and Paramilitary Activities in and against **Nicaragua** (**Nicaragua** v. United States of America) 1986 p. 109, n. 17.
[48] Hannu Tapani Klami, The Rules of Man (Vammala 1984) p.33.
[49] *Judge McNair*, Advisory opinion on Namibia 19 ICJ Rep. p.148.
[50] L.Oppenheimer (1912), n.23, p. 32.
[51] Corfu Channel ICJ.Rep.1949, 4, 22.
[52] Harold Berman. World Law, *Fordham Int.Law Journal* (1995) p. 1617.
[53] Jacque Derrida, Adieu to Emmanuel Levinas (Stanford University Press 1999).
[54] C. Wilfred Jenks, The common law of mankind, New York 1958 p. 167.
[55] Judge McNair, Advisory opinion on Namibia 1950 ICJ 148.
[56] Barcelona Traction case ICJ.Rep.1970, 3. § 38.
[57] Resolution 36/55, Nov. 25, 1981.
[58] N. 8: World Council of Religious Leaders' declaration
[59] Lumen Gentium, Chapter IV, paragraph. 36, italics added).
[60] Walter Abbott (ed.), *The Documents of Vatican II: Introductions and Commentaries by Bishops and Experts* (New York: Guild Press, 1966) pp. 675-697
[61] L.c.
[62] Moltmann, (2009) N. 25.
[63] Christine M.*Korsgaard, 1985*. Kant's formula of universal law. Pacific Philosophical Quarterly 66, no. 1-2: 24-47.

[64] Matthew 10:5.
[65] Aristotle, Rhetoric, Book I.
[66] Hannu Tapani Klami, The Rules of Man (Vammala 1984) p.41.
[67] Alfred Verdross, Les principes géneraux du droit dans la jurisprudence international, Vol. 52II (1935) *Recueil des Cours de l'Academie de Droit International (RCADI),* pp. 198.
[68] Morris Raphael Cohen, *Reason and Law,* Collier Books, New York 1950 p. 81.
[69] Judge McNair, Namibia 1950 ICJ.Rep. Pp.148.
[70] Judge Huber, Perm. Ct. of Arbitration, 2 U.N. Rep. Int'l Arb. Awards 829 (1928).
[71] Barcelona Traction Case ICJ.Rep.1970 p. 23.
[72] The Golden rule, Luke 6:31.
[73] Theresa Der-lan Yeh, The way to peace: a Buddhist perspective, *International Journal of Peace Studies*, Vol. 11, No. 1 (2006), pp. 91-112, at p. 94.
[74] L.c. p. 95.
[75] Nuclear Tests (Australia v. France), Judgment, ICJ Rep. 1974, p. 253, at § 46.
[76] Der-lan Yeh, 2006, p. 103.
[77] Solon, Athenian Constitution Part 2, Section 12
[78] Psalm 89:34, New King James Version.
[79] Hannah Arendt, *Civil Disobedience, Crises of Republic* (Penguin Books 1973) p. 92.
[80] Questech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran, in The Iran-United States Claims Tribunal at the Hague, 9 IRAN-U.S. C.T.R. 9 – 107.
[81] Peter Thomas Örebech, International Comity or Chaos? "Interest Balancing" and Curbing the "effects doctrine" in Anon, *Stefánsbók. Rit til heidurs Stefáni Má Stefanssyni* (Fons Juris, Reykjavik Iceland 2018) p. 461-488.
[82] R.L. Muse, A Public International Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996), 30 *GW J. INT'L L. & ECON.* 207 (1996/1997) p. 207.
**[83]** Societe Nationale v. District Court, 482 U.S. 522, at p. 555, 1987.
[84] L. Oppenheimer (1912), n.23, p. 25.
**[85]** P. van Dijk, Equity; a recognized manifestation of international law? In Wybo P. Heere (ed.).*International Law and Its Sources: Liber Amicorum Maarten Bos* (Kluwer, 1989) p. 15.
[86] Thakur (2016) at p. 370, n. 10.
[87] Ramesh Thakur (2016), Ethics, International Affairs and Western Double Standards, Asia & the Pacific Policy Studies, p. 370–377, at p. 370.
[88] Galatians 3:28.
[89] Siri Guru Granth Sahib, 3rd. ed p. 446.
[90] Nuclear Tests Case ICJ.Rep.1974, p. 46.
[91] Alain Epp Weaver, *Mapping Exile and Return: Palestinian Dispossession and a Political Theology for a Shared Future (*Fortress Press, 2014*).*
[92] Factory at Chorzow, PCIJ, Series A, No. 17. 15 (1928).
[93] L. Oppenheim, n.23 p. 34
[94] Nathan Feinberg, *Palestine under the Mandate and the State of Israel. Problems in International Law* (1962) p. 101.
[95] Archbishop Kirill's peacekeeping role in eastern Ukraine https://www.theguardian.com/world/2017/dec/27/ukraine-and-separatists-begin-largest-prisoner-exchange-of-conflict:
[96] Miguel D'Escoto Brockmann, President of the 63rd session of the United Nations General Assembly. *See* Intl Middle East Media Centre. http://www.imemc.org/article/57057. Visited Sept. 20, 2008.