

# Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law

Teresa F. Mayr\*/Jelka Mayr-Singer\*\*

|   |     |
|---|-----|
| Abstract  | 425 |
| I. Introduction   | 426 |
| II. The Advisory Jurisdiction of the Court  | 427 |
| 1. Statutory Framework  | 428 |
| 2. Nature and Authority of Advisory Opinions  | 429 |
| III. Advisory Opinions and Their Impact on the International Legal System                                   | 430 |
| 1. Development of Existing Law vs. Making of New Law  | 431 |
| 2. The ICJ as a Legislator?   | 434 |
| 3. The Court as an Active Agent in the Development of International Law                                     | 436 |
| a) Art. 38 ICJ Statute: Judicial Determinations as a Subsidiary Means for the Determination of Rules of Law | 437 |
| b) How the Development Comes About  | 438 |
| (1) Precedents  | 440 |
| (2) Treaty Interpretation   | 441 |
| (3) Shaping of Customary International Law  | 443 |
| (4) Pronouncements in the Absence of a Generally Accepted Rule  | 446 |
| IV. Concluding Remarks  | 448 |

## Abstract

The International Court of Justice's role in the development of international law has been a matter of disagreement since the establishment of the Court. While it is by now widely accepted that legal development falls within the ambit of the Court's functions, the degree and manner of such an involvement remains disputed. The current article will outline the Court's many contributions in its advisory function to the development of international law, highlighting the semantic and normative authority of the Court's pronouncements. While being an active agent in the law-making process,

---

\* BA (Cantab) in Law, currently pursuing an Advanced LL.M. Degree in Studies in Public International Law at the University of Leiden.

\*\* Dr. *imr.*, Senior Research Fellow and Lecturer at the Department of European Law and Public International Law, University of Innsbruck.

internal and external safeguards keep the Court within its proper role as a judicial body, thereby avoiding any risk of judicial activism.

## I. Introduction

Many discussions at the inter-State level as well as in academic circles have been devoted to the contours of the judicial role of the International Court of Justice (ICJ). The current article will combine two areas of debate, namely the advisory function of the Court and its role in the development of international law. The criticism in relation to both turns on questions of judicial propriety and the Court's place in the international legal system as a whole. Since its adoption, the advisory function of the ICJ (and previously the Permanent Court of International Justice, PCIJ) has been widely scrutinized as an alienation of the traditional judicial role of courts of law. It has been criticized as a way to circumvent the Court's binding contentious jurisdiction with its stringent consent requirement and has suffered from a lack of recourse by the United Nations' (UN) organs and agencies authorized to request such opinions.<sup>1</sup> Due to their *erga omnes* character and the high authority of the ICJ, advisory opinions, however, can strongly influence the understanding of rules of international law. At the same time, a basic premise of the international legal system postulates that it is only States that can make and shape international law.

Besides those taking a principled stance against all judicial law-making, it is now widely accepted that the ICJ's advisory opinions may and do develop the law.<sup>2</sup> As *Lauterpacht*, one of the most prominent proponents of judicial law-making, already acknowledged in 1958,

“[j]udicial legislation, so long as it does not assume the form of a deliberate disregard of the existing law, is a phenomenon both healthy and unavoidable”.<sup>3</sup>

“Healthy” as it may be, due to the nature of the international legal system, pinpointing *Lauterpacht*'s “deliberate disregard of the existing law” is

<sup>1</sup> While the ICJ has only given 27 advisory opinions since its establishment, it has delivered 121 judgments in contentious cases (available at <[www.icj-cij.org](http://www.icj-cij.org)>; accessed 4.4.2016).

<sup>2</sup> E.g. *H. Lauterpacht*, *The Development of International Law by the International Court*, 1958; *L. Boisson de Chazournes*, *Advisory Opinions and the Furtherance of the Common Interest of Mankind*, in: L. Boisson de Chazournes/C. P. R. Romano/R. Mackenzie (eds.), *International Organization and International Dispute Settlement: Trends and Prospects*, 2002, 105; *Y. Shany*, *No Longer a Weak Department of Power? Reflections on the Enforcement of a New International Judiciary*, *EJIL* 20 (2009), 73.

<sup>3</sup> *H. Lauterpacht* (note 2), 156.

no easy task. Particularly in relation to customary international law as well as in cases of dynamic treaty interpretation, it is often not possible to decisively blame the Court for (impermissible) disregard of existing law or praise it for (permissible) development of established rules.

The current article, after outlining the basis and nature of the advisory function, will analyze when and how the Court – wearing its advisory hat – has indeed developed the law and will argue that whether these instances are referred to as law-making or developing or clarifying is in fact a matter of degree or preference, rather than kind. Concerns of judicial activism following the acknowledgement of a law-creative role of the Court will be rejected as the international legal system possesses inherent safeguards to prevent such instances and the Court itself has shown strong adherence to its primary judicial function. Some of the topics discussed and arguments raised will be equally applicable to the Court's contentious jurisdiction, but case examples will be solely drawn from the Court's advisory function. In fact, some of the most influential cases in terms of law development stem from the ICJ's work as an advisory body rather than from its role as a venue for binding dispute settlement.

## II. The Advisory Jurisdiction of the Court

The ICJ's advisory opinions have been defined as “judicial statements on legal questions submitted to the Court by organs of the United Nations and other legal bodies so authorized”.<sup>4</sup> They are part of the Court's jurisdictional activities and, in exercising its advisory function, the ICJ is guided by the same provisions that apply in contentious cases. The fact that only organs of the UN and of the specialized agencies are entitled to request opinions, emphasizes the ICJ's role as the principal judicial UN organ and enables it to participate in the activities of the Organization. In a way, advisory opinions might be conceived as a method to compensate for the procedural incapacity of the UN and the specialized agencies before the Court.<sup>5</sup> The purpose of the advisory function is, however, “not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion”.<sup>6</sup> This is in line with the current trend to ask for an

---

<sup>4</sup> K. Oellers-Frahm, Article 96, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, Vol. II, 3<sup>rd</sup> ed. 2012, 1976.

<sup>5</sup> S. Rosenne, *The International Court of Justice. An Essay in Political and Legal Theory*, 1957, 452.

<sup>6</sup> E.g. *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226, at 236.

advisory opinion in order to obtain guidance for the body making the request as regards its future activities and the corresponding restraint in applying an advisory procedure to settle international disputes.<sup>7</sup>

## 1. Statutory Framework

The main provisions governing the Court's advisory function appear in Art. 96 of the UN Charter and in Art. 65 of the ICJ Statute.<sup>8</sup> Art. 96 of the Charter authorizes two categories of bodies to request advisory opinions. The General Assembly and the Security Council may automatically seek advisory opinions on legal questions of any kind, whereas other organs and the specialized agencies are allowed to do so only by virtue of an authorization by the General Assembly and are restricted to legal questions that are within the scope of their activities.<sup>9</sup> While the Security Council has only once resorted to its prerogative, requests stemming from the General Assembly's privileged position form the overall majority of opinions. Bearing in mind the small number of only 27 advisory opinions in 69 years, suggestions have been made to grant access to the Court's advisory jurisdiction *ratione personae* to a wider group of intergovernmental organizations, to empower the Secretary-General to request opinions on his own initiative and to authorize international and even national supreme courts to ask for an advisory opinion on difficult or disputed questions of international law.<sup>10</sup> There is, however, an ongoing discussion on whether expanding the circle of bodies with such an entitlement would indeed reinvigorate the ICJ's advisory competence.

Although the ICJ's jurisdiction extends only to "legal questions", the Court has frequently held that to a certain degree every international question possesses both legal as well as political aspects and that the mere fact that a question also has political implications "does not suffice to deprive it of its character as a 'legal question'".<sup>11</sup> Furthermore, it is established that the

<sup>7</sup> S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. I, 4<sup>th</sup> ed. 2006, 293.

<sup>8</sup> Four instruments contain provisions on the ICJ's advisory function: UN Charter (Art. 96), ICJ Statute (Art. 65-68), Rules of Court (Art. 102-109) and Practice Directions (Art. XII).

<sup>9</sup> A list of organs and agencies of the UN authorized to request advisory opinions is available online at <<http://www.icj-cij.org>> (accessed 14.7.2015).

<sup>10</sup> Statement by the then President of the ICJ, Judge *Shi*, to the Sixth Committee of the General Assembly, 5.11.2004, A/C.6/59/SR.21, para. 76 et seq.

<sup>11</sup> *Nuclear Weapons Opinion* (note 6), at 234; more recently *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136, at 155;

legal question may be abstract or relating to a dispute that is actually pending between two or more States.<sup>12</sup>

If a legal question put to the ICJ has links to a currently pending dispute between States, the request for an advisory opinion could be seen as an effort to circumvent the principle that in contentious proceedings the parties' consent is required. The Court, in both its contentious cases and advisory proceedings, has consistently adhered to its obligation to respect the essential rules guiding its activities as a court of justice, including the principle that a State does not have to allow its disputes to be submitted to judicial settlement without consent. It did, however, point out, that there is a difference when it comes to advisory proceedings, since the Court's opinions are only of an advisory nature and do not have binding force. They are not addressed to the States but to the requesting body and, in principle, should not be refused. Still, the Court considers lack of consent as an element in relation to questions of judicial propriety.<sup>13</sup> In such a case, the ICJ might make use of its discretionary power under Art. 65 of the Statute to decline a request by invoking "compelling reasons" which justify the refusal to deliver an advisory opinion.

## 2. Nature and Authority of Advisory Opinions

Neither the Charter nor the Statute provides advisory opinions with legally binding force. Additional to the lack of a consent requirement of States in advisory proceedings, States cannot prevent the rendering of an advisory opinion which an organ or specialized agency of the UN deems necessary.<sup>14</sup> At the same time, an advisory opinion does not have a *res judicata* effect and creates no obligations for the primary addressee or for an individual State or the community of States as a whole to accept the Court's answer.

Still, lack of binding force does not "deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ de-

---

*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010, 403, at 415.

<sup>12</sup> Art. 102(3) Rules of Court. "... the Court may give an advisory opinion on any legal question, abstract or otherwise." – *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, ICJ Reports 1948, 57, at 61.

<sup>13</sup> E.g. *Wall Opinion* (note 11), 157 et seq.

<sup>14</sup> *Wall Opinion* (note 11), 157 et seq.

living the opinion, or even of its legal consequences”.<sup>15</sup> On the contrary, because the Court is held in such high esteem its opinions doubtlessly do “have a justifying effect for any action taken in conformity with the finding in the advisory opinion”.<sup>16</sup> No State can therefore be considered to act in contradiction to international law if complying with the findings of the Court in an advisory opinion.<sup>17</sup> *Fitzmaurice* very pointedly spoke of the “persuasive character and substantive authority”<sup>18</sup> of advisory opinions and indeed it would be almost blasphemous to call the authoritative character of the ICJ’s advisory opinions into question. It has been argued that, due to the fact that the persuasive nature of advice is often superior to force and coercion, advisory opinions may even be more important in international relations than judgments.<sup>19</sup>

Advisory opinions have rightly been defined as statements of the law for all, the law *erga omnes*. This characterization, however, fails to address the question on the extent to which an advisory opinion actually enters into the general corpus of international law.<sup>20</sup> The main body of the current article is devoted to this issue. While the requesting bodies have consistently acted in compliance with the legal advice given to them by the ICJ, the reception of the community of States is a decisive element in determining the Court’s involvement in the development of international law through its advisory opinions.

### III. Advisory Opinions and Their Impact on the International Legal System

With the statutory background of the advisory opinion and the authority of such opinions in practice in mind, the current section will analyze the impact of the ICJ’s opinions in the international legal system as well as the

<sup>15</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Reports 1950, 65, Separate Opinion of Judge Azevedo.

<sup>16</sup> *K. Oellers-Frahm* (note 4), 1987.

<sup>17</sup> *J. A. Frowein/K. Oellers-Frahm*, Article 65, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams (eds.), *The Statute of the International Court of Justice: A Commentary*, 2<sup>nd</sup> ed. 2012, 1605, at 1624.

<sup>18</sup> *K. Oellers-Frahm*, *Lawmaking Through Advisory Opinions?*, GLJ 12 (2011), 1033, at 1050 quoting *Fitzmaurice*.

<sup>19</sup> *M. Lachs*, *Some Reflections on the Contribution of the International Court of Justice to the Development of International Law*, *Syr. J. Int’l L. & Com.* 10 (1983), 239, at 249 quoting *Hudson*.

<sup>20</sup> *S. Rosenne* (note 7), Vol. III, 4<sup>th</sup> ed. 2006, 1699.

community of States. While it has been accepted that the Court has some role to play in the development of international law, there has been an ongoing debate about the degree and scope of such involvement. Is the Court allowed to make law, to develop the law or neither of the two? Is the differentiation between law-making and law-developing a distinction without difference, and if the Court were allowed to make law, does this mean it is a legislator in the formal sense? How would such a role be reconcilable with the relevant provisions in the UN Charter as well as the traditional conception of a judicial body?

In discussing these questions, the view put forward by the present authors is that, though there is no formal legislative role for the ICJ, the Court in its advisory function has been actively involved in the development of the law where it was expedient in the interest of the international community to do so. In order to guard its authority as an independent and objective court of law in the process, it has shown caution and judicial restraint. The ICJ thereby remained within the realms of functions conferred on it by the international community, and hence, whether such involvement is called law-making or clarification or development is, in practice, a matter of little importance.

## 1. Development of Existing Law vs. Making of New Law

As the traditional role of any court, in the words of *Francis Bacon* in the opening of his *Essay of Judicature*, is to “jus dicere, and not jus dare; to interpret the law, and not make or give law”, many commentators show displeasure when it comes to attributing a law-making function to the ICJ. While they often acknowledge that the Court may develop the law, they highlight the distinction between the development and the creation of a legal rule. *Ruda* adheres to such an approach when he states that

“[t]he word “development” stands for the Court’s contribution to the interpretation and application of existing rules of international law and not to the establishment of new rules. The work of any court, be it national or international, consists of the interpretation and application of existing law and not the creation of new language.”<sup>21</sup>

Although such a distinction seems natural at first, it does not translate well into the reality of the international sphere. As *Venzke* has argued,

---

<sup>21</sup> *J. M. Ruda*, Some of the Contributions of the International Court of Justice to the Development of International Law, N.Y.U. J. Int’l L. & Pol. 24 (1991), 35, at 35.

“[u]pon closer inspection ... the concept of development starts to blur. It seems to suggest the creation of something new, or ... an addition to that which already exists. But in this sense the concept of development would challenge the idea that international courts *apply* and do not *make* law”.<sup>22</sup>

Besides the overlap in effect between law-making and law-developing, in many instances, it will also be difficult to clearly label the Court’s engagement as an interpretation or clarification of existing legal rules and a resulting development of the law, rather than a principal creation of a new legal norm. Particularly in relation to customary international law, a source of law that is in constant flux, attributing a fixed role to the Court as clarifier or interpreter will be problematic. Furthermore, there are many instances where judicial legislation does not in fact change the law, but merely fulfils its (theoretical) purpose in practice, adding to the blurring of the line between the making of new rules and the application and development of existing rules of international law.<sup>23</sup>

*Kelsen*, as early as 1928, opposed a strict distinction between law-making (*Rechtssetzung*) and the application of law (*Rechtsanwendung*) and argued that every application of the law amounted to the creation of new legal rules.<sup>24</sup> *Pellet* boiled down the distinction between law-making and legal development to a question of perspective, boldly stating that,

“you will name ‘legislation’ a legal reasoning you disapprove of but you will call that same reasoning ‘progressive development’ when you favour it”.<sup>25</sup>

Though such an assessment may shed an overly pessimistic light on the motives of some States and academics, it still pointedly highlights the arbitrariness between the two terms.

The *prima facie* requirement remains that the ICJ cannot engage in politics per se nor act as a primary legislator. The Court must decide disputes before it on the basis of the existing law, but the law is full of nuances, sometimes giving the Court a choice between mechanical application of an existing rule and development of that norm.<sup>26</sup>

<sup>22</sup> *I. Venzke*, The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation, *Loy. L. A. Int’l & Comp. L. Rev.* 34 (2011), 99, at 100 et seq.

<sup>23</sup> *H. Lauterpacht* (note 2), 161.

<sup>24</sup> *H. Kelsen*, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, *VVDStRL* 5 (1929), 30.

<sup>25</sup> *A. Pellet*, Shaping the Future of International Law: The Role of the World Court in Law-Making, in: M. H. Arsanjani/J. K. Cogan/R. D. Sloane/S. Wiessner (eds.), *Looking to the Future. Essays on International Law in Honour of W. Michael Reisman*, 2010, 1065, at 1075.

<sup>26</sup> *R. Kolb*, *The International Court of Justice*, 2013, 1182.

“There are obvious limits to [the] ... law-making activity of judges, but these limitations do not materially alter the fact that courts do not slavishly administer abstract rules without being able to exercise creative discretion.”<sup>27</sup>

Sir *Robert Jennings* therefore described the law-creative role of the Court as an ancillary function, but one that is within the limits of the ICJ’s judicial competence. He stated that

“[t]he primary task of a court of justice is not to “develop” the law, but to dispose, in accordance with the law, of that particular dispute between the particular parties before it. This is not to say that development is not frequently a secondary part of the judge’s task ... And it is to say that any “development” should be integral and incidental to the disposal according to the law of the actual issue before the court.”<sup>28</sup>

The judicial activities of the Court can hence be positioned on a sliding scale with pure application of the law on one end and creation of a new legal norm on the other. Where the boundaries between application, clarification, interpretation, development and law-making lie as well as where the line between permissible and impermissible actions by the Court is, will in many cases be questions of preference or subjective opinion, rather than be objectively determinable.

Statements by academics and judges since the establishment of the PCIJ and its successor, the ICJ, make the subjectivism in this debate visible. While *Lauterpacht* would have applauded any law-making role of the ICJ as long as it did not amount to a deliberate disregard of the existing law,<sup>29</sup> Judge *Yusuf* only conceded a law-developing function when the law was in a grey zone<sup>30</sup> and Baron *Descamps* would not have allowed any law-creative but only law-elucidating function of the Court’s judges.<sup>31</sup> Then again, *Akande* contends that the ascertainment, interpretation and application of a legal rule to a particular set of facts already amounts to a law-making act as it requires a certain amount of judicial creativity.<sup>32</sup> Due to the absence of a clear demarcation, a *prima facie* rejection of a law-making role of the Court

<sup>27</sup> *H. Lauterpacht*, The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals, BYIL 11 (1930), 134, at 144.

<sup>28</sup> *R. Y. Jennings*, The Role of the International Court of Justice, BYIL 68 (1998), 1, at 41.

<sup>29</sup> *H. Lauterpacht* (note 2), 156.

<sup>30</sup> *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, ICJ Reports 2012, 99, at 209 et seq. paras. 47-49, Dissenting Opinion of Judge *Yusuf*.

<sup>31</sup> *PCIJ, Advisory Committee of Jurists*, Procès-verbaux of the proceedings of the Committee of Jurists, 16.6.-24.7.1920, 336.

<sup>32</sup> *D. Akande*, The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice, EJIL 9 (1998), 437, at 464.

coupled with the acceptance of a law-developing function is artificial and shows a blind adherence to semantics over reality. Nevertheless, referring to the ICJ as a legislator is a more delicate matter.

## 2. The ICJ as a Legislator?

Having rejected an outright denial of any involvement of the ICJ in law-making processes, it is still important to recall that the ICJ remains “the principal *judicial* organ” of the UN, rather than a world legislator. The Court itself has over and over again emphasized its strong adherence to a purely judicial role. In the oft-cited statement of the Court in the *Nuclear Weapons* opinion, the Court refused to accept the suggestions of some States that it had taken on a legislative role, stating that

“[i]t is clear that the Court cannot legislate ... Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules ... [I]t states the existing 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.”<sup>33</sup>

Similarly, in the *Icelandic Fisheries Jurisdiction* judgment, the Court declared that

“[i]n the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down”.<sup>34</sup>

The ICJ’s reiteration and strong (formal) devotion to a purely judicial role stems from the nature of the international judicial system and is based on fundamental principles of international law. A basic premise of the international legal system is that only those rules that are the product of the States’ express will can bind them. As the international judicial system depends on the voluntary submission of States, an international court that makes renewed attempts to modify existing law and to create new rules, will cause suspicion among governments and thereby risk a “drastic curtailment of its activity”.<sup>35</sup> Hence, the ICJ must present its judgments as being firmly based on existing law in order to maintain an important element of its legit-

<sup>33</sup> *Nuclear Weapons* Opinion (note 6), 237 para. 18.

<sup>34</sup> *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, ICJ Reports 1974, 175, at 192 para. 45.

<sup>35</sup> *H. Lauterpacht* (note 2), 76.

imacy. The Court's approach allows it to claim objectivity and to maintain the trust of States parties. *Hernández* has summarized this point:

“Simply put, the Court has a vested interest in sustaining the view that it merely applies existing law; this view allows it to uphold the parties' consent, denies any agency as a law-creating actor, and allows it to uphold the legitimacy of its reasoning as a mere reflection of the law.”<sup>36</sup>

He further argues that limiting the role of judges in the development of the law to the mere exposition of legal rules waiting to be discovered is a tactical move by judges to protect themselves from any accusations as to an engagement in law-creation rather than mere application and interpretation of the law.<sup>37</sup> Hence, although the line between *jus dicere* and *jus dare* is not necessarily fixed, but rather may vary from context to context, keeping a distinction between the two remains important for the authority of the Court.<sup>38</sup> Still, as mentioned above, whatever the Court's formal adherence to the fiction of a purely law-applying role may be, the Court is an indispensable actor in the development of the law. While the formal function remains *jus dicere*, *jus dare* is often an inevitable side product. As *Capelletti* has stated,

“speaking of the judge as a law-maker is, in a sense, no more than an obvious banality, a meaningless truism. Of course any interpretation is creative; and, of course, judicial interpretation is law-making.”<sup>39</sup>

Nevertheless, the terms “law-maker” and “legislator” cannot be used interchangeably. The form, mode and process of making the law are fundamentally different. Not only the Court's public utterances as well as the nature of the international system stand in the way of the Court becoming a primary legislator, but also obstacles of a – crudely termed – “procedural” nature hinder any such development. Firstly, the judicial process has an essentially reactive character that prevents courts from acting as primary law-making agents.<sup>40</sup> In relation to advisory opinions, the requesting organ not only decides when to make a request, but also determines the scope and content of any question posed. Though the Court in the past has sometimes bent the four corners of the request, the question posed still regulates the

<sup>36</sup> *G. I. Hernández*, *The International Court of Justice and the Judicial Function*, 2014, 87.

<sup>37</sup> *G. I. Hernández* (note 36), 90.

<sup>38</sup> *R. Y. Jennings* (note 28), 41.

<sup>39</sup> *M. Cappelletti*, *The Law-Making Power of the Judge and Its Limits: A Comparative Analysis*, *Mon. L. R.* 8 (1981), 15, at 19.

<sup>40</sup> *R. Higgins*, *Problems and Process*, 1994, 202.

Court's potential as a law-making agent. Secondly, the ICJ, in contrast to primary legislators, is bound to base its opinions on one of the sources in Art. 38 of its Statute. Legislators do not generally have to follow any such constraint, but can legislate freely without reference to other legislative enactments.

Thirdly, judicial "legislation" takes a different form than codification by a legislative body. Instead of giving detailed provisions as to definition and application of the new legal norm, judicial law-making focuses on laying down broad principles which are applied in the case at hand.<sup>41</sup> Though the Court may sometimes limit the application of such rules to specific circumstances, it does not purport to elaborate on their precise details. This is left to formal legislative processes, doctrinal writing and future judicial decisions that provide for further development beyond the case in which the standard in question was established.

Accordingly, while the Court has an important role to play in the development and creation of the law, the manner and mode of its law-making is fundamentally different from that of a legislator. Hence, having both dispensed the fiction of a Court that is not involved in any law-making as a matter of principle as well as the picture of the Court acting as a legislator, the next section will discuss the true involvement of the ICJ, as a judicial body, in the development of rules of international law.

### 3. The Court as an Active Agent in the Development of International Law

Ranging from *Hudson* who contended that no system of law can solely depend on the law-making of political organs,<sup>42</sup> to *Lauterpacht* who proclaimed that "judicial law-making is a permanent feature of administration of justice in every society",<sup>43</sup> the importance of judicial involvement in the development of the law has now been widely established and accepted. Similarly, with regards to the fulfilment of the judicial role, law-development has been described as one of the "essential axes of jurisprudence"<sup>44</sup>.

Before advancing on specific instances of the law-creative and law-developing role of the Court, it is necessary to first consider the standing of

---

<sup>41</sup> *H. Lauterpacht* (note 2), 189 et seq.

<sup>42</sup> *M. O. Hudson*, *Progress in International Organization*, 1932, 80.

<sup>43</sup> *H. Lauterpacht* (note 2), 155.

<sup>44</sup> *R. Kolb* (note 26), 1141.

judicial decisions as a source of international law, for which Art. 38 of the ICJ Statute provides a starting point.

**a) Art. 38 ICJ Statute: Judicial Determinations as a Subsidiary Means for the Determination of Rules of Law**

With international treaty law, international customary law and general principles of law forming the primary sources of law, Art. 38(1)(d) ICJ Statute establishes,

“subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as *subsidiary means for the determination of rules of law*” [emphasis added].

This was a clear change from the initial draft of 1920, which read:

“The authority of judicial decisions and the opinion of writers as *means for the application and development of law*”.<sup>45</sup>

The discussions of the members of the 1920 Committee of Jurists indicate that there was an intention to avoid any law-developing role for the PCIJ, which is evident in the Statute in its current form.<sup>46</sup> The change is truly significant as there is a fundamental difference between a means for the *determination of rules of law* and a means for the *application and development of law*.

Due to the wording of Art. 38(1)(d), a judicial decision cannot be regarded as a formal source of law and therefore cannot be relied upon in future cases before the Court. As a natural consequence, and by following a strict legal positivist approach to Art. 38, the starting point must be that the Court has no formal role in law-making as its decisions do not amount to formal sources of international law. However, the Court’s pronouncements and its interpretations of the rules of international law carry the highest authority and strongly influence State behavior. Thus, many actors in the international sphere treat the decisions of the ICJ in a similar way as the primary sources in Art. 38.<sup>47</sup>

As the Court’s decisions state the content of the three primary sources of international law, *Lauterpacht* concluded that they

<sup>45</sup> A. Pellet, Article 38, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams (note 17), 731, at 739 (emphasis added).

<sup>46</sup> A. Pellet (note 45), 853.

<sup>47</sup> A. von Bogdandy/I. Venzke, Beyond Dispute: International Judicial Institutions as Lawmakers, GLJ 12 (2011), 979, at 979 et seq.

“for most practical purposes ... show, therefore, what international law is. In fact they are to a substantial degree identical with the sources of law enumerated in the first three paragraphs of Article 38. In form they may be merely a subsidiary means for determining what these sources are. The effect is the same.”<sup>48</sup>

The current authors’ view is that although the Court’s decisions are no formal source of law per se, their impact remains significant as part of a broader process of law-making and legal development.<sup>49</sup> As *Venzke* has argued,

“law is not fixed in and at its source; rather, it gains meaning and shape in its interpretation”.<sup>50</sup>

Accordingly, the decisions of the Court decisively influence the content of the formal sources. To limit the Court’s role in the development of the international legal system to the interpretation and application of existing rules to particular facts, denying the decision any effect beyond the case at hand, does not accord with reality.<sup>51</sup> In the following section, we will discuss four concrete ways in which the Court influences and, sometimes even, takes a lead in legal development without transgressing the boundaries set by the international community and the UN Charter.

## b) How the Development Comes About

Though legal development through the judiciary is in many circumstances unavoidable and legitimate, it cannot amount to the standard method of legal reform. As *Lowe* has pointed out, ad hoc dispute resolution systems are “not a recipe for satisfactory resolution of a systematic problem”.<sup>52</sup> The decisions of a court remain case-specific, and lack the detail for a system-wide application. This applies equally to advisory opinions, even of an abstract nature, as the scope and content of the opinion is still limited by the specific request made. At the same time, a lack of judicial innovation may receive as much criticism as progressive judicial law-making. The *Kosovo*

<sup>48</sup> *H. Lauterpacht* (note 2), 22.

<sup>49</sup> *C. J. Tams*, *The World Court’s Role in the International Law-Making Process*, in: J. Delbrück/U. Heinz/K. Odendahl/N. Matz-Lück/A. von Arnald (eds.), *Aus Kiel in die Welt: Kiel’s Contribution to International Law. Essays in Honour of the 100th Anniversary of the Walther Schücking Institute for International Law*, 2014, 139, at 144.

<sup>50</sup> *I. Venzke* (note 22), 117.

<sup>51</sup> *M. Shahabuddeen*, *Precedent in the World Court*, 1997, 68.

<sup>52</sup> *V. Lowe*, *The Function of Litigation in International Society*, *ICLQ* 61 (2012), 209, at 216.

opinion<sup>53</sup> serves as an example of a judicial pronouncement that received criticism for its overly cautious approach.<sup>54</sup> In the request on the legality of the unilateral declaration of independence of Kosovo from Serbia, the Court refrained from addressing some critical points, such as the right to secession, and instead made the disputable statement that the principle of territorial integrity only applied to the sphere of inter-State relations.<sup>55</sup> The opinion shows the difficulty the Court faces when trying to find the right balance between proper judicial restraint and an unduly conservative attitude.

The base line remains that the ICJ must apply the law, rather than deliberately change it so as to accord legal norms with the judges' own views. Nevertheless,

“[t]his does not mean they do not in fact shape or even alter the law. But they do it without admitting it; they do it while guided at the same time by existing law; they do it while remembering that stability and uncertainty are no less of the essence of the law than justice; they do it, in a word, with caution.”<sup>56</sup>

An important factor in the Court's shaping of the law as well as in the international community's perception as to the proper adherence of the ICJ to its judicial function is the giving of reasons. In order to play an influential role in the international legal discourse, the pronouncements of the Court have to persuade and the actors involved must be convinced of the quality of the decision.<sup>57</sup> Additionally, the lack of adequate reasoning by the ICJ can create an impression of arbitrariness and thereby risk losing the trust of States in the Court's judicial processes, an element fundamental to the international judicial system, which is based on voluntary submission. The perceived legitimacy or acceptability of a judgment will determine its effect on the subsequent development of international law.<sup>58</sup> Hence, the existence of adequate reasons in an advisory opinion is a prerequisite for any involvement of the Court in the development of international law. The following

<sup>53</sup> *Kosovo Opinion* (note 11).

<sup>54</sup> *A. von Bogdandy/I. Venzke* (note 47), 983.

<sup>55</sup> *Kosovo Opinion* (note 11), 437 para. 80. The finding of the ICJ is contrary to the practice of the UN Security Council which has applied the principle to situations involving non-State actors in the context of non-international armed conflict, e.g. in relation to conflicts in Croatia, Sudan and Georgia. *M. Koben*, *The Court's Contribution to Determining the Content of Fundamental Principles of International Law*, in: G. Gaja/J. Grote Stoutenburg (eds.), *Enhancing the Rule of Law Through the International Court of Justice*, 2014, 139, at 145.

<sup>56</sup> *H. Lauterpacht* (note 2), 75.

<sup>57</sup> *C. J. Tams* (note 49), 144; *A. von Bogdandy/I. Venzke* (note 47), 990.

<sup>58</sup> *N. Petersen*, *Lawmaking by the International Court of Justice – Factors of Success*, *GLJ* 12 (2011), 1295, at 1300.

will outline four broad categories of methods by which the Court has shaped legal discourse and thereby developed the law, often quietly rather than revolutionary, adhering to a cautious approach in order to maintain the confidence of States in the legitimacy of the Court while at the same time responding to the needs of the international legal system.

### (1) Precedents

The starting point in this discussion is that there is no formal rule of precedent in relation to the ICJ's jurisprudence as the decisions of the Court are no formal source of international law. Hence, States cannot rely on them in future cases. However, in contrast to the ICJ's express rejection of a law-making role, it shows a declared adherence to its previous pronouncements. In *Application of the Genocide Convention (Croatia v. Serbia)* the Court articulated the general test that it will not depart from settled jurisprudence unless it finds very "particular reasons" to do so.<sup>59</sup> Its reliance on past decisions seems to stem from an interest to uphold consistency, certainty and stability in the system and to avoid the appearance of any excess judicial discretion.

The *Wall* advisory opinion<sup>60</sup> serves as a good illustration of the importance of previous decisions in the Court's jurisprudence. In the opinion, the ICJ relied to a great extent on its previous case law when it found the existence of a right to self-determination of people living in non-self-governing territories<sup>61</sup> and made no less than 28 cross-references to its own past decisions over the course of only three pages of the opinion<sup>62</sup>. This shows, as *Hart* has argued, that the Court's adherence to precedent is not just about respecting its own case law, but has instead a central role in the Court's legal reasoning and its conception of its own role in the international system as a whole.<sup>63</sup>

Since the ICJ will uphold the legal position taken in a previous advisory opinion unless there are particular reasons to do otherwise, it "induces a belief in the correctness of the conclusions as it has drawn with respect to international law" and thereby "advances a claim to normative authority".<sup>64</sup>

---

<sup>59</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections ICJ Reports 2008, 412, at 428 para. 53.

<sup>60</sup> *Wall* Opinion (note 11).

<sup>61</sup> *A. Pellet* (note 45), 867.

<sup>62</sup> *Wall* Opinion (note 11), 154 et seq.

<sup>63</sup> *H. L. A. Hart*, *The Concept of Law*, 2<sup>nd</sup> ed. 1994, 132.

<sup>64</sup> *G. I. Hernández* (note 36), 192.

Such normative force that goes beyond the confines of the individual case will give the opinion an intrinsically law-making character and, as a result, it

“redistributes argumentative burdens, shapes the normative expectations of all actors involved, and thus serves as a vehicle that drives international courts’ role as interpreters and developers of the law, or more clearly, as lawmakers”.<sup>65</sup>

Hence, precedents can be conceptualized as argumentative burdens on the party seeking to argue otherwise than the Court in a pertinent previous case, which is “independent from the status of precedent as a formal source of law or any express denial of its bindingness”.<sup>66</sup> Because of this strong normative force as well as argumentative burden, the Court’s opinions are very much akin to a source of law and, as a result, in many cases

“actors in legal interpretation fight about the meaning of previous decisions just like they do about the meaning of instruments that come under the heading of sources”.<sup>67</sup>

The Court will uphold its previous decisions which will guide States as a reflection of the current state of international law. Hence, *Lauterpacht* contended that

in a society of States in which opportunities for authoritative and impartial statements of the law are rare, there should be a tendency to regard judicial determination as evidence or, what is in fact the same, as a source of international law.<sup>68</sup>

To conclude, by maintaining a certain legal position on several occasions, it is more difficult for a State to contend otherwise, putting the Court in a *de facto* law-making position. Judicial precedent thus often takes the form of quiet law-making over an extended period of time and thereby avoids accusations of judicial legislation.

## (2) Treaty Interpretation

It is a misconception to believe that the Court’s role in the development of international law diminishes in the case of treaty interpretation.<sup>69</sup> In fact, some of the Court’s most significant opinions in terms of its law-creative effect stem from questions of treaty interpretation. Besides the development

<sup>65</sup> *I. Venzke* (note 22), 127.

<sup>66</sup> *M. Jacob*, *Precedents: Lawmaking Through International Adjudication*, GLJ 12 (2011), 1005, 1023.

<sup>67</sup> *H. Lauterpacht* (note 2), 123.

<sup>68</sup> *H. Lauterpacht* (note 2), 14.

<sup>69</sup> *K. Oellers-Frahm* (note 18), 1040; *H. Lauterpacht* (note 2), 27.

of the law of treaties itself, there are two main ways in which the Court's advisory function can develop the law in such requests.

Firstly, in treaty interpretation cases the Court's role is central, as it must determine the object and purpose of the international agreement as intended by the parties or as would have been intended by the parties in the changed circumstances. The Court's involvement becomes even more significant in the context of dynamic treaty interpretation when it attributes a new meaning to the terms of a treaty based on an alleged intention of the parties that its provisions are not meant to be fixed, but rather may evolve over time. This puts a lot of power in the hands of the Court to effectively discover, or even establish, the content and scope of a treaty.

Secondly, the Court's interpretation of international agreements is influenced by what it thinks the customary law position on the question is and at the same time will alter that custom. The ICJ's handling of a request on specific treaty provisions will inevitably be guided by relevant existing customary law and, as a repercussion, may have an effect on such rules in their future application by States. Accordingly, there is a strong inter-relation between the two sources of law that may lead to a reassessment of a rule of customary international law in a case on treaty law.

An illustrative example for both points is the *Reparations*<sup>70</sup> opinion in which, through the interpretation of the UN Charter, the Court asserted that the UN has the capacity to bring a claim against a State for injuries suffered by one of the organization's employees. This finding was "standard setting"<sup>71</sup> and "a watershed in the development of the law of international organisations"<sup>72</sup> as the common understanding at the time was that only States held any form of legal personality in the international sphere. The Court had to define the object and purpose of the UN Charter and found that the organization would not be able to carry out its functions without having a certain degree of legal personality. The Court's teleological approach in treaty interpretation resulted in a ground-breaking change in customary international law. Hence, in *Reparations*, the ICJ clearly created a new rule of custom in a request on the true meaning of treaty provisions.

The *Wall* opinion also shows the Court's relevance in the development of the law in treaty interpretation requests. On the question of the legality of Israel's construction of the wall, the Court advanced on the interpretation

---

<sup>70</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174.

<sup>71</sup> K. Oellers-Frahm (note 18), 1041.

<sup>72</sup> S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. I, 3<sup>rd</sup> ed. 1997, 313.

of the term “armed attack” under Art. 51 of the UN Charter. Contrary to the position taken by the United Nations Security Council, the Court limited “armed attack” in cases of self-defense to the sphere of inter-State relations and excluded it in cases of counter-terrorism offensives taking place within territories under the control of the State invoking Art. 51 UN Charter.

The *Wall* opinion serves as a concrete illustration of the difficulty of clearly defining what it was the Court did in this case – did it clarify the meaning of “armed attack” or did it develop the term or even create a new rule? Whatever verb is used, the impact of the opinion is paramount. Unfortunately, the *Wall* case is one of the few examples of advisory opinions that have not been fully complied with. Academics have voiced doubts as to the correctness of the Court’s interpretation of Art. 51 and Israel did not demolish the wall found to be in violation of international law by the ICJ. However, since such a reception remains exceptional, it does not diminish the Court’s authority and adds to the argument that the Court is involved in legal development.

While the ICJ has assumed a central role in the elucidation and development of treaty law, its impact in the creation and affirmation of rules of customary international law is even greater.

### (3) Shaping of Customary International Law

Particularly in relation to custom, due to its unwritten form and constantly evolving content, the difference between determining and making law is one of degree rather than kind. It is often left to the judge to say what the law is and what is not. The judges have

“to evaluate the conduct of the relevant players in society and to attempt to construct a legal norm that has developed from that conduct”.<sup>73</sup>

As *Hernández* has argued,

“the interpretation and application of unwritten law is an act of cognition, or of will; it is creative of the law”.<sup>74</sup>

For the present discussion, the Court’s role in its advisory function in the determination, clarification and development of legal norms of customary international law will be divided into two parts, with one standing at the beginning of the creation of a customary rule – the normative influence of

---

<sup>73</sup> D. Akande (note 32), 465.

<sup>74</sup> G. I. Hernández (note 36), 91.

advisory opinions on State behavior – and the other being at a late stage of the development of custom – an advisory opinion providing conclusive evidence of the existence of custom.

i) Normative influence on State behavior and belief: as discussed in Part Two, the ICJ's advisory opinions are authoritative *erga omnes* and strongly influence the international community's understanding of international law as well as the normative expectations of States. By exerting such influence, actors in the international sphere orientate themselves and their actions on past opinions by the Court. Advisory opinions consequently have an impact on State practice and thus have a formative effect on custom.<sup>75</sup>

The Court in its advisory opinions takes part in the general legal discourse and while its pronouncements

“are not a formal source of law, [...] their persuasive authority can and does induce the creation of customary law or ... in the case that they do not accept the opinion, to act contrary to it thereby preventing the creation of customary law.”<sup>76</sup>

The difference between an advisory opinion with a normative character in these circumstances and a formal source of law lies in their impact on State behavior. Rather than laying down a clear rule which States directly rely on and follow, advisory opinions provide arguments and focal points in the process of creating a new formal rule of customary law. While an act contrary to the findings of an advisory opinion by the Court will not amount to a violation of international law, it will require justification. On the other hand, the Court's authority backs up State action in conformity with an advisory opinion.<sup>77</sup> Hence, in the early formative stages of a customary rule, an opinion of the Court can strongly influence not only the behavior of States, but also what they believe they are bound to do – i.e. *opinio juris*.

ii) Conclusive evidence of the existence of a rule of customary law: where State practice as well as *opinio juris* are already present, but there is a lack of formal appraisal of the new norm and hence a lingering uncertainty, the Court has the power to “translate in terms of express principle such changes as have in fact been accomplished”.<sup>78</sup> Accordingly, this represents one of the last steps in the creation of a new customary law. Since the ICJ, in these cas-

<sup>75</sup> C. Schaller, Das Kosovo-Gutachten des IGH und seine Implikationen für die Vereinten Nationen, in: U. Halbach/S. Richter/C. Schaller (eds.), Kosovo – Sonderfall mit Präzedenzwirkung?, Stiftung Wissenschaft und Politik Studie Mai 2011, 7, at 14.

<sup>76</sup> K. Oellers-Frahm (note 18), 1052.

<sup>77</sup> K. Oellers-Frahm (note 18), 1047.

<sup>78</sup> H. Lauterpacht (note 2), 173.

es, asserts changes in international law that have in fact already occurred, it arguably only gives the impression of judicial legislation, rather than amounting to true judicial law-making.

*Lauterpacht*, however, disagrees and argues that whether the Court's opinion is viewed as evidence of the existence of the customary rule or as a source of law itself is a debate of little importance –

“the distinction between the evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed”<sup>79</sup>.

It is still wise to maintain the formal contrast between source and evidence here and rather describe the Court's role as a participant in a law-making process rather than the creator of a new rule of customary law as it should remain in the hands of States to bring to life such legal norms. While States determine the existence and largely the content of custom, the Court often remains the ultimate arbiter on the question<sup>80</sup> and therefore has an important role to play.

The view of the current authors is that the ICJ's involvement in the late stages of the development of custom is as important as its contributions in earlier phases of the process. While custom is the product of the will of States, not judicial pronouncements,

“through its concrete interpretation and application to a given legal dispute or situation, judicial decisions can provide systematization and written confirmation of the existence of a legal rule”<sup>81</sup>.

With State practice and *opinio juris* already clearly standing, the ICJ, by confirming a new legal rule, will shape the full range of implications arising from such a norm and will reveal its true significance.

In the *Nuclear Weapons* advisory opinion, the Court affirmed the existence of a customary rule that had developed over decades, giving expression to changes in the international community as well as international law. The ICJ held that the International Covenant on Civil and Political Rights did not cease to apply in times of armed conflict<sup>82</sup> and that States are under a duty to protect the environment<sup>83</sup>. *Sands* argues that the *Nuclear Weapons* opinion recognized for the first time that norms of international environmental law have customary international law status which are equally appli-

---

<sup>79</sup> *H. Lauterpacht* (note 2), 21.

<sup>80</sup> *A. Roberts*, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, *AJIL* 95 (2001), 757, at 772.

<sup>81</sup> *G. I. Hernández* (note 36), 91.

<sup>82</sup> *Nuclear Weapons* Opinion (note 6), 240, para. 25.

<sup>83</sup> *Nuclear Weapons* Opinion (note 6), 241, para. 29.

cable in times of armed conflict.<sup>84</sup> Furthermore, the formal acknowledgement that international humanitarian law and human rights law apply simultaneously in armed conflict situations provides a benchmark in the international legal system as a whole. Still, the opinion was not “revolutionary”, but rather “formally confirmed an ‘evolutionary’ development of the twentieth century”.<sup>85</sup> The rules as to the mutual application of the two systems as well as the States’ environmental law duties did exist before the Court’s advisory opinion, but it was a crucial step in their evolution to be formally confirmed by the ICJ.

To conclude therefore, the Court has a role to play throughout the development process of customary law. Its opinions induce State behavior and influence the normative expectations of actors at the international level. They confirm already existing practice and thereby achieve clarity and coherence in the complex system of customary rules. In the process, the Court can shape the content as well as the wider ramifications of the legal norm. Hence, its role in relation to customary international law is vital as it is involved in the clarification, determination, development and creation of customary rules simultaneously.

#### (4) Pronouncements in the Absence of a Generally Accepted Rule

Both in relation to treaty law and customary international law, the ICJ sometimes affirms a rule that arises from developments in the international community and the international legal system that are still somewhat implicit and not yet clearly accepted in custom or international agreements. Particularly in relation to customary law, there is an overlap between the current and the previous sections as customary norms in many cases will not be unequivocally established up until the point the Court makes a pronouncement to the effect. As *Kolb* said,

“[t]he way that States actually behave and interact, keeping customary law in constant flux, gives to the rules of international law an underlying uneasiness, an unending propensity to movement and adjustment, now expanding, now contracting ... The jurisprudence frequently needs to clarify what is, and what is not, international law.”<sup>86</sup>

---

<sup>84</sup> P. Sands/J. Peel, *Principles of International Environmental Law*, 3<sup>rd</sup> ed. 2012, 797.

<sup>85</sup> D. Stephens, *Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, *Yale Human Rights & Development Journal* 4 (2001), 1, at 23.

<sup>86</sup> R. Kolb (note 26), 1142.

While the distinction between a decision by the Court that creates a new rule that is in line with developments at the international level where there had remained conflicting practice and a confirmation of a rule that lacked formal confirmation might be slim, it still warrants separate attention.

A good example of judicial rule-making in an area of the law where there remained uncertainty is the *Genocide*<sup>87</sup> advisory opinion. The request for the opinion was about the admissibility and effect of reservations to multi-lateral treaties in the event of objections or lack thereof by other parties to the treaties. The crux of the question was the severability of reservations, an area that at the time did not have a generally accepted legal rule. After finding that the States parties concluded the Genocide Convention for humanitarian and civilian purposes, the Court established (or confirmed) the customary character of the prohibition of genocide and limited the use of reservations to all international conventions with humanitarian objections. Allowing a curtailment of the high principles enshrined in the conventions would be against their very purpose or *raison d'être*.<sup>88</sup> Therefore, while finding that there existed no binding rule on the subject, the ICJ held that

“[i]t must clearly be assumed that the contracting States are desirous of preserving intact at least what is essential to the object of the Convention”.<sup>89</sup>

The International Law Commission later adopted the Court’s guidelines in section 2 of the Vienna Convention on the Law of Treaties.

Hence, the Court in its advisory function has not shied away from contributing to the establishment of new rules of treaty and customary international law in cases where there was ambiguity before. Its involvement in the development of international law therefore is not limited to a passive role of formal confirmation. Still, the Court is wary of not venturing out too far onto the thin ice of law-making. As discussed above, there are plenty of internal and external obstacles in the way of the Court becoming a primary legislator so that any real concerns in this regard are misplaced.

In the end, States have the final say whether a rule established by the Court becomes part of the body of international law. Before States confirm the new norm by way of State practice or the conclusion of an international agreement, the ICJ’s decisions

“only serve as precedents, as guidelines, or as authoritative pronouncements of considerable weight, but no more”.<sup>90</sup>

---

<sup>87</sup> *Reservations to the Convention on Genocide*, ICJ Reports 1951, 15.

<sup>88</sup> *Genocide Opinion* (note 87), 23.

<sup>89</sup> *Genocide Opinion* (note 87), 27.

<sup>90</sup> *K. Oellers-Frahm* (note 18), 1054.

The advisory opinion will have to be persuasive in its reasoning and its findings. Lacking any formally coercive power, its impact is dependent on the reception in the general legal discourse by all actors in the international sphere, providing a natural barrier to judicial activism. As much as it is a truism that the Court is a participant in the development of international law, so it is self-evident too that the ICJ is not the only actor indispensable in the process. States, international organizations and academics all to a different degree weigh in, making the law-making process potentially more complex, but also positively more nuanced.

#### IV. Concluding Remarks

Whether covertly or overtly, whether developing or law-making, the ICJ's advisory opinions have and will in the future shape international law. In a complex and sometimes turbulent system of law like the international legal system, the Court has the power to increase coherence and to respond to new developments in the international community and the legal environment. While disagreement will remain on where the exact line between permissible and impermissible judicial activities lies, it is the international community as a whole that has chosen to give the Court such an essential role in the process of international law-making. It is the States which have decided to attribute normative authority to the Court's case law, making it a reference point, and to adjust their behavior in alignment with the Court's pronouncements. It is the Court that relies heavily on its own jurisprudence, illustrating its own claim to semantic authority and the correctness of its decisions, and it is academic writers who discuss the case law of the Court at length when outlining the content of international law. As all actors, including the ICJ itself, are mindful to keep the Court within its proper role and as there are inherent safeguards in the process, the fear of judicial activism is misplaced.

Still, the ICJ will continue to face critique when its involvement in the law-making process is too bold as it will when it renders overly conservative opinions. Such high scrutiny itself highlights the crucial role and wide influence of the Court's work. As *Rosenne* has said,

“for those who practise international law, judicial decisions, and especially those of the International Court, cannot be relegated to any subsidiary position”.<sup>91</sup>

---

<sup>91</sup> *S. Rosenne* (note 7), 1554.

In the end the wheels will keep on spinning and the Court will remain an active agent in the development of international law.

ZaöRV 76 (2016)

