

Does the *International Court of Justice* make international law? Should it do so? ¹

As cortes internacionais fazem direito internacional? Elas deveriam fazê-lo?

Danielle Hanna Rached*

Abstract

This article investigates whether the judicial decision is and should be an activity of merely “law-applying” or of genuinely “law-making”. The theoretical problem of adjudication is seen from the perspective of the *International Court of Justice* (ICJ), a central forum of many-faceted conflicts in international law. The article tries to escape the rigidity of a “logic of either or” (either creation or mechanical application) and to see the nuances between both extremes. Judges neither create nor apply in the sense these concepts are usually used.

Key words: International Court of Justice; law applying; law making

Resumo

O presente artigo analisa se as decisões judiciais são atividades que apenas aplicam ou criam o direito. A questão teórica sobre adjudicação é vista a partir da perspectiva do Tribunal Internacional de Justiça, fórum responsável por decidir vários conflitos de direito internacional. O artigo tentou escapar da rigidez de uma lógica binária (ou criação ou aplicação mecânica do direito) e ver as nuances entre os dois extremos. Juízes nem criam nem aplicam o direito no sentido em que estes conceitos são normalmente utilizados.

Palavras-chave: Tribunal Internacional de Justiça; aplicação do direito; criação do direito

1. Introduction

Legal theory has produced thousands of pages about one of the central characters in the legal phenomenon: the judge. The judicial decision is usually supposed to solve controversies, dissipate conflicts and promote some criteria of justice in concrete cases, a necessary task of any legal system. It does so in a specifically meaningful context: it must be a practical implementation of the general ideal of the “rule of law, not of men”, which

¹ Artigo recebido em 5/04/2014 e aceito em 5/08/2014.

* Post-doctoral fellow at the International Relations Institute, University of São Paulo (IRI-USP). I would like to thank the support received from CAPES (Coordenação de Aperfeiçoamento de Pessoal de Nível Superior).

transcends the particular case and gives a justification for it. In this sense, a judicial decision should be in accordance with the “law”, not with the result of a human arbitrary will. It should be part of a system, not an isolated fact.

One of the main controversies that legal theory has to address, at least since the liberal revolutionary era of the end of XVIII century, is whether the judicial decision is and should be an activity of merely “law-applying” or of genuinely “law-making”. The responses, like in all deep themes in the theoretical agenda, are far from a stable agreement and vary between both extremes. Herbert Hart, for example, coined a provoking classification as to the theories of adjudication in the American jurisprudence. At one extreme are those who conceive the judicial decision as pure creation, or as “crypto-legislation”.² At the other, are those who claim that it can and should be made within the boundaries of the law. The former, referring mainly to the American Realists, he called “The Nightmare”. The latter, he named “The Noble Dream”.³ For Hart, the real decisional context of judges lies somewhere between the extremes of an absolute constrained and an absolute free situation.⁴

This article is an attempt to give an account of this theoretical problem in relation to the *International Court of Justice* (ICJ), a central forum of many-faceted conflicts in international law. This account is both descriptive and normative, or, in other words, tries to answer the questions of how the ICJ actually operates and how it should act as regards that problem. The status of adjudication is, itself, as stated above, a complex question and it gains another ingredient of complexity when it is seen from the perspective of international courts, because in this case the “legal character of international law” also comes to the fore.⁵ Nevertheless, this work will not reflect upon this prior question, but will assume that

² H. Hart, ‘American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream’ (1977) 11 *Georgia Law Review* 973.

³ H. Hart (n 1) 973.

⁴ There are other examples. William Lucy used a similar conceptual device to classify theories of adjudication. In an updated version of Hart’s dichotomy, he sees, on one side, the “Orthodox”, who considers the judge bound to some kind of rational limit, and on the other side, the “Heretics” (*Understanding and explaining adjudication*, OUP, Oxford 1999,1). Jerzy Wroblewski proposes three types of ideology: “bound judicial decision-making”, “free judicial decision-making” and “legal and rational decision-making” (*The Judicial Application of the Law*, Kluwer, London 1992, 321).

⁵ Two of the most important legal theorists of the XXth century, Kelsen and Hart, defended in different ways that international law is a kind of law and that, despite the differences between the domestic and the international normative orders, there are common denominators that justify the application of the concept “law” to both. See Hart, *The Concept of Law* (2nd edn OUP, Oxford 1997) 215-218; see also Hedley Bull, ‘Hans Kelsen and International Law’, in *Essays on Kelsen*, edited by Richard Tur and William Twining (Clarendon Press, 1986) 322-325.

international law deserves the “legal label” despite some singular features as opposed to domestic law. This is an uncontested and stipulated starting point in order to give priority to the main problems the title of this article suggests.

Therefore, my choice is to focus on the nature of the judicial decision of the ICJ. In this respect, I would like to propose a further distinction of two perspectives in which the activity of judicial “law-making” can be seen: (i) the degree of creativity of the decision in relation to previous legal sources and (ii) the authority that this decision has in relation to future similar cases. In the first case, the question is whether and to what extent the decision is creative, inventive and discretionary (an unconstrained choice between alternatives, an act of will), or an act of merely application or discovery of a pre-existent law, fully defined in a previous source. In the second case, the challenge is to find out whether the judicial decision is a mere solution of a present concrete conflict, or if it transcends the specific case and stands as a source of law, a precedent to be taken into account in future similar cases.

Thus, the descriptive and the normative dimensions of the central topic are analytically decomposed in these two perspectives, leading us to a fourfold investigation: 1) Are ICJ’s decisions creative? 2) Should they be? 3) Are ICJ’s precedents “sources of international law”? 4) Should they be?

The structure of this article is inspired by the explanatory strategy proposed by Jerzy Wroblewski as regards the judicial decision:

From a descriptive point of view the question is whether or not a judicial practice, in defined spacio-temporal dimensions, is an ‘application of law’ or ‘law-making’. To answer this question one must (a) make clear the meaning of the terms ‘application of law’ and ‘law-making’, and (b) analyse concrete judicial decisions in relation to the valid legal rules which are their normative basis.⁶

From a normative point of view, one may add that both descriptive steps proposed by Wroblewski (clarifying the terms and analysing concrete cases to find out the concept to which they fit better) are a necessary starting-point from which it is plausible to conceive some normative patterns of how judges should decide. The next topic will describe how this

⁶ Jerzy Wroblewski (n 3) 315.

problem arises in the context of ICJ and how some relevant authors in international law deal with it; the second topic will develop a short case analysis to depict, according to premises previously stated, the actual nature of ICJ decision-making. Finally, this article will raise some concluding remarks, specially related to the normative claims that can reasonably be made under the evidence described.

2. The *International Court of Justice*: law-making or law-applying powers

The paragraph 1 (d) of Article 38 of the Statute of the ICJ provides that when deciding a dispute the Court shall apply “*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*”.⁷ In addition, Article 59 states that “*The decision of the Court has no binding force except between the parties and in respect of that particular case*”.⁸ Thus, among other sources, the ICJ shall apply judicial precedents as a “*subsidiary and indirect source of international law*”.⁹ The combination of both provisions seems to institutionalise, through a formal normative text, a traditional theory of the sources of law in the ICJ’s decision-making, that is to say, a theory that considers the judicial precedent as a secondary and subsidiary reference for decision, similar to the canonical description of civil law statutory systems.

But that first impression is not so uncontroversial within the general literature on the subject. According to the Oppenheim’s International Law, “*since judges do not in principle make law but apply existing law, their role is inevitably secondary since the law they propound has some antecedent source*”.¹⁰ Hugh Thirlway says, on the other hand, that judicial decisions, differently from the other three formal sources indicated in paragraphs (a) to (c) of Article 38, are material sources which have a “*special degree of authority*”.¹¹

⁷ <www.icj-cij.org/icjwww/ibasicdocumentes/ibasicstext/ibasicstatute.htm> accessed 9 January 2007.

⁸ <www.icj-cij.org/icjwww/ibasicdocumentes/ibasicstext/ibasicstatute.htm> accessed 9 January 2007.

⁹ *Oppenheim’s International Law*, R. Jennings and A. Watts (eds.) (Vol I, 9th edn Longmar, London and New York, 1996) 41.

¹⁰ *Oppenheim’s International Law* (n 8) 41.

¹¹ Hugh Thirlway, ‘The Sources of International Law’, in M. Evans (ed), *International Law* (2nd edn OUP, Oxford 2006, 115-139) 129.

Originally, when the draft of the Statute of the *Permanent Court of International Justice* was made in 1920, the prevailing idea among the Advisory Committee of Jurists was that judicial decisions could only find and develop the existing international law and not create new law.¹² These are, nonetheless, incomplete descriptions of the Court's tasks, as Shahabuddeen notes, and it remains to be answered "*whether the interpretation and development of the international law in force can result in the creation of new law*".¹³ He points out that when the Court decides one case according to the existing legal system, "*new law has in fact been made*".¹⁴ Moreover, he notes that "*the molecular nature of the activity does not obscure its creative character*".¹⁵

The application of the existing law to settle a particular dispute should not be seen, in this vein, as an automatic act.¹⁶ As Tom Ginsburg warns, the process of judicial reasoning demands more than a mathematic syllogism. It requires, to a certain extent, a creation which may be the result of the exercise of interpretation, because the existing rules do not always provide a definite answer.¹⁷

The creative character of the Court's functions was also explicit at Judge Alvarez's dissenting opinion:

(...) by virtue of the dynamism of international life (...), (the Court) has a double task: to declare the law and develop the law. (...) As regards the Court's second task, namely, the development of law, it consists of deciding the existing law, modifying it and even creating new precepts, should this be necessary. This second mission is justified by the great dynamism of international life.¹⁸

Yet, the inescapable awareness of the ICJ's power to create new precepts comes along with its resistance to acknowledge it. The law can be even changed by a decision, but the Court usually does not explicitly accept it.¹⁹ One reason for this caution is probably

¹² In this sense Mohamed Shabuddeen, *Precedent in the World Court* (Grotius Publications, CUP, Cambridge 1996) 54.

¹³ Mohamed Shabuddeen (n 11) 84.

¹⁴ Mohamed Shabuddeen (n 11) 85.

¹⁵ Mohamed Shabuddeen (n 11) 91.

¹⁶ R. Higgins, 'Problems and Process: International Law and how we use it' (Clarendon Press, Oxford 1994) 202.

¹⁷ Tom Ginsburg, 'Bounded Discretion in International Judicial Law Making' (45*Va J. Int'l L*) 631, 635.

¹⁸ *Anglo-Iranian Oil Company* (1952), ICJ Reps, dissenting opinion 132.

¹⁹ In this sense Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, (London, Stevens & Sons Limited, 1958) 75.

related to a sensitive topic that all international courts have to deal with: the States' sovereignty. Lauterpacht puts bluntly:

(...) in so far as sovereignty is, inaccurately, identified with the traditional legal right of States to be judges in their cause, submission to the jurisdiction of the Court does imply a surrender of sovereignty. The measure of that surrender is to some extent proportionate to the degree of discretion open to the Court (...).²⁰

The case *Legality of the Use or Threat of Nuclear Weapons* illustrates this judicial tendency to caution:

Finally, it has been contended by some states that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It 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 applicable to the threat or use of nuclear weapons. (...) The Court could not accede to this argument; it 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 notes its general trend.²¹

Despite not following the doctrine of binding precedents (*stare decisis*),²² the ICJ looks and refers constantly to its previous decisions and opinions²³ as a result of the common belief that these decisions and opinion are an expression of the “*authoritative pronouncements upon the current state of international law*”.²⁴ Shahabuddeen gives various examples of the explicit reliance by the ICJ on its own previous decisions and on the decisions of its predecessor, the *Permanent Court of International Justice*.²⁵ This reliance would result in different “*degrees of crystallisation*”²⁶ of international rules, varying from a fixed jurisprudence to the recognition of principles applied by the Court in other cases.²⁷

One may say that this occurs as a result of the direct influence of the practice emanated from the common law countries, but that is not a complete explanation of the phenomenon. The practice of attaching great value to precedents can be seen not only in

²⁰ Sir Hersch Lauterpacht (n 18) 394.

²¹ *Legality of the Use or Threat of Nuclear Weapons* (1996), ICJ Reps 226 para 18.

²² Mohamed Shabuddeen (n 11) 98 and Sir Hersch Lauterpacht (n 18) 13.

²³ Sir Hersch Lauterpacht (n 18) 9.

²⁴ R.Higgins (n 15) 202.

²⁵ Mohamed Shabuddeen (n 11) 23-28.

²⁶ Sir Hersch Lauterpacht (n 18) 18.

²⁷ Sir Hersch Lauterpacht (n 18) 18.

the Anglo-American legal system, but also in the Continental system. That is the thesis of Lauterpacht when comparing the Anglo-American and the Continental legal traditions: “*no legal doctrine and no express legal provision can do away with the fact that judges actually do, within their sphere, make law; that the legal principles or views enunciated in and underlying judicial decisions do inevitably influence judges in future cases in pari materia.*”²⁸

The author suggests that the difference between these two traditions, namely, of binding precedents and of merely persuasive precedents, is of degree rather than of kind. Whereas in the Anglo-Saxon countries the departure from a precedent is possible through the process of distinguishing, it is possible to see many civil law countries where reasoning is becoming increasingly concerned with giving good reasons to deviate from a precedent.²⁹

In the international field the respect demonstrated to previous decision is not different. In pursuing “*precedential consistency*”,³⁰ the judges feel compelled to follow previous decisions unless there are strong reasons to reject them.³¹ Shahabuddeen, in his separate opinion in *Phosphate Lands in Nauru*, suggested that the value of a precedent “*however high one may be disposed to rate it, is only influential not controlling*”.³² For Lauterpacht, however, thanks to the duty of consistency in the administration of justice, precedents should play more than mere influence in future decisions,³³ even if a power to depart remains as a matter of justice: “*no legal rule or principle can bind the judge to a precedent which, in all the circumstances, he feels bound to disregard. In that case he will contrive to do what he considers to be justice through the elastic process of ‘distinguishing’ and in other ways.*”³⁴

Rosenne explains that the practice of regularly taking precedents into account and even following them is a natural phenomenon in judicial activity, regardless of any theory of

²⁸ Sir Hersch Lauterpacht, ‘The So called Anglo-American and Continental Schools of Thought in International Law’ (1931) 12 *BYBIL* 31, 52-53.

²⁹ Sir Hersch Lauterpacht (n 27) 55. A similar conclusion about the remaining differences and general convergences between the two systems can be found in the major comparative work *Interpreting Precedents: a comparative study*, Neil MacCormick and Robert Summers (Aldershot, Dartmouth, 1997) 532-533.

³⁰ Mohamed Shabuddeen (n 11) 31.

³¹ In this sense Mohamed Shabuddeen (n 11) 31 when describing the reasons given for Judge Read Lauterpacht and Ago.

³² *Phosphate Lands in Nauru* (1992), ICJ Reps, separate opinion 298.

³³ In this sense Sir Hersch Lauterpacht (n 18) 14.

³⁴ Sir Hersch Lauterpacht (n 18) 14.

binding precedent.³⁵ For Lauterpacht, this adherence power of precedents springs from the fact that they are persuasive, as they “*embody a volume of legal experience*”³⁶ and pursue the “*maintenance of security and stability*”,³⁷ one important function of judicial power.

Also worth noting is the tendency to rely on jurisprudence as a source of law, which can be explained as a consequence of the absence of written rules and, more important, of the necessity to control judicial discretion.³⁸ Despite the lack of obligation to adopt the previous decision, judges cannot simply pretend that the decision does not exist if they want to decide consistently and legitimately. Actually, the duty of “*consistency*”, so important to the credibility of the judicial function, impinges on the judges the obligation to justify the departure of the previous decision.³⁹ According to Lauterpacht, the obligation to give reasons in order to deviate from a prior decision has an even more special implication to international law courts due to the fact of the voluntary nature of the international jurisdiction.⁴⁰

A more practical reason for the importance enjoyed by judicial decisions is suggested by Fitzmaurice, who explains that when an advocate quotes a decision before a Court, he does so in the sense that it is “*something which the tribunal cannot ignore, which it is bound to take into consideration and (by implication) which it ought to follow unless the decision can be shown to have been clearly wrong (...)*”.⁴¹ The practice of invoking its prior decisions, however, is neither reflected on Article 38 nor on Article 59 of the Statute of the Court.⁴² Subsidiary, indirect and material are the expressions most cited to describe the current status of judicial decisions. Should judicial decisions be regarded simply as a secondary source of law?

Fitzmaurice criticises this usual classification.⁴³ His central claim is that judicial decisions should not be considered as mere “*one amongst various material sources*”,⁴⁴ and

³⁵ S. Rosenne, ‘The Law and the Practice of the International Court’ (Vol II, A.W. Sijthoff: Leyden 1965) 612.

³⁶ Sir Hersch Lauterpacht (n 27) 53.

³⁷ Sir Hersch Lauterpacht (n 27) 53.

³⁸ In this sense Sir Hersch Lauterpacht (n 18) 14.

³⁹ In this sense Sir Hersch Lauterpacht (n 18) 15.

⁴⁰ In this sense Sir Hersch Lauterpacht (n 18) 15.

⁴¹ Sir Gerald G. Fitzmaurice, ‘Some Problems Regarding the Formal Sources of International Law’, in Martii Koskeniemi (ed), *Sources of International Law* (Ashgate, Dartmouth, Aldershot, Burlington USA, Singapore, Sydney 2000, 57-80) 76.

⁴² Sir Hersch Lauterpacht (n 18) 18.

⁴³ Sir Gerald G. Fitzmaurice (n 40) 73-74.

even if they are not a direct formal source of law, it would certainly be against “*practical reality*”⁴⁵ to relegate them through diminishing classification. At least they should have the status of a “*quasi-formal*”⁴⁶ source. According to him, the precedent should be followed in any similar case, unless there are grounds for distinguishing the two cases.⁴⁷ Despite being aware of the fact that, technically, international decisions need not to be followed, as a result of the provisions of Articles 38 and 59 of the Statute of the ICJ, Fitzmaurice says that “*subject to various limitations, some kinds of decisions, once given, are almost certain, or intrinsically likely to be followed; and that they may be followed even by a tribunal which, had it been the one originally called upon to decide the point involved, might have decided it differently*”.⁴⁸

To Fitzmaurice, the *Anglo-Norwegian Fisheries* case⁴⁹ can be seen as an illustration of this role – a *quasi-formal* source – played by judicial decisions. In this case, the method employed for the delimitation of the fisheries zone – straight lines – by the Royal Norwegian Decree was not considered contrary to international law. Although, in principle, only the United Kingdom was bound by the decision, Fitzmaurice states that neither the United Kingdom nor any other country could successfully contest this subject since the decision represented a new application of the maritime law,⁵⁰ or, as Shahabuddeen explains, it influenced decisively the subsequent development of state practice.⁵¹

In the *Libya/Malta* case, Judge Jennings criticised the Court’s interpretation of Article 59 of the Statute and, actually, ended up clarifying its role. The context of the case was that the Court rejected Italia’s claim to intervene in the contention between Malta and Libya regarding the delimitation of the areas of continental shelf, but, based on Article 59, stated that its rights would be safeguarded because “*the object of Article 59 is simply to*

⁴⁴ Sir Gerald G. Fitzmaurice (n 40) 74.

⁴⁵ Sir Gerald G. Fitzmaurice (n 40) 74.

⁴⁶ Sir Gerald G. Fitzmaurice (n 40) 77.

⁴⁷ Sir Gerald G. Fitzmaurice (n 40) 77.

⁴⁸ Sir Gerald G. Fitzmaurice (n 40) 75.

⁴⁹ *Anglo-Norwegian Fisheries* (1951) ICJ Reps 116.

⁵⁰ Sir Gerald G. Fitzmaurice (n 40) 74-75.

⁵¹ Mohamed Shabuddeen (n 11) 209.

*prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes.*⁵²

According to Judge Jennings, the idea that the principles stated in a judgement “*are not binding in the sense that they might be in some common law systems through a more or less rigid system of binding precedents*”, as one can imply from Article 59, doesn’t mean that it has no role at all. Actually, the constant use of the Court’s jurisprudence demonstrates that “*Article 59 does by no manner of means exclude the force of persuasive precedent*”,⁵³ and that the role played by Article 59 is to attach the *dispositif* of a decision to the parties of that specific case.⁵⁴ As Shahabuddeen contends, the force of a judicial decision to bind the parties of a case doesn’t exclude the effect that it may have as a precedent of international law.⁵⁵

To sum up, this topic shows that the main literature agrees that the common categories and classifications are not accurate enough to explain the nature of ICJ decisions. Thus, it is simplistic and incongruent to state that these decisions are a mechanical application of law, as it is far from precise to defend that precedents are merely subsidiary. Both claims are superficial and don’t take the decisional reality seriously in order to derive plausible descriptive and normative conclusions from it.

3. The *Arrest Warrant Case*

The *Arrest Warrant* case involved a dispute between Congo and Belgium regarding an international arrest warrant issued by a judge from the latter country against the Minister of Foreign Affairs of Congo on the grounds of the occurrence of war crimes and crimes against humanity.⁵⁶ The question submitted to the Court was whether Ministers of Foreign Affairs enjoyed any kind of immunity and to what extent this immunity could be applied.

⁵² *Libya/Malta Continental Shelf (Italian Intervention)* (1984) ICJ Reps 3, para 27, 158 (Judge Jennings’ dissenting opinion).

⁵³ *Libya/Malta Continental Shelf* (n 51) para27, 158.

⁵⁴ *Libya/Malta Continental Shelf* (n 51) para27, 158.

⁵⁵ Mohamed Shabuddeen (n 11) 100.

⁵⁶ *Arrest Warrant case* (2002), ICJ Reps 3, 1-30.

The Court analysed the question on the basis of customary international law, since the Conventions that were brought by the parties could not answer the question.⁵⁷ The Court, then, observed that customary international law put the Ministers of Foreign Affairs in the same position as the Heads of State and the Heads of Government,⁵⁸ and concluded that such Ministers enjoyed “*full immunity from criminal jurisdiction and inviolability*.”⁵⁹ For the Court, such immunities covered both the Minister’s “*official*” and “*private*” capacity.⁶⁰

Finally, the Court rejected Belgium’s claim because the immunities granted for Ministers of Foreign Affairs could not act as a protection in cases where war crimes and crimes against humanity have occurred. According to the Court, no exception could be found in State practice.⁶¹ The Court adopted the thesis of full immunity for those Ministers without being supported by a pre-existing law. Actually, the extent of the immunities was not clearly drawn on the treaties nor represented by State practice, as the dissenting opinions show.

In his dissenting opinion, Judge Al-Khasawneh said straightforwardly that “*the nature and extent of immunities enjoyed by Foreign Ministers is far from clear*.”⁶² He illustrated it with the point made by the *ILC Special Rapporteur on Jurisdictional Immunities of States and their Property* that the basis for the immunities conferred for Ministers of Foreign Affairs were “*of comity rather than of established rules of international law*.”⁶³

Judge Van Den Wyngaert, also in her dissenting opinion, emphasized that “*there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution*.”⁶⁴ According to her, there may be state practice about immunities for current (*Quaddafi* case) or former (*Pinochet* case) Heads of State, but not to Ministers of Foreign Affairs. Rather, what exists for those Ministers would be a “*negative practice*.”⁶⁵ In order to support her argument, Judge Van Den Wyngaert analysed several international sources⁶⁶ and concluded that no rule of customary international law “*assimilates Foreign*

⁵⁷ *Arrest Warrant* case (n 55) para.52, 19.

⁵⁸ *Arrest Warrant* case (n 55) para.53, 19.

⁵⁹ *Arrest Warrant* case (n 55) para.54, 20.

⁶⁰ *Arrest Warrant* case (n 55) para.55, 20.

⁶¹ *Arrest Warrant* case (n 55) para.58, 22.

⁶² *Arrest Warrant* case (n 55) para.1 (Judge Al-Khasawneh dissenting opinion).

⁶³ *Arrest Warrant* case (n 55) para.1 (Judge Al-Khasawneh dissenting opinion).

⁶⁴ *Arrest Warrant* case (n 55) para.10 (Judge Van Den Wyngaert dissenting opinion).

⁶⁵ *Arrest Warrant* case (n 55) para.13 (Judge Van Den Wyngaert dissenting opinion).

⁶⁶ Namely, the 1969 *Convention on Special Missions* and the 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*, the legal doctrine, the draft resolution of the

*Ministers and Heads of States.*⁶⁷ She believes that Principle 3 of the *Nuremberg Principles* represents an exception to immunity under international law and that the Court's decision was contrary to a substantial part of legal doctrine. She stated: "*The Court has not engaged in the balancing exercise that was crucial for the present dispute.*"⁶⁸⁻⁶⁹

Jan Wouters, in a critical remark, considers the effects that this decision will have as a real international precedent, transcending the particular case:

It goes without saying, however, that in practice the impact of the Court's judgments as a precedent or leading case with regard to the issue of immunities is much broader than the mere withdrawal of this particular arrest warrant. The Court's decision does seriously affect the way in which Belgium and other states deal with the issue of immunities in pending and future cases.⁷⁰

4. Conclusion

Adjudication has been much debated in the course of the last two centuries. This debate has usually been structured around a conceptual opposition that can be derived from the title of this article: does the ICJ apply or create international law? There is no unique and single response to that question. Any sound approach will depend on the conceptual premises one adopts, consciously or not. This article believes, however, that the dichotomic analytical structure underlying the title is tricky and probably fails to grasp accurately the peculiar nature of the decision of the ICJ. Thus, it tried to escape the rigidity of a "logic of either or" (either creation or mechanical application) and to see the nuances between both extremes. Judges neither create nor apply in the sense these concepts are usually used.

Among the "phrasing formulas" that legal authors use to illustrate the kind of law-making powers of judges, a famous one coined by Holmes is malleable enough to give it a better account. Hart has also adopted it: judges exercise a "genuine though interstitial law-

Institut de Droit International regarding the subject. *Arrest Warrant* case (n 55) para 18-22 (Judge Van Den Wyngaert dissenting opinion).

⁶⁷ *Arrest Warrant* case (n 55) para 21 (Judge Van Den Wyngaert dissenting opinion).

⁶⁸ *Arrest Warrant* case (n 55) para 85 (Judge Van Den Wyngaert dissenting opinion).

⁶⁹ The joint separate opinion of Judges Higgins, Kooijmans and Buergenthal achieved the same conclusion that Ministers of Foreign Affairs do not have the same immunities as such offered to Heads of States. *Arrest Warrant* case (n 55) para 81-82 (Judge Higgins, Judge Kooijmans and Judge Buergenthal dissenting opinions).

⁷⁰ Jan Wouters, 'The Judgement of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks', (2003) 16 *Leiden Journal of International Law* 264.

making power”⁷¹, a kind of discretion that can be equated neither with a mechanical and bureaucratic law-applying judge, nor with a pure legislative-like law-creating power. To make this equation is to lose the opportunity to investigate how it really works. That’s why contemporary literature tends to put the problem in terms of a *continuum*, a more flexible analytical tool to measure both the kind of discretion there is in judicial decision, and the kind of authority it has in the dynamics of precedents. They are a “matter of degree.”⁷² In spite of analysing whether the ICJ does or does not make law, an endless theoretical discussion, it is more important to reflect upon the kind of normativity its decisions do and should have.

The picture of the judicial decision as a logical syllogism and the naïve promises of this kind of formalism have a history. France is the paradigm of a cultural environment of distrust against judges, probably because of the spirit of the bourgeois revolution and the radical popular sovereignty that emerged from it, which deemed judges as elitists from the *Ancien Regime* and led to the codified legal rationality and to the “school of exegesis”.⁷³ The obsession with this theoretical picture of the judge ended up playing the role of hiding his power by giving him a comfortable mask for the sake of a coherent idea of legislative supremacy. Montesquieu has provided the most classical metaphor to this portrait of judicial automatism: “mouthpiece which recites the law”. Neumann, in the XXth century, has used the metaphor of the “phonograph” to refer to the French tradition, in which the judge could perform a mere “act of recognition”.⁷⁴ That tradition is the main source which influenced the civil law systems henceforth. In the common law, however, a similar attitude could be seen in the “declaratory theory” of precedents, which claimed that the judges merely declare the

⁷¹ See H. Hart (n 4) 259 and 273.

⁷² Aleksander Peczenik, ‘The Binding Force of Precedent’, in Neil MacCormick and Robert Summers (eds), *Interpreting Precedents: a comparative study* (n 28) 472.

⁷³ Norberto Bobbio, *O Positivismo Jurídico* (Ícone Editora, São Paulo, 1999) 83.

⁷⁴ Franz Neumann, referring to the “phonograph theory” of adjudication, as coined by Morris Cohen, described: “In that theory, the judge performs only an act of recognition. The judgment expresses only those ideas which are already contained in the general norm in an abstract way. The function of the judge is that of making a mere logical subsumption, in which the law is the major premiss, the facts of the case the minor premiss, and the decision of the judge nothing but the application of this major premiss to the minor premiss. (...) The decisive significance of this institution is the attempt to carry the supremacy of Parliament to its logical conclusion, and to prevent the establishment of a rule of judges veiled by the phonograph theory. (...) Today the orthodox theory is a doctrine hiding the power of the judges.” (*The Rule of Law: Political Theory and the Legal System in Modern Society*, Berg Publishers, 1986, 225 and 227-228).

pre-existing law. As MacCormick described, this was a convenient protection to the power of judges, later replaced by the doctrine of “stare decisis”.⁷⁵

This “gap between saying and doing”⁷⁶ is not rare in contemporary theories of adjudication, and can also be found in analyses of the ICJ and other international tribunals. Some examples have been cited in the second part of this article. To see the judges as bureaucrats of the legal system who operate a deductive syllogism and play a merely complementary role in the political decisional chain fails to provide a fruitful grasp of the institutional reality in which domestic and international law are produced.

Put in an international legal perspective, the same question arises. International tribunals, under the “traditional” theoretical perspective, should be subordinated to politically responsible actors, applying their decisions impartially, not an independent piece in the international legal realm. If, however, one unveils the “dirty little secret”⁷⁷ upon which rest not only the justificatory edifice of the judiciary within national democracies, but also the international tribunals under the ideal of an international “rule of law”, one also needs to face the new argumentative burdens that emerge from it. Judges exercise creativity when making decisions. The acknowledgement of this fact should be the starting point of a reflection that tries to establish the limits and conditions of legitimacy of this “creativity”. The normative theory, in this sense, should take into account a realistic picture of judicial decision.

If, in descriptive terms, it is impossible that judges work as the “mouthpiece of the law”, and therefore, inadequate, in normative terms, to claim that they should act as if they were absolutely constrained, it is more useful to investigate the degree of rational limit it is reasonable to expect if the judge is committed to the rule of law. The most reasonable answer as to whether judges should make or apply law lies somewhere between that *continuum*, which is a more nuanced device to perceive this phenomenon. To figure out that judges create law within a set of rational argumentative limits, coupled with a principle of

⁷⁵ Neil MacCormick, among others, defends this thesis: “Once these theories had become part of the intellectual bag-and-baggage of the law, it was clear that judges could no longer hide behind the declaratory theory. If they were to legislate, they must legislate openly. But Austin’s invitation was not accepted. Judges came to accept that to deviate from previous decisions is to legislate” (‘Can Stare Decisis Be Abolished?’ (1966) *Juridical Review*, 204).

⁷⁶ See *Interpreting Precedents: a comparative study* (n 28) 500.

⁷⁷ Unger’s expression borrowed by Jeremy Waldron, ‘Dirty Little Secret’ (review article of the book *What should legal analysis become?* Roberto Mangabeira Unger) (1998) 98 *Columbia Law Review*, 510-530.

coherence and formal justice (treating like cases alike) may provide a better path. Precedents “represent a method by which courts talk to themselves”,⁷⁸ and may show that, even if creative, the judicial decision is not arbitrary. The old hesitation of recognising an inevitable fact, albeit the evidences produced by concrete analysis of case-law (or, at least, of “hard-case-law”⁷⁹), can be mitigated by claiming that, at least, judges should and could make an effort to build a coherent line of precedents.

Although the same resistance also exists as to the vision of judicial precedents as sources of law, this perspective opens an interesting front of reflection in legal theory, as recent studies show.⁸⁰ It is not plausible to claim that judges do or should “revolutionize” the law, but they indeed “develop” it through inventive decisions, which influences but do not absolutely bind future decisions, as it has been shown above.⁸¹ A theoretical enterprise that is able to acknowledge the “nakedness of the King”⁸² – judges have discretion and precedents play a role nobody should ignore – and then reflect upon the conditions within which this power may be realistically exercised is more profitable. If one overcomes the step of “seeing”, then it is possible to pursue a second step of rationally “controlling” or “constraining”.

Having said that, it is possible to rehearse a few conclusions regarding those questions listed in the introduction. 1) Are ICJ’s decisions creative? Yes, in a specific sense: they are not and cannot be fully contained in previous sources of international law. 2) Should they be creative? Yes, to the extent that denying this fact will not avoid or forbid them developing the law, but will only conceal an inevitable fact. Thus, acknowledging it should be the starting point of critical evaluation. 3) Are ICJ’s precedents “sources of international law”? Yes, to the extent that they influence future decisions and cannot be disregarded if one wants to know what the law is. The dichotomy of “binding” and “not binding” does not clearly describe the dynamics of precedents, which constrain in a singularly argumentative way and can be classified through a more flexible adjective: they

⁷⁸ Peter Blume, ‘The Unbearable Lightness of Precedent’, 48 *Scandinavian Studies in Law* 25, 31.

⁷⁹ This is a free adaptation of an expression made famous by Ronald Dworkin. See “Hard Cases”, (1975) 88 *Harvard Law Review* 1057.

⁸⁰ For the theoretical implications of this new approach, see mainly *Interpreting Precedents: a comparative study* (n 28) 542-544.

⁸¹ This distinction between “developing” and “revolutionizing” is made by Peter Blume (n 77) 30.

⁸² The image of a naked king became a common literary reference to refer to shortsightedness (Hans Christian Andersen’s tale, ‘The Emperor’s New Clothes’).

are persuasive. 4) Should they be “sources of international law”? Yes, in accordance to all premises developed in this article and also to the concrete cases analysed, it is impossible to know a great part of international law without looking carefully at judicial decisions and their reasoning. To take precedents into account in legal reasoning is a legitimate pursuit of formal justice.

Bibliography

ANDERSEN, Hans Christian ‘The Emperor’s New Clothes’, found in <http://www.pitt.edu/~dash/type1620.html>, accessed in January, 10th, 2007.

BLUME, Peter ‘The Unbearable Lightness of Precedent’ 48 *Scandinavian Studies in Law* 25.

BOBBIO, Norberto *O Positivismo Jurídico* (Ícone Editora, São Paulo, 1999).

BULL, Hedley ‘Hans Kelsen and International Law’, in *Essays on Kelsen*, Richard Tur and William Twining (ed.) (Clarendon Press, 1986).

DWORKIN, Ronald “Hard Cases”, (1975) 88 *Harvard Law Review* 1057.

FITZMAURICE, Gerald G. ‘Some Problems Regarding the Formal Sources of International Law’, in Martii Koskenniemi (ed.) *Sources of International Law* (Ashgate, Dartmouth, Aldershot, Burlington USA, Singapore, Sydney, 2000, 57-80).

GINSBURG, Tom ‘Bounded Discretion in International Judicial Law Making’ 45 *Va.J.Int’lL* 631.

HART, H. L. A. ‘American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream’ (1977) 11 *Georgia Law Review* 969.

_____. *The Concept of Law* (2nd edn OUP, Oxford, 1997).

HIGGINS R. *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994).

LAUTERPACHT, Sir Hersch *The Development of International Law by the International Court* (London, Stevens & Sons Limited, 1958);

_____. ‘The So called Anglo-American and Continental Schools of Thought in International Law’ (1931) 12 *BYBIL* 31.

LUCY, William *Understanding and explaining adjudication* (OUP, Oxford 1999).

MACCORMICK, Neil ‘Can Stare Decisis Be Abolished?’ (1966) *Juridical Review*.

MACCORMICK, Neil and SUMMERS, Robert *Interpreting Precedents: a comparative study* (Aldershot, Dartmouth, 1997).

NEUMANN, Franz *The Rule of Law: Political Theory and the Legal System in Modern Society* (Berg Publishers, 1986).

Oppenheim's International Law, R. Jennings and A. Watts (eds.) (Vol I, 9th edn Longmar, London and New York, 1996).

PECZENIK, Aleksander 'The Binding Force of Precedent', in Neil MacCormick and Robert Summers (ed.) *Interpreting Precedents: a comparative study* (Aldershot, Dartmouth, 1997).

ROSENNE S. *The Law and the Practice of the International Court* (Vol II, A.W. Sijthoff:Leyden, 1965).

SHAHABUDDEEN, Mohamed *Precedent in the World Court* (Grotius Publications: CUP, Cambridge 1996).

THIRLWAY, Hugh 'The Sources of International Law', in M. Evans (ed.) *International Law* (2nd edn OUP, Oxford 2006, 115-139).

WALDRON, Jeremy 'Dirty Little Secret' (1998) 98 *Columbia Law Review* 510.

WOUTERS, Jan 'The Judgement of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks', (2003) 16 *Leiden Journal of International Law* 264.

WROBLEWSKI, Jerzy *The Judicial Application of the Law* (Kluwer, London, 1992).

Judicial Decisions

Anglo-Iranian Oil Company (1952), ICJ Reps.

Legality of the Use or Threat of Nuclear Weapons (1996), ICJ Reps 226.

Phosphate Lands in Nauru (1992), ICJ Reps.

Libya/Malta Continental Shelf (Italian Intervention) (1984) ICJ Reps 3.

Arrest Warrant Case (2002), ICJ Reps 3.