THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF THE LAW OF TREATIES

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Sir Hersch Lauterpacht had paid lip-service to the idea that ‘Courts have to apply the law and...they have to apply the law in force.’ He proceeded to say, however, that: ‘[t]his does not mean that they do not in fact shape or even alter the law. But they do it...with caution.’ He considered that the International Court of Justice (ICJ) had to exercise in each case a creative activity, having in mind the necessities of the international community.\footnote{Sir Hersch Lauterpacht, The Development of International Law by the International Court (Cambridge University Press, 1982), p. 75. This contribution is based on a lecture presented in the Lauterpacht Lecture Series on The Development of International Law by the ICJ, at the University of Glasgow on 28 April 2010.}

Though the ICJ has itself stated on numerous occasions that ‘[i]ts duty is to apply the law as it finds it, not to make it,’\footnote{See Shabtai Rosenne, ‘Sir Hersch Lauterpacht’s Concept of the Task of the International Judge’, 55 AJIL (1961) 825–862, p. 835.} it is by now a truism to state that it has played an important role in the development of international law both through its advisory opinions and its contentious cases. Ultimately, the outcome of many of its cases have depended on the vision which particular judges have had of the role the Court should play in the development of international law. At one end of the spectrum, judges like Alvarez and Weeramantry would have had the Court create and formulate new precepts ‘to bring the law into harmony with the new conditions of social and international relations, founded on social interdependence.’\footnote{Southwest Africa cases (Liberia v. South Africa), ICJ Reports 1966, para. 89. Again, ‘The possibility of the law changing is ever present: but that cannot relieve the Court from its obligation to render a judgment on the basis of the law as it exists at the time of its decision’ (Fisheries Jurisdiction (United Kingdom v. Ireland), Merits, ICJ Reports 1974, para.40; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para.18.} At the other end, were those who, like Judge Guillaume, believed in transactional justice – the Court’s
role was merely to decide the case at hand and to satisfy the parties, with the minimum of verbiage necessary for this purpose.

This contribution in honour of Christian Dominé, whose work has taken an innovative approach to many traditional areas of international law, will focus on the way in which the Court has helped shape a law of treaties more in keeping with the requirements of contemporary society. International conventions being the bread and butter of the Court’s mandate under Article 38 of its Statute, the material is necessarily voluminous, so my remarks can only be impressionistic ones. The overall picture shows that the Court, while it has been at pains in its jurisprudence to stress the stability of treaty relations and generally strengthen the classical doctrine of the law of treaties, has at the same time taken into account the evolution of international society.

Treaties are *par excellence* the legal act or transaction by which social claims and hence social change cross the normative threshold, in other words they ensure the passage of non-law into law, although the increasing role played by soft law has made the shifting boundary between the normative and non-normative more difficult to seize. It is clear that contemporary transformations in the social and legal environment have affected general law-making by States: (I) the complexity and increasing technicity of the social environment has affected the formal techniques of treaty-making and led to the diversity of treaty forms; and the emergence of a multiplicity of non-state actors has challenged the monopoly of the State in law-making; (II) though the law of treaties is concerned with the *instrumentum* and not the *negotium*, the substance of the norms in certain functional fields of international law has affected law-making; thus the budding of an international public policy and hierarchization of international law has had an impact, *inter alia*, on the changing nature of State consent underlying treaty-making in certain fields; and (III) the proliferation of different subsets of norms has been said to challenge the unity of international law, including the unity of the 1969 Vienna Convention regime.\(^5\)

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