CHAPTER 10

The Court’s Contribution to Determining the Content of Fundamental Principles of International Law

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International Law: A Legal System

The subject of the panel of the Conference held on 23 September 2013 to which this presentation contributed was “The International Court of Justice and the International Legal System”. Some may believe that the manner in which the second element of this relationship is expressed—‘international legal system’—is merely a somewhat more elaborate and elegant way of referring to our own discipline, international law. However, these two formulations may be used indistinctly only if one considers that international law amounts to a system. This is what I think, and I believe the Court thinks so too, not only because this was the title chosen for this session, but above all because of the contribution it has made throughout the existence of the Hague Courts.

Let us briefly consider the notion of ‘system’. To borrow this notion from the great Geneva linguist Ferdinand de Saussure, a system constitutes an organic whole whose elements can only be defined in relation to one another and according to their respective positions within it. Contrary to what some—for fortunately, a minority—affirm, international law is not an aggregate or juxtaposition of scattered rules. As the Court has said:

[...] a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.\footnote{Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, p. 76, para. 10.}

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The Court employed the expression ‘legal system’ in its 1949 advisory opinion on *Reparation for Injuries*, to refer to the plurality of the types of subjects of international law, and again in its 1971 opinion on *Namibia*, in respect of the interpretation of treaties through time.

For a system to exist, three elements must be present. *First*, completeness. There must always be some means of settling legal disputes, even in the absence of specific rules. This is what the authors of the Statute of the Court had in mind by including, at letter (c) of the first paragraph of Article 38 of the Statute, general principles of law. This is also what the Permanent Court may have had in mind in formulating what later became known as the ‘Lotus principle’ (though often improperly invoked). This is above all what the Court has put into practice by incorporating the notion of equity into its decision-making tools, which is consubstantial to the idea of law and justice, as the Court noted in, among others, the *North Sea Continental Shelf* and *Frontier Dispute (Burkina Faso/Mali)* judgments.

*Second*, coherence. This means that if two rules which both appear applicable to the same issue lead to contradictory results, either there must be some conflict of norms rule in order to settle such a conflict, or the rules concerned must be interpreted harmoniously. This is what the Court has generally done, including through the use of rules such as ‘*lex specialis derogat legi generali*’. It is true that, when confronted with taking politically sensitive positions in the *Nuclear Weapons* advisory opinion requested by the General Assembly, the Court chose not to choose. But this should rather remain an exception.

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7 *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, ICJ Reports 1986, p. 633, para. 149.

Third, unity. This is the idea of applying rules that are part of a larger whole. For this whole to exist and take shape, it is vital that there be a certain number of principles which are at the basis of the legal corpus, and which constitute its framework. As the Chamber of the Court stated in the Gulf of Maine case, these are “rules of international law in whose case the use of the term ‘principles’ may be justified because of their more general and more fundamental character”.

Fundamental Principles of International Law

Let us turn now to these fundamental principles. This paper will mostly focus on the Court’s contribution to determining the content of the fundamental principles of international law, those, that is, which are at the summit of the system because of their content, and which contribute to giving the system its aim.

We find the fundamental principles of contemporary international law in the Charter of the United Nations, albeit formulated in different ways and in different places. There is nothing surprising in the fact that in its first judgment, in the Corfu Channel case of 1949, “elementary considerations of humanity”—a notion which heralded the importance of the protection of human rights as a fundamental principle—and respect for the territorial sovereignty of States both appear in the Court’s legal argumentation. Some decades later, the Court took advantage of the Friendly Relations Declaration contained in General Assembly Resolution 2625 (XXV) to identify the fundamental principles, establish their content and affirm their customary character. The Court has gone farther than simply restating the text of the Charter or of General Assembly resolutions when having to apply these principles to the cases for which it has been seized.

The following principles are identified in the Friendly Relations Declaration:

(a) Refraining from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;
(b) The principle that States shall settle their international disputes by peaceful means;

10 Corfu Channel (United Kingdom v. Albania), Merits, Judgment, ICJ Reports 1949, p. 22.
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(c) The duty not to intervene in matters within the domestic jurisdiction of any State;
(d) The duty of States to cooperate with one another;
(e) The principle of equal rights and self-determination of peoples;
(f) The principle of sovereign equality of States;
(g) The principle that States shall fulfil in good faith the obligations they assume.

In this text, I will leave aside the analysis of the principles of cooperation and sovereign equality, and I will add another principle, which today is undoubtedly a fundamental principle, and which is only mentioned as part of the other principles in Resolution 2625 (XXV): the respect of the fundamental rights of the human person.

The greatest contribution made by the Court with regard to fundamental principles begins in the 1970s. Having rejected the existence of an *actio popularis* in international law in its 1966 judgment in the *South-West Africa* cases, the Court found it appropriate to mention in an *obiter dictum* of its following judgment, in the *Barcelona Traction* case, that certain obligations relative to the protection of human rights had an *erga omnes* character. Soon after, its advisory opinions on *Namibia* and *Western Sahara* would allow the Court to affirm the legal nature of the principle of self-determination, and to ascertain its content.

**The Right of Peoples to Self-determination**

Let us begin with the principle of self-determination. It is undoubtedly thanks to the *Namibia* and *Western Sahara* advisory opinions that the legal nature of the principle was no longer questioned. The Court affirmed the customary character of Resolution 1514 (XV) and the rules relating to decolonisation, clarifying the role of the General Assembly in the matter, and ruling out the possibility for administering powers to unilaterally decide the fate of territories.

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undergoing the process of decolonisation. The Court also emphasised that to hold this right, it is necessary to be recognised as a ‘people’, mentioning that in some cases the General Assembly has not granted this classification to given populations. The advisory opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* applied this idea to a concrete situation, underlining that the existence of a ‘Palestinian people’ was no longer in issue, and that even Israel had recognised the existence of such a people, with the corollary right to self-determination.\(^\text{15}\) The 1995 *East Timor* judgment, while upholding the inability of the Court to exercise its jurisdiction, underlined the *erga omnes* character of the right of peoples to self-determination.\(^\text{16}\)

In its *Kosovo* advisory opinion, the Court decided not to examine whether a right to unilaterally declare independence applied, and purportedly did not examine the applicability, or inapplicability, of the right to self-determination to the situation under consideration.\(^\text{17}\) However, a careful reading allows some further conclusions to be drawn regarding the latter principle. The Court recognised that a significant number of States, those born from decolonisation, were created thanks to the exercise of a right to independence, resulting from the principle of self-determination.\(^\text{18}\) It noted that some unilateral declarations of independence were made outside this context.\(^\text{19}\) The conclusion which follows is simple: where self-determination is applicable, the right to create a new State exists, and in other cases it does not.

The Court also mentioned that widely divergent views exist on the point of knowing whether, aside from cases of decolonisation or foreign domination, the right to self-determination authorises one part of the population of a State to separate from it.\(^\text{20}\) The Court found the same regarding the doctrine of ‘remedial secession’.\(^\text{21}\) The Court’s finding of a deep divergence within the international community regarding these two propositions excludes the possibility of affirming the existence of customary rules in the matter, although not putting an end to the debates surrounding the possible interpretation of the principle of self-determination.


\(^\text{18}\) Ibid., p. 436, para. 79.

\(^\text{19}\) Ibid.

\(^\text{20}\) Ibid., p. 438, para. 82.

\(^\text{21}\) Ibid.
The Prohibition of the Threat or Use of Force

Another important fundamental principle of international law which has been clarified in the Court’s jurisprudence is that of refraining from the threat or use of force in international relations, of which the judgment in Military and Paramilitary Activities in and against Nicaragua is without a doubt the most significant landmark.

The 1986 judgment had the great merit of setting aside permissive interpretations, outlawing armed reprisals and indirect aggression, and keeping collective self-defence within its proper bounds.22 It also distinguished the gravest forms of the use of force, such as aggression, from other less severe ones.23 This judgment deliberately did not touch on the notion of ‘preventive self-defence’,24 but it should be noted that the Court had no reason to pronounce itself on this matter in the context of the case. On the other hand, the Court clearly fixed the scope of self-defence and the conditions it must meet, notably necessity and proportionality.25

As for the 2004 advisory opinion on the Wall, it also restricted the situations in which it was possible to validly invoke self-defence, limiting it to the sphere of inter-state relations, and excluding it in relation to the repression of terrorism within territories which are under the jurisdiction or control of the same State invoking self-defence.26 The DRC v. Uganda judgment followed the same logic. In this judgment, the Court further clarified the scope of self-defence in terms which are of continued relevance. To quote:

Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council.27

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23 Ibid., p. 101, para. 191.
24 Ibid., p. 103, para. 194.
26 Advisory Opinion, ICJ Reports 2004, p. 194, para. 139.
In the context of the use of force, the Wall opinion explicitly reaffirmed a corollary of the prohibition: “the illegality of territorial acquisition resulting from the threat or use of force”.28

**Respect for Territorial Integrity**

Respect for territorial integrity was mentioned as an autonomous principle in the 1986 Nicaragua judgment. The first two judgments of the two Hague Courts, respectively those in the Lotus and the Corfu Channel cases, had however already mentioned the particular importance of the rule. As was stated in the Lotus case,

> the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.29

The Court made the following statement in the Corfu Channel case: “Between independent States, respect for territorial sovereignty is an essential foundation of international relations”.30

In its advisory opinion on Kosovo, the Court arrived at the conclusion that the principle only applies in the sphere of inter-State relations.31 Practice shows, however, that the Security Council has often addressed non-state actors in the context of non-international armed conflict, calling on them to respect the territorial integrity of the States concerned, as demonstrated by resolutions adopted in respect of, for example, the conflicts in Bosnia-Herzegovina, Croatia, Georgia, Azerbaijan, the Democratic Republic of the Congo, and Sudan.32

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29 Judgment of 7 September 1927, PCIJ, Series A, No. 10, p. 18.
30 Judgment, ICJ Reports 1949, p. 35.
31 Advisory Opinion, ICJ Reports 2010, p. 437, para. 80.
32 See in particular UNSC Res. 787 (1992) concerning Bosnia and Herzegovina, in which the Security Council “[s]trongly reaffirms its call on all parties and others concerned to respect strictly the territorial integrity of Bosnia and Herzegovina, and affirms that any entities unilaterally declared or arrangements imposed in contravention thereof will not be accepted”. Similarly, UNSC Res. 971 (1995) “calls upon the parties to intensify efforts […] to achieve an early and comprehensive political settlement of the conflict, including on the political status of Abkhazia, fully respecting the sovereignty and territorial integrity of the Republic of Georgia” (emphasis added). Among others, cf. on Georgia, UNSC Res. 876 (1993), 896 (1994) and 906 (1994); on Azerbaijan, UNSC Res. 882 (1993), 853 (1993), 874 (1993) and 884 (1993); on the DRC, UNSC Res. 1756 (2007) and 1771 (2007); on Sudan,
Non-Intervention
Another principle which has been the object of attention since the beginning of the present Court’s activities is that of non-intervention. In its judgment in the Corfu Channel case, the Court categorically condemned non-compliance with the principle:

The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law.\(^{33}\)

It was however once again in the Nicaragua judgment of 1986 that the Court clarified the limits of the principle.\(^{34}\) The judgment established that an intervention is illicit when it concerns those matters on which each State may freely decide, such as the choice of a political, economic, social and cultural system, and the conduct of external relations.\(^{35}\) We do know, of course, that these choices are not in fact entirely free, as they depend on the respect of other rules of international law, such as the respect for the various aspects of fundamental human rights.

In the context of the principle of non-intervention, nearly thirty years ago the Court elaborated—on the basis of the Red Cross principles—the fundamental elements of what constitutes humanitarian assistance: it must be dedicated to achieving its true purpose, that is, “‘to prevent and alleviate human suffering; and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need” and not only to one specific group.\(^{36}\)

Respect for Human Rights
This reference to the limits of the principle of non-intervention allows us to move on to another fundamental principle which is of great importance in the world of today: the respect for human rights.

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\(^{33}\) Judgment, ICJ Reports 1949, p. 35.


\(^{36}\) Ibid., p. 125, para. 243.
After the wake-up call in *Barcelona Traction*, the Court proved itself to be more receptive to the matter of human rights. In the *Tehran Hostages* case, it went beyond the strictly applicable law to refer to deprivation of freedom, detention of persons in conditions of hardship and physical constraint as actions contrary to the Charter and the Universal Declaration of Human Rights.\(^{37}\)

The Court has even subsequently had the opportunity to apply a number of universal and regional human rights treaties. The Court’s contribution to clarifying the scope of these treaties is particularly important. They do not cease to apply in cases of armed conflict—international humanitarian law is only *lex specialis* in such a situation—and States parties have the obligation to apply these treaties wherever they exercise jurisdiction, even outside their territory, as the Court showed in its advisory opinions on *Nuclear Weapons*\(^{38}\) and the *Wall*\(^{39}\) and in the *DRC v. Uganda* judgment.\(^{40}\) It remains to be seen whether the Court will push these advances further in its future case law.

**Peaceful Settlement of International Disputes**

Both the Permanent Court and the current Court have had the opportunity to decide on a variety of aspects relating to the various means of peaceful settlement of disputes, particularly negotiation and judicial settlement. The *dictum* according to which judicial settlement of international disputes “is simply an alternative to the direct and friendly settlement of such disputes between the Parties”\(^{41}\) is well known. The content of the obligation to negotiate has been continuously clarified, from the *Free Zones*\(^{42}\) and *Railway Traffic between Lithuania and Poland*\(^{43}\) cases to the judgments in the *North Sea Continental...*
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Shelf,  Fishery Jurisdiction,  Pulp Mills, and  Former Yugoslav Republic of Macedonia v. Greece cases. The Court has however gone even further, in some cases imposing the obligation to negotiate on the parties to a dispute, as this obligation “merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations”. The Court has underlined its nature as an obligation of performance, rather than a principle of abstention: it has however also to recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today: the principle that the parties to any dispute, particularly any dispute the continuation of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means.

Good Faith

The Court has also reaffirmed the importance of good faith in international relations in a variety of different contexts, whether treaty interpretation or the conduct of negotiations. In the Nuclear Tests cases, it characterised the principle as “[o]ne of the basic principles governing the creation and performance of legal obligations […]. Trust and confidence are inherent in international co-operation”. In its judgment on preliminary objections in the Border and Transborder Armed Actions case, the Court indicated, however, that good faith does not apply in isolation: the principle of good faith “is not in itself a source of obligation where none would otherwise exist”. Already in the Gulf of Maine case, the Court had found the notions of acquiescence and estoppel to stem from good faith and equity. This means that these two tools should

45  (United Kingdom v. Iceland), Merits, Judgment,  Reports 1974, p. 32, para. 75.
52 Judgment,  Reports 1984, p. 305, para. 130.
not be used to encourage trickery in international relations, but rather as a guarantee of their stability and foreseeability, two of the main objectives of any legal system.

**Conclusion**

In concluding, it is worth commenting upon a notion that is also consubstantial to the idea of a ‘legal system’: *jus cogens*. We are all aware of how timid the Court initially was in embracing this notion, to the point that all the *Nicaragua* judgment did was to put the characterisation of the principle of non-use of force as *ius cogens* in the mouth of the International Law Commission, without however explicitly validating it.\(^5^3\) We know that the *Nuclear Weapons* opinion introduced the notion of ‘intransgressible’ norms of international humanitarian law.\(^5^4\) Having finally qualified the prohibition of the crime of genocide as a norm of *jus cogens* in the *DRC v. Uganda*\(^5^5\) case, the Court merely supposed, for the sake of argument in the recent *Germany v. Italy* case, that the prohibition to kill civilians in an occupied territory, or to deport them for use as forced labour, are norms of *jus cogens*.\(^5^6\) This timidity did not fail to surprise more than one observer. On the contrary, there is reason to welcome the assessment made by the Court in its judgment in the *Belgium v. Senegal* case, where it recognises that “the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).”\(^5^7\)

This comment on *jus cogens* does not take away from the importance of the contribution made by the International Court of Justice to establishing the existence and content of fundamental principles, and the implementation of international law as a true legal system, which has been attempted to demonstrate in this brief overview. The observations of the Court in this domain subsequently become the interpretation generally followed by the international community. While the Court is the principal judicial organ of the United

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\(^5^4\) Advisory Opinion, ICJ Reports 1996, p. 257, para. 79.


\(^5^6\) *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, pp. 140–142, paras. 93–97.

\(^5^7\) *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports 2012, p. 457, para. 99.
Nations, its authority is not only as the “general guardian of legality within the [UN] system”, but also, as Judge Lachs recalled, “In fact the Court is the guardian of legality for the international community as a whole, both within and without the United Nations”.58