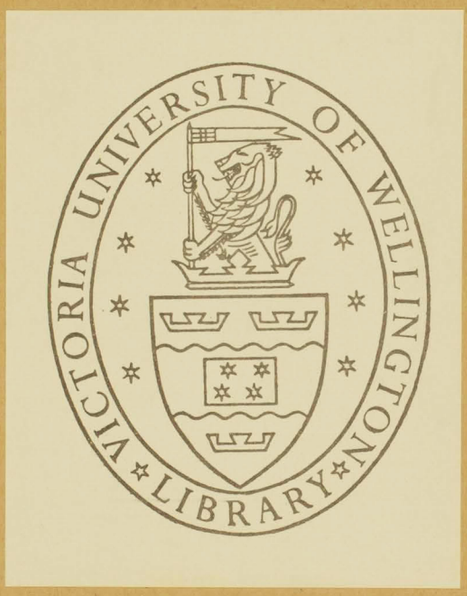
TX SI SINGH, A. JUDICIAL INNOVATION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INTERNATIONAL LAW

LL.M. 1976

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Judicial Innovation: the use by the International Court of Justice of general principles of law

Research paper submitted for the Degree of
Master of Laws and Honours in Law at the
Victoria University of Wellington 1976

Judicial Innovation: the use by the International Court of Justice of general principles of law.

1.1 Scope

An attempt will be made in this paper to gauge the significance of the use by the International Court of Justice (1) of arguments based on the general principles of law after it has failed to discover the relevant rules of custom or treaty. In the application of the general principles of law the Court is often involved in a process of judicial innovation. One is inevitably faced with the question of desirability or otherwise of judicial law-making and the consequent reflections which the use of the general principles of law have on the status of the Court.

1.2 Introduction

The judicial process has a central place in the international community for the settlement of international conflicts. The Court is the "principal judicial organ of the United Nations" to offer the possibility of "substituting orderly judicial processes for the vicissitudes of war and reign of brutal force."(2)

The application of the general principles of law provide excellent tools in the hands of the Court in developing international law through authoritative decision-making process. The use of the general principles of law provides a flexible element which enables the Court to give greater completeness to customary law and in some limited degree to

(1) Hereinafter called the Court.
(2) San. Frans. Conf. Rap., Doc. 913, 13U.N.C.I.O. at P.393.

extend it. Jenks has, in a spirit of optimism, appealed "to develop from the common elements in these legal systems all of which are still in a process of evolution, a universal legal order." (3) Waldock refers to the "general principles of law" as the "common law of the international community." (4) Judge Tanaka, in speaking of the World Law element of the Court, hopes that the "general principles of law" element will enable through the rule of law the primary objective of the United Nations Charter: the ideal of permanent peace. (5)

2.1 The Development of International Law by the Court

The Statute of the Court provides, in Article 38, that the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply, inter alia, "the general principles of law recognised by civilized nations."

When the Permanent Court of International Justice was established, it was expected that it would not merely clear up dubious points but also, in the absence of an international legislature, contribute to the development of the international law. For a court to survive and to continue to receive disputes for peaceful settlement it has to be aware of the application of general principles and rules of international law. The application of general principles of law is a technique that demonstrates that legal norms can be applied to novel situations without rigidity and blind conformity to precedent. There is a constant interaction of law-making and law-findings. However, the

(3) The Common Law of Mankind (1958) 169.
(4) 'General Course in Public International Law' Recueil des cours, CV1 (1962) 54.
(5) 'World Law in the I.C.J.', Jap. Ann.I.L. Vol.15 (1971) 1 at P.22.

judges of the Court do not profess to legislate. Yet, a constant process of development of law goes on through the courts, a process which includes a considerable element of judicial law-making. (6) This is where when accepted norms are not to be found the Court applies the general principles of law, mindful of the variety, flux and novelty of the actual events. In times of 'crisis' there is often a strong pressure to meet the necessities of the particular problem and to avoid the adoption of formulae that might have unforseen implications in future cases. The occasions calling for judicial innovation is nicely summed up by Sir Gerald Fitzmaurice thus:

> "It is axiomatic that courts of law must not legislate: nor do they overtly purport to do so. Yet it is equally a truism that a constant process of development of the law goes on through the courts, a process which includes a considerable element of innovation... for it is beyond the normal capacity of any legislature to provide in advance for all the subtleties, the twists, the turns and the by-ways resulting from novel and constantly changing conditions.... Nor can the legislature anticipate great issues of principle which may arise suddenly.... In practice, courts hardly ever admit a non-liquet... they adapt existing principles to meet new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept , or by invoking doctrines in the light of which an essentially innovatory process can be carried out against a background of received legal precepts." (7)

(6) 'Judicial Innovation - Its Uses and its Perils' Essays in Honour of Lord McNair, Cam. Essays in Int'l. Law P.24.
(7) Ibid. pp 24-25.

2.2 Policy Considerations in International Judicial Process

In the context of policy considerations in international judicial process, Higgins suggests that there now exists two differing jurisprudential approaches on the nature of international law and the role and function of the Court.(8) These are the teleological or sociological and the conceptual or formalistic approaches.

Though Sir Gerald Fitzmaurice acknowledges that the Court does sometimes take into account the climate of the opinion of the day and the prevailing social and economic tendencies when deciding disputes submitted to it, (9) the majority of the British scholars and jurists appear to see the function of the Court as applying the law objectively to facts of the case. However, there are exceptions, notably the great British scholar, Sir Hersch Lauterpacht, who believes that the task of a judge is not merely finding the 'correct rule', but rather making a choice between alternatives - and alternatives are often each as meritorious. (10) The 'teleological' approach manifests itself in some American jurists and scholars. According to this view international law is a continuing process of authoritative decision-making. The teleological approach acknowledges policy considerations and takes into account the social, economic and the particular circumstances of the actual events.

Sir Gerald Fitzmaurice's approach to judicial innovation is not as policy oriented as it may, at first sight, appear.

(8) 'Policy Considerations and the International Judicial Process', (1968) 17I.C.L.Q.58.
(9) Note 6 at P.25.
(10) The Development of International Law by the International Court (1958) 14.

He regards that factors of social and humanitarian character are better left for the political rather than the legal arena. The conceptualist approach of Judges Fitzmaurice and Spender become abundantly clear in their Joint Dissenting Opinion in the S.W. Africa case (Preliminary Objections):

> "We are not unmindful of, nor are we insensible to, the various considerations of a non-juridical character, social, humanitarian and other, which underlie this case; but these are matters for the political rather than the legal arena. They cannot be allowed to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view."(11)

In 1966 S.W. Africa case (Sec. Phase) the Court elaborated this theme, this time in the context of whether moral considerations required the Court to seek to 'fill the gaps' in law:

> "This is a court of law and can take account of moral principles only in so far as these are given a sufficient expression in legal form." (12)

And, while humanitarian considerations

> "may constitute the inspirational basis for rules of law... (they) do not, in themselves amount to rules of law." (13)

Judges Jessup and Tanaka, while acknowledging that judicial innovation should not assume a form of a deliberate disregard of the existing law, show their disappointment at the lack of creativity in the majority view. In the words of Judge Tanaka, the Court is permitted to:

(11) I.C.J. Rep., 1962, p.466.
(12) I.C.J. Rep., 1966, pp.48-9.
(13) ibid.

> "declare what can be logically inferred from the raison d'etre of a legal system.... In the latter case the lacuna in the intent of legislation or parties can be filled." (14)

In the context of policy considerations in the international judicial process, Schachter, in characterising Dag Hammarskjold's concept of imperative quality of legal norms, said that:

> "...this did not mean that he regarded law as an autonomous force which develops and is applied independently of political and social factors. He preferred to view law not as a 'construction of ideal patterns,' but in an 'organic sense,' as an institution which grows in response to felt necessities and within the limits set by historical conditions and human attitudes.... But it was characteristic that he regarded these factors not merely as imposing limits on the use of law, but in a more positive sense as a challenge which called for creative attempts to find new norms and procedures." (15)

It is the interplay of the traditional sources of international law with imaginative judicial interpretation, taking into consideration new principles of international public policy as expressed in international conventions, U.N. resolutions and the newer forms of international transactions, that commands respect and brings about a reasonable expectation of compliance with the Court's decisions.

(14) Sep. Dissenting Op., Judge Tanaka, Note 12 at PP277-278.
(15) 'Dag Hammarksjold on Law and Politics' (1962) 56 A.J.I.L. 1 at P.2.

2.3 Application of General Principles of Law by the Court

It is important to recognise that the Court, in applying the general principles of law, does not refer to the specific provisions of Article 38(1)(c). Scholars and jurists of international law have variously described the general principles of law in such verbal expressions as:

> "principles of jurisprudence accepted by the law of all countries,... a universally recognised principle,... general principles of the common law of modern nations,... principles of law generally accepted by all nations,..."(16)

The inclusion of "the general principles of law recognised by civilized nations" as part of the law to be applied by the International Court has provoked considerable discussion with widely differing views:

> "While some writers regard them merely as a means for assisting the interpretation and application of international treaty and customary law, others consider them as no more than a subsidiary source of international law, some modern authors look upon 'general principles' as the embodiment of the highest principles - the 'super-constitution' - of international law." (17)

The positivists confine the source of law to conventions and custom. In rejecting general principles of law as a separate source of law they dismiss Article 38(1)(c) as either a subsidiary source of international law or as being superfluous. Professor Kelsen doubts the possibility that general principles "common to the legal orders of the

(16) General Principles of Law as Applied by International Courts and Tribunals (London 1953), B. Cheng.
(17) Ibid. P.28.

civilized nations" exist because of the ideological differences existing among States. (18) The Court, he suggests, applies general principles of international law in so far as it is evidenced in treaty or customary international law.

As the leading exponent of the Communist international legal theory, Tunkin (19) suggests that the Court is not empowered to treat Article 38(1)(c) as a separate source of international law. While such an interpretation could have been defended previously on the basis of the text of Article 38 of the Statute of the Permanent Court, the Statute of the present Court empowers it to settle disputes only in accordance with international law. (20) It has been contended that the "general principles of law common to all civilized states" do not take due regard to the views of Soviet and the Afro-Asian States. These legal systems are fundamentally distinct by virtue of their class, nature, role in society and purposes. Tunkin does, however, acknowledge that the existence of externally identical principles and norms in different systems of national law frequently lead to the emergence of corresponding principles and norms of international law. This generates the development of general legal concepts, legal rules and modes of legal technique. Article 38(1)(c), he suggests, has in view not a special source of international law but are general principles of law which help in the interpretation and application of law in general.

(18) Principles of International Law (2ed.) 540.
(19) G.I. Tunkin, Theory of International Law, (Translated by Butler) Chap.7.
(20) ibid.

In deprecating the present text of Article 38(1)(c), Judge Ammoun said that the reference to the term "civilized nations" is "incompatible with the relevant provisions of the United Nations Charter, and the consequence thereof is an ill-advised limitation of the notion of the general principles of law." (21) In his view Article 38(1)(c) would be acceptable only if the adjective referred to is omitted to read "the general principles of law recognised by (the) nations" or "the general principles of law recognised in national legal systems," or quite simply: "the general principles of law." (22)

It is generally accepted that the general principles of law assist the Court in the interpretation and application of international treaty and customary law. There are others who suggest that Article 38(1)(c) is a separate source of international law.

Judge Tanaka suggests that although Article 38(1) lists "the general principles of law" after international conventions and customs, this fact does not preclude them being applied simultaneously in relation to one another. Such a construction, according to him, is reached from proviso (d) being a subsidiary means to determine the rules of law. (23) Judge Tanaka, in emphasising the importance of the general principles of law said that:

> "...to acknowledge 'the general principles of law' as a source of law can assume tremendous significance in

(21) Continental Shelf Cases, I.C.J. Rep., 1969, p.132 (Sep. Op. Ammoun).
(22) ibid at P.135.
(23) Note 5 at PP.20-21.

"the field of international law which, with its many defects, is not yet fully prepared for positive sources of law." (24)

Sir Hersch Lauterpacht views the provision, in enlarging the role of the Court, as an important landmark in the history of international law. (25) The application by the Court of the general principles of law resemble the law-making functions of the courts in 'common law' legal systems. In the context of Article 38(1)(c), he said that:

"Its importance as a source of international law and as such an ultimate safeguard against the possibility of a non-liquet remains unaffected by the relative infrequency of or lack of articulation in its use. Experience has shown that the main function of 'general principles of law' has been that of a safety-valve to be kept in reserve rather than as a source of law of frequent application..." (26)

A thorough analysis of the travaux preparatoires of the Statute of the Permanent Court led Cheng to conclude that:

"The order in which these component parts of international law are enumerated is not, however, intended to represent a juridical heirachy, but merely to indicate the order in which they would normally present themselves to the mind of an international judge called upon to decide a dispute in accordance with international law. There is nothing to prevent these three categories of rules or principles of international law from being simultaneously present in the mind of the judge." (27)

(24) Note 5 at P.20.
(25) L. Oppenheim, International Law, (8th ed.) Vol.1(1955)p.30.
(26) Note 10 at P.166. (27) Note 16 at P.28

General principles of law are often applied, not only to supplement conventional customary law, but also to clarify and interpret the law when it is obscure, ambiguous, or in a state of flux. Sir Hersch Lauterpacht has contended that the general principles of law enable the Court to interpret existing conventional and customary law by reference to "common sense and the cannons of good faith."(28)

Verdross suggests that the general principles of law are a reflection of natural law - not principles of natural law directly, but those principles which have already reflected positively in the prevailing legal systems of States. The general principles of law rest upon a general legal consciousness. International law:

> "is not exhausted by treaty or customary international law; general principles of law should be added to them." (29)

The application of general principles of law enable the Court to fill the gaps in the guise of supple application of those principles when the positive international law fails to adequately provide 'rules' applicable to a particular case.

The practice of the Court suggests that it treats the 'common law' which it is authorised to apply under Article 38, paragraphs (b) and (c), very much as a single corpus of law. While acknowledging that customary law enormously predominates and most of the law applied by the Court falls within it, Waldock concludes:

(28) Note 10 at P.166.
(29) Verdross, quoted by Tunkin, Note 19 at P.194.

> "But paragraph (c) adds to the corpus - very much in the way actually intended by its authors - a flexible element which enables the Court to give greater completeness to customary law and in some limited degree to extend it." (30)

2.4 The General Principles of Law

Some of the better-known general principles of law resorted to by the Court in deciding disputes before it are: 'equity,' 'estoppel,' 'good faith,' 'pacta sunt servanda,' 'unjust enrichment,' the principle of nemo iudex in sua causa or audiatur et altera pars. (31) Wolfgang Friedmann, in the context of Article 38 (1)(c), classifies these various principles in three different categories:

> "(1) principles of approach and interpretation to legal relationships of all kinds; (2) minimum standards of procedural fairness; (3) substantive principles of law sufficiently widely and firmly recognised in the leading legal systems of the world to be regarded as international legal principles." (32)

The third category of general principles of law apply directly to the facts of the case whenever there is no formulated rule governing the matter. In a legal system like international law, where precisely formulated rules are few, this third function of general principles of law acquires a special significance and has contributed greatly towards defining the legal relations between States. (33)

(30) Note 4 at P.64.
(31) The Changing Structure of International Law (1964) at P.196.
(32) ibid.
(33) See generally Cheng, Note 16 at P.390.

It is generally accepted that the domain of law in international relations will be restricted if it flows only from treaties and customs, but will be greatly extended if use is made of the general principles of law.

The pervasive role of equity and good faith, among other general principles of law, occupy a very important role in providing the Court with flexible general principles of approach and interpretation of legal relationships of all kinds. The scope of equity as a general principle of law becomes manifest from the reflection on the number of synonyms and facets of equity in international law. The general principles of law referred to above, together with the closely related principles such as good neighborliness and justice, and fields of international law in which equitable considerations have exercised a strong formative influence, have contributed greatly to the jurisprudence of the international law. Professor Schwarzenberger suggests that:

> "thus the task is really to analyse the whole of international law from the angle of equity and if possible to isolate the equity element in international law." (34)

Much inspiration for the use of equity and good faith in the conduct of international relations is gained from the United Nations Charter. Article 2(2) provides that members are to fulfil in good faith the obligations assumed

(34) 'Equity in International Law', 26 Yr.book of World Affairs, (1972) P.346.

by them in accordance with the present Charter. Sir Hersch Lauterpacht suggests that:

> "...rules of equity ... inasmuch as they are identical with good faith form part of international law." (35)

In his Separate Opinion in the Continental Shelf Cases, Judge Ammoun said that in the circumstances of the case there was a lacuna which was to be filled by inferring a general principle of law recognised in national legal systems. (36) The general principles of law are, in his view, indisputably factors which bring morality into the law of nations. Judge Ammoun highlights the importance of equity, as well as good faith "which is no more than a reflection of equity and which was born from equity," (37) in the implementation of legal rules.

Jenks, in highlighting the important role of good faith in regulating international relations, said that:

> "Without good faith neither treaty, nor custom, nor general principles of law, nor equity nor public policy can conjure law from lawlessness or fairness from injustice." (38)

And of fair play, he said that:

> "This principle transposes that of good faith to conduct not governed by agreement. Fair play includes respect for rules of the game in the conduct of international relations..." (39)

(35) Note 10 at P.213.
(36) Note 21 at P.135.
(37) ibid at P.136, cites K. Strupp.
(38) A New World of Law? P.296.
(39) ibid PP.296-7.

The use of general principles of equity, good faith, neighborliness, and principles of peaceful settlement and international cooperation provide excellent tools in the hands of the Court, which can apply them to a specific factual situation, as it will be demonstrated in a later part of this paper. Wolfgang Friedmann hopes that:

> "such principles as equity or abuse of rights can contribute to the evolution of a new balance of rights and duties in many fields of international law." (40)

3.1 Judicial Innovation: Application of General Principles of Law

First, we will consider, albeit briefly, the earlier cases as occasions of judicial innovation or as evidence of the use by the Court of the general principles of Law. Thorough and comprehensive accounts of the subject is documented elsewhere. (41) We will then discuss, in some detail, the recent cases of S.W. Africa (Sec. Ph.) (42), Continental Shelf Cases (43), The Fisheries Jurisdiction Cases (44) and the French Nuclear Test Cases (45).

3.2 (a) Reparations for Injuries to United Nations Servants Case (46)

This case represents an important judicial innovation. The Court, for the first time, recognised that the United Nations

(40) Note 31, at P.199
(41) Lauterpacht, Note 10 & Fitzmaurice, Note 6.
(42) I.C.J. Rep., 1966, p.6
(43) I.C.J. Rep., 1969, p.3
(44) I.C.J. Rep., 1974, pp. 3 & 175.
(45) I.C.J. Rep., 1974, p.3
(46) I.C.J. Rep., 1949, p.74.

was a separate international entity, with its own legal personality, distinct from that of member and non-member States. Thus the United Nations was entitled to prefer an international claim for damage sustained by it as an entity, arising from internationally unlawful acts. The Court said that the Organisation, as distinct from its Member States, occupied "in certain respects a position in detachment from its Members, (and was) under a duty to remind them, if need be of certain obligations." (47)

3.2(b) Corfu Channel (Merits) case (48) is another example of judicial innovation of far-reaching effect. The Court held that the defendant was responsible under peace-time conditions for damage caused to vessels in passage through a minefield in its waters. The Court found that although the defendant State had not itself laid the minefield, it knew of its presence and had failed in its international obligation of "notifying, for the benefit of shipping in general, the existence of a minefield in... (its)... territorial waters and in warning... approaching... ships of the imminent danger to which the minefield exposed them."(49) In applying the "general and well recognised principles" the Court said that the obligation was founded not merely on "the principle of the freedom of maritime communication," and "every States' obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States," but more importantly on:

(47) Note 46 at P.179.
(48) I.C.J. Rep. 1949, p.4.
(49) ibid. P.22.

"elementary considerations of humanity even more exacting in peace than in war..." (50)

Of circumstantial evidence, the Court said: "this indirect evidence is admitted in all systems of law, and its use is recognised by international decisions." (51)

3.2(c) S.W. Africa case (Advisory Opinion) (52) is yet another instance of 'judicial legislation.' (53) The Court found an automatic succession or devolution on the ground that the reporting power remained intact. The existence of the United Nations and its willingness to exercise supervisory function, the fact that it was not disqualified from doing so under its Charter, led to the finding that the Mandatory was under a legal obligation to furnish reports to it. The central theme was that "the effective performance of the sacred trust of civilization" represented by the mandate system required accountability and that it should be subject to international supervision.

3.2(d) The Anglo-Norwegian Fisheries case (54) is no exception to the process of 'judicial law-making.' Norway advanced the 'base-line system' as against the 'tide mark' rule. The Court, in referring to the "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage," and to the "rights, founded on the vital needs of the population and attested by very ancient and peaceful usage," rendered a solution

(50) Note 48 at P.22.
(51) ibid. at P.18.
(52) I.C.J. Rep., 1950, p.128.
(53) ibid at P.162, per Lord McNair.
(54) I.C.J. Rep., 1951, p.116.

deemed to be in accordance with justice and economic or geographic reality. The decision embodies a rational principle best suited to provide the basis of a general rule. There is elasticity and flexibility in the Court's approach to the issues.

In holding that the straight 'base-line' rule was not "contrary to international law," the Court elevated it as a general principle of international law:

> "all that the Court can see is the application of general international law to a specific case." (55)

Having seen the creative role and function of the Court in the decision-making process we will turn to an examination of the recent cases.

3.3(a) S.W. Africa Case (Second Phase) (56)

It is important to note that in this case the Court was equally divided, seven judges on each side, with the President casting a double vote. This decision has been described by Judge Tanaka as representing two divergent modes of judicial interpretation, the "teleological or sociological and the conceptual or formalistic." (57) The discussion on policy considerations in judicial process is worth recalling here.

The majority judges, in adopting a conceptual approach, directed themselves to the "interpretation" as distinct from the the "rectification or revision" of the relevant provisions

(55) Note 54 at P.131.
(56) I.C.J. Rep, 1966, p.6
(57) ibid at P.278.

and documents. The Court cannot remedy a deficiency, that would be beyond normal judicial action:

> "It may be urged that the Court is entitled to engage in a process of 'filling in the gaps,' in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here inquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision. Rights cannot be presumed to exist merely because it might seem desirable that they should." (58)

The majority held, but with which the majority did not disagree, that the Court cannot remedy a deficiency if, in order to do so, it has to exceed the bounds of normal judicial action.

The Court was urged to make good an omission resulting from the failure of those concerned to forsee what might happen, and to have regard to what may be presumed the framers of the Mandate would have wished, or would have made express provision for, had they had advance knowledge of what was to occur. To this the majority replied that:

> "The Court cannot, however, presume what the wishes and intentions of those concerned would have been in

(58) Note 56 at PP.48-9.

"anticipation of events that were neither forseen nor foreseeable; and even if it could, it would certainly not be possible to make the assumptions in effect contended for by the Applicants as to what those intentions were." (59)

The dissenting opinion of Judge Tanaka is perhaps the most interesting manifestation of the policy-oriented, teleological approach:

"Undoubtedly a court of law declares what is the law, but does not legislate.... Of course, judges declare the law, but they do not function automatically. We cannot deny the possibility of some degree of creative element in their judicial activities. What is permitted to Judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the raison d'etre of a legal system.... In the latter case the lacuna in the intent of legislation or parties can be filled." (60)

It will be recalled that the Court, in the S.W. Africa case (Advisory Op.) highlighted the importance of international supervision in the mandate system. The existence of the United Nations, characterised by political and social homogeneity with the defunct League required accountability. This was particularly so in respect of the "sacred trust" for the peoples who have not yet attained a full measure of self-government. Judge Tanaka considered these factors, individually and as a whole, as enough to

(59) Note 58, supra. pp.48-9.
(60) Note 56 at PP.277-78. My emphasis.

establish the continuation of the international supervision of the mandated territories by the U.N.:

> "Considerations of the necessity... can by no means be denied. But we are not going to deduce the above-mentioned conclusion from mere necessity or desirability but from the raison d'etre and the theoretical construction of the mandate system as a whole." (61)

Social and individual necessity constitutes one of the guiding factors for the development of law by way of interpretation as well as legislation. Judge Tanaka, in urging that the Court should consider 'the reasonably assumed intention' by taking into consideration all legal and extra-legal factors, from which 'necessity' is not excluded, said that:

> "These kinds of activities of judges is not very far from those of legislators." (62)

Judge Jessup concludes in a similar fashion to Judge Tanaka. He adopts with emphatic approval what Judge Lauterpacht said in his separate opinion in the 1955 S.W. Africa case (63) about the so-called "clear meaning" rule:

> "which to my mind is often a cloak for a conclusion reached in other ways and not a guide to correct conclusion. Judge Lauterpacht said:
>
> 'This diversity of construction provides some illustration of the unreliability of reliance on the supposed ordinary and natural meaning of words. Neither having regard to the integrity of the functions

(61) Note 60 at P.278.
(62) ibid.
(63) I.C.J. Rep.,1955, p.93.

"'of interpretation, is it desirable that countenance be given to a method which by way of construction may result in a summary treatment or disregard of the principle issue before the court.'" (64)

The Court was seen to reverse its own verdict of 1962. However, it denied this allegation, regarding the 1962 decision as an interlocutory decision and that as such it could not pre-judge questions of merit. (64a)

It is interesting, however, to note that Judge van Wyk rejects the tortuous reasoning of the Court:

"It is true that a great deal of the reasoning of the present Judgment is in conflict with the reasoning of the 1962 Judgment.... The Court is not bound to perpetuate faulty reasonings, and nothing contained in the 1962 Judgment could constitute a decision of any issue which is part of the merits of the claim." (65)

The Court's reasoning has been castigated in strong terms not only by the dissenting minority, but also by commentators as being fraught with fallacies, and plainly contrary to common understanding. This case generated a great deal of controversy about the role and function of the Court.

Judge Forster, in his dissenting opinion, rejected the Court's judgment in vigorous terms and concluded that:

"This passes my understanding." (66)

Judge Jessup is no less critical:

(64) Dis. Op. Jessup, at P.352, 355 (his emphasis).
(64a) Final Judgment at pp.37-8.
(65) Sep. Concurring Op. P.67. My emphasis.
(66) Final Judgment at P.478.

"The Court now in effect sweeps away this record of 16 years and... decides that the claim must be rejected on the ground that the applicants have no legal rights or interests." (67)

A review of cases prior to this case by Terry (68) evidences that the Court was a "dynamic body at the vortex of the international legal system." Rosenne regarded the Court as being remarkably perceptive of the changing currents of international issues:

"it is the International Court... which has infused dynamism into the international law of today." (69)

Pollock, speaking of the unresolved tension between the 'teleological' and 'conservative' approaches, said that:

"In terms of the central goals of our jurisprudential alternatives the human spirit has not made up its collective mind about the relative importance of the sovereignty of the nation-state and the recognition of fundamental human rights..." (70)

Wolfgang Friedmann regards that the S.W. Africa Case (Sec. Phase) marks the undermining of the role and function of the Court by its insensitiveness to moral and social factors:

"It is feared that the Judgment of the International Court in the South West Africa case has dealt a devastating blow to the hope that the International Court might be able to deal with explosive and delicate international issues." (71)

(67) Final Judgment at pp.327-28.
(68) "Factional Behaviour on the I.C.J." (1975) 10M.U.L.R.59.
(69) The Law and Practice of the International Court, Vol.1 (1965)18.
(70) 'The S.W. Africa Cases' (1969) 23I.O.185.
(71) 'The Jurisprudential Implications of the S.W. Africa Case' (1967) 6:1Col.J.I.L. 1 at 16.

The decision highlights the jurisprudential division of the Court regarding the manner in which the case was to be approached, that is, the conservative and the teleological approaches. One cannot, however, be so certain about the criticism that there exists 'factional' behaviour dividing the Court.

Falk speaks of "the conservative faction" and "the basic disagreement dividing the International Court of Justice." (72) To Friedmann:

> "it is the division of representatives between the older and the newer countries, or, in a different perspective, between the 'developed' and the 'less-developed' countries..." (73)

However, Gross suggests that:

> "it does not seem possible to classify the members of the Court into schools. There is no alignment of judges between the conservatives and liberals..." (74)

Terry suggests that the judicial approach taken by the various judges was generally a function of issues, rather than a definite judicial philosophy. He dismisses the notion of there being a 'conservative faction' dividing the Court. While acknowledging the jurisprudential division, Terry finds that there was no significant bias in the judges who formed the majority, even assuming that they had constituted a faction. (75)

(72) Falk, R.A., 'The S.W. Africa Cases: An Appraisal' (1967) 21I.O. 1-23.
(73) Note 71 at P.2.
(74) 'The I.C.J. and the U.N.' (1967) 1 Recueil des Cours 321, 322.
(75) Note 68 at P.117.

3.3(b) The North Sea Continental Shelf Cases (76)

The International Court was faced with the newly developed doctrine of the continental shelf. It was confronted by a number of complex and contoversial issues. We will identify and comment on the issues, and then consider, in some detail, the question of delimitation of boundaries in the light of the Court's own conceptions of equity.

The Court accepted that the concept of the continental shelf had become part of international law, binding upon all States either as custom or as a general principle of law. In accepting the continental shelf as an extension of the sovereignty of the coastal state, the Court said that:

> "the right of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land,.... In short, there is here an inherent right..." (77)

Denmark and the Netherlands contended that the rule of equidistance contained in Article 6 had 'crystallised' as a rule that is part of the corpus of general international law. The Court, while acknowledging that the equidistance principle was most generally acceptable because of practical convenience and certainty of application, pointed out that it was not contained in the Truman Proclamation, which speaks

(76) I.C.J. Rep., 1969, P.3 Hereinafter called the Judgment.
(77) ibid Para.19.

of 'equitable principles' of delimitation. The majority, in rejecting the equidistance principle as part of the general international law, found support in the fact that the Convention permitted reservations to be made to Article 6. The Court said that no derogation from customary law is allowed by its very nature, consequently any rules susceptible of being avoided by States cannot be rules of custom. (78) It is important to note that the dissenting judges considered the equidistance rule as part of the corpus of general international law.

Having rejected the equidistance rule, the Court was compelled to formulate certain principles of general equity as applicable to the delimitation of the continental shelves between three of the coastal States of the North Sea. It is this attempt by the Court to formulate the general principles of equity applicable to a fair allocation of the resources of the Continental Shelf between the neighbours with which the following discussion will be mainly concerned.

The Federal Republic argued for a "just and equitable share" of the continental shelf. This would have allowed for the allotment of shares in proportion to the length of the coastal or sea frontage, to its advantage. The Court, while rejecting the particular formulation, accepted the criterion of "just and equitable" in the delimitation process.

In drawing a distinction between apportionment and delimitation, the Court said that the former would mean a decision ex aequo et bono, which is inconsistent with the notion of natural prolongation. However, the Court would

(78) Judgment Para.63.

only be authorised to do so with the consent of the parties under Article 38(2). In the absence of consent the Court could do no more than apply general principles as part of the relevant rule of law. This distinction can, however, often be easily blurred when the Court is handling a concrete situation.

The Court undertook to determine the delimitation of boundaries at issue in the light of its own conception of equity. It approached the question of equity and its underlying philosphy in a grand style:

> "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea be allotted an area of continental shelf. .... Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy.... Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf considerably different from those of its neighbours merely because in one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography... but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result." (79)

(79) Judgment Para. 91.

Judge Tanaka, in his dissenting opinion, saw the Court as having applied a kind of distributive justice while denying that it was doing so. The Court, he said, suggested that the parties settle their dispute by negotiations according to ex aequo et bono without:

> "any indication as to what are the 'principles and rules of international law,' namely juridical principles and rules vested with obligatory power rather than considerations of expediency - factors or criteria - which are not incorporated in the legal norm and about which the parties did not request an answer." (80)

The Court, in applying its concept of equity, harped on the notions of 'natural' and 'neighborliness', as the central theme of its decision. (81) This decision can be seen as a novel extension of national sovereignty as a kind of natural law principle. The Court goes even further and regards the proportionality between the area of the continental shelf and the size of the coastal state to which it belongs as an evident correction of "unnatural" formations of coastlines. (82) The Court, in making use of the concept of 'neighborliness', said that the equitable sharing could be better effected by joint exploration. Judge Jessup found that the principle of joint exploration:

> "... is particularly appropriate in cases involving the principle of unity of deposit, it may have a wider

(80) Diss. Op. Tanaka, Judgment at P.196.
(81) Para 19: 'a natural prolongation', Para.24:'extraordinary, unnatural or unreasonable', Para.91:'natural inequalities.'
(82) W. Friedmann, 'The N.S. Continental Shelf cases - A Critique' (1970) 64A.J.I.L. 229, for a general criticism.

"application in agreements reached by the parties concerning the still undelimited but potentially overlapping areas of the continental shelf which has been in dispute." (83)

The Court left the parties with various factors that were to be taken into consideration by them, in good faith, in the negotiation process, with a view to an equitable result. Judge Jessup hoped that the elaboration of these factors:

"may contribute to further understanding of the principles of equity which, in the words of Judge Manley O. Hudson, are 'part of the international law which it (the Court) must apply'." (84)

3.3(c) The Fisheries Jurisdiction Cases (85)

The growth of technology, social needs and political awareness led to a unilateral extension by Iceland of its exclusive economic zone to 50 miles. The facts of the case is set out with admirable clarity in the Court's judgment. The United Kingdom and the Federal Republic of Germany, the two distant-water fishing States, were among those directly affected by it. Failing extensive negotiation attempts, the two States brought the cases before the Court. In all the phases of the proceedings before the Court Iceland not only declined to be present but also protested throughout that it did not recognise

(83) Sep. Op. Jessup, P.67 at p.82.
(84) Note 83, at P.84. My emphasis.
(85) U.K. v. Iceland I.C.J. Rep., 1974, p.3.
F.R. Germany v. Iceland, ibid. at P.175.
Hereinafter called the Judgments.

the Court's jurisdiction. Since both the cases are essentially the same in facts, claims, preliminary decisions and opinions, the discussion will be limited to the case between the U.K. and Iceland.

Two points deserve mention here before we embark on a consideration of the issues before the Court. First, the Exchange of Notes between U.K. and Iceland of 1973 was limited to two years and without prejudice to the legal position or the rights of either party. The Court held that it was not precluded from the determination of the issues in that the agreement was necessarily temporary, and it declared the dispute a continuing one. The four dissenting judges were strongly of the view that the Court was acting in excess of its jurisdiction. Judge Ignacio-Pinto reprimanded the Court for:

> "embarking on the construction of a thesis on (those subjects) on which there has never been any dispute, nor even the slightest shadow of controversy..." (86)

Secondly, in the context of uncertainty about fishery limits and the on-going Law of the Sea Conference convened precisely at the time it handed down the judgment which was supposed to, inter alia, lay down such limits, the Court stated that it:

> "cannot render judgment sub specie legis farendae, or anticipate the law before the legislator has laid it down." (87)

(86) Judgment at P.37.
(87) ibid at pp. 23-24.

The United Kingdom asked the Court to adjudge and declare:

(a) that Iceland's claim to a 50-mile exclusive fisheries zone was 'without foundation in international law and is invalid';

(b) that, in the view of the 1961 Exchange of Notes, Iceland could not take such an action unilaterally;

(c) That the claim was not opposable to British vessels, and

(d) that to the extent the action was warranted on conservation grounds, Iceland and the U.K. were 'under a duty to examine in good faith... the existence and extent of that need and similarly to negotiate...'

The Court decided that there was no need to resolve the first issue. While acknowledging that:

"the extension of fishery zone up to a 12-mile limit from the base-line appears now to be generally accepted," (88)

the Court stated that it did not wish to anticipate the law that was going to be laid down at the Third Law of the Sea Conference. In declining to consider the first issue the Court, sub silentio, declared a non-liquet. But the separate and dissenting opinions shed some light on this issue.

Judges Forster, Bengzon, Jimenez de Arechaga, Nagendra Singh and Ruda, in their Joint Separate Opinion, justified the Court's failure to decide the question of whether the extension by Iceland to 50 miles of its fisheries jurisdiction is without basis in international law. The Joint Opinion pointed out that between 30 and 35 States had claimed economic zones beyond 12 miles. In contending

(88) Judgment, P.23.

that the Court should look forward to fill the gaps of evolving international law, they urged the Court to examine the initial papers and debates at the Law of the Sea Conference for direction. In conclusion, it was their contention that while 12 mile limit was recognised by most States, it did not preclude the possibility that a wider zone might be permissible under international law. (89)

In the absence of international consensus, Judges Dillard and Waldock did not feel that a claim to 50 mile exclusive fishery zone was ipso jure contrary to international law and so invalid erga normes. Judge Dillard cites the uncertain state of law and the influence of the U.N. Law of the Sea Conference as chief reasons for the Court's not dealing with the claim. (90) It was, however, the dissenting minority, Judges Gros, Ignacio-Pinto, Onyeama and Petren who firmly stated that a claim to a 50 mile exclusive fishery zone was contrary to international law.

The Court anchored its judgment on the interrelated principles of preferential rights, conservation of species and historic rights. It is important to note that the dissenting Judges very strongly argued that the Court would exceed its jurisdiction if it based its decision on those principles. Judge Onyeama maintained that Iceland's extension, not conservation, "was the gravamen of the dispute." (91) Judge Gros argued that the Court's choice

(89) Judgment, p.52.
(90) ibid., 53, 56.
(91) Judgment, p.171.

to base the judgment on the respective rights of the parties on the basis of history of fishing in the area, special situation of Iceland and conservation of species, just to avoid rendering a declaratory judgment applicable erga omnes, had in fact made its position untenuous. (92)

The Court observed that the two concepts of fishery zone and preferential rights had evolved on the basis of the debates and near agreements at the 1960 Law of the Sea Conference. (93) The former concept implies an exclusive jurisdiction within that zone while under the latter the coastal State does not have exclusive jurisdictional rights, the preference relates to the catch.

The Court did not venture to define the concept of preferential rights but it described the context within which the right operates. Not only must the claimant be a coastal State but it must also exhibit a contemporary dependence upon the fishing economy for either the physical sustenance of its people or the general economic well-being of the nation. Preferential rights come into play only as a means of conservation, that is, the marine resources adjacent to the State's coast must be so depleted as to be unable to satisfy all the demands made upon them by the coastal and the distant-water fishing States. (94)

Preferential rights do not entitle a State to articulate unilaterally the nature and extent of those rights. Economic dependence of States which have long been engaged in the same fishery over a long period was not to be disregarded. The interaction of the completing rights was formulated by the Court as follows:

(92) Judgment at p.138.
(93) ibid, P.23.
(94) Judgment, P.30.

"The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States." (95)

The preferential rights of a coastal State were not a "static concept", that being "a function of the exceptional dependence" of a coastal State, those rights might "vary as the extent of that dependence changes". In reconciling the competing rights "in as equitable a manner as is possible," the Court stated that neither right was absolute:

"It is one of the advances in maritime international law,... that the former laissez faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all." (96)

The Court easily manipulated the flexible interrelated principles of preferential rights, conservation and historic rights as a springboard to set the stage for the negotiation process. Thus the Court enunciated the conditions precedent and the general theoretical limits, and left the functional substance of the mutually interrelated principles to be

(95) Judgment at pp.27-28. My emphasis.
(96) ibid. at p.31. My emphasis.

developed through negotiation by the disputants themselves. (97) The Court indicated various factors the parties had to consider to carry out negotiations in good faith, with a view to an equitable apportionment of the fishing resources in the disputed waters. (98) The Court stated that the duty to negotiate:

> "flows from the very nature of the respective rights of the parties."

It recalled that in the Continental Shelf case the Court had established the obligation to negotiate as a:

> "special application of a principle which underlies all international relations." (99)

It is submitted that the Court's manipulation of the interrelated equitable principles of preferential rights, conservation and historic rights come to assume an important role in the international legal order. It allows the Court a limited, but by no means insignificant, role of directing the prescribed negotiations according to the equitable principles of fairness.

The decision generated some criticism about the role and function of the Court.(100) In making castigating remarks about the role of the Court, Churchill said that it did not take into account policy-considerations of political, technical and economic factors. In what is surely an overstatement, Churchill said that:

(97) Judgment at pp.25-26.
(98) ibid., p.33.
(99) ibid., p.32.
(100) Churchill, R.R.,'The Fisheries Jurisdiction Case' (1975) 24I.C.L.Q.82.

> "All the suspicions aroused by the 1966 S.W. Africa case have no doubt been re-awakened. The developing States are therefore less likely than ever to entrust the settlement of their disputes to the Court.... If the Court's role is to be limited to hearing the odd case between developed States, its future as an international tribunal seems bleak." (101)

While not doubting the desirability of judicial creativity when the law is in a state of flux, it is possible that the Court, in dealing with a major controversial issue in the middle of the Law of the Sea Conference, could jeopardice its judicial function and its impartiality by attempting to influence an international legislative body. However, the Court should not declare a non-liquet or moot the case merely because the issue is contoversial and the law is in a state of flux or in a process of transition.

Another point that deserves mention here is that in the absence of compulsory jurisdiction and lack of reasonable expectation of compliance with its judgment, the Court has to proceed with the utmost caution and restraint. However, the Court should not refuse to adjudicate merely because the post-adjudicative compliance is in doubt. (102) It is a sobering realisation that in the generality of cases, with the exceptions of Lotus case and possibly the present one, the Court's decisions have been respected. An exceptional feature of this case is that the position of the Parties may well have changed by the time of the application of the Court's judgment in consequence of the outcome of the conference, or by special agreements between the Parties or by the evolution of new rules of customary international law.

(101) Note 100 at p.98.
(102) Higgins, Note 8 at pp.72-3.

Whatever arguments are advanced for or against the decision, one cannot doubt that the Court evolved novel and flexible interrelated principles of preferential rights, conservation and historic rights as a wide springboard for a decision of legislative character.

3.3(d) The Nuclear Test Cases

The background and the facts of the case are set out with admirable clarity and conciseness in the Court's judgment. Australia and New Zealand litigated against the French atmospheric nuclear tests in the Mururoa Attol. The Court delivered two separate judgments. Since both decisions are substantially the same, we will refer to one by Australia against France. (103)

In 1973 the Court granted the Orders of Interim Measure of Protection which requested the Parties to take:

> "no action of any kind... which might aggravate or extend the disputes submitted to the Court... and in particular, the French Government should avoid nuclear tests causing the deposit of radioactive fall-out on Australian territory." (104)

Eighteen months later the Court saw fit to moot the case on the ground that since the French Government had made unilateral declaration not to continue testing in the atmosphere in the future, there was no more any dispute. Not only was it unnecessary, in the Court's view, to deal with the case, but any attempt to do so would be inimical to international peace:

(103) I.C.J. Rep., 1974, 253. Hereinafter called the Judgment.
(104) I.C.J. Rep., 1973, p.99 at 106.

"While judicial settlement may provide a path to international harmony in the circumstances of conflict, it is nonetheless true that the needless continuance of litigation is an obstacle to such harmony." (105)

The Court chose to insist on the principle of good faith in rejecting the possibility that France could decide to renew testing in the atmosphere just as it unilaterally decided to discontinue such tests. The Court, in holding that France's unilateral declarations created binding legal obligations, said that:

" It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations may have the effect of creating legal obligations.... An undertaking of this kind if given publicly, and with an intent to be bound even though not made within the context of international negotiation is binding." (106)

In holding that France was bound by the statements it had made, the Court chose to rely on the principle of good faith:

" One of the basic principles of governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence is inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the rule of pacta sunt servanta in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral

(105) Judgment, Para. 58 at P.271.
(106) Judgment, at P.469.

"declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus required be respected." (107)

In invoking the principle of 'good faith' the Court did not specifically refer to Article 38 (1)(c), but said that it was a "principle governing the creation and performance of legal obligations whatever their source." (108)

The Court was for the first time faced with a novel, complex and controversial issue of whether atmospheric tests were illegal. Lellouche has persuasively argued that the Court declared, albeit sub silentio, a non-liquet, leaving the States to work out some consensus on the issue in dispute. (109) The Court was further seen to use the doctrines of caution and restraint so as not to alienate a major Western customer by deciding against France. Moreover, it would have made it extremely difficult for the Court, had it reached the merits, to decide that the tests were legal, because such a judgment would be an open invitation to France to renew her atmospheric tests. One has a suspicious feeling that some of the members of the Court may well have been influenced by the attitudes of the States they came from. Ideally speaking, the judges do not represent their State, but the idea of geographic representation and of national judges is well established.

Even accepting the various criticisms levelled against

(107) Judgment at P.472. My emphasis.
(108) ibid. My emphasis.
(109) "The Nuclear Test Cases" (1975) 16Harv.I.L.J.614,634.

the judgments, one cannot overlook the fact that France has not disputed the Court's interpretation of its unilateral declarations. It is a sobering realization that France has, in fact, desisted from resuming further atmospheric tests. This has, no doubt, restored the hope of a reasonable expectation of compliance of the Court's decisions, and has high-lighted the significance of the Court's use of such general principles of law as 'good faith' and 'international cooperation' in resolving international disputes. Furthermore, it has been contended that this case represents a piece of judicial innovation in that this was the first time the Court has held that unilateral declarations of a State's intentions are binding on it. (109a)

4.1 Conclusion

The primary objective of the international community being the ideal of permanent peace, the Charter of the United Nations, in Articles 2(3) and 33, provide for the principle of peaceful settlement of international disputes. The International Court of Justice plays a very significant role in resolving explosive and delicate international issues. At the very least, the Court provides a cooling-off period, which has, no doubt, helped to lessen international tensions on volatile and explosive issue.

(109a) J.B. Elkind, 'Footnote To The Nuclear Test Cases: Abuse Of Right - A Blind Alley For Environmentalists' (1976) Vol.9, No.1 Van.J.T.L. 57 at P.64.

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The international legal system is still, in the absence of legislature, in a primitive stage of development. However, the absence of a uniformly accepted rule has not prevented the Court from acting in the past. Where the Court has failed to find uniformly accepted rules of law it has often invoked substantive principles of law "sufficiently widely and firmly recognised in the leading legal systems of the world to be regarded as international legal principles." (110) An analysis of the cases discussed show the application of such substantive general principles of law as the continental shelf being a natural prolongation of a State's land territory, principles of humanity, the straight 'base-line' rule, the interrelated principles of preferential rights, conservation and historic rights, and the binding legal obligation assumed by unilateral declaration, among others.

The Court, in resolving international disputes has often invoked such general principles of approach and interpretation to legal relationships, as demonstrated by the cases discussed, as equity, good faith, neighborliness, fairness, estoppel, duty to negotiate and principle of international cooperation. In invoking the principle of 'estoppel' in the Temple of Preah Vihear case (111) the Court said that:

> "it is an established rule of law that a plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error." (112)

(110) Friedmann, Note 32, supra.
(111) I.C.J. Rep., 1962, pp.23, 31-2., See Sep. Op. Alfaro, pp.39-51.
(112) ibid. p.26.

In a positivist legal system where rules of law stem from specific authoritative sources distinct from the courts applying them, one is inevitably faced with the logical possibility of a gap or lacuna within that body of rules. In practice, courts hardly ever admit non-liquet. The gaps, where rules do not exist, are remediable by, inter alia, either a liberal interpretation of judicial function or by the application of general principles of law. It has been contended that reasoned and flexible judgments are surely a better guarantee of progressive development of international law than are non-liquets.(113) Sir Hersch Lauterpacht is strongly of the view that there is a wide scope for judicial interpretation as long as there is no express departure from the express rules of international law:

> "a decision which is at first sight contra legem can be brought within the pale of law conceived as a whole." (114)

He further urges that:

> "the prohibition of non-liquet is one of the general principles of law recognised by civilized nations,"

and that:

> "the completeness of the rule of law... is a priori assumption of every system of law." (115)

(113) Higgins, Note 8 at pp.67-9.
(114) Note 10 at p.80.
(115) ibid. at p.64. See generally Stone, 35 Br.YB. I.L.124 (1959), who takes issue with Sir Hersch Lauterpacht.

In the absence of an international legislature the Court is often faced with the very difficult task of having to reconcile the sacrosanct doctrine of state-sovereignty and the need to develop law through authoritative decision-making process. In practice, the Court has often shown a general desire and willingness to consider wider principles in reliance upon traditional sources, but it has not yet fully utilised the opportunity of applying Article 38(1)(c) of the Statute of the Court. Jenks urges that the gaps in the international law can be filled, and that the progress of international legal system will be best served by the Court when it takes a more active role in the identification and the application of general principles of law and international public policy. (116) The recognition of 'general principles of law' as a source of law has a tremendous significance in the field of international law. It enlarges the creative role of the Court and allows it to avoid decisions of a non-liquet character.

While it is much easier to criticise than to suggest constructive means of enhancing the role of the Court, it is equally a truism that the initiative to bring about improvements is often a direct result of a critical appraisal of the institution. The aftermath of the 1966 S.W. Africa case witnessed massive criticisms of the Court as being a representative of the 'developed' West European

(116) C.W. Jenks, The Prospects of International Adjudication (1964) P.316.

States. The demand for a better representation of the Afro-Asian States was met in only a short time, in the 1966 election of the judges. The criticisms also led to a review of the role of the Court at the initiative of the United States. (117)

The International Court of Justice is blessed with some very eminent judges whose guiding influence on the role and function of the Court is of tremendous significance in enhancing the role and function of the Court. Even accepting the various indictments of the Court, one has to acknowledge that it has played a very significant role in developing the general corpus of international law.

Joining the band-wagon of such eminent scholars and jurists as Sir Hersch Lauterpacht, Waldock, Cheng, Jenks and Judges Tanaka and Jessup, among others, it is submitted that the role and function of the international Court of Justice will be best served, in a complex and diverse socio-economic systems of the international community we live in, by recognising that the authoritative decision-making process, in an 'organic sense', has to acknowledge the significance of the general principles of law, mindful of the variety, flux and novelty of the actual events.

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(117) See generally Gross, 'Review of the Role of the I.C.J.' (1972) 66A.J.I.L. 479-90.