THE ICJ IN THE 21ST CENTURY: JUDICIAL RESTRAINT, JUDICIAL ACTIVISM, OR PROACTIVE JUDICIAL POLICY

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Abstract A court of law can take various approaches when dealing with a case before it: judicial restraint, judicial activism or a proactive policy. In the present article the recent case law of the International Court of Justice is analysed in this light. The author is of the view that the Court, as the principal judicial organ of the United Nations should, wherever possible, by a careful judicial policy, apart from deciding the case in hand, give guidance and provide clarification on a number of questions which are of primordial importance in present-day international society but still are largely obscure from a legal point of view.

I. ISSUES OF JUDICIAL POLICY

Sixteen years from now the international community will celebrate the centenary of permanent inter-State adjudication. I do not know whether I will be there to see it nor do I know whether it will be celebrated at all. But if it is, surely this question will be put: in what way did inter-State adjudication contribute to the realization of peace and security in accordance with the principles of justice and international law as formulated in Article 1, paragraph 1 of the Charter?[1] Was it a basic factor in the 'firm establishment of the understandings of international law as the actual conduct of Governments', as it is so beautifully worded in the preamble of the Covenant of the League of Nations?

In her speech on the occasion of the 60th anniversary of the ICJ, the President, Judge Rosalyn Higgins, said: 'We must continue to provide that core predictability that distinguishes law from politics, but we have to do so in a way that is responsive to the legitimate needs and aspirations of the international community.'[2]

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[1] 'The Purposes of the United Nations are: 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.' Charter of the United Nations, Article 1, para 1.

[2] 'Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice, at the

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What are the legitimate needs and aspirations of the international community and what does it expect from the Court in this respect? Is it merely the settlement of disputes which have been brought to the Court by mutual consent and the responding to legal requests made by other institutions of the UN family, or do these needs and aspirations transcend the narrow parameters set by the Court's Statute? Of course, the Court has no choice but to act within these parameters but the way in which it carries out its function is dependent upon the conceptualization of its task; the Statute is not a straitjacket which leaves no room for an imaginative interpretation.

This may be illustrated by quoting from Sir Gerald Fitzmaurice's seminal article, 'Hersch Lauterpacht—The Scholar as Judge':

> There are broadly two main possible approaches to the task of a judge, whether in the international field or elsewhere. There is the approach which conceives it to be the primary, if not the sole duty of the judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning, and while not unduly straying outside the four corners of the case, to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law.[3]

It is this dual approach which will be the main theme of this article. I use the word 'dual' on purpose, because these approaches are not mutually exclusive. For clarity's sake it may be useful to set judicial activism against judicial restraint (as Hugh Thirlway does in his contribution to the Liber Amicorum for Judge Oda[4]) or the juridical against the meta-juridical (as Sir Elihu Lauterpacht does in his contribution to the Liber Amicorum for Judge Skubiszewski[5]), but in actual practice the situation often, be it not always, is rather nebulous. The ICJ is a collegiate body and both approaches will be reflected in its composition. And the final product of the deliberations, whether a judgment or an advisory opinion, will usually be more determined by the specificities of the case than by a contest of approaches. Because what binds all judges is the need to decide a case on the basis of the facts and the applicable law. It is often in the separate and dissenting opinions of individual judges that the characteristics of the two approaches are more clearly recog-

solemn sitting on the occasion of the sixtieth anniversary of the inaugural sitting of the Court' Press Release (12 Apr 2006), <http://www.icj-cij.org/presscom/index.php?pr=1004&p1=6&p2=1&search=%2260th+anniversary%22>.

[3] G Fitzmaurice, 'Hersch Lauterpacht—The Scholar as Judge' (1961) 37 British Yearbook of International Law 1.

[4] H Thirlway, 'Judicial Activism and the International Court of Justice' in *Liber Amicorum Judge Shigeru Oda* (Brill, Leiden, 2002).

[5] E Lauterpacht, 'The Juridical and the Meta-Juridical in International Law' in J Makarczyk (ed), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Kluwer, The Hague, 1996).

nizable. But even then the picture cannot always be drawn in black and white. Judges like Christopher Weeramantry who dissented in about half the number of cases which were decided during his term, more often than not because in his view the Court had failed to act in conformity with its judicial responsibility, are rather an exception than the rule. His view on this judicial responsibility is well reflected in his dissenting opinion in the *Lockerbie*[6] case, provisional measures phase:

> Particularly when situations are tense, with danger signals flashing all around, it seems that the Court should make a positive response with such measures as are within its jurisdiction . . . If international law is to grow and serve the cause of peace as it is meant to do, the Court cannot avoid that responsibility in an appropriate case.[7]

This is judicial activism *pur sang*. This is an urgent appeal to respond to what he saw as the legitimate needs and aspirations of the international community.

In dealing with this purported judicial responsibility, I will focus first on jurisdictional issues, then on the impact of a decision on the parties to the dispute, and finally on the Court's role in the development and enrichment of the law, to use again Fitzmaurice's words.

II. JURISDICTIONAL ISSUES

The Court's jurisdiction is based on consent, 'even if one might regret this state of affairs as we approach the twenty-first century',[8] as Judge Higgins sighed in 1999 in her opinion to the Order on provisional measures in the Kosovo cases.

This precondition for the Court's functioning is a serious set-back. It prevents the Court from playing a role comparable to that of the European Court of Justice in Luxembourg or the European Court of Human Rights, whose jurisdiction flows automatically from their basic treaties. This means that before dealing with the merits the Court always has to analyse in a meticulous way whether the heads of jurisdiction invoked provide the Court with jurisdiction in all those cases which are brought unilaterally (the bulk of the cases before the Court in the last two decades). If the result of this analysis is too restrictive the Court will undermine its authority, if it is too ambitious it will endanger its position, since States may become more reluctant to accept its jurisdiction or more inclined to withdraw the acceptance already given.

Allow me to illustrate this probing exercise, which can be compared to tightrope-walking, by comparing a number of relatively recent cases.

[6] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom and Libyan Arab Jamhiriya v United States of America* [1998] ICJ Rep 119 [hereinafter *Lockerbie*].

[7] Dissenting Opinion of Judge Weeramantry, *Lockerbie* [1992] ICJ Rep 180.

[8] Separate Opinion of Judge Higgins, *Legality of the Use of Force* [1991] ICJ Rep, para 26.

The first case which comes to mind is the *East Timor*[9] case, where Portugal as administering power of East Timor instituted proceedings against Australia. Since 1975 East Timor had been occupied and annexed by Indonesia, a state of affairs which had not been recognized by the UN. In 1989 Australia concluded a treaty with Indonesia on the delimitation and exploitation of part of the continental shelf between Australia and East Timor.[10] Portugal contended that by doing so Australia had infringed upon the rights of the East Timorese people, in particular their right to self-determination, and upon the rights of Portugal, which, as administering power, was exclusively entitled to act on behalf of East Timor.

The Court found that it could not exercise the jurisdiction it had by virtue of the declarations of the Parties in which they had accepted the compulsory jurisdiction of the Court, since the dispute centered on the question whether Australia could have lawfully entered into an agreement with Indonesia. This question, however, which was premised on the lawfulness or unlawfulness of Indonesia's conduct, could not be handled by the Court without Indonesia's consent. The Court applied the so-called Monetary Gold doctrine according to which the Court cannot exercise jurisdiction if the rights and obligations of a third State constitute the very subject-matter of the case before it, in the absence of that third State's consent.

This judgment has been criticized as being overly restrictive, and not without reason. The Court explicitly took note of the fact that it was not at issue between the Parties: (a) that East Timor had remained a non-self-governing territory and thus was entitled to the right to self-determination; and (b) that the General Assembly after Indonesia's invasion had continued to refer to Portugal as the administering power of East Timor, even if the Parties did not agree on the legal implications of that qualification.

But that is exactly the issue which constituted the legal dispute between the Parties and the Court could perfectly well have ruled on that issue without having to pass a verdict on the legality of Indonesia's conduct. Portugal was claiming that its own right as administering power, acting on behalf of a non-self-governing people, had been violated by Australia.

This overly cautious attitude of the Court is even more regrettable since basic principles and values of the international community were at issue, namely the rights of non-self-governing people and their right to self-determination. A reasoned opinion on these matters by the highest legal organ of the UN would have been highly significant, even if with regard to the decolonization process it would have come rather late in the day.

Little did it help that the Court emphasized that the right to self-determination is a right *erga omnes*, since it evidently was of the view that such an *erga*

[9] *East Timor (Portugal v Australia)* [1995] ICJ Rep 90.

[10] Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia [Timor Gap Treaty] (adopted 11 Dec 1989, entered into force 9 Feb 1991) [1991] Australian Treaty Series 9.

omnes right cannot be upheld against a State which has accepted the Court's jurisdiction if the lawfulness of the conduct of a third State is involved. But it was not that third State's conduct which was the subject of the applicant's claim. It is not so much the protection of a third State's rights which hurts but the protection provided to a defendant in a dispute which in the Court's view is perfectly well judiciable.

A different but comparable problem confronted the Court recently. The Democratic Republic of Congo had brought a complaint against Rwanda, accusing it of having violated, inter alia, the Genocide Convention.[11] Both States were party to this convention but Rwanda had made a reservation to Article IX, which establishes the Court's jurisdiction to entertain any dispute relating to the interpretation, application or fulfillment of the Convention.[12] The Congo, however, contended that this reservation was invalid because it was incompatible with the object and purpose of the Convention which establishes norms of jus cogens.

The Court, in a judgment of 3 February 2006, recalled what it had said in the *East Timor* case, namely, 'that the *erga omnes* character of a norm and the rule of consent are two different things'[13] and said that the same applied to norms of *ius cogens*: 'the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the court to entertain that dispute.'[14] Since reservations are not prohibited by the Convention and a reservation to the Court's jurisdiction does not affect substantive obligations relating to acts of genocide themselves under the Convention, it cannot be regarded as incompatible with the object and purpose of the Convention or with a norm of peremptory law.

In itself this judgment seems much more logical and straightforward than that of 1995. A reservation to a jurisdictional clause means absence of consent. A number of judges nevertheless deemed it necessary to give expression to a certain concern. One of them, Judge Koroma, was of the view that in the light of the special circumstances of the case, Rwanda itself having been a victim of genocide, and because of Rwanda's conduct, the Court should have taken the case.[15] Five other judges, including myself, did not disagree with the Court's decision but drew attention to new trends in the

[11] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* [2006] ICJ Rep.

[12] 'Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.'

[13] *East Timor (Portugal v Australia)* [1995] ICJ Rep 102.

[14] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* [2006] ICJ Rep 27.

[15] Declaration of Judge Koroma, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* [2006] ICJ Rep 55.

practice of, in particular, human rights courts which had pronounced on the compatibility of reservations to jurisdictional clauses with their basic treaties.[16] They further called it

> a matter for serious concern that at the beginning of the 21st century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide, thereby allowing a State to shield from international scrutiny any claim that might be made against it concerning genocide, one of the greatest crimes known.[17]

And the five end by saying that 'it is thus not self-evident that a reservation to art IX could not be regarded as incompatible with the object and purpose of the Convention and we believe that this is a matter that the Court should revisit for further consideration.'[18]

Is this merely an exhortation to States to withdraw their reservations to Article IX or is it an indication that the principle of consent may under certain conditions be set aside by 'higher' norms and that the principle of consent is less impenetrable and indestructible than it used to be? If it is the former this is exactly what a court of law is entitled to do in the interest of the wider legal community, while at the same time exercising judicial restraint in the awareness that it cannot change the law as it stands. I would call this a proactive approach. Whether it, on the other hand, foreshadows a development which leads to a greater relativity of the principle of consent, only the future can tell. Such a development would at least require a certain activism.

In 1994 Canada amended its acceptance of the compulsory jurisdiction of the Court by adding a reservation, excluding from the Court's jurisdiction disputes about new conservatory measures it intended to take in areas beyond the limits of its maritime jurisdiction, ie on the high seas. The lawfulness of these measures under international law was doubtful and that was exactly the reason why the new reservation was made.

According to the Court, the fact that a State may lack confidence as to the compatibility of some of its actions with international law does not operate as an exception to the principle of consent to jurisdiction and the freedom to enter reservations.[18a]

The fact that the reservation was made with the specific intent to prevent the Court from assessing the lawfulness of certain conduct is beyond any doubt difficult to reconcile with the general intent of the State concerned to settle its disputes in a judicial way, as reflected in its declaration of acceptance of the Court's jurisdiction. The confidence in the judicial system and in the

[16] Joint separate opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)* [2006] ICJ Rep 65.

[17] ibid 71, para 25

[18] ibid 72, para 29.

[18a] 18bis—*Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 456, para 54.

Court, exemplified by the willingness to submit a wide range of conceivable but not yet imminent legal disputes to judicial settlement is neutralized by the exemption from the Court's jurisdiction of an anticipated and therefore probably imminent dispute.

Although some members of the Court came to the conclusion that a 'law-conform' interpretation of the reservation allowed the Court to entertain the case, in my view that interpretation failed to appreciate Canada's intent in making the reservation and therefore is rather artificial. The Court itself acknowledged that the very purpose of States in making reservations is to bar the Court from pronouncing on the lawfulness of actions it intends to take. And I cannot disagree with the Court that in that case it is without jurisdiction; there is no consent.

But by merely taking note of this state of affairs, the Court, in my view, was unduly passive. It should at least have posed the question: how credible is a system where a State of its own free will has chosen to have (certain categories of) its legal disputes settled by the Court but, after having done so, can exempt from that system certain specific actions it intends to take because it has doubts about their compatibility with international law? Is not the very essence of that system the exclusive competence of the Court to evaluate that compatibility? That system is a fragile one and, as I said in my separate opinion, it would not have been beyond the Court's mandate as guardian of the Statute to draw attention to that fragility and to the risks to which it is exposed.[19] Again, an exhortation, but motivated by the desire to strengthen the system. Such a proactive approach, which could not have been mistaken for activism because it respected the law as it stands, would not have been amiss.

The examples I have given illustrate how much the Court is handicapped by the principle of consent. Could the European Court of Justice have rendered such important and influential decisions as the *van Gend and Loos*[20] or the *Costa–ENEL*[21] judgments, which have broken new ground, if its jurisdiction had not been firmly founded in the EEC Treaty?

III. THE JUDGMENT AND THE PARTIES TO THE DISPUTE

Does the Court have a special responsibility towards the Parties relating to matters which—strictly speaking—are not, directly or indirectly, included in their submissions? Is it the duty of the Court not only to decide the case within the confines of the submissions but also to express its view on the future conduct of the Parties in implementing the judgment?

[19] Separate Opinion of Judge Kooijmans, *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 493, para 15.

[20] Case 26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I-1.

[21] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR I-585.

A typical example of the latter approach is the *Gabčíkovo/Nagymaros* case between Hungary and Slovakia.[22] In 1977 the two countries had concluded a highly complex treaty for the development of hydro-electric energy through the construction of a system of dams in the Danube. In the 1980s, serious differences of opinion arose over the implementation of the plan, in particular about its ecological consequences. In the end Hungary abandoned the works and suspended the treaty, whereupon Slovakia unilaterally put into effect a variant of the plan on its own territory in order to meet its own energy needs. In reaction, Hungary terminated the treaty. In 1993 the Parties concluded a Special Agreement to submit the dispute to the Court. The Court was asked to evaluate the legality of the conduct of the Parties both with regard to the suspension and termination of the treaty by Hungary and the construction and putting into operation of part of the system by Slovakia. The Court was also asked to decide on the legal consequences arising from its judgment. From the submissions it is clear that both Parties understood by 'legal consequences' in the first place 'restitutio in integrum and compensation'.

The Court found that both Parties had violated their obligations under international law. Moreover, the Court concluded that the 1977 treaty was still in force and that, consequently, both Parties were obliged to implement it.

The Court could have left it at that and have further decided on the reparation due to either of the Parties. That would also have been in conformity with the Special Agreement, where both parties had committed themselves to enter into negotiations on the modalities for the execution of the judgment; thus the implementation issue could have been left to the Parties.

But the Court decided otherwise. It realized that it was not very helpful for the Parties to state that the treaty was still in force whereas the factual situation had dramatically changed. It therefore decided to interpret the term 'legal consequences' in a future-oriented way. After having given a declaratory judgment on the past conduct of the Parties, it now determined what their future conduct should be.

Let me highlight one sentence, which contains in a nutshell what the Court saw as its task:

> What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship in order to achieve its object and purpose in so far that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.[23]

By choosing this approach the Court went beyond the usual parameters of what is understood by remedies.

The Court actually restructured the treaty regime, taking into account not only the changed factual circumstances but also the legal developments which

[22] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.
[23] ibid 76, para 133.

had taken place since the conclusion of the treaty, in particular concerning the protection of the environment. 'In order to evaluate the environment risks (a point of major concern to Hungary) current standards must be taken into consideration'.[24] The Court escaped the reproach of creating new law between the Parties by recalling that the treaty itself obliged them to maintain the quality of the water of the Danube and to protect nature. To achieve this objective new norms have to be taken into consideration and new standards have to be given proper weight.

The Court then gave specific and concrete guidance to the Parties when negotiating on the implementation of the judgment. In my view, the approach taken by the Court is a felicitous example of a proactive judicial policy directed to a comprehensive settlement of the dispute in order to re-establish a fruitful relationship between the Parties. It is certainly true that the Court could have taken a more limited approach but the policy it chose was certainly in line with its main function, that is to decide disputes in accordance with international law.

Another example of such a proactive approach, be it in a less striking way, can be found in the judgment in the *Kasikili/Sedudu Island*[25] case between Botswana and Namibia, another case brought by Special Agreement. In the Agreement the Parties asked the Court to determine the boundary between them around Kasikili/Sedudu (K/S) island and the legal status of the island, a rather straightforward request.

The Court found that the boundary followed the northern channel of the river Chobe, which runs around the island, and that the island belonged to Botswana. It thus did exactly what the Parties had asked it to do. But that is not yet the end of the story because after this finding the Court referred to a joint communiqué of a more general nature in which the two Presidents resolved, inter alia, that navigation should remain unimpeded, including the free movement of tourists. The Court concluded therefrom that there shall be unimpeded navigation for craft of their nationals and flags in both channels of the river around K/S island and it made this conclusion part of the *dispositif*.

While Judge Oda was of the view that, since this matter was not part of the Special Agreement and the issue of navigation had not been included in the submissions, it should not have been dealt with in the operative part.[26] Judge Koroma stated that the Court was entitled to lay down terms which not only determined the boundary as such but would contribute to the peace and stability between the two States.[27] The Court's finding should therefore in his view not be regarded as extra-legal.

[24] ibid 77, para 140.

[25] *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1045.

[26] See Separate Opinion of Judge Oda, *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1117, para 2.

[27] See Declaration of Judge Koroma, *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1112.

I myself stated in my separate opinion that, since the communiqué was part of an ongoing effort to settle the boundary dispute peacefully, the Court could, and even should, consider the Special Agreement in its context together with related statements and documents and conclude obligations of conduct, even if the Special Agreement merely asked for a declaratory judgment.[28]

Although the Court did not expand on the reasons for this additional finding, as it did in *Gabčíkovo-Nagymaros*, it is in my view clear that it acted in order to give guidance to the Parties in finding a definitive settlement of the dispute.

I strongly believe that such a proactive judicial policy serves the interests of the Parties and enriches the Court's mission, provided the 'extras' given by the Court rest on a solid legal basis. It is not for a court of law to make moral recommendations or to suggest political measures. Both in *Gabčíkovo/Nagymaros* and in *Kasikili/Sedudu Island* the Court referred to existing legal obligations, thereby placing the relations between the Parties in a wider perspective. In the first case the Court explicitly referred to new norms relating to the environment and the utilization of international watercourses, in the second to obligations ensuing from a bilateral document.

It can be readily admitted that not all cases lend themselves to such an approach. But whenever the possibility is there and the relations between the Parties make such an approach commendable, the Court should not shy away from using available opportunities which may contribute to an effective solution of the dispute.

IV. THE JUDGMENT AND THE DEVELOPMENT OF THE LAW

This type of proactive policy differs from that mentioned by Fitzmaurice,[29] namely the function of the judge to utilize those aspects of the case in hand which have a wider interest or connotation in order to make general pronouncements of law and principle that may enrich and develop the law. Such an approach seems to be diametrically opposed to that of Chief Justice Roberts of the US Supreme Court who said: 'Judges must be constantly aware that their role is limited. They do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law.'[30]

These two propositions refer to statements by a court relating to issues which are incidental to the case before it but are not strictly necessary for its ruling. Such statements may take the form of *obiter dicta* but may also be

[28] Separate Opinion of Judge Kooijmans, *Kasikili/Sedudu Island (Botswana v Namibia)* [1999] ICJ Rep 1148, para 22.

[29] See Fitzmaurice (n 3).

[30] Judge Roberts's Response to the Senate Judiciary Committee Questionnaire: <http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/supreme_court_watch/roberts-judiciary-qustionnaire.htm>.

contained as part of the dictum-oriented reasoning. An example of the former is the famous *obiter dictum* in the *Barcelona Traction*[31] case (1970). This *obiter dictum*, which was only faintly related to the case in hand, was a clear signal to the international community that the *South West Africa II* judgment was not the last word.[32] As such, it can be said to have functioned as a significant contribution to the interpretation and development of the law.

An example of the latter is the reference in the *Gabčíkovo/Nagymaros* case to the new principles and norms on the protection of the environment; here the Court concluded 'that the need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'.[33]

It is, however, noteworthy that the Court used the term 'concept' of sustainable development, which is more neutral than the term 'principle' of sustainable development would have been since that has a clearer legal connotation. The terminology chosen is as such a sign of judicial restraint.

And it is judicial restraint that seems to characterize the Court's jurisprudence of the last 10 years. This was very clear in the Court's decision in the *Arrest Warrant*[34] case, where it refused to deal with the issue of universal criminal jurisdiction in spite of the fact that it had explicitly stated that the *non ultra petita* rule (the Parties had not asked the Court to rule on the issue of universal jurisdiction although they had given it a great deal of attention in their written pleadings) cannot preclude the Court from addressing certain legal points in its reasoning, in particular the question whether the Belgian investigating judge, in exercising his purported universal jurisdiction, complied in that regard with the rules and principles of international law. By abstaining, however, from doing what it said it was entitled to do, and instead concentrating on the question of immunity, the Court made a logical mistake. Immunity means immunity from jurisdiction; if there is no jurisdiction, the question of immunity does not arise.

What is perhaps of even greater importance is that the Court willfully abstained from using the opportunity (which does not come that often) to provide clarification on a matter which, while being of great topical value, is highly controversial. Such clarification would, as President Guillaume said in his separate opinion, have been in the interest of all States, including Belgium in particular.[35] As a result we have an interesting clash of views between

[31] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3.

[32] *South West Africa Cases (Ethiopia v South Africa and Liberia v South Africa) Second Phase* [1966] ICJ Rep 6.

[33] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 78.

[34] *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 3.

[35] Separate Opinion of President Guillaume, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 35, para 1.

President Guillaume and the three judges who wrote a joint opinion,[36] but no authoritative opinion of the Court.

This judicial restraint is also noticeable in the field of the legality of the use of force. The Court has had ample opportunity to expose its view on the way the prohibition of the use of force and the right of self-defence has to be interpreted in the beginning of the 21st century. It did so in three cases (*Oil Platforms*,[37] *Construction of a Wall*[38] and *Congo–Uganda*)[39] even if it missed the chance to do so in the Kosovo cases because of lack of jurisdiction.

In *Oil Platforms* the Court could have easily disposed of the case without even dealing with the alleged illegality of the use of force by the USA. However, in an upsurge of misplaced activism it decided to give that issue prime place in its reasoning and even in the *dispositif*. As far as I know this is the first time that an *obiter dictum* found a place in the operative part of a judgment. It did not, however, add new elements to the traditional interpretation of the prohibition of the use of force.

In the advisory opinion on the construction of the wall in the occupied Palestine territories the Court dealt with the right of self-defence, which was invoked by Israel as justification for the construction of the wall. It contended that a number of Security Council resolutions had explicitly recognized the right of States to use force in self-defence against terrorist attacks and 'therefore surely recognizes the right to use non-forcible measures to that end'.[40]

The Court, however, merely stated that Article 51 of the Charter recognizes the existence of an inherent right of self-defence in the case of an armed attack by one State against another State and that Israel did not claim that it had been attacked by another State.[41] But the Court failed to note that Article 51 does not mention an attack by a State and that this was recognized in the Security Council resolutions adopted after 9/11. It regrettably bypassed an element, the legal implication of which marks undeniably a new approach to the concept of self-defence, although the issue had been explicitly raised by Israel.

[36] Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* [2002] ICJ Rep 63.

[37] *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161.

[38] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

[39] *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 1.

[40] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 194, para 138.

[41] 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security' (Art 51 of the Charter of the United Nations).

The Court was, in my view, again unduly reticent when it dealt with the right of self-defence in the *Congo–Uganda* case. Uganda alleged to have been the victim of attacks by irregular bands acting from Congolese territory; it invoked the right of self-defence when it invaded the Congo, which in its view had actively supported these bands. Relying again on its interpretation of Article 51 as requiring an armed attack by a State, the Court found that the attacks were not attributable to the Congo and that consequently Uganda was not entitled to use force in self-defence. Then the Court stated that there was no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.[42] It certainly would have not been amiss if it nevertheless had done so; the contentions of the Parties had brought this highly topical and controversial issue within the context of the case. By refraining from dealing with it, the Court has foregone a precious opportunity to provide clarification on a number of questions which are of primordial importance in present-day international society but still are largely obscure from a legal point of view.

A court may have sound reasons not to rule on issues which are not strictly necessary for the determination of the *petitum*. One may wonder, however, whether this is the most meritorious attitude for a court which is the principal judicial organ of a world community which has to cope with a multitude of problems and where lawlessness is rampant and thus could benefit from guidance in the legal field.

The Court increasingly is dealing with cases concerning what President Higgins called 'cutting-edge' issues. This allows the Court to play a more preponderant role in delineating the law than it was able to do in the past.

I am certainly not in favour of judicial activism which may turn into a destructive trap. But neither am I in favour of a form of judicial restraint that closes windows which need to be opened and thus becomes barren. Earlier I used the word 'proactive'. In one of my dictionaries I found the following meaning of that term: 'Having an orientation to the future, anticipating problems and taking affirmative steps to deal positively with them rather than reacting after a situation has already occurred'. I find this attitude reflected in what Sir Robert Jennings, that wise and erudite man, once wrote:

> The *primary* task of a court of justice is not to 'develop' the law, but to dispose, in accordance with the law, of that particular dispute between the particular parties before it. This is not to say that development is not frequently a secondary part of the judge's task. . . . And it is to say that any development should be integral and incidental to the disposal according to the law of the actual issues before the court. For the strength of 'case law' is precisely that it arises from actual situations rather than being conceived *a priori*.[43]

[42] 41bis, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda* [2005] ICJ Rep, para 147.

[43] R Jennings, 'The Role of the International Court of Justice' (1997) 68 British Yearbook of International Law 41.