Beyond Dispute:
International Judicial Institutions as Lawmakers

Lawmaking by the International Court of Justice—Factors of Success

By Niels Petersen[*]

A. Introduction

The process of norm evolution and development in international law has been highly debated in recent international law and international relations scholarship. However, the debate focuses primarily on states or non-state actors as the agents responsible for shaping international law. In contrast, the role of the judiciary is often neglected in the debate.[1] It is an open secret, though, that courts are not merely Montesquieu's *bouche de la loi*, impartial arbiters, who apply and interpret exogenous norms. Armin von Bogdandy and Ingo Venzke have already pointed out that decisions for concrete cases can hardly be derived from abstract legal concepts by the mere exercise of logical deduction.[2] Instead, the application of legal provisions often involves the development of the applied norm itself. This not only applies in the domestic setting, but is also valid in the international arena. This contribution will deal specifically with lawmaking by the International Court of Justice (ICJ).

If you want to analyze the lawmaking of the World Court, you must first define what lawmaking is. There are two elements to the definition: First, we have to observe a development in the law. The law on a particular matter has to be different in point t_2 than it was in point t_1. Second, this development has to be caused by a judgment of the ICJ. We thus have to analyze whether the development observed would also have occurred in the counterfactual situation that no judgment had been entered. In the following, we will have a closer look at these two elements. First, I will try to identify criteria of how we can observe a development in the law (B). Then the circumstances under which judgments

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[1] There are, however, exceptions. *See*, *notably*, Wayne Sandholtz & Alec Stone Sweet, *Law, Politics, and International Governance*, in: THE POLITICS OF INTERNATIONAL LAW, 238 (Christian Reus-Smit ed., 2004).

[2] Armin von Bogdandy & Ingo Venzke, *Beyond Dispute: International Judicial Institutions as Lawmakers*, in this issue, 979, 985.

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influence the state of the law will be examined in more detail (C). The theory will then be put to the test in two case-studies (D), before it is finally examined from the wider perspective of the framework of the project (E).

B. The Concept of Law and the Three Dimensions of Lawmaking

A development of the law occurs when the law is actually different in point t_2 than it was in a prior point t_1. To observe a development in the law, we thus have to define what the law is conceptually and how we measure the state of the law in a specific point t. There are, basically, two principal ways of defining the law. One can define law either from an external or an internal perspective.[3] The internal perspective is the perspective of judges and legal practitioners who want to determine the actual content of the law. It thus contains normative guidelines for courts to come to their decisions. The most adequate definition for this internal perspective seems to be a formal definition—as provided by legal positivism—that principally concentrates on the sources of the law.[4] The external perspective, in contrast, observes law as a social phenomenon. It wants to describe certain factual developments or analyze causal relationships. In order to be able to do that it considers law to be the body of the actual legal practice. The choice between these two perspectives is not one of right or wrong. It is rather one of the more or less appropriate. Just as melancholic music can be a wonderful enjoyment, it is, perhaps, not the right thing if you are looking to be exhilarated. As I try to analyze the causal effect of court judgments on the law, the external perspective seems to be more adequate for the purposes of this study.

This contribution will adopt a discourse-oriented understanding of the law, according to which the state of the law is determined by the legal discourse. This discourse has two dimensions, which overlap but are not perfectly identical. First, we have the formal legal discourse, which is led by courts, legal practitioners and international law scholars. The starting point for an analysis of the legal discourse is certainly court judgments.[5] But we will have to go beyond the mere analysis of judgments of the World Court. Other important indicators of the state of this discourse are scholarly books and articles, as well as general textbooks on international law. After important judgments, many scholars comment on the soundness of the legal reasoning of the particular court decision. These case comments are an indication for how the judgment was received by international law scholars and lawyers. However, we have to be aware of a possible selection effect.[6]

[3] *See* HERBERT L. A. HART, THE CONCEPT OF LAW 86-88 (1961).

[4] *See id.*; HANS KELSEN, PURE THEORY OF LAW (1967).

[5] Some scholars even limit their analysis of lawmaking by international courts to an analysis of court judgments, *see* ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 272-311 (2007).

[6] On the issue of selection effects, *see* GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 128-139 (1994).

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Scholars have incentives to write something innovative. They will, therefore, rarely comment on a decision they completely agree with because they would not have much to add worth to be published. We will get a more accurate picture by contrasting the case comments to the reception of the judgment in legal textbooks, as the goals of textbooks are different than those of scholarly articles.

But we have to look beyond the formal legal discourse on international law. If the legal discourse were completely utopian and detached from the legal understanding of states, it would still not be a good yardstick of the state of international law. Therefore, it is also necessary to analyze whether the judgment of the ICJ is reflected in state practice and, in particular, the opinion of state representatives about the state of international law in t_1 and t_2. According to this perspective, norms of international law are all those norms that states perceive to be normative restrictions on their conduct. Indicators are similar to the ones that are commonly used for the identification of *opinio juris* in the discussion on customary international law.[7] In this study, there will be a particular focus on legal opinions of states issued for particular occasions, such as the drafting of new legal texts.

C. The Causal Mechanism: Lawmaking Through Persuasion in the Legal Discourse

There has been an intense debate about whether and to what extent international law influences the behavior of states despite the lack of a central enforcement mechanism.[8] Similar concerns can also be raised with regard to judgments of the International Court of Justice. As these judgments are not centrally enforced, it is not self-evident that states comply with them[9] or that they serve as guidelines for the future conduct of all members of the international community. Thus, how do judgments influence the legal discourse among legal scholars as well as the perception of states of the law? In the following, a general model of the influence of judgments on the legal discourse will be developed (*I.*). In a second step, I will look at potential factors that will make it more or less likely that an ICJ judgment will influence state conduct (*II.*).

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[7] *See* ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 74-102 (1971); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW. A NEW THEORY WITH PRACTICAL APPLICATIONS 171-228 (2010).

[8] *See* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE LAW JOURNAL 2599 (1997); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Anne van Aaken, *To Do Away with International Law? Some Limits to 'The Limits of International Law'*, 17 EJIL 289 (2006); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008). The traditional view of the mainstream legal doctrine is probably best represented by Louis Henkin, according to whom "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" (LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (1979).

[9] For a study on compliance of states with judgments of the ICJ, *see* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004).

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I. The Cycle of Normative Development

The model for the influence of judgments on the legal discourse and state conduct will be based on Wayne Sandholtz's model of normative change.[10] Sandholtz's cycle has four steps: at the starting point, rules provide a normative structure within which actors decide what to do and what not to do. However, rules are often ambiguous and do not provide orientation for every possible situation. In such cases, a dispute between states may arise that leads to a discourse about the content of the law. This discourse leads to a development of the rule because one of its competing interpretations is strengthened in the discourse. That rule will then again structure the behavior of actors in the international arena so that the cycle is closed.

This cycle of normative development is not unique to the international system. The basic structure of the process will be the same in societies without any legal institutions as well as in advanced, institutionalized legal systems in modern nation states. However, there are differences with regard to the quality of the discourse about the content of rules and its effect on rule development. In an institutionalized legal system, the *form* of the discourse about the rule will be preponderantly legal. Although important cases may be accompanied by a general public discussion, the discourse is mainly led by the parties in the formal *forum* of the courthouse. It is decided authoritatively by the court through a formal decision. There is thus a strong likelihood that this court judgment will directly lead to a development of the norm(s) at issue and influence future behavior because of the changed norm structure.

In a small society without legal institutions, the rules will basically emerge out of behavioral patterns.[11] If there is a dispute about the content of a rule, the discourse will not be led by legal experts, but potentially by all interested members of the society. There is no authoritative decision that ends the discourse and determines the future state of the law. But we may observe the formation of a majority opinion changing the rule and influencing future conduct. However, the connection between the discourse about the content of the "law" and rule development is much less direct and certain than in the model of the institutionalized system.

[10] Wayne Sandholtz, *Dynamics of International Norm Change: Rules against Wartime Plunder*, 14 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 101 (2008).

[11] *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

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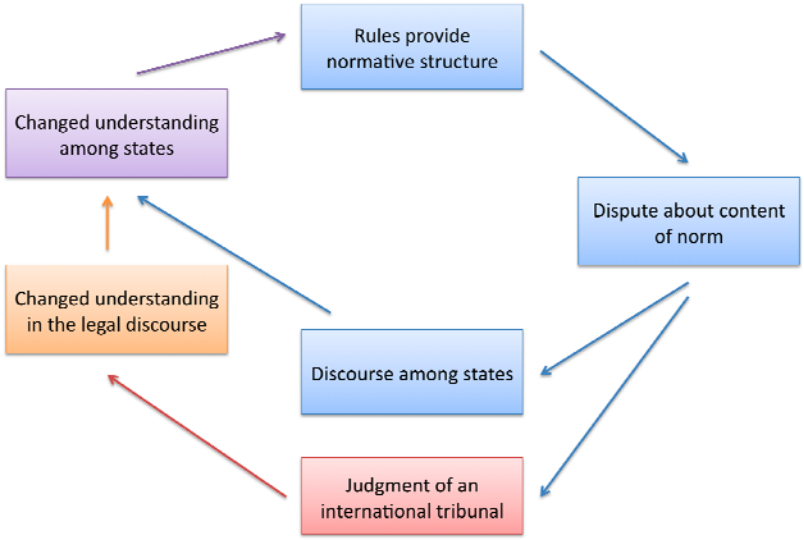
Figure 1: The Cycle of International Normative Change and the Dual Legal Discourse



In the international arena, we observe a hybrid between these two models (Figure 1). When a dispute about the content of a rule arises, we observe parallel discourses. On the one hand, we have an expert discourse that is led by legal scholars and in which the ICJ may be involved. On the other hand, the states as addressees of the international norms will voice their own opinions about what they think the law is. Even if a dispute is brought to the ICJ, the connection between a court judgment and a development of the rule is often weaker than in a domestic legal system. Whether a court judgment effectively influences what states think about the law and thus creates legitimate expectations will depend on whether a considerable number of states actually accept the interpretation of the court. If individuals do not accept the interpretation of a competent court in the domestic setting, they risk losing in a subsequent legal proceeding and facing a sanctions-backed judgment. In the international arena, it is not certain whether states that do not accept an interpretation of the ICJ will ever face a legal proceeding before a court.

Despite these differences to the domestic setting, court judgments may not only have an influence on the internal understanding of legal rules in the legal discourse, but also on the external evaluation of states. One of the problems of a decentralized discourse on the content of rules, such as a discourse among states, is that there is no arbiter who finally decides the discourse and determines the prevailing rule. However, if rules are supposed

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to structure normative thinking and to determine behavior, then it is important to know what the rules are, or—more precisely—to know what the other members of the international community think the rules are. Michael Byers once emphasized that customary law is the shared understanding of the legal importance of acts in international relations.[12] Yet, it is not always clear what this shared understanding is. In such situations of uncertainty, decisions of the World Court offer a focal point to make this shared understanding salient.[13]

II. Factors Determining Whether Judgments Have an Influence

Even if we assume that judgments of the ICJ influence the perception of legal norms by states and thus make law, this does not mean that all judgments have an automatic effect. Whether a judgment has an influence on the legal discourse and the communicative practice of states might—in some cases—depend on historical circumstances. We may, nevertheless, be able to identify certain factors that make it more or less likely that a judgment of the ICJ will have a sustainable effect on the subsequent development of international law. Whether a judgment of the ICJ translates into a "norm development" in the legal discourse depends on the perceived legitimacy or acceptability of a judgment.[14] Legitimacy can be defined either in a procedural or in a substantive way. One could imagine that the legitimacy of a judgment rather depends on procedural criteria, such as the methodological soundness of the legal argumentation. If one applies a substantive perspective, by contrast,[15] the result of the judgment is more important than the quality of its reasoning.

The hypothesis of this contribution is that the substantive quality of the legal concept elaborated by the ICJ is the decisive factor for its subsequent influence on the legal discourse and state opinion about the law. What, then, constitutes a "good" decision? The question is complex, and I will only be able to give a few guidelines. The answer depends on what kind of normative problem the court has to address. I will distinguish three types of situations in which international norms may have different effects – coordination games, cooperation games and ethical norms.

[12] MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES (1999).

[13] *See also* Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WILLIAM & MARY LAW REVIEW 1229, 1269 (2004), according to whom judgments of the ICJ provide focal points when resolving ambiguity in the interpretation of international treaties.

[14] *See* FRANCK (note 8); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INTERNATIONAL ORGANIZATION 887 (1998).

[15] The position of FRANCK (note 8), can be qualified as a substantive one.

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Coordination games in the sense of this contribution are situations in which there are multiple equilibria[16] of conduct so that states have an incentive to coordinate on one of these equilibria. This does not mean that states are indifferent with regard to the concrete equilibrium they coordinate on. An example from game theory for coordination games with distributive consequences is the battle of the sexes game, in which a couple has to decide what to do on a Saturday night. While she wants to see a baseball game, he would prefer to go to the theater. However, they still prefer doing something together to following their individual preferences. States might thus individually prefer to coordinate on a different equilibrium, but they are nevertheless better off coordinating than acting unilaterally.[17]

In such situations legal norms may be focal points, which make a particular equilibrium salient.[18] They thus create legitimate expectations of behavior and facilitate coordination among states. If the ICJ faces a coordination problem, a judgment will influence the legal discourse if the solution can be framed in the legal discourse as an equilibrium of the problem. The decision will then be understood as making one of the equilibria salient, and it is likely that the states will coordinate on this equilibrium. However, if the solution found by the court does not achieve an equilibrium, it will neither have a lasting effect on the legal discourse nor on state conduct.

Cooperation games, in contrast, are characterized by a divergence of the game-theoretical equilibrium and the social optimum. Classical examples are the prisoner's dilemma or the public good game, where states have individual incentives not to cooperate although cooperation would provide the most social benefit.[19] In such situations, states are usually conditional cooperators. They only cooperate if they can expect that other states do cooperate as well.[20] Legal norms supporting the social optimum create legitimate expectations of general cooperation.

[16] An equilibrium is a stable point of coordination, in which no participant has an individual incentive to deviate from this point if the other participants do not change their conduct. One the concept of equilibrium, *see* DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELING 28-36 (1990).

[17] On games with multiple equilibria, *see* DREW FUDENBERG & JEAN TIROLE, GAME THEORY 18-23 (1991).

[18] *Seminally* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VIRGINIA LAW REVIEW 1649 (2000). For an application of this theory to customary international law, *see* Edward T. Swaine, *Rational Custom*, 52 DUKE LAW JOURNAL 559 (2002).

[19] *Seminally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[20] *See* STEFAN MAGEN, GERECHTIGKEIT ALS PROPRIUM DES RECHTS 114-117 (2009) (habilitation thesis, Universität Bonn) (on file with author).

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If a state does not comply, this may damage its reputation and reduce the opportunities for future cooperation with other members of the international community.[21] It may also face decentralized sanctions in the form of retaliation.[22] An ICJ judgment in such a situation will be effective if the solution can be understood as highlighting the social optimum or a point close to the social optimum. If the norm is perceived to promote the social optimum in a cooperation problem, it will create legitimate expectations of states that all members, or at least the majority of the international community, will comply with the norm and exert pressure on states to justify deviant behavior.

Ethical norms in the sense used in this contribution are norms which do not protect the interests of a particular state. Instead, they protect the interests of an entity that is not involved in the formation of international law. This may be individuals or the environment if the environment is also protected for its own sake and its protection is not understood as an exclusively anthropocentric endeavor. Ethical norms exert influence by being perceived as models highlighting accepted standards of conduct to be considered a modern state by the international community.[23] They thus force states to justify deviant behavior, which may also lead to an increase in norm-conforming conduct if there is considerable internal or external pressure.[24] Ethical norms are rarely absolute, but subject to reasonable disagreement.[25] Their scope and applicability depend on the concrete situation, potential conflicting values and the cultural context.[26] They will be more likely to become accepted standards of behavior the more they accommodate these different factors and the less they give room for reasonable disagreement about their validity and scope.

It has to be noted that the three situations highlighted here are certainly neither exclusive nor totally distinct. An environmental norm may at the same time be an ethical norm as well as a standard of a social optimum in a cooperation game. Furthermore, the matter is complicated by the fact that incentive structures are rarely exogenously given, but may themselves be social constructs. Environmental problems, for example, were perceived

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[21] ROBERT O. KEOHANE, AFTER HEGEMONY. COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); GUZMAN, (note 8).

[22] George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541, 560 (2005).

[23] Ryan Goodman & Derek Jinks, *Incomplete Internalization and Compliance with Human Rights Law*, 19 EJIL 725, 728 (2008).

[24] MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS. ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998); Thomas Risse, *International Norms and Domestic Change: Arguing and Communicative Behavior in the Human Rights Area*, 27 POLITICS & SOCIETY 529 (1999); Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INTERNATIONAL ORGANIZATION 1 (2000); Goodman & Jinks (note 23), 738.

[25] *See* SAMANTHA BESSON, THE MORALITY OF CONFLICT. REASONABLE DISAGREEMENT AND THE LAW (2005).

[26] *See* Niels Petersen, *International Law, Cultural Diversity and Democratic Rule - Beyond the Divide between Universalism and Relativism*, 1 ASIAN JOURNAL OF INTERNATIONAL LAW 149, 152-154 (2011).

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differently forty years ago than they are today. Nevertheless, although the distinction is only an approximation, it is of some analytical value for highlighting slight differences in how judgments can influence the perception of states about the law.

D. The Case-Studies

In this section, I illustrate the theoretical considerations elaborated in the previous section using two case studies of judgments of the World Court. If we want to observe the causal effect of judgments on the perception of states of what the law is, in theory we have to compare the state of the world in which such a judgment occurs to the hypothetical, counterfactual situation in which no such judgment has occurred. A change in the legal opinion of states and legal scholars that follows after a judgment can also be a mere coincidence that is due to other factors and not necessarily causally related to the court's opinion. But a comparison of the current state of the world to the counterfactual state would imply that we could rerun history, holding everything constant except the issuance of the judgment of the ICJ.

One potential way to get around this problem would be to find similar cases whose principal difference lies in the main explanatory variable: the verdict of the ICJ.[27] However, such comparable cases are often hard to find. One advantage of qualitative research is that we are not limited to observing causal effects, but that we can also trace causal mechanisms. We not only know that there is development in the factor we want to explain, the state of the law, but we can observe, to a certain extent, how this development comes about. If the observations of the causal process correspond to the causal mechanism described in the theory, this would be strong evidence that the analyzed judgment did in fact have a causal influence on the states' and legal scholars' perception of the specific law. Thus, this study will not make an inter-case comparison, but a within-case comparison, and compare our cases to the underlying theory.[28]

One practical problem of selecting the cases is that we need to observe reactions to the judgment by legal scholars and by states in order to be able to draw inferences regarding the acceptance of the judgment by the legal discourse. In order to get a coherent picture of these reactions, we have to observe a certain time frame. Consequently, earlier decisions of the ICJ are more suitable for this analysis than very recent ones. The two cases selected for this case study thus both stem from the 1970s. One of them concerns an ethical norm: the *Barcelona Traction* judgment. In this case, the ICJ made a proposition

[27] *See* Arend Lijphart, *The Comparable-Cases Strategy in Comparative Research*, 8 COMPARATIVE POLITICAL STUDIES 158 (1975); GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 83 (1994).

[28] On the within-case comparison, *see* ALEXANDER L. GEORGE & ANDREW BENNETT, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES (2005).

that was widely accepted in the legal discourse of scholars and states. The other one concerns a coordination problem. In the *Fisheries Jurisdiction* case, the ICJ failed to achieve an equilibrium. The result of this judgment was that the judgment did not have an influence on the further legal development of this field.

I. Proposing an Ethical Norm—The Barcelona Traction Case

On its face, the judgment of the ICJ in the *Barcelona Traction* Case is a decision about the diplomatic protection of corporations.[29] The World Court had to decide whether the standing of a state exercising diplomatic protection depended on the nationality of the corporation or the nationality of the majority of the shareholders. However, the judgment is more famous for something else: an obiter dictum, in which the Court first mentioned the conception of obligations *erga omnes* in international law.[30]

1. The Judgment

The case concerned the Barcelona Traction company, a company established under Canadian law operating in Spain with a majority of Belgian shareholders. After the Spanish Civil War, Barcelona Traction needed an authorization from the Spanish authorities to import foreign capital in order to be able to service its sterling bonds. However, the Spanish authorities refused to give such an authorization. Consequently, the company could not service its bonds. As a result, three Spanish holders of such bonds filed a bankruptcy case before a Spanish court, which declared the company bankrupt on 12 February 1948. Following the judgment, the appointed bankruptcy commissioner dismissed the principal management of the company and appointed Spanish directors. Several countries, including Canada and Belgium, protested these measures. However, after a diplomatic compromise failed, Belgium filed a proceeding before the International Court of Justice.

The main question the Court had to answer was whether Belgium had sufficient standing to represent the legal interests of Barcelona Traction before the Court. Before going into the particulars of the doctrine of diplomatic protection, the ICJ generally stated:

> When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor

[29] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), ICJ Reports 1970, 3.

[30] *Id.*, para. 33.

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> unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[31]

This was the first time that the term obligations *erga omnes* was ever mentioned. It had not previously appeared in any legal texts, judgments of international courts or tribunals or contributions in international law scholarship. However, despite the novelty of the conception, the reasoning of the Court is brief and apodictic. It neither refers to state practice nor to legal precedents. It does not even try to deduce the principle of obligations *erga omnes* from established, more abstract legal principles. Instead, the Court simply states that there are not only obligations under international law that are owed towards specific states, but that there are obligations that are owed towards the international community as a whole. Because of this lack of reasoning, the judgment is often cited as a prominent example of lawmaking by the ICJ.[32] However, before we can draw this conclusion, we first have to analyze whether the principle of obligations *erga omnes* was truly a novel concept, or just a new expression for an already existing one, and what impact the judgment had on the international legal discourse of scholars and states.

2. The State of Law Before the Judgment—Old Wine in New Bottles?

Although the term obligations *erga omnes* appeared for the first time in the *Barcelona Traction* judgment, there are indications that the concept was not entirely new.[33] The question of obligations *erga omnes* is, in principle, a question of standing—whether a state is entitled to make a certain legal claim either before an international court or tribunal or, decentrally, through the use of countermeasures. Traditionally, states only had standing to enforce a violation of international law if this violation infringed their subjective rights or legal interests or the rights of their citizens.[34] Four years before the *Barcelona Traction* judgment, the ICJ had denied standing to two African states invoking the violation of

[31] *Id.* (italics in the original).

[32] *See* BOYLE & CHINKIN (note 5), 271.

[33] MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 18-42 (1997); CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 69-96 (2005).

[34] *See* HERSCH LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 347-348 (1955); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 386-390 (1966).

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international law through South Africa's Apartheid regime.[35] However, even before the World Court issued the *Barcelona Traction* judgment, there were certain exceptions to this rule.

These exceptions concerned, in particular, the implementation of humanitarian and human rights standards.[36] On the one hand, there were several multilateral treaties in this area that recognized the right to bring proceedings or take countermeasures for the protection of minorities or human rights.[37] The principal example is Art. IX of the 1948 Genocide Convention, which proclaimed that any party could bring a dispute concerning the violation of another party to the ICJ.[38] On the other hand, there was, even before *Barcelona Traction*, a debate on the admissibility of humanitarian intervention—countermeasures for humanitarian reasons that are taken by states not specially affected in order to protect the population or a certain group of the population of a third country.[39]

There were even some instances of state practice.[40] In 1960, Ghana and Malaysia adopted economic sanctions against the South African Apartheid regime in the form of quantitative restrictions within the meaning of Art. XI GATT. As they were not covered by Art. XX, XXI GATT, they could, if at all, only be justified if they were considered countermeasures.[41] In 1967, the member states of the European Communities partly suspended the association agreement with Greece as a reaction to violations of political human rights by the Greek military regime. This action was not covered by the treaty regime and could thus only be justified as a countermeasure. In such an environment, it is not surprising that the 1966 *South West Africa* judgment of the ICJ received a lot of criticism in the legal literature. Many commentators favored a broader interpretation of the mandate treaty's standing

[35] *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, ICJ Reports 1966, 6.

[36] *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), First Phase, Separate Opinion of Judge Jessup of 21 December 1962, ICJ Reports 1962, 387, 425.

[37] LAUTERPACHT (note 34), 348.

[38] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS, vol. 78, 277.

[39] On this debate, *see* LAUTERPACHT (note 34), 312-323; Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA LAW REVIEW 325 (1967); Myres McDougal & William Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AJIL 1 (1968).

[40] TAMS (note 33), 90-91.

[41] There is a controversial discussion on whether there the GATT regime leaves room for general countermeasures that do not fall under Art. XX, XXI GATT. *See*, *e.g.*, Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARVARD INTERNATIONAL LAW JOURNAL 333 (1999); Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EJIL 753 (2002); JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW. HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, 4 April 2006, UN Doc. A/CN.4/L.682.

provision, allowing the two applicants (Liberia and Ethiopia) to invoke human rights violations by South Africa.[42] Even before the *South West Africa* judgment, some scholars expressed the desire to recognize standing for third states in some instances.[43]

Consequently, the ICJ did not act in a legal vacuum when rendering the *Barcelona Traction* judgment. Attempts to extend standing so that states not directly affected could better react to violations of human rights had existed before. Yet there was no overarching, general framework with regard to the standing of third states. Nor was it clear that the standing of third states could not only be achieved by treaty, but also by "general international law,"[44] i.e. customary law. The Court thus pushed the legal discourse in a specific direction in a situation where no clear prevailing legal view was identifiable.

3. The Subsequent Developments—A Revolution of International Law?

The ICJ confirmed the concept of obligations *erga omnes* in several subsequent judgments. In the 1995 *East Timor* case, the ICJ qualified the respect of the right of peoples to self-determination as an obligation *erga omnes*.[45] In 2004, the Court confirmed this qualification of the right to self-determination as a right opposable *erga omnes* in its *Israeli Wall* decision.[46] From the *erga omnes* character of the principle of self-determination, the Court drew the conclusion that all states were obliged "not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory."[47]

However, the effects of the principle of obligations *erga omnes* were not limited to the jurisprudence of the ICJ. It also found expression in one of the most important developments in the law of state responsibility—the drafting process of the Articles on State Responsibility by the International Law Commission (ILC). In 1976, the ILC adopted a new Art. 19, which made a distinction between two different kinds of wrongful acts: international crimes and international delicts.[48] This distinction had been proposed by the

[42] *See* Dietrich Kappeler, *La récente décision de la Cour internationale de Justice dans les affaires du Sud-Ouest africain*, 85 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 335 (1966); Brian Flemming, *South West Africa Cases*, 5 THE CANADIAN YEARBOOK OF INTERNATIONAL LAW 241 (1967).

[43] WILHELM WENGLER, 1 VÖLKERRECHT 580-581 (1964); Michael Akehurst, *Reprisals by Third States*, 44 BRITISH YEARBOOK OF INTERNATIONAL LAW 1 (1970).

[44] *Barcelona Traction* (note 29), para. 34.

[45] *Case Concerning East Timor* (Portugal v. Australia), Judgment of 30 June 1995, ICJ Reports 1995, 90, para. 29.

[46] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, paras 155-156.

[47] *Id*., para. 159.

[48] 1 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1976, 253 (then article 18).

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Special Rapporteur, Roberto Ago, in his report.[49] Although the ILC did not include what specific consequences could be drawn from this conclusion either in the Draft Articles or in its comments,[50] one popular interpretation was that every state had standing to react to international crimes.[51] Ago himself referred to the obiter dictum in the *Barcelona Traction* judgment in making his case for the distinction and pointed out that every state should be entitled to invoke responsibility where a state is committing an international crime.[52]

In 1984, Special Rapporteur Willem Riphagen proposed a new Art. 5 lit. e, according to which all states should be considered to be injured states if the international wrongful act constitutes an international crime.[53] This specification was received very positively by the international community of states. Thirty-five states explicitly or implicitly welcomed the extension of standing to third states for certain international wrongful acts, while only two states—Sweden and Madagascar—were opposed to it.[54] Even states that had been reluctant to recognize the concept of an international crime accepted the concept of obligations *erga omnes* proposed by Riphagen. Germany, for instance, had objected to the notion of an international crime,[55] but was favorable to the extension of standing to third states.[56] France had claimed in 1976 that any *actio popularis* should be considered illegal under international law.[57] However, it equally welcomed the proposal of Special Rapporteur Riphagen.[58]

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[49] Fifth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur - the Internationally Wrongful act of the State, Source of International Responsibility (continued), UN Doc. A/CN.4/291, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1976, Pt. 1, 3, 24.

[50] Bernhard Graefrath, *International Crimes - A Specific Regime of International Responsibility of States and its Legal Consequences*, in: INTERNATIONAL CRIMES OF STATE - A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, 161, 161 (Joseph H. H. Weiler, Antonio Cassese & Marina Spinedi eds, 1989).

[51] *See* Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in: INTERNATIONAL CRIMES OF STATE - A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, 151, 156 (Joseph H. H. Weiler, Antonio Cassese & Marina Spinedi eds, 1989).

[52] Fifth Report on State Responsibility (note 49), 28-29.

[53] Fifth Report on the Content, Forms and Degrees of International Responsibility (part two of the draft articles), by Mr. Willem Riphagen, Special Rapporteur, UN Doc. A/CN.4/380, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1984, Pt. 1, 1, 3.

[54] *See* Marina Spinedi, *International Crimes of State: The Legislative History*, in: INTERNATIONAL CRIMES OF STATE, - A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY, 7, 72 (Joseph H. H. Weiler, Antonio Cassese & Marina Spinedi eds, 1989), with further references.

[55] UN Doc. A/CN.4/342 and Add. 1-4, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1981, Pt. 1, 71, 75.

[56] *Id*.

[57] UN Doc. A/C.6/31/SR.26, para. 6.

[58] UN Doc. A/C.6/37/SR.38, para. 13.

After severe criticism of the notion of an international crime by many state representatives, the ILC deleted the distinction between international crimes and international delicts in its final draft in 2001. Instead, it introduced a distinction with regard to the right to invoke state responsibility. According to Art. 48 of the final draft, all members of the international community may invoke state responsibility if the breached obligation is owed to the international community as a whole.[59] Thus, the provision basically codifies the concept of obligations *erga omnes*.[60] Giving third states the opportunity to invoke state responsibility for the breach of obligations *erga omnes*, was widely supported in the comments of state representatives.[61] China was the only country openly opposed to the idea of granting third states the right to invoke state responsibility for violations of obligations *erga omnes*.[62]

Although the Articles on State Responsibility have not yet been finally adopted as of the writing of this contribution,[63] their drafting history and the numerous positive comments of state representatives show that a considerable number of states today accept the concept of obligations *erga omnes*, whose breach enables third states to invoke state responsibility. This conclusion is confirmed by an analysis of state practice since the *Barcelona Traction* judgment. The most comprehensive study in this respect is probably Christian Tams' dissertation, in which the author comes to the conclusion that state practice supports a right for third states to invoke countermeasures for breaches of obligations *erga omnes*.[64] Countermeasures have been employed in a variety of different instances and are not limited to Western countries.[65]

The concept of obligations *erga omnes* was not only accepted in the discourse of states. The reaction in the legal literature to the obiter dictum in *Barcelona Traction* was also preponderantly positive.[66] While early comments in France expressed some reluctance,[67]

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[59] Responsibility of States for Internationally Wrongful Acts (2001), U.N. Doc. A/56/49(Vol. I)/Corr.4.

[60] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 276 (2002).

[61] There was implicit or explicit support by Austria, Denmark, Finland, Iceland, Norway, Sweden, Denmark, the Netherlands, South Korea, Slovakia, the United Kingdom and the United States, *see* UN Doc. A/CN.4/515, 62-64, 69-71 (2001).

[62] *Id*., 69-70.

[63] *See* GA Res. 62/61, U.N. Doc. A/RES/62/61 (2007).

[64] TAMS (note 33), 207-251. *See also* Jochen Abr. Frowein, *Reactions by not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS 345, 416 (1994).

[65] TAMS (note 33), 250.

[66] *See* Frowein (note 64), 408.

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the concept of obligations *erga omnes* was mostly welcomed in the German and English speaking literature.[68] Although there is still discussion about the scope and the details of the concept, there seems to be consensus about the existence of the concept of obligations which enable even states not directly affected to react to international wrongful acts.[69]

4. Résumé

The analysis of the historical development of the concept of obligations *erga omnes* shows that the ICJ did not invent the concept; the Court did not decide in a void. There was a growing discussion in international law scholarship about whether legal standing should be extended to third states in certain situations. There were even some sporadic instances of state practice. However: an acknowledgment of obligations *erga omnes* did not yet represent the prevailing view. The majority opinion was still expressed by the *South West Africa* decision of the ICJ,[70] according to which only directly affected states could invoke state responsibility. The *Barcelona Traction* judgment can thus be seen as a tipping point, which caused the majority opinion among states and legal scholars to shift from a rather bilateral understanding of state responsibility to a more nuanced concept extending legal standing to third states for certain legal principles.

Why did the judgment have an influence on the subsequent legal discourse and the communicative practice of states? The postulation of an *erga omnes* character of certain provisions can, to a certain extent, be qualified as an ethical norm. Certainly, the question of standing is, at first glance, a procedural question that seems to have little moral impact. However, the norm has its biggest impact in the field of human rights.[71] Here, it allows states to invoke human rights violations by other states even if their own nationals have

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[67] *See*, *e.g.*, BRIGITTE BOLLECKER-STERN, LE PRÉJUDICE DANS LA THÉORIE DE LA RESPONSABILITÉ INTERNATIONALE 83-90 (1973); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413 (1983).

[68] Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 182 (1982); Jochen Abr. Frowein, *Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung*, in: VÖLKERRECHT ALS RECHTSORDNUNG - INTERNATIONALE GERICHTSBARKEIT - MENSCHENRECHTE. FESTSCHRIFT FÜR HERMANN MOSLER, 241 (Rudolf Bernhardt, Wilhlem Karl Geck, Günther Jaenicke & Helmut Steinberger eds, 1983); ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT 907 (1984).

[69] *Id.*; Karin Oellers-Frahm, *Comment: The Erga Omnes Applicability of Human Rights*, 30 ARCHIV DES VÖLKERRECHTS 28 (1992); Olivia Lopes Pegna, *Counter-claims and Obligations Erga Omnes before the International Court of Justice*, 9 EJIL 724 (1998); ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT 381-382 (2001); TAMS (note 33); SANTIAGO VILLALPANDO, L'ÉMERGENCE DE LA COMMUNAUTÉ INTERNATIONALE DANS LA RESPONSABILITÉ DES ÉTATS (2005).

[70] *South West Africa Cases* (note 35).

[71] The examples given by the ICJ for obligations *erga omnes* all originate in the field of human rights law. *See Barcelona Traction*, (note 29), para. 34.

not been affected. It is thus a mechanism to make reaction to non-compliance with human rights norms more effective. Because of its procedural nature, the principle of obligations *erga omnes* is accessory to the underlying ethical principles. Therefore, there is less potential for reasonable disagreement than for many substantive principles.

One might disagree about the substantive ethical principles and individual rights that are embraced by international law. However, if there is agreement on certain ethical principles, then it would seem to be inconsistent not to provide an opportunity to react to a violation of the principle:[72] States who oppose procedural mechanisms to implement certain legal obligations expose themselves to the suspicion of acting strategically to avoid compliance with the underlying substantive principles. Therefore, the concept of obligations *erga omnes* offered little room for reasonable disagreement, so that it was likely to be accepted by the states at least on the communicative level.[73]

Today, *Barcelona Traction* is the main point of reference for every legal study in the field of obligations *erga omnes*.[74] Furthermore, the International Law Commission referred to the judgment when elaborating the concept of an international crime by a state[75] and obligations owed to the international community as a whole.[76] The judgment is thus a primary example of the Court shaping international law scholarship and influencing, at the same time, the perception of states about the law.

II. Failure to Identify an Equilibrium—The Fisheries Jurisdiction Cases

Let us now turn to the *Fisheries Jurisdiction* cases,[77] in which the ICJ faced a coordination problem.

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[72] Stefan Kadelbach, *Folgen von Rechtsverletzungen gewohnheitsrechtlicher Menschenrechtsverpflichtungen*, in: MENSCHENRECHTSSCHUTZ DURCH GEWOHNHEITSRECHT, 198, 218 (Eckart Klein ed., 2003); VILLALPANDO (note 69), 371.

[73] Certainly, there is some disagreement with regard to the scope of the reactions that are possible if an obligation *erga omnes* has been violated. *See* on this discussion, *e.g.*, Akehurst (note 43), 15; Oellers-Frahm (note 69), 35; Paolo Picone, *Interventi delle nazioni unite e obblighi erga omnes*, in: INTERVENTI DELLE NAZIONI UNITE E DIRITTO INTERNAZIONALE, 517 (Paolo Picone ed., 1995); Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 12 EJIL 889 (2001); VILLALPANDO (note 69); TAMS (note 33), 209-250.

[74] *See*, *e.g.*, RAGAZZI (note 33), 1; TAMS (note 33), 1-4.

[75] Fifth Report on State Responsibility (note 49).

[76] *See* Preliminary Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the draft articles on State responsibility), by Mr. Willem Riphagen, Special Rapporteur, UN Doc. A/CN.4/330, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1980, Pt. 1, 107, 119; Fourth Report on State Responsibility, by Mr. James Crawford, Special Rapporteur, UN Doc. A/CN.4/517, para. 49 (2001).

[77] *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Judgment of 25 July 1974, ICJ Reports 1974, 3; *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Judgment of 25 July 1974, ICJ Reports 1974, 175.

1. The Judgment

After the 1958 Geneva Conference on the Law of the Sea failed to agree on exclusive fishery rights for coastal states beyond the territorial sea, Iceland unilaterally extended its exclusive fishing zone to twelve nautical miles. This was met with protests by the United Kingdom and the Federal Republic of Germany. The three countries negotiated an agreement, according to which Germany and the UK recognized Iceland's twelve-mile exclusive fishing zone. In return, Iceland promised to give six month's notice to the other two states if it intended to extend this exclusive fishing zone further. In 1971, the Icelandic government announced that it would extend the exclusive fishing zone to fifty nautical miles on September 1 of the following year. After protests and negotiations failed, Germany and the UK referred the case to the ICJ in the summer of 1972.

In the judgment, the Court dealt with two concepts. The first one was that of an exclusive fishing zone, the second one the concept of preferential rights for a coastal state.[78] While an exclusive fishing zone grants the coastal state exclusive jurisdiction with regard to the regulation of all fishing activities, preferential rights do not confer jurisdiction, but only certain privileges in the distribution of fishing quotas if the exploitation of fishery resources makes some system of catch-limitation indispensible.[79] Regarding the exclusive fishing zone, the ICJ stated that a twelve-mile limit from the baselines appeared to be accepted among states.[80] But the Court did not find a general rule of customary international law that the exclusive fishing zone could be extended to fifty nautical miles and thus ruled that the extension of the exclusive fishery jurisdiction beyond twelve nautical miles was not opposable to the United Kingdom and Germany.[81]

However, the Court found that a customary concept of preferential rights for coastal states that are especially dependent on coastal fisheries had developed after the 1958 Geneva Conference on the Law of the Sea.[82] This regime comes into play if the extent of the exploitation of the fish stocks makes it imperative to introduce some system of catch-limitation.[83] These preferential rights did not give Iceland the right to exclude other countries from fishing within the fifty-mile zone if they had a vital interest in fishing there.

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[78] *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (note 77), para. 52.

[79] Robin Rolf Churchill, *The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice to the Debate on Coastal States' Fisheries Rights*, 24 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 87 (1975).

[80] *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (note 77), para. 52.

[81] *Id*., paras 67-68.

[82] *Id*., paras 55-58.

[83] *Id*., para. 60.

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However, the parties have the duty to negotiate in order to apportion an equitable amount of the limited fish stocks to each involved party.[84]

2. The Legal Situation Preceding the Judgment

There was already an intense discussion on the inclusion of an exclusive fishing zone that gives coastal states jurisdiction in fishing matters even beyond their territorial sea during the 1958 Geneva Conference on the Law of the Sea. However, the proposal to establish a six-mile territorial sea and a six-mile exclusive fishing zone failed by one vote. Therefore, the text of the Geneva Convention of 1958 doesn't leave any room for a concept between territorial sea and the high seas.[85] However, soon after the conference, there were several declarations of coastal states claiming a twelve-mile fishing zone.[86] But the development did not stop there. A survey of the U.N. Food and Agricultural Organization (FAO) in 1969 showed that, while a majority of states claimed a twelve-mile exclusive fishing zone or even territorial sea, there were certain states that claim a broader exclusive fishing zone up to 200 nautical miles.[87]

This broadening of the exclusive fishing zone was accelerated in the beginning of the 1970s. In 1970, nine Latin American states adopted the Montevideo Declaration on the Law of the Sea, in which they extended their exclusive rights of jurisdiction to a distance of 200 nautical miles.[88] This claim was reiterated in the 1970 Lima Declaration, which was signed by fourteen Latin American states.[89] In 1972, fifteen Caribbean states issued the Declaration of Santo Domingo, in which they claimed a 200-mile patrimonial sea, a predecessor of the concept of the exclusive economic zone.[90] However, the extension of the exclusive fishing zone was not limited to Latin American countries. Other countries of the developing world made similar moves. Most notably, the Organization of African Unity declared in 1973 that the African states recognized the right of each costal state to

[84] *Id*., paras 72-73, 78.

[85] Alexander Proelß, *Ausschließliche Wirtschaftszone*, in: HANDBUCH DES SEERECHTS, 222, 224 (Wolfgang Graf Vitzthum ed., 2006).

[86] LOTHAR GÜNDLING, DIE 200 SEEMEILEN-WIRTSCHAFTSZONE 22 (1983).

[87] FAO, *Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishery Conservation Zones and the Continental Shelf*, 8 INTERNATIONAL LEGAL MATERIALS 516 (1969). These states are Argentina, Ceylon, Chile, Costa Rica, Ecuador, El Salvador, Ghana, Korea, Nicaragua, Pakistan, Panama and Peru.

[88] Montevideo Declaration on the Law of the Sea, 8 May 1970, 64 AJIL 1021 (1970).

[89] Declaration of Latin American States on the Law of the Sea, 8 August 1970, in: 1 NEW DIRECTIONS IN THE LAW OF THE SEA, 237 (S. Houston Lay, Robin R. Churchill & Myron H. Nordquist eds, 1973).

[90] Declaration of Santo Domingo, 9 June 1972, in: 1 NEW DIRECTIONS IN THE LAW OF THE SEA, 247 (S. Houston Lay, Robin R. Churchill & Myron H. Nordquist eds, 1973).

establish an exclusive economic zone beyond their territorial seas not exceeding 200 nautical miles.[91] Although the majority of states still had an exclusive fishing zone not exceeding twelve nautical miles, when the ICJ rendered its judgment in 1974, there was a growing belief that coastal resource jurisdiction should be extended.

The situation for the second concept the ICJ referred to—preferential rights for coastal states—was not much clearer. Coastal states' preferential rights had been recognized in a few international agreements, such as the Arrangement Relating to Fisheries in Waters Surrounding the Faroe Islands[92] and the Arrangement on the Regulation of the Fishing of North-East Arctic Cod.[93] Furthermore, the concept had been confirmed by the practice of the International Commission for the Northwest Atlantic Fisheries and the North-East Atlantic Fisheries Commission. However, the agreements and the cited practice concerned only a few states and each institution was limited to a single geographical area, so that it is doubtful whether the conditions for a customary rule of international law were fulfilled when the Court rendered its judgment.[94]

3. Subsequent Developments—From Fishing Zone to Exclusive Economic Zone

The judgment had little effect on the subsequent development of international law.[95] Iceland never complied with the judgment.[96] Instead, it even extended its exclusive fishing zone to 200 nautical miles in July 1975 and concluded limited agreements with Germany and the United Kingdom in order to settle the dispute with these two countries. In 1976, the European Communities adopted a Council Resolution, which asked all Member States to extend their exclusive fishing zone to 200 nautical miles.[97] In 1982, the third U.N. Conference on the Law of the Sea finally adopted the United Nations Convention on the Law of the Sea, which recognizes the right to establish a 200-mile exclusive economic zone

[91] Declaration of the Organization of African Unity on the Issues of the Law of the Sea, 19 July 1974, UN Doc. A/CONF.62/33.

[92] Signed on 18 December 1973, in: 4 NEW DIRECTIONS IN THE LAW OF THE SEA, 171 (Robin Rolf Churchill & Myron H. Nordquist eds, 1975).

[93] Signed on 15 March 1974, United Kingdom Treaty Series No. 35 (1974).

[94] Churchill (note 79), 94 -95.

[95] David H. Anderson, *The Icelandic Fisheries Case*, in: LIBER AMICORUM GÜNTHER JAENICKE, 445, 452 (Volkmar Götz, Peter Selmer & Rüdiger Wolfrum eds, 1998).

[96] SCHULTE (note 9), 151.

[97] European Communities, *Council Resolution on Certain External Aspects of the Creation of a 200-Mile Fishing Zone in the Community with Effect from 1 January 1977*, 3 November 1976, 15 ILM 1425 (1976).

to all coastal states.[98] Thus, the twelve-mile concept of the ICJ did not even survive for one decade.

The concept of coastal states' preferential rights has not been more influential either. It has not been included in the 1982 Convention on the Law of the Sea,[99] and there is little evidence that it has developed into a norm of customary international law since the judgment. If one consults contemporaneous treatises and textbooks on the Law of the Sea, the concept of preferential rights is either harshly criticized[100] or not even mentioned.[101] The *Fisheries Jurisdiction* judgments of the ICJ did thus not have any lasting influence on the subsequent development of the international Law of the Sea.

4. Résumé

The issue of the breadth of the exclusive fishing zone might, at first glance, appear like a rather technical issue. However, at its core, it is a coordination problem with considerable distributive impact. Technological developments had allowed fishing boats to exploit fish stocks at greater distances from the coast. This development favored technologically advanced states, whose fishing boats could travel great distances and fish in the high seas. However, this conduct harmed countries that depended on a local, coastal fishery industry, as fishing in the high seas also diminished coastal fish stocks. Thus, this development was detrimental to technologically less advanced states and those countries which were highly dependent on the coastal fishery industry. Consequently, it is not surprising that the push for a 200-mile exclusive fishing zone originated in the developing world. A narrow fishing zone was not acceptable to them; this concept therefore could not establish an equilibrium. By proclaiming the twelve-mile rule the ICJ was thus unable to provide a solution to the coordination problem that was acceptable to both the developed and the developing countries. It is therefore not surprising that the judgment did not have a sustainable impact on the subsequent legal development in this field.[102]

[98] United Nations Convention on the Law of the Sea, Art. 57, 10 December 1982, UNTS, vol. 1833, 3.

[99] *Id*.

[100] *See* Carl August Fleischer, *Fisheries and Biological Resources*, in: A HANDBOOK ON THE NEW LAW OF THE SEA, 1030 (René-Jean Dupuy & David Vignes eds, 1991).

[101] *See* ROBIN ROLF CHURCHILL & ALAN VAUGHAN LOWE, THE LAW OF THE SEA (1988).

[102] *See* Churchill (note 79), 101-103, who voiced this suspicion already shortly after the judgment.

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E. Conclusions

In contrast to domestic courts, the International Court of Justice does not have a central sanction mechanism to enforce its judgments. The Court thus has to persuade states by practicable solutions if it wants to influence the development of international law. The preceding analysis has shown that judgments do not have an impact on the opinion of states about the law solely on the basis of the World Court's authority. Instead, the Court has to find acceptable solutions to problems of coordination or cooperation or propose acceptable ethical norms.

The case studies suggest that the concrete reasoning and the soundness of the legal argument are only of limited relevance in terms of impacting the legal discourse. In the *Barcelona Traction* case, the Court did not even attempt to justify the birth of obligations *erga omnes*. Nevertheless, the judgment had a profound influence on the development of the concept of standing in the law of state responsibility. In contrast, the ICJ did cite some state practices for limiting the exclusive fishing zone to twelve nautical miles in the *Fisheries Jurisdiction* case. But this did not save the judgment from being irrelevant.

How do these findings influence the evaluation of the legitimacy of lawmaking by the World Court? Lawmaking by the ICJ is the exercise of public authority and, in principle, requires justification.[103] However, the necessary degree of justification depends on the nature of public authority. The legitimacy of public authority through coercion follows different standards than of public authority through persuasion. The preceding analysis has shown that the ICJ's lawmaking activity impacts states through the legal discourse. Judgments of the World Court are not transformed into constraining standards of behavior per se. The impact of the judgments rather depends on the reception in the legal discourse.

In recent decades, we have observed an increasing shift of norm-making to the international arena. The legislative processes on the international level differ markedly from the traditional model of domestic democratic legislation. This does not imply that this development is illegitimate per se. Rather, we have to analyze each of these processes individually. The lawmaking by the International Court of Justice is to a large extent based on persuasion and controlled through the legal discourse. Therefore, there is considerably less reason to be concerned about the legitimacy of this process than about international courts and tribunals whose judgments have more coercive power.

[103] Bogdandy & Venzke (note 2), section C.II.

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