CHAPTER II

THE REALITY OF INTERNATIONAL LAW

(1) Apologia

A question only touched upon in the previous Chapter, and requiring further examination, is that of the nature and existence of international law. Does a real international law exist? Is what we refer to as international law, law at all? If so, what is its nature?

It may seem strange, or even perverse, to raise these questions in the precincts of the Hague Academy of International Law, where the subject has been taught in all its ramifications for three-quarters of a century. But we are concerned with the differences between international law and national legal systems; and one of those differences lies precisely in the fact that it is, in principle, only at the international level that the question of the real existence of law has to be faced. There is here a very radical difference between the approach of the international lawyer and that of the national lawyer to their respective specialisations. As Sir Robert Jennings has observed,

> "No teacher of, say, the EEC law, or any municipal system, or even of so elusive a body of unwritten laws, convention and practices as the English constitution, would feel it incumbent upon him to begin by assuring his readers that the law he taught really *was* law . . ."[79]

Furthermore, we must, as was observed earlier, be sure that in confronting national and international law we are comparing like with like. The question to be asked is this: is the structure and reasoning of international law sufficiently like that of "law" as understood in the national sphere, to permit of arguments by analogy? It is also from time to time necessary to repeat the refutations of those

---

79. "Teachings and Teaching in International Law", *Essays in International Law in Honour of Judge Manfred Lachs* (1984), p. 122. In the same sense: Müller and Wildhaben, *Praxis des Völkerrechts*, Berne, 2001, p. 1; Butler, "Comparative Approaches to International Law", *Recueil des cours*, Vol. 190 (1985), p. 46.

who have questioned the existence of international law in the past, and to take account of more modern questionings of its existence and nature. Ten years ago, Prosper Weil began his general course by such an examination[80], and it may be time to repeat the study.

To seek to establish the existence of international law as law, necessarily implies a preconception of what law is; and to discuss the problem of private law analogies in international law similarly implies the adoption of a certain approach to international law. With the current proliferation of philosophies among international lawyers, one cannot suppose that one's own approach, or indeed any approach, is necessarily universally shared.

A recent Symposium in the pages of the *American Journal of International Law* identified seven distinct approaches which, in the view of the editors of the Symposium, "represent the major methods of international legal scholarship today"[81]. These were: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics. To some of these, argument from private law analogies would be irrelevant or inappropriate. For example, feminist legal scholars would probably apply their criticisms of the masculine domination of the way law is made with equal force to the making of international law and of national law; but would probably only find analogy appropriate if it were possible to take a particularly enlightened national system and present it as an example to be followed in international law. The supporters of critical legal studies would tell us that our whole tidy structure of sources, rules and principles was in fact wishful thinking, a reification of what does not exist, devised to cover a vacancy of law[82]. Others, such as the New Haven School, might see analogy as merely one among a wide range of considerations available to the international decision-maker[83], but without giving it the rank of a means toward establishing general principles of law, in the sense of

80. "Le droit international en quête de son identité (Cours général de droit international public)", *Recueil des cours*, Vol. 237 (1992).

81. 93 *AJIL* (1999), p. 293, introduction by Anne-Marie Slaughter and Steven R. Ratner.

82. See for example Carty, "Critical International Law: Recent Trends in the Theory of International Law", 2 *European Journal of International Law* (1996), p. 66.

83. So far as this School sets store by the "policy-oriented" approach, recourse to national law analogies would seem to be excluded *a priori*: see the *AJIL* Symposium, *loc. cit.*, at p. 320.

Article 38, paragraph 1 *(c)*, of the Statute of the International Court, or any comparable status.

Even adopting, as I have indicated that I shall do, a positivist approach, it is however essential to our enquiry that analogy be permitted by the nature of international law. If a strict positivist approach implies that international law is to be regarded as based solely on consent or acceptance by States, there is no room for the "general principles" derived by analogy from private law; this was the very battle being fought by Lauterpacht in his study of the matter[84]. Prosper Weil, a foremost exponent of modern positivism, takes the view that the "general principles of law", understood as those extracted by analogy from national legal systems, constitute no more than a material source of international law, not a formal source[85]; but he does recognize that

> "Puiser dans le fonds commun des droits nationaux sera pour le juge international … un moyen précieux d'éviter le *non liquet* et de conjurer le spectre de lacunes dans le droit international."[86]

Bruno Simma and Andreas Paulus, speaking as the representatives of positivism in the *American Journal* Symposium, and who called their approach "enlightened positivism"[87], were of the opinion that, in modern international law, "Increasingly, general principles of law establish themselves from the top down, as it were; that is, not by deduction from domestic law but by proclamation in international fora."[88]

Having reminded you that these divergent approaches exist, I shall not however pursue further, in the time available, their competing claims. May I recall that at the outset of this course I observed that the content of international law may be said to be determined by Article 38 of the Statute of the International Court. Is that starting point, which entails the acceptance of the "general principles of law", a legitimate one?

---

84. *Private Law Sources and Analogies of International Law*, pp. 50-51, para. 23.
85. "Le droit international en quête de son identité (Cours général de droit international public)", *Recueil des cours*, Vol. 237 (1992), pp. 148-149.
86. *Ibid.* p. 148.
87. *Loc. cit.*, p. 307.
88. *Loc. cit.*

(2) "Le droit international existe : je l'ai rencontré"

It is clear that States, even powerful States, do recognize the existence of international law, and find it a restraint on their activities, actually or potentially, even if at times one might wish the restraint more effective. Even where armed force is being used, as in the Gulf War or in Kosovo, there is concern, to say the least, whether humanitarian law, the *jus in bello*, is being respected ; and to go back to an earlier war, the Argentine seizure of the Malvinas or Falkland Islands was generally condemned as an unlawful use of force, even on the assumption that Argentina had the better historical title. More recently, we have the spectacle of the United States desperate to dissociate itself from the Rome Statute of the International Criminal Court, even to the extent of endeavouring to "un-sign it" ; why should this be, unless it was feared that the signature committed the United States to obligations under international law [89] ?

In fact, perhaps the only effective refutation of the thesis, still sometimes advanced, as to the non-existence, or the illusory "reification" of international law [90], is summed up in the observation of Prosper Weil : "Le droit international existe, je l'ai rencontré." [91] This may seem as summary as Dr. Johnson's celebrated reply to Bishop Berkeley [92] ; but Weil's meaning is that he has observed, as we all have, that international law is treated by those directly concerned, States, as existing. International law is also respected even in the breach of it : Marcelo Kohen comments that

> "It is interesting to observe that scholars always raise the question as to why States comply with international law, in order to be sure that international law really is law. They do not

89. The attempt of the United States Government to resile from its original attitude toward the Rome Statute of the International Criminal Court, and as it were to repudiate its signature of that instrument, while partly a response to domestic pressures, is likely to have been in order to avoid application of Article 18 of the Vienna Convention on the Law of Treaties.

90. On this, cf. Carty, *op. cit.* (footnote 82 above).

91. "Le droit international en quête de son identité (Cours général de droit international public)", *Recueil des cours*, Vol. 237 (1992), p. 47.

92. "[W]e stood talking together of Bishop Berkeley's ingenious sophistry to prove the non-existence of matter, and that every thing in the universe is merely ideal. I observed, that though we are satisfied his doctrine is not true, it is impossible to refute it. I never shall forget the alacrity with which Johnson answered, striking his foot with mighty force against a large stone, till he rebounded from it, 'I refute it *thus*'." (Boswell, *Life of Johnson*, Oxford ed., p. 333 (August 1763).)

> ask themselves, however, why States violate international law. The answer is very simple: because they consider that in these situations — irrespective of their explanations — their interests are higher or more important than compliance with international law."[93]

The author however continues: "Of course, states try to conceal this choice with a legal screen . . .", and for our purposes, this is the important element in their behaviour. As the International Court pointed out in the *Military and Paramilitary Activities* case,

> "If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[94]

If then international law is recognized as governing the relations between States (and other subjects of law) there are therefore frequently circumstances in which a decision has to be taken in accordance with international law. Particularly if it is a judicial or arbitral decision, this has the implication that that decision has an authority deriving from its being in accordance with law. There may be a directive that a decision is to be taken in accordance with law. Since 1946, the International Court of Justice has been directed to "decide in accordance with international law"[95]; Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea provide that maritime delimitations are to be effected "in accordance with international law"; and numerous other examples of such directives could be given.

We may take it as axiomatic that when a direction of this kind is given, that direction has a definable meaning: that the decision is to

93. "The notion of 'State Survival' in International Law", in Boisson de Chazournes and Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, p. 313.

94. *ICJ Reports 1986*, p. 98, para. 186. This is not however an observation transferable from, or to, municipal legal systems, in which the attitude of the subjects of law does not have the same direct impact on the creation and continued existence of law.

95. ICJ Statute, Article 38 (1); these words were not in the corresponding text of the PCIJ Statute, but were added in 1946; see *UNCIO*, Vol. 14, pp. 170, 205, 670; Vol. 13, pp. 164, 284, 392.

be taken according to certain criteria, and that other criteria and considerations are not to be taken into account, because they form no part of whatever it is that is called international law. The use of such formulae also implies that international law, whatever it is, is something that enables a decision to be taken, not merely an element that may, in conjunction with other conceptual material, point the way to a solution. The Statute of the International Court is the clearest pointer to this conclusion : the whole function of the Court is to settle disputes, not (for example) to recommend solutions that the parties may choose to adopt[96], so that if the right and duty of the Court under its Statute to decide according to international law does not suffice of itself to permit a settlement to be attained, the text becomes meaningless.

That text is however one which, as an "integral part" of the United Nations Charter, has been accepted by all but a handful of States of the world ; and there is no reason to suppose that that handful which is at present excluded from the Charter hold any different view on the point. If as positivist we ask that international law shall be such rules as have been accepted by States, we can surely include the very definition of international law in Article 38 in that category.

If international law is sufficient to permit of the resolution of disputes, it must have an appropriate nature and structure. This suggests that, in simplest terms, it must be at least primarily a system of rules which can be applied to the facts of a dispute so as to produce a conclusion : the so-called judicial syllogism. Sir Hersch Lauterpacht noted in 1954 that "the essential and normal, though not exclusive, substance of all law is morality reduced to rules and principles of a sufficient degree of clarity, precision and enforceability"[97]. In general we think of law, of whatever kind, as a body of rules and principles : does international law match up also to this definition or categorization ? Certainly, its presentation in textbooks, and even more so in such texts as "law-making" treaties (e.g. the Vienna Convention on the Law of Treaties), declaratory resolutions of such bodies as the United Nations General Assembly, proposals of the International Law Commission, resolutions of the Institut de droit

96. Cf. the case of the *Free Zones of Upper Savoy and the District of Gex, PCIJ*, *Series A/B, No. 46*, p. 162.
97. "International Law : The General Part", in *International Law : Collected Papers*, Cambridge, 1970, Vol. I, pp. 48-49.

international, and re-statements, suggests that such is its nature and composition.

Not all international lawyers accept that international law is a body of rules; which must raise the question whether it is open to them to admit general principles of law derived by analogy. For example, Judge Rosalyn Higgins began her course at this Academy in 1993 with the words: "International law is not rules. It is a normative system"[98]; and in another context Judge Higgins described international law as "a continuous process of authoritative decisions", a view which, she explains, "rejects the notion of law merely as the impartial application of rules"[99]. Yet it is a matter of experience that States in their day-to-day relations are concerned to respect international law; and in order to do so they need also to ascertain what international law prescribes for them. Is not this then to say that what States look for is rules[100]?

How then are those rules to be defined? It is my contention that the rules of law are, and are perceived by States to be, those which an impartial judge would apply to the problem if it were brought before him. We can appeal to experience to say that States do recognize, not merely by accepting the ICJ Statute but in their day-to-day relations, that "law" means something that is capable of resolving disputes, and the "legal" means of resolving "legal disputes" is reference to a judge. Even Hersch Lauterpacht, who had much to say as to the difficulty for an international judge in choosing between conflicting, or apparently conflicting, principles[101], recognized that:

> "Decisions given by a Court show what in all probability the Court will in future treat as law; and for those for whom the science of law is not mere speculation but a practical art of pre-

98. *Problems and Process: International Law and How We Use It*, Oxford, 1994, p. 1. Judge Higgins's philosophy is derived from the New Haven School, already mentioned above, with its emphasis on policy considerations.

99. *Ibid.*, quoting Higgins, "Policy Considerations and the International Judicial Process", (1988) 17 *ICLQ*, pp. 58-59.

100. On the need, and the demand, of Governments from their legal advisers for advice on what international requires of them, in terms of rules of conduct, see Jennings, "Teachings and Teaching in International Law", *Essays in International Law in Honour of Judge Manfred Lachs*, pp. 124-125. For practical account of the processes, see the Symposium on "The Impact of International Law on Foreign Policy-Making: The Role of Legal Advisers" in 2 *European Journal of international Law*, 1991, pp. 131 ff.

101. Cf. Lauterpacht, *The Development of International Law by the International Court*, p. 398.

dicting the future conduct of judges — which is for many the test of science — this is the decisive consideration." [102]

This theory is rejected by some scholars, on the ground it involves applying a highly restrictive criterion which is not consistent with legal reality. Against it has been cited, for example, the observation of the International Court in the *South West Africa* case that "In the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception . . ." [103]. This however is an evident category mistake: to contend that legal obligations are those that would be found to exist by an international judge, assuming that one existed with the jurisdiction to be seised of the matter, is not at all the same thing as asserting that legal obligations are solely those for which there exists a means of enforcement, judicial in the first instance [104].

It is the function of law to resolve disputes; and that implies that it provides all that is necessary to permit this result to be attained. Quite independently of the reference in the ICJ Statute, independently even of the existence of the International Court and its predecessor, or even of the development of arbitral settlement of international disputes, the nature of international law implies the resolution of the clash between two contending claims, and thus the existence

102. "General Rules of the Law of Peace" (1937), in *International Law, the Collected Papers of Hersch Lauterpacht*, Vol. I, p. 247. Cf. Oliver Wendell Holmes: "The prophecies of what the courts will do in fact, and nothing more pretentious, is what I mean by the law": Holmes, *The Path of the Law*, quoted in C. K. Allen, *Law in the Making*, p. 42.

103. *ICJ Reports 1966*, p. 46, para. 86, quoted in Abi-Saab, "Cours général de droit international public", *Recueil des cours*, Vol. 207 (1987), p. 208.

104. Abi-Saab concedes that "la justiciabilité peut être présentée comme fonction de facteurs endogènes (ayant trait au contenu de la règle ou des différends qui s'y réfèrent) ou exogènes (de par l'absence d'habilitation juridictionnelle pour connaître de ces différends)", but continues: "Le résultat reste cependant le même" (*op. cit.*, footnote 151) — the result, perhaps, but not the theoretical basis, which differs in essence. The Court in the *South West Africa* case did not suggest that the obligations of the Mandate were not legal obligations, merely that there was no jurisdiction to enquire, at the suit of the Applicants, into the question whether they had been respected. Nor does it affect the point made here that "Many cultures and civilizations fight shy of litigation, of going to court to settle a dispute . . . For some cultural systems, a court decision would be an imposed solution, with all the disadvantages of such a decision" (Rosenne, "General Course on Public International Law", *Recueil des cours*, Vol. 291 (2001), p. 44). However unwelcome, the court remains in the background as, literally, the final arbiter and therefore the final yardstick of what is legal.

of an impartial view, that dictated by the application of the law which may be (but of course is not necessarily) different from the view taken by either of the contending parties [105]. To assert that "as a matter of law, I am right and you are wrong" differs from the assertion "I say this and I am stronger than you"; to do so is to recognize that, since a State's view of its own legal entitlements may not conform to an abstract or independent, legally correct, view, one's own view may (theoretically) not so conform, and thereby to recognize the primacy of law.

The definition of international law as that which falls to be applied in order to determine legal disputes is evidently a restrictive definition: for one thing, it limits international law to positive law, to the *lex lata*, and excludes considerations of *lex ferenda.* For other purposes, a different, wider, definition may be required: for example in the curriculum of a university law faculty, "international law" as a taught subject would not only involve taking notice of *lex ferenda*, but also of a certain amount of history, politics and international relations. This observation may go some way to defuse the controversies as to the nature of international law: at all events, we may say that the definition above is not offered as an ultimate definition of international law for all purposes, but as the best definition of the core of the matter.

Does international law then consist solely of a system of rules, so that, in theory, the judge has merely to fit the relevant rules to the facts of the case, almost mechanically? If so, any lacuna in the system of rules would have to be dealt with by the application of judicial discretion, "discretion" and "law" being regarded as mutually exclusive categories. This position has been strongly attacked by, in particular, Dworkin [106], who has shown convincingly that law must include not merely rules, capable of automatic and direct application, but also principles, which are neither case-specific nor automatic, and may conflict, so that a degree of priority has to be established between them.

---

105. This is not to deny that the existence of a means of third-party judicial settlement may have an impact on State attitudes towards a given dispute: in terms of theory, the "legalization" of a situation may differ from its "judicialization": see Slaughter, "International Law and International Relations", *Recueil des cours*, Vol. 285 (2001), p. 205.

106. "Is Law a System of Rules?", from "The Model of Rules", 14 *University of Chicago Law Review* (1967); reprinted in Dworkin (ed.), *The Philosophy of Law*, Oxford, 1977.

The international lawyer need have no difficulty with this conclusion, provided it is recognized that principles are not unrelated to rules: they take effect through crystallization into rules. Thus, as Sir Gerald Fitzmaurice has put it,

> "By a principle, or general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlies a rule, and explains or provides the reason for it. A rule answers the question 'what': a principle in effect answers the question 'why'."[107]

Thus the application of a legal principle to a specific disputed question, if it is to contribute to the resolution of that question, must operate either by the application of an existing rule which is inspired by the principle, or in effect by the creation of a new rule so inspired. A principle of law differs from an ethical, moral, political or pragmatic principle in that it is one which is capable of generating rules of law.

We can now return to Article 38 of the Statute of the International Court. Principles of law can generate rules of law: the process envisaged by paragraph *(c)* of that Article is derivation of rules of international law from general principles which are not themselves part of international law, but are to be traced in national legal systems. Both international law and national systems are essentially structures of rules, so that in this respect at least the requirement stated above, that we compare with like, is satisfied.

Before proceeding further, however, I should like to examine two particular apparent qualifications to the universality which should be

---

107. "The General Principles of International Law Considered from the Standpoint of the Rule of Law", *Recueil des cours*, Vol. 92 (1957), p. 7. Cf. also Weil:

> "Règles et principes sont des termes juridiquement synonymes, sous la réserve que l'on a habitude de qualifier de principes des normes de caractère plus général et plus fondamental, relevant plus ou moins de la technique des standards." ("Le droit international en quête de son identité (Cours général)", *Recueil des cours*, Vol. 237 (1992), p. 150.)

An important difference between principles and rules flows from the definition given above. A conflict, or at least a collision, between principles is perfectly possible, and indeed normal: as emphasized by Higgins (following Lauterpacht) a judicial decision is frequently a choice between the operation of two or even more conflicting considerations of principle: *Problems and Process: International Law and How We Use It*, Oxford, 1994, p. 3. But rules, at least in theory, do not conflict: they represent the practical application of a principle, or of the sum of two or more principles.

a mark of international law, because they affect the possibility that international law as a whole is sufficiently parallel to national law for analogy to be possible. One is the not yet eradicated doctrine of the vital interests of States, or of non-justiciable matters; the other, the idea that while the rules applied by an international judge are international law, they are not the whole of international law.

(3) Non-Justiciable Matters and the "Reserved Domain"

An important difference between international law and any municipal legal system derives from the very special status of the entities which are the subjects of law. Essentially, the subjects of international law are sovereign States; we shall have more to say on this point, but at this stage we are concerned with one particular implication which has been attached to the concept. I refer to the idea that certain disputes, or certain matters, are "non-justiciable", that is to say that not only that they escape the scrutiny of international tribunals, even assuming such tribunals to have, in principle, jurisdiction, but also that they escape the control of law. This notion is generally traced back to Article 15, paragraph 8, of the League of Nations Covenant [108], though the germ of it has also been seen in the Russian invitation to the Hague Conferences of 1899 and 1907 [109], in relation to the move towards generalized arbitral settlement of disputes and the establishment of the Permanent Court of Arbitration.

The fundamental notion is that certain interests of States are too important, and too bound up with the exercise by the State of the power to determine its own fate — in a word, with its sovereignty — to be subjected to any exterior control, and thus may not be the subject of judicial or arbitral assessment. The idea is therefore linked in particular to binding judicial or arbitral determination, but it makes its appearance in the political sphere also, in the form (for example)

108. In this sense Arangio-Ruiz, "Le domaine réservé… (Cours général de droit international public)", *Recueil des cours*, Vol. 225 (1990), pp. 30, 54-55.

109. The Circular Note of 12/24 August 1898 indicated that

> "It is well understood that all questions concerning the political relations of States and the order of things established by treaties, as in general all questions which do not directly fall within the programme adopted by the Cabinets, must be absolutely excluded from the deliberations of the Conference." (Carnegie Endowment for International Peace, *The Reports to the Hague Conferences of 1899 and 1907*, Oxford, 1917, p. 3.)

of Article 2, paragraph 7, of the United Nations Charter[110]. This is a concept which is highly relevant to our theme, that of the relationship between international law and national law[111]; it is evident that in national legal systems it is not open to the citizen to declare in what respects he will not submit himself to law because his vital interests might be affected.

It is of course necessary to see reservations of this kind against the background of the system — or lack of system — of judicial or arbitral settlement of disputes that constitutes their context. An evident difference between the organization of the international community and that of a State is the absence on the international level of any system of compulsory judicial settlement, which is a normal feature of any organized society. We are not here concerned with the desirability of amending this state of affairs, nor even with the question whether international law must consequently be regarded as an imperfect or primitive system[112], but solely with the question whether or not the absence of universal compulsory jurisdiction affects the way we think about international law, and the nature of international legal reasoning.

It is submitted that it does not have this impact; that, on the contrary, it is essential for the international lawyer to reason as though his reasoning could be submitted to the test of judicial examination, or indeed as though he were himself acting judicially. This follows from the nature of international law as explained above, as essentially related to dispute-settlement, and as defined in that context. The fact that no State is obliged to accept third-party judgment of whether it has behaved in accordance with international law does not affect the duty so to behave, or the existence of objective standards of assessment of that duty.

This general principle is equally applicable when a State chooses, of its own will, to submit certain aspects of its conduct to judicial determination; thus the fact that it may at the same time exclude

110. "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; . . ."

111. In this sense, Arangio-Ruiz, "Le domaine réservé… (Cours général de droit international public)", *Recueil des cours*, Vol. 225 (1990), p. 29.

112. On this point, see Virally, "Sur la prétendue 'primitivité' du droit international", in *Le droit international en devenir,* IUHEI, Geneva, 1990, pp. 91 ff; Abi-Saab, "Cours général de droit international public", *Recueil des cours*, Vol. 207 (1992), pp. 123-125.

certain other aspects does not mean that there is a difference in the nature of the law applicable to the aspects submitted and the law applicable to those excluded. As the International Court observed in the *Fisheries Jurisdiction* case between Spain and Canada:

> "There is a fundamental distinction between the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law." [113]

How then does this relate to the special category of exclusion, or purported exclusion, from international jurisdiction referred to above, namely the doctrine of "vital interests" or of "domestic jurisdiction", or again of "non-justiciable disputes", which is related to the nature of States and State sovereignty?

If a State is simply free to decide for itself how far it will submit legal disputes to such settlement, without that freedom having any influence on the existence or nature of the disputed legal rights and obligations, then the voluntary exclusion from third-party settlement of matters affecting "vital interests" does not of itself mean that such interests are not governed by international law. The matter presents a different complexion, however, if it is asserted, either that vital interests are excluded from settlement *because* they are not governed by international law, or that the asserting State has the right to decide for itself, free of judicial or other control, what matters fall within the excluded category of vital interests.

Let us take the second possibility first: it raises the problem of what is called the "self-judging reservation" in relation to international judicial or arbitral jurisdiction. The most well-known, not to say the most flagrant, example of such a reservation is that introduced by the United States into its declaration under Article 36, paragraph 2, of the ICJ Statute, and generally known as the "Connally reservation", whereby disputes are excluded from the acceptance of jurisdiction if they relate to "matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America*" [114]. This reservation, which was copied by other States, enables the reserving State, after a dispute has arisen, to determine unilaterally that the subject of the dispute is

---

113. *ICJ Reports 1998*, p. 456, para. 55.

114. *ICJ Yearbook, 1946-1947*, p. 218; quoted in *Interhandel*, *ICJ Reports 1959*, p. 15.

a matter of domestic jurisdiction, and thus to bar any settlement of it by the ICJ (except with the consent of the United States)[115].

It may of course occur that the subject of a particular dispute is in any event, under international law, a matter of "domestic jurisdiction"; if so, the reservation does not affect the position. It may however also be that, objectively speaking, the dispute is not such a matter, that it relates to a question governed by international law. That question could, however, have been excluded from the jurisdiction of the Court by a specific reservation; and, as indicated above, such exclusion would not have rendered the question itself immune to the application of international law, merely to assessment by the Court. Accordingly, the question whether or not an "automatic reservation" is valid, or in some way legally objectionable, is irrelevant to the question whether certain issues may, by the unilateral action of a State, be taken out of the reach of the law itself.

What then of the possibility of asserting that certain matters are outside the reach of international law, not merely of international judicial jurisdiction? To some extent, this is already recognized by international law itself: there are questions which a State is free to determine simply as matters of national policy, and on which the choices made are entirely free, unfettered by international law. For example, as the Court observed in the *Nottebohm* case,

> "It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality . . . [N]ationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it . . . This is implied in the wider concept that nationality is within the domestic jurisdiction of the State."[116]

The extent of the domestic jurisdiction of States is however itself a question regulated by international law; as the Permanent Court

115. Thus in the case concerning *Military and Paramilitary Activities in and against Nicaragua* the United States chose not to assert the reservation: see *ICJ Reports 1984*, p. 422, para. 67.

116. *ICJ Reports 1955*, p. 20. Similar observations were made in the *Military and Paramilitary Activities* case as regards "matters in which each State is permitted, by the principle of State sovereignty, to decide freely", which included "the choice of a political, economic, social and cultural system, and the formulation of foreign policy" (*ICJ Reports 1986*, p. 108, para. 205); cf. also *ibid.*, p. 135, para. 269, on the "level of armaments of a sovereign State".

observed (also with reference to nationality), while there may be matters "which, though they very closely concern the interests of more than one State, are not, in principle, regulated by international law", so that "As regards such matters, each State is sole judge", yet "The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations." [117] Clearly we have a here a problem of *qualification,* as defined earlier: for a State to declare that a specified matter is, as regards that particular State, a matter of domestic jurisdiction where general law would require otherwise amounts to a claim to an unfettered right of *qualification* of matters as being of domestic jurisdiction, a right which, according to the Permanent Court, a State does not possess.

In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, it was argued by the United States that the dispute was "non-justiciable". When analysing this claim, the Court took note that

> "while the United States contended that the nature of the judicial function precludes its application to the substance of Nicaragua's allegations in this case . . ., it was careful to emphasize that this did not mean that it was arguing that international law was not relevant or controlling in a dispute of this kind" [118].

The Court does not indicate what would have been its attitude if the United States *had* advanced this contention; but it does not suggest that such an argument would be wholly unsustainable. It is difficult to read the dictum as a rejection, even *in casu*, of the concept of disputes which would be unilaterally declared to be, by their very nature, non-justiciable, as affecting the "vital interests" of the declaring State.

The concept of "vital interests" is not however limited in its application to the domain of judicial dispute-settlement; it has also been referred to in such areas as self-defence, reprisals, and termination

117. *Nationality Decrees in Tunis and Morocco, PCIJ, Series B, No. 4*, pp. 23-24.

118. *ICJ Reports 1986*, p. 27, para. 33; see also *ICJ Reports 1984*, pp. 436-437, para. 99. For the US argument on the point, see the US Counter-Memorial in *ICJ Pleadings, Oral Arguments, Documents*, Vol. II, p. 169.

of treaties for fundamental change of circumstances. In the first of these areas, the idea made an unexpected re-appearance in connection with the advisory opinion of the International Court on *Legality of the Threat or Use of Nuclear Weapons.* In his separate opinion in that case, Judge Guillaume observes that "no system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests"[119]. As stated, this is presented as a principle common to all systems of law, not merely international law; but it may be that, if it exists, it is in fact peculiar to international law. In municipal systems, the law may certainly subject the right of self-defence to limitations and restrictions (as, indeed, does international law); and while a legal system that prohibited absolutely the use of force in self-defence might be open to objection on ethical grounds, or on a basis of "natural law", the prohibition would presumably have to be regarded as part of the positive law of the society that had enacted it. Judge Guillaume was asserting that in international law a State is always, and will always be, entitled to act in self-defence; but he was apparently also asserting that there is an area of "vital interests" which similarly is, and will always be, exempt from the control of the law. This, if correct, diverges markedly from the application of law in normal civil societies.

The majority opinion of the Court on this aspect of the case also goes beyond a mere definition of the existence and modalities of the recognized right of self-defence. Having found that the use of nuclear weapons in warfare "seems scarcely reconcilable with respect for [the] requirements" of humanitarian law, the Court, in a passage that is not easy to understand, and has been given various interpretations, declared that it was

> "led to observe that it cannot reach a definite conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake"[120].

It is tempting to see this as an analogy drawn from self-defence in

119. *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports 1996,* p. 290, para. 8.

120. *ICJ Reports 1996*, p. 263, para. 97. As Judge Koroma pointed out, the idea of the survival of the State is "a concept invented by the Court": *ibid.,* p. 571.

national law, as applicable to attacks on human beings; it is universally admitted that the use of lethal force in self-defence against a deadly weapon, or an assault calculated to kill, is wholly legitimate: one is entitled to ensure one's own survival at the expense of that of the aggressor who is threatening it. There is also the possibility, in criminal law, that saving one's own life in, for example, a shipwreck, at the expense of another, equally innocent, person is excusable (the so-called "plank of Carneades" case)[121]. But the word "survival" has a clear meaning in relation to a person as a subject and beneficiary of law, namely the avoidance of death, an irreversible circumstance. What then is the meaning of the "survival" of a State? A State can cease to exist as such without a hair of the head of a single citizen being harmed[122]: contrariwise, an enormous proportion of its population could be massacred without the slightest impact on its continued legal existence[123]. Would a State be entitled to use nuclear weapons against an aggressor that had indicated its intention to annex its territory and cause it to cease to exist as a separate State, even in the absence of any other circumstance that aggravated the plight of the victim of the aggression? For our purposes, it is not necessary to answer questions of this kind; what is clear is that we are in presence of a radical difference between the conceptual approach of domestic law and that of international law as represented by the decision in the *Nuclear Weapons* case[124].

---

121. See the discussion by Kohen in "The Notion of 'State Survival' in International Law", in Boisson de Chazournes and Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, p. 293, particularly pp. 309-310; the author concludes that "any attempt to use the analogy of domestic law in order to raise survival to a general principle of law is not convincing" *(loc. cit.)*.

122. It may also be resuscitated as a separate sovereign State after many years of occupation or purported annexation: cf. the position of the Baltic Republics on the break-up of the Soviet Union; see the enumeration of facts that "support the view that the Baltic Republics were only 'seemingly dead'" in the article by Schweisfurth on "Soviet Union: Dissolution", in Bernhardt (ed.), *Encyclopedia of International Law*, Vol. IV, p. 541.

123. Since the possession of a population is one of the conditions of statehood, presumably the destruction of 100 per cent of the population would cause the State to disappear; but this is no more than a *hypothèse d'école*, and (it is fervently to be hoped) will remain so.

124. Kohen (*op. cit.*, footnote 90 *supra*, p. 314), is concerned lest the notion of State survival be used "in the same way as *raison d'état* in municipal law, that is to justify every action performed by the government, even in violation of law, when 'supreme' or 'vital' interests are at stake", but while this would indeed be as sinister a development, the parallel is not direct: *raison d'état* involves the use of superior power, while State survival would operate on a more horizontal plane.

Must we then conclude that there is here a fundamental lack of correspondence between international law and national legal systems, such that arguments by analogy between them are hardly to be relied on ? This would, I suggest, be an over-pessimistic conclusion. We are here simply faced with a specific situation in which analogies from national law to international law fail because certain limitations on the position of subjects of law vis-à-vis national law do not exist, or are substantially qualified, at the international level.

(4) Norms of Conduct and Norms of Adjudication

Mention has been made of the existence of other approaches to international law, such as the "policy-oriented" approach of the New Haven School and of Judge Higgins, which do not regard international law simply as an assemblage of norms, but these approaches need not, for our present purposes, be enquired into. However, even on the premises of a rule-based law, it has been argued that there is a difference between national law and international law, for this reason : there is, it is said, a distinction to be made between the body of rules that States in fact respect in their relations with each other, and the — allegedly more limited — body of rules that may be applied by a judge. Thus Onuma, following Ehrlich [125], distinguishes between what he terms "norms of conduct" and "norms of adjudication" [126]. He points out that in domestic legal systems possessing courts with universal jurisdiction, a party to a dispute may "tacitly or explicitly, send a message to the opposing party that 'if you do not accept my demand, I will sue you ; and I am confident that my argument will prevail in court' " [127], and this is the very essence of a *legal* claim. On this we can agree with Professor Onuma. However, he continues, the situation is different at the international level, because of the absence of a court whose jurisdiction can always be invoked in this way to back a claim ; and even a judgment of the ICJ may be disregarded with comparative impunity.

125. *Grundlegung der Soziologie des Rechts*, 3rd ed., 1967, pp. 97 ff., using the terms *Handlungsregel* and *Entscheidungsnorm* (though Onuma's definitions are slightly different : see next footnote).
126. Onuma Yasuaki, "The ICJ : An Emperor without Clothes ?", *Liber Amicorum Judge Shigeru Oda*, Heidelberg, 2002, p. 196, note 23.
127. *Ibid.*, p. 197.

We have already rejected the argument that international law is not law, in the sense of national law, because it is not automatically judicially enforceable. This is not however Onuma's contention: his conclusion is however rather different:

> "One must therefore identify the *binding international norms of conduct* independently of the norms of adjudication of the ICJ. Even if a certain rule is not included in Article 38 of the ICJ Statute, this rule may be binding among States as a norm of conduct."[128]

The norms to be applied by the ICJ constitute therefore only a part of the "whole range of international legal norms" regulating the subjects of international law.

By way of example, Onuma offers the resolutions or declarations of the United Nations General Assembly.

> "Even if a rule in a UN declaration has no chance of being applied by the ICJ, still we can argue that the rule in question is binding upon States in their actual behavior if we can, for example, demonstrate that the States concerned actually treat the rule as obligatory between themselves and behave in accordance with it. There is no need for us to say that the rule is obligatory *because* it can be applied by the ICJ. The demonstration that the States concerned treat the rule in question as legally binding will suffice."[129]

The question is however what is or would be meant by "legally binding" in such a context. To establish the distinction between norms of conduct and norms of adjudication, and to show that the former, no less than the latter, constitute international legal norms, it would be necessary to show that States in their mutual relations do rely on rules that they qualify as "legal rules", while at the same time conceding that they are not rules that the ICJ would recognize and apply. This may be the case; but when States adopt public stances in relation to a dispute, they normally indicate that they are relying on what they regard as their *legal* rights in such a way as to show, or suggest, that they would expect the ICJ to uphold them were it to be given jurisdiction in the matter. The fact that in the par-

128. Onuma Yasuaki, *op. cit.*, p. 199, emphasis original.
129. *Ibid.*, emphasis original.

ticular dispute it does not have jurisdiction, or that one or both of the parties is hostile to the idea of international judicial settlement, is beside the point.

There is a distinction between norms of conduct and norms of adjudication in municipal law, but it is one that may not be transferable to the international system. There are rules of conduct in some social systems which are more than mere ethical directives or rules of morality, but are nevertheless not legal obligations. In English law, gambling debts are irrecoverable at law, yet for many citizens the obligation to pay up on a bet would be regarded as a social duty rather than a merely moral one [130]. On the other hand, the money paid to settle a bet cannot be recovered at law, for example by an action for unjust enrichment, so that the law does recognize in a back-handed way the existence of an obligation to pay it. French law is clearer still on the point: it includes the "debt of honour" resulting from the bet in the category of *obligations naturelles*, obligations which cannot be enforced at law, but settlement of which is definitive, and cannot be reclaimed [131]. It is not apparent that such obligations can be found at the international level [132]; their recognition in law depends on the existence of a recognized rule authorizing recovery of "unjust enrichment", *enrichissement sans cause*, or *répétition de l'indu*, which rule does not appear to exist in international law.

In short, while there are certain aspects of municipal law to which no analogy can be found on the international plane, it is suggested that the distinction which Onuma suggests, between binding international norms of conduct and the (more limited, in his view) norms of adjudication of an international tribunal charged with the application of international law, is not well-founded.

---

130. "La morale n'ayant que faire au jeu, mais seulement l'honneur mondain, c'est d'une obligation de convenance, non de conscience qu'il peut s'agir" (Carbonnier, *Droit civil*, t. II, p. 289, No. 85).

131. *Code civil*, Art. 1967, L. Mazeaud and Chabas, *Leçons de droit civil*, 10th ed., t. II, p. 475, No. 363. There is some controversy about this, however: some authors attribute the impossibility of recovery to the application of the maxim *in pari causa turpitudinis cessat repetitio* (Carbonnier, *loc. cit.*). The concept of *obligations naturelles* is however wider, and clearly recognized.

132. The category includes debts extinguished by prescription, and prescription is, it has been contended, one of the general principles of law referred to in Article 38 (1) *(c)* of the ICJ Statute (cf. the 1925 resolutions of the Institut de droit international, *Annuaire de l'Institut*, Vol. 32 (1925), p. 558). Sufficient doubt however surrounds the existence and conditions of prescription in international law for the question here discussed, whether a payment made to settle a prescribed debt can be recovered, to be purely hypothetical.

More generally, we can proceed with confidence to pursue our analysis of the special character of international law in comparison with national legal systems on the basis that we are comparing like with like, that international law exists and is recognizable as law in the same sense that the domestic lawyer uses the term.