
‘All right, Mr. DeMille, I’m ready for my close-up’: Some Critical Reflections on Professor Cassese’s ‘The International Court of Justice: It is High Time to Restyle the Respected Old Lady’

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Abstract

In his essay, ‘The International Court of Justice: It is High Time to Restyle the Respected Old Lady’, Professor Cassese argues that in order to maintain its position as the principal international tribunal and be attractive to potential parties, lest it lose business to others, the practice and procedure of the ICJ should be reformed in order to make it a true court of law fit for the 21st century. He sets out various changes which he thinks should ensure this result. His principal suggestions encapsulate a view of the function of the International Court and the role of its judges with which I profoundly disagree. Rather than constitute a programme for a 21st century renovation of the International Court, I believe that, at core, these suggestions are a reversion to early 20th century conceptions of the aims of international adjudication which have rightly been discarded in the Court’s practice. On the contrary, I believe that the implementation of some of Professor Cassese’s suggestions would act as a disincentive to potential parties, and doubt whether it is legitimate for the Court to pursue a policy of law creation by way of precedent. On the whole, this is a secondary and marginal function of the Court which principally speaks to the parties, and not to the world.

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It is generally accepted that Norma Desmond, the ageing, deluded, and forgotten silent film star, played by Gloria Swanson, who is the protagonist of Billy Wilder's film noir *Sunset Boulevard* bears some relationship to the character of Miss Havisham in Charles Dickens' *Great Expectations*, a matter alluded to in the script itself. On first seeing Miss Desmond's mansion, Joe Gillis, the young writer doomed by their association, remarks:

It was a great big white elephant of a place, the kind crazy movie people built in the crazy 20s. A neglected house gets an unhappy look. This one had it in spades. It was like that old woman in 'Great Expectations', that Miss Havisham in her rotting wedding dress and her torn veil taking it out on the world because she'd been given the go-by.

Both Norma Desmond and Miss Havisham were abandoned: the latter jilted by her fiancé after he had swindled her, and the former by her public at the end of the era of silent film. (Joe Gillis: 'You're Norma Desmond. You used to be in silent pictures. You used to be big.' Norma Desmond: 'I *am* big. It's the *pictures* that got small.') Neither could adapt to her changed circumstances and withdrew into an ever-decreasing private world.

In the chapter of *Realizing Utopia* entitled 'The International Court of Justice: It Is High Time to Restyle the Respected Old Lady',¹ Professor Cassese argues that we should have new expectations of the International Court, that we should examine her in close up, realize that she is showing her age, and demand that she mend her ways so she may become a revitalized force fit for the 21st century. His bottom line is that to maintain her leading position as the principal UN judicial organ:

the Court should ... modernize its procedures. It should update, streamline, and render more expeditious its working practices, in line with other international courts and tribunals. Otherwise there is a risk that more cases will go elsewhere (eg to arbitral courts or to specialized tribunals such as the International Tribunal for the Law of the Sea) and the Court will become a less attractive institution. That would not be a good thing.²

Should we agree with Professor Cassese that there is cause to abandon this 'respected old lady' if she is not reformed?

Professor Cassese's death has caused a significant absence in international legal debate and scholarship. His work is principled, at times visionary, and imbued with idealism, but is his assessment of the role and function of the International Court a case of idealism gone too far? He himself concedes that the changes he suggests should be made to the way the Court functions amount to a 'dream book'.³

Cassese's idealism in relation to the International Court is not the radical social idealism of Philip Allott, aimed at structural change in international order,⁴ but rather

¹ Cassese, 'The International Court of Justice: It Is High Time to Restyle the Respected Old Lady', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), at 239.

² *Ibid.*, at 249.

³ *Ibid.*, at 248.

⁴ See P. Allott, *Eunomia: New Order for a New World* (1990, reprinted 2001), *The Health of Nations: Society and Law beyond the State* (2002), and *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (2005); for commentary see the essays in the symposium *Philip Allott's 'Eunomia' and 'The Health*

a piecemeal idealism, aimed at addressing perceived faults and deficiencies in the way the International Court operates and suggesting how these should be remedied. His broad claim is that the implementation of the changes he suggests would transform the Court from a 19th century arbitral tribunal 'oriented to unrestricted respect for outmoded conceptions of state sovereignty, into a proper court of law, with all the attributes and trappings of a modern judicial body'.⁵

Some of the changes Cassese advocates would require amendment of the Court's Statute, while others would require only changes in its practice and procedure which the Court could implement itself. His wish-list is extensive and encompasses: abolition of judges *ad hoc* (and at times the recusation of judges who are nationals of one of the parties); extending the ability of third states to intervene in contentious proceedings; allowing *amicus curiae* participation in contentious cases; opening the Court's contentious jurisdiction to inter-governmental actors and, conversely, its advisory jurisdiction to actors other than inter-governmental actors; clarifying the legal impact of advisory opinions; issuing preliminary decisions on questions of international law at the request of national or international courts; dividing the court into panels of judges; creating a fact-finding body for the Court; streamlining the Court's procedure; and making its pronouncements less oracular. Cassese barely develops some of his suggestions. I shall focus on his broad proposal in order to decode the concept of the function of the International Court and the judicial role which is implicitly embedded in Cassese's analysis and call for reform, and with which I profoundly disagree.

1 Arbitration, Adjudication, and Intervention

In calling for the transformation of the International Court from a 19th-century arbitral court into a mature court fit for the 21st century (*cue* Bette Davis as Charlotte Vale in *Now, Voyager*, unfolding into a butterfly from a dried-up chrysalis), Cassese oddly demonstrates a late 19th/early 20th century sensibility. The expectation and intent was that the Permanent Court of International Justice should be a court of adjudication as opposed to a court of arbitration. Even before the Statute of the Permanent Court of International Justice (PCIJ) was drafted, an institutionalized arbitral mechanism already existed in the guise of the Permanent Court of Arbitration (PCA). Although the cliché was, and is, that the PCA is neither 'permanent' nor a 'court', the PCIJ was intended to complement it, to have a much wider normative significance, and to be the 'court' that the PCA was and is not.

of Nations', *Thinking Another World: 'This Cannot be How the World was Meant to Be'*, 16 *EJIL* (2005) 255; MacDonald, 'The Rhetoric of Eunomia', IILJ Working Paper 2008/1 (History and Theory of International Law Series, Institute for International Law and Justice, New York University School of Law, 2008), available at: www.iilj.org/publications/documents/2008-1.HT.MacDonald.pdf (last accessed 6 Nov. 2012); and Scobbie, "'The Holiness of the Heart's Affection": Philip Allott's Theory of Social Idealism', in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (2011), at 168.

⁵ Cassese, *supra* note 1, at 249.

The Covenant of the League of Nations did not envisage the abolition of the PCA. This was apparent from the terms of Article 13, which provided in part:

The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.

...

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Advisory Committee of Jurists which drafted the Court's Statute, pursuant to Article 14 of the League Covenant,⁶ proposed in the draft Statute it submitted to the League that both institutions should function alongside one another, and Article 1 of the original Statute of the PCIJ,⁷ annexed to the Protocol of Signature of 16 December 1920 provided:

A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organised by the Conventions of the Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.⁸

This, however, raised the question whether a distinction existed between international arbitration and international adjudication, as '[t]he Permanent Court will not be ... a Court of arbitration, but a Court of justice'.⁹

In a League Secretariat memorandum prepared for the Advisory Committee it was argued that three characteristics distinguished arbitration from adjudication in broad terms. The parties to a case nominated the arbiters, they could also decide which substantive norms the tribunal should apply, and arbitration was dependent on the consent of the parties. The memorandum noted that the distinction between arbitration

⁶ Art. 14 of the League Covenant provided: 'The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.'

⁷ The original Statute, adopted in 1920, was revised by the 1929 Protocol relating to the Revision of the Statute which entered into force on 1 Feb. 1936. The Revision Protocol is reproduced in PCIJ Ser. D, No. 1 (4th edn, 1940), at 9, and the revised Statute at 13. All documents of the Permanent Court cited are available on the website of the International Court of Justice at www.icj-cij.org/pcij/index.php?p1=9 (last accessed 6 Nov. 2012).

⁸ PCIJ Ser. D, No. 1 (1st edn, 1926), 7: the 1920 Protocol of Signature is reproduced at 5. The French text of Art. 1 provided: '*Indépendamment de la Cour d'Arbitrage, organisée par les Conventions de la Haye de 1899 et 1907, et des Tribunaux spéciaux d'Arbitres, auxquels les Etats demeurent toujours libres de confier la solution de leurs différends, il est institué, conformément à l'article 14 du Pacte de la Société des Nations, une Cour permanente de Justice internationale.*'

⁹ 'Speech delivered by M. Léon Bourgeois', 16 June 1920, in League of Nations, *Procès-verbaux of the Committee (June 16th–July 24th 1920)* (1920), at 5, 7.

and adjudication was not hard and fast, but that when all three characteristics were present, the procedure was arbitral rather than judicial in a strict sense.¹⁰ It was also argued that arbitrators did not systematically apply law but often decided by compromise on the basis of equity.¹¹ The initial proposals for the Permanent Court envisaged that its jurisdiction would be compulsory, rather than consensual, but this was rejected by both the Council and Assembly of the League.¹² Nevertheless, because of the existence of a standing bench of judges, and because Article 38 of the Statute¹³ mandated that the Permanent Court apply international law as the basis of its decision-making, and should decide on the basis of equity only if this were expressly requested by the parties, its task was seen as discharging a judicial, rather than arbitral, function. As Bourgeois, the representative of the League Council, stated during the first meeting of the Advisory Committee on 16 June 1920:

The Court of Justice must be a true Permanent Court. It is not simply a question of arbitrators chosen on a particular occasion, in the case of conflict, by the interested parties; it is a small number of judges sitting constantly and receiving a mandate the duration of which will enable the establishment of a real jurisprudence, who will administer justice. This permanence is a symbol. It will be a seat raised in the midst of the nations, where judges are always present, to whom can always be brought the appeal of the weak and to whom protests of the violation of right can be addressed ...¹⁴

¹⁰ See 'Note on the nature of the new Permanent Court of International Justice', in League of Nations, *Documents presented to the Committee relating to existing plans for the establishment of a Permanent Court of International Justice* (Geneva: 1921), at 112 (French text), 113 (English text); and B.S. von Stauffenberg, *Statut et règlement de la Cour permanente de Justice internationale: éléments d'interprétation* (1934), at 12–13.

¹¹ See Pellet, 'Commentary to Article 38', in A. Zimmermann, C. Tomuschat, and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: a Commentary* (2006), at 677, 680–681 (paras 4–5), and 684–685 (paras 17–20); also 'Note read by Baron Descamps: About the difficulties of the problem submitted to the Jurists Committee and a proper method for solving these difficulties', *Procès-verbaux*, at 44–48; and the Report submitted by de Lapradelle to the Advisory Committee on 23 July 1920, *Procès-verbaux*, at 693, 694.

¹² See L. Lloyd, *Peace through Law: Britain and the International Court in the 1920s* (1997), at 5–15; Spiermann, 'Historical Introduction', in Zimmermann *et al.*, *supra* note 11, at 39, 45–48 (paras 11–17); Tomuschat, 'Commentary to Article 36', in *ibid.*, at 598, 593–595 (paras 2–4); and Stauffenberg, *supra* note 10, at 242–254.

¹³ Art. 38 of the Statute of the Permanent Court differed slightly from that of the International Court, providing:

'The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognised by civilised nations;
4. Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.'

The Statute of the International Court substituted for '[t]he Court shall apply' the more expansive '[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply'.

¹⁴ Bourgeois, *supra* note 9, at 8.

The Advisory Committee consciously envisaged the Permanent Court as an innovation in then-existing international judicial institutions, as not only would it be a standing judicial body, but also its function, in part, would be to develop international law.¹⁵ Thus, when it discussed the sources of law the Court should apply, Loder commented:

Rules recognised and respected by the whole world had been mentioned, rules which were, however, not yet of the nature of positive law, but it was precisely the Court's duty to develop law, to 'ripen' customs and principles universally recognised, and to crystallise them into positive rules; in a word, to establish an international jurisprudence.¹⁶

When the draft Statute produced by the Advisory Committee was submitted to the League Council for approval, Balfour, the British representative, commented:

It seems to me that the decision of the Permanent Court cannot but have the effect of gradually moulding and modifying international law. This may be good or bad; but I do not think that it was contemplated by the Covenant; and in any case there ought to be some provision by which a State can enter a protest, *not* against any particular decision arrived at by the Court, but against any ulterior conclusions to which that decision may seem to point.

If this danger has any reality, it becomes doubly formidable from the fact that at present the three most populous Western States – the United States, Germany and Russia – are not Members of the League, and cannot be expected to take their views on international law from the Court's decision.¹⁷

In response, Bourgeois, acting as *rapporteur* for the Council, prepared a report which noted that one point of contention regarding the draft Statute was:

The right of intervention in its various aspects, and in particular the question whether the fact that the principle implied in a judgment may affect the development of international law in a way which appears undesirable to any particular State may constitute for it a sufficient basis for any kind of intervention in order to impose the contrary views held by it with regard to this principle.¹⁸

Bourgeois noted that this raised the question whether non-litigant states should have 'the right of intervening in the case in the interest of the harmonious development of the law, and otherwise after the closure of the case, to exercise, in the same interest, influence on the future development of the law'. The Advisory Committee had given non-litigants 'the right to intervene in a case where any interest of a judicial nature which may concern them is involved', and then-draft Article 61 expressly provided that where a state did not intervene in a case which involved the interpretation

¹⁵ On late C19th/early C20th expectations of international arbitration and adjudication, possibly the best analysis is M. Pomerance, *The United States and the World Court as a "Supreme Court of the Nations": Dreams Illusions and Disillusion* (1996), at 41–64.

¹⁶ *Procès-verbaux*, *supra* note 9, 13th meeting, 1 July 1920, at 294.

¹⁷ 'Note on the Permanent Court of International Justice: submitted by Mr Balfour to the Council of the League of Nations, Brussels, Oct., 1920', in League of Nations, *Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (Geneva: 1921), at 38, emphasis in original.

¹⁸ 'Report presented by the French representative, M. Léon Bourgeois and Adopted by the Council of the League of Nations at its meeting at Brussels on 27 Oct. 1920' in *ibid.*, at 45, 46.

of a treaty to which it was party, the interpretation adopted by the Court would not be binding upon it. Accordingly:

No possible disadvantage could ensue from stating directly what Article 61 indirectly admits. The addition of an Article drawn up as follows can thus be proposed to the Assembly:

*The decision of the Court has no binding force except between the Parties and in respect of the particular case.*¹⁹

Nevertheless, the general expectation that the Court would play a pivotal role in the development of international law was apparent from its inception. For instance, during the preliminary session of the Permanent Court held to draft its rules of procedure, Judge Moore thought it desirable to enable larger states with an interest in the evolution of international law to intervene in contentious proceedings involving small states:

for the purpose of obtaining the decision of the Court on the main principles of international law.²⁰

This view was also current in contemporary doctrine. For example, in an article first published in 1926, Verzijl argued strenuously in favour of 'the great advantage of a consistent case law, which was one of the main objects of the establishment of a permanent court of justice'. He saw this as the influence of 'British judicial practice and judicial conceptions'.²¹

The Court's practice has, however, confounded this expectation of normative development to some extent. Intervention under Article 62 of the Court's Statute has not followed the path plotted by Judge Moore, and shared by his colleagues Loder and Finlay who argued that it should not be limited to cases in which the material interests of the state requesting intervention were in play, but rather encompassed cases in which its interests might be affected by the normative component of the decision.²² On the contrary, Judge Anzilotti's opinion, that Article 62 did not refer to 'cases which were of interest from the point of view of international law',²³ has been the more influential, embodied in the benchmark ruling that:

The Chamber does not however consider that an interest of a third State in the general legal rules and principles likely to be applied by the decision can justify an intervention.²⁴

This has not been affected by the ruling in the *Sovereignty over Pulau Ligitan and Pulau Sipadan case (Indonesia/Malaysia)*, *Philippines application for to intervene judgment*

¹⁹ *Ibid.*, at 50, emphasis in original.

²⁰ PCIJ Ser. D, No. 2, 91.

²¹ Verzijl, 'The Jurisprudence of the Permanent Court of International Justice from 1922 to May 1926', in J.H.W. Verzijl, *The Jurisprudence of the World Court: a Case by Case Commentary* (1965), i, at 20–23, quotation at 23.

²² PCIJ Ser. D, No. 2, 89.

²³ *Ibid.*, at 90.

²⁴ *Land, island and maritime frontier dispute case (El Salvador/Honduras): Nicaraguan application to intervene judgment* [1990] ICJ Rep 92, at 124–125 (paras 76–77), and 126 (para. 82), quotation at 124 (para. 76). This issue arose because, in para. 2.d of its application to intervene, Nicaragua alleged that it had an interest of a legal nature in:

that ‘the interest of a legal nature to be shown by a State seeking to intervene under Article 62 is not limited to the *dispositif* alone of a judgment. It may also relate to the reasons which constitute the necessary steps to the *dispositif*.’²⁵ Nevertheless, it is still the case that an intervening state’s legal interest in the *dispositif* must be material, and capable of being affected by that decision.

2 Limitations on the International Court’s Normative Role

Cassese’s view on the role of the International Court is strikingly similar to that expressed by Loder in the Advisory Committee:

there is no gainsaying that the Court is playing an important role in the area of lawmaking. Since at present, and on political grounds, states are loathe to create new rules by treaties, the scope and impact of customary law on international relations is expanding at a rapid pace. However, the difficulty with custom is that, apart from traditional rules, which are undisputed, emerging rules or rules that are indicative of new trends in the world community need, in order to be recognized, the formal imprimatur of a court of law. No other court is in a better position than the ICJ to play this role. Once the ICJ has stated that a legal standard is part of customary international law, few would seriously challenge such a legal finding.²⁶

If, following Cassese’s strictures, intervention under Article 62 should be easier in order that non-litigant states may play a role in the judicial development of international law,²⁷ then two issues must be addressed. There is the possibility that increased intervention could act as a disincentive to litigant states as they might fear that they would no longer have control over the parameters of a case, but there is also the question of who would intervene, and why.

There is a body of opinion which claims that states are reluctant to resort to the International Court because, in doing so, they lose control of the dispute at the root of the case.²⁸ If the possibility of an easier process of intervention were to become a reality, this might further discourage states from litigating because of the uncertainty this could introduce into the proceedings. It is true that the Court has been clear that intervention under Article 62:

is not intended to enable a third State to tack on a new case, to become a new party, and so to have its claims adjudicated by the Court. A case with a new party, and new issues to be decided,

‘The essential character of the legal principles, including relevant equitable principles, which would be relevant to the determination of the questions placed on the agenda by the Special Agreement [concluded between El Salvador and Honduras which initiated the proceedings].’

See at 108 (para. 37).

²⁵ *Sovereignty over Pulau Ligitan and Pulau Sipadan case (Indonesia/Malaysia), Philippines application to intervene judgment* [2001] ICJ Rep 572, at 596 (para. 47); re-affirmed in *Territorial and maritime dispute case (Nicaragua v. Colombia): Honduran application to intervene judgment*, 4 May 2011, at para. 39, available at: www.icj-cij.org

²⁶ Cassese, *supra* note 1, at 240.

²⁷ See *ibid.*, at 242–243.

²⁸ See, e.g., Fitzmaurice, ‘Enlargement of the Contentious Jurisdiction of the Court’, in L. Gross, *The Future of the International Court of Justice* (1976), ii, at 461, 463.

would be a new case. The difference between intervention under Article 62, and the joining of a new party to a case, is not only a difference in degree; it is a difference in kind ...

... Incidental proceedings [such as intervention] by definition must be those which are incidental to a case which is already before the Court or Chamber. An incidental proceeding cannot be one which transforms the case into a different case with different parties.²⁹

Thus, although intervention cannot deform a case and make it into a new one, it might be that an intervening state raised normative issues that the principal parties did not want to place before the Court, possibly for political reasons. The situation could arise which is analogous to the *Nuclear tests* cases,³⁰ where the Court decided on the basis of an issue which the parties had not argued, and which, by ignoring the parties' arguments, transformed the normative foundation of the judgments. Such an outcome could well alienate states, and cause potential litigants to resort to arbitration where third party intervention is not an option as proceedings are closed.

As a practical matter, if the conditions on intervention under Article 62 of the Statute were to be relaxed, the Court would probably have to make a change in its practice to enable non-litigant states to make a reasoned decision as to whether they should intervene. Rule 53(1) of the 1978 Rules of Court provides:

The Court, or President if the Court is not sitting, may at any time decide, after ascertaining the views of the parties, that copies of the pleadings and documents annexed shall be made available to a State entitled to appear before it which has asked to be furnished with such copies.

Rule 53(2) provides that, in principle, these may be made accessible on or after the start of the oral proceedings. As Rosenne observes, the Court has never made the written pleadings available to a state under Rule 53(1) if one of the parties to the case has objected:

This has worked particular hardship – possibly even amounting to a denial of justice – in the case of a State requesting copies of the written pleadings in order to be able to formulate and plead a request for permission to intervene in the case on the basis of Article 62 of the Statute, that it has an interest of legal nature which may be affected by the decision in the case.³¹

Indeed, in its failed attempt to intervene under Article 62 of the Statute in the *Nicaragua* case, El Salvador indicated that its inability to consult the pleadings had put it at a disadvantage in the intervention proceedings.³²

Even if Rule 53(1) were amended to facilitate intervention, the question arises as to which states would intervene to make known their views on the normative component of the case, and why. Intervention is not without its costs, not simply the financial costs of engaging counsel to prepare and present pleadings, but also the institutional

²⁹ *El Salvador/Honduras*, *supra* note 24, at 133–134 (paras 97–98).

³⁰ *Nuclear tests case (Australia v. France)* [1974] ICJ Rep 253 and *Nuclear tests case (New Zealand v. France)*, [1974] ICJ Rep 457.

³¹ S. Rosenne, *The Law and Practice of the International Court, 1920–2005* (4th edn, 2006), iii, at 1253.

³² See the 24 Sept. 1984 telex from the Ambassador of El Salvador to the Registrar, available at: www.icj-cij.org/docket/files/70/9635.pdf (last accessed 6 Nov. 2012), at 396–397, adverted to by Judge Schwebel in his dissenting opinion in *Military and Paramilitary Activities in and against Nicaragua case: 4 October 1984 (declaration of intervention) Order* [1984] ICJ Rep, 215, at 223, 232–233.

costs of monitoring the docket of the International Court to determine in which cases a state might desire to intervene. This could too easily result in the realization of Judge Moore's desire that larger (or richer) states with a (self-)interest in the elaboration of international law should be able to intervene in contentious proceedings involving smaller states, thus strengthening the law development capability of the already privileged, which would seem to contradict Cassese's inclusive and cosmopolitan view of international legal order.

But, more than that, one should consider the partial nature of pleadings: they are not disinterested but seek to substantiate a state's claim or view of the way in which international law should develop. For example, in the *Norwegian Fisheries* case,³³ the United Kingdom clearly expressed the view that the Court's business was to expound international law:

It is common ground that this case is not only a very important one to the United Kingdom and to Norway, but that the decision of the Court on it will be of the very greatest importance to the world generally as a precedent, since the Court's decision in this case must contain important pronouncements concerning the rules of international law relating to coastal waters.³⁴

That the parties' self-interest might influence their exposition of the law was noted by Norway in the *Norwegian Fisheries* case. Norway argued that, during the course of the proceedings, the United Kingdom had displaced the precise dispute of the validity of the Norwegian baselines in an attempt to turn the litigation into the fixing of general rules of international law regulating the delimitation of the territorial sea. Rejecting the proposal that the Court deliver a judgment of principle, the Norwegian Agent (Arntzen) commented:

Le Gouvernement du Royaume-Uni a moins le désir, semble-t-il, de voir trancher le litige juridique concret qui divise les Parties, que de faire établir par la Cour un précédent pour la communauté des nations concernant les principes formulés par l'honorable Partie adverse. En effet, après n'avoir entendu que les deux membres de la communauté internationale qui sont Parties à cette affaire, la Cour est invitée par le Gouvernement du Royaume-Uni à établir pour une partie du droit international, où il règne tant d'incertitude et de divergence de vues, des règles juridiques normatives pour toute la communauté de droit international. Elle devrait, partant, déclarer implicitement comme sans force et comme contraires au droit, toutes les autres conceptions qui se sont manifestées au sein des différents États par une série de lois et de décrets, et par la pratique judiciaire et administrative ... cette tâche la Cour est invitée à l'entreprendre sans avoir entendu les autres membres de la communauté internationale.³⁵

³³ [1951] ICJ Rep 116.

³⁴ *Norwegian Fisheries* Pleadings, iv, at 23.

³⁵ See *ibid.*, at 170–172, quotation at 171, comma omitted in the final para.; and also Evensen, 'The Anglo-Norwegian Fisheries case and its Legal Consequences', 46 *AJIL* (1952) 609, at 619. Evensen was counsel for Norway in the case. The quotation translates as: '[i]t seems that the United Kingdom government, rather than wanting the Court to resolve the actual legal dispute between the parties, wants it to establish a precedent for the community of states regarding the principles formulated by the honourable adverse party. In fact, after having heard only two members of the international community which are the parties to this case, the United Kingdom government is inviting the Court to establish legal rules for the entire international legal community in an area of international law where there is a great deal of uncertainty and divergence of views. Consequently, it must implicitly declare as ineffective and as contrary to law all

Indeed, the United Kingdom made it clear that it was 'playing for rules', by stating 'this case ... will be of the very greatest importance to the world generally as a precedent'.³⁶

The International Court conclusively defeated this strategy in its judgment. It decided that the Norwegian baselines were lawful, but for reasons peculiar to the parties which left untouched the legality of similar baselines drawn by other states, such as Iceland.³⁷ The Court ruled that the United Kingdom had acquiesced in the method of drawing baselines adopted by Norway, thus making this a matter of obligation and not general international law,³⁸ and founded the validity of those in issue on the distinctive configuration of the Norwegian coast coupled with long-established socio-economic factors.³⁹ By the terms of the judgment, the Court individuated its decision to the Norwegian baselines.⁴⁰ Although initially perceived as innovatory,⁴¹ the Court's ruling passed quickly into customary law⁴² before being incorporated in Article 4 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. While this outcome might be seen as a validation of Cassese's view that '[o]nce the ICJ has stated that a legal standard is part of customary international law, few would

other conceptions expressed by different states in a series of laws and decrees, and in judicial and administrative practice ... the Court is invited to undertake this task without having heard the other members of the international community.'

³⁶ *Norwegian Fisheries Pleadings*, iv, at 23.

³⁷ After claiming that the decision would constitute a precedent, the UK noted that Iceland had promulgated regulations (regs) inspired by the Norwegian legislation: *ibid.*, at 23. The substantive identity of the Icelandic regs was affirmed by Norway: *ibid.*, iii, at 317. The UK argued that a decision on the validity of the Norwegian legislation would be equally applicable to the Icelandic regs: *ibid.*, iv, at 79.

As if this were not enough to demonstrate the effect the judgment could have on states not parties to the case, the proceedings were characterized by the active participation of three non-parties, Belgium, Iceland, and the Netherlands, each of which submitted its views on the legality of the Icelandic regs to the Court through one or other of the parties: see in particular *ibid.*, iii, at 696–702; and iv, at 79, 401–402, 680–682 (in conjunction with 606–607), and 687 (in conjunction with 607–609). See also Evensen, *supra* note 35.

³⁸ [1951] ICJ Rep 138–139.

³⁹ *Ibid.*, at 133 and 140–142; see also *Norwegian Fisheries Pleadings*, iv, at 166–169.

⁴⁰ See Goldie, 'The International Court of Justice's "Natural Prolongation" and the Continental Shelf Problem of Islands', 4 *Netherlands Yrbk Int'l L* (1973) 237, at 239–240; and also the statement of Sir Gerald Fitzmaurice in iii Official Records of the 1958 UN Conference on the Law of the Sea (A/CONF.13/39), at 159 (para. 52).

⁴¹ This opinion was expressed in contemporary doctrine: see, for instance, Johnson, 'The Anglo-Norwegian Fisheries Case', 1 *ICLQ* (1952) 145, at 156 and 180; and H. Lauterpacht, 'Implications of the Norwegian Fisheries Case', in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* (1977), iii, at 213, 215.

⁴² When formulating its draft article on straight baselines preparatory to the 1958 Geneva Conference, the International Law Commission viewed the 1951 judgment as 'expressing the law in force; it accordingly drafted the article on the basis of this judgment': see (1956) II YBILC 267, at para. 2. This view was reflected in governments' comments on the final draft articles adopted by the Commission preparatory to the Geneva Conference: see Official Records, i (A/CONF.13/37) 76 (Canada), 93 (Norway), 102 (UK), and 110 (China). This opinion was also held in the First Committee (Territorial Sea and Contiguous Zone) of the Conference, see Official Records, iii (A/CONF.13/39), at 158–159.

seriously challenge such a legal finding',⁴³ the Court consciously did not do so in this case but restricted the scope of its judgment to the parties before it.

Cassese's view appears to assimilate the International Court to domestic courts to an undue extent, assuming an identity between the role adjudication plays in the domestic and the international legal order. This is to ignore the restraints placed upon the Court's wider normative role which arise from institutional or jurisdictional limitations. In themselves these restraints confound expectations derived from domestic legal systems. It is trite but nonetheless true that:

jurisdiction is not consensual in national law; the situation differs fundamentally from that which governs international jurisdiction.⁴⁴

The breadth of the jurisdictional title relied upon can itself restrict the Court's competence to rule on matters of general international law. If the *compromis* relied on by the applicant, or special agreement concluded between the parties, is limited to the interpretation and application of a given treaty, although the Court might have to draw on custom and general principles to provide a framework within which to discharge this function, it would be incompetent for it to base its decision on autonomous and unrelated customary law. In such cases, the primary focus must be on the parties' obligations under that treaty, and any statements that the Court makes on general international law, that is custom, are only incidental to this task. Lauterpacht acknowledges this distinction in his recognition that most rules of international law deal with subjective rights established by treaties rather than 'abstract rules of an objective nature',⁴⁵ and it is a matter taken into account by states in their pleadings. For instance, in the *Hostages in Tehran* case,⁴⁶ the United States consciously did not rely principally on alleged violations of customary or general international law regarding diplomatic immunities, but rather argued on the basis of the obligations contained in the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, and the bilateral 1955 US–Iran Treaty of Amity, Economic Relations and Consular Rights.⁴⁷

Further, it seems unrealistic to expect the Court to contribute to a linear development of international law, given the episodic and unrelated nature of the matters presented for decision. The structure of the international legal system exacerbates this to some extent. To borrow Tammelo's terminology, it is a rhetorically-oriented rather than an axiom-oriented system because it is neither codified nor based on precisely formulated basic principles which can operate as major premises in deductive syllogistic reasoning.⁴⁸

⁴³ Cassese, *supra* note 1, at 240.

⁴⁴ Judge Schwebel, dissenting opinion, *Certain Phosphate Lands in Nauru case: preliminary objections judgment* [1992] ICJ Rep 240, at 330.

⁴⁵ H. Lauterpacht, *The Function of Law in the International Community* (1933), at 70, n. 2.

⁴⁶ *United States Diplomatic and Consular Staff in Tehran case (United States v. Iran)* [1980] ICJ Rep 3.

⁴⁷ See Schwebel, 'The ICJ Decisions and Other Public International Law Issues', in R.D. Steele (ed.), *The Iran Crisis and International Law* (1981), at 20, 20–21; Schwebel was Deputy Agent and Counsel for the US in the *Hostages in Tehran* case.

⁴⁸ See Tammelo, 'On the Logical Openness of Legal Orders', 8 *Am J Comp L* (1959) 187, and 'The Law of Nations and the Rhetorical Tradition of Legal Reasoning', 13-II *Indian Yrbk Int'l Affairs* (1964) 227, particularly at 252–254; and also Stoljar, 'System and Topoi', 12 *Rechtstheorie* (1981) 385 and 'Paradigms

Further, formal⁴⁹ sources may well be mixed in an exposition, or points rest principally on matters of inter-party obligation rather than general law. It can be difficult to classify some argumentative strategies squarely in terms of the invocation of one or other source enumerated in Article 38(1) of the Statute.

It might be argued that another of Cassese's proposals, that the International Court issue preliminary decisions on issues of international law at the request of national or international courts, could alleviate these problems by generating an increased body of authoritative jurisprudence that would encourage uniformity in the interpretation and application of international law. While the Court was exercising this referral jurisdiction, the requesting court would stay the proceedings before it.⁵⁰ Similar proposals have been made before, most notably by Presidents Schwebel⁵¹ and Guillaume,⁵² who were both concerned with the dangers of inconsistent rulings arising from the proliferation of international tribunals. I incline more towards the view expressed by President Higgins, that a referral jurisdiction would be 'cumbersome' and that it is:

unrealistic to suppose that other tribunals would wish to refer points of general international law to the International Court of Justice. Indeed, the very reason for their establishment as separate judicial instances militates against a notion of intra-judicial reference.⁵³

and Borderlines' [1981] (Special Issue) *Bull Australian Soc Legal Philosophy* 26 (also published in 13 *Rechtstheorie* (1982) 133).

⁴⁹ On this, I follow the distinction expounded by Fitzmaurice between formal and material sources of law, and the related distinction between law and obligation (which should be read in an extensive sense to refer to any legal relationship of restricted application which is peculiar to the parties to a case or to a given treaty). See Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in F.M. van Asbeck *et al.* (eds), *Symbolae Verzijl* (1958), at 153; and also his 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', 92 *RdC* (1957-II) 1, at 97, n. 1; and International Law Association, 'First Interim Report of the International Committee on the Formation of Rules of Customary (General) International Law', in *International Law Association: Report of the 63rd Conference (Warsaw)* (1988), at 956–958; but compare A.A. D'Amato, *The Concept of Custom in International Law* (1971), at 264–268.

⁵⁰ Cassese, *supra* note 1, at 245–246.

⁵¹ See Schwebel, 'Address to the Plenary Session of the General Assembly of the United Nations', 26 Oct. 1999: Presidential statements are available on the ICJ website at the root directory at www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1 (last accessed 6 Nov. 2012); and his 'Preliminary rulings by the International Court at the Instance of National Courts', 28 *Virginia J Int'l L* (1987–1988) 495. A recent academic argument in favour of referral jurisdiction is Strauss, 'Cutting the Gordian Knot: How and Why the United Nations Should Vest the International Court of Justice with Referral Jurisdiction', 44 *Cornell J Int'l L* (2011) 101.

⁵² See Guillaume, 'The Proliferation of International Judicial Bodies: the Outlook for the International Legal Order – Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations', 27 Oct. 2000, available at: www.icj-cij.org/court/index.php?p1=1&p2=3&p3=1 (last accessed 6 Nov. 2012); 'Advantages and Risks of Proliferation: a Blueprint for Action', 2 *Int'l Criminal Justice* (2004) 300, at 302–303; and 'The International Judicial Function', paper given at the 25th Anniversary Conference of the Lauterpacht Centre for International Law, University of Cambridge, July 2008, available at: www.lcil.cam.ac.uk/Media/25_anniversary/Judicial_Function_paper.pdf (last accessed 6 Nov. 2012), at 7.

⁵³ Higgins, 'The ICJ, the ECJ, and the Integrity of International Law', 52 *ICLQ* (2003) 1, at 19–20, quotation at 20.

This appears to be the better view. Apart from questions of specialist expertise⁵⁴ and the practical matter of whether the International Court could cope with an increased workload, there is also that of the delay that referral proceedings could introduce into the original proceedings which, as Cassese notes, would have to be stayed until the International Court delivered its ruling. The situation might be analogous to a relaxation in the requirements of intervention under Article 62: if states were faced with the possibility that a tribunal might refer a point for decision by the International Court, this could be seen as an additional means by which the parties might lose control of the case, and thus act as another disincentive to dispute settlement by international litigation. Apart from the delay referral proceedings would engender and, one must assume, additional costs, presumably the litigant states had consciously chosen some other international tribunal in preference to proceedings before the International Court, and would be loath to have aspects of their case decided by it nonetheless, with the possibility of another state attempting to intervene to argue on the applicable law. Referral proceedings from domestic courts would raise other concerns, such as expertise in deciding that an issue should be referred, and it might be that these proceedings would be initiated only in states, or by parties, who could afford to do so – again raising the spectre that the already-privileged would be those driving the development of international law.

3 The Existence of *Amicus Curiae*

Leaving to one side Cassese's plea for *amicus curiae* briefs in contentious cases (presumably by NGOs or individuals which, admittedly, could cover factual matters as well as normative argument), Article 34(2)(3) of the Statute already permits an international organization to fulfil this function in a limited class of contentious cases. This provides:

2. The Court, subject to and in conformity with its Rules, may request of public international organisations⁵⁵ information relevant to cases before it, and shall receive such information presented by such organisations on their own initiative.

3. Whenever the construction of the constituent instrument of a public international organisation or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organisation concerned and shall communicate to it copies of all the written pleadings.

These paragraphs were added to the text of Article 34 in 1945,⁵⁶ but have been barely used.

⁵⁴ Compare *Pulp Mills on the River Uruguay case (Argentina v. Uruguay)* [2010] ICJ Rep 14, joint dissenting opinion of Judges Al-Khasawneh and Simma, at 108, 109–117 (paras 2–17).

⁵⁵ In contentious proceedings, an NGO is not classified as a 'public international organization' for the purposes of Art. 34. This view was first adopted in the *Asylum* case: see Pleadings, ii, at 227–228. It is now codified in Rule 69.4 of the 1978 Rules of Court.

⁵⁶ See 14 UNCTAD Docs. 697. These paras are implemented by Rule 69 of the 1978 Rules of Court which entitles a public international organization to 'furnish information relevant to [the] case': see G. Guyomar, *Commentaire du règlement de la Cour internationale de Justice adopté le 14 avril 1978: interprétation et pratique*

For example, in the *Appeal relating to the Jurisdiction of the ICAO Council* case, the interpretation and application of the 1944 Chicago Convention on International Civil Aviation was in issue. Pursuant to Article 34(3), the Registrar informed ICAO but it declined to submit any observations, as it was entitled to do under Rule 57(5) of the then-operative 1946 Rules of Court.⁵⁷ Similarly, in the *Questions of Interpretation and Application of the 1971 Montréal Convention arising from the Aerial Incident at Lockerbie* case, the judgments both note that ICAO received notifications regarding Article 34, but that it declined to do so on matters of jurisdiction and admissibility, but it wished to be kept informed of the progress of the case in case it decided to make observations at a later stage.⁵⁸ On the other hand, having received a notification pursuant to Article 34 in relation to the *Aerial Incident of 3 July 1988 (Iran v. USA)* case, which was discontinued, ICAO did submit observations to the Court regarding the 1944 Chicago Convention on Civil Aviation.⁵⁹ Further, in the *Border and Transborder Armed Actions (Nicaragua v. Honduras)* case, the jurisdiction and admissibility judgment noted that, because the 1948 Pact of Bogotá was in issue, the Secretary General of the Organization of American States had been invited to submit observations pursuant to Article 34(3) but had declined to do so.⁶⁰ On the other hand, a contrary example is provided by *US Nationals in Morocco*: although the Articles of Association of the International Monetary Fund were in issue, no Article 34(3) notification was sent.⁶¹

It is surprising that the United Nations appears only once to have received a notification under Article 34, even though the interpretation of the Charter or agreements made pursuant to Charter provisions has been in issue in several contentious cases. The only exception has been the delivery of an Article 34 notification in the *Interpretation and Application of the Genocide Convention* case, but this notification primarily seemed to concern the Genocide Convention rather than the Charter *per se*.⁶² No observations were made by the United Nations in these proceedings.

The general failure to notify the United Nations Secretary General, as ‘chief administrative officer’⁶³ under Article 34 may simply be a parallel to established practice that

(1983), at 442–447, and Rosenne, *supra* note 31, ii, at 620–633. Art. 26 of the Statute of the Permanent Court had provided an analogous facility for the International Labour Office to submit information in cases before the special Chamber of the Court constituted to hear labour cases. This Chamber was never called upon to act. See Stauffenberg, *supra* note 10, at 151–160.

⁵⁷ See [1972] ICJ Rep 46, at 48 (para. 5); *ICAO Council Pleadings*, at 779–780, 782, and 784–785; and Guyomar, *supra* note 56, at 447.

⁵⁸ See *Questions of Interpretation and Application of the 1971 Montréal Convention arising from the Aerial Incident at Lockerbie case: preliminary objections judgment* [1998] ICJ Rep, 9, (*Libya v. UK*) at 12 (paras 3 and 8); and 115 (*Libya v. USA*), at 118–119 (paras 3 and 8).

⁵⁹ See *Aerial Incident of 3 July 1988 (Iran v. USA) case: discontinuance order of 22 February 1996* [1996] ICJ Rep 9, at 10.

⁶⁰ [1988] ICJ Rep 69, at 71–72 (paras 6–7).

⁶¹ [1952] ICJ Rep 176; see Guyomar, *supra* note 56, at 447; and Rosenne, *supra* note 31, ii, at 625.

⁶² The notification was first noted in the *Interim measures order of 8 April 1993* [1993] ICJ Rep 3, at 9 (para. 6). This provides:

‘on 25 March 1993, the Registrar, in accordance with Rule 43 of the Rules of Court, addressed the notification provided for in article 63, paragraph 1, of the Statute to States, other than the parties to the dispute, which ... appeared to be parties to the Genocide Convention, and in addition addressed to the

notifications under Article 63 of the Statute⁶⁴ are not normally sent to UN member states when the Charter is cited before the Court. In the Order declaring inadmissible El Salvador's attempted intervention in the *Nicaragua* case, Judge Schwebel in his dissenting opinion noted that, by virtue of an administrative decision taken during Judge Basdevant's presidency (re-affirmed by President Winiarski), the communication of applications made under Article 40(3) of the Statute is thought sufficient to indicate to UN members when the interpretation of the Charter will be an issue in a case.⁶⁵

Thus, there is some limited scope already provided in the Statute for *amicus curiae* briefs from presumably informed organizations, and states parties to a convention in issue in a case have the right to intervene under Article 63 to make known their views on its interpretation.

4 Are Advisory Proceedings Different?

These strictures concerning the International Court's normative function in contentious cases are perhaps less relevant to its advisory proceedings as all states interested in the question placed before the Court have the ability to appear and make known their views. It is surprising to read that one issue Cassese thinks that the Court should address is to clarify the legal impact of advisory opinions. He states:

By definition advisory opinions rendered by the Court are not legally binding. However, it is striking that in most instances the Court is called upon to state the law on a particular issue. While it may be conceded that the application of the relevant law to the facts at issue, if any, should not be binding, it is difficult to understand why the Court's dictum on the relevant international law should not amount to an authoritative judicial finding of the relevant law, and thus be binding, at least de facto, on all subjects of the international community.⁶⁶

I fear that here Professor Cassese has confused *res judicata* with considerations of precedent. What distinguishes the two is that *res judicata* refers to the determination of the litigant parties' legal relationships within the context of a specific dispute, whereas precedent refers to abstract or general statements of law which are embedded in a decision. *Res judicata* is the final disposition of a given case stated in the operative clause (*dispositif*) of a judgment: precedent looks beyond the case to the future application of

Secretary-General of the United Nations the notification provided for in Article 34, paragraph 3, of the Statute of the Court.'

⁶³ Rule 69(1) and (3) of the 1978 Rules of Court designate an organization's 'chief administrative officer' as the recipient of notifications sent under Art. 34.

⁶⁴ Art. 63 of the Statute is unchanged, apart from the addition of para. numbers, from the original Statute of the Permanent Court, and provides:

'1. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.
2. Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.'

⁶⁵ *Military and Paramilitary Activities in and against Nicaragua case: 4 October 1984 (declaration of intervention) Order* [1984] ICJ Rep 215, at 223, 233–234.

⁶⁶ Cassese, *supra* note 1, at 245.

the rulings it contains, which need not involve the same parties, drawn from the statement of reasons (*motifs*) provided by the court in justification of its decision.⁶⁷

As there are no parties in advisory proceedings, there is no entity which is formally bound by the Court's conclusions. Advisory opinions may not be binding in that sense, but they are nevertheless authoritative. As Judge Gros once observed:

I shall merely recall that when the Court gives an advisory opinion on a question of law it states the law. The absence of binding force does not transform the judicial operation into a legal consultation, which may be made use of or not according to choice. The advisory opinion determines the law applicable to the question put; it is possible for the body which sought the opinion not to follow it in its action, but that body is aware that no position adopted contrary to the Court's pronouncement will have any effectiveness whatsoever in the legal sphere.⁶⁸

5 Why Reform?

Professor Cassese's recipe to revive the International Court and bring it into the 21st century by turning it from 'a substantially arbitral court, a late 19th-century institution' into 'a proper court of law' is oddly anachronistic: it was meant to be the latter from the day of its creation. My concern with his view of an International Court possessed of strong normative powers is that this would be a radically different International Court, which would probably need to exercise compulsory rather than consensual jurisdiction. Given states' resistance to judicial settlement, it is unlikely that they will accept that, and although the Court currently seems busier than ever, it seems imprudent to recommend changes that might only strengthen their general reluctance to litigate. We should accept that the International Court is principally a transactional court, focusing on the cases placed before it, and that the primary audience for its pronouncements is the parties in the instant case, with any consequent normative development being a secondary consideration. The emphasis should be on *audi alteram partem* rather than the Court making a strong claim to *iura novit curia*.

It is possible that the implementation of Professor Cassese's recommendations could too easily drive litigant states into the hands of arbitration where the proceedings can be closed and insulated from the attention and even the knowledge, far less the involvement, of third states. This could lead to the abandonment of the 'respected old lady', who would end up scuttling round the Peace Palace like Miss Havisham, or

⁶⁷ See, e.g., Lowe, 'Res judicata and the Rule of Law in International Arbitration', 8 *Revue africaine de droit international et comparé* (1996) 38; Scobbie, 'Res judicata, Precedent and the International Court: a Preliminary Sketch', 20 *Australian Yrbk Int'l L* (1999) 299; and de Visscher, 'La chose jugée devant la Cour internationale de la Haye', 1 *Revue belge de droit international* (1965) 5.

⁶⁸ *Western Sahara advisory opinion* [1975] ICJ Rep 12, declaration of Judge Gros, at 69, 73 (para. 6); compare *Consequences of the Construction of a Wall in Occupied Palestinian Territory advisory opinion* [2004] ICJ Rep 136, separate opinion of Judge Koroma, at 205, 205–206 (para. 8); and see also Hambro, 'The Authority of the Advisory Opinions of the International Court of Justice', 3 *ICLQ* (1954) 2, at 15–19 and 21; and Keith, 'The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections', 17 *Australian Yrbk Int'l L* (1996) 39, at 42.

living on her past glories like Miss Desmond, wondering why no-one calls any more. It might not be the pictures that 'got small', but the Court's docket instead.

No doubt the issues arising in some cases may be decided relatively easily by the Court on the basis of settled general international law – and *Hostages in Tehran* springs to mind here – but that does not mean that all cases fall into this category. How many are 'hard' cases, where the law is unsettled and persuasive arguments exist on both sides? How many cases revolve round the obligations that exist between the parties, where issues of general international law are of secondary or contextual importance? Further, at least as things currently stand, ascribing an extensive normative rule to the International Court raises acutely the question of its legitimacy in making rulings on issues of general international law which are genuinely controversial and unsettled after having heard only the arguments of the parties to the case, arguments which are unlikely to be disinterested and detached.

The better view would appear to approximate to that indicated by Fitzmaurice: decisions of the International Court should be seen '[a]s "authority", but not necessarily as authoritative'.⁶⁹ It might be better to be cautious and hope for the evolution of a *jurisprudence constante* through time rather than too readily embrace something that is more like a doctrine of precedent arising from the confines of a single case.⁷⁰ Precedents are refined through court hierarchy and the reconsideration of cases by different levels of courts, but the International Court is a court of first and last instance. It should be given the chance, if not to change its mind completely, at least to reconsider its options.

* * *

My analysis of Professor Cassese's recommendations and his conception of the function of the International Court might be thought to be too sceptical, or even too extreme, and possibly the correct position lies somewhere between our opposing views. But in trying to find that optimum position, the issues had to be thrown into relief, to illuminate the assumptions that lie at the root of Professor Cassese's argument. The cover of *Realizing Utopia* is a painting of a small man at the top of a ladder, reaching for the moon. I understand its symbolism, and sympathize with its vision and ambition, *Ah, but a man's reach should exceed his grasp, / or what's a heaven for?*⁷¹ But in the case of Professor Cassese's concept of the normative function of the International Court and the role of the international judge, all I can do is echo Bette Davis in *Now, Voyager* – 'don't let's ask for the moon. We have the stars.'

⁶⁹ See G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), i, at p. xxxii, n. 22.

⁷⁰ Compare Guillaume, 'The Use of Precedent by International Judges and Arbitrators', 2 *J Int'l Dispute Settlement* (2011) 5.

⁷¹ Robert Browning, 'Andrea del Sarto' (1855).