

THE ISSUE OF LACUNAE IN INTERNATIONAL LAW AND NON LIQUET REVISITED

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Introduction

The question of whether international tribunals should declare non liquet when faced with lacunae in international law has long been an issue. In 1875, l'Institut de Droit International denied the declaration of non liquet by international tribunals in its Resolution saying "le tribunal arbitral ne peut refuser de prononcer sous le prétexte qu'il n'est pas suffisamment éclairé soit sur les faits, soit sur les principes juridiques qu'il doit appliquer."¹

International tribunals do face lacunae in international law. *Stone* is of the view that considering the unquestionable deficiencies of international law, as well as the rapid breakdown of many traditional aspects under the impact of technological, economic and political change, it would be a miracle if many cases had not arisen on which no clear rule of positive law was available to the arbitrator.² As we see in this article, in the *Trail Smelter Case*, the *Barcelona Traction Case*, the *Corfu Channel Case*, the *North Sea Continental Shelf Cases*, the *Eastern Extension Case* etc., international tribunals were not able to find a directly applicable principle of international law. Yet, non liquet was not declared in either of these cases.

General principles of law play an important role in filling the lacunae. For example, in the Committee for the Preparation of the Statute for the Permanent Court of International Justice, *Descamps*³, *De Lapradelle*⁴ and *Hagerup*⁵, among others, were concerned that the possibility of a non liquet would weaken the functions of the Court and therefore suggested the introduction of the general principles of law as an additional source of principles to be applied in settling international disputes. In addition to the general principles of law, as we see in this article, recourse to equity and analogy could also contribute to filling gaps. Therefore, as *Stone* points out, in the thousands of cases considered during more than one hundred and fifty years of modern international arbitration, a non liquet has not been squarely pronounced in a single case.⁶ However, the question is, could lacunae in international law be always filled by recourse to general principles of law, equity or analogy? Moreover, in the *Advisory Opinion on the*

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¹ Institut de Droit International, Session de La Haye - 1875, Projet de règlement pour la procédure arbitrale internationale, Article 19.

² Julius Stone, *Non Liquet and the Function of Law in the International Community*, *British Yearbook of International Law*, Vol. 35 (1959), p. 138.

³ Procès-Verbaux of the Advisory Committee of Jurists (1920).

⁴ *Ibid.*, p. 312.

⁵ *Ibid.*, p. 317.

⁶ Stone, *supra* footnote 2.

Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice made it clear that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence.”⁷ Would this be regarded as a declaration of non liquet? Does this have anything to do with lacunae in international law?

This article revisits the issue of lacunae in international law and non liquet.

I. *General Principles of Law*

International tribunals can fill lacunae by applying general principles of law. *Lauterpacht*, in his celebrated article “Some Observations on the Prohibition of ‘*Non Liquet*’ and the Completeness of the Law”⁸, points out that

[u]niform practice was firmly established even before the adoption of the Statute of the Permanent Court of International Justice which in Article 38, elevated ‘general principles of law recognized by civilized nations’ to the authority of one of the three principal and formal sources of international law — an apparent innovation which in itself may not have been more than a declaration of and confirmation of previous practice.... [B]y making available without limitation the resources of substantive law embodied in the legal experience of civilized mankind — the analogy of all the branches of municipal law and, in particular, of private law — it made certain that there would always be at hand, if necessary, a legal rule or principle for the legal solution of any controversy involving sovereign States.⁹

1. **Application of General Principles of Law in International Tribunals**

The following are some examples of cases in which international tribunals filled in lacunae by recourse to the general principles of law.

In the *Trail Smelter Case*, the United States filed a complaint against Canada that sulfur dioxide emissions from the Trail Smelter in Canada had damaged the Columbia River Valley in the State of Washington, USA. The Arbitrary Tribunal could not find a preceding case of air pollution dealt with by an international tribunal.¹⁰ However, the Arbitrary Tribunal stated

[a]s regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.¹¹

⁷ *ICJ Reports 1996*, p. 266, para. 105 (2) E.

⁸ *International Law: The Collected Papers of Hersch Lauterpacht*, Vol. II (E. Lauterpacht, ed. 1975), p. 213.

⁹ *Ibid.*, p. 221-222.

¹⁰ *Reports of International Arbitral Awards*, Vol. 3, p. 1963.

The Arbitrary Tribunal, therefore, found that under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.¹²

In the *Temple of Preah Vihear Case (Merits)*, sovereignty over the Temple was disputed between Cambodia and Thailand. Cambodia contended that the map showing the temple as being on Cambodian soil was an authoritative document to prove her sovereignty, while Thailand contested claims by Cambodia on the grounds that the map had no binding character. The Court denied the binding character of the map while confirming its own inherent technical authority.¹³

Although the binding character of the map was denied and authoritative elements to define the sovereignty over the Temple were lacking, the Court judged that Thailand is precluded from asserting that she did not accept the map, since she has, for fifty years, enjoyed the benefit of a stable frontier, and Cambodia, relied on Thailand's acceptance of the map. The Court further noted that it is not open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.¹⁴ Here, the Court seems to have applied the principle of estoppel.¹⁵

In the *Barcelona Traction Case (Second Phase)*, the distinction and the community between the company and the shareholder was an issue. Since there were no corresponding institutions of international law to which the Court could resort, the Court referred to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares.¹⁶

2. Application of General Principles to Persistent Objectors

However, whether general principles of law could always be at hand needs further consideration. The Separate Opinion of *Judge Ad Hoc Van Wyk*, in the *South West Africa Case (Second Phase)* is suggestive in this regard. Against the applicants' contention that the rule of non-discrimination or non-separation had ripened into a legal norm binding even upon sovereign States¹⁷, *Judge Ad Hoc Van Wyk* raised the following points. The provisions of Article 38 (1) (c), which the Applicants invoked to justify their alleged norm, do not authorize the application of the laws of civilized nations, they limit the Court to "the general principles of law" of these nations. Therefore, it certainly does not mean that by legislating on particular domestic matters a majority of civilized nations could compel a minority to introduce similar legislation.¹⁸

¹¹ *Ibid.*, p. 1964.

¹² *Ibid.*, p. 1965.

¹³ *ICJ Reports 1962*, p. 21.

¹⁴ *Ibid.*, p. 32.

¹⁵ See Separate Opinion of Vice-president Alfaro, *ibid.*, pp. 39-40; Separate Opinion of Sir Gerald Fitzmaurice, *ibid.*, pp. 62-65.

¹⁶ *ICJ Reports 1970*, p. 37, para. 50.

¹⁷ Separate Opinion of Judge Van Wyk, *ICJ Reports 1966*, p. 168, para. 50.

¹⁸ *Ibid.*, p. 170, para. 56.

Here we must consider the issue of applying customary international law to persistent objectors. It is stipulated in the comment to § 102 (2) of the Restatement (Third) of the Foreign Relations Law of the United States that a principle of customary law is not binding on a state that declares its dissent from the principle during its development. Although the Restatement is not an official document of the Government, its influence should not be underestimated, since it is regarded as the primary source of guidance for lawyers and judges in the United States on those questions of international law within its scope.¹⁹

The persistent objector theory is also recognized by the Inter-American Commission on Human Rights. In *Roach & Pinkerton v United States*,²⁰ the petitioners alleged that the United States breached international customary law by executing juveniles. The US Government, on the other hand, maintained that it had always dissented from that alleged rule. The Commission, in its Report, noted that since the United States has protested the norm, it would not be applicable to the United States should it be held to exist.²¹ Similarly, the Commission recognized the persistent objector defense in the *Domingues v United States*²², in which the United States asserted a persistent objector defense against allegations that its use of the juvenile death penalty violated customary international law²³. The Commission held that a norm which has been accepted by the majority of States has no binding effect upon a State which has persistently rejected the practice upon which the norm is based²⁴.

Turning to the judgments of the ICJ, in the *Fisheries Case*, the Court expressed that the ten-mile rule would not to be applicable as against Norway because she has always opposed any attempt to apply it to the Norwegian coast.²⁵ In the *Asylum Case*, the Court ruled that even if a custom of diplomatic asylum existed between certain Latin-American States, it could not be invoked against Peru which, has, repudiated it by refraining from ratifying conventions which included a rule concerning the qualification of the offence in matters of diplomatic asylum.²⁶

Since principles of international law are basically formed through the consent of States, it may be quite rational to regard that principles of customary law are not binding on persistent objectors.²⁷ According to *Akehurst*, no rule of international law would ever emerge from a system that requires the unanimous consent of all States, therefore, a State must either be able to opt out of a rule of customary law, or the system must accept some form of majority voting. Here, *Akehurst* regards such a majority voting system unworkable, since it is impossible to agree about the size of the majority necessary or the degree to which different States' votes

¹⁹ Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, *Harvard International Law Journal* (1985), p. 469.

²⁰ Annual Report of the Inter-American Commission on Human Rights, 1986-1987, OEA/Ser.L/V/II.71, Doc 9 rev 1 (22 September 1987).

²¹ *Ibid.*, para. 53.

²² Inter-American Commission on Human Rights: Report No 62/02, Merits Case 12.285 (2002).

²³ *Ibid.*, para. 14.

²⁴ *Ibid.*, para. 48. While recognizing the persistent objector theory, the Commission did not justify the defense by the United States in this specific case because proscription of the juvenile death penalty had attained the *jus cogens* status. (see para. 85)

²⁵ *ICJ Reports 1951*, p. 131.

²⁶ *ICJ Reports 1950*, pp. 277-278.

²⁷ Charney is of the view that inclusion of the persistent objector rule in the Restatement may presage a return to a more consent-oriented analysis of international law. See Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, *British Yearbook of International Law*, Vol. 56 (1985), p. 5.

should be weighted, and concludes that the only alternative is that a persistent objector may contract out.²⁸

The persistent objector status does not in any way protect a State from the pressure exerted by the international community to force it to conform to the norm.²⁹ There is even a view that no example of State practice was found where a State's opposition to a customary rule was recognized by other States and where such a claimed special status was actually effective in preventing the application of a rule to the dissenting State.³⁰ Being a persistent objector did not immunize South Africa and Rhodesia from the apparent consensus of the international community that they are obligated not to practice apartheid.³¹ Neither, does the persistent objector status endow a State with opposability. For instance, when, in the mid 1960s, Australia, Mexico, New Zealand, the Republic of Korea and the US claimed their 12-mile exclusive fishery zones, Japan made its position clear that the area beyond the 3-mile territorial sea was high seas open to fishing by all nations. However, this position did not endow Japan with opposability. Japan had to obtain permission from these coastal States to fish in their fishery zones.³² Thus, the persistent objector status may eventually be neither effective nor opposable, however, it is quite rational to regard that a rule of customary international law would not be applied to the persistent objector in the first place.

Certainly, if a State is not bound by a rule of customary law which it has consistently and constantly opposed *ab initio*, it would be illogical to regard a State as bound by a general principle of law which has been rejected by its own law.³³ In the *Texaco – Libya Case*, the arbitrator confirmed the conformity of the principle of international law “*pacta sunt servanda*” with the principle of Libyan law “a contract must be performed in accordance with its contents and in compliance with the requirements of good faith” before declaring that the deeds of concession in dispute have binding force.³⁴

Considering the above, it might be incorrect to affirm that legal rules for dispute solution would always be at hand by recourse to general principles of law.

II. *Equity*

Equity has a certain role to play in filling gaps in international law. During the Pleadings of the *North Sea Continental Shelf Cases*, Professor *Oda* remarked “among civilized nations, the principle that justness and equitableness governs the sharing of the common interest is followed by the domestic courts as *a recognized source of law* which exists in addition to

²⁸ Michael Akehurst, Custom as a Source of International Law, *British Yearbook of International Law*, Vol. 47 (1974-5), pp. 23-27.

²⁹ Charney, *supra* footnote 27, at p. 15.

³⁰ Patrick Dumberry, Incoherent and Ineffective: the Concept of Persistent Objector Revisited, *International and Comparative Law Quarterly*, Vol. 59 (2010), p. 802.

³¹ Charney, *supra* footnote 27, at p. 15.

³² *Ibid.*, pp. 11-12.

³³ Michael Akehurst, Equity and General Principles of Law, *International and Comparative Law Quarterly*, Vol. 25 (1976), p. 821.

³⁴ *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, AD HOC AWARD OF JANUARY 19, 1977, reprinted in *International Legal Materials*, Vol.17, 1978, pp.18-19.

statutory or customary law.”³⁵

Although it is not easy to find a precise definition of equity, *Schachter* regards equity as a consideration of fairness, reasonableness and good faith.³⁶ According to *Schwarzenberger*, equity transforms absolute rights into relative rights in the course of a balancing process.³⁷ *Meesen* regards the application of equitable principles as a “law finding” (*Rechtsfindung*), in which the Court could fill the lacunae not through widening the “catalogue of source of law” (*Rechtsquellenkatalogs*), but by means of interpreting existing legal principles in an evolving manner.³⁸

1. Application of Equity in International Tribunals

Equity is applied in international tribunals with a view to achieving reasonable solutions where applicable principles of international law are lacking.

In the *Corfu Channel Case (Merits)*, the Court recognized the obligations of the Albanian authorities to notify, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and to warn the approaching British warships of the imminent danger to which the minefield exposed them. However, there were no principles of international law available that could directly support such obligations because the Court found that the Hague Convention of 1907, No. VIII is only applicable in time of war and not in peacetime.³⁹ The Court therefore noted that such obligations are based

[o]n certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.⁴⁰

Here, “humanity” seems to fall into the category of equity,⁴¹ since the Court, by having recourse to this principle, is mitigating Albania’s right to use its territorial water in an attempt to balance it with Britain’s right of innocent passage (in *Schwarzenberger’s* terms above, the Court is transforming Albania’s absolute right into a relative right in the course of balancing with Britain’s right).

In the *North Sea Continental Shelf Cases*, the Parties involved were under no obligation to apply The Convention on the Continental Shelf of 1958 because the Federal Republic of Germany was not a member to it. Nor could the equidistance method be applied because the Court found it not a mandatory rule of customary law.⁴² The Court was faced with a situation

³⁵ *ICJ Pleadings*, North Sea Continental Shelf Cases, Vol.2, Reply of Professor Oda p. 200 (emphasis added by the writer).

³⁶ Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law, Recueil des Cours*, Vol. 178 (1982), p. 82.

³⁷ Georg Schwarzenberger, *Equity in International Law, Yearbook of World Affairs*, Vol. 26 (1972), p. 362.

³⁸ Karl M. Meesen, *Völkerrechtliche Grundsätze des internationalen Kartellrechts* (Baden-Baden, 1975), p. 71.

³⁹ *ICJ Reports 1949*, p. 22.

⁴⁰ *Ibid.*

⁴¹ Akehurst regards application of “humanity” in the *Corfu Channel Case* as an example of application of “equity *praeter legem*.” See Akehurst *supra* footnote 33, at pp. 805-806.

⁴² *ICJ Reports 1969*, p. 46, para. 83.

of potential non liquet.⁴³ However, under the belief that “there are still rules and principles of law to be applied,”⁴⁴ the Court ruled that delimitation must be arrived at in accordance with equitable principles, and that it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field⁴⁵. Based on equity, the Parties were “under an obligation so to conduct themselves that the negotiations are meaningful⁴⁶.” In this case, Denmark, the Netherlands and the Federal Republic of Germany together requested the ICJ to determine what rules of international law could be applied to the delimitation as between the parties of the area. In other words, the Parties had a single goal of delimitation but differed as to the means with which they reached the goal; there were no plaintiffs or defendants and the absence of law would not have been favorable to any of the Parties.⁴⁷ Therefore, equity played a significant role in achieving the goal, in *Meesen’s* terms, by filling the lacunae, by means of interpreting existing legal principles in an evolving manner.

2. Controversies on the Application of Equity

However, the application of equity is not free from controversy. Contrary to the Judgment of the *Corfu Channel Case*, the application of “humanity” was denied in the *South West Africa Case*, for the following reasons. Firstly, the Court is a court of law, and can take account of moral principles only in so far as these are given sufficient expression in legal form.⁴⁸ Secondly, humanitarian considerations may constitute the inspirational basis for rules of law, however, such considerations do not, in themselves, amount to rules of law.⁴⁹

Vice-president Koretsky’s Dissenting Opinion in the *North Sea Continental Shelf Cases* is raising the following points. Firstly, the International Court is a court of law, therefore its function is to decide disputes submitted to it “in accordance with international law” (Statute, Article 38, paragraph 1), and on no other grounds.⁵⁰ Secondly, the notion of equity was long ago defined in law dictionaries, which regard it as a principle of fairness bearing a non-juridical, ethical character.⁵¹ Thirdly, to introduce so vague a notion into the jurisprudence of the International Court may open the door to making subjective and therefore at times arbitrary evaluations, instead of following the guidance of established general principles and rules of international law in the settlement of disputes submitted to the Court.⁵²

It is to some extent undeniable that equity is such a vague notion that concepts or norms that are yet to amount to a rule of law could be applied under the name of equity. From the

⁴³ Sir Gerald Fitzmaurice, *The Problem of Non-liquet: Prolegomena to a Restatement*, *La Communauté Internationale, Mélanges Offerts à Charles Rousseau* (1974), p. 107

⁴⁴ *North Sea Continental Shelf*, *supra* footnote 42.

⁴⁵ *Ibid.*, pp. 46-47, para. 85.

⁴⁶ *Ibid.*,

⁴⁷ Erik Nerep, *Extraterritorial Control of Competition under International Law*, (P A Norstedt & Sönersförlag Stockholm, 1983), p. 405.

⁴⁸ *South West Africa*, *supra* footnote 17, at p. 34, para. 49.

⁴⁹ *Ibid.*, p. 34, para. 50.

⁵⁰ Dissenting Opinion of Vice-president Koretsky, *North Sea Continental Shelf*, *supra* footnote 42, at p. 165.

⁵¹ *Ibid.*, p. 166.

⁵² *Ibid.*,

viewpoint of avoiding arbitrary decisions, international tribunals should be mindful not to take in such norms of non-judicial character when applying equity.

Another issue is the possible ineffectiveness of the method of achieving an equitable goal. In the *Case Concerning the Gabčíkovo-Nagymaros Project*, the situation was similar to that of the *North Sea Continental Shelf Cases*. The Court found the need to reconcile economic development with protection of the environment which is aptly expressed in the concept of sustainable development⁵³. In the absence of substantive principles of law other than new norms and standards, which are given proper weight when States contemplate new activities or continue with activities begun in the past⁵⁴, the Court did not determine what shall be the final result, but left the Parties [Hungary and Slovakia] themselves to find an agreed solution⁵⁵. Unlike the *North Sea Continental Shelf Cases*, negotiations aiming at an equitable solution was not successful, therefore, Slovakia filed in the Registry of the ICJ a request for an additional Judgment, asking the Court to adjudge and declare that the two Parties shall resume the negotiations in good faith⁵⁶. However, to date, no agreement has been reached. Considering the fact that the Court left the Parties to find an agreed solution and the Parties were unable to do so, leaving the case unsettled after all, this case might be regarded as an example of *defacto non liquet*.

III. *Analogy*

1. **Recourse to Analogy by International Tribunals**

Recourse to analogy is one way of filling the gaps of international law. In the following cases, international tribunals found no principles of international law directly applicable and looked elsewhere for applicable rules.

In the *Eastern Extension Case*, the Manila-Hong Kong and the Manila-Capiz submarine telegraph cables had been cut by the United States naval authorities during the Spanish-American War in 1898. At issue was whether the United States Government was bound to pay damages to the British Company.⁵⁷ The British Government admitted that in 1898 there was no treaty or rule of international law imposing on the United States the legal obligation to pay compensation for the cutting of these cables, but contended that, in the absence of any rule of international law on the point, it is within the powers of the Tribunal to lay down such a rule.⁵⁸ The Tribunal noted that international law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases, but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution to the problem.⁵⁹ Having recourse to the rules of

⁵³ *ICJ Reports 1997*, p. 78, para. 140.

⁵⁴ *Ibid.*,

⁵⁵ *Ibid.*, p. 78, para. 141.

⁵⁶ Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Slovakia requests an additional Judgment, Press Release 1998/28, 3 September 1998

⁵⁷ *Reports of International Arbitral Awards*, Vol. 6, p. 113.

⁵⁸ *Ibid.*, p. 114.

international law applicable to sea warfare, the Tribunal judged that the cutting of the cables by the United States naval authorities was not prohibited. Furthermore, the Tribunal contended that such action may be said to be implicitly justified by the right of legitimate defence.⁶⁰

In the *Atomic Bomb Trial*⁶¹, a domestic lawsuit in Japan, atomic bomb survivors of Hiroshima took an action against the Japanese Government requesting reparation and a declaration of the illegality of the use of an atomic bomb by the United States during the Second World War. The Japanese Government, the defendant, claimed that there is no principle in *jus im bello* applicable to an atomic bomb, which was a totally new type of weapon, therefore, the event did not raise issues in international law. Tokyo District Court however, judged that prohibition in international law does not only include direct prohibition in statutory form, but also prohibition assumed through interpretation and analogy of existing principles of international law, therefore, the plaintiffs' request for the declaration of the illegality of the use of the atomic bomb could be admitted.⁶² (Although the request for reparation was turned down, the plaintiffs did not appeal to the High Court because the illegality of the use of the atomic bomb was declared.)

In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ noted that

[i]nternational customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self defense. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization.⁶³

Although faced with the lacunae of principles governing the legality of nuclear weapons, the Court held that there could be no doubt as to the applicability of humanitarian law to nuclear weapons.⁶⁴ The Court admitted that nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence and that there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms.⁶⁵ However, this did not prevent the Court from analogically applying the principles and rules of humanitarian law applicable in armed conflict to nuclear weapons. The Court was of the view that the humanitarian character of the legal principles in question, which permeates the entire law of armed conflict, could be applied to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.⁶⁶

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at 115.

⁶¹ Lower Courts Reports (civil cases), Vol. 14-12 (1963), p. 2435.

⁶² *Ibid.*, p. 2458.

⁶³ *Legality of the Threat or Use of Nuclear Weapons*, *supra* footnote 7, at p. 247, para. 52.

⁶⁴ *Ibid.*, p. 259, para. 85.

⁶⁵ *Ibid.*, p. 259, para. 86.

⁶⁶ *Ibid.*

2. Controversies on Recourse to Analogy

However, there are critical views that by relying too much on analogy, the international tribunal is creating a law. That is to say, an international tribunal, especially the ICJ, is not a legislator but a court of law and its decisions have to be based upon existing rules. Indeed, eminent writers regard law creation or judicial legislation as possible, but only to a certain extent. According to *Greig*, in deducing a rule or refining an existing rule, the new rule or the modified rule will be regarded as a general rule of international law as long as the traditional fiction is that the judge is in no way creating law, but simply applying existing international law is to be preserved.⁶⁷ *Fitzmaurice* is of the view that by the use of analogy, recourse to pertinent rules of municipal law, appeals to general principles of law, etc., -an international tribunal can give a decision of substance while still remaining plausibly within the limits of the judicial function. However he continues, “the final question therefore must be, are we in the last resort prepared to accept judicial legislation as the price of avoiding substantive non liquets?”⁶⁸

Needless to say, international law has an evolutionary character and the international tribunal should take this into account. For instance, by interpreting the principles of humanitarian law as covering all kinds of weapons and analogically applying them to the use or threat of nuclear weapons, the Court might “still remain plausibly within the limits of the judicial function” despite the fact that those principles were established before the invention of nuclear weapons and that there is a difference between nuclear weapons and conventional arms. However, a line has to be drawn somewhere to distinguish analogical application and judicial legislation. As said in the *Fisheries Jurisdiction Case (Merits)*, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.⁶⁹

Actually, in the *Corfu Channel Case*, as indicated above, the ICJ did NOT analogically apply the Hague Convention of 1907 on the grounds that the Convention is applicable in time of war and not in peace.⁷⁰ In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ, while applying the principles and rules of humanitarian law as mentioned above, did NOT have recourse to legal principles regulating poison or poisoned weapons, namely, the Second Hague Declaration of 29 July 1899, Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907, and the Geneva Protocol of 17 June 1925.⁷¹ The Court observed that the terms of these international agreements have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate,⁷² therefore, the use of nuclear weapons cannot be regarded as specifically prohibited on the basis of the above instruments.⁷³

⁶⁷ D. W. Greig, *International Law*, 2nd Edition (London, 1976), p. 131.

⁶⁸ Fitzmaurice, *supra* footnote 43, at p. 111.

⁶⁹ *ICJ Reports 1974*, pp. 23-24, para. 53.

⁷⁰ *Corfu Channel*, *supra* footnote 39.

⁷¹ *Legality of the Threat or Use of Nuclear Weapons*, *supra* footnote 7, at p. 248, para. 54.

⁷² *Ibid.*, p. 248, para. 55.

⁷³ *Ibid.*, p. 248, para. 56.

IV. *Residual Negative Principle*

What then would be the consequence if the international tribunal was not successful in filling the gaps by applying general principles of law, equity or recourse to analogy?

One possibility is the declaration of non liquet. In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Judge Vereshchetin declared

[e]ven had the Court been asked to fill the gaps, it would have had to refuse to assume the burden of law-creation, which in general should not be the function of the Court. In advisory procedure, where the Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive.⁷⁴

The other possibility is the recourse to the residual negative principle, a principle that regards “what is not prohibited is legally permitted,” or in *Kelsen’s* terms, “where there is no duty, there is freedom.”⁷⁵ *Nerep* also supports the residual negative principle for the following reasons. In the international law system, the court is not the legislator, and should not be, if its real function of resolving disputes is to be upheld. At some point, the court must halt and say “This is as far as we can go. What follows is *lex ferenda*.” International law, without the residual negative principle, does not provide a solution for all the problems which may arise in the international arena.⁷⁶ Thus, in order to avoid non liquet while refraining from law creation by the court, the residual negative principle could be the key.

1. **The Lotus Case**

The residual negative principle was an issue in the *Lotus Case*. The Case is well known and hardly needs detailed explanation – whether Turkey could exercise its jurisdiction over a French national regarding his conduct on the high seas was disputed. France, the plaintiff, contended that Turkey, in order to have jurisdiction over the French national, should be able to point out a principle of international law in favor of Turkey.⁷⁷ Meanwhile, Turkey, the defendant, was of the view that exercising its jurisdiction would be permitted so long as it did not come into conflict with a principle of international law.⁷⁸ The Court’s decision is as follows.

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.⁷⁹

⁷⁴ Declaration of Judge Vereshchetin, *ibid.*, p. 280.

⁷⁵ Hans Kelsen, *Reine Rechtslehre* (Leipzig-Wien, 1934), p. 100.

⁷⁶ *Nerep*, *supra* footnote 47, at p. 404.

⁷⁷ *PCIJ Series C*, No.13-II, p. 149.

⁷⁸ *Ibid.*, p. 305.

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.⁸⁰

2. Development of Cases after the Lotus

Quite a few subsequent Judgments and Advisory Opinions refer, or at least imply recourse to the residual negative principle.

In the *Fisheries Case*, whether Norway's unilateral delimitation of territorial water by straight base-line could be enforced to the United Kingdom was under dispute. In the Judgment, the Court raised the following points.

Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.⁸¹

Norway has been in a position to argue without any contradiction that neither the promulgation of her delimitation Decrees, nor their application, gave rise to any opposition on the part of foreign States. Since, moreover, these Decrees constitute, the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States.⁸²

The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom... in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.⁸³

If the Court had not applied the residual negative principles and had taken the position that "what is not permitted by international law is prohibited," Norway's enforcement of her system against the United Kingdom based on notoriety, toleration, and prolonged abstention could not have been warranted, because the unilateral act of delimitation by Norway would have been invalid in the first place. Secondly, the Court's decision that Norway's system could be enforced because the governments involved "did not consider it to be contrary to international law" rather than "considered it to be compatible with international law," implies its recourse to the residual negative principle.

In the *Fisheries Jurisdiction Case*, the United Kingdom claimed that her fishing rights were disregarded due to the unilateral act by Iceland of establishing an exclusive fisheries zone.

⁷⁹ *PCIJ Series A*, No.10, p. 18.

⁸⁰ *Ibid.*, p. 19.

⁸¹ *Fisheries Case*, *supra* footnote 25, at p. 132.

⁸² *Ibid.*, p. 138.

⁸³ *Ibid.*, p. 139.

The Court ruled that Iceland's unilateral action constitutes an infringement of the principle enshrined in Article 2 of the 1958 Geneva Convention on the High Seas, which requires that all States, including coastal States, in exercising their freedom of fishing, pay reasonable regard to the interests of other States. Accordingly, the Court concluded that the Icelandic Regulations of 14 July 1972 establishing a zone of exclusive fisheries jurisdiction extending to 50 nautical miles from baselines around the Coast of Iceland, are not opposable to the United Kingdom, and the latter is under no obligation to accept the unilateral termination by Iceland of United Kingdom fishery rights in the area.⁸⁴ Here again, had the Court taken the position "what is not permitted is legally prohibited," the unilateral action of extending the exclusive fisheries jurisdiction zone by Iceland would have been invalid regardless of whether the action infringed the principle of Article 2 of the 1958 Geneva Convention on the High Seas. Neither the question of opposability of the extended zone nor the obligation of accepting the termination of fishery rights could have arisen.

In the *Nicaragua Case (Merits)*, the United States aimed at justifying its military activities on the grounds that the militarization of Nicaragua was excessive, such as to prove its aggressive intent. However, the Court found it irrelevant and inappropriate to pass upon this allegation of the United States, because in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.⁸⁵

In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, as seen above, the Court's view is that principles of international law neither authorize nor prohibit the threat or use of nuclear weapons. The Court further continues "State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition,"⁸⁶ which clearly indicates recourse to the residual negative principle.

Finally, recourse to the residual negative principle could also be implied from the *Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. The Court pointed out that during the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, and that in no case, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law⁸⁷. The Court further mentioned that the illegality attached to the declarations of independence stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law⁸⁸.

⁸⁴ *Fisheries Jurisdiction*, *supra* footnote 69, at p. 29, para. 67.

⁸⁵ *ICJ Reports 1986*, para 269.

⁸⁶ *Legality of the Threat or Use of Nuclear Weapons*, *supra* footnote 7, at p. 247, para. 52.

⁸⁷ *ICJ Reports 2010*, p. 436, para 79.

⁸⁸ *Ibid.*, p. 437, para 81.

3. The Residual Negative Principle as a Principle of International Law

Without the residual negative principle, all new measures would be prohibited unless they were permitted by international law: the sending up of satellites to outer space, the extension of territorial waters, the transmission of radio and TV programmes across borders, etc. The first state to take a measure of such kind would act in violation of international law.⁸⁹ In the *Fisheries Case* for instance, as we have seen above, Norway's unilateral act of delimitating her territorial water by straight base-line was judged enforceable to the United Kingdom. The straight base-line was codified as Article 4 paragraph 1 of the Convention on the Territorial Sea and the Contiguous Zone after the incident. From this perspective, the general prohibition would seem to be merely an empty phrase, and international law would be a mere paper product whose only function is to endorse every state practice.⁹⁰

In the same context, if it were not for the residual negative principle, extraterritorial application of competition law, a unilateral action of a State extending its legislative jurisdiction outside the territory could not be justified without a permissive rule. The "effects doctrine" may serve as a permissive rule. The International Law Association found that the effects doctrine provided authority for a State to establish a regulatory framework for actions that occurred outside its borders, but that nevertheless had effects within its territory.⁹¹ It might be true that the effects doctrine is recognized today by a number of countries (especially OECD member countries). However, until not too long ago, countries such as Japan⁹² or the United Kingdom⁹³ had been denying the doctrine, therefore it was rather unclear whether the effects doctrine could serve as a permissive rule mature enough to be regarded as customary international law. Even under such circumstance, the fact was that cases of extraterritorial application of competition law have consistently accumulated.

With the residual negative principle, the extraterritorial application of competition law would be justified as far as it does not come into conflict with the principles of international law, therefore, authorization by permissive rules is not needed. Provided that the extraterritorial application of competition law is justified by the residual negative principle, it is also enforceable to States that persistently object to the effects doctrine, because, as seen above,

⁸⁹ Nerep, *supra* footnote 47, at p. 392.

⁹⁰ Kiyotaka Morita, *International Economic Law under WTO* (Kokusai Shoin, 2010), p. 224.

⁹¹ The effect doctrine allows for the extraterritorial application of domestic laws if the following tests are met: (a) The actions and their effects constitute activities that would fall under the scope of regulation within the law; (b) There are significant domestic effects; and (c) The effects are the direct and primarily intended result of extraterritorial actions. See Report of the Fifty-Fifth Conference Held at New York, August 21st to August 26th, 1972.

⁹² Japan's position is as follows; [I]t also should be noted that the "effects doctrine" has to our knowledge never been accepted as a legitimate basis for an extraterritorial reach of criminal punishment for economic offenses, aside from fraud... [I]ndeed it cannot be accepted as such consistent with international law. See *Nippon Paper Industries Co., Ltd., vs. United States of America*, Brief of Amicus Curiae the Government of Japan in Support of the Petitioner (1996), p. 14.

⁹³ In an aide-mémoire to the Commission of the European Communities, the British Government stated; [O]n general principles, substantive jurisdiction in antitrust matters should only be taken on the basis of either (a) the territorial principle, or (b) the nationality principle. There is nothing in the nature of antitrust proceedings which justifies a wider application of these principles than is generally accepted in other matters; on the contrary, there is much which calls for a narrower application. See A. V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, *American Journal of International Law*, Vol. 75 (1981), p. 264.

being a persistent objector does not necessarily mean that the State has opposability. As a matter of fact, some countries have legislated blocking statutes to ensure opposability against the extraterritorial application of competition law. For example, § 2 of the Protection of Trading Interests Act, 1980 of the United Kingdom allows the Secretary of State to direct persons within the United Kingdom not to comply with requirements, actual or imminent, by foreign courts, tribunals or authorities to produce commercial documents or information located outside the territorial jurisdiction of any such authority.⁹⁴

From the above considerations, we may fairly conclude that the residual negative principle could be regarded as a principle of international law. However, there are skeptical views as to having recourse to this very principle. *Fitzmaurice* thinks that if a tribunal is constrained to find in favour of the respondent or defendant, or reject the claim or complaint of the applicant or the plaintiff, because it considers that the case is not covered by any applicable rule or principle, it is in substance a non liquet.⁹⁵ *Stone* has a similar view in which, application of the residual negative principle and pronouncement of non liquet may have the same practical effect, because in either case no decision would be made against the defendant State, therefore, the applicant State could not have won anyway.⁹⁶

From the viewpoint of avoiding substantive non liquet, therefore, application of general principles of law, application of equity, or recourse to analogy plays an important role. As we have seen above, in the *Trail Smelter Case*, the *Corfu Channel Case* and the *Atomic Bomb Trial*, the claims of plaintiffs were NOT rejected thanks to those principles. Equity, for instance, was not included in Article 38, paragraph 1 in the drafting process of the Statute of the Permanent Court of International Justice.⁹⁷ Actually, as we have seen, applying equity is not free from controversy. However, the concept of justice and equity has been applied in international tribunals and evolved so as to be regarded as a principle in which the Court should render its decision upon, in reliance on Article 38, paragraph 1 (c) of the Statute of the Court.⁹⁸

Thus, principles of international law are evolving through application by international tribunals. As stated in the *Mavrommatis Palestine Concessions Case*, the Court is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law, in the face of lacunae of procedural rules.⁹⁹ In other words, “what is not prohibited is legally permitted” is the principle latent in the international legal procedure and principles of international law are enabled to evolve through application by international tribunals in the course of dispute settlements. It is important for international tribunals to look for applicable principles considering the evolving nature of international law, with a view to avoiding easy recourse to the residual negative principles.

⁹⁴ *Ibid.*, p. 275.

⁹⁵ *Fitzmaurice*, *supra* footnote 43, p. 105.

⁹⁶ *Stone*, *supra* footnote 2, pp. 135-136

⁹⁷ Procès-Verbaux, *supra* footnote 3, pp. 332-335.

⁹⁸ *ICJ Pleadings*, *supra* footnote 35.

⁹⁹ *PCIJ Series A*, No.2, p. 16.

4. Significance of the Residual Negative Principle as a Last Resort

Although easy recourse to the residual negative principle is never good, it is worthwhile noting once again that international tribunals should not assume the burden of stepping into law creation.

In the *Whaling in the Antarctic*, Australia filed a case against Japan insisting that the use of lethal methods by Japan under the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) was in breach of obligations assumed by Japan under Article VIII, paragraph 1 of the International Convention for the Regulation of Whaling (ICRW). Australia, by invoking certain IWC [International Whaling Commission] resolutions and Guidelines, asserted that Article VIII, paragraph 1, authorizes the granting of special permits to kill only when non-lethal methods are not available¹⁰⁰.

The ICJ found that Article VIII expressly contemplates the use of lethal methods, and that Australia overstates the legal significance of the recommendatory resolutions and Guidelines on which they rely. The Court continued that many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan, therefore, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of Article 31 of the Vienna Convention on the Law of Treaties. The Court further noted that the relevant resolutions and Guidelines that have been approved by consensus do not establish a requirement that lethal methods be used only when other methods are not available¹⁰¹.

The Court however, did not justify the use of lethal methods in JARPA II, because IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods, and Japan has accepted its obligation to give due regard to such recommendations¹⁰². The Court's decision was that the expanded use of lethal methods in JARPA II is difficult to reconcile with Japan's obligation to give due regard to IWC resolutions and Guidelines¹⁰³.

This judgment seems rather confusing. It is evident that the call upon States parties by the IWC resolutions and Guidelines “to take into account whether research objectives can be achieved using non-lethal methods” is merely *lex ferenda*. It is not of a binding nature because the Court clearly admits that the relevant resolutions and Guidelines “do not establish a requirement that lethal methods be used only when other methods are not available.”

Why should the Court make its judgment based on *lex ferenda*? There could be a possibility that even though compliance with the IWC resolutions and Guidelines themselves are not of a binding nature, Japan's in-compliance with them may result in a situation of estoppel because Japan has accepted to give due regard to them. By analogy to the ICJ's decision on estoppel in the *North Sea Continental Shelf Cases*¹⁰⁴, if Japan clearly and consistently evinced acceptance of those resolutions and Guidelines, and Australia, in reliance

¹⁰⁰ *ICJ Reports 2014*, p. 256, para 78.

¹⁰¹ *Ibid.*, p.257, para. 83.

¹⁰² *Ibid.*, pp. 269-270, para. 137.

¹⁰³ *Ibid.*, p. 271, para. 144.

¹⁰⁴ *North Sea Continental Shelf*, *supra* footnote 42 at p. 26, para 30.

on such conduct of Japan, were to detrimentally change position or suffer some prejudice, Japan might be precluded from denying compliance with them. However, this does not seem to be the case. Considering the above, in the absence of legally binding principles restricting the lethal methods, the Court should have had recourse to the residual negative principle and justify the use of lethal methods in JARPA II.

Thus, the residual negative principle has a significant role to play as a last resort in order to prevent the tribunals from making judgments based on *lex ferenda*. Last but not least, it is worthwhile looking into the Declaration of Judge Bruno Simma in the *Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* referring to the residual negative principle. According to Judge Simma, under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from “tolerated” to “permissible” to “desirable”¹⁰⁵. *Lex ferenda* would certainly bring about different colours of legality and thereby make the possible degrees of non-prohibition distinguishable. However, *lex ferenda* should not and would not change “non-prohibition” to “prohibition.”

V. *Non Liquet Resulting in the Absence of Sufficient Elements*

As we have seen, lacunae in international law could be filled by recourse to general principles of law, equity, analogy and arguably, the residual negative principle as a last resort. Still, international tribunals have the possibility of declaring non liquet.

1. **The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons**

In this Advisory Opinion, the Court found that the use of nuclear weapons is scarcely reconcilable with respect to humanitarian requirements. Nevertheless, the Court considered that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.¹⁰⁶ As a result, the Court declared that it “cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”¹⁰⁷ Here, lacunae of international law are not to be found because the Court stated “there can be no doubt as to the applicability of humanitarian law to nuclear weapons,”¹⁰⁸ while making it clear that it “cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the [UN] Charter.”¹⁰⁹

In the case of this Advisory Opinion, the Court was facing an abstract question of whether the threat or use of nuclear weapons is legal or illegal. Because the nuclear weapons were not

¹⁰⁵ Declaration of Judge Simma, *Unilateral Declaration of Independence*, *supra* footnote 87 at p. 480.

¹⁰⁶ *Legality of the Threat or Use of Nuclear Weapons*, *supra* footnote 7, at pp.262-263, para. 95.

¹⁰⁷ *Ibid.*, p. 266, para. 105 (2) E.

¹⁰⁸ *Ibid.*, p. 259, para. 85.

¹⁰⁹ *Ibid.*, p. 263, para. 96.

actually used, the Court lacked “sufficient elements” to examine in a practical manner how harmful and inhumane the weapons are. Neither could the Court examine how effective and indispensable the weapons are in self-defence. Therefore, the Court was not able to decide whether the humanitarian law would take precedence over the right to resort to self-defence or vice versa, and had no choice but to declare non liquet. It can be fairly said that absence in “sufficient elements” rather than absence in principles of international law was the cause of the non liquet.

2. The Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations

The situation was quite similar in the case of this Advisory Opinion. The Court was invited to deal with an abstract question of how the State’s right of diplomatic protection and the United Nations’ right of functional protection would be reconciled.¹¹⁰

The Court did not give a clear answer because there was no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organization to refrain from bringing an international claim.¹¹¹ However, the Court continued

[t]hat does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. International tribunals are already familiar with the problem of a claim in which two or more national States are interested and they know how to protect the defendant State in such a case.¹¹²

Here too, the Court seems to imply that in each particular case whereby “sufficient elements” could prioritize the claims by two or more plaintiffs, a decision would be possible.

VI. Conclusion

From the above observations, we summarize lacunae in international law and non liquet as follows.

Firstly, international tribunals can fill the lacunae by applying general principles of law. However, general principles of law might not be applied to a State that persistently objects to the principles.

Secondly, applying equity could also contribute to filling the lacunae. However, due to its vagueness, international tribunals should be mindful not to take in such norms of non-judicial character in order to avoid subjective and arbitral judgments. Also, in the absence of substantive principles of law, international tribunals may order the Parties involved to negotiate and to achieve an equitable solution. However, this would result in *defacto* non liquet if the negotiation were unsuccessful.

Thirdly, gaps in international law could be filled by recourse to analogy. However, from the viewpoint of avoiding judicial legislation by international tribunals there is a limit.

¹¹⁰ *ICJ Reports 1949*, p. 185.

¹¹¹ *Ibid.*,

¹¹² *Ibid.*, p. 186.

Fourthly, if international tribunals could not fill the gap in international law by recourse to general principles of law, equity or analogy, the residual negative principle could serve as a last resort in order to avoid non liquet while preventing international tribunals from judicial legislation.

Finally, even if international tribunals are successful in finding an applicable principle, it does not necessarily mean that non liquet could be avoided. There could still be a possibility of non liquet if sufficient elements are lacking.

