state's unilateral act. This stands in contrast to Clarenc's position, pursuant to which the judge has merely a power to consider suspension as an unlawful act and to engage the state's responsibility (at 346). It would have been interesting to see how Clarenc would have incorporated this wind of objectivism into her fundamentally voluntarist approach to suspension.

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Florian Couveinhes Matsumoto and Raphaëlle Nollez-Goldbach (eds). ***Les motifs non-juridiques des jugements internationaux***. Paris: Pedone, 2016. Pp. 213. €30. ISBN: 9782233000081 69.

The traditional view that regards judicial decisions as the outcome of a deductive process based on the application of the law to a set of facts in a syllogistic way has long been challenged; it offers, at best, only a partial explanation of the process by which judges reach their decisions. Contemporary theoretical approaches to the study of judicial reasoning have called attention to other factors, such as the indeterminacy of law and the political role of judges. These approaches stress the fact that judicial decisions reflect the moral and ideological choices of its author. They regard judicial reasoning as the instrument by which a judge seeks to persuade the parties and all those concerned about the correctness of its position. By showing the limits of a strict formalist analysis, these approaches have contributed to shed light on the fact that a full understanding of a judge's position requires taking into account both the legal and non-legal considerations.

Until recently, the interest of legal scholars, and particularly of legal theorists, towards the reasoning of judicial decisions was primarily confined to the decisions of domestic courts. While judgments and advisory opinions of international courts, and particularly of the International Court of Justice, are routinely scrutinized and dissected in a myriad of comments and publications, the international legal literature has traditionally analysed the impact of international decisions on the development of the law or on the conduct of the parties. Less attention has been paid to studying the ways in which international courts and tribunals approach the problem of justifying their decisions. There are signs, however, of a new trend in this respect, with an increasing number of publications entirely devoted to this subject.[1] The growing 'jurisdictionalization' of the international society and the increasing awareness of the role of international courts and tribunals appear to be the main reasons explaining this interest in delving deeper into the argumentative strategy employed by international judges to justify their decisions. In this perspective, judicial reasoning is increasingly regarded as being of crucial importance to the overall legitimacy of international courts, including their democratic legitimacy.[2]

[1] See, in particular, H. Ruiz Fabri and J.-M. Sorel (eds), *La motivation des décisions des juridictions internationales* (2008); G.-A. Alvarez and W.M. Reisman (eds), *The Reasons Requirement in International Investment Arbitration* (2008).

[2] A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), at 111.

The book under review, which compiles the proceedings of a conference held in Paris in 2014, is part of this new wave of scholarship dedicated to the reasoning in international judicial decisions. Its approach to the subject is quite original; it subverts the traditional paradigm of judicial decision making by placing centre stage the non-legal reasons that may be relied upon by international judges – both those explicitly stated and those that are not openly mentioned but that appear to be relevant for explaining a judge's decision. As the two editors make clear in their foreword, the purpose of the book is to establish, through an assessment of the case law of international courts and tribunals, whether it is possible and appropriate to distinguish between legal and non-legal reasons of international decisions and what the content, the role and the importance of these non-legal reasons are.[3]

The book is divided into three parts. It begins by considering the notion of non-legal reasons. Here, it is much to the editors' credit that the book opens with a contribution that puts into question the central assumption of the book. Relying principally on theoretical considerations, Pierre Brunet's 'skeptical examination' sets the stage by warning against the possibility of a neat separation between legal and non-legal reasons as well as the appropriateness of using this distinction as an analytical tool for assessing the decision-making activity of judges (a point to which I shall revert later on).[4] In Parts 2 and 3, the book moves from the terrain of a theoretical reflection to an assessment of the relevant case law. Part 2 deals generally with the use of non-legal reasons in three areas of law – territorial disputes, law of the sea disputes and environmental disputes. Part 3 moves on to focus on the activity of four different judicial bodies – the International Court of Justice (ICJ), the International Criminal Court, the World Trade Organization's dispute settlement bodies and the European Court of Human Rights. The coverage of the book is sufficiently wide. A chapter dealing with investor–state dispute settlement would have been a valuable addition to the collection, particularly considering the current debate over the reasoning of investment arbitral tribunals.[5] Equally, a chapter dealing with arbitral tribunals would have shed light on the possible differences between permanent tribunals and tribunals established on an ad hoc basis. Admittedly, however, the latter gap is greatly attenuated by Pierre-Marie Dupuy's concluding chapter, which briefly addresses how the different position and functions of the ICJ and an ad hoc arbitral tribunal may impact on their use of non-legal reasons.[6]

The book does not offer a precise notion of non-legal reasons nor does it focus on a specific aspect of the decision-making activity of judges. In his long essay about the existence of non-legal reasons of international judicial decisions, Florian Couveinhes Matsumoto refrains from delimiting the notion. He emphasizes that the distinction between legal and non-legal reasons is acknowledged by international judges as well as by the legal instrument governing their activity and invites the detection of the employment of non-legal reasons by relying, not exclusively, on the explicitly given statement of reasons, but on many contextual, or implicit, elements, including individual opinions of judges, the arguments of the parties and previous or subsequent decisions of the same court.[7] For their part, the other authors contribute to this joint exercise of unearthing the non-legal reasons of international decisions by focusing on a variety of different

[3] Couveinhes Matsumoto and Nollez-Goldbach, 'Avant-propos', in F. Couveinhes Matsumoto and R. Nollez-Goldbach (eds), *Les motifs non-juridiques des jugements internationaux* (2016) 3, at 4.

[4] Pierre Brunet, 'Examen sceptique de la distinction entre motifs juridiques et non-juridiques', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 9, at 21.

[5] See P. Lalive, 'On the Reasoning of International Arbitral Awards', 1 *Journal of International Dispute Settlement* (2010) 55.

[6] Dupuy, 'Conclusions générales', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 203, at 205.

[7] Couveinhes Matsumoto, 'Mise au point theorique Existe-t-il des motifs "non-juridiques" des jugements internationaux?', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 23, at 28.

issues, ranging from the assessment of facts to the interpretation of the law in question or to the meta-question (the 'reasons for the reasons') of why a court employs or abstains from employing certain legal or non-legal reasons for justifying its decisions. They frequently base their analysis on a detailed examination of specific judgments, as in the contribution of Raphaëlle Nollez-Goldbach, who examines the way in which the International Criminal Court dealt with the difficulties in collecting evidence in its first judgments,[8] or in that of Mouloud Boumghar, who addresses the European Court of Human Rights' position in interpreting the notion of victim.[9] The variety of approaches to the identification of non-legal reasons helps to avoid a sense of repetitiveness. At the same time, however, the red ribbon tying together the different contributions appears sometimes rather thin. The fact that the contributions focus on different aspects of the judge's decision-making activity renders it hard to make a comparison between the various international tribunals in regard to their attitude to the use of non-legal reasons.

After reading this book, one is left with the impression that non-legal reasons are ubiquitous and play a significant role in the decision making of international courts and tribunals. The long list of examples provided by the various authors contribute significantly in conveying this impression. Thus, one is reminded that geographical and socio-economic considerations are constantly invoked by parties to disputes and relied upon by tribunals in the settlement of territorial or maritime delimitation disputes.[10] In the context of international environmental disputes, non-legal reasons appear to have a role in the selection by a judge of the techniques for dealing with complex scientific matters – be it the use of *experts fantômes* or a complete deference towards an external source.[11] The role of non-legal reasons may be detected behind the fact that WTO judicial bodies leave a wide margin of appreciation to member states in regard to the interpretation of the concept of public morality, while they have an 'authoritarian' attitude when having to decide upon scientific issues.[12] Another example of non-legal reasons include those stemming from a court's own perception of its functions – they are non-legal reasons having not been imposed by any positive rule. 'Functional considerations' of this kind must be taken into account, for instance, when examining the position of the ICJ regarding the possibility of a refusal to respond to a request for an advisory opinion.[13]

One could continue as there are plenty of further examples described in the different contributions. Yet, despite all of these examples and references drawn from the case law of international courts, the book does not do enough to define the contours of the notion of non-legal reasons. In many cases, one is left wondering whether the reasons at stake are indeed non-legal and where the boundaries of this notion lie. Consider, for instance, the reference to geographical and socio-economic considerations in judgments and awards concerning territorial or maritime delimitation disputes. As Niki Aloupi rightly observes, given that in matters of maritime

[8] Nollez-Goldbach, 'Fondement et enjeux du recours aux motifs non-juridiques dans la jurisprudence de la Cour européenne des droits de l'homme', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 149, at 151.

[9] Boumghar, 'Fondement et enjeux du recours aux motifs non-juridiques dans la jurisprudence de la Cour européenne des droits de l'homme', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 183, at 192.

[10] Girardeau, 'Les motifs non-juridiques dans le contentieux territorial', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 81, at 84.

[11] Vinuales, 'Observations sur le traitement des motifs scientifiques dans le contentieux environnemental international', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 113, at 124.

[12] Dufour, 'Les motifs non-juridiques dans la jurisprudence de l'OMC: entre valeurs non-marchandes et représentations sociales', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 163, at 165.

[13] Couveinhes Matsumoto, 'Les motifs des motifs des arrêts et avis de la CIJ', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 129, at 132.

delimitation the governing rule may be as vague as the general principle of equitable solution, the employment of non-legal reasons appears to be inherent to the application of law.[14] When a legal rule requires the judge or arbitrator to take non-legal reasons into consideration, should one not regard these reasons as becoming *par ricochet* legal?

It is here that the remarks of Pierre Brunet in the book's opening contribution appear most relevant. The point is not whether non-legal considerations are present in the reasoning of international judges or whether they must be taken into account for the purposes of interpreting the real significance of a decision. They are present, making Couveinhes Matsumoto right in insisting that legal scholars cannot exclude them from consideration if they want a fuller understanding of judicial decisions.[15] The point is that the determination of a non-legal reason is itself a matter of subjective assessment. While there are core ideas or concepts that most would regard as non-legal, the line dividing legal and non-legal reasons is far from being firm or clear, more so at the level of international law given the importance attached to general principles and the higher presence of rules having vague content or aimed simply at achieving equitable solutions. In sum, as Pierre-Marie Dupuy wisely puts it, if non-legal reasons are everywhere in the decisions of international judges and arbitrators, these reasons are never very distant from the law.[16] In the end, the book is a thought-provoking collection that should encourage more research and further study on the reasoning of international judicial decisions.

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## *Individual Contributions*



[14] Aloupi, 'Les motifs non-juridiques en droit de la mer', in Couveinhes Matsumoto and Nollez-Goldbach, *supra* note 3, 97, at 105.

[15] Couveinhes Matsumoto, *supra* note 7, at 24–27.

[16] Dupuy, *supra* note 6, at 211.