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Introduction

Decisional authority

'Judicial decisions', said Hersch Lauterpacht, 'particularly when published, become part and parcel of the legal sense of the community.'[1] Not everyone rejoices. Writing in 1942, Lord Wright remarked that one effect of the destruction inflicted during the war on 'law libraries has been to reduce the number of authorities quoted in arguments in Court. Professor Goodhart', he cheerfully added, 'has assured me that this will conduce to the improvement of the law.'[2] Drastic action is not yet needed at The Hague; but beyond that it would not be prudent to prophesy. 'The practising international lawyer of today', remarked O'Connell, '. . . selects as his sharpest and most valued tool the judicial decisions which will support his case.'[3] This monograph is devoted to the precedential aspects of the most important of these, namely, decisions of the World Court itself; the prominence of the role played by them is all the more striking when it is considered that, as compared with the situation at municipal law, the number of cases decided by the Court is small.[4]

Comparison may, of course, be made with several legal systems. If so wide an exercise is not undertaken, this is because, at the founding of the Permanent Court of International Justice, the

[1] E. Lauterpacht (ed.), *International Law, being the Collected Papers of Hersch Lauterpacht* (Cambridge, 1975), II, pp. 473–474.
[2] Lord Wright, 'Precedents', *CLJ*, 8 (1942), p. 145.
[3] D. P. O'Connell, *International Law* (London, 1970), I, p. 32.
[4] Max Sørensen, *Les Sources du Droit international* (Copenhagen, 1946), p. 174.

schools of thought which were influential with the framers of its Statute were two, namely, the Continental and the common law schools. In an effort to form a general view of the use to which the Court puts its holdings, the practical course would be to limit comparison, where necessary, to those two schools. But that, whenever it is done, is subject to the caution that, if in the end the Court's approach appears to lie closer to one than to the other, this is not because it has sought consciously to model its method on one as against the other; it is the coincidental result of the independent operation of the systems. There is no suggestion that any particular legal tradition is superior to another. Each system has its virtues.

There is no reason to believe that any lawyer from anywhere has any special difficulty in coming to terms with the methods of reasoning employed by the Court. It is possible, however, that a lawyer formed in the traditions of the common law may feel rather at home, if somewhat strangely so, in the way the Court has recourse to its previous decisions in the process of determining the law. The principal difference, he will be told, is that *stare decisis* does not apply; and, indeed, largely because of this important fact, it is sometimes said that it is not right to speak of 'precedents' in the case of decisions of the Court. But the fact that the doctrine of binding precedent does not apply means that decisions of the Court are not binding precedents; it does not mean that they are not 'precedents'. The term occurs in the jurisprudence of the Court;[5] it occurs also in the pleadings of counsel and in the writings of publicists.[6]

Nor is this surprising, for the fact is that the Court seeks guidance from its previous decisions, that it regards them as reliable[7]

[5] *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article iv), 1928, PCIJ, Series B, No. 16*, p. 15, and *Factory at Chorzów (Merits), 1928, PCIJ, Series A, No. 17*, p. 7. And see *Certain Norwegian Loans, ICJ Rep 1957*, p. 60, Judge Lauterpacht; and *Namibia, ICJ Rep 1971*, p. 19, para. 9.

[6] See, for example, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, ICJ Rep 1981*, p. 11; and Shabtai Rosenne, 'Article 27 of the Statute of the International Court of Justice', *Virg JIL*, 32 (1991), pp. 230–231.

[7] It is not believed that, in this context, much violence is done to the distinction made by Fitzmaurice when he said that decisions of the Court may be cited '[a]s 'authority', but not necessarily as authoritative'. See Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge, 1986), I, p. xxxii, footnote 22. He went on, in the text, to say that 'even controversial [decisions]

expositions of the law, and that, though having the power to depart from them, it will not lightly exercise that power. In these respects, the submission is that the Court uses its previous decisions in much the same way as that in which a common law court of last resort will today treat its own previous decisions. Thus, the fact that decisions of the Court are not precedentially binding is not likely to interest the common lawyer very much, not at any rate in the period following the House of Lords Practice Statement of 1966.

A question which may be of some interest to him – and, contradictorily as it may seem, it may not be the same – is whether decisions of the Court create law. It is of course an old quarrel; it is not on that account irrelevant. If decisions of the Court can result in the creation of law, is this a sufficiently important matter to merit asking how, and at what point, is that law created? Does the phenomenon occur within the judicial process itself? Or outside of it?

These issues apart, opportunity has been taken to deal with connected elements in the hope of not putting forward too disjointed an account of the system, while not claiming to paint a full portrait. Thus, the question is considered whether the Court makes a distinction between *ratio decidendi* and *obiter dictum*. If it does, what is the measure of authority or persuasiveness that it assigns to each category? To what extent does it practise the art of distinguishing cases? Can it depart from its previous decisions? If so, in what circumstances? What is the impact of individual opinions – whether separate or dissenting – on the system? Has the Court developed rules on these matters? These questions are interrelated, and answers may overlap. It is sought to deal with them in the following pages.

The juridical basis of the Court's functions

The questions posed above, and the answers which they attract, assume a system of adjudication functioning on the basis of law. A preliminary word may be said on this.

To liken the Court to a municipal court is misleading; there are important organisational, jurisdictional and procedural differences.

tend in the course of years to be generally regarded as law'. It may be supposed that, at least when that result comes about, they may be taken to be 'authoritative'.

Yet, the similarities are greater than the differences. The fundamental nature is the same;[8] for the essential thing about the Court is that it is, of course, a court of justice.[9] That is the characteristic which distinguishes it from other mechanisms of peaceful settlement. There are several such mechanisms, and States are free to resort to any; but this freedom of recourse to other methods, or the utility of the solutions which they offer, should not obscure the special character of the Court as a court of justice.

There is a political aspect to a municipal court in the paradoxical sense that, to the extent that it delivers justice in accordance with strictly legal criteria, as it must, it is providing one of the services expected of a sound system of government broadly understood. However the global arrangements within which the Court functions may be characterised, there is a sense in which it may also be said of it that, if it is to satisfy the indispensable requirement of political credibility, it must act judicially, and only so.[10] Decisions of national courts, even the most circumspect of these, are sometimes followed by suspicions of political motivation. Decisions of the World Court have not been exempt from similar criticisms, as witness the controversies attendant on the decision of the Permanent Court of International Justice in *Customs Regime between Germany and Austria*.[11] But the criticisms presuppose that the Court operates on a judicial basis; though sometimes severe, they do not justify the view that it does not.[12] Needless to say, its functions can only be discharged on the basis of judicial independence. The concept is well understood in municipal law; but, in the age of communication, it is as well to recall Judge Tanaka's view that 'the judicial independence

[8] Gilbert Guillaume, 'L'administration de la justice internationale', *Revue française d'administration publique*, 57 (1991), p. 135.

[9] See, *inter alia*, *Fisheries Jurisdiction, ICJ Rep 1974*, pp. 23–24, para. 53; by the present writer 'The International Court of Justice: The Integrity of an Idea', in R. S. Pathak and R. P. Dhokalia (eds.), *International Law in Transition, Essays in Honour of Judge Nagendra Singh* (Dordrecht, 1992), p. 341; and, also by him, *First Taslim Elias Memorial Lecture* (Nigerian Institute of Advanced Legal Studies, Lagos, 1994).

[10] As to the sense in which a court may be said to fulfil a political purpose, see Francis Vallat, reviewing Shabtai Rosenne, *The Law and Practice of the International Court* (Leiden, 1965), in *BYBIL*, 43 (1968–69), pp. 322–323.

[11] *1931, PCIJ, Series A/B, No. 41*, p. 4.

[12] See answers to criticisms of bias given in Thomas M. Franck, 'Fairness in the International Legal and Institutional System', *Hag R*, 240 (1993–III), pp. 304, 307, 313, 340.

of courts and judges must be safeguarded not only from other branches of the government, that is to say, the political and administrative power, but also from any other external power, for instance, political parties, trade unions, mass media and public opinion'.[13]

Insistence on these normative bases does not, of course, mean that the Court is required to take a blinkered view of the reality of a situation; no more so than in the case of a municipal court. In the words of President Huber:

> [I]l n'est pas douteux que tout législateur et tout juge, pour bien remplir ses fonctions, doive avoir une pleine compréhension des rapports de la vie sociale dans lesquels il intervient soit par une loi, soit par un jugement. De même, il est nécessaire que la Cour, en interprétant et en recherchant les règles de droit international, tienne compte de la nature spécifique des rapports entre Etats. La Cour n'a pas seulement besoin de la confiance de l'opinion publique, mais aussi de celle des gouvernements, et il est naturel que ceux-ci veuillent être assurés que la Cour a une véritable compréhension des problèmes qui sont à la base des différends qu'elle est appelée a trancher.[14]

However, marking the essential distinction between political decision-making and judicial decision-making, the same celebrated judge added:

> Foncièrement différente est la Justice. Ici toute balance de forces, tout opportunisme, tout marchandage sont exclus. La décision judiciaire tire son autorité non pas du fait qu'elle s'adapte bien aux exigences d'une situation particulière et momentanée, mais de ce qu'elle repose sur des raisons qui ont une valeur générale en dehors du cas concret et une force conclusive pour tous. Les institutions judiciaires reposent toutes sur deux principes d'ordre spirituel: la logique juridique, élément rationnnel, et la justice, élément moral. Ces deux principes, ces deux piliers de la fonction judiciaire l'élèvent au dessus de la mêlée où s'affrontent les intérêts et

[13] *Barcelona Traction, Light and Power Company, Limited, ICJ Rep 1970*, p. 154.

[14] *PCIJ, Series C, No. 7–I*, p. 17. And see *ICJ Pleadings, Reparation for Injuries Suffered in the Service of the United Nations*, p. 46, President Basdevant; *Namibia, ICJ Rep 1971*, p. 23, para. 29; Charles De Visscher, *Theory and Reality in Public International Law*, tr. P. E. Corbett, revised edition (New Jersey, 1968), pp. 387–388; Rosenne, *Law and Practice* (1965), I, pp. 90–92; Sir Robert Jennings, in *Judicial Settlement of International Disputes* (Berlin, 1974), p. 37; and W. M. Reisman, 'International Politics and International Law-Making – Reflections on the so-called "Politicization" of the International Court', in Wybo P. Heere (ed.), *International Law and its Sources, Liber Amicorum Maarten Bos* (Deventer, 1981), p. 81.

les passions des hommes, des partis, des classes, des nations et des races.[15]

The jurisprudence of the Court is impressed with this emphasis on the juridical basis on which its functions are exercised; that in turn forms the foundation of its system of precedents.

The concept of precedents

As remarked by Lord Wright, 'Precedents are what they are because men faced with a problem ask "Have we not had this before or something like it?".'[16] The point is illustrated by the well-known words of James I, 'Reason is too large. Find me a precedent and I will accept it.'[17] In the dictionary definition of the term, the idea is followed by many legal systems, if not by all.[18] Goodhart recalls a suggestion by Sir Edward Coke that Moses was the first law reporter. The idea must have been sufficiently known to the Romans to move Justinian to limit it with the precept *non exemplis, sed legibus iudicandum est*.[19] That maxim, though the basis of the Continental approach, has not succeeded in altogether preventing the development of the precedential influence of decisions even in civil law systems. The phenomenon has of course been even more marked in common law systems.[20] Can it exist outside of the framework of a municipal legal system? It would seem so; it is noticeable in international law, particularly as applied by the International Court of Justice.

[15] *PCIJ, Series C, No. 7–I,* p. 18. For the distinction, in English law, between the administrator and the judge, see H. W. R. Wade, *Administrative Law,* 6th edn (Oxford, 1988), p. 46, and S. A. de Smith, *Judicial Review of Administrative Action,* 4th edn (London, 1980), pp. 48, 69, 77, 81–82, 101.

[16] Wright, 'Precedents', p. 144.

[17] Gerald J. Postema, 'Some Roots of our Notion of Precedent', in Laurence Goldstein (ed.), *Precedent in Law* (Oxford, 1987), p. 9.

[18] A. L. Goodhart, 'Precedent in English and Continental Law', *LQR*, 50 (1934), p. 41. Cf. Laurence Goldstein, *Precedent in Law* (Oxford, 1987), p. 1, stating that it is false to suggest 'that, in any legal system, a practice exists of deciding cases on the basis of decisions made in similar cases in the past'.

[19] Codex 7.45.13, cited in Goodhart, 'Precedent', p. 56.

[20] See C. K. Allen, *Law in the Making*, 7th edn (Oxford, 1964), pp. 187 ff. The phenomenon was already sufficiently prominent to rate a well-known reference in Shakespeare's *The Merchant of Venice*. See Goodhart, 'Precedent', p. 56, citing Act IV, Scene 1.

The use of precedents by the Court is governed primarily by Article 38, paragraph 1 *(d)*, of its Statute, which of course goes back to the corresponding provision of the Statute of the Permanent Court of International Justice. The precise meaning of this provision, which will be considered later, lies at the root of the literature on the subject. Writing in 1933, Castberg considered that the provision presented no special difficulty of interpretation.[21] That view is not generally shared today. That author was right, however, in observing that no certain rules existed for attributing importance to precedents.[22] So too did Hudson, remarking in 1943 that in 'its jurisprudence to date, the Court has not evolved a definite principle as to the weight which it will attach to its earlier judgments'.[23] Although noticing the Court's 'consistent reference to its own judicial precedents', in 1964 Rosenne likewise considered that it was 'premature to deduce any definite concepts or rules or principles governing their use'.[24] That caution has not lost its force; it will not do to give the matter more system or shape than the facts will admit. Yet, some thirty years later, there may be reason to revisit the subject. Possibly, the need for rules is less felt in the case of a court which, like the World Court, does not operate as a tier within a judicial hierarchy. Where, as in a national system, a court operates as part of such a hierarchy, the need for clear principles is greater. In some parts of the Commonwealth, for example, it is important to be wary of the rules regulating the relative weight to be attached to a decision on the common law given by the House of Lords, as against one given by the Privy Council; counsel, who has got the rules wrong, could lose his client's case.[25] No similar risk is likely to ambush the practitioner at The Hague. He may yet share the surprise felt by Jennings when he remarked in 1967 that

[21] Frede Castberg, 'La Méthodologie du droit international public', *Hag R*, 43 (1933–I), p. 373.
[22] *Ibid.*, p. 367.
[23] M. O. Hudson, *The Permanent Court of International Justice, 1920–1942, A Treatise* (New York, 1943), p. 627.
[24] Rosenne, *Law and Practice* (1965), II, p. 612. And see, by him, 'Article 27 of the Statute of the International Court of Justice', *Virg JIL*, 32 (1991), pp. 230–231.
[25] See, generally, Taslim O. Elias, 'Judicial Process and Legal Development in Africa', in I. J. Mowoe and Richard Bjornson (eds.), *Africa and the West: The Legacies of Empire* (New York, 1986), p. 196; W. S. Clarke, 'The Privy Council, Politics and Precedent in the Asia–Pacific Region', *ICLQ*, 39 (1990), p. 741; and *De Lasala* v. *De Lasala* [1979] 2 All ER 1146, PC.

since 'judicial decision has become so important in the development of international law it is surprising that relatively so little has been done to elaborate principles governing the use of precedents in international law'.[26]

The surprise is understandable. In so far as the corpus of the law is based on decided cases, it is logical that there should be rules regulating the way in which previous cases are used for the purpose of determining the law. A system of precedents is thus the inevitable accompaniment of a body of law based on case law. The conditions required for its development have been considered by several writers.[27] In a valuable article Koopmans identified three. Condensing rather liberally, these are, first, that the main rules are unwritten; second, that the court should function as a unifying element in a legal system characterised by centrifugal forces; and, third, that there is something like the necessity of resorting to principles.[28]

Now, it is possible to say that, technically, some or all of those three conditions are not met in the case of the Court; but, if the matter is looked at in the broad sense appropriate to international law, a different conclusion is suggested. Despite the growing importance of 'law-making treaties', the main rules of international law are unwritten; further, as has been the experience of countries with written codes, even in relation to codified international law the development of a system of precedents is not excluded. The first of Koopmans's three conditions may be reasonably regarded as satisfied. Arguably, the second condition is also met, for, although there is no hierarchical judicial system in international law headed by a common superior organ, the various adjudicating bodies, with the International Court of Justice – a permanent global judicial institution – as their informally acknowledged summit of authority,[29] do exercise a unifying normative influence on the polycentric forces within the inter-

[26] R. Y. Jennings, 'General Course on Principles of International Law', *Hag R*, 121 (1967–II), p. 342.

[27] See *inter alia*, Goodhart, 'Precedent', *passim*, and John C. Gardner, *Judicial Precedent in Scots Law* (Edinburgh, 1936), pp. 19, 76–78.

[28] T. Koopmans, '*Stare decisis* in European Law', in David O'Keefe and Henry G. Schermers (eds.), *Essays in European Law and Integration* (Deventer, 1982), pp. 14–17.

[29] See C. F. Amerasinghe, *State Responsibility for Injuries to Aliens* (Oxford, 1967), p. 33.

national legal system.[30] The point is not free from controversy;[31] yet one can scarcely disagree with the remark made by Basdevant, speaking of the Permanent Court of International Justice, that 'la jurisprudence de cette Cour jouit d'une grande autorité auprès des autres tribunaux internationaux'.[32] Speaking of the present Court, Grisel has likewise observed, 'Seul tribunal vraiment universel et principal organe judiciaire des Nations Unies, la Cour rend des arrêts qui ont une autorité considérable'.[33] The third condition is also satisfied, there being clear necessity for legal issues arising within the international community to be resolved by recourse to general propositions of law if the solutions reached are to command some critical minimum level of supporting respect; all international tribunals recognise this.

Different ways in which a system of precedents may operate

A system of precedents may operate in one of several ways. At the risk of oversimplification, but, it is hoped, not of caricaturing, these may be summarised thus: such a system may authorise the judge to consider previous decisions as part of the general legal material from which the law may be ascertained; or, it may oblige him to decide the case in the same way as a previous case unless he can give a good reason for not doing so; or, still yet, it may oblige him to decide it in the same way as the previous case even if he can give a good reason for not doing so.[34] Continental systems are of the first kind; occasionally, they incline to the second, and in some areas to the third. A system of the last kind is said to be based on the

[30] Emmanuel Roucounas, 'Rapport entre 'moyens auxiliaires' de détermination du droit international', *Thesaurus Acroasium*, 19 (1992), pp. 264, 265, 267; but see, *ibid.*, p. 270, para. 26.

[31] See and compare Sørensen, *Les Sources*, p. 154; Sir Humphrey Waldock, *Aspects of the Advisory Jurisdiction of the International Court of Justice* (Gilberto Amado Lecture, Geneva, 1976), p. 92; Luigi Condorelli, 'L'Autorité de la décision des juridictions internationales permanentes', in *La Juridiction internationale permanente*, Colloque de Lyon (Paris, 1987), pp. 309–310; and Volker Röben, 'Le précédent dans la jurisprudence de la Cour internationale', *Germ YBIL*, 32 (1989), p. 382.

[32] Jules Basdevant, 'Règles générales du droit de la paix', *Hag R*, 58 (1936–IV), p. 511.

[33] Etienne Grisel, '*Res judicata*: l'autorité de la chose jugée en droit international', in Bernard Dutoit (ed.), *Mélanges Georges Perrin* (Lausanne, 1984), p. 142.

[34] Rupert Cross and J. W. Harris, *Precedent in English Law*, 4th edn (Oxford, 1991), p. 4.

doctrine of binding precedent. Common law courts are of this kind, but the highest courts, while generally following their previous decisions, reserve the right to depart from them; in this sense the view may be hazarded that, even where they aver that they are treating their former decisions as 'normally binding', their power to depart 'when it appears right to do so' means that they are not strictly bound.[35]

The development of the right of a common law court of last resort to depart from its own previous decision strengthens a tendency to narrow the differences between the two systems at the top.[36] In a general way, however, it may be said that the highest common law courts pay greater attention to particular cases than do their civil law counterparts; they are likelier to rely on a single case as sufficing to establish a principle of law. The Continental approach to precedent is, as the writer understands it, that, although the court in some circumstances follows a single decision,[37] particularly where, as in France, the decision has been given on a question of principle by l'Assemblée plénière du Conseil d'Etat or les chambres réunies de la Cour de Cassation, more normally, it tends to seek guidance from an accumulation of judicial responses to a particular legal problem.[38] The excellence of that approach is clear, involving, as it does, a certain suppleness in a process of trial and error, as contrasted with what may be thought of as an element of rigidity

[35] See the wording of the 1966 House of Lords Practice Statement, in Cross and Harris, *Precedent*, p. 104; and *A.–G.* v. *Reynolds*, (1979) 3 All ER 140.

[36] See, in the case of The Netherlands, Maarten Bos, 'The Interpretation of International Judicial Decisions', *Revista Española de Derecho Internacional*, 33 (1981), p. 16.

[37] Lazare Kopelmanas, 'Essai d'une théorie des sources formelles du Droit international', *Revue de Droit international*, 21 (1938), p. 126; and H. C. Gutteridge, *Comparative Law, An Introduction to the Comparative Method of Legal Study and Research*, 2nd edn (Cambridge, 1949), p. 90.

[38] Goodhart, 'Precedent', p. 42. For precedent in Continental systems, see, *inter alia*, W. S. Holdsworth, *A History of English Law*, 3rd edn (London, 1924), IV, pp. 220 ff; René David and H. P. de Vries, *The French Legal System, An Introduction to Civil Law Systems* (New York, 1958), Part 3, Chapter IV; H. C. Gutteridge, *Comparative Law, An Introduction to the Comparative Method of Legal Study and Research*, 2nd edn (Cambridge, 1949), pp. 90 ff; Koopmans, '*Stare decisis* in European Law', pp. 11 ff; Otto Kahn-Freund, Claudine Lévy and Bernard Rudden, *A Source-book on French Law* (Oxford, 1973), pp. 98 ff; and Roger Perrot, *Institutions judiciaires*, 5th edn (Paris, 1993), pp. 29–30, para. 26. For the position in the European Court of Justice, see Bernard Rudden, *Basic Community Cases* (Oxford, 1987), p. 39; and T. C. Hartley, *The Foundations of European Community Law*, 2nd edn (Oxford, 1988), pp. 75–76 .