

CORFU CHANNEL CASE (UNITED KINGDOM v. ALBANIA)

International Court of Justice, 1949.

1949 I.C.J. 4, 22.

[The case involved the explosion of mines in Albanian waters which damaged British warships and caused loss of life of British naval personnel on those vessels. The United Kingdom claimed Albania was internationally responsible and under a duty to pay damages. In regard to the obligations of Albania, the Court stated:]

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefields exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII which is applicable in time of war, but on 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.

Notes

1. "Elementary considerations of humanity" may also be based today on the provisions of the United Nations Charter on human rights, the Universal Declaration of Human Rights, and the various Human Rights Conventions. See the Advisory Opinion of the International Court in the Namibia Case, 1971 I.C.J. 57, also discussed in note 5, p. 1088 *infra*. In its earlier decision in the 1966 *Southwest Africa Case* (2d Phase), the majority of the court declared that humanitarian considerations were not decisive and that moral principles could be considered only insofar as they are given "a sufficient expression in legal form" (1966 I.C.J. at 34).

2. For a Soviet writer's view that humanitarian considerations and principles of morality have a necessary role in forming international law, see Lukashuk, *Morality and International Law*, 14 *Indian J.Int'l L.* 321-331 (1974). The article is strongly critical of Western positivists who seek to exclude moral considerations from international law. Contemporary Western jurists who have placed high value on the role of humanitarian and moral factors in international law include such representative scholars as Hersch Lauterpacht, Myres McDougal, H. Mosler, and G. Schwarzenberger.

SECTION 5. EVIDENCE OF INTERNATIONAL LAW AND SUBSIDIARY MEANS FOR DE- TERMINATION OF RULES OF LAW

A. JUDICIAL DECISIONS

1. *International Court of Justice*

Article 38 of the Statute in its paragraph 1(d) directs the Court to apply judicial decisions as "subsidiary means for the determination of rules of

law." It is expressly made subject to Article 59 which states that "the decision of the Court has no binding force except between the parties and in respect of that particular case." Hence the principle of *stare decisis* is not meant to apply to decisions of the International Court. That qualification and the relegation of judicial decisions generally to a "subsidiary status" reflect the reluctance of states to accord courts—and the International Court in particular—a law-making role. The Court's decisions are supposed to be declaratory of the law laid down by the states in conventions and customary rules. In addition, the stated objection to *stare decisis* reflects a perception of international disputes as especially individual, each distinguished by particular features and circumstances.

Despite these qualifications, the decisions of the International Court of Justice are, on the whole, regarded by international lawyers as highly persuasive authority of existing international law. The very fact that state practices are often divergent or unclear adds to the authority of the Court. Its decisions often produce a degree of certainty where previously confusion and obscurity existed. A much-quoted dictum of Justice Cardozo reflects the attraction of judicial authority, especially to lawyers in the common law tradition:

International law or the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests to its jural quality.

New Jersey v. Delaware, 291 U.S. 361, 54 S.Ct. 407, 78 L.Ed. 847 (1934).

A decision of the International Court is generally accepted as the "imprimatur of jural quality" when the Court speaks with one voice or with the support of most judges. However judgments and advisory opinions by a significantly divided court have diminished authority. This is especially true when the issues are perceived as highly political and the judges seem to reflect the positions of the states from which they come. Notable examples are the 1966 decision of the Court in the *Case Concerning South West Africa* (infra p. 1088) and the 1984 decision on jurisdiction and admissibility in the case brought by Nicaragua against the United States. Not infrequently, the separate opinions of dissenting judges or other individual opinions contain cogent reasoning that influences subsequent doctrine more than the decision of the majority. Judgments and advisory opinions are not always compelling to states. Governments respond in various ways to decisions they consider unfounded or unwise. For example, after the *Lotus Case* (supra), many governments adopted a treaty provision which reversed the Court's ruling and prohibited a state other than the flag state from exercising criminal jurisdiction against a non-national in case of a collision or accident on the high seas. Individual states have also reacted to unfavorable decisions by altering or withdrawing their consent to jurisdiction (see Chapter 10).

Notwithstanding these reactions the Court's pronouncements, especially in non-political matters, are a primary source for international lawyers. Every judgment or advisory opinion is closely examined, dissected, quoted and pondered for its implications. They are generally lengthy and learned analyses of relevant principles and practices and particular cases include opinions often amounting to more than 200–300 pages. After more than 70

years the case-law and associated opinions of the two "World Courts" constitute a substantial *corpus juris* relevant to many of the questions facing states in their international relations.

The fact that the Statute excludes *stare decisis* (Article 59) has not meant that the Court's case-law ignores precedent. The Court cites its earlier decisions and often incorporates their reasoning by reference. When the Court seems to depart from precedent, it generally distinguishes the cases and explains the reasons for the different views. See cases cited in Rosenne, 2 *The Law and Practice of the International Court* 611-613 (1965). However, Article 59 still has an effect. In excluding *stare decisis*, it must mean that the Court's prior decisions are not to be treated as conclusive evidence of the law. Hence there is no strict rule of precedent as there is in many municipal law jurisdictions. In Waldock's words, "the authority of the jurisprudence of international tribunals depends more directly on its subsequent recognition by states as acceptable than is the case with municipal decisions." Waldock, *General Course*, at 95.

A more complex problem concerns the role of the Court in "developing" international law and reaching decisions that go beyond declarations of existing law. It is clear that states, by and large, do not expect or wish the Court to "create" new law. Yet as Brierly observed some years ago "the act of the Court is a creative act in spite of our conspiracy to represent it as something else." *The Basis of Obligation in International Law* 98 (Waldock ed., 1958). Both states and judges are aware "of the discretionary elements in the art of judging: the selection of 'relevant' facts, the need to give specific meaning to broad undefined concepts, the subtle process of generalizing from past cases, the uses of analogy and metaphor, the inevitable choices between competing rules and principles." Schachter, *International Law in Theory and Practice* 41 (1991). These discretionary elements are more evident in international law than in most areas of domestic law. The fragmentary character of much international law and the generality of its concepts and principles leave ample room for "creative" judicial application. On the other hand, the judges are well aware of the dangers of appearing to be "legislating" and of their precarious consensual jurisdiction (See Chapter 10). One way to meet the problem is to place emphasis on the particular facts of the case to avoid the appearance of creating new law. But there is also a pull in the opposite direction. The Court needs to show that its decisions are principled and in accord with the agreed basic concepts of international law. This requirement leads to reliance on broad doctrinal concepts and precepts taken from treatises and prior case-law. When applied to new situations, the abstractions of basic doctrine create new law. Though many governments hesitate to accept or recognize this, international lawyers acknowledge the formative role of the Court while recognizing the political necessity for the Court to appear solely as an organ for declaring and clarifying the existing law.

Notes

1. The 15 judges of the International Court are elected for 9-year terms by majority votes of political bodies, namely the Security Council and the General Assembly of the United Nations. (Statute of the Court, Articles 3-18). They are required to have the qualifications required in their respective countries for appointment to the highest judicial office or to be "jurisconsults of recognized

competence in international law." (Id. Art. 2). They are supposed to represent the "main forms of civilization and of the principal legal systems of the world." This requirement is considered to be met by a geographical and political distribution of seats among the main regions of the world. Many of the judges have been well known legal scholars. In recent years, most have had prior service in their national governments, as legal advisors to the foreign office or as representatives to international bodies.

2. Does the fact that the judges are elected by political bodies and are considered likely to reflect the views of their own governments impugn or reduce "the jural quality" of their decisions? Is it legally justifiable to minimize a judicial decision as a source of law because many of the judges have taken the same position as their own governments? How can states parties to cases before the Court seek to reduce the effect of ideological or national bias, assuming they wish to do so? Former Judge Mosler (Federal Republic of Germany) has written:

Where there is no common agreement as to the substantive rules and especially where there is no complete agreement as to the sources of general international law, the subjective views of the individual judges assume increased importance.

The International Society as a Legal Community, 140 *Rec. des Cours* 293 (1974-IV). See also Suh, *Voting Behaviors of National Judges in International Courts*, 63 *A.J.I.L.* 224 (1969); S. Rosenne, *The Composition of the Court*, in *The Future of the International Court of Justice* 377 (L. Gross ed., 1976); Schachter at 69-73 (1991).

2. Decisions of International Arbitral Tribunals and Other International Courts

International judicial decisions also embrace the numerous decisions of arbitral tribunals established by international agreement for individual disputes or for categories of disputes. Though they are not in a strict sense judicial bodies, they are generally required to decide in accordance with law and their decisions are considered an appropriate subsidiary means of determining international law. Governments and tribunals refer to such decisions as persuasive evidence of law. The International Court has only occasionally identified specific arbitral awards as precedents but it has also referred generally to the jurisprudence and consistent practice of arbitral tribunals. Governments do not hesitate to cite international arbitral decisions in support of their legal positions. Such decisions may be distinguished on the basis of the agreements establishing the tribunal or other special circumstances but in many cases they have been accepted as declaratory of existing international law.

The decisions of arbitral tribunals are published by the United Nations in *Reports of International Arbitral Awards* (U.N.R.I.A.A.). Other publications containing texts of arbitral decisions include the *International Law Reports*, an annual publication (E. Lauterpacht ed.), and *International Legal Materials* (published by the American Society of International Law 7 times each year). For further discussion of arbitration as a means of dispute settlement see Chapter 10.

Two European courts—the Court for the European Economic Community (located in Luxembourg) and the European Court of Human Rights (in Strasbourg) also hand down many decisions that express or interpret principles and rules of international law relevant to their special areas of compe-

tence. The Inter-American Court of Human Rights has had only a few cases (including advisory opinions) but they too may be regarded as part of international case-law.

3. *Decisions of Municipal Courts*

The *Paquete Habana* and the *Lotus Case* (supra) opinions cite municipal court decisions as evidence of customary law. Such decisions are indicative of state practice and *opinio juris* of the state in question. However, inasmuch as national courts in many countries also apply principles and rules of international law, their decisions may be treated as a subsidiary source independently of their relation to state practice. While the authority of a national court would as a rule be less than that of an international court or arbitral body, particular decisions of the higher national courts may be the only case-law on a subject or the reasoning and learning in the decisions may be particularly persuasive. Decisions of the United States Supreme Court have been relied on by arbitral bodies and have been cited by states in support of their claims. In some areas of law such as state responsibility and sovereign immunity, national court decisions have had a prominent role. See Chapters 1 and 8.

B. THE TEACHINGS OF THE MOST HIGHLY QUALIFIED PUBLICISTS OF THE VARIOUS NATIONS

The place of the writer in international law has always been more important than in municipal legal systems. The basic systematization of international law is largely the work of publicists, from Grotius and Gentilis onwards. In many cases of first impression only the opinions of writers can be referred to in support of one or the other of the opposing contentions of the parties. The extent to which writers are referred to as "subsidiary" authorities differs often according to the tradition of the court and the individual judge. Here the practice of national as well as of international courts is relevant. As a corollary to the position of precedent in common law jurisdictions, there has traditionally been judicial reluctance, more marked in the British jurisdictions than in the United States, to refer to writers. In the civilian systems reference to textbook writers and commentators is a normal practice, as the perusal of any collection of decisions of the German, Swiss or other European Supreme Courts will show. In France the notes appended by jurists to important decisions published in the *Recueil Dalloz* and *Recueil Sirey* enjoy high authority and often influence later decisions. A prominent example of reliance on writers in a common law court is the decision of the U.S. Supreme Court in the *Paquete Habana* case (see p. 58 supra).

The practice of the International Court of Justice and of its predecessor has generally been to refer to doctrine, i.e., teachings, only in very general terms. Lauterpacht, *The Development of International Law by the International Court* 24 (1958). Lauterpacht suggests as a reason for the Court's reluctance to refer to writers: "There is no doubt that the availability of official records of the practice of States and of collections of treaties has substantially reduced the necessity for recourse to writings of publicists as evidence of custom. Moreover, the divergence of view among writers on many subjects as well as apparent national bias may often render citations

from them unhelpful. On the other hand, in cases—admittedly rare—in which it is possible to establish the existence of a unanimous or practically unanimous interpretation, on the part of writers, of governmental or judicial practice, reliance on such evidence may add to the weight of the Judgments and Opinions of the Court.” *Id.*

Although the Court itself has been reluctant to identify writers in its judgments and advisory opinions, it is evident from the pleadings and from the references in the separate and dissenting opinions of the judges that the opinions of authorities on international law have been brought to the attention of the Court and have often been taken into account by some of the judges. For a broad historical survey of the role and influence of “teachings” in the development of international law, see lectures by Judge Manfred Lachs, *Teachings and Teaching of International Law*, 151 *Rec. des Cours* 163–252 (1976–III).

The major treatises of international law usually cited by states and tribunals were generally produced by jurists of Western Europe. The citations in those treatises referred to state practice and judicial decisions in only a few countries. Most writers also relied heavily on quotations and paraphrases of statements by earlier writers. These highly selective tendencies, presented in support of broad conclusions of law were far from consistent with the prevailing doctrine of sources based on state practice accepted by law by states generally. Moreover, many of the well known treatises were written from the standpoint of national concerns and perceptions. Schachter has commented that

many of the legal scholars had close links with their official communities and there were often pressures on them, sometimes obvious and sometimes subtle to conform to the official point of view. Even apart from such pressures, we recognize that social perspectives and values are generally shared by those in the same political and cultural community * * *. That a degree of bias is inescapable is recognized by the common assumption that more credible judgments on controversial issues of international law were more likely if made by a broadly representative body than by persons (however expert) from a single country or a particular political outlook.

Schachter at 38–39 (1991).

International bodies of “publicists” include the International Law Commission, an organ of the United Nations composed of 34 individuals elected by the U.N. General Assembly on the basis of government nominations and criteria of wide geographical representation. See Article 2 of the Statute of the I.L.C. They are concerned, as indicated above (section 3) with the preparation of codification conventions and other draft treaties. However, in the course of their work, and in their reports, positions are expressed by the Commission as a whole on existing rules of law.

A non-official body, the Institut de Droit International, established in 1873, is composed of about 120 members and associate members elected by the Institut on the basis of individual merit and published works. Its resolutions setting forth principles and rules of existing law and, on occasion, proposed rules, have often been cited by tribunals, states and writers. The biennial *Annuaire* of the Institut contains its resolutions and the lengthy reports and records of discussion that preceded the resolution. For an

account of its contribution from 1873 to 1973, see its centenary volume, *Livre du Centenaire, Annuaire de l'Institut de Droit International* (1973), particularly articles by Charles de Visscher and H. Battifol.

Another unofficial body, the International Law Association, (also founded in 1873) has about a thousand members, organized in national branches in many countries. Resolutions adopted by majority votes at conferences of the Association are based on reports and studies of international committees. The multinational character of the Association adds weight to those of its resolutions that are adopted by general consensus or large majorities representative of different regions and political systems. The biennial reports of the I.L.A. contain the resolutions and committee reports.

Another category of the writings of publicists is the Restatement of the Foreign Relations Law of the United States, prepared by recognized legal scholars and adopted after discussion by the American Law Institute, a non-official professional body. The first restatement appeared in 1965 designated curiously as the Restatement Second. A revised restatement was adopted in 1986 (Restatement Third). The restatement contains rules of international law as it applies to the United States in its relations with other states and also rules of U.S. domestic law that have substantial significance for the foreign relations of the United States. Although this is a restatement of existing rules by a United States professional association, it does not purport to state the rules that the U.S. government would put forward or support in all cases. As stated in its introduction, "the Restatement in stating rules of international law represents the opinion of the American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law." In considering what a hypothetical international court would decide is an applicable rule, the American Law Institute adopts a standard that aims at an objective international determination of general international law.

Writings of authoritative international law scholars are published annually by the Hague Academy of International Law in its *Collected Courses*, generally referred to by its French title, *Recueil des Cours*. The scholars are selected by the international curatorium of the Academy on a broad geographical basis. Although Western European contributors tend to predominate, there is increasingly representation of scholars and practitioners from other areas and with diverse points of view. In addition to discussion of particular topics, the *Recueil* includes an annual comprehensive work by a well-known publicist under the heading of General Course. As of 1993, the *Recueil* includes over 230 published volumes.

Notes and Questions

1. If "the most highly qualified publicists" are generally influenced by the interest and policies of their own states (and by their legal cultures), is their authority open to question on that ground? Would a tribunal look for majority opinions, "representative" views or "objective" data? Nardin, a political theorist, concluded that international law is founded not only on the customs of the community of states but on those of the community of international lawyers. T. Nardin, *Law, Morality and the Relations of States* 173 (1983). Schachter has described the "invisible college of international lawyers" as engaged in a continuous process of communication and collaboration across national lines. Schacht-

er, *The Invisible College of International Lawyers*, 72 *Northwestern Univ.L.Rev.* 217 (1977).

2. Since the "leading" publicists are often engaged or consulted by their own governments, they influence state conduct and are in turn influenced by their governments. What advantages and drawbacks are likely in this dual role? Can the legal advisers of foreign offices meet the sometimes conflicting demands of their "clients" and the obligation to ascertain the law objective? Do they have the double function of applying the law in the national interest and supporting international legal system? See Report of a Joint Committee on The Role of the Legal Adviser of the State Department, 85 *Am.J.Int.L.* 358-71 (1991).

3. The vast increase in international law has naturally led to specialization. It is no longer possible for international lawyers to claim expertise on the subject as a whole. Many find it difficult to keep abreast of developments in any one of the main specialized areas. (In 1992, the American Society of International Law had more than 30 "interest groups.") Has this reduced the role of general international law? See D. Vagts, *Are There No International Lawyers Anymore?* 75 *Am.J.Int.L.* 134-37 (1981). Schachter argues for maintaining international law as a unified discipline. "The Invisible College of International Lawyers" loc. cit. supra at 221-23. See also T. Franck, *Review Essay—The Case of the Vanishing Treatises*, 81 *Am.J.Int.L.* 763 (1987).

SECTION 6. DECLARATIONS AND RESOLUTIONS—"SOFT LAW"

A. GENERAL ASSEMBLY RESOLUTIONS

FILARTIGA v. PENA-IRALA

United States Court of Appeals, Second Circuit, 1980.
630 F.2d 876.

[This was a wrongful death action which was brought in the federal district court (Eastern District, N.Y.) by two nationals of Paraguay, the father and sister of a 17-year old Paraguayan, who, it was alleged, was tortured to death in Paraguay by the defendant Pena-Irala who at the time was Inspector-General of the police. Jurisdiction was claimed principally on the basis of the Alien Tort Statute (28 U.S.C. § 1350) which provides:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The plaintiffs claimed that the conduct resulting in the wrongful death constituted torture which they contended violated the "law of nations" that is, international customary law. The District Court dismissed the complaint on jurisdictional grounds, the district judge considering himself bound by higher court decisions to construe "the law of nations" as used in the Alien Tort Law, as excluding that law which governs a states treatment of its own citizens. On appeal, the Second Circuit Court of Appeals reversed the district court and ruled that the Alien Tort Law provides federal jurisdiction. The Court held that deliberate torture under the color of official authority