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The Research Centre for International Law
University of Cambridge

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Edited by

E. LAUTERPACHT, CBE QC
Honorary Professor of International Law, University of Cambridge
Bencher of Gray's Inn

C. J. GREENWOOD
Fellow of Magdalene College, Cambridge

and

A. G. OPPENHEIMER
Associate Editor: Civil Law Jurisdictions
Fellow of the Research Centre for International Law, University of Cambridge

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PREFACE

Most of the present volume is taken up with three substantial decisions of international tribunals: the two jurisdictional decisions of the International Court of Justice in the *Qatar* v. *Bahrain* case, delivered in 1994 and 1995, and the awards of the United Kingdom-United States Arbitration in the *Heathrow Airport* case. In view of the importance of the *Heathrow* case on a number of points, we have published the award and the more important supplementary decisions in full. In addition, the volume contains a selection of decisions from national courts in Switzerland and the Philippines.

It is with great pleasure that we also publish (at pages ix to xxiii) the text of the lecture entitled "The Judiciary, International and National, and the Development of International Law". This lecture was delivered by H.E. Judge Sir Robert Jennings on 5 October 1995 to mark the publication of the centenary volume of the *International Law Reports*. A version of this lecture appeared in the *International and Comparative Law Quarterly* in January 1996. We are most grateful to Sir Robert and to the Editor of the *Quarterly* for permitting us to publish the full text here.

The detailed summary of the *Heathrow* case was prepared by Ms Jennifer Skilbeck, Barrister, to whom we are most grateful. We also wish to acknowledge our debt to Mr Jeremy Lever, QC, and Mr A. I. Aust, Legal Counsellor, Foreign and Commonwealth Office for assisting us in locating material connected with this case. We are grateful to Justice Camilo D. Quiason and Justice Florentino P. Feliciano for two of the cases from the courts in the Philippines. These were prepared, with the Swiss cases, by Mr Andrew Oppenheimer, Fellow of the Research Centre of International Law and Associate Editor of these *Reports*. Ms Karen Lee and Ms Donata Rugarabamu gave invaluable assistance in seeing this volume through the press. The Table of Treaties and Index was compiled by HE Miss Maureen MacGlashan. Mrs Marie Pepper checked the copy and proofs. Mrs Glen Howard and Mrs Rebecca Drew gave much valuable secretarial assistance. The text of the decisions of the International Court has been photographically reproduced by kind permission of the Registrar of the International Court of Justice. The volume has been published by the Cambridge University Press and we are indebted to Ms Lyn Chatterton and Mr Fergal Martin for their contribution. The volume

has been printed with their customary case by the Gomer Press. To all the above, we extend our warmest thanks.

E. LAUTERPACHT
C.J. GREENWOOD

RESEARCH CENTRE FOR INTERNATIONAL LAW
UNIVERSITY OF CAMBRIDGE

January 1996

THE JUDICIARY, INTERNATIONAL AND NATIONAL, AND THE DEVELOPMENT OF INTERNATIONAL LAW

BY

HIS EXCELLENCY JUDGE SIR ROBERT JENNINGS QC*

The publication of the hundredth volume of the *International Law Reports*, some seventy years after the publication of the first volume, is a matter for celebration but also for rumination; for this is not just a useful work—what one of the earlier reviewers was to call a "useful accessory to the literature of international law". It has had and still has a determinative effect on the shaping and content of substantive international law.

It is right and proper that this celebration should take place in the London School of Economics for the ancestor of the *International Law Reports*, the *Annual Digest and Reports of Public International Law Cases* was "under the direction" of the Department of International Studies of the School. The "chief inspirers", to use Fitzmaurice's phrase, were Arnold McNair and Hersch Lauterpacht, the latter then on the teaching staff of the School. There was also an Advisory Committee of Sir Cecil J. B. Hurst, a former Legal Adviser to the Foreign Office and later President of the Permanent Court of International Justice; Mr W. E. Beckett, also of the Foreign Office; Dr Å. Hammarskjöld, the Registrar of the Permanent Court of International Justice, and Sir John Fischer Williams of Oxford and the Reparation Commission.

The volume first published—that was the 1925-26 volume,[1] which appeared in 1929, the plan being to work backwards to 1919 and also forwards at the same time—was said by its joint Editors, McNair and Lauterpacht, in words redolent, however, of McNair, to have been promoted by the suspicion that there is more international law in existence "than this world dreams of"; and "by the conviction that it is more international law that this world wants". Later, the Editors reported that "as the work progresses that surmise ripened into certainty", and went on to speak of "a body of authority which both in quantity and variety has exceeded our expectations".

I. Municipal Law cases

Let us be clear that the innovative aspect of the *Annual Digest* was the international reporting of the decisions of municipal courts in matters concerning international law. For international tribunals there were already many collections such as the *Recueil* of Lapradelle-Politis, J. B.

* Formerly President of the International Court of Justice and Member of the Court (1982-1995); Whewell Professor of International Law, University of Cambridge (1955-1981).

[1] The volumes were not given numbers until 1958; the volumes *then* numbered 1 and 2 were edited by Fischer Williams and Lauterpacht; the present Volume 3 was the first published and edited by McNair and Lauterpacht.

Scott's *Hague Court Reports*, George Grafton Wilson's *The Hague Arbitration Cases*, Moore's *Digest of International Law*; the Permanent Court of International Justice had its own elaborate reports—Hudson called it "probably the best documented public institution in the world"—and Hudson's own splendidly comprehensive and convenient *World Court Reports*.

So it was clearly the municipal courts' part of the *Digest* which in its quality and quantity exceeded even the Editors' sanguine expectations. One of them, Hersch Lauterpacht, had already examined municipal law in his 1927 *Private Law Sources and Analogies of International Law*. But this is a very different matter from the municipal courts' decisions, directly on questions of public international law; and Hersch Lauterpacht produced a seminal article in the *British Year Book* for 1929[2] which clearly reflected the *Digest* experience, significantly entitled, "Decisions of Municipal Courts as a Source of International Law"; and in which he refers to the other Editor's 4th edition of Oppenheim as a text book in which "copious references to case law will be found".[3] Lauterpacht in his article is able to say that "there is, quite apart from judgments of prize courts, hardly a branch of international law which has not received judicial treatment at the hands of municipal tribunals".[4] At first sight this looks a surprisingly large claim. There are parts of international law which one would expect to find treated even primarily by municipal courts: sovereign immunity, diplomatic privileges, piracy and of course prize. But the copious references to municipal decisions found in the body of the article show that Lauterpacht's broad generalization is no exaggeration. One remembers, too, that the argument in the *Lotus* case[5] before the Permanent Court contains several references to municipal decisions in collision cases; and the judgment of the Court relies on some of these cases, including the great English case, the *Franconia*.[6]

I must not yield to the temptation to linger over this extremely important article of Hersch Lauterpacht and I will confine myself to mentioning that, first, there is towards the end of it a penetrating discussion of municipal court decisions as a source of customary international law. In this connection it is interesting to note that Professor Karl Zemanek, in a recent article points out that domestic courts may play a role in "transforming codification conventions and other multilateral law-making treaties into customary law by applying them in non-party States. Thus, it has been argued that the United States should ratify the Vienna Convention on the Law of Treaties

[2] 10 *BYIL* (1929), p. 65.
[3] *Ibid* at p. 67, n. 1.
[4] *Ibid* at p. 67.
[5] PCIJ, Series A, No 10; 4 *Ann Dig* 5.
[6] *R* v. *Keyn* (1876) 2 Ex Div 63, 202.

since United States Courts were already treating its content as customary law".[7]

Secondly, there is in this article of Hersch Lauterpacht the suggestion that it might be made possible for municipal courts to refer to the Permanent Court of International Justice for an opinion "on difficult or unsettled questions of international law which do not involve national interests";[8] and even the suggestion that eventually this might evolve into a right of appeal. This idea has had a number of resurrections in recent years in relation to the International Court of Justice and has been treated as a rather daring suggestion. It is interesting that Hersch Lauterpacht's imagination was equal to making it even as early as 1929. In the important final sentence, he says of this suggestion for references from municipal courts to the World Court: "but it is believed that such an innovation would bring into relief the deep significance of the fact that international law is the only branch of law containing identical rules professedly administered as such by the courts of all nations".[9] Thus Lauterpacht's own thinking about municipal law and courts had undergone a change in direction: instead of thinking of municipal decisions as a source by analogy for the development of international law, those decisions have become a direct source of international law; a source moreover of both custom and of the interpretation of treaties. For many multilateral and law-making treaties fall continually to be interpreted and applied by municipal courts. Indeed to echo again Lauterpacht's own words, "hardly a branch" of international law escapes from this processing by municipal courts. In fact it is fair to say that the Editors of the *Annual Digest* had themselves found their task an educative one to an extent far beyond their expectations. A review of the first volume by "APF" notes about these reported municipal law cases:

> Speaking broadly, and subject to certain notable exceptions, it is the consistency of the decisions, both national and international, rather than conflicts or contradictions that impresses one, and this emphasizes the value and assistance that are to be derived from municipal decisions in elucidating the principles of international law.[10]

So one of the great values of the *Digest* was to reveal the importance of international law as what the present Secretary-General has referred to as a "common language" of law and diplomacy. As Mervyn Jones put it in his review on the tenth birthday of the *Digest*, it "is now so well

[7] *Festschrift für Rudolf Bernhardt*, 1995, pp. 289-306 at p. 294. Footnote references are omitted from the quotation.
[8] *Loc. cit.*, n. 2 above, at p. 95.
[9] *Ibid.*
[10] Alexander P. Fachiri, 11 *BYIL* (1930), p. 244 at p. 245.

established in the literature of international law that its importance as marking a new departure in the study of the subject is apt to be overlooked".[11]

Perhaps this is the point where, having spoken of municipal decisions as a direct source of international law, I should explain that I have not forgotten that Article 38 of the Hague Court's Statute speaks of judicial decisions as a "subsidiary means for the determination of rules of law". This provision I understand as a necessary recognition that judges whether national or international, are not empowered to make new laws. Of course we all know that interpretation does, and indeed should, have a creative element in adapting rules to new situations and needs, and therefore also in developing it even to an extent that might be regarded as changing it. Nevertheless, the principle that judges are not empowered to make new law is a basic principle of the process of adjudication. Any modification and development must be seen to be within the parameters of permissible interpretation. For otherwise the judges lose their one ultimate source of authority. Litigating parties do not resort to judges because they are wise or statesmanlike—very often they are manifestly neither—but because they know the law. Accordingly, I see the language of Article 38 as essential in principle and see no great difficult in seeing a subsidiary means for the determination of rules of law as being a source of law, not merely by analogy but directly.

What we have been examining thus far is the place of municipal judicial decisions on questions of international law, mainly as it was seen by Hersch Lauterpacht in 1929 as a result in no small measure of his participation in the great experiment of the creating of the *Annual Digest*. What then is the position today? For in the meantime there has developed a very great deal of new international law of the kind—especially multilateral law-making treaties—which looks even primarily to its being interpreted and applied by municipal courts. There was always a part of international law which, since it was directly concerned with individuals, had to be recognised, applied and enforced by municipal courts. The rules of international law about the position of accredited diplomats, or visiting Heads of State need by definition to be known and respected by the local courts.

Today the examples of rules of international law which require to be likewise known and applied by the local courts are legion: to mention only a few very familiar examples, there is much of the law of human rights, a great deal of the rules concerning the environment and conservation of resources, much of air law, space law, and maritime law; including navigation, the extent of maritime territory and of jurisdiction beyond territory; fishing; the resources of the continental

[11] Mervyn Jones, 22 *BYIL* (1945), p. 293.

shelf; much of the law about taxation and about foreign investment; governmental and non-governmental organisations (think of the massive litigation in various fora, including municipal courts, resulting from the demise of the Tin Council, or the relations of the Arab Organization for Industrialization and Westland Helicopters). In fact the place of international law in municipal court cases amounts today to a quiet and often unnoticed revolution in the nature and context of international law. It means that the strictly dualistic view of the relationship between international law and municipal law is becoming less serviceable and the old well-defined boundaries between public international law, private international law and municipal law are no longer boundaries but grey areas. By way of illustration one need only mention that large and thriving new grey area of litigation which goes under the tag of commercial arbitration.

It is true that the change in the nature of international law and of its relationship with municipal law is not always sufficiently apparent to either international or municipal judges. This is partly because so much of this international law is transformed into municipal statute and its international character is not always apparent.

It should also be mentioned here that the International Court of Justice is largely insulated from this new and very important kind of international law, at any rate in its contentious jurisdiction, in consequence of Article 34(1) of its Statute by which only States may be parties before the Court; this, we may remind ourselves, is a provision dating from the international law of 1920.

II. International Tribunals

If we now turn away from the municipal court decisions, we also find at the present time big changes in the international tribunals applying international law; that is, their sheer number and variety. A glance at many of the recent volumes of the *International Law Reports* strikingly demonstrates the contemporary phenomenon of the proliferation of such international tribunals applying international law but there are many that do not appear in the *International Law Reports*. There are all the administrative tribunals; the human rights courts; probably eventually the new Law of the Sea Tribunal; the *ad hoc* international criminal law tribunals; the proposed permanent one; the regional tribunals of various kinds, such as the Badinter Commission; the Iran/United States Claims Tribunal at The Hague; the very large number of *ad hoc* arbitration tribunals, both international and mixed; the new trade organisation tribunals; and very many others. But how many others? And what do they all do? And where do they sit? It is not easy to find out.

There is no kind of structured relationship between most of them.

There is not even the semblance of any kind of hierarchy or system. They have appeared as need or desire or ambitions promoted yet another one. In this particular respect, contemporary international law is just a disordered medley. Suffice it to say that it is very difficult to try to make any sort of pattern, much less a structured relationship, of this mass of tribunals, whether important or petty. It is sometimes difficult to find out what is going on, much less to study it.

As Professor Thierry, discussing this proliferation of tribunals, has recently put it: "each of them has the opinion that it is specific and thus, that it has its own problems". This is well illustrated by a recent decision of the Strasbourg Court of Human Rights in a case against Turkey, which had accepted the jurisdiction of the Court only subject to a reservation concerning happenings in the Turkish controlled part of Cyprus.[12] The clause of the Protocol providing for declarations for acceptance of jurisdiction was modelled almost verbatim on the "optional clause" (Article 38(2)) of the Statute of the International Court of Justice. It has been argued that the decisions of the Permanent Court of International Justice and of the International Court of Justice on the meaning of this clause, and of reservations to it, were at least, cogent precedents. The Court would have none of this, holding that the Turkish reservation was not permissible in law and that the World Court precedents were inapposite to the wholly different Strasbourg Court, which had different purposes and functions. I feel bound to say that I find this insistence on separateness disturbing; and wonder whether this is what the parties to the treaty intended when they took over the wording of the International Court of Justice Statute. In any event, this decision adds a whole new dimension to the art of distinguishing. These tendencies to fragmentation in international adjudication threaten to give an ironic modern twist to McNair's belief that there is more international law in existence "than this world dreams of".

III. Precedent

The *International Law Reports* are an influential addition to the literature of international law. But they must also be considered in their role as a source of precedent. This is not at all the same thing, even though Article 38 of the Statute of the International Court of Justice treats writings and judicial decisions as it were in the same breath. Somewhere Pound, discussing the way in which the French law of Louisiana became nevertheless a case law system, remarks that this always happens when you have law reports. But of course both Hague World Courts have had their own very full reports from the beginning.

[12] *Loizidou* v. *Turkey* (*Preliminary Objections*), Ser. A, No 310, 23 March 1995; to be reported at 103 *ILR* 621.

Moreover, the Court pretty rigidly eschews the citing of decisions other than those of the two World Courts (I speak, of course, of the pronouncements of the Court—separate opinions are a law unto themselves). Must we then say that the *International Law Reports* have only a very marginal role in respect of the creation of a doctrine and practice of precedent as a source of law? After all the *International Law Reports* are never cited in the decisions of the International Court of Justice, and this for obvious reasons of their duplication with the official reports from which the *International Law Reports* citations of Hague cases are simply lifted. It is my own belief that the *International Law Reports* ought to have a quite particular and important influence on the use of International Court of Justice decisions as precedent, for reasons I shall come to later.

This is perhaps the point at which I should explain that I am exonerated from attempting to deal generally with the subject of precedent in the World Court, for this has been done in a characteristically thorough, penetrating and elegant manner by Judge Shahabuddeen, appropriately enough in his recent Lauterpacht Memorial lectures, which will shortly be published by the Cambridge University Press. So I can afford to confine my remarks to some comments about aspects of the matter which rather trouble me.

As soon as one mentions the question of precedent in the World Court there will be murmurs about the old, but readily rejuvenated debate about the meaning of Article 59 of the Court's Statute; and whether it was intended to prevent any system of binding precedent besides referring as it obviously must to the *dispositif* of a decision as *res judicata*. (In speaking of the *dispositif* we are already using language that is unknown to the common lawyer.) But I cannot conceive that the classical debate about Article 59 has very great practical significance, for as far as I know nobody has ever seriously suggested that there ought to be, or indeed could be, a system of binding precedent in the World Court.

Article 59 has, of course, been dealt with very thoroughly by Judge Shahabuddeen; but he has one observation which is so deliciously final that I feel I must share it with you. He points out that, despite the Court's practice, Article 38, paragraph (d) of the Statute refers to "judicial decisions" in general and unqualified terms. This must include decisions of tribunals other than the International Court of Justice. It is equally clear that the provisions of Article 59 relate only to the International Court of Justice. Now if the purpose of Article 59 were "to prevent decisions of the Court from exerting precedential effect with binding force", it would follow that "the decisions of other courts and tribunals presumably stand on higher ground, not being caught by the Article 59 limitation. The consequence of this is so

improbable as to suggest that the interpretation on which it rests cannot be correct".

The main point I want to make about the language of Article 59 is, however, a different one. There is indeed an element of ambiguity. It is easy enough, and indeed important, to distinguish in theory between the *res judicata* and the precedent; it is not always so easy to do so in a particular case; there is often a grey area where choices have to be made—and this grey area is more extensive, given a system of *consensual* jurisdiction which nevertheless has imposed upon it a possibility of third party intervention, and in Article 63, a right of intervention; and given also that in contemporary international relations it is going to be a more and more common situation that a third State finds that it has indeed "an interest of a legal nature which may be affected by the decision" in a case between other States.

It is perhaps unfortunate that this question has come to revolve round the *Monetary Gold* case[13] which arose from a third State *omitting* to intervene. I still think, though I seem to be lonely in this position, that President Sir Arnold McNair, in his very short declaration, said all that needed to be said in relation to the facts of that particular case. Let me remind you of it:—

> The Court is asked to adjudicate upon an Italian claim against Albania arising out of an Albanian law of January 13th, 1945. Albania is therefore an essential respondent. But these proceedings are not brought against Albania, nor does the Application name Albania as a respondent, although there is nothing in the Washington Statement which could preclude the Italian Government from making Albania a respondent. I cannot see how State A, desiring the Court to adjudicate upon its claim against State B, can validly seize the Court of that Claim unless it makes State B a respondent to the proceeding—however many other States may be respondents.[14]

We must, however, resist the temptation to divert into this fascinating and very important legal problem of third party intervention, or non-intervention; except perhaps just to mention that the decision of the Chamber in the *El Salvador/Honduras: Nicaragua intervening* case[15] has loosened things up considerably in discovering the possibility of a new kind of partial intervention where the intervener is not a non-party; which device mitigates the jurisdictional link problem, though at the expense of the application to the intervener of Article 59.

But whatever solution is employed to solve the problem—whether allowing intervention, developing a new kind of intervention, or as in

[13] *Monetary Gold Case* (*Preliminary Objection*), *ICJ Reports 1954*, p. 19; 21 *ILR* 399.
[14] *ICJ Reports 1954*, at p. 35; 21 *ILR* 399 at 408.
[15] *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*), *ICJ Reports 1992*, p. 351; 97 *ILR* 112; (*Application by Nicaragua for Permission to Intervene*) (Chamber), *ICJ Reports 1990*, p. 92; 97 *ILR* 112 at 266.

the *Libya/Malta* case,[16] refusing intervention yet paring off large parts of the main case for non-decision and thus allowing to the would-be intervener more than they would have dared hope for if they had been permitted to intervene—there is usually involved some compromise of the pure consensual principle of jurisdiction. There is a valuable generalisation of this point, in Professor Georges Abi-Saab's reflections on the evolution of the International Court.[17] He points to the tendency of the Court from the beginning to move to its own "institutionalisation" by affirming its autonomy *vis-à-vis* the parties in the way it works and in its procedure of decision. This, he very rightly says, is the crucial difference of the Court from arbitration, which depends upon a mandate from the parties; and where, for example, third party intervention is not conceivable without a new agreement, and a new mandate.

There is another aspect of this subtle and elusive relationship between the *res judicata* and the precedent which becomes apparent as soon as one begins to ask to what extent judicial decisions are properly speaking sources of international law. Here one immediately turns to that magisterial treatment by Fitzmaurice hidden away in the *festschrift* for Verzijl.[18] There Fitzmaurice illustrates the problem from the *Anglo-Norwegian Fisheries Case*.[19] Of course the decision of the Court in the *dispositif* is "only binding on the parties to the dispute, and binding on them only for the purposes of the particular dispute". Furthermore, no other country is bound by the decision. This, says Fitzmaurice, is "technically correct, but is it true as a practical reality?" He gives the answer to his own question:

> In practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general *principle* of straight base-lines, at any rate in any legal proceedings, even (in all probability) before a tribunal other than the International Court.[20]

Certainly, the process by which this result has been brought about owes something to practice and general opinion as well as to the Judgment of the Court. But there is no gainsaying the practical authority and power of that precedent of the International Court. It would be wrong, of course, to try to treat all judgments, even of the International Court, as being of equal authority. It depends upon a

[16] *Continental Shelf Case (Libyan Arab Jamahiriya/Malta) (Application by Italy for Permission to Intervene), ICJ Reports 1984*, p. 3; 70 *ILR* 527.
[17] G. Abi-Saab, "De L'Evolution de la Cour", *Revue Générale de Droit International Public*, 1992, p. 273.
[18] Sir Gerald G. Fitzmaurice, "Some Problems regarding the Formal Sources of International Law", *Symbolae Verzijl*, 1958, p. 153.
[19] *ICJ Reports 1951*, p. 116; 18 *ILR* 86.
[20] Fitzmaurice, *supra* at p. 170.

number of factors; and one is that one must look to see how they wear in later practice.

It is interesting to note again that the provisions of the Statute of the International Court of Justice are singularly unhelpful in the matter of exploring that shadowy area between precedent and *res judicata*. For both Article 38(d) and Article 59 use the same word, "decisions"; and it is precisely that word that is responsible for the ambiguity of Article 59. (For once, the French version does not help). As to Article 38(d), it is difficult not to agree with Fitzmaurice who says that it "errs in placing judicial decisions on the same footing as the teachings of the most highly qualified publicists".[21]

The judgments of the International Court of Justice accept this distinction between writings and judicial decisions; for there is a strong drafting convention that publicists, however eminent, are not cited at all in the Court's judgments or advisory opinions. (They are, of course, frequently cited in separate opinions). The main reason for this convention is, one suspects, not so much based upon any principle concerning a source of law, as to avoid invidious distinctions between publicists cited and publicists not cited.

Fitzmaurice, however, in a well-known passage in his article on sources, makes another distinction between writings and decisions. Let me remind you of it:—

> When an advocate before an international tribunal cites juridical opinion, he does so because it supports his argument, or for its illustrative value, or because it contains a particularly felicitous or apposite statement of the point involved, and so on. When he cites an arbitral or judicial decision he does so for these reasons also, but there is a difference—for, additionally, he cites it as something *which the tribunal cannot ignore*, which it is bound to take into consideration and (by implication) which it ought to follow unless the decision can be shown to have been clearly wrong, or distinguishable from the extant case, or in some way legally or factually inapplicable.[22]

There are two ways of referring to a previous judgment: as with juridical opinion it can be used in order to quote a passage which seems to put something rather well; but this is quite different from citing the *decision* as something having those other qualities which make up a precedent. It is important to be able to distinguish these two completely different uses of reported cases; for even a casual acquaintance with almost any judgment of the International Court of Justice will reveal that the Court itself uses reported cases in both these different ways. How then are we to identify this precedential decision from mere felicitous drafting?

[21] *Ibid* at p. 174.
[22] *Ibid* at p. 172.

Here I suggest that international law has something to learn from the common law. And in common law terms, the question we are posing is how to establish the *ratio decidendi* of a case and distinguish it from *obiter dicta*? This may seem a bold suggestion because the international law books hardly if at all mention the term *ratio decidendi*; though I am reminded by Judge Shahabuddeen's lectures that I myself did use the term in my dissenting opinion in the 1987 case about a *Review of Judgment No 333 of UNAT*;[23] when I drew what I still regard as a useful distinction between the *ratio decidendi* and "many different ideas that are highly adumbrated but not pursued".[24] In any event, international lawyers talk about an *obiter dictum*; and that implies the existence in international law decisions of something that the common lawyer calls the *ratio decidendi*. In fact I fail to see how you can have one without the other.

The making of this distinction seems to me to be no more than a question of proper intellectual discipline in the use of precedent. For it must be said that the Court's judgments are not above sometimes citing passages from previous judgments almost as if any pronouncement of the Court may be cited, not because it embodies the decision in the case but because it is a passage that has become hallowed into something akin to the Holy Writ. Let me give you an example which any international lawyer must come across.

In the jurisdiction phase of the *Mavrommatis Concessions* case in 1924,[25] the following astonishing, but constantly cited phrase occurs:—

> A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.

Reading this curious pronouncement one sees immediately that a dispute is not at all the same thing as a disagreement and also that a dispute can be between more than two persons. There is no need to pursue the criticism, however, for Professor Morelli (in his dissenting opinion in *South West Africa cases* (*Preliminary Objections*)[26] and more recently Professor Cassese, have done that most thoroughly.[27] Yet the Court cites this passage still, the most recent example being the judgment in the *East Timor* case;[28] though here significantly bowdlerised to avoid the reference to *two* parties.

[23] *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal* ("*Yakimetz Case*"), *ICJ Reports 1987*, p. 18; 83 *ILR* 296.

[24] *ICJ Reports* 1987, at p. 152; 83 *ILR* 296 at 437.

[25] *The Mavrommatis Palestine Concessions*, PCIJ Series A, No 2; 2 *Ann Dig* 27.

[26] *South West Africa Cases* (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*) (*Preliminary Objections*), *ICJ Reports 1962*, p. 319 at pp. 564*ff*; 37 *ILR* 3 at 176*ff*.

[27] A. Cassese in *Studi in onore di Gaetano Morelli*, 1975, at p. 179.

[28] *Case concerning East Timor* (*Portugal v. Australia*), *ICJ Reports 1995*, p. 90; to be reported in volume 104 of the *International Law Reports*.

Now why is this unfortunate passage so much cited? Surely not because it represented the decision in the case. The issue in that case was whether the dispute regarding the interests of Mr Mavrommatis constituted a dispute between the Mandatory and another Member of the League of Nations; and whether, if so, it was a dispute that could be settled by negotiation. No one had any doubt that there was indeed a dispute; or about what a dispute was. In short that definition of a "dispute" is an *obiter dictum*. It can hardly be cited, on the other hand, for being particularly felicitous or apposite; at least not after Morelli finished with it. I believe it is much cited just because it makes for the draftsman an easy initial run in for introducing any argument about disputes.

How then do we set about finding the true decision, the precedent, the principle of decision in a case? It is clearly not the same as the *dispositif*, for the *dispositif* ought not to include argument, though argument sometimes erroneously creeps in. This purity of the *dispositif* from argument reflects the like purity required of the parties' submissions, which according to Article 50 of the Court's Rules, should be set out "distinctly from the arguments presented"; though again this requirement seems sometimes not to be noticed by parties.

So the *ratio decidendi* will comprehend the decision in the *dispositif* but also the determinative argument which led to that decision.

Perhaps the handiest definition is the one by Cross and Harris, that it means "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion".[29] Of course, it may well be that a sentence of a judgment may indeed digest a determining principle of the case. One finds an excellent and famous example in that same *Mavrommatis Concessions* judgment:—

> By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person or its subjects, respect for the rules of international law.[30]

I offer these ideas on the importance of scientific discipline in the treatment of international precedents with diffidence because authorities who must command respect have felt that the idea of finding the *ratio decidendi* of a decision has no place in the international sphere. No less an authority than Anzilotti, dissenting in the *Chorzów Factory* case, is quoted by Judge Shahabuddeen as "coming near" to that in the passage of Anzilotti's opinion where he rejects any attempt to distinguish between "essential and non-essential grounds, a more or

[29] R. Cross and J. W. Harris, *Precedent in English Law*, 4th edition, 1991, at p. 178.
[30] PCIJ, Series A, No 2; 2 *Ann Dig* 398 at 401.

less arbitrary distinction which rests on no solid basis and which can be regarded as an inaccurate way of expressing the different degree of importance which the various grounds of a judgment may possess for the interpretation of its operative part".[31] But with great respect, this has little to do with precedent. The question in that case was, what was the "binding" part of a judgment for the purposes of Article 60 of the Statute, where there has been a dispute between the parties over the meaning of the "binding part". In fact it was concerned with Article 59 and the *res judicata*. And yet we have already noticed that *that* distinction is sometimes a shadowy one.[32]

Judge Shahabuddeen also cites Hersch Lauterpacht:—

> It is not conducive to clarity to apply to the work of the Court the supposedly rigid delimitation between *obiter dicta* and *ratio decidendi* to a legal system based on the strict doctrine of precedent[33]

But strictness is a matter not of a difference in kind but of degree, and I do not understand why a technique found essential in a system of strict precedent should thereby be disqualified from assisting in a less strict system; indeed, I would have supposed it even more useful in a system founded on the idea of a jurisprudence, which I take is a system that looks for a run of like decisions. Yet, Ambassador Rosenne also thinks there is no place for the distinction in international law. So there is indeed formidable authority for that view.

But Hersch Lauterpacht had a quite particular view of the proper scope of the pronouncements of international tribunals when he advocated in his *Development*, that "there are compelling considerations of international justice and of the development of international law which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals".[34] This passage, as you will remember, was cited with approval by Judge Jessup in the opening paragraph of his separate opinion in the *Barcelona Traction* case.[35] Of more direct interest to us here, however, is that in the same case, that same passage from Lauterpacht was used by Fitzmaurice in his separate opinion, as the reason, one might almost say the excuse, for the view "that it is

[31] *Judgment No 11* (*Interpretation of Judgments Nos 7 and 8 concerning the Case of the Factory at Chorzów*), PCIJ Series A, No 13, p. 23; 4 *Ann Dig* 506.

[32] Judge Shahabuddeen also cites the Permanent Court in the *Polish Postal Service in Danzig* case (Series B, No 11, pp. 29-30; 3 *Ann Dig* 421 at 422): "It is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned". But are any *reasons* binding on the parties as *res judicata* in the sense of Article 59?

[33] H. Lauterpacht, *The Development of International Law by the International Court*, revised edition, 1958, at p. 61.

[34] *Ibid* at p. 37.

[35] *Case concerning the Barcelona Traction, Light and Power Company Limited, ICJ Reports 1970*, p. 3 at p. 161; 46 *ILR* 1 at 335.

incumbent on international tribunals to bear in mind this consideration, which places them in a different position from domestic tribunals as regards dealing with—or at least commenting on—points that lie outside the strict *ratio decidendi* of the case". In the same paragraph, however, he says, of his own opinion, "these comments can only be in the nature of *obiter dicta*, and cannot have the authority of a judgment".[36] This statement does, therefore, give very high authority for the proposition that the distinction between *res judicata* and *obiter dicta* is applicable to international judgments; and if judges are indeed supposed by some authorities to be morally obliged to write monographs rather than opinions, this distinction has better be kept well honed. Nevertheless, an *obiter* opinion can of course be valuable and important even though not part of the precedent.

But whenever judges or publicists talk about *obiter dicta* the point of the distinction from the *ratio decidendi* is conceded by implication. So in spite of the weight of contrary opinion, I remain unrepentant. In my belief that a proper intellectual discipline in the use of international decisions as precedents cannot avoid endeavouring to distinguish that part of the decision which should be regarded as the precedent and the parts that should not; whether the common law terminology be used to indicate the process is not so important.

This whole business of understanding judgments as precedents, and deciding how far and in what particular respects they develop the law, brings me back to the *International Law Reports*. The Hague Court in particular has always been very well served by its own excellent *Reports*; and is, I think, probably the only Court which publishes—eventually—virtually the entire archives of a case. But the *International Law Reports*, though it has now for many years reproduced verbatim the official report of the judgment and the separate opinions, has never—and we must be thankful for this—ceased also to continue to be the *Annual Digest*. The "summary", by the series' own Editors, with its traditional "Held" part—not just the operative part, the *res judicata*, but also a penetrating analysis of the relevant determinative argument—is admirable; not just because it is convenient to have a summary, but because each of these summaries is an expert piece of analysis. In fact, it represents the scientific examination that is necessary to establish the parameters of the precedent. The answer to those who say the *ratio decidendi* technique cannot be employed in International Court of Justice cases, is that the *International Law Reports* Editors virtually do it all the time. And these invaluable summaries of the cores of decisions, are not of course to be found in the official *Reports*.

[36] *ICJ Reports 1970*, p. 64; 46 *ILR* 1 at 238.

It is right, therefore, to pay tribute, and express the grateful thanks of the international law community, to those many persons who have contributed over the years—their names are recorded in the several introductions to the volumes of the *International Law Reports*—and especially to the two present Editors, Eli Lauterpacht and Christopher Greenwood, for their long and faithful dedication and expert labours making this series a first class and indispensable tool; not just for becoming acquainted with cases, but for understanding them and using them for eminently practical purposes.

EDITORIAL NOTE

The *International Law Reports* endeavour to provide within a single series of volumes comprehensive access in English to judicial materials bearing on public international law. On certain topics it is not always easy to draw a clear line between cases which are essentially ones of public international law interest and those which are primarily applications of special domestic rules. For example, in relation to extradition, the *Reports* will include cases which bear on the exception of "political offences" or the rule of double criminality, but will restrict the number of cases dealing with purely procedural aspects of extradition. Similarly, while the general rules relating to the admission and exclusion of aliens, especially of refugees, are of international legal interest, cases on the procedure of admission usually are not. In such borderline areas, and sometimes also where there is a series of domestic decisions all dealing with a single point in essentially the same manner, only one illustrative decision will be printed and references to the remainder will be given in an accompanying note.

Decisions of International Tribunals

The *Reports* seek to include so far as possible the available decisions of every international tribunal, e.g. the International Court of Justice, or *ad hoc* arbitrations between States. There are, however, some jurisdictions to which full coverage cannot be given, either because of the large number of decisions (e.g. the Administrative Tribunal of the United Nations) or because not all the decisions bear on questions of public international law (e.g. the Court of the European Communities).
In these instances, those decisions are selected which appear to have the greatest long-term value.

Human rights cases. The number of decisions on questions of international protection of human rights has increased considerably in recent years and it is now impossible for the *Reports* to cover them all. As far as decisions of international jurisdictions are concerned, the *Reports* will continue to publish decisions of the European Court of Human Rights and of the Inter-American Court of Human Rights, as well as "views" of the United Nations Committee on Human Rights. Selected decisions of the European Commission of Human Rights will be printed, chosen by reference to the importance of the points at issue and their interest to public international lawyers generally. (All reports of decisions of the European Commission of Human Rights are published in an official series, the *Official Collection of Decisions of the European Commission of Human Rights,* as well as in the *European Human*

Rights Reports). Decisions of national courts on the application of conventions on human rights will not be published unless they deal with a major point of substantive human rights law or a matter of wider interest to public international lawyers such as the relationship of international law and national law, the extent of the right of derogation or the principles of the interpretation of treaties.

International arbitrations. The *Reports* of course include arbitral awards rendered in cases between States which involve an application of public international law. Beyond this, however, the selection of arbitral decisions is more open to debate. As these *Reports* are principally concerned with matters of public international law, they will not include purely private law commercial arbitrations even if they are international in the sense that they arise between parties of different nationality and even if one of them is a State. (For reports of a number of such awards, see *Yearbook Commercial Arbitration* (ed. Pieter Sanders, under the auspices of the International Council for Commercial Arbitration)). But where there is a sufficient point of contact with public international law then the relevant parts of the award will be reported. Examples of such points of contact are cases in which the character of a State as a party has some relevance (e.g. State immunity, stabilization clauses, *force majeure*) or where there is a choice of law problem involving discussion of international law or general principles of law as possible applicable laws. The same criteria will determine the selection of decisions of national courts regarding the enforcement of arbitral awards.

Decisions of National Tribunals

A systematic effort is made to collect from all national jurisdictions those judicial decisions which have some bearing on international law.

Editorial Treatment of Materials

The basic policy of the Editor is, so far as possible, to present the material in its original form. It is no part of the editorial function to impose on the decisions printed in these volumes a uniformity of approach or style which they do not possess. Editorial intervention is limited to the introduction of the summary and of the bold-letter rubric at the head of each case. This is followed by the full text of the original decision or of its translation. Normally, the only passages which will be omitted are those which contain either statements of fact having no bearing on the points of international law involved in the case or discussion of matters of domestic law unrelated to the points of international legal interest. The omission of material is usually indicated

either by a series of dots or by the insertion of a sentence in square brackets noting the passages which have been left out.

Presentation of Materials

The material in this volume is of two kinds, material reproduced photographically and material which has been freshly set for this volume.

Material photographically reproduced. This consists exclusively of reports originally printed in the English language. The material can usually be recognized by the differences between its type-style and the Baskerville type otherwise used in these *Reports*. The source of the material is identified by the reference to "Report" in square brackets at the end of the case. Where more than one citation is given, the report used is the one first listed. The bold type figures in square brackets in the inner margin of each page refer to the pagination of the original report. The smaller figures in square brackets in the margins of these cases are the indicators of footnotes which have been editorially introduced.

Other material. The remaining material in the volume has been typeset for this volume. This includes all material specially translated into English for these *Reports* as well as some material in English which in its original form was not suitable for photo-reproduction. The source of all such material is indicated by the reference to the "Report" in square brackets at the end of the case. The language of the original decision is also mentioned there. The bold figures in square brackets in the body of the text indicate the pagination of the original report. Small figures in square brackets within the text are indicators of footnotes which have been editorially introduced.

Notes

Footnotes. Footnotes enclosed in square brackets are editorial insertions. All other footnotes are part of the original report.

Other notes. References to cases deemed not to be sufficiently substantial to warrant reporting will occasionally be found in editorial notes either at the end of a report of a case on a similar point or under an independent heading.

Digest of Cases

With effect from Volume 75 the decisions contained in the *Reports* are no longer arranged according to the traditional classification scheme. Instead a Digest of Cases is published at the beginning of each

volume. The main headings of the Digest are arranged alphabetically. Under each heading brief details are given of those cases reported in that volume which contain points covered by that heading. Each entry in the Digest gives the name of the case concerned and the page reference, the name of the tribunal which gave the decision and an indication of the main points raised in the case which relate to that particular heading of the Digest. Where a case raises points which concern several different areas of international law, entries relating to that case will appear under each of the relevant headings in the Digest. A list of the main headings used in the Digest is set out at page xxxiii.

Consolidated Index and Tables

A Consolidated Index and Consolidated Tables of Cases and Treaties for volumes 1-80 was published in two volumes in 1990 and 1991. A further volume containing the Consolidated Index and Consolidated Tables of Cases and Treaties for volumes 81-100 will be published later in 1996.

TABLE OF CASES REPORTED

ALPHABETICAL

(Cases which are reported only in a note are distinguished from cases which are reported in full by the insertion of the word "note" in parentheses after the page number of the report.)

TABLE OF CASES REPORTED

ARRANGED ACCORDING TO COURTS AND TRIBUNALS (INTERNATIONAL CASES) AND COUNTRIES (MUNICIPAL CASES)

(Cases which are reported only in a note are distinguished from cases which are reported in full by the insertion of the word "note" in parentheses after the page number of the report.)

I. DECISIONS OF INTERNATIONAL TRIBUNALS

II. DECISIONS OF MUNICIPAL COURTS

DIGEST OF CASES

List of Main Headings

(Those headings for which there are entries in the present volume are printed in italics. For a guide to the Digest, see the Editorial Note at p. xxv.)