

Decisions of the International Court of Justice are almost as replete with references to precedent as are decisions of a common law court. Even though previous decisions are not binding, the Court relies upon them as authoritative expressions of its views on decided points of law. In his lectures, Judge Shahabuddeen examines various aspects of this phenomenon. While the treatment of precedent in common law courts of last resort has become more flexible, the case law of the International Court of Justice has shown a remarkable jurisprudential consistency. In addition, Judge Shahabuddeen discusses the way in which parties to cases are themselves guided by previous decisions of the Court in framing and presenting their cases.

Precedent in the World Court

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PRECEDENT
IN THE WORLD COURT

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FOR RIYAH AND JAVED

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Foreword

SIR ROBERT JENNINGS

The historical endeavour, extending from the First Hague Conference of 1899 until eventual success in 1920, to establish a permanent international court as distinct from *ad hoc* tribunals, was inspired by the belief that only a court established on a permanent basis could, besides deciding disputes, make an adequate contribution to the progressive development of international law as a working system of law. This belief implied a commitment to the acceptance of a case-law system as the way forward. This acceptance was confirmed by the decision to publish law reports for the Permanent Court of International Justice; for, given law reports, a system based upon case law invariably follows.

The principal features of this case law were economically and inimitably described and analysed by Hersch Lauterpacht in his *Development*;¹ it is therefore a happy circumstance that this new and considerable study by Judge Shahabuddeen was one of the series of Hersch Lauterpacht Memorial Lectures given in Cambridge University.

The formal basis of this case law is still that now laid down in the present Article 38 of the Statute of the International Court of Justice (for earlier drafts see p. 52 below) which lists amongst what the Court is to apply, 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists

¹ The first edition of Lauterpacht's *Development of International Law by the Permanent Court of International Justice* was in 1934; the revised edition under the title of *The Development of International Law by the International Court* was in 1958; see Chapter 1 of the later version and especially pp. 9–25, which deal with the question of judicial precedent in international law.

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of the various nations, as subsidiary means for the determination of rules of law’.

This treatment of the writings of publicists and judicial decisions as sources that are on a par has been much modified by the practice of both World Courts, at any rate as regards the treatment of the Court’s own decisions. The difference is very clearly stated by Fitzmaurice (see pp. 42 and 88 below): a publicist is cited because he has expressed a point in a way that is felicitous, or apposite, but a judicial decision is cited because it is ‘something which the tribunal cannot ignore’. But there is a problem. A passage from a previous judgment may also be cited almost in isolation from the case as a whole, and because it happens to be a felicitous expression of a point the Court is desirous of making. How does one distinguish between using earlier judgments almost as if they were writings, and their use as authoritative and highly persuasive precedent decisions? What is the proper technique for determining the authoritative precedent which establishes principles and rules of law; and distinguishing it from that particular decision to which Article 59 refers?

This is the question, or rather set of questions, that Judge Shahabuddeen sets out to tackle in this monograph: the principle of *stare decisis*; the meaning of Article 59; the art of distinguishing the *ratio decidendi* and *obiter dicta*; the position of chambers; advisory opinions of the Court; separate and dissenting opinions of the Judges; and all the other important but delicate matters that arise. Being common law trained and now a very respected and experienced Judge of the World Court, he is particularly well qualified to do so; for the common law has a unique experience of the techniques of handling cases. This, as he makes clear, is not to suggest of course that the World Court could adopt anything like the common law doctrine of binding precedent. Indeed the necessary hierarchical court system which is the essence of binding precedent is in any case lacking in international law. Moreover, as a great common lawyer and international lawyer, A. L. Goodhart, pointed out, the Continental system of following a settled *jurisprudence* may be thought superior in practicality. For a ‘system of law to be truly practical [it] must be one based on a series of experiments, tested by trial and error; this, however, is not the method of English law, for, owing to the doctrine of precedent, the first experiment must

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also be the last'.² Fortunately, as Judge Shahabuddeen points out, even the common law now shows a certain degree of flexibility at the top of the system.

It is an honour and a pleasure to provide a foreword for so accomplished a study of a topically apposite but hitherto relatively neglected subject. It is a happy coincidence that this study of the place of the World Court in the development of international law appears as the present Court is about to celebrate its fiftieth anniversary.

² See A. L. Goodhart 'Precedent in English and Continental Law', *LQR* 50 (1934), at p. 26.

Preface

In important ways the World Court was established on the Continental model, which knows no doctrine of precedent. Indeed, if curiously so, in 1920 it was the representatives of the legal systems where judge-made law prevailed who were foremost in insisting that decisions of the Court should not have precedential force as understood in Anglo-American judicial practice. That in principle remains the case. And yet decisions of the Court are almost as replete with references to precedents as are decisions of a common law court. This monograph is devoted to some aspects of this phenomenon.

The subject, by reason of its nature, attracts reference to the common law experience. I accept that a more rounded approach could benefit from perceptions made from the standpoint of other legal traditions. Even so, imperfections will appear to me as soon as the text leaves my hands; others will surface in due course. I own the shortcomings in advance.

Judge Sir Robert Jennings, a former President of the Court, Judge Gilbert Guillaume and Professor Elihu Lauterpacht have been good enough to read the work in draft. I thank them for their comments.

The study, which is limited to decisions of the Court itself, is based on the Hersch Lauterpacht Memorial Lectures of November 1994. I thank Professor Lauterpacht for inviting me to speak. Sir Robert Jennings took the chair at the lectures and has now provided a foreword. I appreciate this.

I would like also to thank my secretary, Miss Charlotte Kamers, for her willingness, patience and efficiency.

Abbreviations

- AC** Appeal Cases
- AFDI** *Annuaire français de droit international*
- AJIL** *American Journal of International Law*
- All ER** *All England Reports*
- Aust YBIL** Australian Year Book of International Law
- Barberis**, 'La Jurisprudencia' Julio A. Barberis, 'La Jurisprudencia Internacional como fuente de Derecho de Gentes según la Corte de la Haya', *ZöV*, 31 (1971), pp. 641–670
- Beckett** 'Jurisprudence' W. E. Beckett, 'Les Questions d'Intérêt général au point de vue juridique dans la Jurisprudence de la Cour permanente de Justice internationale', *Hag R*, 39 (1932–I), pp. 135–269
- Brierly**, 'Règles générales du droit de la paix' J. L. Brierly, 'Règles générales du droit de la paix', *Hag R*, 58 (1936–IV), pp. 5–237
- BYBIL** *British Year Book of International Law*
- Castberg**, 'La Méthodologie' Frede Castberg, 'La Méthodologie du droit international public', *Hag R*, 43 (1933–I), pp. 313–383
- CLJ** *Cambridge Law Journal*
- Col LR** *Columbia Law Review*
- Condorelli**, 'L'Autorité' Luigi Condorelli, 'L'Autorité de la décision des juridictions internationales permanentes', in *La Jurisdiction internationale permanente*, Colloque de Lyon (Paris, 1987), pp. 277–313
- Cross and Harris**, *Precedent* Rupert Cross and J. W. Harris, *Precedent in English Law*, 4th edn (Oxford, 1991)
- De Visscher**, *Theory and Reality* Charles De Visscher, *Theory and Reality in Public International Law*, tr. P. E. Corbett, revised edition (New Jersey, 1968)

List of abbreviations

- Documents Presented, 1920** Permanent Court of International Justice, Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice*, HMSO (London, 1920)
- Documents concerning the Action Taken by the Council of the League of Nations, 1921** League of Nations, *Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (Geneva, 1921)
- ECHR** European Court of Human Rights
- EJIL** *European Journal of International Law*
- Fitzmaurice**, *Law and Procedure* Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 2 vols. (Cambridge, 1986)
- Germ YBIL** *German Year Book of International Law*
- Goodhart**, 'Precedent' A. L. Goodhart, 'Precedent in English and Continental Law', *LQR*, 50 (1934), pp. 40–65
- Hag R** *Recueil des cours, Académie de Droit International de La Haye*
- Hudson**, *The Permanent Court* M. O. Hudson, *The Permanent Court of International Justice, 1920–1942, A Treatise* (New York, 1943)
- ICJYB** *International Court of Justice Yearbook*
- ICLQ** *International and Comparative Law Quarterly*
- Indian JIL** *Indian Journal of International Law*
- ILR** *International Law Reports*
- Jennings**, 'Collegiate Responsibility' Sir Robert Jennings, 'The Collegiate Responsibility and Authority of the International Court of Justice', in Yoram Dinstein (ed.), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (Dordrecht, 1989), pp. 343–353
- Jennings**, 'General Course' R. Y. Jennings, 'General Course on Principles of International Law', *Hag R*, 121 (1967–II), pp. 323–606
- Keith**, *Advisory Jurisdiction* K. J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Leiden, 1971)
- Koopmans**, 'Stare decisis in European Law' 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. 11–27
- Lauterpacht**, *Collected Papers* E. Lauterpacht (ed.), *International Law, being the Collected Papers of Hersch Lauterpacht*, Vol. II, (Cambridge, 1975)

List of abbreviations

- Lauterpacht**, *Development* Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (London, 1958)
- Lauterpacht**, 'Schools of Thought in International Law' H. Lauterpacht, 'The so-called Anglo-American and Continental Schools of Thought in International Law', *BYBIL*, 12 (1931), pp. 31–62
- LQR** *Law Quarterly Review*
- MLR** *Modern Law Review*
- Oppenheim** *Oppenheim's International Law*, 9th edn (London, 1992)
- Procès-Verbaux, 1920** Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes*, (The Hague, 1920)
- RGDIP** *Revue générale de droit international public*
- RIAA** *Reports of International Arbitral Awards*
- Röben**, 'Le précédent' Volker Röben, 'Le précédent dans la jurisprudence de la Cour internationale', *Germ YBIL*, 32 (1989), pp. 382–407
- Rosenne**, *Law and Practice* S. Rosenne, *The Law and Practice of the International Court*, 2 vols. (Leiden, 1965); second revised edition in one volume (Dordrecht, 1985)
- Scelle**, 'Les Sources des diverses branches du droit' Georges Scelle, 'Les Sources des diverses branches du droit, Essai sur les sources formelles du droit international', in *Recueil d'études sur les sources du droit en l'honneur de François Gény*, III (Paris, 1934)
- Sørensen**, *Les Sources* Max Sørensen, *Les Sources du Droit international* (Copenhagen, 1946)
- UNCIO** *Documents of the United Nations Conference on International Organization*, 22 vols. (London/New York, 1945)
- Waldock**, *Advisory Jurisdiction* Sir Humphrey Waldock, *Aspects of the Advisory Jurisdiction of the International Court of Justice* (Gilberto Amado Lecture, Geneva, 1976)
- Waldock**, 'General Course' H. Waldock, 'General Course on Public International Law', *Hag R*, 106 (1962–I) pp. 1–251
- Wright**, 'Precedents' Lord Wright, 'Precedents', *CLJ*, 8 (1942), pp. 118–145
- YBILC** *Yearbook of the International Law Commission*
- ZöV** *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*