Judicial Precedent in the International Court of Justice

Some of you are expecting me to speak about Article 38(1)(d) of the Statute of the International Court of Justice ("ICJ") which requires the Court to apply judicial decisions subject to the provisions of Article 59, which states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". I would instead like to focus on why this is so.

If International law is regarded as a complete system, then every international situation is capable of being determined as a matter of law, either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles. It is hence impermissible for an international tribunal to pronounce non liquet¹ – to invoke the absence of clear legal rules applicable to a dispute as a reason for declining to give judgment.

It has recently been noted that "[a] steady flow of cases...allows a court to become an actor on the legal and political stage, raising its profile in the elementary sense that other litigants become aware of its existence and in the deeper sense that interpretation and application of a particular legal rule must be reckoned with as a part of what the law means in practice...a

court [also] gains political capital from a growing caseload by demonstrably performing a needed function.”2 Clearly this strategy develops doctrine without raising political concern.3

Law reflects a political system – “[P]olitics decides who the lawmaker and what the formulation of the law shall be; law formalizes these decisions and makes them binding”.4 The law’s limitation also contains its potential – law is as much a cause as it is an effect of politics. In the municipal sphere law is made for us, and only indirectly by us. At the international level law is made by states themselves. The creation of international law is therefore a matter of international agreement and accordingly, treaty and custom5 are the two most prominent formal sources of international law. The masterful Oppenheim’s Treatise, in its 8th and 9th editions, defines law “as a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power.”6 International law satisfies the three requirements of this definition with common consent underlined.

Different from the duty to submit to existing rules of international law is the liberty of all states within the international community to contribute to the evolution of those rules. In this

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5 The link with consent in a treaty is evident and materialised by Article 12(1) of the Vienna Convention of the Law of Treaties, 1969. As regards the link of consent with the existence of a rule of customary international law, see *Fisheries* judgment, ICJ Rep. (1951) 116 and commentary by Waldock in (1951) 28 B.Y.I.L. 114 where it emerges that specific consent of a state to customary rules is unnecessary, but timely objection will prevent a state’s becoming bound.
way, the character of rules is defined by common consent of all members of the international community – and the device of consensus comes in very handy in this regard. However, as common consent makes a rule, it also takes away. Thus, while a single state’s divergence from a rule does not alter the legal character of the rule, taken together with a similar attitude on the part of other states leads to a change in the law. Many states which achieved independence in the 20th century have questioned the extent to which certain parts of the hitherto accepted body of customary rules are properly to be regarded as true rules of a universal international law.

This decentralised method of making international law has a number of important effects on the legal obligations of states. It means first, that international law is rather obscure – and this obscurity centres on customary law. Since state practice is incomplete, inaccessible, or inadequately recorded, it falls on exposition by formal international bodies, whether or not they have a law creating role. In the Western Sahara case, the ICJ based its conclusion that self-determination must be regarded as a legal right on the evidence of a number of General Assembly resolutions endorsing the principle. A second consequence of the way international law is made is even when its content is clear its obligations are far from uniform. While the rules exist, a feature of international law is its particularity, that is its concern with specific situations and particular relationships. The particularity which is the hallmark of international law is a mixed blessing – while it enables unique situations to be dealt with in an appropriate way, the ease with which states can avoid assuming inconvenient legal obligations promotes

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intransigence and discourages compromise. This leads to the third and most important consequence of decentralised law making, the fact that international law is often controversial, because on important matters there will simply be insufficient agreement for a clear rule to emerge. Law which rests upon agreement will stand unchallenged only as long as the situation which made agreement possible remains unchanged. On most issues the law of a dynamic community⁹, with its constantly shifting balance of power and interests cannot be static. Thus, the ability or inability of states to maintain their claims effectively is crucial in determining the “international law”.

The acknowledgement by one state of another’s claim has the effect of preventing a subsequent challenge to its lawfulness.¹⁰ Where there are major conflicts of interests, however, things are more difficult. States have protested when enterprises owned by their subjects are seized without compensation and take counter measures. Armed invasion, once a crude but effective method of protecting investments, has fallen out of favour since the Anglo-French invasion of Egypt in 1956. Blocking of foreign assets, cutting off aid and now, bilateral investment treaties, have become chic. Recent challenges by states to the rights of foreign investors, which today through bilateral investment treaties are regaining the security they enjoyed in the days of the colonial empires, is a reminder that the world does not stand still.

⁹ In some subjects the interests of states are relatively constant, for example the purpose and functions of ambassadors changed little to enable a strong customary law to develop regulating their privileges and immunities.
¹⁰ See for example, the Channel Arbitration, (1979) 18 ILM 397 for when a claim can be said to be “opposable” to the state which has acknowledged it.
The development of the law by the process of claim necessarily invests states’ actions with far reaching significance as precedents. That international law can change quite rapidly even on highly controversial matters is illustrated by the development of the Exclusive Economic Zone in the early 1970s. As that experience shows, when law breaking is an important method of law making, conflict and controversy are unavoidable. It is this “logic of reciprocity” that deters powerful states from acting unilaterally to claim some minor advantage in the interests of avoiding similar and perhaps more far reaching claims from others.

It follows that in trying to form an accurate picture of the way legal precedent is made our focus must be on the state. When states agree they can make international law by treaty and custom. But since international law is a reflection of the way states view the world, law cannot be made when their interests are in sharp conflict. When states’ interests change established principles come under challenge. In such a situation only state practice can change the law and there will be controversy until new law emerges from the cauldron of claim and counter-claim. This convulsive process\(^\text{11}\) invests state acts with powerful law creating potential.

We are advised from Oppenheim that “it must be recognised that deficiencies in the means available for the enforcement of international law – including in particular the absence of truly compulsory arrangements for the judicial settlement of disputes – make it, by comparison with municipal law and the means available for its enforcement, certainly the

\(^{11}\) J. Merrills, *supra* at Chapters 1 and 2.
"weaker of the two in this respect."¹² Like its creation, the interpretation of international law is also highly decentralised. International courts have no compulsory jurisdiction and refusal to submit a dispute to an international tribunal is regarded as a legitimate exercise of state sovereignty. As a result international courts play only a subsidiary role in the interpretation of international law. Why?

First, since no judicial decision can be predicted with absolute certainty, when great interests are at stake the possibility of an adverse verdict makes judicial settlement unacceptable. Secondly, only rarely will a state take to court a case it expects to lose. The importance of taking an arguable issue to court lends itself, in international relations, to negotiation rather than judicial settlement because a compromise can be achieved which may not be open to a court applying the law. Thirdly, states often disagree over what the content of international law to be applied by the court should be. The decentralised creation of international law makes formal change difficult, especially where there is disagreement, and encourages states to make claims and to adopt practices inconsistent with the present law as a means of protecting their immediate interests and ultimately perhaps achieving a change in the law. Obviously states will refuse to subject themselves to the Court’s application of what they consider to be obsolete law – disputes are not justiciable if justice is disputable.¹³ Thus, the chief virtue of the judicial process – its independence – is from the state-centric point of view, its chief disadvantage. In 1907 the German Chancellor put the point candidly when he

¹² Jennings & Watts, supra. at 11.
¹³ Merrills at Chapter 2.
rejected a treaty of general arbitration on the ground that: “It would deprive us of bringing
into play the factor of power, both generally and in regard to obnoxious smaller states.”¹⁴

It is therefore possible to understand why states are reluctant to make a general acceptance of
the Court’s decisions as “law” or introduce the discipline of judicial precedent in the ICJ.

The ICJ takes judicial notice of international law.¹⁵ This design principle combined with a
voluntary basis for the ICJ is enshrined in the opening words of Article 38(1) of its Statute –
“The Court, whose function is to decide in accordance with international law such disputes
as are submitted to it...”¹⁶. With the creation and interpretation of international law such a
decentralised process, how can judicial precedent, meaning law ‘creation’, be held – as a
matter of principle – to this system? I will now turn to my friends to talk about matters of
practice.

¹⁴ Quoted in G. Schwarzenberger, Power Politics (1964).
¹⁵ Fisheries Jurisdiction Case, ICJ Rep. (1974) p. 9; reaffirmed in the Military and Paramilitary Activities Case,
¹⁶ Article 38(1), Statute of the International Court of Justice.

Judicial Precedent in the ICJ - Final (BIICL Annual Meeting)