LLB

Public International Law Casebook

15th edition 1994

Edited by Robert M MacLean

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PREFACE

This HLT Casebook has been written as a companion volume to the *Public International Law Textbook*, but also stands as an invaluable source of reference materials by itself. Its purpose is to supplement and enhance the study of this subject by providing easy access to the most important sources of international law. The Casebook has been divided into chapters, with cases in alphabetical order in each chapter, in order to facilitate reference.

This edition of the *Public International Law Casebook* takes into account the most current developments in the field of international law. From the United Kingdom courts we have a number of notable decisions in the area of immunity from the jurisdiction of the United Kingdom courts. The Court of Appeal's decision in *Kuwait Airways Corporation* v *Iraqi Airways Company* provides important guidance on when a state company is entitled to the protection conferred by the State Immunity Act 1978. Similarly, the rights of states and state bodies to sums due on the liquidation of commercial banks have been clarified in *Re Rafidain Bank*. The problem of state succession and immunity was also the subject of a short decision by the Scottish courts in *Coreck Maritime GmbH* v *Sevrybokholodflot.*

In 1993 and early 1994, the International Court has been relatively inactive. Its two most important decisions were in *Maritime Delimitation in the Area between Greenland and Jan Mayen* and *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The former judgment relates to the division of the continental shelf between two states and the principles which would apply in such circumstances. The latter, and infinitely more significant judgment, concerns an application by the government of Bosnia-Herzegovina against the state of former Yugoslavia for interim measures to prevent the commission of acts of genocide by the Serbian government.

This edition takes into account the developments in the field of public international law occurring prior to 18 April 1994.

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Competence to qualify offence for purpose of asylum

Facts

An unsuccessful military rebellion took place in Peru in October 1948. It was suppressed on the same day and the President of the Republic thereupon issued a decree outlawing the American Peoples' Revolutionary Alliance who he charged with having organised and directed the rebellion. A warrant was issued for the arrest of Victor Raul Haya de la Torre, a Peruvian national, in connection with the rebellion. On January 3rd, 1949 Haya de la Torre sought asylum in the Columbian Embassy in Lima.

The Columbian Ambassador informed the Peruvian Government that he had granted diplomatic asylum to Haya de la Torre under Article 2, paragraph 2 of the Havana Convention on Asylum 1928. Also, under Article 2 of the Montevideo Convention on Political Asylum, 1933 he had qualified Haya de la Torre as a political refugee. Peru contended that Haya de la Torre was not entitled to asylum. The Columbian Government therefore asked the Court to declare:

'That the Republic of Columbia, as the country granting asylum, is competent to qualify the offence for the purpose of the said asylum, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911, and the Convention on Asylum of February 20th, 1928 and of American international law in general.'

Held

The Colombian Government had not proved the existence of any custom to enable it to qualify the offence. It could not show any 'constant and uniform usage' or 'evidence of a general practice accepted as law'.

Judgment

> '... The Colombian Government has finally invoked "American International law in general." In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.
>
> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".
>
> In support of its contention concerning the existence of such a custom, the Columbian Government has referred to a large number of extradition treaties which, as already explained, can have no bearing on the question now under consideration. It has cited conventions and agreements which do not contain any provision concerning the alleged rule of unilateral and definitive qualification such as the

Montevideo Convention of 1889 on international penal law, the Bolivarian Agreement of 1911 and the Havana Convention of 1928. It has invoked conventions which have not been ratified by Peru, such as the Montevideo Conventions of 1933 and 1939. The Convention of 1933 has, in fact, been ratified by not more than eleven States and the Convention of 1939 by two States only.

It is particularly the Montevideo Convention of 1933 which Counsel for the Colombian Government has already relied on in this connection. It is contended that this Convention has merely codified principles which were already recognised by Latin-American custom and that it is valid against Peru as a proof of customary law. The limited number of States which have ratified this Convention reveals the weakness of this argument and, furthermore, it is invalidated by the preamble which states that this Convention modifies the Havana Convention.

Finally, the Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or – if in some cases it was in fact invoked – that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But, even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence in matters of diplomatic asylum.'

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General principles of law – application of the concept of equity in international law

Facts

The Netherlands and Belgium submitted a dispute between them to the Permanent Court relating to the diversion of water from a river flowing from Belgium into the Netherlands. Water had been diverted in Belgium with the effect that the river levels further downstream fell considerably below the levels which traditionally existed. The Netherlands argued that the diversion was contrary to international law.

Held

The principle of equity could be applied to the facts of this case in order to settle the dispute. The most lucid explanation of the history and function of this principle in international law was rendered by Judge Hudson in the terms which follow.

Individual Opinion by Mr Hudson

'... What are widely known as principles of equity have long been considered to constitute a part of international law and as such, they have often been applied by international tribunals. A sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence; even in some national legal systems, there has been a strong tendency towards the fusion of law and equity. Some international tribunals are expressly directed by the *compromis* which control them to apply "law and equity".

Of such a provision, a special tribunal of the Permanent Court of Arbitration said in 1922 that "the majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular systems of jurisprudence". Proceedings of the United States – Norwegian Tribunal (1922) p141. Numerous arbitration treaties have been concluded in recent years which apply to differences "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." Whether the reference in an arbitration treaty is to the application of "law and equity" or to justiciability dependent on the possibility of applying "law and equity", it would seem to envisage equity as a part of law.

The Court has not been expressly authorised by its Statute to apply equity as distinguished from law. Nor, indeed, does the Statute expressly direct its application of international law, though as has been said on several occasions the Court is "a tribunal of international law". Series A, No7, p19; Series A, Nos 20/21, p124. Article 38 of the Statute expressly directs the application of "general principles of law recognised by civilized nations" and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it "to decide a case *ex aequo et bono,* if the parties agree thereto". It must be concluded, therefore, that under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.

It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are: "Equality is equity"; "He who seeks equity must do equity". It is in line with such maxims that "a court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper". 13 Halsbury's *Laws of England* (2nd ed, 1934) p87. A very similar principle was received into Roman Law. The obligations of a vendor and a vendee being concurrent, "neither could compel the other to perform unless he had done, or tendered, his own party". Buckland *Text Book of Roman Law* (2nd ed, 1932) p493. The *exceptio non adimpleti contractus* required a claimant to prove that he had performed or offered to perform his obligation. This conception was the basis of Articles 320 and 322 of the German Civil Code and even where a code is silent on the point Planiol states the general principle that "dans tout rapport synallagmatique, chacune des deux parties ne peut exiger la prestation qui lui est due que si elle offre elle-même d'exécuter son obligation". Planiol, *Droit civil,* Vol 2 (6th ed, 1912) p320.

The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case and with scrupulous regard for the

limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness ...'

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North Sea Continental Shelf Cases: Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands (1969) ICJ Rep p3 International Court of Justice (President Bustamante y Rivero; Vice-President, Koretsky; Judges Sir Gerald Fitzmaurice, Tanaka, Jessup, Morelli, Sir Muhammad Zafrulla Khan, Padilla Nervo, Forster, Gros, Ammoun, Bengzan, Petrén, Lachs, Onyeama; Judges ad hoc Mosler, Sørensen; Registrar Aquarone)

Principles and rules applicable to delimitation of the Continental Shelf

Facts

Disputes arose between the Federal Republic of Germany and Denmark and The Netherlands concerning the delimitation of the Continental Shelf in the North Sea. Special Agreements were concluded between the Parties under which the International Court of Justice was requested to decide the following question:

'What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the Continental Shelf in the North Sea which appertains to each of them beyond the partial boundary (already) determined ...?'

On behalf of the Governments of Denmark and The Netherlands the Court was asked to declare that:

The delimitation as between the Parties of the said areas of the contintental shelf in the North Sea is governed by the principles and rules of international law which are expressed in Article 6, paragraph 2, of the Geneva Convention of 1958 on the Contintental Shelf.

Held

The Court rejected this argument, holding that Article 6 of the Geneva Convention did not embody or crystallise any pre-existing or emergent rule of customary law. Therefore, the equidistance principle for

delimiting jurisdiction over the Continental Shelf could not bind those States, such as the Federal Republic of Germany, which had not ratified the 1958 Convention.

Judgment

'... the Court reaches the conclusion that the Geneva Convention did not embody or crystallise any pre-existing or emergent rule of customary law, according to which the delimitation of continental shelf areas between adjacent States must, unless the Parties otherwise agree, be carried out on an equidistance-special circumstances basis. A rule was of course embodied in Article 6 of the Convention, but as a purely conventional rule. Whether it has since acquired a broader basis remains to be seen: *qua* conventional rule however, as has already been concluded, it is not opposable to the Federal Republic.

The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallised in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice – and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

In so far as this contention is based on the view that Article 6 of the Convention has had the influence and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law. Considered *in abstracto* the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties – but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6 and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention – of which there is at present no official indication – it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964 and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

The Court must now consider whether State practice in the matter of continental shelf delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which continental shelf boundaries have been delimited according to the equidistance principle in the majority of the cases by agreement, in a few others unilaterally – or else the delimitation was foreshadowed but has not yet been carried out.

Amongst these fifteen are the four North Sea delimitations United Kingdom/Norway-Denmark-Netherlands and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But, even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, *a priori*, several grounds which deprive them of weight as precedents in the present context.

To begin with, over half the States concerned, whether acting unilaterally, or conjointly, were or shortly became parties to the Geneva Convention and were, therefore, presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not and have not become parties to the Convention, the basis of their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But, from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23) there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridicial nature.

The essential point in this connection – and it seems necessary to stress it – is that even if these

instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris* – for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, eg in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition and not by any sense of legal duty.

In this respect the Court follows the view adopted by the Permanent Court of International Justice in the Lotus case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, *mutatis mutandis,* to the present case (PCIJ, Series A, No 10, 1927 at p28):

"Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstances alleged ... it would merely show that States had often, in practice, abstained from instituting criminal proceedings and not that they recognised themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand ... there are other circumstances calculated to show that the contrary is true."

Applying this dictum to the present case, the position is simply that in certain cases – not a great number – the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so – especially considering that they might have been motivated by other obvious factors.

Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But, the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and The Netherlands. It simply considers that they are inconclusive and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law more particularly where lateral delimitations are concerned.

There are, of course, plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance – mostly of internal waters (lakes, rivers, etc) and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the continental shelf.

The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up to date has equally been insufficient for the purpose ...'

Petroleum Development Limited v Sheikh of Abu Dhabi (1951) 18 ILR 144 (Umpire: Lord Asquith of Bishopstone)

Agreement between independent ruler and private company – application of municipal rules of interpretation – general principles of law

Facts

A dispute arose over the interpretation of the terms of an agreement purporting to transfer to Petroleum Development (Trucial Coast) Limited, the exclusive right to drill for mineral oil in Abu Dhabi. The matter was referred to Arbitration and the Umpire was called upon to decide the 'proper law' governing the agreement. Article 17 of the Agreement, the translation relied upon by the Claimants, provided:

> 'The Ruler and the Company both declare that they intend to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner ...'

Held

The agreement was not governed by either the law of Abu Dhabi or the law of England. Instead, the rules of international law applied and, in particular, general principles of law recognised by civilised nations. Whether a specific maxim of law applied or not was to be determined in the light of the common practice of civilised nations and the generality of the application of the rule in question.

Decision

> '... (b) *What is the "Proper Law" applicable in construing this contract?* This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the municipal Law of England could apply. On the contrary, Clause 17 of the Agreement, cited above, repels the notion that the municipal Law of any country, as such, could be appropriate. The terms of that Clause invite, indeed prescribe, the application of principles rooted in the goodsense and common practice of the generality of civilised nations – a sort of "modern law of nature". I do not think that on this point there is any conflict between the parties.
>
> But, albeit English Municipal Law is inapplicable *as such,* some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence – this "modern law of nature". For instance, while in this case evidence has been admitted as to the nature of the negotiations leading up to and of the correspondence both preceding and following the conclusion of the Agreement, which evidence as material for construing the contract might, according to domestic English Law, be largely inadmissible and to this extent the rigid English rules have been disregarded; yet, on the other hand, the English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere idiosyncrasy of our system, but a principle of ecumenical validity. Chaos may obviously result if that rule is widely departed from: and if, instead of asking what the words used mean, the inquiry extends at large to what each of the parties meant them to mean and how and why each phrase came to be inserted.
>
> The same considerations seem to me to apply to the principle *expressio unius est exclusio alterius.* I defer entirely to the warnings given by Wills J and Lopes LJ in the case of *Colquhoun* v *Brooks* (19 Queen's Bench Division 400 at p406: and 21 QBD 52 at p65) as to the possibilities (and indeed the frequency) of its misapplication. But, confined within its proper borders, it seems to me mere common sense. (If I have a house and a garden and two hundred acres of agricultural land and if I recite this and let to X "my house and garden", it seems obvious that the two hundred acres are excluded from the lease.)