EDVARD HAMBRO

THE CASE LAW OF THE INTERNATIONAL COURT

A REPERTOIRE OF THE
JUDGMENTS, ADVISORY OPINIONS AND ORDERS
OF THE INTERNATIONAL COURT OF JUSTICE
INCLUDING
DISSENTING AND SEPARATE OPINIONS

IV
1959-1963

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TO
HANS KELSEN

PREFACE TO THE SECOND PRINTING OP VOLUME IV OF THE *CASE LAW*

Unlike Volumes I-III and V-VII of the *Case Law* series, the texts in the reprint of this volume are presented in English only, rather than in English and French, because of rapidly increasing costs. We are hopeful that a one-volume work in one language will prove acceptable to the international legal community.

INTRODUCTION

The first Volume of the Case Law of the International Court was published by Sijthoff in 1952 and contained 423 pages text and an index of 114 pages (prepared by Miss A. Welsby), a table of Judgments and Opinions and a bibliography of 121 page. This excellent bibliography was prepared by the Librarian and Document Officer of the Court, *J. Douma.*

In the Preface to this volume the author stated i.a.

The purpose of the present Collection of Texts is to give a complete picture of the Court's pronouncements in the field of general international law. The preparation of such a *repertoire* or digest may be undertaken in a variety of ways. It has been felt that the publication of extracts from the decisions of the Court, chosen as carefully as possible, and made convenient for reference by means of indexes, would, in the present circumstances, prove to be a useful work for those concerned with the study of this subject. It is hoped that the present volume will encourage a more exhaustive study of the practice of the Court, for this is really no more than an introductory work which must be used with caution. It must be emphasized that it in no way dispenses with the need for reference, in any given case, to the decisions themselves, but it should provide guidance to those decisions in which points of interest are likely to be found. A collection of this sort makes no claim to absolve its readers from such direct research. It is clear that a few sentences taken from a judgment can only be properly understood if read in the context of the whole judgment, and if care is taken to consider them in relation to the facts of the case which gave rise to the Court's decision. No sentence can be isolated from its context. The same rule must be applied here as is applied to the interpretation of treaties, a rule which led the Permanent Court to say in its advisory opinion on the competence of the International Labour Organization and the conditions of labour in agriculture (P.C.I.J., Series B, Nos. 2 and 3, p. 23): "In considering the question before the Court upon the language of the Treaty, is is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense." Furthermore, it must be remembered that even the whole text of a judgment of the Court may sometimes be

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more clearly understood if it is read in the light of the individual or dissenting opinions of the judges who have not be able to agree either with the operative part or with the reasoning of the majority, or with both.

In spite of this, only decisions of the Court as such have been included, whether these be given in judgments or advisory opinions; the separate opinions of one or more judges have not been included, whether these be in the form of dissenting or individual opinions. However notable these may have been and however, great the learning and wisdom of the judge in question, such statement do not represent the views of the Court.

The book seemed to meet a need and it had to be reprinted subsequently, and in 1960 a new volume was published under the title The Case Law of the International Court, II, 1952-1958. It contained 376 pages and was also embellished by a bibliography by Mr. Douma who had by then retired as the Librarian of the Court just as the author had retired from his position of as the Registrar of the Court.

Both these volumes contained only excerpts from the majority opinions of the Court and not from the dissenting or separate Opinions.

The explanation for this was given by the author in the preface quoted above.

These words were *mutatis mutandis* repeated in the preface to Volume II. However, very many of the learned writers who were kind enough to review these volumes expressed their keen regret that no excerpts from the dissenting judges were included. The author responded to this by publishing in 1963 a new volume with the title The Case Law of the International Court, III, Individual and dissenting opinions, 1947-1958. He explained this change of policy in the following way:

"The quasi-unanimous opinion of the reviewers was that it was a wrong decision and that the Case Law would gain by including also a digest of the opinions of the dissenting Judges. I have bowed to this opinion partly because modesty forbids me to think that I can be right when nearly all my learned collegues hold an opposite opinion on a question of presentation and usefulness. Also the individual and dissenting opinions tend to become more and not less important with the years. They become more frequent and more bulky. They are now, already, in many cases much longer than the pronouncements of the majority. It would then not give a correct and balanced picture of the working of the Court to exclude all this material."

The Volume became very bulky although it contained only material from the International Court and not from the Permanent Court. It

was therefore published in two parts. It contained no bibliography since a reference to the two previous volumes was deemed sufficient.

The demand for these volumes has been great enough to justify in the mind of the author and the publishers a new and fourth Collection.

The lessons of the previous editions have led to the conclusion that it would meet with the approval of the readers and add to the usefulness of the Volume if dissenting and separate opinions were included in the text together with excerpts from the majority of the Court. In order to make it quite clear that there is—in the mind of the author—an important difference between the majority and the dissenters, the excerpts from the Majority of the Court are printed in italics and from the dissenters in ordinary print.

An asterisk indicates that this version is authentic.

This book which is also for the sake of convenience printed and bound in two sections does not contain a bibliography. The reason is that the book was bulky enough and that the writing of a full bibliography is a very heavy task and demands a new and special volume. This has been prepared again by the experienced hand of Mr. *Douma* and is published as a companion volume under the title: "*Bibliography on the International Court of Justice, including the Permanent Court, 1918-1964*".

Oslo, August, 1965 EDVARD HAMBRO

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PART I. SOURCES OF INTERNATIONAL LAW

CHAPTER I

INTERNATIONAL TREATIES

a. GENERAL RULES

See Volume I, Nos. 1-5, 185, 194, 241 and 365; Volume II, No. 1; Volume III, Nos. 1-16, 289, 290, 294, 296, 338, 847 and 918; Present Volume, Nos. 42, 48, 50, 57, 90, 113, 120, 142, 169, 248, 263, 275, 290, 310, 314, 319, 320, 325, 335, 336, 337, 339, 340, 498, 574, 614, 632, 665, 708, 784, 787 and 791.

* 1. The second ground why, apart from its inconsistency with the Statute, it is impossible for the Court to apply the reservation in question is that, in consequence thereof, the instrument in which it is contained is not an instrument conferring legal rights and creating legal obligations. This is so for the reason that a purported undertaking in which one party reserves for itself the exclusive right to determine the extent or the very existence of its obligation is not a legal undertaking and that the instrument embodying it is not a legal instrument cognizable before a court of law. That aspect of the question is elaborated on pages 43-48 of my Separate Opinion in the case of *Certain Norwegian Loans* and it is not therefore necessary to repeat here the views there expressed, in particular those derived from general principles of law applicable alike to all instruments, whether bilateral or unilateral, intended to create legal rights and obligations.

Interhandel Case (dissenting opinion of Sir Hersch Lauterpacht), I.C.J. Reports 1959, p. 106.

* 2. I have formed the view that the evidence submitted to the Court in the shape of the formal Minutes, succinct in the extreme, of the Boundary Commission and of fragmentary correspondence lacking in sequence has not wholly dispelled the impact of the confused situation thus created. The circumstances of the adoption, in 1843, of the Descriptive Minute must, to some extent, be in the nature of conjecture. In particular, it has not been proved possible to state a direct conclusion as to the authenticity or otherwise of the cardinal piece of evidence, namely, of the only existing copy of the Communal Minute produced

by the Netherlands. Moreover, while the Commissioners who drafted the Descriptive Minute enjoyed wide powers, they had no power to endow with legal efficacy a document in which they purported to transcribe word for word the Communal Minute and to observe the *status quo* but in which they actually modified the Communal Minute and departed from the *status quo*. The law knows of no such power. For these reasons, I am of the opinion that the relevant provisions of the Convention must be considered as void and inapplicable on account of uncertainty and unresolved discrepancy.

Case concerning Sovereignty over certain Frontier Land, (declaration by Judge Sir Hersch Lauterpacht), I.C.J. Reports 1959, pp. 231.

3. Reliance has been placed upon the principle of the upholding of treaties. But that principle—which in any event is not an absolute one—is in no way opposed, particularly when there is a clause expressly providing therefor, to the correction of clerical errors which they may contain, provided such errors be shown really to exist by genuine evidence of a clear and unchallengeable nature.

The principle of respect for treaties is thus fully applied; that principle does not require acceptance of a treaty which is not juridically valid in one of its parts.

Case concerning Sovereignty over certain Frontier Land, (dissenting opinion of Judge Armand-Ugon), I.C.J. Reports 1959, p. 245.

4. A mistake of fact—as the most qualified writers in international law teach us—vitiates the consent of the Parties to a legal instrument such as a treaty. This defect in consent involves the total or partial nullity of the instrument in question. In the present case, it is only Article 90 of the Descriptive Minute, which allots the plots to Baerle-Duc, that would be affected by the decision of a judicial body. The other provisions of the Convention of Maastricht, which reflect the intention of the Parties, would be unaffected. And, so as to conform with this decision, it would be for the Parties to regulate their new legal situation according to the principles of international law—as they had shown the will to do on the occasion of the abortive Treaty of 1892.

Case concerning Sovereignty over certain Frontier Land, (dissenting opinion of Judge Moreno Quintana), C.I.J. Reports 1959, p. 258.

* 5. *India objects on various grounds that what is alleged to be the Treaty of 1779 was not validly entered into and never became in law a treaty binding upon*

the Marathas. The Court's attention has, in this connection, been drawn inter alia *to the divergence between the different texts of the Treaty placed before the Court and to the absence of any text accepted as authentic by both parties and attested by them or by their duly authorized representatives. The Court does not consider it necessary to deal with these and other objections raised by India to the form of the Treaty and the procedure by means of which agreement upon its terms was reached. It is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually. The Marathas themselves regarded the Treaty of 1779 as valid and binding upon them, and gave effect to its provisions. The Treaty is frequently referred to as such in subsequent formal Maratha documents, including the two* sanads *of 1783 and 1785, which purport to have been issued in pursuance of the Treaty. The Marathas did not at any time cast any doubt upon the validity or binding character of the Treaty.*

Case concerning Right of Passage over Indian Territory (Merits), I.C.J. Reports, 1960, p. 37.

6. It might even be asked whether the said agreement really constitutes a treaty, since there is no document in existence ratified simultaneously by the two contracting parties and which may be regarded as its authentic text. However, even a cursory study of the situation shows that the exchange of documents—the Marathi text of 4 May 1779 and the Portugese text of 17 December of the same year—was no doubt the expression of a common agreement creating mutual rights and obligations between two legal persons recognized as such in their international relationships. Article 6 makes it clear that a bilateral treaty was concluded and the documentary evidence produced also shows by many instances that it was the intention of the parties to conclude a treaty and that they were aware of having done so. It took the legal form of an exchange of notes and the jurisprudence of the Permanent Court accepted this form as valid in its Advisory Opinion on the *Austro-German Customs Régime* (see *Judgments*, Series A/B, No. 41, p. 47).

Case concerning Right of Passage over Indian Territory (Merits), (dissenting opinion of Judge Moreno Quintana), I.C.J. Reports 1960, p. 91.

* 7. *Even if there was no delimitation of the frontier in the eastern sector of the Dangrek approved and adopted by the Mixed Commission, it was obviously open to the Governments themselves to adopt a delimitation for that region, making use of the work of the technical members of the Mixed Commission. As regards any departures from the watershed line which any such delimitation embodied*

—since, according to Thailand's own contention, the delimitation indicated on the Annex I map was not the Mixed Commission's—there is no point in discussing whether such departures as may have occurred at Preah Vihear fell within the Commission's discretionary powers or not. The point is that it was certainly within the power of the Governments to adopt such departures.

The real question, therefore, which is the essential one in this case, is whether the Parties did adopt the Annex I map, and the line indicated on it, as representing the outcome of the work of delimitation of the frontier in the region of Preah Vihear, thereby conferring on it a binding character.

Thailand denies this so far as she is concerned, representing herself as having adopted a merely passive attitude in what ensued. She maintains also that a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party to a departure at Preah Vihear from the watershed line specified by Article 1 of the Treaty of 1904, so great as to affect the sovereignty over the Temple area.

The Court sees the matter differently. It is clear from the record that the publication and communication of the eleven maps referred to earlier, including the Annex I map, was something of an occasion. This was no mere interchange between the French and Siamese Governments, though, even if it had been, it could have sufficed in law. On the contrary, the maps were given wide publicity in all technically interested quarters by being also communicated to the leading geographical societies in important countries, and to other circles regionally interested; to the Siamese legations accredited to the British, German, Russian and United States Governments; and to all the members of the Mixed Commission, French and Siamese.

Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, I.C.J. Reports 1962, pp. 22-23.

*** 8.** A secondary basis of the principle is the necessity for security in contractual relationships. A State bound by a certain treaty to another State must rest in the security that a harmonious and undisturbed exercise of the rights of each party and a faithful discharge of reciprocal obligations denote a mutually satisfactory state of things which is permanent in character and is bound to last as long as the treaty is in force. A State cannot enjoy such a situation and at the same time live in fear that some day the other State may change its mind or its conduct and jeopardize or deny rights that for a long time it has never challenged. A continuous and uncontroverted fulfilment of a treaty is tantamount to a pledge, a security renewed day by day that the treaty is valid and effective as signed, intended and understood by the parties. Such a security must needs be upheld as an indispensable element of fruitful harmony in all treaty relationships.

Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, (separate opinion of Judge Alfaro), I.C.J. Reports 1962, p. 42.

* 9. It may thus be seen that the rule *pacta sunt servanda* cannot be conciliated with the notion of inconsistency in the interpretation and observance of public treaties. Of course, this notion does not conflict with the entirely different question of *rebus sic stantibus*. Inconsistency condemns two contradictory positions with regard to the same situation existing at the time the binding acts occurred. The clause *rebus sic stantibus* contemplates two different situations: the one existing when the treaty was signed and the new one created by conditions and circumstances posterior to the treaty. But even in the case of ordinary, non-contractual relations between States the rule of consistency must be observed and a State cannot challenge or injure the rights of another in a manner which is contrary to its previous acts, conduct or opinions during the maintenance of its international relationships.

Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, (separate opinion of Judge Alfaro), I.C.J. Reports 1962, p. 42.

* 10. I would add only to the views expressed in the Judgment, that I cannot accept the plea so eloquently urged on behalf of Thailand that any adherence to the Annex I line would have involved a departure from a solemn treaty obligation. This surely begs the question; for as the Judgment says, it is always open to governments, in their bilateral relations, to agree on a departure of this kind, provided they do so knowingly, or (as I think was Thailand's case here) in circumstances in which they must be held to have accepted, and as it were discounted in advance, the risks or consequences of lack, or possible lack, of knowledge. In the present case, the conduct of each Party, over what was an important matter of common concern to both, was, in my opinion, evidence of, or amounted to, a mutual agreement to accept a certain line as the frontier line. What seems to me therefore really to have occurred was not in the legal sense a departure from the treaty provision concerned, but the mutual acceptance of a certain result as being its actual outcome, irrespective of the precise conformity of that outcome witht the treaty criterion.

Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, (separate opinion of Sir Gerald Fitzmaurice), I.C.J. Reports 1962, pp. 55-56.

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