

EDITORIAL COMMENT

RESPECTING ONE'S OWN JURISPRUDENCE: A PLEA TO THE INTERNATIONAL COURT OF JUSTICE

This above all—to thine own self be true,
And it must follow, as the night the day,
Thou canst not then be false to any man.
Hamlet, 1.3.78

On two occasions in the recent past, the International Court of Justice has misstated its own prior holdings by selective quotation. In each instance, the partial quotation was invoked as authority for the opposite of what the previous Court had said. Neither matter was *de minimis*: in each instance, the issue for which authority was being sought was central either to the case at bar or to an important aspect of the Court's role. The consequences for the future of international adjudication and the stability of authoritative expectation, which is such an important strut of international law, are serious and merit examination.

I. THE *MILITARY AND PARAMILITARY ACTIVITIES* CASE

In the nature of international adjudication, nonappearance by a defendant state is not an uncommon occurrence. Article 53 of the Statute of the International Court of Justice deals with it explicitly.

1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.¹

In the merits phase of the *Military and Paramilitary Activities* case,² the Court purported to restate its cumulative jurisprudence or case law on its own responsibilities in testing the evidence required to establish an applicant's case when the respondent state refuses to appear. "There is however no question of a judgment automatically in favour of the party appearing, since the Court is required, as mentioned above, to 'satisfy itself' that that party's claim is well founded in fact and law."³

¹ For legislative history, practice and comments on Article 53, see J. ELKIND, *NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE: FUNCTIONAL AND COMPARATIVE ANALYSIS*, especially at 79–102 (1984).

² *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14 (Judgment of June 27) [hereinafter *Nicaragua*].

³ *Id.* at 24, para. 28.

Judicial self-satisfaction on the law in a case of nonappearance is not a serious obstacle. The Court recalled that in the Icelandic *Fisheries Jurisdiction* case it had observed:

It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.⁴

In *Nicaragua*, the Court reaffirmed this view:

For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law . . . , so that the absence of one party has less impact.⁵

Because the Court knows the law and is not, in any case, restricted to the parties' legal arguments (in contrast to an adjudication on an agreed basis, where, in the absence of *jus cogens*, it presumably would be so restricted⁶), a defendant's nonappearance would not seriously disable the Court in determining whether a claim is well-founded in law.

The situation is more complex with regard to the Court's self-satisfaction on the facts, for the facts may be largely within the province of the parties. In *Nicaragua* the Court took account of this difficulty yet reached the following conclusion: "the Court cannot by its own enquiries entirely make up for the absence of one of the Parties; that absence, in a case of this kind involving extensive questions of fact, must necessarily limit the extent to which the Court is informed of the facts."⁷

In the second clause here, the Court has edged away from the injunction of Article 53(2), laying the basis for qualification and reduction of the preemptory and unqualified requirement of the Statute that "[t]he Court must . . . satisfy itself . . . that the claim is well founded in fact and law." The Court continued:

It would furthermore be an oversimplification to conclude that the only detrimental consequence of the absence of a party is the lack of opportunity to submit argument and evidence in support of its own case. Proceedings before the Court call for vigilance by all. The absent party also forfeits the opportunity to counter the factual allegations of its opponent. It is of course for the party appearing to prove the allegations it makes, yet as the Court has held:

"While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain

⁴ *Fisheries Jurisdiction* (UK v. Ice.; FRG v. Ice.), Merits, 1974 ICJ REP. 3, 9, and 175, 181 (Judgments of July 25).

⁵ *Nicaragua*, 1986 ICJ REP. at 24, para. 29.

⁶ But cf. the Judgment of the Chamber in *Frontier Dispute* (Burkina Faso/Mali), 1986 ICJ REP. 554, 557 (Judgment of Dec. 22).

⁷ *Nicaragua*, 1986 ICJ REP. at 25, para. 30.

unopposed cases prove impossible in practice.” (*Corfu Channel, ICJ Reports 1949*, p. 248.)⁸

Thus, the Court significantly reduced the burden that Article 53 imposes on it. If the Court is not obliged to examine the accuracy “in *all* their details” (emphasis added) of the applicant’s claims, certain claims may be either accepted without being tested to the point of satisfaction that they are well-founded or accepted without being tested at all, in other words, by default.

The Court developed this amendatory interpretation by itself reaffirming the language of Article 53(2) and then ascribing the qualification to a previous Court whose holding is quoted. In invoking the *Corfu Channel* Judgment as authority for a partial default judgment, the Court implied that it was doing no more than restating a doctrine to which it had adhered for some 40 years. In fact, the Court cited only one-half of the relevant sentences in the *Corfu Channel* case and, in so doing, created the impression that *Corfu* was holding something it did not hold. The pertinent section of *Corfu Channel* states:

The position adopted by the Albanian Government brings into operation Article 53 of the Statute, which applies to procedure in default of appearance. This Article entitles the United Kingdom Government to call upon the Court to decide in favour of its claim, and, on the other hand, obliges the Court to satisfy itself that the claim is well founded in fact and law. While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. *It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.*⁹

This section of *Corfu* concerned the methods to be used in fulfilling the requirement of Article 53(2). The point it makes is obvious and innocuous: in satisfying itself that the applicant’s claim is well-founded, the Court must resort to methods different from those which the absent defendant might have used. The selective quotation in the *Nicaragua* case, which suppresses the final sentence of the paragraph in *Corfu*, leaves the impression that it is long-standing jurisprudence that the Court is entitled to reach judgment in Article 53 cases without satisfying itself that the factual claims made by the applicant state are well-founded. It is not.

II. THE PLO MISSION OPINION

In *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*,¹⁰ the United States and the

⁸ *Id.*

⁹ *Corfu Channel (UK v. Alb.)*, 1949 ICJ REP. 244, 248 (Judgment of Dec. 15) (emphasis added).

¹⁰ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 1988 ICJ REP. 12 (Advisory Opinion of Apr. 26) [hereinafter *Mission*].

United Nations agreed that the proper interpretation of the Headquarters Agreement precluded the United States from requiring the Palestine Liberation Organization's Observer Mission at UN headquarters to close. It was also clear that there was a dispute about the closing of the PLO's Observer Mission in New York. If there were no dispute, it is difficult to see what the parties were negotiating about. The question posed to the Court by the General Assembly was whether, in the circumstances, the United States was obliged to go to arbitration under section 21(a) of the Headquarters Agreement. Section 21(a) provides: "Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators"¹¹

Issues were joined on an important legal question. The United Nations claimed that, given an arbitration clause, once a dispute existed and one party called for arbitration, the other party was obliged to arbitrate. The United States did not really contest that point but claimed that notwithstanding the existence of a dispute, the critical question was whether, in the circumstances of the case, arbitration was appropriate at a particular moment. The United States contended in its written statement to the Court: "The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be *appropriate or timely*."¹²

Thus, the central legal question of the case was whether arbitration had to be compelled at that moment or whether an international tribunal had some prudential discretion to determine whether it was appropriate or timely to compel immediate arbitration or to postpone it or defer decision while the parties resorted to some other mode of dispute resolution. Only if the legal proposition that there was prudential discretion was sound would the Court reach the factual question of whether the circumstances of the case warranted its exercise.

The Court rejected the U.S. legal contention:

The Court could not allow considerations as to what might be "appropriate" to prevail over the obligations which derive from section 21 of the Headquarters Agreement, as "the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on con-

¹¹ Agreement Regarding the Headquarters of the United Nations, U.S.-UN, June 26, 1947, 61 Stat. 3416, TIAS No. 1676, 11 UNTS 11, 22 U.S.C. §287 note (1982).

¹² *Mission*, 1988 ICJ REP. at 29, para. 39 (emphasis added). Despite the fact that the case was largely briefed and pleaded in English, the Court designated French as the authentic language. *Id.* at 35, para. 58. The translation of this part of the judgment is not felicitous. The statement "we do not believe arbitration would be appropriate" is rendered in the authentic version as "nous pensons qu'un arbitrage ne serait pas opportun." *Id.* at 29, para. 39. Five lines later, the word "opportunité" in the important quotation from the 1930 *Free Zones* case (see note 14 *infra*) was rendered in English as "expediency." That is an accurate translation, but the translation of "appropriate" in the U.S. pleading as "opportun," viz. "expedient," in this setting does not capture the implication of the U.S. pleading. This interlinguistic adjustment, however, does make *Free Zones* quotable in this context.

siderations of pure expediency" (*Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 15*).¹³

The impression created by the quotation from the *Free Zones* case is that jurisprudence of more than 50 years' standing holds that, in determining the appropriate moment for compelling arbitration, the Court is precluded, by its nature as a court, from considering and taking account of prudential factors such as the appropriateness and timeliness of arbitration in the particular case.

Once again, the Court, by selective quotation, created exactly the opposite impression of what the Court in the precedent invoked had actually said. Consider the exact words of the Permanent Court in *Free Zones*:

and although the Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency, *nevertheless there is nothing to prevent it, having regard to the advantages which a solution of this kind might present, to offer the Parties, who alone can bring it about, a further opportunity for achieving this end.*¹⁴

In the *Mission* opinion, the Court quoted only a dependent clause and suppressed the most important part of the prior Court's holding. Deleting the conjunction "although," which introduced the quoted clause, obscured the fact that this fragment was only a dependent clause, a syntactical construction that is invariably qualified, if not contradicted, by the independent clause it accompanies.

CONCLUSION

The issue of concern in these cases is not whether the Court was right in the substance of its innovations, but whether it was right in its treatment of its own prior jurisprudence. The criticism is not directed to the fact that the Court has seen fit to change prior holdings. No modern law is inscribed in stone with the vaunted finality of the decrees of the Medes and the Persians. Law is conformity and conformation: conformity with the past and conformation for the future.¹⁵ The International Court is entitled, if not obliged, to reconsider prior holdings and to bring them into conformity with current community goals and policies.

¹³ *Mission*, 1988 ICJ REP. at 29, para. 40.

¹⁴ *Free Zones of Upper Savoy and the District of Gex*, 1930 PCIJ (ser. A) No. 24, at 15 (Order of Dec. 6) (emphasis added). The authentic language of the judgment was French and read as follows:

Considérant . . . que si la Cour, étant une Cour de justice, ne peut faire abstraction de droits reconnus par elle pour se déterminer seulement par des considérations de pure opportunité, rien ne l'empêche, vu les avantages que pourrait présenter une solution de ce genre, d'offrir aux Parties, qui, seules, peuvent la réaliser, une nouvelle occasion d'atteindre ce but.

¹⁵ Reisman, *Private Armies in a Global War System*, 14 VA. J. INT'L L. 1, 46-47 (1973), reprinted in *LAW AND CIVIL WAR IN THE MODERN WORLD* 252, 297-98 (J. N. Moore ed. 1974), and M. S. MCDUGAL & W. M. REISMAN, *INTERNATIONAL LAW ESSAYS* 142, 182 (1981).

It is certainly arguable that these cases may have justified such *démarches*, for the issues in each were far from simple. The facts of the *Mission* case may have warranted the exercise of the Court's prudential power to "compel" arbitration at that moment, though the wisdom of a judicial declaration of the absence of discretion in future matters of this sort is not immediately apparent. The policy problem presented to the Court by American nonappearance in *Nicaragua* was especially formidable. Article 53(2) obliges the Court to satisfy itself that the applicant's case is "well founded." That may require extensive fact gathering by the Court itself or rejection of the case when neither the applicant nor the Court can satisfy the judges that the claim is factually well-founded. The first alternative is burdensome, especially in a court where the judges have neither trial experience nor, for the most part, prior judicial experience. The second alternative could produce judgments that reward defendants for not appearing. Perhaps there were grounds for judicially amending the Statute to deal with a contingency that was unforeseen at the time of drafting. Reasonable people may disagree on that. But they will agree that when revisions are necessary, they ought to be effected with clarity and candor and their underlying policies made express.

The morality of case law, like all law, rests on respect for expectations that have been established and authorized by appropriate community processes. A court cites its prior holdings, even when it is not institutionally required to do so, to affirm this commitment and to reinforce expectations of authority. That expectation is a *fortiori* critical for a court whose jurisdiction is consensual. When a court plays fast and loose with its own case law, it undermines the confidence of others in its reliability, deters litigants from resorting to it and reduces in consequence its own potential contribution to the community.

Two cases do not constitute a *pathologie constante*, but they come alarmingly close. One hopes that the Court will reconsider this emerging practice and treat its own jurisprudence with the care and respect it deserves.

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