CHAPTER 9

The Status of Municipal Law before the World Court in the Light of Recent Cases

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I Introduction

A unilateral act of a State, generally speaking, pertains, first and foremost, to the domestic law of that State, although it may produce legal effects in the international legal order. It is for international law to determine if, and under what circumstances, an internal act of a State produces or can produce legal effects in the international legal order. Although it is only since the 20th Century that international jurists have shown some interest in the interaction between international law and municipal law, the relationship between the two is a topic that is now addressed in virtually all standard international law textbooks. It is a vast area, partly touched upon in article 27 of the Vienna Convention on the Law of Treaties, and also largely dealt with by international courts and tribunals. I will not venture into such complex terrain in this brief reflection in honour of one of my former and esteemed colleagues at the International Law Commission, Professor John Dugard. After all, substantive scholarship has already been devoted to that matter. Indeed, the topic “international law versus municipal law” is well researched and has been the subject of copious legal literature.1

In other words, the present contribution will not deal with all aspects of the systemic relationships between domestic law and public international law in the way Kelsen did in the early 20th Century.2 More precisely, consideration


2 See Hans Kelsen, “Les Rapports de Système entre le Droit Interne et le Droit International Public,” (1925) 8 Recueil des Cours 231, where he considered these relationships as being merely those of two systems of norms or rules. (pp. 231–232); see also D.P.O’Connell, “The Relationship between International Law and Municipal Law” (1960) 48 Georgetown Law Journal 431–485.
will not be given to the way a State invokes its domestic law, either positively to oppose its international obligations,\(^3\) or negatively by alleging the absence of legal remedies in its domestic law;\(^4\) nor will I consider whether an individual can claim a right on the basis of international law before the national courts.\(^5\) I will also not consider the decisions of national courts as evidence of State practice of international law. Extensive research has been devoted to this issue recently,\(^6\) and in any case it does not fall within the scope of the present study. This chapter focuses on how the International Court of Justice (ICJ) approaches domestic law in cases brought before it. At first sight the jurisprudence of the Court might lead to the conclusion that the Court has a uniform and rather static conception of the status of domestic law in international law. However, that would surely be a misconception.

Whether one considers the rule of binding precedent as being applicable before the ICJ or not, the jurisprudence of that Court is usually presented as constant and stable, and indeed not evolving. On the issue of the status of domestic law vis-à-vis international law, international jurists and the Court itself continue to refer to the *obiter dictum* of the 1926 landmark Judgment of the Permanent Court of International Justice (PCIJ) in the *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (also known as the *Chorzow Factory case*), as if it was valuable *ne varietur.*\(^7\) In fact,

\(^3\) See the *Wimbledon case* (France, Great-Britain, Italy, and Japan c. Germany; Poland intervening), (1923) P.C.I.J. Ser. A No. 1, p. 29, where the Court said that the German Empire could not oppose its ordinances on neutrality to the commitments it had undertaken by virtue of Article 380 of the Versailles Treaty.

\(^4\) See the *Alabama case* (Great-Britain/United States of America) Arbitral Award 14 September 1872, International Awards Report (I.A.R.), p. 891, where the Tribunal declared that the British Government could not exonerate itself for failing to comply with its due diligence obligations under international law by alleging the insufficiency of its domestic legal means.

\(^5\) As it is well known, the Arbitral Tribunal in the *Martini case* (Italy v. Venezuela) answered this question negatively (see *Arbitral Award 3 May 1930*, Arbitral Awards Report (A.A.R.), Vol. II, para. 985). But this is not the state of international law nowadays.


\(^7\) *Certain German Interests in Polish Upper Silesia*, (1926) P.C.I.J. Ser. A, No. 7.