Chapter 9


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1. INTRODUCTION

The principal role of courts and tribunals is to resolve the disputes submitted to them by applying the existing rule of law¹. However, in every legal system, and most prominently in the international legal order, their contribution to the law-making process, be it customary or conventional, is fundamental. The term “progressive development”, borrowed from the United Nations Charter, is closely related to the codification of international law, it being one of the missions of the General Assembly through the creation of the International Law Commission and the organization of international conferences. Within the United Nations fora, States have indeed the last word. But if one looks at the results of such a process, one is impressed by the impact on codification, usually in the form of international conventions, of the decisions of international courts and tribunals.

Major issues of the law of the sea have been put both before the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ), each of them having been for a long time the only international judicial forum with broad jurisdiction. In the S.S. Wimbledon case (1923), the Permanent Court has had the opportunity to declare that an artificial channel used for international navigation between two parts of the high seas should be assimilated to an international strait, where freedom of navigation exists

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even for warships of belligerent States\(^2\). In the *Lotus* case (1927), the PCIJ discussed the exercise of criminal jurisdiction of States vis-à-vis foreign nationals in the case of collision in the high seas. The Court held that jurisdiction of the national State of the responsible person (France) runs concurrent to the jurisdiction of the State of the victims (Turkey)\(^3\). It should be noted, though, that the decision of the Court was eventually reversed by international practice and later codification, which reserves the exercise of criminal jurisdiction only to the flag State and the national State of the person responsible for the collision (article 11 of the 1958 Geneva Convention on the High Seas and article 97 of the 1982 United Nations Convention on the Law of the Sea, hereinafter cited as “LOS Convention’’\(^4\).

## 2. The Contribution of the International Court of Justice to the Codification of the Law of the Sea

In its early days already, the International Court of Justice was seized with cases concerning the law of the sea. In the *Corfu Channel Case* (1949) the parties, United Kingdom and Albania, had discussed the elements necessary for a natural strait to qualify as a strait in the legal sense. The Court admitted that both criteria, “the geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation”, were important and declared that innocent passage could not be suspended therein\(^5\). The Court’s *dicta* were subsequently included in article 16 paragraph 4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (hereinafter cited as “TSC”) and later incorporated in the relevant articles of Part III of the LOS Convention on straits used for international navigation, *inter alia* articles 37 and 45.

In the *Anglo-Norwegian Fisheries Case* (1951), the Court innovated by admitting the validity in international law (and its opposability to the United Kingdom) of the outer limit of the territorial sea of Norway, drawn by reference to the new, at the time of the judgment of the Court, straight baselines system. Against strong reaction by three dissenting judges\(^6\), the Court’s deci-

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\(^2\) PCIJ, Series A, 1923, No 1, p. 28 .  
\(^3\) PCIJ, Series A, 1927, No 10, p. 30.  
\(^5\) Judgment of 9 April 1949, Merits, ICJ Reports 1949, p. 28.  
\(^6\) Judges Hsu Mo, Sir Arnold MacNair and Read, ICJ Reports 1951, pp. 154, 185 and 186 respectively.