

## RECONSTRUCTING THE DOCTRINE OF *STARE DECISIS* AS A STABILISER IN THE DEVELOPMENT OF INTERNATIONAL LEGAL NORMS\*

### Abstract

*International law in contemporary times has expanded in range, substance, depth and technique. This is a fallout of the burgeoning and equally expanding albeit complex inter-state relations of the modern era. Given the role of law as a stabilising index of man's quest for order and peace in his interaction both as a person and in his corporate manifestation as a state; norm creation, interpretation and or application becomes a veritable path towards actualising this desire. However, norms are not self-interpreting, thus necessitating the establishment of institutions charged with this onerous but alluring function. The multiplicity of these institutions across both supranational and regional lines with their variegated jurisdictions and jurisprudence has in turn created an anxiety as to the unity of legal norms that they espouse. Given the near perfect unity that exist in the interpretation of legal norms at the domestic level, using the doctrine of stare decisis, this paper x-rayed the prospects of reconstructing the doctrine at the international level with a view to making it a stabilizer in the development of international legal norms. Such a reconstruction holds the key to stability of legal norms at international law. The doctrinal method was relied upon in this essay.*

**Key words:** *Reconstructing, Stare Decisis, Stabilizer, Development, International, Legal norms*

### 1. Introduction

Our world seems to be in a perpetual state of flux, especially at the international level. Both the international political system and the structures of global capitalism are in a state of flux.<sup>1</sup> The global system is witnessing a diffusion of preferences. More voices are agitating to be heard both globally and within states thus reopening issues of social, economic and political concerns. Globalization rendered obsolete the old Westphalian world of great power rivalries, balance of power politics and the old fashioned international law built around state sovereignty and strict rules of non-intervention.<sup>2</sup> Thus with an expanded role for formal and informal multilateral institutions as well as individuals, a huge increase in the scope, density and intrusiveness of rules and norms made at the international level but affecting how domestic societies are organised became ineluctable. Ditto to the ever greater involvement of new actors in global governance and the expansion of inter-state modes of governance; the move towards the coercive enforcement of global rules; the fundamental changes in political, legal and moral understandings of state sovereignty and of the relationship between the state, the citizen and the international community.<sup>3</sup> Consequently increased attention is being paid to the world of complex governance beyond the state. This becomes the forte of international law. Governance beyond the state is often a mesh of complex global rule making; undergirded by the role of private market actors and civil society groups in articulating values which are then assimilated in inter-state institutions; the increased range of informal yet norm based governance mechanisms built around both trans-national and trans-governmental networks and the interpretation of international and municipal law. Given the above scenario and the fact that law is reflective of the conditions and cultural traditions of the society within which it operates, the author agrees with the view expressed by Shaw when he posits that 'international law since the middle of the last century has been developing in many directions as the complexities of life in the modern era have multiplied'<sup>4</sup>

### 2. International Law and Development of International Legal Norms

Against the backdrop that changes occurring within the international system can be momentous and reverberating throughout the system, especially in the face of the continuing tension between those rules already established and the constantly evolving forces that seek changes within the system; international

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<sup>1</sup> A Hurell, "International Law 1989-2010: A Performance Appraisal" in J Crawford and S Nouwen (eds) *Select Proceedings of the European Society of International Law* (Oxford: Hart Publishing, 2012) p. 3

<sup>2</sup> Ibid, p. 4

<sup>3</sup> Ibid

<sup>4</sup> MN Shaw, *International Law*, 6<sup>th</sup> edn (Cambridge, Cambridge University Press, 2008) p. 43

law has always tasked itself on determining when and how to incorporate new norms into the already existing framework of international life so that on the one hand the norm remains relevant and on the other hand, the system itself is not too vigorously disrupted. Thus, whether in their quest to maximise the resources of the earth for the benefit of her citizens or a felt need for a concerted effort to curb the menace of international terrorism, the international community has always realised the centrality of law as a stabilizing index of their individual and collective aspirations. Thus, the world is witnessing a move to law. This is often termed ‘legalisation’ which refers to the emergence and development of legal norms for the ordering of relations between subjects of international law<sup>5</sup>.

In this wise, legalisation may involve new treaties or protocols, development of existing instruments through amendments or otherwise or it may involve the extension of existing treaties to newly ratifying states. It can also extend to the subsequent process in which subjects increasingly make use of legal norms to organise their mutual relations including the settlement of any disputes that may arise in these relations.<sup>6</sup> This will necessarily entail the granting of competence to international institutions to interpret, apply and enforce the law. The international political system is a determining factor in the composition of international law and *pro tanto*, its *raison d’etre*. Given the fact that more than one entity exist within the system either on the basis of co-existence or hostility, the acceptance of rights possessed by these entities inevitably leads to a system to develop legal norms that defines such rights and obligations. The state forms the basic purpose of international law hence its norms has always reflected that state-oriented character of the international system, becoming over time the principal repository of the organised hopes of beneficial aims. The norms developed is in realisation of the fact the players of the system need law in order to seek and attain certain goals as well as dispute resolution mechanisms to settle disputes arising from pursuit of these goals. Thus, law mirrors the normative concerns of players within the international system.

### **3. The Judiciary and the Development of International Law**

Every system that is norm driven also puts in place institutions that act as the guardians of these norms and *pro tanto* the orderly development of the system. This is more so when the subjects of the system are bound to misinterpret the norms as they seek to give vent to their individual and / or collective aspiration. Conflicts thus become inevitable. Against this backdrop, particularly given the deleterious effect of conflicts, every society has always created institutions charged with protecting the norms and interpreting them in the dynamics of the society with a view to resolving emergent disputes.

The judiciary as an institution has always played these roles at every epoch in history cutting across both domestic and international jurisdictions. However, it is at the international level that the roles and impact of the judiciary has come up for greater scrutiny especially in the development of norms thereat. In this wise, the foremost international legal instrument to wit: the UN Charter; makes provision for a judicial organ – the International Court of Justice. This model has been replicated in other supra-national and regional treaties. A collection of these organs will constitute what can be aptly called the international judiciary *simpliciter*. However, when used in the generic sense, the term will also encapsulate national courts. Their impacts on the development of international law can be founded on Article 38 of the Statute of the International Court of Justice which provides for judicial decisions as a source for determining the rules of law.

While the provisions refer to judicial decisions as a subsidiary means for determining rules of law, it has been argued that the term ‘subsidiary’ does not mean secondary.<sup>7</sup> This argument is predicated on the fact that in many areas of International Law, judicial decisions constitute the best means of

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<sup>5</sup> A Nollkaemper, “The Process of Legalization after 1989 and its Contribution to the International Rule of Law” in J Crawford and S Nouwen (eds), *op. cit.* pp. 90-91. Note that in its narrow conventional sense, Legalisation refers to the process of authenticating or certifying a legal document so a foreign country’s legal system will recognise it with full legal effect. See <https://en.m.wikipedia.org>. Accessed on 1/11/2016. Note also the Convention Abolishing the Requirement for Legalisation For Foreign Public Documents 1961 (which entered into force on 24 January 1965)

<sup>6</sup> *Ibid.*, p.91. This viewpoint drifted in from international relations literature wherein the concept the concept now seems to be increasingly used to refer to a process of increase in the use of law. *Ibid.* p.90

<sup>7</sup> HO Agarwal, *International Law and Human Rights* (Allahabad: Central Law Publications, 2013) p. 27.

ascertainment of what the law is. Even as the construction to be placed on the term ‘subsidiary’ remains moot, it remains indubitable that judicial decisions play a larger part in the development of International law than theory may suggest.<sup>8</sup> This is especially so given the backdrop that state practice seldom points so clearly in one direction. Moreso given the burgeoning intrusion of International law over the last century beyond its once reserved arcane matters of diplomacy and trade to encapsulate a broad range of human experience and activity. While the proper role of a court as a law determining agency remains unassailable, its law creating impact cannot equally be lightly glossed over. This is especially so given the presumed gaps that exist in International Law. Thus, they put a lot of flesh around the bare bones of emergent norms of International Law. Emblematic of this approach is the International Court of Justice decision in the *Anglo-Norwegian Fisheries Case*<sup>9</sup> wherein the statement on the criteria for the recognition of baselines from which to measure the territorial sea was later enshrined in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. Other examples include the *Reparation Case*<sup>10</sup> which accorded recognition to the legal personality of international institutions thus putting an end to the idea that International Law applies *stricto sensu* to sovereign states and not international institutions; the *Reservations Case* which engendered a re-appreciation of the rules applicable to reservation to treaties.<sup>11</sup>

The regional courts are not left out either, the decisions of the IACHR in *Velasquez-Rodriguez*<sup>12</sup>, *Fairen Garbi*<sup>13</sup> and *Solis Corrales*<sup>14</sup> on forced disappearance of persons paved the way for a reappraisal of the rules on state responsibility, human rights and International Criminal law. In fact the *magnum opus* of International Criminal Law – the Rome Statute of the International Criminal Court has made forced disappearances a crime against humanity.<sup>15</sup> The judgments of the European Court of Justice have equally created landmarks in EU Law and relationship. Its judgment in *Van Gend en Loos*<sup>16</sup> established the direct effect of the EC Laws in the legal system of member states, the *Francovich Case* established that member states can be held financial liable for losses resulting from non-implementation of EC directives,<sup>17</sup> the *Costa v. Enel Case*<sup>18</sup> established the doctrine of supremacy which engendered a capacity of a norm of European Community Law to overrule contrary norms of national law in domestic court proceedings. Equally important are the decisions of International Criminal Courts/Tribunals. For instance, the Special Court for Sierra Leone made inroads in limiting the immunity historically enjoyed by heads of state from prosecution under International Law when it indicted, tried and convicted the former Liberian President, Charles Taylor, for crimes he ordered to be committed in Sierra Leone during his reign as president of Liberia.<sup>19</sup>

Given the undoubted influence of courts pronouncement on state practice in contradistinction to being a mechanical recorder of law that might be supposed, it becomes apt to re-echo the admonition of Judge Azevedo in the *Asylum case* thus: ‘It should be remembered that the decision in a particular case has deep repercussions, particularly in International Law because views which have been confirmed by that decision acquire quasi – legislative value ...’<sup>20</sup>

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<sup>8</sup> DJ Harris, *Cases and Materials on International Law* 6<sup>th</sup> edn. (London: Sweet & Maxwell, 2004) p. 52.

<sup>9</sup> ICJ Reports, 1951, p. 116.

<sup>10</sup> ICJ Reports 1949, p. 174.

<sup>11</sup> ICJ Reports 1951, p. 15

<sup>12</sup> 95 ILR, 232

<sup>13</sup> IACHR Series C No. 6 IHRL 1387 (IACHR 1989)

<sup>14</sup> *Ibid.*

<sup>15</sup> Article 7(i) of ICC Statute

<sup>16</sup> (1963) E.C.R. 1

<sup>17</sup> (1991) E.C.R. 1 – 5357.

<sup>18</sup> (1964) E.C.R. 585.

<sup>19</sup> Available at [www.rscsl.org](http://www.rscsl.org). accessed on 05/09/2016

<sup>20</sup> ICJ Reports 1950, p. 266 at 332.

#### 4. The Rule of *Stare Decisis*

The term ‘*stare decisis*’ is a Latin word meaning ‘to stand by things decided’. It is a derivative of the doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.<sup>21</sup> The essence of the rule is that when a point or principle of law has once been officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudications.<sup>22</sup> Its rationale is hinged on the fact that taking the same course as has been taken previously or as has usually been adopted in the past, not only confers the advantage of accumulated experience of the past but also saves the effort of having to think out a problem anew each time it arises.<sup>23</sup> Thus, following past decisions is a natural and indeed necessary procedure in our everyday affairs. Accordingly in almost any form of organisation, precedents have to be established as guides to future conducts. However, this eulogy is not a *carte blanc*. Given the fact that much of the working progress of any organisation may depend on its ability to apply precedents creatively, following precedents may lead to stereotyped procedures. Consequently, the author agrees with Lloyd when he posits thus:

The infinite variability of the facts in human situations comes to the assistance of mankind not only by rendering it impossible to apply past rulings purely mechanically, but by providing scope for the gradual moulding of the rules to meet fresh situations as they arise. There is a constant interaction between rules and the factual situations which they govern ... a too rigid observance of the rules may stereotype the very structure and activities of society itself, whereas a freer approach will allow a richer interplay of social forces<sup>24</sup>

The common law adjudicatory system is often regarded as the epicentre of the application of the rule on precedents.<sup>25</sup> This is often based on the fact that the system is often built on the hierarchical structure of courts and an efficient system of law reporting- all essential corollaries for the operation of the doctrine of precedent of which the principle of *stare decisis* is an ineluctable derivative.

##### 4.1 *Stare Decisis*, International Law and the Need for a Reconstruction

The role of law as a stabilizing index of man’s collective aspiration for achieving harmony within his society cannot be over-emphasised. Thus, the maxim *ubi jus societas ibi* is not just a mere legal aphorism. This role of law is never lost on members of the international society. Among the levers for the control of inter-state relations, law, albeit international law, is the most general and continuous.<sup>26</sup> However, law among states is not automatic and self-executing. It must depend on men and institutions skilled in the adjudicatory process. This is against the backdrop that disputes and its resolutions in inter-state relations cannot be wished away. Thus, if bringing inter-state power politics under law is a desideratum of inter-state actors, the adjudicatory process is an ineluctable roadmap.

The complexities of contemporary inter-state intercourse have engendered increasing felt needs of state that peace through law and the adjudicatory process is better in resolving inter-state disputes. This has led to the establishment of judicial institutions through which various actors of the international system

<sup>21</sup> *Stare decisi* is an abbreviation of the term “*stare decisis et non quieta movere*.”

<sup>22</sup> See BA Barner. (ed), *Blacks’ Law Dictionary* 8<sup>th</sup> edn, (St Paul Minesota: Thomson & West, 1999) p. 1443.

<sup>23</sup>MDA Freeman, *Llyod’s Introduction to Jurisprudence* 8<sup>th</sup> edn. (London: Sweet & Maxwell, 2008) p. 1536.

<sup>24</sup> *Ibid.*

<sup>25</sup> See also the legal dictionary available at [www.legaldictionarythefreedictionary.com](http://www.legaldictionarythefreedictionary.com); <https://en.m.wikipedia.org> for a detailed expose on the history and workings of the doctrine, see MDA Freeman, *op. cit.*, pp 1536-1549; D Llyod, *The Idea of Law* (London: Penguin Books, 1987) pp 272-281; JM Elegido *Jurisprudence*, (Ibadan: Specrum Books, 1994) pp. 252-266; CC Wigwe *Jurisprudence and legal Theory* (Accra: Readwide Publishers, 2011) p. 153-160; ON Ogbu, *Modern Nigerian Legal System* 3<sup>rd</sup> edn. (Enugu: SNAAP Press Ltd, 2013) pp. 135-176; JN Asein. *Introduction to Nigerian Legal System* 2<sup>nd</sup> edn. (Lagos: Ababa Press Ltd, 2005) pp 73-79.

<sup>26</sup> ND Palmer and HC Perkins, *International Relations* (Delhi: AITBS Publishers, 2010) p. 266.

can ventilate their grievances. Given the fact that there is no legislature that will make laws binding on states willy-nilly and the fact that International Law is ‘law among states’ and not ‘law over states,’ the adjudicatory process becomes a veritable instrument for the validation of norms of International Law. Ironically, this is the problem. Especially is this so given our disquisition on the doctrine of *stare decisis* which thrives on the existence of vertically hierarchical structure of courts. The international adjudicatory system is constituted in the main by a horizontal structure of courts on either general or special issues of concern to the international community. Thus, while the United Nations is widely acclaimed as the number one international organisation<sup>27</sup> and its adjudicatory organ – the ICJ, the principal judicial organ,<sup>28</sup> there is nowhere in the Charter wherein the determination of its judicial organ is accorded primacy vis-à-vis other pronouncements from other supra-national judicial institutions.<sup>29</sup>

In specific terms, Article 59 occludes any importation of the doctrine of *stare decisis* by stating that ‘the decision of the court has no binding force except between the parties and in respect of that particular case.’<sup>30</sup> While views might differ on the seemingly bald statement of Article 59, it does not mean however that the decisions of the court have no effect as precedents for the court or for International Law in general. What it does is to obviate the binding force of particular decisions in the relations between the countries who are parties to the Statute. However, the judgment of the ICJ may have a wider application than only to the parties to the case. Especially is this so where the interpretation of a multilateral treaty which both litigating states are parties comes up for reinterpretation. This is normally termed the doctrine of the impermissibility of *a contrario* contention. It was first enunciated by Guillaume<sup>31</sup> in a declaration made in connection with the *La Grand Judgment*.<sup>32</sup> The President’s declaration after pointing out that the judgment only decides on the obligations of the US vis-à-vis German nationals went on to state that:

The ruling does not address the position of nationals of other countries or that of individuals sentenced to penalties that are not of a severe nature. However, in order to avoid ambiguity, it should be made clear that there can be no question of applying *a contrario* interpretation to this paragraph.<sup>33</sup>

The foregoing seem to be the conventional interpretation placed on the doctrine of *stare decisis* as it affects the ICJ and the espousal of International Law. However, the deepening and intensification of International Law and its forays into virtually all facet of life has called into question the need for a common strand that will unify all norm validating institutions; more so given the independence and horizontal structure of international adjudicatory bodies. The increased international interactions and interdependence have significantly expanded the need for rules to govern a host of functional areas of human endeavour across national boundaries such as in the areas of trade, finance, travel and communication etc. In view of the foregoing, it becomes imperative to engraft the doctrine of *stare decisis* into the application of the rules so as to create for certainty and uniformity. This reconstruction is made more needful when the structures of international law are appraised. The existence of a uniform norm to undergird these structures in their interface cannot be overemphasised. Howsoever the structures are construed, whether horizontally as involving states only on an equal footing or vertically as that involving international law vis-à-vis domestic law on the one hand or international law vis-à-vis regional or supra-national institutions on the other hand, *stare decisis* remains a *desideratum* in assuring on the certainty of legal norms in the ever dynamic interface of norm creation, interpretation and

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<sup>27</sup> This is evidenced by the fact that virtually all states on planet earth are members and it can even set rules for non-member states. See Article 2(6) and 4(1) UN Charter.

<sup>28</sup> See Article 92 of the UN Charter.

<sup>29</sup> Contra the position Under Articles 52(1) and 103 of the UN Charter

<sup>30</sup> On the content and context of this provisions, see S Rosenne, *The Law and Practice of the International Court, 1920 – 2005* (Leiden: Martinus Nijhoff Publishers, 2006) pp. 1570 – 1590.

<sup>31</sup> A one-time president of the court. He was actually the president of the court at the time of the declaration hereunder.

<sup>32</sup> ICJ (2001) 466. The judgment gave an interpretation of a multilateral treaty to which both litigating states were parties.

<sup>33</sup> *Supra*, fn. 31 at 517.

application among supra-national and national judicial institutions in the bounden duty of making law rule among nations.

It is important to state that the lack of veneration accorded this doctrine by domestic courts vis-à-vis principles of law established by international courts accounts for the fine but facile distinction made by the US Supreme Court in the *Medellin's* case<sup>34</sup> so as to detract from the bindingness of the ICJ decisions in the *Lagrand*<sup>35</sup> and *Avena*<sup>36</sup> cases respectively. Divergence in the interpretation and application of International law by both international and domestic courts creates room for fragmentation of the norms they espouse with dire consequences for the parties who form the *raison d'etre* for the existence of these norms. This divergence has necessitated a call for judicial dialogue among international courts on the one hand and between international and domestic courts on the other hand.<sup>37</sup>

Given the absence of legislative intervention on the national vis-à-vis the international sphere and vice versa, that is designed to regulate and entrench jurisdictional relations, the doctrine of *stare decisis* comes in as a stabilizer in the judicial pendulum. Judicial institutions do not operate in complete normative isolation from one another as the complexities of today's world make it imperative. Efforts at creating a precise normative and institutional distinction to undergird and prevent jurisdictional overlap are at the core of the monist/dualist dichotomy. Institutional expansion is an ineluctable corollary of normative development which since the last decades of the twentieth century is evidenced by the sharp increase in the number of functioning international courts and a significant extension of their adjudicatory powers into matters hitherto the exclusive preserve of domestic courts. Thus today, a growing number of events and issues can be regulated by national and International Law and that disputes may also be referred to national judicial bodies and / or international judicial bodies for adjudication and *a'fortiori*, impelling the need for a common thread to underpin the interpretation of norms.

## 5. Conclusion

It is now trite that an important consequence of the normative and institutional expansion of International law in recent times has been its forays into the domestic sphere and the increased direct application of its settled norms by national courts. Coupled to this is the fact that the deepening and intensification of International law in the life of man has also necessitated the establishment of both generalist and specialist judicial institutions that will settle disputes that might otherwise play out on the world scene. Given the fact that norm setting is an ineluctable corollary in the adjudicatory process, more so the certainty of the norms so established, it becomes necessary for a mechanism to assure on the certainty and uniformity in application of the norms to be espoused. The doctrine of *stare decisis* comes in handy as a vital tool. Law thrives on the certainty and predictability of its precepts. The success of the doctrine of *stare decisis* in engendering stability in the domestic legal firmament can be replicated in the international sphere where the doctrine of state sovereignty and the absence of a hierarchical structure of courts conduce to create a near anarchical judicial superstructure. Consequently, the need has arisen for a judicial dialogue among players of the international legal milieu to formally entrench the doctrine in the international legal superstructure. In this wise, the task should begin with the UN Charter wherein its principal judicial organ, the ICJ enjoys pre-eminence. Article 59 of the Statute is due for an amendment so as to formally entrench the doctrine of *stare decisis* with a further addition that in matters of International Law, its decisions enjoys a pre-eminence above all other courts whether international, regional or domestic. This is to curb the persistence of the so-called fragmentation of international legal norms.

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<sup>34</sup> *Medellin v Texas*, 552 US 491 (2008)

<sup>35</sup> *Germany v United States of America* (2001) ICJ Reports 466

<sup>36</sup> Case Concerning *Avena and Other Mexican Nationals* (Mexico V United States of America) (2004) ICJ Reports, 12

<sup>37</sup> Y Shany, *Regulating Jurisdictional Relations between national and International Courts* (London: Oxford University Press, 2009) p. 1 *et seq.*