The Concept of Opposability in International Law

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The subject-matter of the science of law is primarily legal norms. It is salutary at the same time to bear in mind that the science of law is not wholly and exclusively concerned with norms *per se*, but, as in the case of the social sciences generally, must utilize concepts. Concepts are not only tools of inquiry and theoretical deduction, but also sometimes the necessary components of propositions and generalizations, including those formulations which are expressed as legal norms. A norm itself can often not be framed without involving or containing a legal concept.

The value of concepts, including legal concepts, lies above all in their serviceability for the purpose of analysis, communication, and definition, and it is therefore but seldom that they can constitute absolute truths, from which no departure can be contemplated. According to a learned American Judge, "all concepts are relative",[1] while the most eminent English authority on jurisprudence has pointed out that concepts "are excellent servants, but not always good masters".[2]

These observations apply with particular force to the concept of opposability which, in the writer's experience at The Hague and elsewhere has come into current use in recent years by practising international lawyers,[3] as well as by judges of the International Court of Justice.[4] Kept within limits, opposability is a helpful concept, a methodological aid to reasoning and decision, without cutting across the more fundamental notions of international law.

The term "opposability" seems to have originated as a translation of the French word *opposabilité*, which carries not so much the sense of hostile resistance, but rather that of a reliance upon some matter set up (*opposé*) by way of a technical legal bar to a claim or defence. Thus, in a dispute between two States, A and B, where State A supports its case by reference to some principle or institution, State B may seek to invoke, i.e. oppose as against State A, either a particular institution or régime under State B's domestic law, or, on a different level, the terms of some general or particular convention or treaty, alleging that this is to prevail over the principle or institution relied

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1 See per Vinson, C.J., in *Dennis v. United States* (1951), 341 U.S. 494, at p. 508.

2 Dennis Lloyd, *The Idea of Law* (Penguin Book edition, 1970), p. 295.

3 See, e.g. *North Sea Continental Shelf Cases, Pleadings, Oral Arguments, Documents*, I.C.J., vol. I, 1968, Counter-Memorial of Denmark, pp. 176-7.

4 See judgment of the Court in the *North Sea Continental Shelf Case*, I.C.J. Reports 1969, p. 3, at p. 41.

on by State A. Whether the case of State A is or is not tenable will turn on what is said to be the "opposability" (*opposabilité*) in law to State A of the institution, régime, or treaty set up by State B.

What is now regarded as a standard illustration of opposability[5] is that of the delimitation of the fisheries zone according to the base-lines method as fixed by the Norwegian Royal Decree of 12 July 1935; under the judgment of the International Court of Justice in the *Fisheries Case*,[6] this delimitation was, in law, opposable to the United Kingdom in respect to its case that British fishing vessels were entitled to operate in the greater part of the waters of the Norwegian fisheries zone, extending beyond four sea miles measured from the low-water mark on permanently dry-land part of Norwegian territory, or from the proper closing line of certain Norwegian internal waters.[7] To take the contrary case, it may be, however, that the allegation of opposability cannot be sustained in law. A standard instance of non-opposability[8] is that of the grant of nationality by Liechtenstein to one, Nottebohm, in 1939, which the International Court of Justice held in the *Nottebohm Case* (*second phase*), *Judgment of* 6 *April* 1955[9] could not be invoked against Guatemala, i.e. was not, in law, opposable to Guatemala, where Guatemala was maintaining that Liechtenstein was not entitled to espouse a claim of Nottebohm *vis-à-vis* Guatemala in proceedings in the international forum. Since this grant of nationality was not, in law, opposable to Guatemala, Guatemala was not obliged to recognize Nottebohm's Liechtenstein nationality.

These are examples of the issue of opposability being raised with regard to domestic law, or with regard to an institution or régime established under domestic law. In the *North Sea Continental Shelf Case*,[10] the question was whether the provisions of an international convention, namely Article 6 of the Geneva Convention on the Continental Shelf, containing the equidistance rule for the delimitation of a continental shelf common to adjacent countries, were opposable to the German Federal Republic, *vis-à-vis* Denmark and the Netherlands, where the German Federal Republic's case was, broadly speaking, that, in the absence of an agreed division, demarcation should be carried out according to equitable principles. The point was also raised incidentally in the cases whether, apart from Article 6 of the Convention, unilateral acts or bilateral treaties applying the equidistance rule to the delimitation of common continental shelves, other than to the North Sea continental shelf, were opposable to the German Federal Republic. In the result, neither the provisions of Article 6

5 See e.g. Bin Cheng, *Year Book of World Affairs*, 1966, at p. 247; *North Sea Continental Shelf Case, Pleadings, Oral Arguments, Documents*, I.C.J., vol. I, 1968, Counter-Memorial of Denmark, pp. 176-7.

6 I.C.J. Reports 1951, p. 116.

7 For the final submissions relied upon by the United Kingdom, see I.C.J. Reports, 1951, p. 116, at pp. 121-2.

8 See Bin Cheng, *Year Book of World Affairs*, 1966, at p. 247.

9 I.C.J. Reports 1955, p. 4.

10 I.C.J. Reports, 1969, p. 3, at p. 41.

of the Convention nor unilateral acts or treaties applying the equidistance rule were held opposable.

International lawyers, who have practised within the framework of a common law system, may well question the relevance or utility of the concept of opposability. Is it not enough to say that the rule of domestic law or the treaty rule, alleged to be opposable, governs or does not govern the position, as the case may be? Or, if a unilateral act or régime is claimed to be opposable, why go further than to declare that the act or régime is or is not in accordance with international law, and that therefore the State, against whom it is alleged to be opposable, must respect or may disregard it, as the case may be?

There are perhaps two answers.

First, by using the concept of opposability, the question is treated as confined to the area of dispute between the parties. When an international tribunal holds that a rule of domestic law or a treaty rule is opposable to one or other of the litigating States, it is not in terms making any pronouncement as to opposability in respect to all other States. This approach would be consistent with the restricted judicial functions of international tribunals, expressed for instance, in the case of the International Court of Justice, in Article 59 of the Court's Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case". Indeed, referring again to the *North Sea Continental Shelf Cases*,[11] the Court would be entitled to hold in any subsequent case involving a State which had ratified the Geneva Convention of 1958 on the Continental Shelf, without reservation as to Article 6, that Article 6 was opposable to that State, and not non-opposable, as in regard to the German Federal Republic which had not ratified, if it should claim to divide a common continental shelf in the light of principles other than the equidistance rule. In these days of the selective ratification or acceptance of treaties, and of bilateral "contracting-out" from conventions, the employment by international tribunals of the concept of opposability may serve a useful purpose where questions arise between States of the applicability either of provisions in general conventions or of the terms of treaties particular to a few States only.

Second, opposability has a certain thrust of precision. For example, an opposable treaty rule may not be a rule of general international law; to say merely that it is opposable to one State party to the litigation is to avoid any misunderstanding as to whether it is of wider operation. In the same way, if an international tribunal should hold that a treaty rule is not opposable to a State party, this does not signify that the treaty rule is inoperative for all purposes, or that the treaty itself is invalid. Similar considerations apply to the claims of a State party, to which a rule of domestic law or a treaty rule is held to be opposable. These claims may be valid in areas other than the area of dispute between the litigating States, and the use of the term

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11 I.C.J. Reports, 1969, p. 3.

"opposability" precludes any false inference of general invalidity. Experience of the working of international tribunals suggests that this aspect of precision is not one to be minimized.

In the domain of the relationship between international law and domestic law, this becomes particularly important. One or two general propositions may be hazarded. Thus, it can be said that a rule of domestic law of one State or an act pursuant to that domestic law will be opposable to another State party if the domestic law in question is in conformity with international law. But if the rule of domestic law or the act pursuant to such domestic law be held non-opposable, this does not necessarily mean that the rule or the act is without validity in the domestic domain. The position is the same if the rule or act be held non-opposable because it is in breach of international law. Unless under domestic law itself, it automatically follows that the rule or act is invalid within the domestic domain, there is no invalidity, because international law provides no procedure of invalidation of such rule or act in the domestic framework.[12] To that extent, it is better for an international tribunal to say that a rule or act is not opposable, than to pronounce upon its validity or invalidity.

However, the validity or invalidity of a rule of domestic law, or of an act purporting to be in conformity with domestic law, or of a treaty rule, may be conclusive on the issue of its opposability. For instance, if the rule of domestic law, or the act under domestic law, be invalid by reference to the provisions of the domestic constitution, neither the rule nor the act can be opposable to another State in a case before an international tribunal, unless that State has waived invalidity. Again, a treaty rule which at the time of the conclusion of the treaty conflicted with a peremptory norm of general international law (*jus cogens*) would be deemed invalid under Article 53 of the Vienna Convention of 1969 on the Law of Treaties, and could not therefore be opposable to a litigant State in the international forum.

It will be interesting to follow future developments in regard to the concept of opposability, now so much in the current vogue of the practice of international law. So far, the concept has been applied within a narrow field, beyond the limits of which its value would seem somewhat theoretical.

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12 Cf. Kelsen, *Pure Theory of Law* (2nd ed., translated by Max Knight, 1967), at p. 331.