THE DEVELOPMENT

OF

INTERNATIONAL LAW

BY

THE INTERNATIONAL COURT

BEING A REVISED EDITION OF
"THE DEVELOPMENT OF INTERNATIONAL LAW BY
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By

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enunciated in the case of *Eastern Carelia* according to which, in relation to its advisory jurisdiction, the consent of the interested State is invariably required as a condition of the jurisdiction of the Court.[68] For this reason, to give a concrete example, it cannot be asserted with any justifiable assurance that if the issue decided in the *Lotus* case—an issue which was determined by a Court equally divided and whose purport has not met with general approval on the part either of various maritime States or of legal opinion [69]—were to present itself before the Court in any subsequent case, the Court would feel itself precluded from considering it afresh on its merits.

10. *Judicial Precedent as a Source of International Law*

In the practice of the Court departures from precedent, necessary as they may be on occasions, constitute an exception to the general rule. The general rule, as illustrated by the survey undertaken in the preceding Sections, is the constant and normal operation of precedent in the jurisprudence of the Court. That survey suggests the usefulness of an examination of the part played by the decisions of the Court, and of other international tribunals, as a source of international law. The authority, in this respect, of decisions of international tribunals is in a different category from that of municipal courts. The part played by the latter as a source of international law in the international sphere results from the fact that municipal courts are organs of the State. Their decisions within any particular State, when endowed with sufficient uniformity and authority, may be regarded as expressing the *opinio juris* of that State. When, further, a point of international law is covered by a series of concordant and authoritative decisions of municipal courts of various States, such decisions may properly be regarded as evidence of international custom. In that sense, those decisions are not merely a subsidiary means for determining rules of international law in the sense of Article 38 (4), but also "evidence of a general practice accepted as law" in the meaning of Article 38 (2) of the Statute.[70]

Decisions of international courts are not a source of international law in that sense. They are not direct evidence of the practice of

[68] See below, p. 353.

[69] See below, pp. 359 *et seq.*

[70] This view, it must be observed, does not command general agreement. See the author's article in the *British Year Book of International Law*, 10 (1929), pp. 75–92.

States or of what States conceive to be the law. International tribunals, when giving a decision on a point of international law, do not necessarily choose between two conflicting views advanced by the parties.[71] They state what the law is. Their decisions are evidence of the existing rule of law. That does not mean that they do not in fact constitute a source of international law. For the distinction between the evidence and the source of many a rule of law is more speculative and less rigid than is commonly supposed. Witness the animated, but highly unreal, controversy as to whether judges create the law or whether they merely reveal the rule already contained *in gremio legis*. Witness the indifference with which lawyers are prepared to accept the paradoxical assertion that judges are at the same time docile servants of the past and tyrants of the future. The imperceptible process in which the judicial decision ceases to be an application of existing law and becomes a source of law for the future is almost a religious mystery into which it is unseemly to pry. We recall the reply of Dürer to Pirkheimer's remark that the Last Supper cannot be painted: "It should not be *thought*." In fact, the legal profession is not unduly troubled by the phenomenon of the mysterious birth of an authoritative source law out of what is supposed to be no more than evidence of the existing law. It can afford such indifference seeing that the exact definition of the process is of insignificant practical importance.

The position is the same with regard to courts generally, including international tribunals. It is of little import whether the pronouncements of the Court are in the nature of evidence or of a source of international law so long as it is clear that in so far as they show what are the rules of international law they are largely identical with it. For what are rules of international law for the purpose of judicial settlement? They are rules which, according to legal opinion, based—among other things—on the study of the work of the Court, the latter will apply. It is to a large extent in this practical aspect of its operation, namely, in the ability of the lawyer to attempt to predict the nature of the decision, that law is a science. This is, of course, not the assertion of the rigid positivist view. For while it must be assumed that the judge will apply existing law, the law thus applied is not the mechanical product of an effortless

[71] See below, pp. 206 *et seq*.