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Draft report of the International Law Commission on the work of its seventy-fifth session

Rapporteur: Ms. Penelope **Ridings**

Chapter V
Subsidiary means for the determination of rules of international law

Addendum

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Please recycle

2. Text of the draft conclusions and commentaries thereto provisionally adopted by the Commission at its seventy-fifth session

2. The text of the draft conclusions, together with commentaries provisionally adopted by the Commission at its seventy-fifth session, is reproduced below.

Conclusion 4
Decisions of courts and tribunals

1. Decisions of international courts and tribunals, in particular of the International Court of Justice, are a subsidiary means for the determination of the existence and content of rules of international law.

2. Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law.

Commentary

(1) Draft conclusion 4 concerns the role of decisions of international and national courts and tribunals as subsidiary means for the identification or determination of the existence and content of rules of international law. Draft conclusions 4 (decisions of courts and tribunals) and 5 (teachings) build on the prior work of the Commission. They both seek to clarify how decisions of courts and tribunals and teachings, the two principal means derived from Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, are to be used as subsidiary means for the purpose of identifying or determining the existence and content of rules of international law.

(2) The present draft conclusion starts by elaborating in detail and in substance the first of the three categories of subsidiary means recognized in draft conclusion 2, namely: "(*a*) decisions of courts and tribunals; (*b*) teachings; (*c*) any other means generally used to assist in determining rules of international law". Draft conclusion 5 addresses the second of the three categories of subsidiary means, specifically "teachings", in the sense of those of scholars from the various nations, regions and legal systems of the world as subsidiary means for the identification or determination of the existence and content of rules of international law. Later draft conclusions, to be adopted by the Commission, will address the third residual category of "any other means generally used to assist in determining rules of international law".

(3) Draft conclusion 4 consists of two paragraphs. Paragraph 1 addresses decisions of international courts and tribunals, especially those of the International Court of Justice, which are expressly identified as a subsidiary means for the identification or determination of the existence and content of rules of international law. Paragraph 2 considers the relatively more qualified role of decisions of national courts as subsidiary means for the identification or determination of the existence and content of rules of international law. The latter use of decisions of national courts is without prejudice to their other uses in the context of treaty interpretation or their dual role in the identification or determination of customary international law or as part of the methodology for the identification or determination of general principles of law. It is also without prejudice to the analytical use of decisions in the writings of scholars and in other subsidiary means. Key elements of each of the two paragraphs of draft conclusion 4 are considered below.

Paragraph 1

"Decisions"

(4) The term "decisions", as used in the present commentaries, was already explained in the commentary to draft conclusion 2, subparagraph (*a*). It is therefore sufficient to recall here that the Commission there indicates that the narrow term "judicial decisions", found in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, had been broadened by using the unqualified term "decisions" in order to reflect contemporary

practice.[1] That contemporary practice confirms the use of a wider set of decisions from a wide variety of bodies, not just judicial ones, as part of the process of identifying or determining the existence and content of rules of international law.[2]

(5) The first meaning of the umbrella term "decisions" is a judgment, decision or determination by a court of law, in which case, it would be a *judicial* decision. Such judicial decisions include those from both international courts and tribunals and those from regional courts and tribunals as well as those from national courts.

(6) The second meaning of the term "decisions" is decisions from another type of adjudicative body, other than a court of law, such as a body of persons or institution engaged in a process of adjudication with a view to ending a dispute or settling a matter. In that case, it would simply be described as a "decision" without the qualifying term "judicial". The Commission has explained that this broader meaning of "decisions" would include not just those final judgments rendered by a court of law, but also advisory opinions and any other orders issued in incidental or interlocutory proceedings, including provisional measures.[3] They would also encompass those "decisions", sometimes referred to as "quasi-judicial decisions", taken under individual complaints procedures of State-created treaty bodies, for example, the Human Rights Committee[4] or the Committee against Torture,[5] or those issued by other types of adjudicative *ad hoc* or permanent bodies styled as commissions.

(7) The Commission also already established that separate and dissenting opinions and declarations, which are better understood as "teachings", may shed light on decisions, including those of a judicial and of a non-judicial character. Such opinions are given by the individual judge or decision maker depending on the context.[6] They may be either concurring or dissenting opinions and may also be called declarations.[7] However styled, such opinions play a useful complementary role in that they may clarify the legal or factual basis of a decision or provide additional reasons for a particular decision or even address points raised by the parties, but which, for whatever reason, including reasons of judicial economy, are not addressed in a given court or tribunal's decision.

(8) That said, since such opinions are those of the individual judges, they are attributable to the named judge rather than the tribunal or court as a whole. Thus, in strictly technical terms, such opinions "do not form part of the Court's decision; whatever their intrinsic merits, it is the decision of the Court which has legal effect".[8] This implies that a measure of caution

[1] See para. (4) of the commentary to draft conclusion 2, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 126, at p. 81.

[2] See paras. (6)-(7), *ibid*., pp. 80–81 (note that the reference to courts and tribunals would also encompass regional judicial bodies, such as the African Court on Human and Peoples' Rights, the Caribbean Court of Justice, the Court of Justice of the European Union, the Court of Justice of the Economic Community of West African States, the East African Court of Justice, the European Court of Human Rights and the Inter-American Court of Human Rights).

[3] See para. (5) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 109 ("the term 'decisions' includes judgments and advisory opinions, as well as orders on procedural and interlocutory matters").

[4] See Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171 (art. 1 states: "[a] State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant").

[5] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85 (art. 22, para. 1, states: "[a] State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention").

[6] See para. (5) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 109.

[7] *Ibid*.

[8] See Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge, Cambridge University Press 1996), p. 192.

is warranted when consulting separate opinions, especially the dissenting opinions, in so far as they reflect the particular views of the individual judge and, in some cases, go further in addressing issues not addressed or perhaps even deliberated upon by the court or tribunal as a whole. At the same time, individual opinions are often useful in explaining elements for which there might be no explanation in the judgment itself. They are in that sense, at a minimum, equivalent to the types of opinions given in scholarly writings and fall within the ambit of "teachings" as used in draft conclusion 5.

"of international courts and tribunals"

(9) In the commentary to draft conclusion 2, the term "courts and tribunals" was also explained as forming part of two broad types or categories of courts: first, "international courts and tribunals"; and second, "national courts". The distinction between international courts and tribunals, on the one hand, and national, domestic or municipal courts, on the other, in the present draft conclusion carries implications for the weight to be attached to the decisions of courts and tribunals and is further elaborated below in relation to paragraph 2.

(10) The current draft conclusion underscores that the decisions of "international courts and tribunals" should be understood broadly. The term is intended to cover "any international body exercising judicial powers"[9] and which is called upon to determine the existence and content of rules of international law irrespective whether they are found in treaties, customary international law, general principles of law or another source of law. Examples of such international courts today abound. They would include permanent bodies such as the International Court of Justice, but also a wide variety of other specialist and regional courts and tribunals, some of which may be *ad hoc* instead of permanent and may be inter-State arbitral tribunals or other types of tribunals applying international law, including those that may permit individuals to initiate proceedings.[10] The body of law that they apply, as well as the skills and the breadth of evidence usually at the disposal of international courts and tribunals, may lend significant weight to their decisions, subject to the considerations mentioned in draft conclusion 3 setting out the general criteria for the assessment of subsidiary means and draft conclusion 8 identifying specific criteria to evaluate the weight of decisions of courts and tribunals.

"in particular of the International Court of Justice"

(11) While paragraph 1 clarifies that decisions of all international courts and tribunals are a subsidiary means for the identification or determination of the existence and content of rules of international law, the Commission makes express reference to the International Court of Justice. This understanding is captured by the formulation "in particular of the International Court of Justice". This language is identical to paragraph 1 of conclusion 13 (decisions of courts and tribunals) of the conclusions on identification of customary international law,[11] paragraph 1 of draft conclusion 9 (subsidiary means for the determination of the peremptory character of norms of general international law) of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)[12] and paragraph 1 of draft conclusion 8 (decisions of courts and tribunals) of the draft conclusions on general principles of law.[13] There is, at present, no hierarchy of international courts and tribunals in the decentralized international legal system. But decisions of the International Court of Justice, especially on matters of general international

[9] Para. (4) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 109.

[10] *Ibid*. There is a burgeoning number of international courts and tribunals. For example, while studies show that around 1989 there were only six permanent international courts, over a dozen such bodies that had issued over 37,000 rulings existed as of 2014. See, in this regard, Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, Princeton University Press, 2014).

[11] *Yearbook … 2018*, vol. II (Part Two), para. 65.

[12] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

[13] *Ibid., Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 40.

law, are often regarded as authoritative, including by other courts and tribunals.[14] On the other hand, depending on the context, the decisions of specialized or regional courts and tribunals may carry considerable weight, and at times even greater weight, taking into account their specific mandates and the issue under consideration.

(12) The Commission considers that highlighting the International Court of Justice in paragraph 1 of draft conclusion 4 is warranted for several reasons. First, Article 38, paragraph 1 (*d*), is the applicable law clause of the Statute of the International Court of Justice, which forms an integral part of the Charter of the United Nations and directs the judges when resolving disputes between States in accordance with international law or issuing advisory opinions, to "apply" subject only to the provisions of Article 59 "judicial decisions" as a "subsidiary means for the determination of rules of law". Naturally, a study such as the present one aimed at clarifying the practice in relation to a provision contained in the Statute of the Court ought to give due deference to that body's extensive judicial practice. In fact, the practice indicates that the Court routinely refers to its own previous decisions, and increasingly those of other courts and tribunals, although without necessarily characterizing them as "subsidiary means".[15] In this way, the Court does not only apply the applicable law provision as a function of its own Statute, now deemed to be part of customary international law, it also issues authoritative decisions that assist in upholding the unity and coherence of international law as a legal system.

(13) Second, under Article 92 of the Charter of the United Nations, the International Court of Justice is "the principal judicial organ of the United Nations".[16] Besides the fact that all Members of the United Nations are *ipso facto* "parties to the Statute of the International Court of Justice",[17] its members are elected by the main political organs of the United Nations, namely, the General Assembly, which is comprised of all Member States, and the Security Council, composed of 15 States, entrusted with the primary responsibility for the maintenance of international peace and security. The Court, in other words, is a truly universal body of jurists founded by a truly universal international organization that is broadly representative of the main regions and legal systems of the world. Its judicial findings therefore possess the legitimizing features that have rightly led to it be described as the "World Court".[18]

(14) Third, while some States have established courts to judicially settle disputes among themselves at the regional level,[19] the International Court of Justice remains the only

[14] See footnote 743 in para. (4) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 109. See, for example, European Court of Human Rights, *Jones and Others v. the United Kingdom*, Application Nos. 34356/06 and 40528/06, *Reports of Judgments and Decisions of the European Court of Human Rights* (ECHR) 2014, para. 198; International Tribunal for the Law of the Sea, *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment*, *ITLOS Reports 1999*, p. 10, at paras. 133–134; and World Trade Organization, *Japan — Alcoholic Beverages II*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, adopted on 1 November 1996, *Dispute Settlement Reports* (DSR) 1996:I. p. 97, at sect. D.

[15] See memorandum by the Secretariat on subsidiary means for the determination of rules of international law: elements in the previous work of the International Law Commission that could be particularly relevant to the topic (A/CN.4/759), para. 219.

[16] See Charter of the United Nations, Article 92: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

[17] See Charter of the United Nations, Article 93, paragraph 1: "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice."

[18] For example, see United States of America, "The United States and the 'World Court'", Congressional Research Service, 17 October 2018, CRS Report No. LSB10206, available from https://crsreports.congress.gov/product/pdf/LSB/LSB10206 (noting that the International Court of Justice is "commonly called the 'World Court'").

[19] See Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM [Caribbean Community] Single Market and Economy (Nassau, 5 July 2001), United Nations, *Treaty Series*, vol. 2259, No. 40269, p. 293, art. 12, para. 8 ("Notwithstanding any

international tribunal to date with general subject matter jurisdiction. Although this power is not unique, the Court also possesses the competence to give advisory opinions on any legal questions requested by the two main political organs, as well as by other United Nations organs and their specialized agencies. It follows that there is some merit in attaching significance to its case law, given its special status as the only standing international court of general jurisdiction.

(15) Fourth, and this point also flows from Article 94 of the Charter of the United Nations, each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.[20] Such decisions, including final judgments and provisional measures, are enforceable by the Security Council. This is because any party to a case may have recourse to it if the other party fails to perform the obligations incumbent upon it under a judgment rendered by the Court. The Security Council may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. This power has not been frequently invoked in practice. Yet, the option for States to resort to that provision for both the enforcement of interlocutory decisions, including provisional measures, and final judgments remains under the Charter of the United Nations.[21] Moreover, it seems significant that, in accordance with Article 103, in the event of a conflict between the obligations of State Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter will prevail. These obligations would plainly include the obligation to comply with decisions of the Court pursuant to Article 94 of the Charter.

(16) Overall, taking into account the foregoing considerations, the Commission considered it appropriate to highlight the role of the International Court of Justice without in any way implying that a hierarchy exists vis-à-vis other international courts and tribunals created by States or international organizations exercising specific competencies conferred on them by their founders. For example, on matters of international criminal law, international human rights law, the law of the sea, and international economic law, decisions of the *ad hoc* or permanent tribunals, courts and commissions created by States and decisions of international

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other provision of this Treaty, the Conference may consider and resolve disputes between Member States."); Treaty for the Establishment of the East African Community (Arusha, 30 November 1999), *ibid*., vol. 2144, No. 37437, p. 255, art. 32, subpara. (*b*) (the East African Court of Justice has jurisdiction over disputes "[a]rising from a dispute between the Partner States regarding [the] Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned"); Statute of the Central American Court of Justice (Panama City, 10 December 1992), *ibid*., vol. 1821, No. 31191, p. 291, art. 22, subpara. (*a*) ("The Court's competence includes the following: … To hear, at the request of the Member States, the controversies that arise among them"); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), *ibid*., vol. 213, No. 2889, p. 221, as revised, art. 33 (referring to inter-State cases heard before the European Court of Human Rights: "Any High Contracting Party may refer to the court any alleged breach of the provisions of the Convention and the protocols thereto another High Contracting Party").

[20] See Charter of the United Nations, Article 94, paragraph 1: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

[21] The United Kingdom requested the Security Council to call upon Iran to act in conformity with provisional measures that the International Court of Justice indicated in the *Anglo-Iranian Oil Co. case*. For a discussion of the debate, see https://legal.un.org/repertory/art94/english/rep_orig_vol5_art94.pdf. The Court addressed the effect and the force of its judgment under Article 94 of the Charter of the United Nations in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at para. 29. Similarly, Article 94 was relevant in: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14, at para. 178; *LaGrand Case (Germany v. the United States of America), I.C.J. Reports 2001*, p. 466; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 311; *Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening), Judgment, 11 September 1992, I.C.J. Reports 1992*, p. 350; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303.

organizations establishing them must be carefully taken into account and, in some cases, given considerable or even great weight. The legal value to attribute to such decisions from all such bodies will vary depending on the context and must be assessed on a case-by-case basis.

"are a subsidiary means for the determination of the existence and content of rules of international law"

(17) In the final element of paragraph 1 of draft conclusion 4, the Commission has determined that decisions of international courts and tribunals, especially those of the International Court of Justice, "*are* a subsidiary means for the determination of the existence and content of rules of international law" (emphasis added). The decisions of such courts and tribunals on questions of international law, in particular those decisions in which treaty rules are interpreted and applied or the existence of rules of customary international law, general principles of law or peremptory norms is identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of international law.

(18) The terms "subsidiary means" and "determination" were already explained in the commentary to draft conclusion 1. Reference can be had to that explanation in the earlier part of the commentary to that draft conclusion (see paras. (10)-(13) thereof).[22] There, the Commission already established that the term "determination" has at least two meanings. First, it refers to the process of using the subsidiary means to ascertain or identify whether a certain rule exists and, if it does exist, the content of the rule. Second, determination means stating the rule and its scope and then applying it to a given situation. Consequently, the terms "identification" or "determination", both of which are part of the interpretation process, may be used to encompass several operations for the purposes of the draft conclusions. Similarly, the commentary also clarified the terms "existence and content" of rules of international law (para. (3) of the general commentary).[23] Thus, the reference to the "existence and content", in the context of the present draft conclusion on the role of decisions of international courts or tribunal, reflects the fact that, while often in practice there may be a need to use such a subsidiary means to identify a rule, in some cases, it may already be accepted that the rule exists but its precise content is what is disputed and therefore needs to be determined. Both scenarios are captured by the formulation used.

(19) Regarding the term "rules of international law", the earlier commentary (para. (3) of the commentary to draft conclusion 1[24]) explained the phrase, to the effect that "rules of law" is actually used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. The Commission noted that, while the former term is more frequently used in the present topic, it is equivalent to the latter, since they are interchangeable. For avoidance of doubt, the reference to "rules"[25] of international law is meant to encompass all those rules that may be found in treaties, customary international law (which may be referred to as "principles" because of their more general and more fundamental character), and rules and principles contained in the general principles of law. The rules being referred to are not limited to the rules derived from the specific sources mentioned here. They may include those rules found in any source of an international legal obligation, such as a unilateral declaration of States capable of creating legal obligations.

(20) Furthermore, the Commission had previously determined that, as with the sources of international law referred to in the preceding paragraph, decisions of international courts and tribunals are a subsidiary means for determining the peremptory character of norms of

[22] A/78/10, para. 126.

[23] *Ibid*.

[24] *Ibid*.

[25] The International Court of Justice explained this in *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at para. 79 ("the association of the terms 'rules' and 'principles' is no more than the use of a dual expression to convey one and the same idea, since in this context, 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character").

general international law.[26] It was elucidated in previous work that there "is an abundance of [such] examples",[27] including in the case law of various international tribunals such as the International Criminal Tribunal for the Former Yugoslavia.[28] In short, consistent with the Commission's approach on recent topics and as clarified in the commentary to draft conclusion 1 on scope, decisions of international courts and tribunals are a subsidiary means for determining the existence and content of a wide range of rules of international law.

Paragraph 2 – Decisions of national courts may be used, in certain circumstances, as a subsidiary means for the determination of the existence and content of rules of international law

(21) Paragraph 2 of draft conclusion 4 concerns decisions of national courts, which may be used, in certain situations, as a subsidiary means for the determination of the existence and content of rules of international law. First, as a preliminary point, the Commission must recall that Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice refers to "judicial decisions" without in any way qualifying or distinguishing the use of such decisions as emanating from international, or national or domestic courts.[29] This means that, as a starting proposition, decisions of both international courts and decisions of national courts could equally serve as a source of subsidiary means that may be used to identify or determine the existence and the content of rules of international law. Therefore the two types of decisions, whether from national or international courts, are equal in principle and do not differ in their formal status.

(22) Second, while the distinction between national and international courts is not always easy to draw, given also the emergence of a new type of so-called "hybrid"[30] courts, which

[26] European Court of Human Rights: *Soering v. the United Kingdom*, 7 July 1989, Series A No. 161; *Cruz Varas and Others v. Sweden*, 20 March 1991, Series A No. 201; and *Chahal v. the United Kingdom*, 15 November 1996, *Reports of Judgments and Decisions* 1996-V.

[27] Para. (3) of the commentary to draft conclusion 9 of the draft conclusions on conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, para. 44.

[28] See International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, *Judicial Reports 1998*, vol. 1, p. 467, at p. 569, paras. 153–154. The European Court of Human Rights later relied on this interpretation in *Al-Adsani v. the United Kingdom* [Grand Chamber (GC)], No. 35763/97, ECHR 2001-XI, para. 30. See also Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, Series C, No. 153, para. 128, and Inter-American Commission on Human Rights, *Michael Domingues v. United States*, Case 12.285, Merits, 22 October 2002, Report No. 62/02, para. 49.

[29] See para. (6) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at pp. 109–110.

[30] There are several types of such "hybrid" tribunals that are hybrid to varying degrees. Some of the "hybrid courts" form part of or operate within a domestic legal system, while others operate as independent institutions with their own distinct legal personality under international law. Often discussed in terms of the legal basis for their establishment and whether they have mixed composition in terms of staff or apply international or domestic law, at least three broad categories can be identified. First, courts established through a treaty between either a State or an international or regional organization. Second, tribunals established by an international transitional administration charged with administering a country in transition. Third, courts established by States under their domestic law with some level of international, including technical and funding, support. The Extraordinary African Chambers within the Senegalese judicial system and the Extraordinary Chambers in the Courts of Cambodia are examples of the former. The Special Court for Sierra Leone and the Special Tribunal for Lebanon were created through bilateral treaties between the United Nations, on the one part, and, on the other part, the Governments of Sierra Leone and Lebanon, respectively. Other "hybrid" tribunals were established by international administrations such as the Special Panels for Serious Crimes in East Timor and the War Crimes Chamber in Bosnia and Herzegovina. Yet more examples are the internationally assisted domestic accountability efforts, such as those of the International Crimes Division of the High Court of Uganda, the War Crimes Chamber of the Belgrade District Court in Serbia supported by the Organization for Security and Cooperation in Europe and the Special Criminal Court in the Central African Republic. For more on hybrid courts, see Sarah Williams, *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues*

may, depending on their nature, fall into either the international or national categories, as a practical matter a distinction is drawn in practice by the use to which the decisions of international courts and tribunals, on the one hand, and the decisions of national courts, on the other, are put.

(23) The Commission considers that the use of decisions of international courts and tribunals as subsidiary means for the determination of the existence and content of rules of international law is unqualified, for the reasons already explained above. However, the use of the decisions of national courts calls for some caution.[31] This reality emerging from the practice is reflected in the different wording of paragraphs 1 and 2, in particular the use of the terms "may be used" and "in certain circumstances" qualifying a "subsidiary means for the determination of the existence and content of rules of international law". Whereas paragraph 1 definitively states that the decisions of international courts and tribunals "are" a subsidiary means, the decisions of national courts "may be used" for the determination of the existence and content of rules of international law. The use of "in certain circumstances" expresses somewhat differently essentially the same idea found previously in the Commission's work on the identification of customary international law (conclusion 13, para. 2[32]) and general principles of law (draft conclusion 8, para. 2[33]) – "[r]egard may be had, as appropriate" – or its work on the topic identification and legal consequences of peremptory norms of general international law (*jus cogens*) (draft conclusion 9, para. 1[34]) – "[r]egard may *also* be had, as appropriate" (emphasis added).

(24) The Commission has established that sound reasons exist to distinguish between the decisions of international courts and tribunals and those of national courts. The decisions of international courts and tribunals reflect the views of international tribunals that are constituted to apply international law and that are usually composed of benches that are reflective of the main legal systems and regions of the world. They are therefore generally an authoritative means for identifying the existence of and determining the scope and content of rules of international law.

(25) In contrast, national courts operate within a particular legal system, which may incorporate international law only in a particular way and to a limited extent. Their decisions may reflect a particular national perspective and normally are only issued by judges that are nationals of the State concerned. Unlike most international courts, national courts sometimes lack international law expertise. They may have also reached their decisions without the benefit of hearing arguments advanced by States, or even where such arguments are heard, they may reflect the views of one or two organs of only one State.[35] That said, even within the category of national courts, greater weight is often placed on the decisions of higher appellate courts, such as the supreme or constitutional courts. Less weight will attach to decisions of lower courts or courts of first instance. National court decisions that have been reversed by a subsequent decision of a higher court or through the passage of domestic legislation may not carry much weight.

(26) Draft conclusion 4 must be read together with draft conclusion 3, which indicates the general criteria for the assessment of subsidiary means for the determination of rules of law, as well as draft conclusion 8, which sets out illustrative criteria for the assessment of the weight to be given to decisions of any court or tribunal, whether international or national. Those two draft conclusions indicate that the assessment of the weight of such decisions must take into account, in particular, whether the decisions are representative or address the same

(Oxford, Bloomsbury, 2012), Laura A. Dickinson, "The promise of hybrid courts", *American Journal of International Law*, vol. 97 (2003), pp. 295-310, and Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, Oxford University Press, 2004).

31 On decisions of national courts as a subsidiary means for the determination of rules of customary international law see, for example, United Kingdom, Supreme Court, *Mohammed and others v. Ministry of Defence*, [2017] UKSC 2 (17 January 2017), paras. 149–151 (Lord Mance).

32 *Yearbook … 2018*, vol. II (Part Two), para. 65.

33 A/78/10, para. 40.

34 A/77/10, para. 43.

35 See para. (7) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), p. 110.

or similar issues as those under consideration, the quality of the reasoning in the decision, the expertise of those involved in making the decision, the level of agreement among those involved in deciding the case, whether the court or tribunal in question had specific competence regarding the application of the rule in question, the extent to which the decision is part of a body of concurring decisions and the extent to which the reasoning remains relevant when taking into account subsequent developments.

(27) The Commission here underlines that the degree of representativeness of national court decisions that are used in the determination of rules of international law is an important consideration that ought to be taken into account. Far too often, in practice, the decisions of certain courts from certain regions are given priority to the exclusion of others.[36] This may have the unintended effect of undermining the global acceptance of international law. In the view of the Commission, much as with teachings as a subsidiary means in draft conclusion 5, best efforts should be made to use a representative set of domestic court decisions from the various legal systems, regions and languages of the world. This helps to enhance legitimacy and the development of a truly universally applicable body of international law.

Conclusion 5
Teachings

Teachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law. In assessing the representativeness of teachings, due regard should also be had to, *inter alia*, gender and linguistic diversity.

Commentary

(1) Draft conclusion 5 concerns the role of teachings or materials ("*la doctrine*" in French and "*la doctrina*" in Spanish) understood in a broad sense to include writings or doctrine, as well as recorded lectures and audiovisual materials.[37] The draft conclusion, following on from draft conclusion 4 addressing the use of decisions of international and national courts and tribunals as subsidiary means, takes up "teachings" whenever they are used in the process of determining the existence and content of rules of international law. The term also generally encompasses teachings produced by an individual or collectives of individuals organized into *ad hoc* or permanent expert groups, whether created privately or by States and or international organizations.[38]

(2) The present draft conclusion comprises two sentences. The first sentence sets out the general rule concerning teachings. The second sentence highlights the important issue of representativeness of teachings. The first sentence provides that "[t]eachings, especially those generally reflecting the coinciding views of persons with competence in international law from the various legal systems and regions of the world, are a subsidiary means for the determination of the existence and content of rules of international law."

(3) The Commission recalls that the present formulation differs from the approach taken to the formulation of the conclusion on "Teachings" in the topics relating to the sources of international law, as finalized upon second reading in 2018 and in 2022 and on first reading in 2023. The differences relate primarily to two aspects. First, in draft conclusion 5, the Commission has dropped the identical albeit archaic language of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which employs "teachings of the most

[36] See James Thuo Gathii, "The promise of international law: a third world view", Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law (29 August 2020).

[37] In its prior work, the Commission has determined that "teachings" are "to be understood in a broad sense". It also considered that the category would include "teachings in non-written form, such as lectures and audiovisual materials". See para. (1) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110.

[38] The inclusion of teachings produced by individuals as well as collectives whether created privately or by States or international organizations is consistent with the prior work of the Commission. See, *inter alia*, para. (4), *ibid*.

highly qualified publicists of the various nations", in favour of the more contemporary formulation used in the preceding paragraph of the present commentary. That said, for reasons of consistency, the much shorter title "Teachings", as used in the other topics, has been retained.

(4) Second, whereas in previous conclusions teachings of the most highly qualified publicists of the various nations "may serve as" a subsidiary means, the Commission employed in the present draft conclusion the more direct formulation that teachings "are" a subsidiary means.[39] The idea expressed in draft conclusion 5 aligns the way in which teachings are referred to with the more positive formulation of draft conclusion 4, paragraph 1, stating that decisions of international courts and tribunals "are" also a subsidiary means.

(5) Before settling on the formula that teachings "are" a subsidiary means, the alternative formulations of "may be used" or "may serve as" were also considered. The term "may be used" was employed in relation to decisions of national courts in draft conclusion 4, paragraph 2, above. Specifically with regard to teachings, the phrase "may serve as" was used in conclusions on teachings in the topics identification of customary international law (conclusion 14[40]) and general principles of law (draft conclusion 9[41]) and in draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).[42] In any case, both the formulations of "may serve as" or "may be used" are intended to clarify that it is not all teachings that would constitute subsidiary means but only those fulfilling certain conditions.[43]

(6) As with decisions of courts and tribunals, referred to above in draft conclusion 4, teachings or doctrine are not themselves sources of international law. They may, however, offer useful guidance for the determination of the existence and content of rules of international law. It follows that the use of "are" was not meant to alter the auxiliary role of teachings. Instead, it merely recognizes the value that teachings may have in the process of identifying and determining the existence and content of rules of international law. The choice to adjust how reference is made to teachings also reflects the fact that Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice does not distinguish in its actual wording between judicial decisions and teachings.

(7) The Commission has already indicated in its previous work that the term "teachings" is in practice a broad category. The word "especially" was included in the part of the first sentence, set off by commas, to emphasize several elements of teachings. First, to provide for various practical scenarios involving teachings. The first being that there could, in some situations, be an abundance of teachings in order to identify or determine the existence and content of rules of international law. In such a case, the word "especially" underlines the possibility that there could be among the teachings "those generally reflecting the coinciding views of persons with competence in international law" and that such teachings may come "from the various legal systems and regions of the world". The idea is to underline that particular attention might be paid to those teachings reflecting such characteristics. As regards the first part of that the first sentence of draft conclusion 5, which has already been explained earlier in the commentary, the balance of views of those possessing international law competence may happen to reflect a general trend when considered in totality against the body of scholarly work available. In such instances, this could be seen as an indication that those views – to the extent that they are diverse and representative – are more likely to be accurate, with commensurate weight attached to them. The draft conclusion does not however

[39] See draft conclusion 14, *ibid.*, and para. 2 of draft conclusion 9 of the draft conclusions on conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, para. 44, at p. 43.

[40] *Yearbook … 2018*, vol. II (Part Two), para. 65.

[41] A/78/10, para. 40.

[42] A/77/10, para. 43.

[43] See para. (3) of the commentary to conclusion 14 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 110, and para. (7) of the commentary to draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, para. 44, at pp. 44-46.

require there to be scholarly consensus, let alone unanimity, for a high-quality teaching to be found valuable in determining the existence and content of rules of international law. On the other hand, the fact that there are especially widely diverging views among scholars could also be relevant to determining the weight to attach to a particular teaching. Where scholarly views are broadly divided, and perhaps matched by uncertainty in the other subsidiary means such as in the available judicial or other decisions, this could be an indication that the law on the issue under consideration is unsettled.

(8) The second scenario would allow for the consideration of teachings where there is a lesser number of teachings on a given subject. While express reference was naturally made to teachings that might reflect expertise or "competence in international law", the possibility was left open for circumstances whereby non-international law teachings could also be relevant for determination. This may arise, for instance, in cases addressing related subject areas, such as comparative law.

(9) The third and particularly important difference between the formulation of teachings in the present draft conclusion and the prior work speaks to the critical issue of teachings and the need for their representativeness both when they are being consulted and also when they are being taken into account. The Commission considered it appropriate that the draft conclusion, as framed, underline the particular value that might be placed on certain teachings in two principal ways: that teachings that come, first, "from the various legal systems" and, second, from the various "regions of the world" will carry considerable weight as subsidiary means for the determination of the existence and content of rules of international law. The intention of the Commission here is to underline that teachings or scholarly works that, on balance, reflect the rich array of legal traditions of a pluralistic world should be accorded greater weight in the process of identifying or determining the existence and content of rules of international law. If the teachings consulted are of high quality but reflect only one dominant legal system, instead of a wide variety of legal systems and regions of the world, then it would be harder for them to enjoy great authority and even perhaps command universal support.

(10) The formulation "especially those generally reflecting the coinciding views of persons with competence in international law from various legal systems and regions of the world" is an inclusive and broad phrasing that seeks to ensure the variety and diversity of teachings from different parts of the world, as well as that a diversity of viewpoints are fully considered when determining rules of international law. In addition to carrying out a broad survey, the reference to various "regions of the world" indicates that, on the whole, even the weight of a particular teaching would be enhanced where it engages in a survey demonstrating that a certain rule of international law is prevalent in legal systems representing the main legal families and traditions of the world (such as customary or indigenous law, civil law, common law and Islamic law).

(11) The second sentence of draft conclusion 5 develops, in an illustrative manner, the criterion of representativeness that ought to be taken into account. A link is made between the first and the second sentences of the draft conclusion. The second sentence states the notion that "[*i*]*n* assessing the representativeness of teachings, due regard should also be had to, *inter alia,* gender and linguistic diversity" (emphasis added). The Commission is of the opinion that, when considering teachings, due account must be taken of gender and linguistic diversity.

(12) In formulating this provision, which is not meant to be restrictive, there was considerable debate whether to highlight racial diversity alongside gender and linguistic diversity as well as diversity of viewpoints on a given subject. The Commission considered that racial, gender and linguistic diversity as well as viewpoint diversity are all important considerations that may need to be weighed when assessing the representativeness of the teachings being consulted. However, since the reference to various regions of the world already reflected various forms of diversity, such as that of race, and the idea was to develop an illustrative instead of exhaustive list of factors to take into account, it was felt necessary to highlight only gender and linguistic diversity which, in the view of members that ultimately prevailed, would not necessarily be covered by the phrase "from the various legal systems and regions of the world". The view was, however, expressed by several members,

and two States[44] in the context of the Sixth Committee debate of the present draft conclusion, that "racial" diversity should have been included for the same reasons that linguistic and gender diversity were included. These reasons included the enumeration of race, alongside gender, as a prohibited ground of discrimination in the International Bill of Human Rights and in regional human rights treaties and most national constitutions from all the different parts of the world.

(13) The formula "due regard should also be had to, *inter alia*," would require users of the draft conclusion to undertake best efforts to ensure the representativeness of the teachings that they consider when using teachings as subsidiary means. The discretionary term "should" is used instead of "shall". The use of the term "also" indicates that the listing that follows is additional to what had been stated before. The last element, i.e. "*inter alia*", meaning among other things, clarifies that gender and linguistic diversity are not exhaustive of the forms of diversity that ought to be considered. Thus, the Commission here highlights some, though not all, of the considerations that may be relevant to the assessment of how representative teachings are. It should be noted that, while the criteria of representativeness mentioned in the draft conclusion were only intended to be illustrative, concern was expressed regarding the feasibility of verifying the representativeness of the authors of teachings, since some of the criteria of representativeness could not be easily ascertained by a simple review of the materials and would require a further and potentially extended inquiry into the background and identity of the author.

(14) The Commission has established that teachings do play a vital role in the process of identifying, determining and applying rules of international law. The importance of teachings notwithstanding, as indicated in the prior topics, there is a need for caution when drawing upon teachings because their actual value for the assessment of the existence and content of rules of international law may vary for different reasons. First, teachings sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate for its development (*lex ferenda*). Second, teachings may reflect the national or other individual viewpoints of their authors. Third, teachings may differ greatly in quality. Assessing the authority of a given work is thus essential. This was famously explained by the Supreme Court of the United States in *Paquete Habana*, which found – about forty-five years before the International Court of Justice was established – that the works of expert jurists and commentators who have made themselves "peculiarly well acquainted" with the subjects that they treat may be resorted to by courts "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is".[45]

Conclusion 6
Nature and function of subsidiary means

1. Subsidiary means are not a source of international law. The function of subsidiary means is to assist with the determination of the existence and content of rules of international law.

2. The use of materials as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes.

Commentary

(1) Draft conclusion 6 aims to clarify the role of subsidiary means for the determination of rules of international law vis-à-vis the sources of international law. It consists of two paragraphs. Paragraph 1 considers the nature and function of subsidiary means, while paragraph 2 is a without prejudice clause.

Paragraph 1 – the nature and function of subsidiary means

(2) Paragraph 1 of draft conclusion 6 is composed of two sentences. The first sentence addresses the nature of subsidiary means and provides that subsidiary means are *not* a source

[44] See, in this regard, the statements by Uganda and Sierra Leone to the Sixth Committee at the seventy-eighth session of the General Assembly during the debate of the report of the Commission. Available from https://www.un.org/en/ga/sixth/78/summaries.shtml.

[45] United States, Supreme Court, *The Paquete Habana and The Lola*, 175 U.S. 677 (1900), at p. 700.

of international law. The Commission found that there is an extensive body of international and national judicial practice as well as scholarly works, including drafting history, to justify this conclusion.[46] This general proposition is best read against the broader context of Article 38, paragraph 1, of the Statute of the International Court of Justice, which in subparagraphs (*a*) through to (*c*) lists the sources of international law as international treaties, customary international law and general principles of law and sets out in subparagraph (*d*), subject to the provisions of Article 59, "judicial decisions" and "teachings of the most highly qualified publicists of the various nations" "as subsidiary means for the determination of the rules of law". The Commission here recalls, for the purposes of the present topic, that it has elected to use the broader terms "decisions" and "teachings" to reflect the extensive and more contemporary practice regarding the use of such materials as subsidiary means for the determination of rules of law.

(3) Implicit in the negative formulation of the first sentence specifying what the subsidiary means are not, instead of what they are, is the question of the relationship between the sources of international law and the subsidiary means for the determination of the rules of international law. That relationship has been in some doubt among certain actors in international law. The Commission's position on that controversy aims to assist in clarifying the legal situation. In reflecting that position, two main alternatives were considered. The first was to provide that the subsidiary means are auxiliary in nature *vis-à-vis* treaties, customary international law and general principles of law and that they are mainly resorted to when determining the rules of international law.[47] The second alternative was to indicate that subsidiary means are not an "autonomous" source of international law or that they are "distinct from" the sources of international law. While it was found that there was merit in each of those approaches, several questions were raised about each of the alternatives, including the possible need to explain them further. The Commission therefore opted for the more direct formulation, stating simply that they are not sources of international law. That said, a view was expressed that the proposition contained in the first sentence was too categorical and that some nuances of subsidiary means were thus at risk of being lost.

(4) The second sentence of paragraph 1 of draft conclusion 6 builds on the basic proposition contained in the first sentence by indicating that the main function of subsidiary means "is to assist with the determination of the existence and content of rules of international law". Alternative formulations considered included formulations specifying that subsidiary means are assistive or auxiliary in nature vis-à-vis the sources of international law. For various reasons, the Commission did not chose those formulations. In this regard, it was observed that the term "auxiliary" is used to describe "subsidiary" in other languages. This means that, if the term auxiliary is used in this draft conclusion, when translated into other official languages such as French, Spanish and Russian, it would not only be repetitive but also circular. In that context, it was considered sufficient to simply provide that the function of subsidiary means is "to assist" in the process of determining the existence and content of rules of international law. That said, the Commission did not exclude, by this formulation, the possibility that subsidiary means could perform other functions, but considered that their distinctive or primary feature was as aids or helpers in the process of identifying, determining and applying rules of international law as confirmed by paragraph 2 of draft conclusion 6.

Paragraph 2 – use of materials as subsidiary means is without prejudice to their other uses

(5) Paragraph 2 of draft conclusion 6 is comprised of a single sentence. It provides, in a simple statement, that the use of "materials" as subsidiary means for the determination of rules of international law is without prejudice to their use for other purposes. This proposition takes as a point of departure the fact that the subsidiary means, for example judicial decisions and teachings, may be used for multiple purposes.

(6) In the first place, as acknowledged in paragraph 1, addressing the main function, such means or rather "materials" may be used to assist in determining the existence and content

[46] See second report on subsidiary means for the determination of rules of international law by the Special Rapporteur (A/CN.4/769), paras. 64-126.

[47] *Ibid*.

of rules of international law.[48] In the second place, they may be used for a wide variety of other purposes. For instance, when it comes to the decisions of national courts, the Commission has already determined in its previous works that they may serve a dual function: (*a*) either as evidence of the constituent elements of customary international law; or (*b*) as subsidiary means that are useful to assess whether there exists evidence of State practice and *opinio juris*.[49] Similarly, when it comes to general principles of law, judicial decisions – in particular those derived from national legal systems – may be used to determine the existence or lack thereof of general principles of law as well as their content.[50] Moreover, when identifying an international legal norm as constituting *jus cogens*, the subsidiary means, such as the decisions of national courts, may also constitute primary evidence of acceptance and recognition, but may not, in and of themselves, be the evidence of such acceptance and recognition.[51]

(7) The Commission also accepts that there may be many other uses for such materials. A good example is the possible use of subsidiary means as supplementary means or tools to interpret the provisions in a treaty, following, for instance, the rules of the Vienna Convention on the Law of Treaties, of 1969.[52] Other examples are the resort to court decisions as sources of obligations for the parties in a dispute or for third parties affected by the findings of an international court decision, such as those establishing the delimitation of a given area.[53] It was also noted that judicial decisions could serve as inspiration for the inclusion of provisions in treaties or as a source of subsequent practice in relation to the interpretation of treaties.

(8) The broad reference to other uses of the materials is additionally important for another reason. The Commission contemplated, in draft conclusion 2, subparagraph (*c*), the possibility of the existence of other materials that could fall within the category of subsidiary means as part of "any other means generally used to assist in determining rules of

[48] See para. (6) of the commentary to draft conclusion 1, A/78/10, para. 126, at p. 77 ("[subsidiary means] are used to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules"). See also A/CN.4/769, para. 21 (there was consensus among the members of the Commission during the first plenary debate on the topic of subsidiary means for the determination of rules of international law that subsidiary means "play an important assistive role in the process of determining the existence and content of rules of international law").

[49] See first report on subsidiary means for the determination of rules of international law by the Special Rapporteur (A/CN.4/760), para. 286. See also para. (1) of the commentary to conclusion 13 of the conclusions on identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 66, at p. 109 ("decisions of national courts may serve a dual role in the identification of customary international law. On the one hand, as draft conclusions 6 and 10 indicate, they may serve as practice as well as evidence of acceptance as law (*opinio juris*) of the forum State. Draft conclusion 13, on the other hand, indicates that such decisions may also serve as a subsidiary means (*moyen auxiliaire*) for the determination of rules of customary international law when they themselves examine the existence and content of such rules.").

[50] See para. (5) of the commentary to draft conclusion 5 of the draft conclusions on general principles of international law, A/78/10, para. 41, at pp. 19–20.

[51] See para. (6) of the commentary to draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, para. 44, at p. 45.

[52] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331 (under article 32, "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) Leaves the meaning ambiguous or obscure; or (*b*) Leads to a result which is manifestly absurd or unreasonable"). See also *LaGrand* (footnote 21 above), paras. 92–109 where the Court established that provisional measures decisions were binding.

[53] See, for example, *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978*, p. 3, at para. 39, which illustrates that a ruling on a particular treaty provision can carry broader implications for not only the disputing parties but the non-parties to a case as well in so far as the Court's interpretation of that treaty provision will likely be seen as authoritative on that point of law (see further A/CN.4/769, para. 195). On the same point see also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13.

international law". [54] These could include, for instance, resolutions of international organizations or resolutions adopted at international conferences, which in certain contexts could have other uses besides serving as possible subsidiary means assisting with the determination of rules of international law.[55] It could also include the pronouncements of expert bodies.[56] It was further pointed out that the other uses of judicial decisions may include in providing evidence of the evolution of the content of certain rules over time, or in explaining what international law provides in respect of a specific aspect or activity.[57]

(9) Taking the above into account, in explaining the function of subsidiary means through the present draft conclusion, the Commission underlines its intention to do so in a general way for the purposes of the present topic. It does not therefore purport to address the various additional functions performed by each of the possible subsidiary means that are used, in practice, to assist in identifying, determining and applying rules of international law. This important point ought to be borne in mind, especially given the Commission's determination in paragraph (8) of the general commentary that the purpose of the present topic is not to address all conceivable subsidiary means that exist now and are used in practice or that may emerge in the future. Given the foregoing, when it reaches the first reading stage of this topic, the Commission will revert to the separate question of the best placement of the present draft conclusion.

Conclusion 7
Absence of legally binding precedent in international law

Decisions of international courts or tribunals may be followed on points of law where those decisions address the same or similar issues as those under consideration. Such decisions do not constitute legally binding precedent unless otherwise provided for in a specific instrument or rule of international law.

Commentary

(1) Draft conclusion 7 deals with the question of precedent in international law. It confirms the existence of an extensive practice from which the Commission has established that, save for a few exceptions, there is no system of legally binding precedent, or *stare rationibus decisis*, in international courts or tribunals under international law.[58] However, for reasons of legal security and stability, which is the essence of any rule of law-based legal system, international courts or tribunals routinely take into account the legal reasoning contained in the decisions of other courts and tribunals, although they are not obligated to apply them. The general rule, in international adjudication, is that decisions of courts are binding only on the parties to the case – as is famously stated in Article 59 of the Statute of the International Court of Justice.

(2) The present draft conclusion consists of two interrelated sentences. The first sentence provides that "[d]ecisions of international courts or tribunals may be followed on points of

[54] Para. (18) of the commentary to draft conclusion 2, A/78/10, para. 126, at p. 84 ("The Commission has left the third category open in order not to foreclose the possibility of other subsidiary means, which may not be in widespread use now or that are in use but left out of the work on the present topic, from being covered by the present draft conclusions as the work develops").

[55] Para. (15), *ibid.* ("While various candidates that could be included in the "any other means" category emerge from practice and the literature, the key ones may include the works of expert bodies and resolutions/decisions of international organizations"); see also the discussion of additional subsidiary means in A/CN.4/760, chap. IX.

[56] *Ibid.*

[57] *Ibid.*

[58] For example, see International Court of Justice, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, I.C.J. Reports 1998*, p. 275, at para. 28; International Centre for Settlement of Investment Disputes, *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on objections to jurisdiction, 29 January 2004, para. 97; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zoran Kupreškić* et al., Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, para. 540 ("generally speaking, and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries").

law where those decisions address the same or similar issues as those under consideration". The Commission considered that the term "decisions", as well as the phrase "international courts or tribunals", should be understood in the same way as described in the context of draft conclusion 4. The general proposition that decisions of international courts or tribunals "may be followed on points of law" requires fulfilment of a precondition triggering its application, namely, "where those decisions address the same or similar issues as those under consideration".

(3) First, with regard to the formulation of the key elements of the first sentence of draft conclusion 7, the Commission selected the term "may" in order to underline the discretionary nature of the exercise. The idea is that the possibility exists for an international court or tribunal to follow other decisions on points of law, but also clarifies that doing so is not mandatory. Second, the term "points of law", which is a reference to the legal reasoning, was used to describe what could potentially be followed. The formulation "points of law" explains that the object is not the decision, as such, but the reasons in support thereof. Thus, the reference to a decision – to take the example of the practice of the International Court of Justice – is an allusion to the operative part of the judgment (i.e. the *dispositif*), which binds only the parties to the case in accordance with Article 59[59] of the Statute of the International Court of Justice. It is the text of the operative part that is of significance for the substantive obligations of the parties and that generates legal effects under Article 59. It is not a reference to the reasons in support, the so-called *motifs*. The reasons in support, that is the *motifs*, of the decision may be used in other cases.

(4) The distinction between the decision constituting the operative part of the judgment and the reasons underlying it is well settled in the jurisprudence of both the Permanent Court of International Justice and the International Court of Justice. In the case of the former, in the *Polish Postal Service in Danzig* case, for instance, the Court explained that: "it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned."[60] In the *Readaptation of the Mavrommatis Jerusalem Concessions* case, the respondent State challenged the jurisdiction of the Permanent Court of International Justice to hear the case. However, in decisions adopted before, it had been determined that there was jurisdiction. The Court found that it had "no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound".[61]

(5) In the *Temple of Preah Vihear* (Preliminary Objections) case, the International Court of Justice, which has followed the case law of the Permanent Court of International Justice distinguishing the decision from the legal reasoning in a long line of cases, was confronted in a preliminary objection raised in relation to the applicability of Article 59 in so far as it implicated its earlier decision in the *Aerial Incident of 27 July 1955* case[62] between Bulgaria and Israel. The Court distinguished between the binding effect of its decision and the reasons in support of the decision constituting an accurate statement of the law:

> The first preliminary objection as advanced by Thailand is evidently based wholly on the alleged effect on Thailand's 1950 Declaration of the conclusion reached by the Court in its decision in the *Israel v. Bulgaria* case as to the correct sphere of application of Article 36, paragraph 5, of the Statute.
>
> The Court does not share the view that this decision has the consequences concerning the effect of Thailand's 1950 Declaration which Thailand now claims.
>
> The Court's decision in the *Israel v. Bulgaria* case was of course concerned with the particular question of Bulgaria's position in relation to the Court and was in any event,

[59] Article 59 of the Statute provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case.").

[60] See Polish Postal Service in Danzig, Advisory Opinion, P.C.I.J., Series B, No. 11, p. 6, at pp. 29–30.

[61] *Readaptation of the Mavrommatis Jerusalem Concessions, P.C.I.J., Series A, 1927, No. 11*, p. 4, at p. 18.

[62] *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Preliminary Objections, Judgment of May 26th, 1959: I.C.J. Reports 1959*, p. 127.

> by reason of Article 59 of the Statute, only binding, *qua* decision, as between the parties to that case. It cannot therefore, as such, have had the effect of invalidating Thailand's 1950 Declaration. *Considered however as a statement of what the Court regarded as the correct legal position*, it appears that the sole question, relevant in the present context, with which the Court was concerned in the *Israel v. Bulgaria* case was the effect – or more accurately the scope – of Article 36, paragraph 5.[63]

(6) In another case, the Court in *Land and Maritime Boundary between Cameroon and Nigeria* determined that: "It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[64] By this formulation, the Court made clear that its general starting point would be the reasoning in earlier cases except if there are contrary reasons.

(7) A third and important consideration for the Commission when formulating the first sentence of draft conclusion 7 on the absence of legally binding precedent in international law was the notion that the decisions of the relevant tribunals, to be followed on the points of law, must address "the same or similar issues as those under consideration". This statement indicates, as is well established in jurisprudence, that there must be a level of comparability between the case at issue and the subsequent cases.[65] The point is that whether to follow the prior decision on points of law in a subsequent case requires a further assessment that it concerns the same or similar type of factual situation or legal issue. Plainly, the earlier decision only applies to similar or analogous cases. In practice, this "means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision".[66] The earlier decision must also be capable of generalization, as the International Court of Justice explained in *Barcelona Traction*, where it reasoned that for the general arbitral

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[63] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961: I.C.J. Reports 1961*, p. 17, at p. 27 (emphasis added).

[64] *Land and Maritime Boundary …, Preliminary Objections* (see footnote 58 above), para. 28.

[65] International Centre for Settlement of Investment Disputes, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 145 (holding that the Centre's tribunals "ought to follow solutions established in a series of consistent cases, *comparable to the case at hand*, but subject of course to the specifics of a given treaty and of the circumstances of the actual case"). See also International Centre for Settlement of Investment Disputes: *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/19, and *AWG Group v. the Argentine Republic*, Decision on Liability, 30 July 2010, para. 189; *Metal-Tech Ltd. v. the Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 116; and *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, Case No. ARB/11/17, Award, 9 January 2015, para. 76. On the other hand, some caution is warranted. For instance, empirical studies by scholars suggest that commitment to a system of following earlier cases has led to the counterintuitive phenomenon of investment adjudicators relying so much on prior decisions that they may fail to even properly interpret distinctive treaty text adopted to overturn such decisions. See, in this regard, Wolfgang Alschner, abstract for Chapter 6 of *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford, Oxford University Press, 2022) ("discusses how precedent grounds the interpretation of new treaties in old case law thereby creating a final means for rolling back innovation in new-generation treaties"; explaining "that tribunals' preference for following prior cases, institutional incentives that favor citing past awards, ineffective controls, and the self-reinforcement of case law make precedent sticky in investor-state dispute settlement").

[66] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zlatko Aleksovski*, No. IT-95-14/1-A, Judgment, 24 March 2000, Appeals Chamber, para. 110. See also Permanent Court of International Justice, *Case of the S.S. "Lotus"*, *Judgment, 7 September 1927, Series A, No. 10*, p. 4, at p. 21; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, at para. 105.

jurisprudence cited by parties in that case to be followed, the decisions cited must be capable of "giv[ing] rise to generalization going beyond the special circumstances of each case".[67]

(8) In the second sentence of draft conclusion 7, the Commission seeks to clarify the legal consequences that flow from the first sentence. It therefore expressly states that the fact that "[s]uch decisions" (i.e. those of international courts or tribunals) may in some circumstances be followed on points of law (as indicated by the first sentence) does not mean that they "constitute legally binding precedent". The only exceptions to the general rule that decisions do not constitute legally binding precedent is indicated by the phrase "unless otherwise provided for". The qualifier concerns two situations. First, where that possibility is contemplated in "a specific instrument" or, second, where it is provided for in a specific "rule of international law". A combined reading of these terms reflect the Commission's intention to capture the full range of situations where a partial or full system of bindingness to precedent in an international court or tribunal is provided for either in: instruments, such as the treaty, statute or other constitutive or founding document of a tribunal; the internal rules of the tribunal; or a specific rule articulated elsewhere, for instance in a decision or resolution or even a judicial decision.

(9) The level of bindingness required may vary from those exceptions with a strict *stare decisis* requirement to those with a more permissive system of *stare decisis*. For example, the Caribbean Court of Justice, when operating under its original jurisdiction, is legally bound to a strict rule of *stare decisis*. According to article 221 of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, "[j]udgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219."

(10) A second example is the Court of Justice of the European Union, which, in at least two situations under its statute regarding appeals and reviews, is empowered to quash the decision of the General Court in an appeal and even itself give final judgment in the matter or even choose to refer a case back to the General Court, in which case the latter tribunal "shall be bound by the decision of the Court of Justice on points of law".[68]

(11) A third illustration is the Inter-American Court of Human Rights. Although its founding treaties and rules do not expressly provide for this, in a rich jurisprudence that has developed and strengthened over the years, the Inter-American Court has determined that:

> the [j]udiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.[69]

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[67] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at para. 63. For a more recent discussion, see also *ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293.

[68] See articles 61, second paragraph, and 62*b* of the Statute of the Court of Justice of the European Union providing for the binding application of decisions including in relation to situations concerning a serious risk of the unity or consistency of Union law (available from https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf; containing the consolidated version of the Statute, incorporating the texts listed *ibid*., p. 2).

[69] See, for the seminal case, Inter-American Court of Human Rights, Case of *Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006, Series C, No. 154, para. 124. For examples of subsequent application and expansion of this doctrine, and its expansion to apply to other public bodies not just courts, see Inter-American Court of Human Rights: Case of Fermín Ramírez v. Guatemala and Case of Raxcacó Reyes et al. v. Guatemala, Order (Monitoring Compliance with Judgment), 9 May 2008, para. 63; Case of the "Five Pensioners" v. Peru, Order (Monitoring Compliance with Judgment), 24 November 2009, para. 35; Case of Bámaca Velásquez v. Guatemala, Order (Monitoring Compliance with Judgment), 18 November 2010, para. 33; Case of Loayza Tamayo v. Peru, Order (Monitoring Compliance with Judgment), 1 July 2011,

Later case law has held that the application by national court judges of the rulings of the Inter-American Court is obligatory. This implies that the bindingness of decisions may not be limited to the parties to the particular case. While this interpretation has led to a lively scholarly debate,[70] which need not be entered into by the Commission for the purpose of providing this example of a regional court where a specific rule providing for a level of bindingness of its decisions has been developed through case law, it can be noted that some Governments in the Americas region have accepted or acquiesced to the judicial interpretation given by the Inter-American Court, while several[71] others have expressed some doubts.

(12) A fourth example concerns the Dispute Settlement Body of the World Trade Organization, wherein, in the context of international trade law, the Appellate Body has explained that its own jurisprudence ought to be fully taken into account by the *ad hoc* panels settling trade disputes, for reasons of legal security and predictability.[72] The Appellate Body of the World Trade Organization has therefore determined that panels are obliged to follow its own decisions[73] even though its decisions are not binding as such to those other than the parties to the case. It pointed out, to take one example, that one panel's "failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence" and even further that "the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case".[74] In *US – Stainless Steel*, the

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para. 35; Case of Castillo Petruzzi et al. v. Peru, Order (Monitoring Compliance with Judgment), 1 July 2011, para. 20; Case of Lori Berenson Mejía v. Peru, Order (Monitoring Compliance with Judgment), 20 June 2012, para. 18; Case of Barrios Altos v. Peru, Order (Monitoring Compliance with Judgment), 7 September 2012, para. 24; Case of Castañeda Gutman v. Mexico, Order (Monitoring Compliance with Judgment), 28 August 2013, para. 23; 11 cases against Guatemala regarding the obligation to investigate, prosecute and, if applicable, punish those responsible for human rights violations, Order (Monitoring Compliance with Judgment), 21 August 2014.

[70] See, for instance, Laurence Burgorgue-Larsen, "Conventionality control: Inter-American Court of Human Rights (IACtHR)", *Max Planck Encyclopedias of International Law*, December 2018, available at https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3634.013.3634/law-mpeipro-e3634; Pablo González Domínguez, "La doctrina del control de convencionalidad a la luz del principio de subsidiaredad", *Estudos Constitutucionales*, vol. 15 (2017), pp. 55–98; and Paolo G. Carozza and Pablo González, "The final word? Constitutional dialogue and the Inter-American Court of Human Rights: a reply to Jorge Contesse", *International Journal of Constitutional Law*, vol. 15 (2017), pp. 436-442.

[71] Chile, Press release of the Ministry of Foreign Affairs - Ministry of Justice and Human Rights on the inter-American human rights system, 23 April 2019 (see declaration by the Permanent Representatives of Argentina, Brazil, Colombia, Paraguay, and Chile). Available at https://www.minrel.gob.cl/minrel/noticias-anteriores/comunicado-de-prensa-ministerio-de-relaciones-exteriores-ministerio-de (Spanish only).

[72] *US – Stainless Steel (Mexico)*, Report of the Appellate Body, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513, at para. 161.

[73] *Japan – Alcoholic Beverages II* (see footnote 14 above), p. 108 ("Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."); *US – Shrimp (Article 21.5 – Malaysia)*, Appellate Body Report, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481, at para. 109 ("Thus, in taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning"); *US – Oil Country Tubular Goods Sunset Reviews*, Appellate Body Report, WT/DS268/AB/R, adopted 29 November 2004, DSR 2004:VII, p. 3257, at para. 188 ("The Panel had before it exactly the same instrument that had been examined by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*; thus, it was appropriate for the Panel, in determining whether the SPB is a measure, to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.").

[74] See *US – Stainless Steel (Mexico)* (footnote 72 above), para. 161; see also *India – Patents (EC)*, Panel Report, WT/DS79, adopted 22 September 1998, DSR 1998:VI, p. 2661, at para. 7.30.

Appellate Body went further and even determined that subsequent panels are not "free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the [Dispute Settlement Body]".[75]

(13) In a different context, much as the International Court of Justice also held in *Avena and Other Mexican Nationals*,[76] in other areas of international law, such as those involving international administrative law, there are reasons why certain interpretations given by a permanent court or tribunal of a treaty provision may carry implications through legal reasoning. See, in addition, single or interrelated courts or tribunals with an internal hierarchy, such as the United Nations Dispute Tribunal whose decisions can be appealed, in relation to the administration of the United Nations internal justice system, to the United Nations Appeals Tribunal.[77] In those circumstances, a system of binding precedent can be said to apply, since the latter's decisions are final and binding on the tribunal that decided the initial case, save for the narrow exception concerning requests for interpretation or revisions of the initial appellate-level judgment.

(14) A final set of examples drawn from the practice of *ad hoc* international criminal tribunals support the final part of the second sentence of draft conclusion 7. The first concerns article 21 of Rome Statute of the International Criminal Court,[78] which specifies the applicable law, under which that Court "may apply principles and rules of law as interpreted in its previous decisions".[79] While the use of the modal verb "may" indicates that the reference to the principles and rules contained in prior decisions is discretionary, meaning that *stare decisis* does not apply, the Appeals Chamber of the International Criminal Court has determined that it will not lightly depart from its previous decisions absent "convincing

[75] See *US – Stainless Steel (Mexico)* (footnote 72 above), para. 158 ("It is well settled that Appellate Body reports are not binding, except with respect to resolving the particular dispute between the parties. This, however, does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the DSB.").

[76] See *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at para. 151 ("To avoid any ambiguity, it should be made clear that, while what the Court has stated concerns the Mexican nationals whose cases have been brought before it by Mexico, the Court has been addressing the issues of principle raised in the course of the present proceedings from the viewpoint of the general application of the Vienna Convention, and there can be no question of making an *a contrario* argument in respect of any of the Court's findings in the present Judgment. In other words, the fact that in this case the Court's ruling has concerned only Mexican nationals cannot be taken to imply, that the conclusions reached by it in the present Judgment do not apply to other foreign nationals finding themselves in similar situations in the United States.").

[77] See the Statute of the United Nations Appeals Tribunal, as adopted by the General Assembly in resolution 63/253 on 24 December 2008, annex II, and amended by resolutions 66/237 of 24 December 2011, 69/203 of 18 December 2014, 70/112 of 14 December 2015 and 71/266 of 23 December 2016; for a sample of cases, see United Nations Appeals Tribunal, *Igbinedion v. Secretary-General of the United Nations*, Judgment, 2 April 2014, Judgment No. 2014-UNAT-410, para. 24; United Nations Dispute Tribunal, *Weeks v. Secretary-General of the United Nations*, Case No. UNDT/2014/083, Judgment on receivability, 25 June 2014, Judgment No. UNDT/2014/083, para. 35; United Nations Dispute Tribunal, *Khisa v. Secretary-General of the United Nations*, Case No. UNDT/NBI/2017/094, Judgment on receivability, 4 April 2018, Judgment No. UNDT/2018/047, para. 27; International Labour Organization Administrative Tribunal, *L.N.*, Judgment, 11 February 2015, Judgment No. 3450, para. 8 of the considerations.

[78] Rome Statute of the International Criminal Court (Rome 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3.

[79] See Situation in the Republic of Côte d'Ivoire in the Case of *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, No. ICC-02/11-01/15 OA 6, Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr. Gbagbo's detention (ICC-02/11-01/15-134-Red3)", 31 July 2015, Appeals Chamber, para. 14; see also Situation in the Central African Republic in the Case of *Prosecutor v. Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08 OA 2, Reasons for the "Decision on the Participation of Victims in the Appeal against the 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", 20 October 2009, Appeals Chamber, para. 16.

reasons" given "the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions".[80] Of course, as with the practice of the *ad hoc* international criminal tribunals, the rulings and decisions of the Appeals Chamber of the International Criminal Court are binding on those of the lower chambers of the same court.

(15) The Special Court for Sierra Leone offers the second example of the situation in the second sentence of draft conclusion 7 where the decisions (in this case of other international courts and one domestic court due to the hybrid law applied by that tribunal) could constitute legally binding precedent because it was expressly provided for in a specific instrument. Article 20, paragraph 3, of the Statute of the Special Court for Sierra Leone, which was adopted by the United Nations and the Government of Sierra Leone pursuant to a bilateral treaty, sought to limit the prospect of conflicting judicial decisions and the fragmentation of international criminal law,[81] stating that the judges of the Appeals Chamber of that tribunal "*shall* be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone".[82]

(16) The Appeals Chamber of the Special Court for Sierra Leone, in interpreting the first part of that provision, determined in the *Norman* case that:

> [w]ithout meaning to detract from the precedential or persuasive utility of decisions of the [International Criminal Tribunal for Rwanda] and the [International Criminal Tribunal for the Former Yugoslavia], it must be emphasized, that the use of the formula "shall be guided by" in Article 20 of the Statute does not mandate a slavish and uncritical emulation, either precedentially or persuasively, of the principles and doctrines enunciated by our sister tribunals.[83]

The Appeals Chamber of the Special Court explained implicitly that the authority of another decision also turns on its persuasiveness, not just a formal statutory requirement, and further that, as the highest chamber in the Special Court's two-level system, it was duty bound to ensure interpretations from those other courts would be consistent with its own specific context. The Appeals Chamber also clarified that it supported, at the same time, the intention of its founders to maintain consistency and uniformity in the interpretation and application of international criminal law.[84]

(17) In the view of the Commission, given the above practice, the general position contained in draft conclusion 7 that there is no system of legally binding precedent in international law remains valid in the sense that, in inter-State disputes, decisions of the tribunals are binding only on the parties to the case. However, in some circumstances such as those exceptions discussed immediately above, in specialized fields and regional courts, there are exceptions to the general rule whereby the obligation to follow prior decisions is

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[80] *Gbagbo and Blé Goudé* (see previous footnote), para. 14.

[81] See Report of the Security-General on the establishment of a Special Court for Sierra Leone, S/2000/915, para. 41.

[82] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137 (Statute, at p. 145), art. 20 (emphasis added). See also Special Court for Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, Trial Chamber, para. 295. For commentary on the jurisprudential contributions of the Special Court for Sierra Leone, see Charles C. Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (Cambridge, Cambridge University Press, 2020).

[83] Special Court for Sierra Leone, *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-08-PT, Decision the Prosecutor's motion for immediate protective measures for witnesses and victims and for non-public disclosure, 23 May 2003, Trial Chamber, para. 11.

[84] *Ibid*. (stating "the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different socio-cultural and juridical dynamics prevailing in the *locus* of the Court. This is not to contend that sound and logically correct principles of law enunciated by [the International Criminal Tribunal for Rwanda] and [the International Criminal Tribunal for the Former Yugoslavia] cannot, with necessary adaptations and modifications, be applied to similar factual situations that come before the Special Court in the course of adjudication so as to maintain logical consistency and uniformity in judicial rulings on interpretation and application of the procedural and evidentiary rules of international criminal tribunals").

established in either a specific instrument or a specific rule of international law articulated elsewhere, such as a judicial decision or body of decisions.

Conclusion 8
Weight of decisions of courts and tribunals

When assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*:

(*a*) whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question;

(*b*) the extent to which the decision is part of a body of concurring decisions; and

(*c*) the extent to which the reasoning remains relevant, taking into account subsequent developments.

Commentary

(1) Draft conclusion 8 sets out more specific criteria to guide users when employing decisions of courts and tribunals in the determination of the existence and content of rules of international law. It builds on the general criteria for the assessment of subsidiary means for identifying and determining rules of international law contained in draft conclusion 3. In other words, while draft conclusion 3 concerns the general criteria for assessing the weight to be given to subsidiary means, draft conclusion 8 serves the specific purpose of clarifying how the decisions of courts and tribunals are to be assessed by adding additional relevant criteria that must be considered so as to carry out a proper assessment.

(2) Before clarifying the content of the current draft conclusion, the Commission recalls that draft conclusion 3, as provisionally adopted in 2023, listed six general factors or considerations for determining the relative weight to be assigned to materials that are already considered subsidiary means within one of the three categories identified in draft conclusion 2 of the present draft conclusions (i.e. decisions of courts and tribunals, teachings, and any other means generally used to assist in determining rules of international law).[85]

(3) The general criteria mandated an assessment of the degree of representativeness of the materials being used as subsidiary means, the quality of the reasoning, the expertise of those involved, the level of agreement among those involved, the reception of States and other entities, and, where applicable, the mandate conferred on the body. The Commission considers that, in the specific context of the use of decisions of courts or tribunals, only some of these general criteria should be accorded weight. Indeed, the commentary to draft conclusion 3 setting out the general criteria foreshadowed this point by clarifying that "which factors would be relevant, and to what extent, would depend on the specific subsidiary means in question and the prevailing circumstances".[86] For instance, as has been explained in earlier commentary, when it comes to assessing the weight of a decision of a court or tribunal, the quality of the reasoning in the decision and the expertise of those involved in making that decision and their level of agreement should carry weight. Consistent with that view, the present draft conclusion seeks to specify which criteria the Commission deems particularly appropriate to ensure that proper weight is given to decisions of courts or tribunals as subsidiary means.

Chapeau *of draft conclusion 8*

(4) The draft conclusion opens with a c*hapeau* followed by three subparagraphs. For consistency reasons, the *chapeau* of draft conclusion 8 is formulated in analogous language to the *chapeau* of draft conclusion 3. With minor textual adjustments, the text provides that, "when assessing the weight of decisions of courts or tribunals, regard should be had to, in addition to the criteria set out in draft conclusion 3, *inter alia*", three factors, contained in

[85] Paras. (2)-(3) of the commentary to draft conclusion 3, A/78/10, para. 126, at p. 85.
[86] Para. (3), *ibid*.

subparagraphs (*a*) to (*c*), when using decisions to determine the existence and content of rules of international law.

(5) Through their analogous formulation, although in this case referring specifically to the decisions of courts or tribunals only, instead of all subsidiary means, the *chapeau* incorporates the substantive criteria established in draft conclusion 3. For the avoidance of doubt, the scope of application of the term "decisions of courts or tribunals" is broader in this context and is intended to apply to decisions of all types whether of international courts and tribunals or those of national or domestic courts.

(6) By expressly stating that "regard should be had to", the Commission indicates that the three specific factors that follow in this draft conclusion, although in many cases desirable, are meant to serve as a form of guideline instead of being mandatory elements. The "*inter alia*" towards the end of the clause also confirms that the listed criteria are merely illustrative of the most likely scenarios to arise. It also seeks to account for the fact that some users, for example different courts and tribunals, may take different criteria into account and place different weight on them. For example, a tribunal may place greater weight on decisions issued by the same court than those issued by another court or tribunal.

(7) Finally, as formulated, it is made clear that the factors or considerations set out in draft conclusion 8 are to be read together with those in draft conclusion 3. That is why the Commission states that they are additional criteria for the assessment of the weight to be given to decisions of courts and tribunals. Thus, the specific factors in the present draft conclusion are intended to supplement the general criteria for subsidiary means set out in draft conclusion 3. A discussion of each of the three more specific criteria applicable to the assessment of the weight of decisions of courts and tribunals follows.

*Subparagraph (*a*) – whether the court or tribunal has a specific competence*

(8) Subparagraph (*a*) of draft conclusion 8 refers to the question "whether the court or tribunal has been conferred with a specific competence with regard to the application of the rule in question". This formulation is similar to the criterion contained in draft conclusion 3, subparagraph (*f*), referring to the specific mandate conferred on a body. In that earlier context, the Commission's commentary already explained that a relevant consideration to take into account is whether a particular subsidiary means is produced by a body acting under an official mandate conferred by States.[87] It was further explained that this general criterion was to be used when determining, for instance, whether special regard should be given to decisions of a particular court and, if so, whether to confer greater weight on such decisions.[88] Several illustrations were given of specialist courts and tribunals with specific competencies in relation to various subject matter, such as those relating to the law of the sea (the International Tribunal on the Law of the Sea), international criminal and humanitarian law (the *ad hoc* international criminal tribunals and the International Criminal Court) and international trade law (Dispute Settlement Body of the World Trade Organization).[89]

(9) In the context of the current draft conclusion, which addresses the weight of decisions of courts and tribunals specifically, the Commission considered it appropriate to reflect more

[87] Para. (12), *ibid.*, p. 87.
[88] Para. (13), *ibid*.
[89] *Ibid*.

directly in the draft conclusion the practice of international,[90] regional[91] and national[92] courts or tribunals under which the specific competence given to a court or tribunal to apply a particular treaty is treated as a relevant consideration in assessing the authority to ascribe to its pronouncements. In this regard, for example, the International Court of Justice has referred on at least seven occasions to the outputs, including decisions concerning individual cases, of both regional human rights courts and commissions, and human rights treaty bodies.[93] Thus, with this criterion, the Commission follows the practice mandating an assessment of whether the body concerned has a specific competence with regard to the application of the rule in question. Before turning to a specific example, it is to be noted that, while for the most part assessment of the competence of a tribunal might be found in the treaty concerned, there may be jurisdictions that do not initially possess the competence referenced, but subsequent developments – including those found in a subsidiary means such as a judicial decision or a series of such decisions – may give rise to such competence.[94]

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[90] International Court of Justice: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324; *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13, at para. 188.

[91] Inter-American Court of Human Rights, *Case of the Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 August 2013, Series C, No. 268, paras. 189 and 191; African Commission on Human and Peoples' Rights, *Civil Liberties Organisation and others v. Nigeria*, Communication No. 218/98, Decision, 7 May 2001, para. 24 ("In interpreting and applying the Charter, the Commission … is also enjoined by the Charter and by international human rights standards, which include decisions and general comments by [United Nations] treaty bodies"); African Commission on Human and Peoples' Rights, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, Decision, 27 October 2001, para. 63 ("draws inspiration from the definition of the term 'forced evictions' by the Committee on Economic Social and Cultural Rights "); European Court of Human Rights: *Magyar Helsinki Bizottság v. Hungary* [GC], No. 18030/11, 8 November 2016, para. 141; *Marguš v. Croatia* [GC], No. 4455/10, ECHR 2014 (extracts), paras. 48–50; *Baka v. Hungary*, No. 20261/12, 27 May 2014, para. 58; *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, ECHR 2012 (extracts), paras. 107–108, 147–151, 155 and 158; *Gäfgen v. Germany* [GC], No. 22978/05, ECHR 2010, paras. 68 and 70–72; see also International Law Association, Final report on the impact of findings of the United Nations Human Rights Treaty Bodies, *Report of the Seventy-first Conference, Berlin Conference (2004)*, pp. 29–38, paras. 116–155.

[92] International Law Association, *Report of the Seventy-first Conference* (see previous footnote), p. 43, para. 175; see, e.g., Germany, Federal Administrative Court, *Bundesverwaltungsgericht*, vol. 134, p. 1, at p. 22, para. 48; Colombia, Constitutional Court, Judgment T-077/13 (2013), 14 February 2013; India, High Court of Delhi, *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors*, WP(C) Nos 8853 of 2008, and 10700 of 2009 (2010), Judgment, 4 June 2010, para 23; Bangladesh, High Court Division of the Supreme Court, *Bangladesh Legal Aid and Services Trust and ors v. Government of Bangladesh*, Writ Petitions No 5863 of 2009, No 754 of 2010, No 4275 of 2010, ILDC 1916 (BD 2010), 8 July 2010, para. 45; but see Spain, Supreme Court of Spain, Judgment No. 1263/2018, 17 July 2018 (fundamento de derecho séptimo), pp. 23–24.

[93] See memorandum by the Secretariat on subsidiary means for the determination of rules of international law (A/CN.4/765), para. 151.

[94] Practice indicates that the basis for such a specific competence of a particular tribunal may not always be immediately apparent. Thus, greater investigation of the possible application of the rule in question may be warranted. For example, the East African Court of Justice determined, via a series of judicial decisions, that it was competent to exercise jurisdiction over matters touching upon human rights complaints brought by individuals even though there were no direct provisions to that effect in its

(10) To illustrate, in the *Ahmadou Sadio Diallo* case, the International Court of Justice pointed out that, while it was in no way obliged to do so, it deemed it necessary for reasons of clarity, consistency and legal security for individuals and States to take into account, when applying a regional or international treaty instrument for the protection of human rights, the interpretations adopted by the independent bodies that have been established to monitor the application of the treaty in question, by considering, among other things, individual communications.[95] Thus, the Court referred to the "considerable body of interpretative case law"[96] of the Human Rights Committee, whose mandate is rooted in the International Covenant on Civil and Political Rights,[97] and concluded "that it should ascribe *great weight* to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".[98]

(11) Similarly, in relation to the interpretation it had given to a specific provision of the African Charter on Human and Peoples' Rights, which was consistent with the "case law"[99] of the African Commission on Human and Peoples' Rights – a quasi-judicial body established by the African Charter, the International Court of Justice emphasized the importance of taking "*due account* of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question".[100]

(12) Moreover, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, the Court recalled that "in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation",[101] although it also reiterated that it was not under an obligation to automatically adhere to the interpretations given by human rights treaty bodies.[102]

(13) It is clear that a close reading of the case law of the International Court of Justice mentioned above might suggest drawing a distinction between "great weight" and "due account", depending on the type of body concerned: in the view of the Commission, the broader and more important point is that the decisions issued by bodies with specific

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founding treaty. Similarly, the regional Court of Justice of the Economic Community of West African States initially established such competence by jurisprudence before the States concerned adopted a protocol establishing such jurisdiction. For a discussion of this issue in the context of the East African Court of Justice and the evolution of the *Katabazi* doctrine, see James Thuo Gathii, "Mission creep or a search for relevance: the East African Court of Justice's human rights strategy", *Duke Journal of Comparative and International Law*, vol. 24 (2013), pp. 249–296.

95 *Diallo, Merits* (see footnote 90 above), para. 66.

96 *Ibid.*

97 International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

98 *Diallo, Merits* (see footnote 90 above), para. 66 (emphasis added).

99 *Ibid*., para. 67 (The International Court of Justice noted "[w]hen the Court is called upon … to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question").

100 *Ibid*., para. 67 (emphasis added), citing African Commission on Human and People's Rights *Kenneth Good v. Republic of Botswana*, Communication No. 313/05, Decision, 26 May 2010, para. 204, and *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights v. Rwanda*, Communications Nos. 27/89-46/91-49/91-99/93, Decision, 31 October 1996. See also Mads Andenas and Johann R. Leiss, "The systemic relevance of 'judicial decisions' in Article 38 of the ICJ Statute", *Heidelberg Journal of International Law*, vol. 77 (2017), pp. 907–972, for a discussion of Article 38 and the International Court of Justice approach to judicial decisions.

101 *Application of the International Convention … (Qatar v. United Arab Emirates)* (see footnote 90 above), para. 77, citing *Diallo, Compensation* (see footnote 90 above), paras. 13 and 24; *Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 90 above), para. 101; *Diallo, Merits* (see footnote 9090 above), para. 66; *Legal Consequences of the Construction of a Wall* (see footnote 90 above), paras. 109 and 136.

102 *Application of the International Convention … (Qatar v. United Arab Emirates)* (see footnote 90 above), para. 101.

competencies deserve to be considered when interpreting instruments concerned, even if such decisions or interpretations need not be followed by other tribunals.

*Subparagraph (*b) *– whether the decision is a part of a body of concurring decisions*

(14) Subparagraph (*b*) of draft conclusion 8 refers to a second more specific criterion for evaluating the weight of a decision: "the extent to which the decision is part of a body of concurring decisions". Here, the Commission accepts, based on practice, that, in some situations, a single or a few decisions could be particularly authoritative or even determinative of a particular legal question. First, the definition of a "dispute" for the purposes of adjudication before international tribunals given by the Permanent Court of International Justice in its by now famous judgment is a case in point.[103] A second example, the case involving *Monetary Gold*, is so well known that the name of the case is associated with the principle it espoused following the 1954 judgment of the International Court of Justice.[104] The third example is the judgment in the *LaGrand* case, which recognized, for the first time, the binding effect of orders for provisional measures.[105] In all these cases, so much weight is subsequently accorded to the decisions concerned that they would be cited in a long line of later cases by the same court and even other international tribunals.

(15) At the same time, while it seems evident that a single decision or a handful of decisions may sometimes carry considerable and even decisive weight, the Commission with this formulation of subparagraph (*b*) of draft conclusion 8 indicates that there is a greater likelihood in international law for a stream or body of jurisprudence or line of authority to become authoritative. Accordingly, while temporal considerations may in some cases only be a factor, this subparagraph anticipates the possibility that there are other prior decisions following the same reasoning as that in a particular case. In other words, in some cases when assessing the weight of decisions of courts or tribunals, there might already be a wider body of concurring decisions (or *jurisprudence constante*) supporting a particular decision, thereby indicating that potentially the same legal reasoning could be useful to address the legal issue at hand or under consideration.

(16) In its practice, the International Court of Justice periodically refers to a basically equivalent notion of a body of concurring decisions by using terms such as "settled jurisprudence",[106] "consistent jurisprudence"[107] and "established case law".[108] Out of many possible examples, the Court has determined, for instance, that in accordance with its "consistent jurisprudence … only 'compelling reasons' may lead the Court to refuse [to give] its [advisory] opinion".[109] In a similar manner, it referenced the "consistent jurisprudence"[110] and "established case law"[111] to adduce the meaning of a "dispute" in the *Mavrommatis*

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[103] Permanent Court of International Justice, *Mavrommatis Palestine Concessions, Jurisdiction, Series A, No. 2*, 30 August 1924, p. 6, at p. 11.

[104] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgement of June 15th, 1954: I.C.J. Reports 1954*, p. 19, at pp. 32-33.

[105] *LaGrand* (see footnote 21 above), para. 109.

[106] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at para. 407.

[107] *Certain Property (Liechtenstein v. Germany), Preliminary Objections, Judgment, I.C.J. Reports 2005*, p. 6, at para. 24.

[108] See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, at para. 37; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at para. 30.

[109] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at para. 65, citing *Legal Consequences of the Construction of a Wall* (see footnote 90 above), para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at para. 30; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 14.

[110] *Certain Property* (see footnote 107 above), para. 24.

[111] See *Obligations concerning Negotiations* (footnote 108 above), para. 37; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (footnote 108108 above), para. 30.

Palestine Concessions case. The Court has also determined: that it was established that jurisdiction must be examined at the time of a State's filing of an application before it;[112] that, in establishing its methodology for effecting maritime delimitation, the "first stage of the Court's approach is to establish the provisional equidistance line";[113] that "a dispute must exist for a request for interpretation to be admissible";[114] and that "the Court … must examine *propio motu* the question of its own jurisdiction" to consider the application made by a State.[115]

(17) Similarly, in the *Indus Waters* arbitration, the tribunal in the case observed that:

> fewer propositions in international law can be more confidently advanced than that the non-appearance of a party does not deprive a properly constituted court or tribunal of its competence. Whether a court has been properly constituted in a specific instance is not a matter that can be subjectively determined by a party to a dispute and then resolved simply through non-appearance by that party.[116]

In the same case, the tribunal determined it had a duty to satisfy itself that it had jurisdiction over the dispute, pointing out that "the wealth of judicial and arbitral decisions on the matter confirms that this duty is undoubtedly part of *jurisprudence constante*".[117]

(18) Based on the above sample of the extensive practice available, the Commission considers that, while it is not necessarily required that a decision in each case be part of a body of concurring decisions, where such concurring decisions exist and support the findings and conclusions of a particular decision, the fact that they do so will likely give it more weight, provided that such decision is well reasoned and persuasive to a later user.

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[112] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022*, p. 266, at para. 41; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at para. 26.

[113] See *Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment, I.C.J. Reports 2009*, p. 61, para. 118. See also *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139, at para. 98 ("In accordance with its established jurisprudence, the Court will proceed in two stages: first, the Court will draw a provisional median line; second, it will consider whether any special circumstances exist which justify adjusting such a line"), citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 40, at para. 176; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, at para. 268.

[114] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) (see footnote 21 above), para. 21, citing *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case, Judgment of November 27th, 1950: I.C.J. Reports 1950*, p. 395, at p. 402; *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 192, at para. 56. See also *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (*Cameroon v. Nigeria*), Preliminary Objections *(Nigeria v. Cameroon), Judgment, I.C.J. Reports 1999*, p. 31, at para. 12.

[115] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Decision, 2 February 1973, General List No. 56, p. 49, at para. 13. See also *Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment, I.C.J. Reports 1973*, p. 3, at para. 12; *Aegean Sea* (see footnote 53 above), para. 15.

[116] Permanent Court of Arbitration, *Indus Waters Treaty Arbitration (Pakistan v. India),* PCA Case No. 2023-01, Award on the Competence of the Court, 6 July 2023, para. 126, citing *Military and Paramilitary Activities in and against Nicaragua* (see footnote 21 above); *South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China,* Award on Jurisdiction and Admissibility, 29 October 2015, *Reports of International Arbitral Awards* (UNRIAA), vol. XXXIII, pp. 1–152; *Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation),* Award on Jurisdiction, 26 November 2014, UNRIAA, vol. XXXII, pp. 183–353.

[117] *Indus Waters* (see previous footnote), para. 135, citing *Military and Paramilitary Activities in and against Nicaragua* (see footnote 21 above); *South China Sea* (see previous footnote); *Arctic Sunrise* (see previous footnote); *Aegean Sea* (see footnote 53 above), para. 15.

*Subparagraph (*c*) – whether the reasoning remains relevant*

(19) Subparagraph (*c*), containing the third and final additional criterion for evaluating the decisions of courts and tribunals introduced by draft conclusion 8, indicates the requirement to take into consideration "the extent to which the reasoning remains relevant, taking into account subsequent developments". The Commission included this criterion in order to take into account the possible evolution of international law, which might result in less weight being given to previous decisions. It should be recalled that a decision issued by a court or tribunal may apply at a certain time, but does not necessarily freeze the law or its evolution.

(20) Developments may overtake a decision with the passage of time. The phrase "subsequent developments" was therefore chosen to introduce a measure of flexibility in allowing for changes to the weight to be given to a decision or group of decisions considering new events. These include not only decisions of courts and tribunals, but also factual or legal developments, such as the emergence of a different rule following, for example, the adoption of a treaty or the subsequent practice of States, that would limit the applicability or relevance of the reasoning of a court or tribunal in an earlier decision. Decisions may also change where a tribunal decides to change its stance to reflect more contemporary understandings of issues or as circumstances change, for example. Users of the present draft conclusions must therefore keep this in mind when evaluating the weight to accord to the decisions of courts and tribunals as subsidiary means for the determination of rules of international law.