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Second report on subsidiary means for the determination of rules of international law

By Charles Chernor Jalloh, Special Rapporteur**

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I. Introduction

A. Addition of the topic to the programme of work

1. During its seventy-second session (2021), the International Law Commission decided to place the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work.[1] The General Assembly, during its seventy-sixth session (2021), adopted resolution 76/111,[2] in which it took note of the inclusion of the topic in the long-term programme of work.[3]

2. At its seventy-third session (2022), given the interest in the topic, the opening of space on the programme of work and the positive feedback of States, the Commission decided[4] to move the topic to its current programme of work, and appointed Mr. Charles Chernor Jalloh as Special Rapporteur for the topic.[5]

3. At the same session, the Commission also requested information from States on their practices,[6] as well as two memorandums from the Secretariat.[7] In the first memorandum, which was submitted at the seventy-fourth session (2023) of the Commission, the Secretariat addressed the elements in the previous work of the Commission that could be particularly relevant to the topic. In the second memorandum, to be submitted in advance of the seventy-fifth session (2024) of the Commission, the Secretariat will survey the relevant case law of international courts and tribunals, and other bodies, and identify the elements of their practice that could be particularly relevant to the topic.

4. During the debate in the Sixth Committee at the seventy-seventh session (2022) of the General Assembly, States welcomed the Commission's plan to examine the subsidiary means for the determination of rules of international law. The General Assembly, in its resolution 77/103 of 7 December 2022, took note of the Commission's decision to include the topic in the current programme of work.[8] It also drew the attention of Governments to the importance for the Commission of having their views on the various aspects of the topics on its agenda, in particular on the specific issues identified in chapter III of the report of the Commission on the work of its seventy-third session (2022), regarding subsidiary means for the determination of rules of international law.[9]

5. At its seventy-fourth session (2023), the Commission held a general debate on the basis of the first report of the Special Rapporteur.[10] Alongside the first report of the Special Rapporteur, the Commission also considered the first memorandum, prepared by the Secretariat, identifying elements in the previous work of the Commission that could be particularly relevant to the topic.[11]

6. In his first report, the Special Rapporteur indicated that his second report would consider the function of subsidiary means. He planned to focus on judicial decisions, including their relationship to the sources of international law, namely, treaties,

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[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 302 and annex.

[2] General Assembly resolution 76/111 of 9 December 2021, para. 5.

[3] *Ibid.*

[4] A/CN.4/SR.3583, p. 8.

[5] *Ibid.*

[6] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 29.

[7] *Ibid.*, para. 245.

[8] General Assembly resolution 77/103 of 7 December 2022, para. 7.

[9] *Ibid.*, para. 5.

[10] A/CN.4/760.

[11] A/CN.4/759.

customary international law and general principles of law.[12] The possibility of also examining the question of the unity and coherence of international law in relation to conflicting decisions by different courts and tribunals was also noted.[13] Those proposals were generally endorsed by members of the Commission during the first plenary debate on the topic. That support was ultimately reflected in the Commission's tentative schedule for the development of the topic for the remainder of the quinquennium in its report to the General Assembly on the work of its seventy-fourth session (2023).[14]

B. Purpose and structure of the present report

7. The present report, in which the Special Rapporteur aims to build on the first report and the progress made so far on the topic, is organized as follows. In addition to the present chapter, which is introductory in nature, in chapter II, the Special Rapporteur will discuss the previous consideration of the topic. It contains a brief summary of the outcome of the debate in the Commission followed by a more detailed summary of the debate in the Sixth Committee. The Special Rapporteur will then address four issues arising from the debates and propose a way forward.

8. In chapter III, the Special Rapporteur will examine the nature and function of subsidiary means, focusing on judicial decisions as subsidiary means for the determination of rules of law. It is argued, in line with the previous work of the Commission on topics both past and present, that the main function of subsidiary means is auxiliary in nature. The analysis of the text, drafting history and practice in relation to Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice confirms that both international and national courts and scholarly writings confirm the auxiliary function of subsidiary means. There are, of course, certain more specific functions of judicial decisions, teachings and other subsidiary means that bear on their relationship to the sources of international law, such as the interaction between the subsidiary means for the determination of rules of law and the supplementary means of interpretation set out in the Vienna Convention on the Law of Treaties,[15] which have been reserved for discussion in a future report.

9. In the second substantive chapter, that is chapter IV, the Special Rapporteur explores the relationship between Article 38, paragraph 1 (*d*), and Article 59 of the Statute of the International Court of Justice since the subsidiary means in the former are expressly subject to the latter when it provides that the decisions of the Court carry no binding force except between the parties and in respect of their particular case. That provision has provoked much debate and confusion on the issue of binding precedent, or lack thereof, in international law. The chapter contains a brief comparative section on the common law and civil law approaches to precedent in judicial adjudication at the domestic or municipal level. The question of precedent in international law is thereafter analysed in relation to the International Court of Justice, focusing on elements of the practice concerning Article 59, including in respect of what it aims to achieve by protecting or preserving the rights of third parties. The Special Rapporteur then briefly discusses examples of how the International Tribunal for the Law of the Sea, which, like the International Court of Justice, also resolves inter-State disputes and issues advisory opinions, approaches precedents before drawing conclusions.

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[12] A/CN.4/760, para. 388.

[13] *Ibid*., para. 50.

[14] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 261.

[15] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

10. In its second memorandum,[16] the Secretariat reviews the case law of international courts and tribunals, and other bodies, including arbitral tribunals, and the decisions of other bodies. It provides comprehensive information on the actual practice of a wide range of bodies, addressing both (a) the functions of subsidiary means and (b) the use of precedents to resolve both procedural and substantive questions. In the second memorandum, the Secretariat includes numerous examples of how arbitral tribunals, ad hoc and permanent international criminal tribunals, as well as other bodies, interpret subsidiary means and practically address the question of precedent. While there are some nuances, such as the applicability of a system of binding precedent by international courts with an internal hierarchy, such as at the International Criminal Court, the overall conclusion confirms that there is no formal system of binding precedent in inter-State disputes by permanent or ad hoc bodies in international law. The Special Rapporteur highly commends the Secretariat for its second memorandum as it constitutes a valuable repository of tribunal practice in relation to the two fundamental aspects of the topic addressed by the current report.

11. In the final part of the report, chapter V, the Special Rapporteur addresses the future programme of work on the topic. He recalls the position that he took last year, namely that, while he proposed a tentative programme to guide his work on the topic, "it is subject to change, on the basis of the actual progress of the work on the topic".[17] In keeping with that flexible position to meet the scientific and other needs of the topic, depending on the outcome of the debate and the actual progress made during the seventy-fifth session (2024), he may propose some adjustments to the tentative programme in his next report.

12. For the convenience of its members, the conclusions provisionally adopted by the Commission at its seventy-fourth session (2023), as well as the draft conclusions that were provisionally adopted by the Drafting Committee, are annexed to the present report (annexes I and II). They are followed by the three new draft conclusions proposed by the Special Rapporteur in the present report (annex III).

II. Work to date on the topic

A. First report of the Special Rapporteur and the first plenary debate in the Commission

13. In his first report, the Special Rapporteur mapped out the main issues raised by the work of the Commission on the topic of subsidiary means for the determination of rules of international law.[18] The Special Rapporteur analysed the generally positive reception of the topic by States, as expressed in the Sixth Committee at two successive sessions of the General Assembly in 2021[19] and 2022.[20] He addressed issues of methodology, grounded in the practices of States and tribunals. He examined the previous work of the Commission on the topic, the theoretical foundations and the nature of subsidiary means and their relationship to sources of international law, distinguishing between them as materials instead of formal sources of law. Furthermore, he engaged in a detailed analysis of the text and practice, as well as the drafting history, of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

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[16] A/CN.4/765.
[17] A/CN.4/760, para. 387.
[18] *Ibid*.
[19] *Ibid*., chap. II, sect. A.
[20] *Ibid*., sect. B.

14. As regards the substance of subsidiary means, the Special Rapporteur analysed the main aspects of the topic, taking as the point of departure Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which expressly identifies judicial decisions and teachings of the most highly qualified publicists of the various nations as the subsidiary means for determining rules of law. That said, since there is nothing in the text and drafting history of Article 38, paragraph 1 (*d*), to indicate that it was meant to be exhaustive, and there is already extensive use in contemporary practice of additional means to determine the rules of international law, the Special Rapporteur examined some possible candidates of subsidiary means for further study in the topic. Those included a preliminary assessment of unilateral declarations or acts of States, resolutions and decisions of international organizations, agreements between States and international enterprises, religious law and the works of both public and private expert bodies.

15. The Special Rapporteur proposed that the final outcome of the work, consistent with the approved syllabus and the Commission's approach to previous sources-related topics, should be draft conclusions accompanied by commentaries. He suggested clarifying the normative value of draft conclusions as a final output on the topic. In that regard, in his first report, the Special Rapporteur explained that, while to date there had been no-one-size-fits-all definition of draft conclusions in the practice of the Commission, since it must necessarily examine each topic in the light of its specific circumstances, their essential characteristic was nonetheless clear: that is to say, to clarify the law based on current practice. Thus, in accordance with the Statute and general practice of the Commission, the content of the conclusions, as a final output on the topic, would reflect primarily codification and possibly elements of progressive development.

16. In the final analysis, drawing upon the detailed analysis presented in his first report and considering the Commission's previous related work, the Special Rapporteur proposed five draft conclusions. Draft conclusion 1 is on the scope of the topic; draft conclusion 2 is on the categories of subsidiary means; draft conclusion 3 outlines the criteria for the assessment of subsidiary means; draft conclusion 4 relates to the decisions of courts and tribunals; and draft conclusion 5 is on teachings.

17. The Special Rapporteur also suggested a tentative programme of work for the topic. In that tentative programme of work, he suggested that three successive substantive reports should be prepared, the second of which focused on judicial decisions and the third on teachings and additional subsidiary means. The goal being, assuming the timetable were to be maintained, to accomplish the first reading of the full set of conclusions and the commentaries thereto in 2025, and the second reading in 2027, following comments by States. That said, in the first report, the Special Rapporteur also stressed that the preliminary timetable was not definitive and was subject to change to reflect the actual progress of the work and the scientific or other needs of the topic.

18. During the first plenary debate on the topic, the first report was well received by most members of the Commission, who complimented the Special Rapporteur for a rigorous, balanced and comprehensive report, even though there were also members who would have preferred a shorter report. Given the constraints on the present report, it is unnecessary to summarize the first plenary debate here. In any event, though the summary of the debate focused on the two conclusions for which commentaries were yet to be prepared, the main trends of the first plenary debate on the topic of subsidiary means were well captured by the Commission in its 2023 report to the General Assembly.[21]

[21] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10).

19. At the end of the first plenary debate, which attracted significant interest from almost all members of the Commission, the Special Rapporteur summarized the rich debate and identified strong consensus on the overall scope and direction of the topic.[22] His conclusions can be restated as follows.

20. First, there was consensus among members of the Commission concerning the importance and practical relevance of the topic of subsidiary means, with members' emphasizing that the text of and practice on Article 38 of the Statute of the International Court of Justice is the point of departure for the current work and that the present study offered the Commission the opportunity to complete its work on the last remaining part of Article 38, paragraph 1 (*d*), which concerned the subsidiary means for the determination of rules of international law.

21. Second, there was consensus among members of the Commission that, although the subsidiary means contained in Article 38, paragraph 1 (*d*), are not sources of international law in and of themselves, they do in practice play an important assistive role in the process of determining the existence and content of rules of international law.

22. Third, as regards the methodology for the work on the topic, there was consensus that the Commission should follow its usual methodology by examining the practices of States, especially their courts, as well as international courts and tribunals and others. Relatedly, it was agreed that, for reasons of consistency, the Commission should build on its prior work related to subsidiary means and avoid reopening issues that had already been settled. Naturally, that was without prejudice to a full consideration of the issues within the specific context of the present topic. That is especially true considering that all the topics treated subsidiary means as secondary elements, rather than as central to the main focus of the work.

23. Fourth, there was broad consensus among members of the Commission that the study would address three main components of the topic. The first main component would address the origins, nature and scope of subsidiary means. In that regard, members unanimously supported the two traditional categories of subsidiary means set out in Article 38, paragraph 1 (*d*), namely, judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of international law. Members also generally agreed that further consideration should be given to the weight of subsidiary means.

24. The second main component of the topic would address the function and relationship between the subsidiary means and the sources of international law, namely, treaties, customary international law and general principles of law. Their main function, consistent with the previous work of the Commission, is auxiliary or ancillary in character and is confirmed by the various official language versions of Article 38, paragraph 1, of the Statute of the International Court of Justice. In that regard, members broadly agreed that it would be useful to clarify further the function of subsidiary means, which, taking into account the formulation of "subsidiary means" in Article 38, paragraph 1 (*d*), in the other official languages of the United Nations, appeared to be mainly to assist with the determination of the existence and content of rules of international law found in the sources of international law.

25. The third main component of the topic would address the third category of subsidiary means for the determination of rules of international law. Since judicial decisions and teachings are not in practice exhaustive of the subsidiary means that can be consulted, members broadly agreed that the Commission should elaborate the additional subsidiary means for the determination of rules of international law.

[22] *Ibid*., paras. 84–98.

26. As to which specific subsidiary means could fall within the third agreed category, views were more divided. Most members supported further analysis of certain resolutions and decisions of international organizations and the works of private and public expert bodies. Some of those members urged express recognition of those categories, including in specific conclusions. A number of other members expressed doubts about the latter approach, while a number of others retained an open mind. Only a handful of members supported further analysis of unilateral acts capable of creating legal obligations, while most other members opposed them, along with the Special Rapporteur, with all but one member supporting the exclusion of religious law. No member supported further examination of agreements between States and multinational enterprises.

27. Fifth, on the question of the unity and coherence of international law, sometimes referred to as fragmentation, there was wide agreement that the Commission could add value by examining the matter as part of its work on the topic. A number of members expressed opposing views. While support for the study of that aspect of the topic seemed strong within the Commission, which had the final word on the matter, the Special Rapporteur suggested that States in the Sixth Committee should still be given an opportunity to comment in order to enable their important views to be taken into account.

28. Sixth, there was overwhelming support among members of the Commission on the proposed final outcome of the topic. It was agreed that they should take the form of draft conclusions accompanied by commentaries with the primary aim of clarifying the law based on current practice.

29. Seventh, as part of the Commission's contribution to the topic, there was consensus among members to support the preparation of a multilingual bibliography, which would be as representative as possible of the various regions, legal systems and languages of the world. In seeking to ensure more representativeness, in his summing up, the Special Rapporteur invited suggestions from members of the Commission and States for inputs for the multilingual bibliography, which would be compiled towards the end of the first reading of the draft conclusions.

30. Following the Special Rapporteur's summary of the first plenary debate, the Commission decided to refer the five draft conclusions, as contained in his first report, to the Drafting Committee, taking into account the views expressed during the plenary debate.[23] The Drafting Committee held a number of meetings on the topic, finalizing the first three draft conclusions by the end of the first half of the session. The remaining two draft conclusions were retained for consideration during the second half of the session. Upon resumption of the session, a number of additional meetings of the Draft Committee were dedicated to an examination of the two other draft conclusions proposed by the Special Rapporteur in his first report.

31. The Commission, on 3 July 2023, considered the report of the Drafting Committee on the topic.[24] It provisionally adopted draft conclusions 1 to 3 and, towards the end of the seventy-fourth session, the commentaries thereto.[25]

32. On 21 July 2023, the Commission also considered an additional report of the Drafting Committee containing draft conclusions 4 and 5 provisionally adopted by

[23] *Ibid.*, para. 63.

[24] See statement of the Chair of the Drafting Committee on subsidiary means for the determination of rules of international law, 3 July 2023, available from https://legal.un.org/ilc/documentation/english/statements/2023_dc_chair_statement_sm.pdf.

[25] *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 64.

the Committee, as orally revised, and took note of them.[26] The commentaries to those two draft conclusions will likely be presented for adoption during the seventy-fifth session (2024) of the Commission.

B. Debate in the Sixth Committee

1. General support for the scope, direction and outcome of the topic

33. During the debate in the Sixth Committee, in 2023, on the report of the Commission on the work of its seventy-third and seventy-fourth sessions, a relatively large number of delegations participated. Some 51 States (including the Nordic countries, which were represented by Denmark), together with the European Union and one observer (the Holy See), specifically addressed chapter VII of the report of the Commission on the work of its seventy-fourth session, which concerned the subsidiary means for the determination of the rules of international law.[27]

34. At a broad level, most of the participating delegations offered positive feedback on the topic, with many delegations reiterating their support for the Commission's decision to include the topic of subsidiary means in its programme of work, which they saw as a logical continuation[28] and a useful complement[29] to its prior work on the sources of international law. One of the less than a handful of initially hesitant delegations noted that, while it had initially expressed doubt regarding the inclusion of the topic on the current programme of work, it had now, after the first year of work, become convinced of its potential.[30] The Special Rapporteur welcomes that development, especially given the strong support for the topic by many other States.

35. In their comments on the substance, most delegations also generally welcomed the Special Rapporteur's comprehensive first report. A number of delegations commended the progress made by the Commission in its consideration of the topic so far, including the adoption of three draft conclusions and the commentaries thereto, as well as the provisional adoption of two draft conclusions by the Drafting Committee.[31] Most delegations commented on the three provisionally adopted draft conclusions and the commentaries thereto. About half of the delegations participating in the debate in the Sixth Committee also offered preliminary views on the final two draft conclusions.[32]

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[26] *Ibid*., para. 65.

[27] In addition to the European Union and the Holy See, the delegations that addressed the topic during the debate of the Sixth Committee were: Armenia, Austria, Belarus, Brazil, Cameroon, Chile, China, Colombia, Cuba, Czech Republic, Denmark (on behalf of the Nordic countries), Ecuador, El Salvador, Estonia, France, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Kenya, Malaysia, Mexico, Netherlands (Kingdom of the), Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Thailand, Türkiye, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

[28] See the statements by Armenia (A/C.6/78/SR.30), Belarus (A/C.6/78/SR.31), Germany (*ibid*.), Sierra Leone (A/C.6/78/SR.32) and Uganda (*ibid*.).

[29] See the statements by Cameroon (A/C.6/78/SR.33), Chile (A/C.6/78/SR.31), the Czech Republic (*ibid*.), El Salvador (A/C.6/78/SR.33), Estonia (*ibid*.), Kenya (*ibid*.) and Singapore (A/C.6/78/SR.31).

[30] See the statement by the Kingdom of the Netherlands (A/C.6/78/SR.31, para. 68).

[31] See the statements by Estonia (A/C.6/78/SR.33), Japan (A/C.6/78/SR.32), Sierra Leone (*ibid*.), Slovakia (A/C.6/78/SR.31), Uganda (A/C.6/78/SR.32) and the European Union (A/C.6/78/SR.30).

[32] See the statements by Austria (A/C.6/78/SR.31), Brazil (*ibid*.), Chile (*ibid*.), China (A/C.6/78/SR.29), the Czech Republic (A/C.6/78/SR.31), Denmark (on behalf of the Nordic

36. As regards substance, in terms of the big picture, many of the participating delegations expressed support for the scope of the topic. The majority of delegations supported the examination of judicial decisions and teachings to determine rules of international law, while concurring with the Commission that subsidiary means were auxiliary in character and not sources of international law. While some delegations expressly supported the inclusion of "various other means",[33] a number of other delegations expressed doubts regarding the third category or called for some caution to avoid undue expansion of subsidiary means.[34]

37. Support was also generally expressed for the Commission's methodological approach, which would ground it in the practice of States and international tribunals. There was also broad support for the tentative programme of work for the topic. That said, regarding the programme of work, the progress already made in the first year of the topic was welcomed by almost all delegations, while three delegations felt that more time might be needed to fully comprehend all the issues.[35]

38. Regarding the final output, almost all[36] the participating delegations supported the Commission's choice of conclusions as the appropriate output for the topic. In general, they found the format of conclusions accompanied by commentaries and a multilingual bibliography suitable, with several pointing out that that choice was in accordance with the Commission's previous work on related topics.

2. Comments on the draft conclusions provisionally adopted by the Commission

39. Delegations also offered specific comments on the text of each of the provisionally adopted draft conclusions with a number of delegations also providing some helpful suggestions for the commentaries. Specifically, many delegations[37] welcomed the text of draft conclusion 1,[38] finding it appropriately formulated in setting out the scope of the topic, which was to elucidate the subsidiary means for the determination of rules of international law.[39] A number of delegations commended

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countries) (A/C.6/78/SR.30), France (A/C.6/78/SR.31), Germany (*ibid.*), Hungary (*ibid.*), Iran (Islamic Republic of) (*ibid.*), Israel (*ibid.*), Italy (*ibid.*), Malaysia (A/C.6/78/SR.32), Netherlands (Kingdom of the) (A/C.6/78/SR.31), Poland (*ibid.*), the Republic of Korea (*ibid.*), Romania (*ibid.*), Singapore (*ibid.*), Slovakia (*ibid.*), Thailand (*ibid.*), Türkiye (A/C.6/78/SR.33), the United Kingdom (A/C.6/78/SR.31), the United States (*ibid.*), the European Union (A/C.6/78/SR.30) and the Holy See (A/C.6/78/SR.33).

[33] See the statements by Chile (A/C.6/78/SR.31), Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.30), Estonia (A/C.6/78/SR.33), Greece (A/C.6/78/SR.32), Mexico (*ibid.*), Peru (*ibid.*), Romania (A/C.6/78/SR.31), Sierra Leone (A/C.6/78/SR.32), Singapore (A/C.6/78/SR.31) and Uganda (A/C.6/78/SR.32).

[34] See the statements by Austria (A/C.6/78/SR.31), Brazil (*ibid.*), Colombia (A/C.6/78/SR.33), Cuba (A/C.6/78/SR.32), Israel (A/C.6/78/SR.31), Japan (A/C.6/78/SR.32), Malaysia (*ibid.*), the Republic of Korea (A/C.6/78/SR.31), Singapore (*ibid.*), Thailand (*ibid.*), the United Kingdom (*ibid.*) and the United States (*ibid.*).

[35] See the statements by Armenia (A/C.6/78/SR.30, para. 80), the Russian Federation (A/C.6/78/SR.32, para. 63) and the United Kingdom (A/C.6/78/SR.31, para. 38).

[36] Only one delegation out of 51, namely the United Kingdom, suggested that the Commission might maintain an open mind as to the form of the final output (A/C.6/77/SR.31, para. 35).

[37] See the statements by Chile (A/C.6/78/SR.31), China (A/C.6/78/SR.29), Estonia (A/C.6/78/SR.33), France (A/C.6/78/SR.31), Ireland (*ibid.*), Mexico (A/C.6/78/SR.32), the Philippines (*ibid.*), Romania (A/C.6/78/SR.31), Sierra Leone (A/C.6/78/SR.32), South Africa (A/C.6/78/SR.31), Uganda (A/C.6/78/SR.32) and the European Union (A/C.6/78/SR.31).

[38] Draft conclusion 1, as provisionally adopted by the Commission, reads as follows:
Conclusion 1
Scope
The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

[39] See the statements by Mexico (A/C.6/78/SR.32), Sierra Leone (*ibid.*) and Uganda (*ibid.*).

the analysis of the different language versions of Article 38, paragraph 1 (*d*), and agreed with the explicit affirmation that subsidiary means played an auxiliary or ancillary role to the sources of international law.[40]

40. Nevertheless, as is customary for topics considered by the Commission, a few other delegations contributed to the debate on the textual formulation of draft conclusion 1.[41] For example, Chile and the Philippines supported the Commission's formulation "the use of" subsidiary means, instead of the phrase "are used", since the former was more reflective of the optional nature of the wording used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.[42] Slovakia similarly welcomed the more neutral and less imperative framing of the scope of draft conclusion 1. At the same time, the same delegation suggested reconsidering the term "use of" since, in its view, the language might not adequately capture all aspects of the topic given the stated goal of the Special Rapporteur to elaborate the origin or function of subsidiary means.[43]

41. Malaysia suggested that, to add greater clarity, the Commission could define the phrase "subsidiary means" and reflect its meaning and effect in draft conclusion 1.[44] In a similar vein, while endorsing the Commission's analysis of the auxiliary nature of subsidiary means, the European Union suggested that the Commission might consider further developing its arguments about the subsidiary character of subsidiary means vis-à-vis sources of international law by underlining the elements of will or consent by subjects of international law in the draft conclusions or the commentaries thereto.[45] Poland supported a further elaboration of what "determination of rules" meant, suggesting it could lie somewhere between interpretation and determination.[46] The Russian Federation contended that the meaning of "determination" as used in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice was used to mean "identification" not "establishment" of rules of international law and that that should be reflected more clearly in the commentary or even directly in the text of the draft conclusions.[47]

42. Delegations also generally welcomed draft conclusion 2,[48] in which the Special Rapporteur set out three categories of subsidiary means in subparagraphs (*a*), (*b*) and (*c*), with some delegations speaking about its textual formulation whereas others addressed the scope of the categories or a combination of both. Many delegations supported the Commission's formulation of the first two categories of subsidiary means, namely decisions of courts and tribunals and teachings, since they were mainly derived from Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. China, the Czech Republic, Hungary, Mexico, the Philippines, Singapore, Sierra Leone and

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[40] See the statements by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.30), France (A/C.6/78/SR.31) and Mexico (A/C.6/78/SR.32).

[41] See the statements by China (A/C.6/78/SR.29), Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.30), Estonia (A/C.6/78/SR.33), France (A/C.6/78/SR.31) and the European Union (A/C.6/78/SR.30).

[42] See the statements by Chile (A/C.6/78/SR.31) and the Philippines (A/C.6/78/SR.32).

[43] See the statement by Slovakia (A/C.6/78/SR.31, para. 127).

[44] See the statement by Malaysia (A/C.6/78/SR.32, para. 49).

[45] See the statement by the European Union (A/C.6/78/SR.30, para. 106).

[46] See the statement by Poland (A/C.6/78/SR.31, para. 43).

[47] See the statement by the Russian Federation (A/C.6/78/SR.32, para. 59).

[48] Draft conclusion 2, as provisionally adopted by the Commission, reads as follows:

Conclusion 2

Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

(*a*) decisions of courts and tribunals;

(*b*) teachings;

(*c*) any other means generally used to assist in determining rules of international law.

Uganda supported the Commission's adoption of the broader language "decisions of courts and tribunals" and "teachings" in subparagraphs (*a*) and (*b*) to encompass the language of "judicial decisions" and the "teachings of the most highly qualified publicists of the various nations"[49] found in the Statute of the International Court of Justice. Some of the same delegations appreciated that the formulation used in the topic was also consistent with the Commission's language in the draft conclusions on identification of customary international law and those on general principles of law.[50]

43. Several other delegations, namely, Austria, Brazil, Germany and Greece, expressed some hesitations and called for more clarification of aspects of the text of subparagraphs (*a*) and (*b*) of draft conclusion 2.[51] For example, concerning the first category of subsidiary means, Germany expressed uncertainty about the difference between the meaning of "judicial decisions" in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice and "decisions of courts and tribunals" in draft conclusion 2, urging the retention of the "exact wording of the Statute [of the International Court of Justice] whenever possible in order to avoid misunderstandings in what the applicable law might be and require".[52] Similarly, Austria also considered that the term "decisions of courts and tribunals" might not be satisfactory and wondered whether the formulation "jurisprudence of courts and tribunals and other bodies" could be more helpful to capture any third-party dispute settlement institutions that are empowered to decide disputes.[53] Again, as with draft conclusion 1, a number of clarifications were requested in future revisions of the commentary, including by the European Union, which called for further elaboration of the criteria distinguishing "courts and tribunals" from other bodies.[54]

44. With regard to "teachings", the second category of subsidiary means addressed in subparagraph (*b*) of draft conclusion 2, most of the delegations, including those of the Czech Republic, Greece, Mexico, Sierra Leone and Uganda,[55] supported the succinct formulation by the Commission, while a number of others were more cautious. Malaysia, for instance, argued that referring to teachings in their general form might cause uncertainty in relation to the threshold that must be met to determine whether a teaching could be considered as one of the categories of subsidiary means.[56] Brazil suggested that caution was warranted when dealing with individual publicists, for a variety of reasons and, in any event, expressed a preference for a highly restrictive reading of the term "teachings", under which the category would only encompass the contributions of "collective bodies".[57] Ireland suggested that, in as much as the Commission had suggested abandonment of the term "most highly qualified publicists" as historically and geographically charged, the time was ripe for the Commission to reflect on "of the various nations" and perhaps employ the alternative term "State" instead of the word "nation", which would be more fitting in

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[49] See the statements by China (A/C.6/78/SR.29), the Czech Republic (A/C.6/78/SR.31), Hungary (*ibid.*), Mexico (A/C.6/78/SR.32), the Philippines (*ibid.*), Singapore (A/C.6/78/SR.31), Sierra Leone (A/C.6/78/SR.32) and Uganda (*ibid.*).

[50] See the statements by Sierra Leone (A/C.6/78/SR.32, para. 44) and Uganda (*ibid.*, para. 22).

[51] See the statements by Austria (A/C.6/78/SR.31, paras. 20–22), Brazil (*ibid.*), Germany (*ibid.*) and Greece (A/C.6/78/SR.32).

[52] See the statement by Germany (A/C.6/78/SR.31, para. 40).

[53] See the statement by Austria (*ibid.*, para. 22).

[54] See the statements by Brazil (A/C.6/78/SR.31), the Czech Republic (*ibid.*), Germany (*ibid.*), Greece (A/C.6/78/SR.32), Iran (Islamic Republic of) (A/C.6/78/SR.31), Jamaica (A/C.6/78/SR.33), Malaysia (A/C.6/78/SR.32), Poland (A/C.6/78/SR.31) and the Republic of Korea (*ibid.*).

[55] See the statements by the Czech Republic (A/C.6/78/SR.32), Greece (A/C.6/78/SR.33), Mexico (A/C.6/78/SR.32), Sierra Leone (*ibid.*) and Uganda (*ibid.*).

[56] See the statement by Malaysia (A/C.6/78/SR.32, para. 50).

[57] See the statement by Brazil (A/C.6/78/SR.31, para. 14).

the modern context, or a more inclusive formulation, such as "international community of States".[58]

45. A number of delegations reflected on the implications of draft conclusion 2 for modern technology. Greece found it particularly interesting that new materials, including those that might be developed in future from relevant technological advances, could be considered as teachings.[59] Portugal expressed similar sentiments.[60] Jamaica requested more clarification on the "inclusion of teachings in non-written form", especially given that, unlike written works, "such information was not as immediately accessible for non-written works, making it more difficult to examine the basis on which authors formed their conclusions".[61]

46. As was expected by the Special Rapporteur, it was subparagraph (*c*) of draft conclusion 2, encompassing "any other means generally used to assist in determining rules of international law", that attracted the most comments. In broad terms, a significant number of delegations either fully supported that category (for example, Chile, Denmark (on behalf of the Nordic countries), Estonia, Greece, Mexico, Netherlands (Kingdom of the), Peru, Romania, Sierra Leone and Uganda)[62] or were receptive to it (for example, Italy and Singapore).[63] Conversely, a number of other delegations expressed reservations (for example, Brazil, Chile, Israel, Portugal and the United States)[64] or opposed it (for example, Colombia, Japan, Malaysia and the United Kingdom).[65] Among the delegations that were supportive were the Nordic countries, which highlighted the "very broad" and "inclusive" nature of the category, while also stressing the importance of the additional qualifier "generally used", especially when considered in conjunction with the explanation of the assistive function of subsidiary means.[66]

47. Austria, Cuba, the Republic of Korea and Thailand were still to be convinced about the third category.[67] The Republic of Korea questioned whether the third category might expand the scope of the topic beyond that set out in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.[68] Austria was sceptical about the existence of additional types of subsidiary means and agreed with the view expressed in the commentary that the existing categories in Article 38, paragraph 1 (*d*), were sufficiently broad to encompass developments.[69] The United Kingdom called for caution and suggested avoiding the expansion of the categories of subsidiary means and ensuring consistency with the prior work of the Commission that had addressed subsidiary means, while Italy took note of the debate without

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[58] See the statement by Ireland (*ibid*., para. 146).

[59] See the statement by Greece (A/C.6/78/SR.32, para. 68).

[60] See the statement by Portugal (A/C.6/78/SR.31, para. 89).

[61] See the statement by Jamaica (A/C.6/78/SR.33, para. 19).

[62] See the statements by Chile (A/C.6/78/SR.31), Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.30), Estonia (A/C.6/78/SR.33), Greece (A/C.6/78/SR.32), Mexico (*ibid*.), Netherlands (Kingdom of the) (A/C.6/78/SR.31) and Peru (A/C.6/78/SR.32).

[63] See the statements by Italy (A/C.6/78/SR.31) and Singapore (*ibid*.).

[64] See the statements by Brazil (*ibid*.), Chile (*ibid*.), Israel (*ibid*.), Japan (A/C.6/78/SR.32), Portugal (A/C.6/78/SR.31) and the United States (*ibid*.).

[65] See the statements by Colombia (A/C.6/78/SR.33), Japan (A/C.6/78/SR.32), Malaysia (*ibid*.), the Republic of Korea (A/C.6/78/SR.31) and the United Kingdom (*ibid*.).

[66] See the statement by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.30, para. 116).

[67] See the statements by Austria (A/C.6/78/SR.31), Cuba (A/C.6/78/SR.32), the Republic of Korea (A/C.6/78/SR.31) and Thailand (*ibid*.).

[68] See the statement by the Republic of Korea (A/C.6/78/SR.31, para. 8).

[69] See the statement by Austria (*ibid*., para. 20).

taking a position one way or another.[70] Some of the delegations that were hesitant called for further explanations of the third category.

48. Lastly, with respect to draft conclusion 3, there was considerable support for the six general criteria for the assessment of subsidiary means.[71] However, as usual, there were also calls for clarifications of some issues, including the meaning, weight and order of the criteria.[72] A couple of textual suggestions were made to amend the draft conclusions. For instance, while many delegations welcomed the use of the term "should" to indicate flexibility, Singapore wanted to substitute the term for the word "may", which, in in its view, "would make it clearer that the factors to which regard should be had when assessing the weight of subsidiary means would ultimately depend on the circumstances in each case".[73]

49. A number of delegations welcomed the fact that the objectivity of some of the criteria offered users of subsidiary means a common benchmark against which to assess subsidiary means and the elaboration of additional considerations. For instance, Jamaica suggested the addition of a new criterion along the lines of "relevance to the issues and facts being considered by the court or tribunal", on the basis that such a criterion might prove important in situations in which a decision addressed, in the same manner, the matter that was being considered, thereby giving a court or tribunal scope to attach greater weight to it.[74] Similarly, Thailand suggested that the consistency of prior decisions on a specific legal issue could also be included among the general criteria since it could provide evidence of the existence of international law.[75] Other delegations, such as France, warned against the subjective nature of some of the criteria, which might risk giving rise to divergent interpretations of subsidiary means.[76]

50. Specific comments were made on each of the six illustrative criteria. The inclusion of the criterion of the degree of representativeness, especially in terms of different regions and legal systems of the world, was widely commended.[77] Similarly, a number of States emphasized that the quality of the reasoning, especially as it related to judicial decisions and teachings, was the most important consideration.[78] They considered that it should be given special weight.[79] Several other delegations underlined the importance of the expertise of those involved and the level of agreement among them in assessing subsidiary means.[80] As regards the weight attributed to the reception by States and other entities, a number of delegations

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[70] See the statements by the United Kingdom (*ibid*., para. 37) and Italy (*ibid*., para. 26).

[71] See the statements by Austria (*ibid*.), Brazil (*ibid*.), Chile (*ibid*.), El Salvador (A/C.6/78/SR.33), Germany (A/C.6/78/SR.31), Greece (A/C.6/78/SR.32), Guatemala (*ibid*.), Iran (Islamic Republic of) (A/C.6/78/SR.31), Israel (*ibid*.), Italy (*ibid*.), Mexico (A/C.6/78/SR.32), Netherlands (Kingdom of the) (A/C.6/78/SR.31), the Philippines (A/C.6/78/SR.32), Romania (A/C.6/78/SR.31), Sierra Leone (A/C.6/78/SR.32), South Africa (A/C.6/78/SR.31), Thailand (*ibid*.), Uganda (A/C.6/78/SR.32) and the Holy See (A/C.6/78/SR.33).

[72] See the statements by Austria (A/C.6/78/SR.31), Chile (*ibid*.), Columbia (A/C.6/78/SR.33), Cuba (A/C.6/78/SR.32), Germany (A/C.6/78/SR.31), Greece (A/C.6/78/SR.32), Israel (A/C.6/78/SR.31), Malaysia (A/C.6/78/SR.32), Netherlands (Kingdom of the) (A/C.6/78/SR.31), Poland (*ibid*.), Slovakia (*ibid*.), Thailand (*ibid*.) and Türkiye (A/C.6/78/SR.33).

[73] See the statement by Singapore (A/C.6/78/SR.31, para. 5).

[74] See the statement by Jamaica (A/C.6/78/SR.33, para. 20).

[75] See the statement by Thailand (A/C.6/78/SR.31, para. 118).

[76] See the statements by France (*ibid*.), Malaysia (A/C.6/78/SR.32) and Türkiye (A/C.6/78/SR.33).

[77] See the statements by Austria (A/C.6/78/SR.31), Brazil (*ibid*.), El Salvador (A/C.6/78/SR.33), Italy (A/C.6/78/SR.31), Sierra Leone (A/C.6/78/SR.32) and Uganda (*ibid*.).

[78] See the statements by Austria (A/C.6/78/SR.31), Germany (*ibid*.) and the United States (*ibid*.).

[79] See the statements by Germany (*ibid*.) and the United States (*ibid*.).

[80] See the statement by the Holy See (A/C.6/78/SR.33).

preferred that it be mentioned first,[81] while other delegations were uncertain about its relevance and called for its qualification.[82] Regarding the mandate of the body involved, one delegation underlined that such an assessment be based on the founding instruments of the body instead of the body's own interpretation of that mandate.[83] Lastly, beyond the general criteria for assessing subsidiary means, some delegations urged the Commission to elaborate on the current criteria with further examples in the commentary or, in echoing similar points made by some members of the Commission, suggested it could develop more specific criteria in relation to the different types of subsidiary means.[84]

3. Comments on the draft conclusions provisionally adopted by the Drafting Committee

51. Although the Commission is yet to adopt draft conclusions 4 and 5 and the commentaries thereto, which have been provisionally adopted by the Drafting Committee, a number of useful comments were made by delegations in relation to them. It will be recalled that those draft conclusions were intended to flesh out, in a preliminary manner, the first two categories of means described in draft conclusion 2, namely "decisions of courts and tribunals" and "teachings". The Special Rapporteur recalls that the Drafting Committee had agreed, in line with the previous work of the Commission and the first report of the Special Rapporteur, on the utility of clarifying and building on the conclusions on identification of customary international law and the draft conclusions on general principles of law to address those aspects regulating the relationship between subsidiary means and the rules found in treaties, customary international law and general principles of law.

52. In that regard, several delegations commented favourably on draft conclusion 4, which concerned decisions of courts and tribunals and provided that such decisions, in particular of the International Court of Justice, were a subsidiary means for the determination of existence and content of rules of international law.[85] In the second paragraph, the relevance of national court decisions was also recognized, although their use was qualified by the expression "in certain circumstances".

53. Concerning the first paragraph of draft conclusion 4, several delegations supported the Commission's approach, with many underlining the importance of decisions of international courts and tribunals as subsidiary means – especially those of the International Court of Justice – on matters of general international law.[86] They considered that such decisions played a key role limiting fragmentation and ensuring systemic integration.[87] Conversely, a number of other delegations, despite their agreement to assign greater weight to the decisions of international tribunals, especially

[81] See the statements by Cuba (A/C.6/78/SR.32, para. 3) and Poland (A/C.6/78/SR.31, para. 45).

[82] See the statements by Austria (A/C.6/78/SR.31, para. 23) and Netherlands (Kingdom of the) (*ibid.*, para. 73).

[83] See the statement by Türkiye (A/C.6/78/SR.33, para. 25).

[84] See the statements by Chile (A/C.6/78/SR.31), Colombia (A/C.6/78/SR.33), Germany (A/C.6/78/SR.31) and Israel (*ibid.*).

[85] Draft conclusion 4, as provisionally adopted by the Drafting Committee, reads as follows:

Draft 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.

[86] See the statements by Brazil (A/C.6/78/SR.31), Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.30) and Mexico (A/C.6/78/SR.32).

[87] See the statement by Denmark (on behalf of the Nordic countries) (A/C.6/78/SR.30, para. 112).

those of the principal judicial organ of the United Nations, expressed certain doubts regarding whether the decisions of the International Court of Justice could be regarded as the ultimate authority on all matters of international law.[88] Several delegations stressed, as did some members of the Commission, that in some specialized fields of international law, the decisions of specialized courts or arbitral bodies with more specific expertise could carry greater weight.[89] A few delegations urged caution to avoid suggesting that a hierarchy existed among the judicial decisions of international courts and tribunals.[90]

54. Paragraph 2 of draft conclusion 4, concerning the decisions of national courts as subsidiary means, attracted the most comments. All delegations that spoke on the matter concurred that national court decisions should be used with caution when determining rules of international law, with some noting the dual function of national court decisions as evidence of State practice and as subsidiary means.[91] Several reasons for caution were advanced, including because of the possibility of lower-quality reasoning in respect of international legal issues, to avoid favouring the jurisprudence of the courts of some States over those of others and the possible specificity of some principles.[92] A clarification was requested on the relationship between this draft conclusion and subparagraph (*b*) of draft conclusion 2,[93] while a number of delegations called for elaboration of key phrases such as "in certain circumstances" and delineation of further criteria to guide the use of national court decisions, for instance, by limiting them to decisions of national courts that apply international law.[94] One delegation made a thoughtful proposal to include a reference to representativeness in draft conclusion 4 to ensure consistency with draft conclusion 5, thereby ensuring that different regions and legal systems of the world were represented when assessing judicial decisions.[95]

55. Draft conclusion 5 provides that 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 determining the existence and content of rules of international law.[96] The second sentence indicates that, with reference to the assessment of representativeness, due regard should also be had to, *inter alia*, gender and linguistic diversity.

56. Several delegations welcomed draft conclusion 5, with a number of them stressing their agreement with the first sentence, especially underlining the need for

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[88] See the statements by Belarus (A/C.6/78/SR.31, para. 50) and Slovakia (*ibid*., para. 130).

[89] See the statements by Belarus (*ibid*., para. 50) and Slovakia (*ibid*., para. 130).

[90] See the statement by Slovakia (*ibid*., para. 130).

[91] See the statements by the Czech Republic (*ibid*.), Portugal (*ibid*.), Thailand (*ibid*.) and the Holy See (A/C.6/78/SR.33).

[92] See the statements by the Czech Republic (A/C.6/78/SR.31), Slovakia (*ibid*.) and the Holy See (A/C.6/78/SR.33).

[93] See the statements by Hungary (A/C.6/78/SR.31, para. 67) and Malaysia (A/C.6/78/SR.32, para. 53).

[94] See the statements by Estonia (A/C.6/78/SR.33), Iran (Islamic Republic of) (A/C.6/78/SR.31), the Philippines (A/C.6/78/SR.32), Portugal (A/C.6/78/SR.31), Slovakia (*ibid*.) and South Africa (*ibid*.).

[95] See the statement by Italy (A/C.6/78/SR.31, para. 27).

[96] Draft conclusion 5, as provisionally adopted by the Drafting Committee, reads as follows:

Draft 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.

greater inclusivity of various legal systems and regions of the world,[97] while others stressed their support for the second sentence and, in particular, the need to have due regard to gender and linguistic diversity.[98] Two delegations[99] specifically requested the Commission to include racial diversity among the relevant criteria to be taken into account, while others emphasized that the inclusion of representative criteria, especially regarding gender and linguistic diversity, were either unnecessary or would require further scrutiny as those considerations should be secondary.[100] In general, delegations underlined that the quality of the reasoning should be the primary criterion.[101] At the same time, some delegations requested that the Commission underline the auxiliary function of teachings by clarifying that they merely assisted in the identification of relevant rules of international law.[102] Other delegations, echoing views that had been expressed during the Commission's debate on the topic, wondered whether the criterion of generally coinciding views could have the unintended effect of narrowing down the ambit of relevant teachings that should be considered.[103]

C. Issues arising from the debates and the way forward

57. In the light of the generally positive comments of members of the Commission and States, during the debate in the Sixth Committee on the topic, the Special Rapporteur considers it useful to share four general but important observations before turning to the substantive issues regarding the functions of subsidiary means and the question of precedent tackled in the second report.

58. First, as he has previously indicated, he welcomes the significant interest shown in the topic by the members of the Commission and by delegations in the Sixth Committee. It is clear that there is strong support both within the Commission and the Sixth Committee for the work carried out to date on the topic. The three draft conclusions provisionally adopted by the Commission and the two draft conclusions provisionally adopted by the Drafting Committee have been generally welcomed. While some delegations have offered constructive criticisms, and although the Special Rapporteur may not necessarily agree with all of them, he views them as an essential component of the productive dialogue between the Commission and the Sixth Committee. The comments of the participating States will undoubtedly serve as a valuable source of inspiration for the future work of the Special Rapporteur and the Commission on the topic.

59. Second, as indicated in the preceding sections, a number of delegations offered, during the seventy-eighth (2023) session of the General Assembly, specific textual proposals to revise the draft conclusions and to expand the commentaries thereto. The Special Rapporteur welcomes all such proposals and will reflect on them carefully; he encourages the other members of the Commission to do the same.

60. It might be useful to clarify here that the Special Rapporteur has not, in the present report, responded substantively to the criticisms and proposals. The reason is that the working methods of the Commission generally preclude revising the text and the commentary thereto in the year following their provisional adoption. He therefore

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[97] See the statement by the Islamic Republic of Iran (A/C.6/78/SR.31, para. 106).

[98] See the statements by El Salvador (A/C.6/78/SR.33), Portugal (A/C.6/78/SR.31), Slovakia (*ibid.*) and Uganda (A/C.6/78/SR.32).

[99] See the statements by Sierra Leone (A/C.6/78/SR.32, para. 46) and Uganda (*ibid.*, para. 26).

[100] See the statements by Iran (Islamic Republic of) (A/C.6/78/SR.31, para. 106) and the Philippines (A/C.6/78/SR.32, para. 19).

[101] See the statements by Austria (A/C.6/78/SR.31, para. 23) and the Philippines (A/C.6/78/SR.32, para. 15).

[102] See the statement by Belarus (A/C.6/78/SR.31, para. 52).

[103] See the statements by the Philippines (A/C.6/78/SR.32, para. 19).

proposes to address all the substantive criticisms, as well as the suggestions for revisions to the provisionally adopted conclusions and the commentaries thereto, during the first reading of the topic. At that stage, and this approach broadly aligns with the practice of the Commission, the substantive issues raised by the topic should also be clearer in view. Given the interconnected nature of the various aspects of the topic, presenting a comprehensive set of draft conclusions organized into coherent parts, together with the commentaries thereto, will enable States to offer their considered reflections in preparation for the Commission's second and final reading on the topic.

61. Third, as regards the scope of the topic, as the Special Rapporteur indicated at the end of the debates in both the Commission and the Sixth Committee, the broad scope and direction of the work on the topic is now clearly demarcated. As a consequence, based on the comments received so far, in the view of the Special Rapporteur, the Commission has no reason to depart from the scope delineated in its report on the work of its seventy-fourth session submitted to the General Assembly, which has now generally been endorsed by States.

62. The fourth and final substantive point concerns the question of coherence and unity or fragmentation of international law. In the first report, given that judicial decisions are an established subsidiary means for determining rules of international law, in accordance with Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, the Special Rapporteur offered his preliminary view that practice had shown that it was possible that different international courts and tribunals might concurrently address the same dispute and, when they did so, they might sometimes reach conflicting decisions with respect to essentially the same legal issue. He argued that such an issue naturally arose from a study of judicial decisions and could thus affect the scope, as well as the utility and complexity, of the present topic. For that reason, in both his report and his presentation of it to the Commission, the Special Rapporteur had sought the guidance of the Commission on whether to address that issue. During the summing up of the first plenary debate, while noting his view that the matter be further examined, he had recommended deferring any decision on the issue until comments had been received from States. After considering observations from both members of the Commission and States, he is of the firm belief that the issue should be duly addressed within the topic.

63. Initially, he considered addressing the issue in the present report. However, for various reasons, including concerns about the length of the report and its simplicity, he considers that it could be more fruitful to take up the question of how subsidiary means, especially judicial decisions and their interaction with the sources of international law, assist in promoting systemic integration within international law. The Special Rapporteur proposes to address these topics, which are tied together with the issue of the unity and coherence of international law, in a future report. It is at that stage that he also believes that it is appropriate to address the suggestion of some members of the Commission and certain States that the topic also clarify the link between Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, which provides for "subsidiary means", and the "supplementary means of interpretation", under article 32 of the Vienna Convention on the Law of Treaties.

III. Functions of subsidiary means for the determination of rules of international law

A. Previous discussion of functions in the topic

64. The first report of the Special Rapporteur, as well as the debates in the Commission and the Sixth Committee, confirm that part of his mandate is to clarify the functions of subsidiary means for the determination of rules of international law

and their relationship to the sources of international law. In the present section of the report, the Special Rapporteur will therefore briefly address that issue by examining the key function or role of subsidiary means, while more specific functions of the various subsidiary means will need to be considered in future reports.

65. In his first report, the Special Rapporteur only implicitly addressed the functions of judicial decisions, finding that they performed an auxiliary or assistive role to the sources. They are thus used for both the identification and determination of rules of international law. As regards teachings, the second category of subsidiary means outlined in Article 38, paragraph 1 (*d*), the Special Rapporteur identified, in his first report, three more specific functions (i.e. what he described as the interpretative, persuasive and the codification/progressive development functions of teachings). All of these functions are similar in character to those of judicial decisions in the sense that they all assist in identifying and determining rules of international law.

66. Before turning more directly to the functions of subsidiary means, a number of points need to be recalled. Based on a preliminary examination of the issue, in the first report, the Special Rapporteur noted that the question of the nature and function of sources was fundamental to any discussion of international law. Therefore, before addressing subsidiary means for the determination of rules of international law, which by their very nature must be considered in relation to the sources of international law, it was deemed helpful to start with some general observations on the international legal system in contrast to domestic legal systems. After a discussion of the key features of the international legal system, including its decentralized and horizontal nature, the centrality of Article 38, paragraph 1, was highlighted in order to stress its significance as the applicable law provision of the Statute of the International Court of Justice, as the principal judicial organ of the United Nations, taking into account that the provision is considered as reflecting customary international law.[104]

67. Two central questions were then examined. First, the question of whether paragraph 1 of Article 38 of the Statute of the International Court of Justice – which lists, in a particular sequence, international conventions, whether general or particular, establishing rules expressed recognized by the contesting States (subparagraph (*a*)); international custom, as evidence of a general practice accepted as law (subparagraph (*b*)); and the general principles of law (subparagraph (*c*)) – establishes a formal hierarchy among the sources of international law. However, while during the drafting of Article 38 consideration was given to having some type of hierarchy among the sources, the drafters ultimately decided against that. The general view, which prevailed among the members of the Advisory Committee of Jurists, was that all three sources could be considered by the Permanent Court of International Justice and, in some cases, even simultaneously. Thus, as a matter of principle, treaties, customary international law and general principles were placed on an equal footing within the applicable law provision of the Statute of the International Court of Justice.[105]

68. That said, in the first report, the Special Rapporteur stressed that, despite the formal position indicating that there was no hierarchy of the sources contained in Article 38, there was in practice a hierarchy. That is because States and practitioners, as well as the International Court of Justice, have all tended to rely more on treaties and customary international law when addressing issues related to disputes between States.[106] More limited reliance is placed, at least in the practice of the International Court of Justice, on general principles of law. Indeed, practice confirms that, although technically equal to the other two sources and without being in any way subordinate to them, the general principles of law play more of a gap-filling role in the sources of

[104] See A/CN.4/760, para. 170.
[105] *Ibid*., para. 191.
[106] *Ibid*., para. 192.

international law – as the Commission itself has concluded in the context of its work on that separate topic.[107]

69. The second question concerns whether there is a distinction between the first three subparagraphs of Article 38, paragraph 1, containing what are often referred to as the sources or formal sources, and subparagraph (*d*), which lists the subsidiary means, sometimes referred to as material or documentary sources, namely, judicial decisions and teachings. It was explained that there is some difference of opinion in the literature on the sources of international law between, on the one hand, those scholars and practitioners who maintain that there is a clear dividing line between the sources and the subsidiary means and, on the other hand, those that believe that there is no such separation.[108]

70. In short, one view maintains that Article 38, paragraph 1, establishes two separate lists: the first list (that is subparagraphs (*a*)–(*c*)) being sources from which rules of international law may be extracted and the second list providing the means by which such rules can be identified and determined (subparagraph (*d*)).[109] Put differently, the two separate lists reflect, in the first place, the so-called law-creating processes in subparagraphs (*a*)–(*c*) of Article 38, while, in the second place, subparagraph (*d*) speaks to the law-determining agencies.[110] The emphasis of the former addresses how a particular rule of international law is created by States and the latter on how an alleged rule is to be verified by judges using prior judicial decisions or by consulting scholarly works. That approach, which is arguably the majority view in the literature, is supported by long-standing practice and the drafting history of Article 38.[111]

71. The second view, which is less plausible because it is not supported by the text and drafting history of Article 38, is that there is no distinction between the sources of international law and the subsidiary means.[112] That view essentially considers subsidiary means and the sources as equal in status. However, there are some nuances among the holders of that view, with some authors understanding general principles of law and judicial decisions to be quasi-formal sources of international law and arguing that teachings are ultimately less relevant.[113]

72. The Special Rapporteur, following the analysis of the divergent positions, concluded that there were differences between the sources of law and subsidiary

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[107] Draft conclusions 10 and 11 on general principles of law (adopted by the Commission on first reading), *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 40, at pp. 12 and 13.

[108] See A/CN.4/760, paras. 194–198.

[109] *Ibid*., para. 198.

[110] Georg Schwarzenberger, “International law as applied by international courts and tribunals, 1957”, in Jill Barrett and Jean-Pierre Gauci, eds., *British Contributions to International Law, 1915-2015*: *An Anthology Set*, vol. 1 (Leiden and Boston, Brill Nijhoff, 2021), pp. 96–98. See also Martin C. Ortega Carcelén, “Analisis del valor creador de la jurisprudencia en el derecho internacional”, *Revista Española de Derecho Internacional*, vol. 40, No. 2 (July–December 1988), pp. 55–88.

[111] See A/CN.4/760, para. 248.

[112] The two views are discussed in detail in the first report of the Special Rapporteur (*ibid*., paras. 199–208). See also Robert Yewdall Jennings, “The judiciary, international and national, and the development of international law”, *International and Comparative Law Quarterly*, vol. 45, No. 1 (1996), pp. 3 and 4 (“I see the language of Article 38 as essential in principle and see no great difficulty in seeing a subsidiary means for the determination of rules of law as being a source of the law, not merely by analogy but directly”); and Mohamed Shahabuddeen, “Judicial creativity and joint criminal enterprise”, in Shane Darcy and Joseph Powderly, eds., *Judicial Creativity at the International Criminal Tribunals* (New York, Oxford University Press, 2010), pp. 184–203, at p. 186.

[113] Gerald Fitzmaurice, “Some problems regarding the formal sources of international law”, in Barrett and Gauci, *British Contributions to International Law*, p. 493.

means.[114] The former state the law, while the latter can be used to determine which law to apply. He maintained that, although he accepted that another position had been advanced by some in the literature, both judicial decisions and teachings were, in his view, subordinate to the sources listed in subparagraphs (*a*)–(*c*) of Article 38, paragraph 1.[115]

73. As between the subsidiary means themselves, namely the judicial decisions and teachings mentioned in Article 38, paragraph 1 (*d*), the Special Rapporteur noted that, in principle, there was no distinction between the two types of subsidiary means and no hierarchy between them.[116] Of course, it is true that judicial decisions are, in practice, more important than teachings, the influence of which has declined over time as judicialization of international law has increased. That said, given their nature, he also cautioned that the more relevant issue was not so much whether judicial decisions were more important than teachings, but rather that the two perform distinct yet ultimately complementary functions, offering a means to judges to find solutions to practical legal problems.[117] In the end, having shown their complexity, he concluded that the status and function of subsidiary means and the interplay and relationship between the subsidiary means within subparagraph (*d*) of Article 38, paragraph 1, and treaties, customary international law and general principles of law in subparagraphs (*a*)–(*c*) will need to be explored further in the present report.[118]

B. Views of the Commission and the Sixth Committee on the functions of subsidiary means

74. In the first debates on the topic, several members of the Commission[119] and some Sixth Committee delegations[120] set out their preliminary views on the general

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[114] See A/CN.4/760, para. 345.

[115] *Ibid.,* para. 335.

[116] *Ibid*., para. 348.

[117] *Ibid*., para. 259.

[118] *Ibid*., para. 208.

[119] See the 2023 plenary statements of Mr. Dapo Akande (3632nd meeting, 25 May 2023); Mr. Mathias Forteau (A/CN.4/SR.3626); Mr. Rolf Einar Fife (A/CN.4/SR.3628); Ms. Vilawan Mangklatanakul (A/CN.4/SR.3630); Mr. Ivon Mingashang (A/CN.4/SR.3627); Mr. August Reinisch (3631st meeting, 25 May 2023); Mr. Giuseppe Nesi (*ibid*.); Ms. Nilüfer Oral (*ibid*.); and Ms. Penelope Ridings (A/CN.4/SR.3629).

[120] See the statements of China ("The scope of the draft conclusions on subsidiary means for the determination of rules of international law provisionally adopted by the Commission, as set out in draft conclusion 1, was generally consistent with Article 38 of the Statute of the International Court of Justice, wherein subsidiary means were identified as a supplementary source of international law, not the primary source" (A/C.6/78/SR.29, para. 91)); Colombia ("That potential confusion might be dispelled when the Commission was able to define the term 'determination' in the title of draft conclusion 3 with greater clarity and thereby clarify what function subsidiary means played and how they should be used" (A/C.6/78/SR.33, para. 46)); Czech Republic ("The Commission had already agreed that subsidiary means were not formal sources of international law, and that their function was to assist in the identification and determination of rules of international law" (A/C.6/78/SR.31, para. 59)); Estonia ("[Estonia] supported the plans for future work on the topic, including the Special Rapporteur's intention to address the origins, nature and scope of subsidiary means as well as judicial decisions and their relationship to the primary sources of international law" (A/C.6/78/SR.33, para. 33)); Greece ("With regard to the function of subsidiary means, it would be useful if the Commission could further analyse the distinction between subsidiary means and evidence of the existence of rules of international law" (A/C.6/78/SR.32, para. 66)); Ireland ("It agreed with the Commission's articulation of the auxiliary function of subsidiary means … . Ireland agreed that subsidiary means did not constitute a separate or distinct source of international law, but were rather a means of elucidating the law" (A/C.6/78/SR.31, para. 144)); Malaysia ("as noted in the Commission's report (A/78/10), members of the Commission had expressed agreement with the Special Rapporteur that subsidiary means were not sources of international law, and had also

functions of subsidiary means and, in some cases, in relation to judicial decisions, teachings and other means specifically. Those participating in the debates generally held the view that subsidiary means were auxiliary in character and served as a vehicle through which to interpret the sources or to identify or determine the effects and legal consequences of the rules of international law. The subsidiary means, despite being described as performing an auxiliary function, still remained important and played a supplementary role in the process of determination of the rules of international law, namely, they were helpful materials that were used to identify, interpret and apply the rules of international law.

75. The Commission, in its report to the General Assembly on the work of its seventy-fourth session, taking careful account of the ambiguity of the phrase "subsidiary means" in English and the various official language versions of Article 38, paragraph 1, of the Statute of the International Court of Justice, explained, in the commentary to draft conclusion 1, that subsidiary means were auxiliary to the sources.[121] In subparagraph (*c*) of draft conclusion 2, reference was made to the assistive role of subsidiary means.[122] It was thereafter clarified in the commentary to draft conclusion 1 that subsidiary means "differ in their nature from the sources of law, expressly enumerated in Article 38, paragraph 1 (*a*) to (*c*), of the Statute".[123] It follows that the main function of subsidiary means, which are confirmed as auxiliary in character and "not sources of law that may apply in and of themselves", is "to assist or to aid in determining whether or not rules of international law exist and, if so, the content of such rules".[124] That same view, indicating that a key function of subsidiary means is to assist in determining rules of international law, was stated in subparagraph (*c*) of draft conclusion 2.

76. The previous work of the Commission on the topics of identification of customary international law, general principles of law and identification and legal consequences of peremptory norms of general international law (*jus cogens*) also confirm the auxiliary nature of subsidiary means. The evidence for that includes conclusions 13 and 14 on identification of customary international law, which address the role and weight of decisions and teachings in the identification of rules of customary international law and draft conclusions 8 and 9 on general principles of law, concerning their respective roles as aids in the identification of general principles

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emphasized that the function of subsidiary means was to assist in the determination of rules of international law" (A/C.6/78/SR.32, para. 49)); Philippines ("[the Philippines] could support a proposal for the inclusion of a draft conclusion concerning the functions of subsidiary means, which could also refer to the use of subsidiary means to interpret other sources or to determine the effects and legal consequences of certain rules" (*ibid*., para. 18)); Slovakia ("However, it would be worth examining whether the phrase 'the use of' captured all aspects that the Special Rapporteur intended to address in his work, such as the origin and function of subsidiary means" (A/C.6/78/SR.31, para. 127)); United Kingdom ("[The United Kingdom] agreed with the Commission that it was important to elaborate on the functions of subsidiary means and to define what was meant by 'determination of rules'" (*ibid*., para. 37)); United States ("It would be important to assess the function of subsidiary means early in the Commission's study" (*ibid*., para. 17)); and Holy See ("As could clearly be inferred from the French and Spanish versions of the Statute of the International Court of Justice, subsidiary means for the determination of rules of international law served an auxiliary function and thus were not sources of law in themselves" (A/C.6/78/SR.33, para. 57)).

[121] See paragraph (6) to the commentary to draft conclusion 1, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 127, at p. 77.

[122] Read together with the chapeau, subparagraph (*c*) of draft conclusion 2 provides that subsidiary means for the determination of rules of international law include "any other means generally used to assist in determining rules of international law". See paragraph (19) of the commentary to draft conclusion 2, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 127, at p. 84.

[123] See paragraph (6) to the commentary to draft conclusion 1, *ibid*., at p. 77.

[124] *Ibid*.

of law. In paragraph (2) to the commentary to conclusion 13 on identification of customary international law, the Commission explained, among other things, that subsidiary means "denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law".[125] A similar commentary in both topics, also rooted in Article 38, paragraph 1, of the Statute of the International Court of Justice, explains that teachings are not themselves a source of international law, "but may offer guidance for the determination of the existence and content"[126] of rules of customary international law and of general principles of law. In the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), draft conclusion 9 provides that judicial decisions may be used as subsidiary means to identify and determine *jus cogens* norms, without themselves constituting evidence of such acceptance and recognition, while in some cases, the works of expert bodies created by States or international organizations and teachings may also serve as such means.[127]

77. Given the above, and in line with the prior work of the Commission, it appears that there is a consensus on the auxiliary or assistive function of subsidiary means for the determination of the rules of international law. That means that the key role of judicial decisions and teachings – and perhaps any other subsidiary means that are determined to exist in the future work of the Commission on this topic – is to provide help or support or to assist the sources. It therefore appears convenient to start from that premise. In so doing, and proceeding with the analysis below, it will be shown that subsidiary means are in practice used to assist in the determination of the existence and content of the rules of international law. The focus on the auxiliary or assistive function seems well justified because it appears that this is their principal function or their essential characteristic. There are, however, likely to be specific functions of subsidiary means that, for reasons of space and also methodological concerns, will have to be addressed in a future report. Those functions may overlap with each other or even be distinct. In many instances, subsidiary means will complement one another.

C. Auxiliary nature and function of subsidiary means

78. The Commission has already determined, and some States appear to have already concurred, that subsidiary means play an auxiliary role to the sources. That conclusion can be justified on several grounds. First, starting with a textual interpretation of Article 38, paragraph 1, of the Statute of the International Court of Justice that is consistent with Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties,[128] we can assess the ordinary meaning to be given to the terms of the provision read in their context and in the light of the object and purpose of the provision. Furthermore, where the meaning is still unclear, recourse may be had to

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[125] *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), para. 65, at p. 91; *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 40, at p. 12; and *Yearbook ... 2018*, vol. II (Part Two), para. 66, at p. 109, para. (2). See also paragraph (1) of the commentary to draft conclusion 8 (*Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 41, p. 25) and paragraph (2) to draft conclusion 9 (*ibid*., p. 28) on general principles of law.

[126] *Yearbook ... 2018*, vol. II (Part Two), para. 66, at p. 110.

[127] Draft conclusion 9 and the commentary thereto on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 44, at pp. 43–47.

[128] Article 31, paragraph 1, provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

supplementary means of interpretation. That would include the preparatory work of Article 38, paragraph 1, and the circumstances of its conclusion, which can either serve as a basis to confirm the meaning or to remove the ambiguities, obscurity or manifestly absurd or unreasonable interpretive results.

79. The text of Article 38, paragraph 1 (*d*), as indicated earlier and noted in the first report of the Special Rapporteur, contains some elements of ambiguity that have generated much discussion in the literature. For the narrow purposes of discussing the functions of subsidiary means, and purely on the basis of the text, it is not necessary to repeat all those arguments or the previous step-by-step analysis of the meaning of the terms "subsidiary means"[129] or the meaning of "for the determination of rules of law".[130] It is sufficient to note that, based on that analysis and the literature, as well as the text alone, the notion of "subsidiary means" implies that there are means that are principal in nature. The principal means are the sources. In that regard, there are at least two levels of legal determination of rules that the judges must be attentive to when applying Article 38, paragraph 1, of the Statute of the International Court of Justice.

80. The first level of determination requires the Court, when performing its function, "to decide in accordance with international law such disputes as are submitted to it" and to "apply" the sources, namely treaties, customary international law and the general principles of law. That is a primary task and level of determination of the judges: to find and apply the relevant rules in the sources of law as agreed upon by the States and, in the current state of international law, by States and international organizations and among international organizations. The sources are justified as points of reference since they are rooted in the consent of sovereign States. In the view of the Special Rapporteur, that part of the task of applying Article 38, paragraph 1, would necessarily require the Court to apply a given rule found in one of the sources listed in subparagraphs (*a*) to (*c*) of paragraph 1 to the facts of the case before it and thereafter resolve the dispute or to do so when providing an advisory opinion. That is the main task of the Court, namely: by relying on the sources of law, it can interpret and apply the body of applicable law.

81. The argument that a reference to the sources is the principal level of legal determination finds support in the literature[131] and also accords with the extensive practice of the Permanent Court of International Justice and the International Court of Justice. For instance, in the process of resolving a case, the International Court of Justice would, when confronted with different interpretations of a certain treaty rule by the parties, determine the correct interpretation of that rule, which it would then apply to the case before it. The judicial task required to apply customary international law or general principles of law would be relatively more taxing. That is because the analysis required would have to determine whether, in the case of the former, the two element test is fulfilled (i.e. the existence of State practice matched by *opinio juris*) and, in the case of the latter, whether a general principle of law that is common to the various legal systems exists and, if so, whether it is transposable to the international legal system. The function of the Court is to settle disputes in accordance with international law and, in so doing in respect of the individual case, the judges must always determine the applicable rules of international law to apply through an examination of the sources and, beyond that, the subsidiary means. That is not to

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[129] See A/CN.4/760, para. 334.

[130] *Ibid*., para. 339.

[131] See Aldo Zammit Borda, "A formal approach to Article 38(1)(d) of the ICJ Statute from the perspective of the international criminal courts and tribunals", *European Journal of International Law*, vol. 24, No. 2, pp. 649–661; and Mads Andenas and Johann Ruben Leiss, "The systemic relevance of 'judicial decisions' in Article 38 of the ICJ Statute", *Heidelberg Journal of International Law*, vol. 77, pp. 907–972, at p. 927.

suggest that the process is mechanical or that there are not interactions between the sources and the subsidiary means.

82. The second and more "subsidiary" level of legal determination stems from the determination of the rules of international law through the subsidiary means, namely the judicial decisions or the teachings, which are to be used as a means to first identify whether a rule of international law on a given point exists and, once it has been determined that this is the case, to apply that rule. Unlike the sources, which the judges can go to directly to find a rule to apply, the judges use subsidiary means in an indirect manner. Indeed, like the current Special Rapporteur, some authors have argued that: "The term 'subsidiary means' indicates that judicial decisions are applied subsequently to, and are dependent on, a prior principal determination of legal rules."[132] That, in essence, means that: "They cannot stand alone but must refer back to other legal sources."[133]

83. Put differently, instead of using the rules found directly in the sources of law themselves, the Court will be relying on subsidiary means in its identification and determination process that allow it to establish the basis and scope of the rule. Here, it might use for that purpose its own decisions or those of other courts, such as the International Criminal Tribunal for the Former Yugoslavia,[134] or tribunals, such as the Human Rights Committee,[135] or, more rarely, teachings[136] that it finds persuasive in verifying whether a particular rule of law should be applied and, if so, determining the ambit and content of the rule before then applying it to the concrete case at hand. Subsidiary means are in that way subsidiary to the sources.

D. Drafting history confirms the auxiliary function of subsidiary means

84. The foregoing textual reading can be confirmed by the drafting history. In his first report, the Special Rapporteur reviewed exhaustively the drafting history of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. As he explained, unlike the sources, namely treaties, customary international law and general principles of law, the proposal to include subsidiary means initially began with the notion that the Court should be allowed to examine "international jurisprudence as a means for the application and development of law".[137] A similar proposal would later mention the "opinions of writers as a means for the application

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[132] Andenas and Leiss, "The systemic relevance of 'judicial decisions'", p. 927.

[133] *Ibid*.

[134] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at p. 61, para. 129 ("It is for the Court, in applying the Convention, to decide whether acts of genocide have been committed, but it is not for the Court to determine the individual criminal responsibility for such acts. … The Court will nonetheless take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, as it did in 2007, in examining the constituent elements of genocide in the present case").

[135] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits*, *Judgment, I.C.J. Reports 2010*, p. 639, at p. 664, para. 66 ("Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes 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. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled" (emphasis added).

[136] See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening),* Judgment, 11 September 1992, para. 394 (citing "the successive editors of Oppenheim's *International Law*").

[137] See A/CN.4/760, paras. 215.

and development of law".[138] In that sense, there appeared to be a similarity in the role the drafters envisaged for both international jurisprudence (the term was later broadened to refer to "judicial decisions") and teachings, namely that they could be applied and, more controversially, that they could be used to develop the law.[139]

85. In the early discussions among the drafters, which seemed quite spirited, emphasis was placed on the law that the judges should apply when neither treaty law nor customary international law provided for a rule. That, as the Special Rapporteur explained, then generated a long debate concerning general principles of law and their relationship to "international jurisprudence".[140] A key aspect of that debate was the discomfort felt by some members of the Advisory Committee of Jurists that judges would, if the initial formulations were adopted, be tasked with making law that they did not consider would be found acceptable by States. In any event, it was ultimately concluded that, while not formally subordinated to the sources, the general principles of law could play a key role, especially in situations of *non liquet*. It was also thought that the same held true in relation to judicial decisions and teachings.

86. Of course, in the mid-1920s, when a permanent international tribunal had not even been established, international law was in an immature stage of development, which worried the experts since the Permanent Court of International Justice might find itself in a position to declare a *non liquet*.[141] As the discussion evolved, a key point of convergence among the drafters was that jurisprudence and doctrine do not create law but that they "assist in determining rules which exist".[142] Therefore, in the view of one member, a judge could use both doctrine and jurisprudence, but they served only as elucidation, while in the view of another member, the judge was to use them "in a supplementary way to clarify the rules of international law".[143] The idea of elucidation captures the act of explaining something in order to make it clear or clearer.

87. A compromise had to be found. As many writers have since argued, the narrow vision of some of the drafters that the future judges of the international court could do nothing more than objectively select and apply rules of law given to them without anything more was not acceptable. The notion that the jurisprudence could over time mould, shape or even develop international law was mentioned expressly by the delegate of the United Kingdom to the Assembly of the League of Nations (leading to the introduction of the opening qualifier to Article 38).[144] On the other hand, an expansive role for judges as lawmakers who could step in to fill legal gaps, especially given, at that time, the immaturity of international law, to avoid a *non liquet*, did not find consensus either. That is reflected in the compromise language of Baron Descamps, President of the Advisory Committee of Jurists, which ultimately characterized both

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[138] *Ibid*., para. 227.

[139] *Ibid*., paras. 215 and 227.

[140] *Ibid*., para. 217 (citing *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920* (The Hague, Van Langenhuysen Brothers, 1920), pp. 310–315).

[141] See A/CN.4/760, para. 217 (citing *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920*, p. 296).

[142] *Ibid*., para. 223 (citing *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920*, p. 336).

[143] *Ibid*. (citing *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920*, p. 336).

[144] See Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge, United Kingdom, Grotius Publications, Cambridge University Press, 1996), pp. 56–64. Moreover, in 1926, the future President of the Permanent Court of International Justice, Sir Cecil Hurst, also wrote on the issue, asserting that: "How far the rule embodied in this decision of the court extends is a question which at the present time it is impossible to answer. … The Court will gradually build up a rule of law on this point out of the decisions which it gives, as no doubt such successive decisions will constitute precedents in the same way that the successive decisions of the English courts in early times have built up the Common Law of England." *Ibid*., p. 13.

judicial decisions and teachings as "subsidiary means for the determination of rules of law".[145]

88. The auxiliary or gap-filling and assistive functions of subsidiary means notwithstanding, as Shabtai Rosenne has argued, "judicial decisions, and especially those of the International Court, cannot be relegated to any subsidiary position".[146] In that practical view, which focuses on what the Permanent Court of International Justice and the International Court of Justice have actually done rather than what the Statute actually says they should do, "[t]he expansion of a body of international case law which can be examined together with all the relevant pleadings is leading to judicial codification or at least restatement of the law through application to concrete circumstances."[147] That conclusion indicates the prescience of the delegate of the United Kingdom to the Assembly of the League of Nations who had flagged, without opposition, the influence and impact of a steady body of jurisprudence in shaping international law.[148] It stands to reason that, when explaining something to make it clearer through elucidation, the judge or court charged with that task could help to shape the contours of a rule as an inherent part of carrying out that task. On the other hand, as the International Court of Justice itself has been careful to explain, even if that statement could be seen as a mere denial aimed at reassuring States in the context of a controversial matter, its own role is to state the law. "This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."[149]

E. Practice of the International Court of Justice and other international tribunals confirm the auxiliary function of subsidiary means

89. While the International Court of Justice frequently refers to its own decisions, those of its predecessor, the Permanent Court of International Justice, and those of other international courts and tribunals, it does so as a matter of routine – as is confirmed by the Secretariat in its second memorandum on the present topic. Methodologically though, the International Court of Justice does not always explain itself or the basis for its actions, especially when those can be said to be routine. Therefore, although references to Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice are missing in the decisions and advisory opinions of the Permanent Court of International Justice, there were, albeit less than a handful of, specific references to Article 38, paragraph 4, by the Court. References to teachings

[145] See A/CN.4/760, para. 231 (citing *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920*, p. 620). See also Amos O. Enabulele, "The avoidance of *non liquet* by the International Court of Justice, the completeness of the sources of international law in Article 38(1) of the Statute of the Court and the role of judicial decisions in Article 38(1)(d)", *Commonwealth Law Bulletin*, vol. 38, No. 4 (2012), pp. 617–652.

[146] Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005,* vol. III (Leiden and Boston, Martinus Nijhoff, 2006), p. 1554.

[147] *Ibid*.

[148] See Shahabuddeen, *Precedent in the World Court*, pp. 56–64.

[149] See, in this regard, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, at p. 237, para. 18 ("The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend"). In the *Fisheries* case, the Court held that "as a court of law, [it] cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down". See *Fisheries Jurisdiction (United Kingdom v Iceland)*, *Merits*, *Judgment, I.C.J. Reports 1974*, p. 3, at pp. 23–24, para. 53.

on a point of law are also rather exceptional in the majority opinions of the International Court of Justice (although they are prevalent in separate opinions) and scholars have been cited on only a few occasions, and even then, often to illustrate or confirm positions already taken.[150] That practice confirms the assistive function of teachings, which are frequently relied upon by parties, but it is rare for them to be actually cited by the Court in its majority decisions.

90. In that regard, taking into account the context of their use, it is clear that the International Court of Justice sees both judicial decisions and teachings as performing an auxiliary role, according more weight to the former. While in the earlier practice of the Court it did not reference the works of other courts, naturally preferring its own, that pattern has now changed for a variety of reasons, including the increase in the number of specialized international tribunals addressing more specific questions of international law in a manner that is often helpful to the Court itself. It refers to other works when they are useful, not because it is required to do so (see chapter IV below).

91. The Special Rapporteur would now like to provide a number of practical examples. In the *Land, Island and Maritime Frontier Dispute* case, a chamber of the International Court of Justice referenced the legal status of a 1917 judgment of the Central American Court of Justice. The Court indicated that "the question of the existence or not of a *res judicata* arising from a case with two parties is not helpful in a case raising a question of a joint sovereignty of three coastal States".[151] It went on to say that: "This is indeed confirmed by the fact of Nicaragua's having sought, and been granted, a right to intervene precisely on this question of the legal position of the Gulf waters."[152] In the judgment, the Court went on to note that: "[T]he Chamber should take the 1917 Judgment into account as a relevant precedent decision of a competent court, and as, in the words of Article 38 of the Court's Statute, 'a subsidiary means for the determination of rules of law'. In short, the Chamber must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit."[153] In so doing, it noted that: "The reasons for this conclusion, apart from the reasons and effect of the 1917 decision of the Central American Court of Justice, are the following … ."[154] Here, the judgment of another tribunal was relied upon to confirm an interpretation, with the Chamber having taken it into account in its findings and reasoning to formulate its own position on the matter.

92. In the *Military and Paramilitary Activities in and against Nicaragua* case, in resolving the question of the law applicable to that case, the Court explained that it was required to apply the various "sources of law enumerated in Article 38 of the Statute",[155]

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[150] See Sondre Torp Helmersen, *The Application of Teachings by the International Court of Justice* (Cambridge, United Kingdom, Cambridge University Press, 2021), p. 45 (demonstrating that, out of 155 cases between 1945 and 2016, the International Court of Justice had referred in only 5 cases to the works of writers for a point of law). See also Tamara G. Quiroga and Leopoldo L. M. Godio, "La doctrina como fuente auxiliar y su utilización en el Tribunal Internacional del Derecho del Mar", in Claudia G. Gasol Varela and others, eds., *Aspectos Actuales de las Fuentes del Derecho Internacional* (Buenos Aires, Consejo Argentino para las Relaciones Internacionales, 2022), pp. 123–153.

[151] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* (see footnote 136 above), para. 403.

[152] *Ibid*.

[153] *Ibid*.

[154] *Ibid*., para. 405.

[155] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 92, para. 172. See generally Carlos Iván Fuentes, "The imperfect paradigm: Article 38 of the Statute of the International Court of Justice", in Carlos Iván Fuentes, *Normative Plurality in International Law: A Theory of the Determination of Applicable Rules*, 1st ed., Ius Gentium: Comparative Perspectives on Law and Justice, vol. 57 (Springer, 2016).

which would include both multilateral treaties and customary international law. In the *Continental Shelf (Tunisia/Libya)* case, the International Court of Justice recalled that: "While the Court is, of course, bound to have regard to all the legal sources specified in Article 38, paragraph 1, of the Statute of the Court in determining the relevant principles and rules of law applicable to the delimitation, it is also bound, in accordance with paragraph 1 *(a)* of that Article, to apply the provisions of the Special Agreement."[156] The priority in those cases was to first apply the sources in the form of treaties and customary international law before it looked at judicial decisions.

93. In the *Gulf of Maine* case,[157] a Chamber of the International Court of Justice determined that:

> the Court, in its reasoning on the matter, must obviously *begin* by referring to Article 38, paragraph 1, of the Statute of the Court. For the purpose of the Chamber at the present stage of its reasoning, which is to ascertain the principles and rules of international law which in general govern the subject of maritime delimitation, reference will be made to conventions (Art. 38, para. 1 (*a*)) and international custom (para. 1 (*b*)), to the definition of which the judicial decisions (para. 1 (*d*)) either of the Court or of arbitration tribunals have already made a substantial contribution.[158]

In that example, the International Court of Justice stressed the sources of law before subsequently acknowledging the possibility of using its own judicial decisions and the relevant decisions of arbitral bodies under Article 38, paragraph 1 (*d*), of its Statute. The assistive nature of those decisions is self-evident throughout the rest of that opinion.

94. In the *Maritime Delimitation in the Area between Greenland and Jan Mayen* case, the International Court of Justice examined "the sources listed in Article 38 of the Statute of the Court", which it found it "must consider" in relation to "the law applicable to the fishery zone".[159] It should be noted here that the reference was to the sources, not the subsidiary means, without of course suggesting that the Court did not later consult such means, especially its own prior decisions on maritime delimitation.

95. Lastly, in another example, on this occasion in relation to the *Frontier Dispute (Burkina Faso/Niger)* case, the Court interpreted Article 38, paragraph 1, in the context of the object of a special agreement between the parties and found that it "clearly indicates that the rules and principles mentioned in that provision of the Statute must be applied to any question that it might be necessary for the Court to resolve in order to rule on the dispute".[160]

96. The preceding examples, in addition to many others wherein the Court routinely refers to the sources of international law before turning to its own decisions, indicate that it conceives of subsidiary means as auxiliary in character. Indeed, in several of the cases cited above, it referred to all the sources specified in Article 38, paragraph 1, which could obviously be inclusive of the subsidiary means after the sources themselves, but priority was clearly given to the treaties concluded by the parties and customary international law.

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[156] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Judgment, I.C.J. Reports 1982*, p. 18, at p. 37, para. 23.

[157] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *Judgment, I.C.J. Reports 1984*, p. 246.

[158] *Ibid*., para. 83 (emphasis added).

[159] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993,* p. 38, at p. 61, para. 52.

[160] *Frontier Dispute (Burkina Faso/Niger), Judgment, I.C.J. Reports 2013*, p. 44, at p. 73, para. 62.

97. Other international courts also treat subsidiary means as auxiliary to sources of international law. For example, in the International Criminal Tribunal for the Former Yugoslavia, the Trial Chamber held, in the *Kupreškić* case, that:

> Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a “subsidiary means for the determination of rules of law” … Clearly, judicial precedent is *not a distinct source of law* in international criminal adjudication.[161]

98. In the *Delalić* case, the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that “recourse would be had to the various sources of international law as listed in Article 38 of the Statute of the ICJ, namely international conventions, custom, and general principles of law, *as well as other subsidiary sources such as judicial decisions and the writings of jurists*. Conversely, it is clear that the Tribunal is not mandated to apply the provisions of the national law of any particular legal system”.[162]

99. The practice of the International Criminal Court, which also considers subsidiary means as auxiliary gap fillers, is consistent with the approach of the ad hoc international criminal tribunals, as well as the International Court of Justice. Under the Rome Statute of the International Criminal Court,[163] the applicable law provision, contained in article 21, in some respects harkens back to the early twentieth-century debate within the Advisory Committee of Jurists mentioned above when it expressly clarifies that both general principles of law and judicial decisions are to be used essentially as gap fillers to the primary sources:

> 1. The Court shall apply:
>
> (a) *In the first place*, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) *In the second place,* where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) *Failing that*, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
>
> 2. *The Court may apply principles and rules of law as interpreted in its previous decisions.*
>
> 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7,

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[161] *Prosecutor v. Zoran Kupreškić and others,* Case No. IT-95-16-T, Judgment, 14 January 2000, Trail Chamber, para. 540 (emphasis added).

[162] *Prosecutor v. Zejnil Delalić and others*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, para. 414 (emphasis added). See also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, para. 196. The Chamber stated that the pronouncements of the “British military courts” for the trials of war criminals were “less helpful in establishing rules of international law” as the law applied was domestic.

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

paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

100. The provision above, and the jurisprudence of the International Criminal Court interpreting it, has made it clear that, as in the case of Article 38, paragraph 1, of the Statute of the International Court of Justice, there is a hierarchy in the applicable law of the Rome Statute contained in article 21. It expressly directs a sequence: in the first place, the Rome Statute and its secondary documents, such as the Elements of Crimes, are to be applied; followed, in the second place, by applicable treaties and the principles and rules of international law; then, failing that, general principles of law as derived from the national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime; and, only thereafter, as a fourth step, could the Court then choose to (i.e. "may") apply principles and rules of law as interpreted in its previous decisions. The last point, as will be shown in the next chapter, accords with the practice of the International Court of Justice, which does not apply its decisions as precedents but frequently applies the principles and rules of international law contained therein.

101. The above reading was judicially confirmed by the Appeals Chamber of the International Criminal Court when it held that reference to subsidiary means is preferable when there is a gap or lacuna in the other sources. In the *Situation in the Republic of Kenya*, for example, Pre-Trial Chamber II of the International Criminal Court explained that: "the purpose of article 21 of the Statute is to regulate the sources of law" that can be used by the Court and to establish "a hierarchy within those sources of law".[164] Thus, while the Rome Statute is the "first source of law", "[r]ecourse to the subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute is only possible when, as established by the Appeals Chamber, there is a *lacuna* in the Statute or the Rules".[165]

102. There are several other such examples in the second memorandum by the Secretariat.[166] In another case, the International Criminal Court recognized the interplay between subsidiary means and its sources, by stating, as in the *Katanga* case, the following: "Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law. To this end, the Chamber may, for example, be required to refer to the jurisprudence of the ad hoc tribunals and other courts on the matter."[167]

103. Here, by pointing to the case law of other tribunals, it is clear that another function of judicial decisions is auxiliary in the sense that they could be used by other courts later because they state a rule of international law (whether rooted in a treaty, customary international law or a general principle of law) that the International Criminal Court finds persuasive for the purposes of the case before it. In the end, in the Rome Statute system, the applicable treaties and principles and rules of international law, with the latter including customary law, are the principal sources of law followed by general principles of law before getting to the subsidiary means and the principles and rules that they articulate. In the quotation cited in the preceding paragraph, it is clear that the Chamber considers that reference to the jurisprudence of the ad hoc tribunals and other courts is secondary to the references to treaties or customary humanitarian law and the general principles of law. The primary conclusion is that it is not just the International Court of Justice (which covers general

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[164] *Situation in the Republic of Kenya*, Case No. ICC-01/09-159, Decision on the "Victims' request for review of Prosecution's decision to cease active investigation", 5 November 2015, para. 17.

[165] *Ibid*. (footnote omitted and emphasis added).

[166] See A/CN.4/765, paras. 415–480.

[167] *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 March 2014, Trial Chamber II, para. 47.

international law), but also the International Criminal Court (which covers international criminal law and the law of armed conflict) that treat subsidiary means, such as their own judicial decisions and those of other courts, as auxiliary to the sources.

F. Practice of national courts indicates the auxiliary function of subsidiary means

104. In addition to the above-mentioned examples, drawn from the international level, courts at the national level also treat subsidiary means as auxiliary. There are many possible examples. A handful of illustrations drawn from Germany, South Africa, Sierra Leone and the United States should suffice to make the point. As regards the first example, in a case before the Federal Court of Justice of Germany, the appellant (a former Afghan National Army officer) was found guilty of torture by the Munich Regional Court, against which he appealed on the basis that he enjoyed functional immunity.[168] In examining the appeal, the Federal Court of Justice referred to Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice to address whether customary international law prohibited the prosecution of subordinate officials of foreign States. The Court, while noting that the Federal Constitutional Court had held that judicial decisions and teachings of international law were to be used only as subsidiary means for the clarification of customary international law, carried out an extensive survey of the decisions of national and international courts that had addressed the same question before noting that the vast majority of academic literature rejected such functional immunities for subordinate officials. It ultimately ruled against the appellant.

105. The second example was a case before the Supreme Court of Appeal of South Africa,[169] wherein it was called upon to determine the narrow question of whether customary international law permitted exceptions to the immunity afforded to Heads of State that might enable South Africa, or is national courts, to disregard such immunity and execute an arrest warrant issued by the International Criminal Court for then President of Sudan, Omar Hassan Ahmad Al-Bashir.[170] The Court analysed the Rome Statute, before turning to customary international law and, faced with the inability to answer the question through analysis of those sources, explained that judicial decisions could offer it "guidance": "*In the absence of a binding treaty* or *other international instrument* creating such an exception, or *an established universal practice in the affairs of nations*, one looks to the decisions of international courts for *guidance* as to the existence of such an exception."[171]

106. The Supreme Court of Appeal of South Africa went on to analyse the decisions of the International Court of Justice on the question of immunity, including the *Arrest Warrant* case,[172] as upheld in subsequent *obiter dictum* in the *Jurisdictional Immunities of the State* case,[173] to conclude that there was no such exception to the rule of immunity in relation to sitting Heads of State.[174] Interestingly, in the same

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[168] See Federal Court of Justice, 3 StR 564/19, Judgment, 28 January 2021 (in German).

[169] See Supreme Court of Appeal of South Africa, *Minister of Justice and Constitutional Development and others v. Southern African Litigation Centre and others*, 2016 (3) SA 317 (SCA) (15 March 2016).

[170] *Ibid*., para. 69.

[171] *Ibid*., para. 70 (emphasis added).

[172] *Ibid*., paras. 67 and 76 (citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at pp. 20–22, paras. 51 and 54).

[173] *Ibid*., para. 70 (citing *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at pp. 136–142, paras. 81–97).

[174] *Ibid*., para. 84.

opinion, the Court also examined the writings of several scholars and noted that their views were divided on the question of whether or not immunity applied. In the end, in rejecting the respondent's submission that such an exception existed as a matter of current international law, at least in so far as national courts were concerned, the Court observed that, while the conflicting views of scholars might serve in the future to "inform *future debate and contribute to the development of customary international law*",[175] thereby speaking to another ancillary function of judicial decisions (namely to contribute to developing customary international law), its own task was not to make new law but to assess "the state of customary international law as it stands at the present time and apply it".[176]

107. Under such circumstances, in the view of the Supreme Court of Appeal, "[i]t would serve little purpose to trawl through the academic literature on the question as the commentators are divided, although one senses a desire on the part of many of them that the problem should be resolved by recognising an exception to the rule of head of state immunity".[177] Ultimately, after also considering the additional argument for the exception rooted in the *jus cogens* nature of the international crimes that Omar Hassan Ahmad Al-Bashir was alleged to have committed, the Court concluded that it was "unable to hold that at this stage of the development of customary international law there is an international crimes exception to the immunity and inviolability that heads of state enjoy when visiting foreign countries and before foreign national Courts".[178]

108. The third example can be drawn from the practice of the national courts of Sierra Leone. It also demonstrates that subsidiary means are used in an auxiliary role in determining the rules of international law. In that regard, in a case before the Supreme Court of Sierra Leone,[179] the Court addressed several questions concerning the validity of the treaty between the Government of Sierra Leone and the United Nations establishing the Special Court for Sierra Leone, including the question of immunity.

109. The Court, in addressing the question of constitutionality in relation to immunity of Heads of State, relied upon the decisions of the International Court of Justice and the House of Lords. It considered that, "where the immunity is claimed by a Head of State before an international court the position to be inferred from the decisions of various national courts and international tribunals, and the writings of international jurists, is that there exists no *a priori* entitlement to claim immunity particularly from criminal process involving international crimes".[180]

110. In addressing the secondary question of the alleged absence of concurrent jurisdiction between the Special Court for Sierra Leone and the national courts of Sierra Leone, the Supreme Court of Sierra Leone referred to the Statutes of the International Criminal Tribunal for the Former Yugoslavia before turning to the Rules of Procedure and Evidence and two judgments of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* and *Karadžić* cases to uphold the primacy of the jurisdiction of the international tribunal on the issue before it. Thereafter, after having relied upon those authorities to reach its finding that the primacy of the Special

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[175] *Ibid*., para. 74 (emphasis added).

[176] *Ibid*.

[177] *Ibid*., para. 83.

[178] *Ibid*., para. 84.

[179] See Supreme Court of Sierra Leone, *Issa Hassan Sesay and others v. The President of the Special Court, the Registrar of the Special Court, the Prosecutor of the Special Court and the Attorney General and the Minister of Justice*, Case No. 1/2003, Judgment, 14 October 2005. A copy of the decision is annexed to the submission of Sierra Leone to the Commission on the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone, dated 18 January 2023, available at https://legal.un.org/ilc/sessions/74/pdfs/english/sm_sierra_leone.pdf.

[180] *Sesay and others* (see previous footnote), p. 12.

Court for Sierra Leone does not contravene section 125 of the Constitution concerning the supervisory jurisdiction of the country's highest court, the Supreme Court of Sierra Leone cited, for additional support, the work of a recognized scholar on the competing jurisdiction of international courts and tribunals.

111. In the end, as Sierra Leone concluded in its submission to the Commission on the topic, "[f]rom an Article 38(1) of the Statute of the International Court of Justice perspective, the treatment of questions of international law by the national courts of Sierra Leone suggest that reliance is often placed on judicial decisions of other national and international courts addressing the same question. Teachings of publicists may be used to elucidate the relevant points or to confirm the interpretation adopted by the courts."[181] That practice is in agreement with that of the Federal Constitutional Court of Germany and the Supreme Court of South Africa discussed above.

112. The fourth and final set of examples confirming the assistive function of subsidiary means comes from the United States. In the practice of the United States, the courts, on the few occasions on which they have addressed questions of international law, typically rely upon Article 38, paragraph 1, for the authoritative list of the sources of international law.[182] In that regard, according to the submission of the United States on the topic, some United States case law has described the various elements of Article 38, paragraph 1, as "hierarchical",[183] noting in that regard that Article 38, paragraph 1 (*d*), provides a subsidiary means of determining the rules of international law.

113. For instance, in *Flores v. Southern Peru Copper Corp.*, the United States Court of Appeals for the Second Circuit determined that:

> Article 38 embodies the understanding of States as to what sources offer competent proof of the content of customary international law. It establishes that the proper *primary* evidence consists only of those "conventions" (that is, treaties) that set forth "*rules* expressly recognized by the contesting states," *id.* at 1(a) (emphasis added), "international custom" insofar as it provides "evidence of a general practice *accepted as law,*" *id.* at 1(b) (emphasis added), and "the general principles of *law* recognized by civilized nations," *id.* at 1(c) (emphasis added). It also establishes that acceptable *secondary* (or "subsidiary") sources summarizing customary international law include "judicial decisions," and the works of "the most highly qualified publicists," as that term would have been understood at the time of the Statute's drafting.[184]

114. The *Flores* ruling confirms a distinction between the primary sources and the subsidiary means, indicating that both judicial decisions and teachings are secondary or subsidiary to the sources. Courts in the United States have evolved in their practice in relation to the secondary nature of teachings as subsidiary means for the determination of the rules of international law. Indeed, in possibly the most cited case of the Supreme Court of the United States relating to international law, *The Paquete Habana*, the Supreme Court addressed the nature of and the relationship between

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[181] Submission of Sierra Leone to the Commission on the use of subsidiary means for the determination of rules of international law in the national courts of Sierra Leone, para. 8.

[182] See, for example, *U.S. v. Hasan*, 747 F. Supp. 2d 599, 631-637 (E.D. Va. 2010) (applying each element, in order, of Article 38, paragraph 1 (*d*), to the question at hand).

[183] See the submission of the United States to the Commission on the use of subsidiary means for the determination of rules of international law, in the sense of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, dated 12 January 2023, available at https://legal.un.org/ilc/sessions/74/pdfs/english/sm_us.pdf.

[184] *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65, 83 (2d. Cir. 2003) (emphasis added).

judicial decisions and “the work of *jurists* and *commentators*”.[185] The Supreme Court explained, in a famous passage that:

> *where there is no* treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[186]

The decision justified the weight given to teachings by citating texts on international law by Henry Wheaton and James Kent both of whom had addressed the “authority of text writers”.[187] That said, it should be noted that *The Paquete Habana* ruling indicates the predicate for the reference to scholarly works was, *inter alia*, the absence of a treaty or relevant domestic legislation or judicial decisions. That shows that, even before the International Court of Justice was created, the treatment by some national courts of scholarly works was subsidiary, which is remarkable given that the decision predated the Statute of the Permanent Court of International Justice by about 25 years and the Statute of the International Court of Justice by 45 years.

115. In *Sosa v. Alvarez-Machain*, a more recent case of the Supreme Court of the United States, the respondent made a claim about his arbitrary arrest on the basis that it violated both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[188] The Court determined that the Universal Declaration of Human Rights was not sufficient ground for his claim since it was a non-binding instrument, while the International Covenant on Civil and Political Rights, though binding in the United States, was not “self-executing” under the declaration made (meaning that it could not form the basis, absent legislation, for him to have an enforceable cause of action in federal courts). The Court then cited *The Paquete Habana* case, before it turned to an assessment of the status of customary international law in relation to arbitrary arrest and found that the claim should fail since it had not attained such status.

116. In *United States v. Yousef*,[189] the United States Court of Appeals for the Second Circuit considered that, although scholarship continued to develop regarding the sources of international law, publicists writings were not true sources of international law.[190] In the view of the Court, writings can be “useful in explicating or clarifying an established legal principle or body of law”[191] and can constitute “an acceptable additional source to shed light on a particular question of international law only when ‘*recourse must also be had*’ beyond the ‘opinions,’ ‘decisions,’ and ‘acts’ of States, and only then ‘to a lesser degree’ than to more authoritative evidence, such as the State’s own ‘declarations,’ ‘laws,’ and ‘instructions’ to its agents”.[192] In that regard, “[t]he Court found that the argument that professors of international law by virtue of their academic experience can determine the rules of customary international law was

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[185] *The Paquete Habana*, 175 U.S. 677 (1900), p. 700 (emphasis added).
[186] *Ibid*. (emphasis added).
[187] *Ibid*., pp. 700 and 701.
[188] See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).
[189] *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).
[190] *Ibid.,* para. 101.
[191] *Ibid*.
[192] *Ibid*. (referencing Clive Parry, *The Sources and Evidences of International Law* (Manchester, Manchester University Press, 1965)).

'certainly without merit'."[193] "Put simply, and despite protestations to the contrary by some scholars (or 'publicists' or 'jurists'), a statement by the most highly qualified scholars that international law is *x* cannot trump evidence that the treaty practice or customary practices of States is otherwise."[194]

117. The Second Circuit returned to the value of the secondary authorities listed in Article 38, paragraph 1 (*d*), in *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*[195] The Court stated that courts did traditionally rely on "the works of jurists, writing professedly on public law … or by judicial decisions recognizing and enforcing that law",[196] but also cited its opinion in the *Yousef* case that "scholarly works are not included among the authoritative sources of customary international law".[197] In other cases, such as *Doe v. Nestle S.A.,* the United States District Court for the Central District of California quoted section 103, note 1, of the Restatement (Third) of Foreign Relations Law, which the Court wrote "helpfully explains the role of scholarly sources as evidence of customary international law".[198]

118. The above-mentioned cases, illustrating practice from diverse national courts, confirm a settled approach, namely that judicial decisions and teachings are to be used as adjuncts when interpreting, clarifying and applying the sources of international law. In them, the courts all treat judicial decisions as more important than teachings. The practice of such courts is in agreement with and complements the approach of the International Court of Justice and other international tribunals.

G. Scholars also confirm the auxiliary nature of subsidiary means

119. Much ink has been spilled on the sources of international law and, as part of this, subsidiary means. It is not necessary to enter into an extensive survey of the literature to make the, perhaps uncontroversial, point that the majority of writers support the above approach, namely, that subsidiary means are auxiliary or secondary in character. However, some illustrations might be useful.

120. For example, James Crawford explained that "judicial decisions are not strictly a formal source of law, but in many instances they *are regarded as evidence of the law*".[199] That is not to say that judicial decisions or for that matter academic works may not be influential in helping clarify or even providing a basis for the subsequent development of the law, much as we saw acknowledged by the Supreme Court of Appeal of South Africa. Lassa Oppenheim, writing over a century ago, noted that judicial decisions and teachings could "*influence the growth of International Law either by creating usages which gradually turn into custom*, or by inducing the members of the Family of Nations to conclude such treaties as stipulate legal rules for future international conduct".[200] Teachings, as James Brierly argues, may also

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[193] Submission of the United States to the Commission on the use of subsidiary means, p. 2.

[194] *Yousef* (see footnote 189 above), para. 102. See also *Flores* (footnote 184 above) (quoting *Yousef* (para. 103) for the proposition that "we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States").

[195] *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008).

[196] *Ibid.,* para. 116.

[197] *Ibid*.

[198] *Doe v. Nestle S.A*, 748 F. Supp. 2d 1057, 1069, n. 11 (C.D. Cal. 2010), footnote 11.

[199] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford, Oxford University Press, 2012), p. 37 (emphasis added).

[200] Lassa Oppenheim*, International Law* (London, Longmans, Green and Co., 1905), p. 24 (emphasis added).

"influence the conduct of states and thus indirectly in the course of time help to modify the actual law".[201]

121. Writing more recently, other academics have traced the considerable impact of judicial decisions in various fields of international law. For example, in a detailed study focused on international humanitarian law, Shane Darcy has shown that: "Judicial decisions affect the development of the law of armed conflict insofar as they address legal lacunae (treaty negotiators can and do accept gaps in the law, judges cannot), as they add flesh to the bare bones of treaty provisions or to skeletal legal concepts such as military necessity or proportionality, and as they identify and give legitimacy to new legal developments such as emergent custom."[202]

122. For her part, Anthea Roberts, while pointing to the dual role of judicial decisions of national courts as evidence of State practice and as a source of subsidiary means, has argued that "[j]udicial decisions play an extremely important role in the identification and formation of international law" and, as part of that, frequently examine decisions outside their own jurisdictions when "identifying custom and interpreting treaties".[203] She goes on to mention connections between the two subsidiary means, pointing out that: "Academics, practitioners and international and national courts frequently identify and interpret international law by engaging in a comparative analysis of how domestic courts have approached the issue."[204]

H. Special Rapporteur's observations on the auxiliary nature of subsidiary means

123. To conclude the present chapter, on the auxiliary function of the subsidiary means, three final observations appear warranted. First, based on the text, drafting history and, more importantly, the practice, at the level of both international and national courts, it is safe to conclude that the subsidiary means set out in Article 38, paragraph 1 (*d*), are not sources of international law. Rather, they are secondary means or materials that are mainly or usually resorted to in the process of identifying, determining or applying rules of international law to address a legal question. That position reinforces the previous findings of the Commission in relation to the present and prior topics on the nature of subsidiary means vis-à-vis the sources of international law. Those include, as already shown above, in the context of the identification of customary international law,[205] general principles of law[206] and the identification and legal consequences of peremptory norms of general international law (*jus cogens*).[207]

124. Second, while the auxiliary function is the main role of subsidiary means, there are, in practice, probably other more specific functions of subsidiary means. Those

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[201] James L. Brierley, *The Law of Nations: An Introduction to the International Law of Peace*, 5th ed. (Oxford, Oxford University Press, 1955) p. 66.

[202] Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (Cambridge, United Kingdom, Cambridge University Press, 2014), p. 65.

[203] Anthea Roberts, "Comparative international law? The role of national courts in creating and enforcing international law", *International and Comparative Law Quarterly*, vol. 60 (2011), pp. 63 and 58.

[204] *Ibid*., p. 58.

[205] See conclusions 13 and 14 on identification of customary international law, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/73/10), para. 65.

[206] See draft conclusions 8 and 9 on general principles of law, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), para. 40.

[207] See draft conclusion 9 on identification and legal consequences of peremptory norms of general international law (*jus cogens*), *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 43.

specific functions include, as was the case with general principles of law, a means of interpreting or complementing the rules of international law, including addressing lacunae in the law or advancing the coherence or the systemic nature of international law as a legal system.[208] The specific functions of subsidiary means could overlap, as among the various types of subsidiary means, but they could also be distinctive, depending on the subsidiary means under consideration. The idea of the general function being mainly auxiliary should therefore be used in order to ensure that the Commission retains a certain degree of flexibility, as the work progresses on the topic, by recognizing that there are other more specific functions of subsidiary means that may be developed in future work on the topic. That is consistent with the approach in relation to general principles of law, which, as was shown in both reports of the Special Rapporteur, play a similar gap-filling role that was anticipated by the drafters.

125. Lastly, and this is an issue that will be taken up in a future report, subsidiary means, in particular judicial decisions but also others, such as the decisions of expert bodies or certain resolutions of international organizations, may serve as an independent basis for the rights and obligations of the subjects of international law, that is, primarily, States, but also international organizations.

I. Proposed draft conclusion

126. In the light of the analysis above, the Special Rapporteur would like to propose a draft conclusion on the nature and function of subsidiary means, which reads as follows:

Draft conclusion 6
Nature and function of subsidiary means

(a) Subsidiary means are auxiliary in nature vis-à-vis the sources of international law found in treaties, customary international law and general principles of law.

(b) Subsidiary means are mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law.

IV. General nature of precedent in domestic and international adjudication

127. As indicated in the syllabus[209] for the topic and the first report of the Special Rapporteur,[210] meaningful discussion on subsidiary means for the determination of rules of international law must necessarily address the caveat regarding Article 59, which appears at the beginning of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice. That is because Article 38, paragraph 1 (*d*), expressly invokes another provision of the Statute because of its apparent relevance to the delimitation of the scope of subsidiary means. Article 38, paragraph 1 (*d*), of the Statute, which is an integral part of the Charter of the United Nations, requires the Court, when resolving disputes between States in accordance with international law and the sources listed in subparagraphs (*a*)–(*c*), to apply "*subject to the provisions of*

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[208] See the third report of the Special Rapporteur on general principles of law, Marcelo Vázquez-Bermúdez (A/CN.4/753, pp. 39–50).

[209] See *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 302 and annex.

[210] A/CN.4/760, para. 275.

Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (emphasis added).

128. In the present chapter, the Special Rapporteur will examine that aspect of the topic, focusing on the relationship between these two important provisions of the Statute of the International Court of Justice. As Article 59 of the Statute is often said to implicate the question of precedent in international law, the Special Rapporteur will open with a brief comparative approach to precedent in common law and civil law systems at the domestic level. Thereafter, he will examine the question of precedent in international courts and tribunals with a focus on the International Court of Justice and the International Tribunal for the Law of the Sea, before offering concluding observations and proposing a draft conclusion.

A. Meaning of precedent and the approach to it in common law and civil law systems

129. There is an old and surprisingly still lively debate about the nature and place of "precedent" in judicial adjudication.[211] Hundreds if not thousands of trees have been felled to provide paper for the judges, scholars and practitioners of international law seeking to unpack that notion in all its forms. There is, as is usual with challenging legal notions, no single universally endorsed definition of "precedent". The term "precedent" can be defined narrowly or broadly. A narrow or technical understanding of precedent is that provided by *Black's Law Dictionary*, in which the term is defined, undoubtedly inspired by domestic law, as "[a]n adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law."[212] The *Oxford Dictionary* similarly defines "precedent" as "a previous case that is taken as an example to be followed;"[213] "[a] judicial decision which constitutes an authoritative example or rule for subsequent analogous cases";[214] or "[a] previous instance taken as an example or rule by which to be guided in similar cases or circumstances; an example by which a comparable subsequent act may be justified".[215]

130. The notion of precedent at the international level, as with the definitions of the term above, retains the same essential characteristic. That is well captured by the definition provided by the Institute of International Law, which provides that: "A precedent is a decision rendered by an international court or tribunal which may serve as a reference in a case other than the one in which it was rendered."[216] As the Institute has explained, a precedent can arise in a variety of ways, requiring certain conditions

[211] The Special Rapporteur does not propose to engage fully in that theoretical academic debate. Rather, given the narrow practical focus of the work on this topic, he approaches it primarily from the perspective of the Statute of the International Court of Justice.

[212] Henry Campbell Black, *Black's Law Dictionary*, 2nd ed. (St. Paul, West Publishing, 1910).

[213] *Oxford Paperback Dictionary*, 4th ed. (Oxford, Oxford University Press, 1994), p. 627.

[214] *Oxford English Dictionary* (Oxford, Oxford University Press, 2023), available at https://doi.org/10.1093/OED/2995362323.

[215] *Ibid*.

[216] Resolution on precedents and case law (jurisprudence) in interstate litigation and advisory proceedings (2 RES EN), 1 September 2023, para. 1, Special Rapporteurs: Mohamed Bennouna and Alain Pellet. The detailed study on jurisprudence and precedents in international law by Mohamed Bennouna and Alain Pellet is highly recommended reading for anyone interested in pursuing the topic of precedent further since there are aspects of that question that will not be elaborated here given the particular purposes of the present report. Readers would also find useful the colloquium on precedent in international law organized by the Société française pour le droit international. See Société française pour le droit international, *Colloque de Strasbourg: Le précédent en droit international* (Paris, Pedone, 2016).

are fulfilled, such as similarity or substantial similarity, before it can be invoked in another case.[217]

131. A broader and non-technical definition of the term "precedent" describes it as "a similar action or event that happened earlier".[218] That broader term essentially speaks to the idea of something that came before. It is the ordinary meaning of the term. The proposed distinction between the narrow or technical meaning and the broader or non-technical meaning carries practical consequences for lawyers. Using the former narrower understanding, which applies in the legal context, the general point can be made that, in some domestic legal systems, there is a system of precedent and, more precisely, binding precedent. According to that doctrine, sometimes referred to as *stare rationibus decisis* or *stare decisis* for short, "a court is to follow accepted and established legal principles set out in previous cases decided by the same court as well as by other courts of equal or higher rank in respect of litigated and necessarily decided issues".[219]

132. *Stare decisis* originated in and is therefore associated with Anglo-Saxon-based common law legal systems. That method of adjudication gives a central role to judges and their decisions and, quite importantly, requires them to rely on prior cases so that like cases are broadly dealt with alike. By treating like cases alike, with the lower courts following the rules set out in cases from the highest courts, a measure of legal certainty and predictability is assured.

133. Legal precedent, in municipal systems, can operate in multiple and complex ways. First, "such a system may authorise the judge to consider previous decisions as part of the general legal material from which the law may be ascertained" or, second, "it may oblige him to decide the case in the same way as a previous case unless he can give a good reason for not doing so" or, third, "it may oblige him to decide it in the same way as the previous case even if he can give a good reason for not doing so".[220] At a broad level, these helpful tripartite classifications of the general approach to precedents speak to general features of civil law or continental jurisdictions, which are said to reflect the first and, occasionally, the second approaches to precedent described above, while common law jurisdictions reflect the last approach.

134. However, the differences in the variety of approaches to precedent between the common law and civil law should not be overemphasized. That is because some civil law systems also incline towards the second approach, while the common law systems, which are relatively more rigid, also reflect some nuances. For instance, although even common law systems show variations – for example, among the approaches in England, India, Sierra Leone and the United States – they generally privilege as binding the rules and exceptions to rules expressed in valid previous decisions of the higher ranked courts, which, in principle, follow their own decisions, but also tend to retain the option to depart from such decisions whenever there are good reasons to do so; whether for the sake of the interests of justice or otherwise.

135. Furthermore, common law judges applying precedent must distinguish between the necessary reasons for a decision, the so-called *ratio decidendi*, which is binding, and the *obiter dictum*, which are not required reasons but those that may carry some persuasive value or exert interpretational influence. When the *ratio* is followed, *stare decisis* "effectively converts past judicial opinions, which applied the law to specific

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[217] See resolution on precedents and case law (jurisprudence) in interstate litigation and advisory proceedings (footnote 216 above), paras. 2–3.

[218] Oxford Learner's Dictionary, available at www.oxfordlearnersdictionaries.com/us/definition/english/precedent?q=precedent.

[219] Guido Acquaviva and Fausto Pocar, "*Stare decisis*", in Anne Peters, ed., *Max Planck Encyclopedia of Public International Law* (Oxford, Oxford University Press, 2023), para. 1.

[220] Shahabuddeen, *Precedent in the World Court*, p. 9.

circumstances, into a source of law according to which future cases concerned with analogous facts should be adjudicated”.[221] That explains why the resulting case law is so important.

136. To be clear, the term “case law” is often used, in common law systems, as a synonym for the technical term “precedent” (alongside other terms such as “judicial decisions” and the less clear term – at least in English – “jurisprudence”). As Bing Bing Jia has explained:

> the term “case law” in a broad sense can be used … interchangeably with those of “judicial decisions”, “precedents”, and “jurisprudence”. But in the narrow sense … “case law” … is the one with the narrowest scope, signifying (1) those precedents which are clearly binding upon lower courts within one and the same judicial system, independent of their role as persuasive precedents in general; (2) rules of law established solely by judicial decisions, which include the exceptional case of rules of procedure and evidence. The term “jurisprudence” has a broader scope than that of “case law” *stricto sensu*, but more restricted than those of “precedents” and “judicial decisions”.[222]

137. The idea that judicial decisions can serve as a valid source of rules of law, in domestic common law systems in which judges can be entrusted with filling legislative gaps, partly explains why there would be considerable resistance to importing such a notion into international law as that could be tantamount to conferring law-creating powers on judges. Such resistance was evident in the discussions of what became Article 38, paragraph 1 (*d*), among the drafters in the Advisory Committee of Jurists in the mid-1920s.

138. In contrast, civil law systems follow their own model. Precedents are used, but in a different way, without necessarily being a formal requirement that legal principles established in prior single cases be followed. Precedents, in the sense of a series of judicial decisions that establish a “trend”[223] or that are concordant, are followed. Instead of subscribing to the notion of precedent in common law whereby a single case could be decisive, the idea of *jurisprudence constante*, or settled case law, is followed. In such systems, a judge does not generally rely on single decisions for a legal rule but an accumulation of individual decisions that form a pattern.

139. Essentially, under the civilist approach, the idea is for the judge to benefit from examining the well-trodden path manifested in prior cases. It follows that, having looked at the previous instances in which the same or similar issues were examined, the civil law judge also applies precedent if the term is understood in the broad terms described above. However, even that statement needs to be qualified because it is said that in France, which is a civil law jurisdiction, a single decision could be followed for its persuasiveness, much as in a common law court, where that single decision concerned a question of principle addressed by either the Plenary Assembly of the

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[221] Acquaviva and Pocar, “*Stare decisis*”, para. 6.

[222] Bing Bing Jia, “International case law in the development of international law”, *Collected Courses of The Hague Academy of International Law*, vol. 382 (2015), p. 203.

[223] See Special Tribunal for Lebanon, *In the Case Against Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin*, Case No. STL-14-06/PT/AP/AR126.1, Decision on interlocutory appeal concerning personal jurisdiction in contempt proceedings, 23 January 2015, Appeals Panel, Separate and Partially Dissenting Opinion of Judge Nosworthy, paras. 21–39 (in which she found that, while the Lebanese system of *jurisprudence constante* may be suitable for domestic legal systems with permanent courts and the International Court of Justice, it should not be applied by the Special Tribunal for Lebanon, holding that *stare decisis* should apply vis-à-vis the lower chambers of the Special Tribunal, in line with the practice of other international criminal tribunals).

Council of State or that of the Court of Cassation.[224] That said, decisions of the courts cannot be "classed as a formal source of law".[225]

140. Unlike at the national level, at the international level, there is broad agreement among jurists that there is no theory or doctrine of precedent. In other words, there is no equivalent to the doctrine of *stare decisis* such as that found in common law-based legal systems. There are no formal rules, save in specific tribunals with a given internal hierarchy, mandating judges to follow prior decisions. That said, it should be underlined that international judicial bodies, such as the International Court of Justice, irrespective how their approach to precedent is formally described, do follow their own rulings. The Court also increasingly takes inspiration from the rulings of other courts and tribunals, when it finds them persuasive, but without necessarily subscribing to a formal system of precedent.

B. Article 38, paragraph 1 (*d*), and its relationship to Article 59 of the Statute of the International Court of Justice

141. Against the above background, comparing the approach to precedent in common law and civil law systems at the domestic level, the Special Rapporteur will now turn to the question of precedent in international courts and tribunals with a primary focus on the International Court of Justice. The starting point of our analysis must be the general rule of interpretation in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

142. Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice requires the Court, when resolving disputes between States in accordance with international law and the sources listed in subparagraphs (*a*)–(*c*), to apply "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Article 59 of the Statute of the International Court of Justice states that: "The decision of the Court has no binding force except between the parties and in respect of that particular case."[226] The legal proposition contained in the article can be said to establish a general rule ("the decision of the Court has no binding force"), but also subjects it to two exceptions (first, "except between the parties") and (second, "in respect of that particular case"). Put more positively, while as a general rule decisions of the Court are not binding on other States, they do actually bind the disputing parties in relation to their specific case. That, in essence, means that – as a technical matter – the decision of the Court will formally be directed to them and only have the effect of shaping the legal relations between the parties in relation to the dispute for which they have submitted and consented to judicial settlement.

143. The caveat in the opening of Article 38, paragraph 1 (*d*), does not appear to establish a precondition that must be fulfilled before subsidiary means can be applied. Rather, it delimits the scope of the subsidiary means that may already be used by subjecting them to the stipulations contained in Article 59. Interestingly, Article 38,

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[224] See René David and Henry P. de Vries, *The French Legal System: An Introduction to Civil Law Systems* (New York, Oceana Publications, 1958), part 3, chap. IV.

[225] *Ibid*., p. 115.

[226] The provision was preceded by or subsequently inspired similar provisions. See, in that regard, articles 54 and 56 of the Convention for the Pacific Settlement of International Disputes (1899); article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights); and article 53 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

paragraph 1 (*d*), does not distinguish between the two categories of subsidiary means, when it refers to judicial decisions and teachings as subsidiary means for the determination of rules of law in Article 38, paragraph 1 (*d*), but subjects them "to the provisions of Article 59".

144. Nevertheless, it can, however, be inferred, from a plain reading and from the practice as well as the drafting history, that the reference is to judicial decisions and not teachings. If this reading is correct, that means that the Court may consult any judicial decisions it deems relevant – such decisions would include, first and foremost, those of the Court and its predecessor, as well as of any national, regional or international courts, as well as the works of other bodies, including those that may be more quasi-judicial in character – but subject to Article 59. It is to that important aspect addressing the relationship between Article 59, which is sometimes thought of as addressing the question of precedent, and Article 38, paragraph 1 (*d*), concerning subsidiary means, that the Special Rapporteur will now turn.

145. The issue of precedent comes up in debates about the role of international courts and tribunals in judicially settling disputes between States and tends to give rise to a series of important questions. With respect to the International Court of Justice, which, as the principal judicial organ of the United Nations, plays a vital role as the leading settler of contentious disputes between States and as a provider of legal advice through advisory opinions, a key issue is the actual place of judicial decisions and teachings as subsidiary means for determining rules of law under Article 38, paragraph 1 (*d*), of the Statute of the Court.

146. Part of the apparent difficulty, as explained in the first report of the Special Rapporteur, stems from the language of the provision on sources of law, which indicates that the judges apply the subsidiary means. This language of Article 38, paragraph 1 (*d*), has been read by some, including prominent scholars, as indicating that subsidiary means are sources of international law, albeit, secondary instead of primary or formal sources. The controversy over that question is often coupled with some sensitivity about the role of judges in a decentralized international legal system in which consent to the jurisdiction of an international tribunal is optional rather than mandatory. The judges, who resolve such disputes, must apply the law that the States have agreed in treaties or that is reflected in customary international law and the general principles of law. The fear being that, if they do not and go further in issuing judicial decisions that are not rooted in the recognized sources of law in relation to which State consent exists by engaging in "judicial lawmaking", they could step outside their legitimate role and also lose the buy-in of States and possibly their interest in peacefully resolving their disputes through judicial settlement.

147. The apparent lack of clarity stemming from the wording of Article 38, paragraph 1 (*d*), also tends to give rise to a second set of concerns. Those centre on the practical implications of the caveat referencing Article 59 of the Statute. The essence of that provision confirms that the decisions of the International Court of Justice carry no binding force except for the parties and, even then, only in respect of their particular case. Both the drafting history and the literature indicates that the opening caveat in Article 38, paragraph 1 (*d*), was added essentially to assuage the concerns of sovereignty-conscious States about the effects of a final judgment, taking into account that they would otherwise hesitate to surrender their national interests to a judicial

process over which they would not have direct control.[227] In fact, some authors hold that, while interlinked in the Statute by the Assembly of the League of Nations basically *ex abundanti cautela*, Article 59 has nothing to do with the subsidiary means for the determination of rules of law in Article 38, paragraph 1 (*d*).[228]

148. For reasons that should be obvious given our focus on subsidiary means in the Statute of the International Court of Justice, it was necessary to discuss the relationship between Article 38, paragraph 1 (*d*), and Article 59.[229] It is now necessary to address the approach of the Court to the former provision, after which the Special Rapporteur will also briefly examine the approach to precedent in inter-State disputes as addressed by another permanent international tribunal, the International Tribunal for the Law of the Sea.

C. Article 59 of the Statute of the International Court of Justice, precedent and the link to the rights of third States

149. Taking the above into account, it can be argued that the legal effect of Article 59 is simply that there is no common law doctrine of binding precedent in international law – at least as the term "precedent" was defined in a narrow legal sense above. But the issue of precedent still comes up in debates about the role of international courts and tribunals in judicially settling disputes between States. It apparently gives rise to a series of questions.

150. There is still considerable debate among international lawyers about the purpose of Article 59. A view that appears to enjoy some support suggests that the purpose is to exclude the application of the doctrine of *stare decisis*, that is to say, the binding force of a judicial decision as a law-creating precedent.[230] Another, and this is the more plausible view according to the Special Rapporteur, is that Article 59 is aimed at other purposes, in particular, to ensure that the decision, as such, binds only the parties to the particular case. It is also linked to the right of intervention by third States and the need to ensure the finality of judgments as expressed in the *res judicata*[231] doctrine.

151. The latter argument finds strong support in that there are a number of articles in the Statute related to the content of Article 59 that interact with it thereby enabling it to serve its purpose. Article 60 of the Statute of the International Court of Justice, for instance, provides that the judgment is final and without appeal (though it leaves open the Cout

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[227] "It is presumably inserted out of abundant caution" (see Robert Yewdall Jennings, "General course on principles of international law", *Collected Courses of The Hague Academy of International Law*, vol. 121 (1967), p. 341). See also Sir Arnold D. McNair, *The Development of International Justice* (New York University Press, 1954), pp. 13 and 14; and James-Leslie Brierly, "Règles générales du droit de la paix", *Collected Courses of The Hague Academy of International Law*, vol. 58 (1936), pp. 78 and 79 (discussing the mistrust of judges).

[228] See Jennings, "General course on principles of international law", pp. 340 and 341.

[229] See, generally, Amos O. Enabulele, "Judicial lawmaking: understanding Articles 38(1)(d) and 59 of the Statute of the International Court of Justice," *Australian Yearbook of International Law*, vol. 33 (2015).

[230] There are international lawyers, including a prominent former judge of the International Court of Justice, who have argued that: "Article 59 has no bearing on the question of precedents. It is directed to emphasising that the juridical force of a judgment *en tant que jugement* is limited to defining the legal relations of the parties only." See Shahabuddeen, *Precedent in the World Court*, p. 63.

[231] See, for a discussion, Jean-Marc Thouvenin, "On different *res*: *res judicata*, *res interpretata*, *res praescripta* (or *indicata*), *res deliberata*", *Japanese Yearbook of International Law*, vol. 65 (2022) pp. 270–300; and Benjamin Salas Kantor and María Elisa Zavala Achurra, "The principle of *res judicata* before the International Court of Justice: in the midst of comradeship and divorce between international tribunals", *Journal of International Dispute Settlement*, vol. 10 (2019).

construing its meaning or scope upon the request of any party). Under Article 62, in a situation in which a State considers that "it has an interest of a legal nature which may be affected by the *decision* in the case" (emphasis added), it may request to intervene. Article 63 provides that, "[w]henever the construction of a *convention* to which states other than those concerned in the case are parties is in question" (emphasis added), all such States be notified of their right to intervene. If they decide to do so, the manner in which the treaty is construed in the judgment will be equally binding on the intervening States.[232] The latter provision is a corollary to Article 59 in the sense that it acknowledges that there are indeed broader legal effects to judicial decisions of the Court in relation to their interpretations of treaty obligations. Hence the provision of not only a right for States to be notified of such, but also a right to intervene in order to influence the interpretation, upon which they would subsequently be bound.

152. Although more distant, but still generally relevant to the core ideas contained in Articles 59 and 60, is Article 94 of the Charter of the United Nations, which confirms the undertaking of each member of the United Nations "to comply with the *decision* of the International Court of Justice in any case to which it is a party" (emphasis added). The Rules of Court further address some of these procedural matters, including the issue of pronouncement and finality of judgments – save requests for revision and reinterpretation. For the limited purposes of the present report, there is no need for the Special Rapporteur to enter into further discussion of these other provisions or the Rules of Court. It is sufficient to allude to them to make the simple point that there are other provisions in the Rules of Court that complement and supplement the ideas in Article 59.

153. Several authors, including Robert Yewdall Jennings, Sir Arnold McNair and Mohamed Shahabuddeen, have also concluded that Article 59 has nothing to do with the question of precedent. As Mohamed Shahabuddeen conveniently put it: "Article 59 was not directed to the possible precedential value of a decision; *a fortiorari*, there can be no question of the provision being directed to excluding the doctrine of binding precedent."[233] As a former judge of the Court, he explained that: "The provision simply had no bearing on the question whether the doctrine was applicable or inapplicable. The doctrine is, indeed, inapplicable, but the provision is not the reason. The doctrine was peculiar to a particular municipal legal system; it was not part of the thinking on which the Court was constructed."[234]

154. The point is that the formal rule in Article 59 is aimed at protecting States, especially those that are third parties to the case, from the binding effect of the particular decision. That makes sense since decisions in disputes of a bilateral character are strictly only aimed at the two parties concerned. Thus, the resolution of such disputes would, save some narrow exceptions in situations in which land or maritime boundaries are fixed, naturally concern only them. It is an altogether different question whether, when a tribunal, such as the International Court of Justice, has taken a decision interpreting a rule of law in a particular way or making a finding on a specific point of law, it is required or even possible for it to avoid looking at that prior legal position in analogous situations when a new dispute arises.

155. The International Court of Justice, and its predecessor, have not interpreted Article 59 to mean that they will start afresh each time since to do so would undermine legal security. Neither, for that matter, have States in their own practice when seeking

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[232] Aspects of these rules are fleshed out in the Rules of Court, for example, article 94, paragraph 2, thereof which provides that: "The judgment shall become binding on the parties on the day of the reading."

[233] Shahabuddeen, *Precedent in the World Court*, p. 105.

[234] *Ibid*.

to judicially resolve their disputes in accordance with international law. In numerous judgments, as will be discussed further below, the International Court of Justice has actually referenced its own "established case law",[235] its "settled"[236] or "consistent jurisprudence".[237] Indeed, as has been recognized by several judges of the Court, whatever may be the formal position on the narrow legal effect of Article 59, the reality is that the full effects of judicial decisions extend far beyond what Article 59 would suggest. That is because the principles determined to exist in one decision will necessarily apply to other cases involving a similar matter. This same approach, as noted above, is reflected in Article 21 of the Rome Statute, which enables the International Criminal Court to rely on principles it articulated in its previous decisions.

156. For instance, Judge ad hoc Guggenheim explained that: "The scope of the judicial decision extends beyond the effects provided for in Article 59 of the Statute."[238] Judge Jessup, for his part, argued that the "influence of the Court's decisions is wider than their binding force",[239] while Judge Singh in alluding to the effects of Article 59, did so in the context of cautioning that judicial propriety means that a court should not pronounce on those aspects of the case that do not call for a decision in the task of accomplishing the adjudication of the dispute, underlining that: "This would particularly apply in the context of administering inter-State law wherein the Court's observations, *despite Article 59 of the Statute,* could easily create implications in the relations between States including even those not before the Court."[240]

157. Scholarly opinion, including from eminent publicists who also later served on the bench of the International Court of Justice, confirm the same view. Indeed, in the works of scholars, such as Gerald Fitzmaurice and Sir Arnold McNair, the proposition that there is no binding precedent in the Court is not contested. What is contested is whether the basis of the exclusion was Article 59 or another ground. Sir Arnold McNair has, in his analysis of the same provision, concluded that, despite all appearances, Article 59 "is closely linked with Article 63 (giving a right of intervention)".[241] In his view, taking into account the drafting history, the clause was inspired for another wider reason: "namely, to prevent a State which has not intervened in a suit from being bound by the decision given in it 'and any ulterior conclusions to which that decision may seem to point'".[242] Mohamed Shahabuddeen agrees.[243]

158. Unsurprisingly, given the formal position set out above and the reality of the practice of the International Court of Justice and suspicions about judicial creativity

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[235] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022,* p. 477, at p. 502, para. 63; and *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Order of 16 November 2023, p. 7, para. 24.

[236] See *United States Diplomatic and Consular Staff in Tehran*, *Judgment, I.C.J. Reports 1980*, p. 3, at p. 18, para. 33.

[237] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019*, p. 95, at p. 113, para. 65.

[238] *Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955,* p. 4, Dissenting Opinion of M. Guggenheim, Judge "Ad Hoc", p. 61, para. 12.

[239] *Barcelona Traction, Light and Power Company, Limited*, *Judgment, I.C.J. Reports 1970,* p. 3, Separate Opinion of Judge Jessup, p. 163, para. 9.

[240] *Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978,* p. 3, Separate Opinion of Vice-President Nagendra Singh, p. 47 (emphasis added).

[241] McNair, *The Development of International Justice*, p. 13.

[242] *Ibid*.

[243] See Shahabuddeen, *Precedent in the World Court,* p. 105.

(which is embraced by some and derided by others), Article 59 generated both theoretical and practical controversy as far back as the days of the Permanent Court of International Justice. Against that backdrop, the Inter-Allied Committee on the Permanent Court of International Justice, which had the opportunity to suggest a redrafting of Article 59 when the Charter of the United Nations and the Statute of the International Court of Justice were being elaborated in 1945, nicely captured the correct state of affairs in a statement that remains true to this day:

> The effect of this provision has, in our opinion, sometimes been misinterpreted. What it means is not that the decisions of the Court *have no effect as precedents for the Court* or *for international law in general*, but that they *do not possess the binding force of particular decisions* in the relations between the countries who are parties to the Statute. The *provision in question in no way prevents the Court from treating its own judgments as precedent*s, and indeed it follows from Article 38 (quoted in paragraph 62 above) that the Court's decisions are themselves "subsidiary means for the determination of rules of law." It is important to maintain the principle that countries are not "bound" in the above sense by decisions in cases to which they were not parties, and we consider accordingly that the provision in question should be retained without alteration.[244]

159. The provision was retained in the original formulation as the experts had suggested. It is interesting to the Special Rapporteur that the experts expressly referenced the subsidiary means in Article 38 as part of their justification for the Court to use its own judgments as precedents understood loosely in a non-technical sense.[245] For all the focus and apparent misinterpretation of Article 59, it has not, as Sir Arnold McNair put it, "hampered the operation of the natural process of looking to previous decisions for guidance in the solution of similar problems. It requires no doctrine of judicial precedent to explain that inevitable practice."[246]

160. The practice of the Permanent Court of International Justice and the International Court of Justice, as well as some arbitral tribunals, regarding their interpretation of Article 59 is helpful in confirming its purpose. While for reasons of brevity it is not possible to examine each of the decisions of the two Courts touching upon Article 59, the examples below are broadly representative and sufficiently capture the proper interpretation of the provision. In essence, as will be shown, the purpose of Article 59 is much narrower and has not precluded, as confirmed by practice, the Court and other international tribunals like it from following their previous decisions for reasons of legal security and stability. The same pattern can be found in arbitral and other international court decisions – as set out in the second memorandum by the Secretariat.

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[244] "United Nations: report of the informal Inter-Allied Committee on the Future of the Permanent Court of International Justice", *American Journal of International Law*, vol. 39, No. 1 (1945), para. 63 (emphasis added).

[245] That said, the views of that Committee, while important, deserve to be put in context. While the experts no doubt included some of the leading international lawyers of the time, including Gerald Fitzmaurice who served as Secretary, their views were not necessarily reflective of the views of States since they served on the Committee in their personal capacities and not in the names of their Governments, which in fact did not agree to be bound to their views. For more on this, see Thouvenin, "On different *res*".

[246] McNair, *The Development of International Justice,* pp. 13 and 14.

D. Decisions of the International Court of Justice carry no binding force except for the parties to the case

161. Preliminarily, before addressing the practice of the Permanent Court of International Justice and the International Court of Justice on Article 59, a word of clarification about the term "decision" is warranted. In the first report of the Special Rapporteur, he analysed the term "judicial decisions" in the context of the reference in Article 38, paragraph 1 (*d*), to the first category of means that can be invoked to determine a rule of international law to apply. Regarding the first element, he argued that the decision of the International Court of Justice primarily concerns the final judgment on the merits of the case.

162. Shabtai Rosenne put it this way: "The operative clause is the decision, itself linked to but following on and distinguished from the reasons."[247] 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. The decision can also encompass, in the practice of the International Court of Justice, not just final judgments, but a variety of other judgments during the preliminary phase, such as judicial responses to preliminary objections or provisional measures,[248] orders under Article 41 to the extent that they are issued in a manner making clear that they are binding on the parties. In other words, the decision is that part of the output of the Court that every State Member of the United Nations undertakes to comply with in relation to cases to which they are parties under Article 94, paragraph 1, of the Charter of the United Nations.[249] If a State does not comply, the other State may then have recourse to the Security Council, which may make recommendations or decide upon measures to be taken to give effect to it.

163. Thus, the reference to a decision, in the practice of the Court, is an allusion to the operative part of the judgment (i.e. the *dispositif*), which binds the parties to the case. It is not a reference to the reasons in support, the so-called *motifs*. The distinction between the operative part of the judgment and the reasons underlying them has been stressed 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, 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.
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> It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion. This is clearly stated in the award of the Permanent Court of Arbitration of October 14th, 1902, concerning the Pious Funds of the Californias, which has been repeatedly invoked by Danzig. The Court agrees with this statement.[250]

164. A broader point confirming the narrow effects of Article 59 has been underlined in the jurisprudence. For example, already in the *Certain German Interests in Polish*

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[247] Rosenne, *The Law and Practice of the International Court,* pp. 1531 and 1532.

[248] *See LaGrand (Germany v United States of America), Judgment, I.C.J. Reports 2001,* p. 466, at pp. 498–506, paras. 92–109; and *Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 231, at p. 245, para. 59.

[249] In the *LaGrand* case (see previous footnote), the Court discussed the difference between paragraph 1 (referring to decisions) and paragraph 2 (referring to judgments) of Article 94 in the context of its discussion of Article 41 of the Statute. See *LaGrand* (previous footnote), pp. 505 and 506, paras. 108 and 109.

[250] *Polish Postal Service in Danzig*, Advisory Opinion No. 11, Series B, 16 May 1925, pp. 29 and 30.

Upper Silesia (Merits) case, in which the issue was whether the Permanent Court of International Justice could issue declaratory judgments, the Court explained that: "Article 59 … does not exclude purely declaratory judgments. The object of this article is simply to prevent legal principles accepted by the Court in a particular case *from being binding upon other States or in other disputes*."[251]

165. The same interpretation on the nature of Article 59 was confirmed in the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów*) case, in which it was held that "the object of Article 59 is simply to prevent legal principles accepted by the [Permanent Court of International Justice] in a particular case from being binding also upon other States or in other disputes."[252] It had been explained before that its previous judgment was declaratory and was intended "to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[253]

166. 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. Without expressly citing Article 59, the Court determined that it saw "no reason to depart from a construction which clearly flows from the previous judgments the *reasoning* of which it still regards as sound".[254]

167. Thus, already in the admittedly limited practice of the Permanent Court of International Justice, the tribunal adopted a narrow view of Article 59. It did so by limiting its effects to the specific decisions applicable to the specific parties. That approach did not preclude the use of statements of law constituting the reasons in support of the decision in relation to other parties in subsequent cases. Indeed, in many subsequent judgments of the International Court of Justice, which has resorted to Article 59 relatively more frequently both concerning contentious matters and in advisory proceedings, similar sentiments were expressed on both substantive and procedural issues – a trend that could be confirmed by the individual opinions of various judges – a point also noted by academic authorities at the time.[255]

168. In the *Temple of Preah Vihear (Preliminary Objections)* case, the Court, which has essentially followed the interpretation of the Permanent Court of International Justice, 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 *Ariel Incident of 27 July 1955* case between Israel and Bulgaria. The Court distinguished between the binding effect of its decision and the wider utility of the decision as 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.

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[251] *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment No. 7, Series A, 25 May 1925, p. 19 (emphasis added).

[252] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów*), Judgment No. 11, Series A, 16 December 1927, p. 21.

[253] *Ibid*., p. 20.

[254] *Readaptation of the Mavrommatis Jerusalem Concessions,* Judgment No. 10, Series A, 10 October 1927, p. 18 (emphasis added).

[255] See William Eric Beckett, "Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale", *Collected Courses of The Hague Academy of International Law*, vol. 39 (1932), pp. 140–142; and Shahabuddeen, *Precedent in the World Court*, p. 105.

> 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.
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> 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, 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.[256]

169. Similarly, in the *Northern Cameroons* case, the International Court of Justice explained that, were it to render judgment in that case, "[i]n accordance with Article 59 of the Statute, the judgment would not be binding on Nigeria, or on any other State, or on any organ of the United Nations".[257] Here, the Court reiterated its settled position on Article 59 in relation to other States. At the same time, it referred to United Nations organs as well. In the view of one commentator, the last part of that statement, which is obviously not mentioned in the Statute of the International Court of Justice, represented a judicial extension of Article 59.[258] Even if that argument is true, based on a textual reading of what had been said, it cannot be insignificant that the Court has not repeated that statement.

170. A different issue arose concerning Article 59 in the context of the *South West Africa* cases, regarding whether a judgment given on preliminary objections in the same matter would prejudge a question concerning the merits. In ruling on the issue of "preclusion", the International Court of Justice determined that it was unnecessary to address:

> whether a decision on a preliminary objection constitutes a *res judicata* in the proper sense of that term, – whether it ranks as a "decision" for the purposes of Article 59 of the Court's Statute, or as "final" within the meaning of Article 60. The essential point is that a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits, whether, or not it has in fact been dealt with in connection with the preliminary objection.[259]

It held, ultimately, that: "Any finding on the point of merits therefore, ranks simply as part of the motivation of the decision on the preliminary object, and not as the object of that decision. It cannot rank as a final decision on the point of merits involved."[260]

171. Chester Brown has described the position of the International Court of Justice in that case as "doubtful"[261] on the basis that such decisions, to the extent that they concern aspects touching on the merits in a previous judgment, must necessarily fall within the narrow scope of Article 59. It indeed later led to a rule change to give

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[256] *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).

[257] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 15, at p. 33.

[258] See Chester Brown, "Article 59 of the Statute of the International Court of Justice", in Andreas Zimmermann and others, eds., *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford, Oxford University Press, 2019), pp. 1561–1590.

[259] *South West Africa, Second Phase*, *Judgment, I.C.J. Reports 1966,* p. 6, at pp. 36 and 37, para. 59.

[260] *Ibid*.

[261] Brown, "Article 59 of the Statute of the International Court of Justice", p. 1573, para. 35.

flexibility for the judges to join a preliminary objection that is not exclusively preliminary in character to the merits under article 79*ter* of the Rules of Court.[262]

172. The International Court of Justice, in the *Case of the monetary gold*, was faced with a matter initiated by Italy against France, the United Kingdom and the United States. The challenge was that the actions of Albania, which was not a party to the proceedings, would be at the heart of the dispute. For that reason, following questioning by Italy of the Court's ability to exercise its jurisdiction, the judges determined that:

> In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.
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> It is also contended that any decision of the Court on the questions submitted by Italy in her Application will be binding only upon Italy and the three respondent States, and not upon Albania. It is true that, under Article 59 of the Statute, the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the Court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.
>
> The Court accordingly finds that, although Italy and the three respondent States have conferred jurisdiction upon the Court, it cannot exercise this jurisdiction to adjudicate on the first claim submitted by Italy.[263]

173. The position taken by the International Court of Justice in that case is often referred to as the *Monetary Gold* principle. In the application of the *Monetary Gold* principle, which has been invoked at other times to urge the Court to decline to exercise its jurisdiction because the interests of third States are implicated, the judges have in several cases, such as in the *Nauru* and *East Timor* cases, addressed the standard that is required for it to decline its jurisdiction by distinguishing those cases. In the former case, the Court pointed out that the absence of requests to intervene by New Zealand and the United Kingdom does not preclude it from adjudicating claims put to it so long as the "legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court …." It went on to conclude that "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the other two States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction."[264]

174. In the *Continental Shelf* case, between Libya and Malta, the International Court of Justice, in the context of a request by Italy to intervene in the matter, reiterated that it did not have jurisdiction to determine matters in disputes between States that have

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[262] *Ibid*. See also Rosenne, *The Law and Practice of the International Court*, pp. 1550–1560, for a discussion on the non-party intervener and Article 59.

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

[264] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at pp. 261 and 262, paras. 54 and 55.

not consented for it to do so. Since there had been a special agreement between Libya and Malta, concluded in May 1976, to bring the case to the Court, it could not determine the delimitation of the respective continental shelves for those States vis-à-vis any third State. That was because the future judgment would not "merely be limited in its effects by Article 59 of the Statute: it will be expressed, upon its face, to be without prejudice to the rights and titles of third States".[265]

175. Building on the preceding position, developed during the preliminary objections phase, the International Court of Justice, in its judgment on the merits, set out the logical conclusion that is to be derived from its position, in that its judgment will only be binding on the specific parties before it in the following terms:

> The decision of the Court will, by virtue of Article 59 of the Statute, have binding force between the Parties, but not against third States. If therefore the decision is to be stated in absolute terms, in the sense of permitting the delimitation of the areas of shelf which "appertain" to the Parties, as distinct from the areas to which one of the Parties has shown a better title than the other, but which might nevertheless prove to "appertain" to a third State if the Court had jurisdiction to enquire into the entitlement of that third State, the decision must be limited to a geographical area in which no such claims exist. It is true that the Parties have in effect invited the Court, notwithstanding the terms of their Special Agreement, not to limit its judgment to the area in which theirs are the sole competing claims; but the Court does not regard itself as free to do so, in view of the interests of Italy in the proceedings.[266]

176. Lastly, in this series of examples concerning interpretation of the International Court of Justice of Article 59 of its Statute, in the *Land and Maritime Boundary between Cameroon and Nigeria* case, the Court reaffirmed that its jurisdiction is founded on the consent of the parties:

> The Court cannot therefore decide upon legal rights of third States not parties to the proceedings. In the present case, there are States other than the parties to these proceedings whose rights might be affected, namely Equatorial Guinea and Sao Tome and Principe. Those rights cannot be determined by decision of the Court unless Equatorial Guinea and Sao Tome and Principe have become parties to the proceedings. Equatorial Guinea has indeed requested – and has been granted – permission to intervene, but as a non-party intervener only. Sao Tome and Principe has chosen not to intervene on any basis.[267]

177. The dispute before it then led the International Court of Justice to explain some limitations stemming from Article 59, which affects the scope of its jurisdiction, which is not displaced, although it must necessarily be exercised with the rights of the absent States being kept in mind:

> The Court considers that, in particular in the case of maritime delimitation where the maritime areas of several States are involved, the protection afforded by Article 59 of the Statute may not always be sufficient. In the present case, Article 59 may not sufficiently protect Equatorial Guinea or Sao Tome and Principe from the effects – even if only indirect – of a judgment affecting their legal rights. The jurisprudence cited by Cameroon does not prove otherwise.[268]

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[265] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, at pp. 26 and 27, para. 43.

[266] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985,* p. 13, at p. 25, para. 21.

[267] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at p. 421, para. 238.

[268] *Ibid*.

178. At the same time, with Nigeria having contested the jurisdiction of the International Court of Justice, in the preliminary objections, on the basis, *inter alia*, that the judgments given by the Court in the *Right of Passage over Indian Territory* case and other cases had no direct compelling effect in its own case with Cameroon as a function of Article 59, the Court's response was 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*."[269]

179. Here, in the latter statement, is a remarkable example that shows the complexity of Article 59 in the sense that it has been interpreted in such a way to separate what we could properly call the narrow legal effect and the broader legal effect of its decisions. As regards the narrow legal effect, the heart of the matter being that the operative aspects of a judgment apply only to the specific parties to the dispute in the specific case. It could not be otherwise in relation to both bindingness of the decision and its non-applicability to third parties. The broader legal effect is felt by all States based on the need for them to abide by the correct legal principles stated by the Court in its case law.

180. That preceding interpretation nonetheless leaves some room for what had long been established in the practice of the International Court of Justice, that is to say, the reasoning and conclusions of earlier cases remain important for other cases. So much so that the broader legal effect is so well established that it could not be denied. Or, if denied, would simply be out of step with the reality. Indeed, as can be seen from the italicized excerpt above, the burden of disposing of a particular legal finding is not even neutral. The presumption is that the Court will start from its prior correct statement of the law. The burden to displace that presumption is shifted to the party that seeks to displace the previously articulated legal conclusion of the Court. That, though perhaps sensitive, almost brings us back to the idea of respect for legal precedent without necessarily calling it such. Characterizing it as such is unnecessary, however, as that only gives rise to unnecessary controversies. However, the sum total of the impact of the provision is the same and offers legal security, consistency and predictability to States, while offering legitimacy to the Court. That the Court is then followed by other national and international courts has systemic implications for maintaining international law as a coherent legal system.

181. In that regard, as one prominent commentator has argued, Article 59 "is directed to emphasising that the juridical force of a judgment *en tant que jugement* is limited to defining the legal relations of the parties only". In other words, "Article 59 is concerned to ensure that a decision, *qua* decision, binds only the parties to the particular case; but this does not prevent the decision from being treated in a later case as 'a statement of what the Court regarded as the correct legal position'"[270] – as the Court explained in one of its cases.[271] Indeed, as another commentator concluded, "the reference to Article 59 simply means that the legal consequences of a decision are limited to the parties and that particular case".[272] That conclusion is also

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[269] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 275, at p. 292, para. 28 (emphasis added).

[270] Shahabuddeen, *Precedent in the World Court*, p. 63.

[271] See *Case concerning the Temple of Preah Vihear* (footnote 256 above).

[272] Eric De Brabandere, "The use of precedent and external case law by the International Court of Justice and the International Tribunal for the Law of the Sea", *Law and Practice of International Courts and Tribunals,* vol. 15 (1) (2016), p. 28. See also Jennings, "General course on principles of international law", p. 341; and Rosenne, *The Law and Practice of the International Court*, pp. 1552 and 1553.

confirmed by State practice (whether as exemplified in their pleadings before the Court or in diplomatic correspondence).[273]

182. In the *Bosnia Genocide* case, the International Court of Justice explained that there was even more nuance to the situation: "in respect of a particular judgment it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues; secondly any peripheral or subsidiary matters, or *obiter dicta*; and finally matters which have not been ruled upon at all".[274]

183. It is evident from the preceding analysis that the International Court of Justice has consistently upheld the interpretation of Article 59 as serving to "protect" the rights of third States. However, that view has not always been universally shared by all the judges. There is some jurisprudence, not without merit and perhaps best reflected by the dissenting opinion of Judge Jennings, that the bald statement contained in Article 59 is more or less "illusory":

> Whilst rejecting the Italian application to intervene the Court nevertheless, concedes that it "cannot wholly put aside the question of the legal interest of Italy as well as of other States of the Mediterranean region" (para. 41). And to cope with this problem, the Court first relies on Article 59 of the Statute. Thus the Court (para. 42) is of the opinion that, without the need to intervene, Italy's rights will be safeguarded by the effect of Article 59 of the Statute; indeed, in the oral presentation it was even suggested that a judgment of the Court is *res inter alios acta*, for any third-party State (see paragraph 26 of the Judgment). On this thesis there is much to be said, because Article 59 is an important provision of the Statute and it is important that it should be seen in a proper perspective.
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> The Court begins its discussion of Article 59 by citing the observation of the Permanent Court of International Justice (*Series A, No. 13*, p. 21) that "the object of Article 59 is simply to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes" (see paragraph 42 of the Judgment). *This is no more than to say that the principles of decision of a judgment are not binding in the sense that they might be in some common law systems through a more or less rigid system of binding precedents. But the slightest acquaintance with the jurisprudence of this Court shows that Article 59 does by no manner of means exclude the force of persuasive precedent. So the idea that Article 59 is protective of third States' interests in this sense at least is illusory.*
>
> Alternatively, Article 59 may be considered as applying, as it clearly does also, more particularly to the *dispositif* of a judgment; and it is true that the particular rights and obligations created by the *dispositif* are addressed, and only addressed, to the parties to the case, and in respect only of that case. And in that quite particular and technical sense, Italy will certainly be protected. This is an important protection, and it would be quite wrong to suggest otherwise.
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> Nevertheless it would be unrealistic even in consideration of strict legal principle, to suppose that the effects of a judgment are thus wholly confined by Article 59. Every State a member of the Court is under a general obligation to respect the judgments of the Court.[275]

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[273] See Shahabuddeen, *Precedent in the World Court*, p. 63.

[274] *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 p. 95, para. 126.

[275] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 265 above), Dissenting Opinion

184. As Mohamed Shahabuddeen, writing in an academic capacity, has pointed out, there are two important readings that one might take away from the first and second paragraphs of the dissenting opinion of Judge Jennings. First, is the view that Article 59 says no more than that the principles and decisions of the Court are not binding as they would be in common law legal systems. Second, and perhaps to be preferred, is the interpretation that the provision applies to the *dispositif* and not necessarily "to the question of *stare decisis*".[276] Notably, on either interpretation, the conclusion is that the practice in relation to Article 59 does not bar the Court from examining the principles and decisions that it has stated in the past to the extent that it continues to hold the view that they reflect an accurate statement of the law.

185. There are many practical reasons why the Court would first look to its own previous decisions when deciding cases. As Sir Hersch Lauterpacht convincingly argued some time ago:

> The Court follows its own decisions for the same reasons for which all courts – whether bound by the doctrine of precedent or not – do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.[277]

E. Link between Article 59 and Article 61 of the Statute of the International Court of Justice on finality of judgments (*res judicata*)

186. Generally, the importance of Article 59 of the Statute of the International Court of Justice is mainly that it indicates the value or effect of the Court's decisions on the merits of a case. The "binding force" element of the Court's decision can be distinguished from the idea of bringing finality to a matter. That raises the separate notion of *res judicata*, which is widely thought to reflect a general principle of law. A number of examples taken from the jurisprudence of the Permanent Court of International Justice and the International Court of Justice will be sufficient to make the point.

187. First, in the *Company of the Orinoco* case, a French-Venezuelan mixed claims commission observed as follows: "the general principle announced in numerous cases is that a right, question or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction, as a ground of recovery, [cannot] be disputed".[278]

188. That principle, which builds on a long-standing idea that is well established in domestic law about the need for finality of judgments, has long been endorsed in international law by many international courts and tribunals. For example, the Permanent Court of International Justice, in the *Polish Postal Service in Danzig* case, explained how the issue had been addressed in the *Pious Funds Case*.[279] However, it

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of Sir Robert Jennings, p. 148, at pp. 157 and 158, paras. 27 and 28 (emphasis added).

[276] Shahabuddeen, *Precedent in the World Court*, pp. 102 and 103.

[277] Sir Hersch Lauterpacht, *Development of International Law by the International Court* (Cambridge, United Kingdom, Cambridge University Press, 1982), p. 14.

[278] *Company General of the Orinoco Case*, Award of 31 July 1905, *United Nations Reports of International Arbitral Awards* (UNRIAA), vol. X, pp. 184–285, at p. 276.

[279] *Polish Postal Service in Danzig* (see footnote 250 above), p. 30.

is the view of Judge Anzilotti, in a dissenting opinion, indicating that the critical elements would concern *persona* (i.e. identity of the parties), *petitum* (relief sought) and *causa petendi* (cause of action), that has prevailed.[280]

189. In the *Barcelona Traction* case of 1964, the International Court of Justice explained that the term *res judicata* meant that the matter was "finally disposed of for good".[281] In the *Trail Smelter Arbitration* case, essentially the same formulation was adopted, with the tribunal finding that there was undoubtedly *res judicata* in that case since "the three traditional elements for identification: parties, object and cause" were the same.[282]

190. As Shabtai Rosenne has argued, in relation to the Court, although some commentators have suggested that there has been an inconsistency in the approach it has taken to the matter in different cases, it is "the combined effect of Articles 59, 60 and 61 of the Statute … [which] creates a *res judicata*".[283] That can be illustrated by the reasoning in the *Bosnia Genocide* case, in which the Court explained that:

> The fundamental character of [*res judicata*] appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal; Article 61 places close limits of time and substance on the ability of the parties to seek the revision of the judgment.[284]

191. In other words, according to the International Court of Justice, and as indicated earlier in the present report, it is the combined reading of Articles 59, 60 and 61 that carries the *res judicata* effect of finally addressing the matter for good. The preceding approach can be confirmed by reference to other cases. In the *Application of the Genocide Convention (Croatia v. Serbia)* case, for instance, the Court arguably amplified the almost sacrosanct nature of its reasoning which it would uphold in the following terms:

> While some of the facts and the legal issues dealt with in those cases [citing to one contentious case and one advisory matter] arise also in the present case, none of those decisions were given in proceedings between the two Parties to the present case (Croatia and Serbia), so that, as the Parties recognize, no question of *res judicata* arises (Article 59 of the Statute of the Court). To the extent *that the decisions contain findings of law*, the Court will treat them as it treats all previous decisions: that is to say that, while *those decisions are in no*

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[280] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* (see footnote 252 above), Dissenting Opinion of Judge Anzilotti, p. 23.

[281] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6, at p. 20.

[282] *Trail smelter case (United States, Canada)*, Award of 16 April 1938 and 11 March 1941, UNRIAA, vol. III, pp. 1905–1982, at p. 1952.

[283] Rosenne, *The Law and Practice of the International Court*, at pp. 1598.

[284] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 274 above), p. 90, para. 115.

> *way binding on the Court, it will not depart* from its *settled jurisprudence* unless it finds very particular reasons to do so.[285]

192. Indeed, despite the above construction of Article 59, the Court has, in some cases, accepted that a given judgment in a case may possess wider legal implications – a fact that has also been recognized in quite a few individual opinions (such as that of Judge Singh).[286] Four out of many possible examples, two from the Permanent Court of International Justice and two from the International Court of Justice, are enough to illustrate the point. First, starting with the Permanent Court of International Justice, in its *Factory at Chorzów* judgment, it relied upon its first judgment in the *S.S. "Wimbledon"* case by explaining that the "Court must … draw attention … to what it has already said in Judgment No. 1 to the effect that it neither can nor should contemplate the contingency of the judgment not being complied with at the expiration of the time fixed for compliance".[287]

193. Second, and similarly, in the *Minority Schools in Albania* case, the Permanent Court of International Justice referred back to its own observation "that in its Advisory Opinion of September 15th, 1923, concerning the question of the acquisition of Polish nationality (Opinion No. 7), the Court referred to the opinion which it had already expressed in Advisory Opinion No. 6 to the effect that 'an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible'".[288]

194. For its part, the International Court of Justice in the *Aegean Sea Continental Shelf* case, stated:

> Although under Article 59 of the Statute "the decision of the Court has no binding force except between the parties and in respect of that particular case", it is evident that any pronouncement of the Court as to the status of the [General Act for Pacific Settlement of International Disputes of 1928], whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey.[289]

195. In the *Aegean Sea Continental Shelf* case, the International Court of Justice essentially puts a judicial gloss on what is implicit in Article 63, paragraph 1, of its Statute. Essentially, under that Article, as discussed earlier, whenever the interpretation of a convention to which States other than those concerned in the case are parties is in question, then all such States should be notified and can exercise the right of intervention. The purpose of that provision, to give States a right to be heard on a particular treaty provision for example, is evidently to allow them to contribute to shaping the legal position of the Court on that question. It accepts the premise that such a ruling will carry broader implications for the non-parties in the case to the extent that an interpretation issued by the Court of that provision will likely be seen as authoritative on that point of law.

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[285] *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 p. 428, para. 53 (emphasis added).

[286] In his separate opinion, he observed that, despite the language of Article 59, the Court's views could carry implications for the relations between States, including those not before it. See *Aegean Sea Continental Shelf*, Separate Opinion of Vice-President Nagendra Singh (footnote 240 above), p. 47.

[287] *Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment No. 13, Series A, 13 September 1928, p. 63 (citing the *Case of the S.S. "Wimbledon"*, Judgment No. 1, Series A, 17 August 1923, p. 32).

[288] *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, Series A/B, p. 20.

[289] *Aegean Sea Continental Shelf* (see footnote 240 above), pp. 16 and 17, para. 39.

196. In other cases, such as the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the International Court of Justice dismissed the application of Italy as an intervener in the case on the basis, *inter alia*, that its rights would be safeguarded by Article 59. As already indicated, Judge Jennings dissented and pointed to several considerations that would undermine the cogency of that conclusion: to wit, that the effects of a judgment are not wholly confined by Article 59 since they could be based on principles and rules of international law and, in any event, States Members of the United Nations are obliged to respect the judicial pronouncements of the Court.

197. It is hard to dispute that position given the various pronouncements of the International Court of Justice, only some of which have been cited above. Indeed, how could it be otherwise? For instance, imagine that there is a dispute on the interpretation or application of the crime of genocide between two States both of which are contracting parties to the Convention on the Prevention and Punishment of the Crime of Genocide. State A thereafter decides to invoke article 9 of the Convention to take State B to the International Court of Justice over an alleged breach of article 2. The Court, in a ruling, interprets the disputed interpretation or application of the Convention that led to the litigation and issues a decision. That decision, *qua* decision, binds only States A and B, in accordance with Article 59 of the Statute of the International Court of Justice and the extensive practice of the Court discussed above.

198. However, even though States C and D or E, also parties to the same Convention, were not parties or participants in the dispute between States A and B before the International Court of Justice concerning the proper interpretation of article 2 of the Convention, it would be difficult to see how any of them could ignore the findings of the Court when determining the proper scope of their own obligations, reliant on the definition of genocide under the Convention, or in a later dispute concerning a similar legal issue. In other words, the rules or principles of law concerning genocide articulated by the Court in its decision in the case involving State A and State B, while technically non-binding, would then be the source of the judicial interpretation of article 2 (not found elsewhere); it would also have implications for the obligations of the other States parties to the Convention.

199. While the preceding example was a fictitious scenario, it was, in effect, the position of the International Court of Justice in the *Avena* case, in which the Court made clear in its judgment that, after having issued its judgment from the viewpoint of the general application of the Vienna Convention on Consular Relations,[290] aspects of article 36 of which were in dispute between the parties, it would not be open to others to offer an *a contrario* interpretation in respect of any of its findings in that judgment since the interpretation offered in relation to the nationals of Mexico would essentially apply to other foreign nationals finding themselves in similar situations in the United States.[291]

200. Put slightly differently, the foregoing examples speak to the distinction regarding "the force of the decision itself" and "the force of international law as authoritatively expressed in the decision".[292] It is a fine but important distinction that

[290] Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

[291] See *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004,* p. 12, at pp. 69 and 70, 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").

[292] Shahabuddeen, *Precedent in the World Court*, p. 107.

has long been drawn in the jurisprudence, dating back to the Permanent Court of International Justice, under which, as alluded to by Judge Zoričić in the *Interpretation of Peace Treaties* case in 1950, "it is quite true that no international court is bound by precedents. But there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so along as the principle retains its value."[293] In the final analysis, "seen from the point of view of the Court itself, the law as stated in a decision is regarded as part of international law; it thus applies to all States whether or not parties to the particular case. It is not then a question whether the decision *per se* applies as a binding precedent, but whether the law which it lays down is regarded as part of international law."[294]

F. Observations on the practice of the Permanent Court of International Justice and the International Court of Justice on precedent

201. Based on the above analysis, taking into account the case law of both the Permanent Court of International Justice and the International Court of Justice, it is without any doubt that the formal legal position in relation to the principal judicial organ of the United Nations is that its decisions are only binding on the parties and only in respect of their case. That, however, is not a statement of the rule concerning the absence of precedent before the Court. Indeed, it is a matter of some dispute that the position that the Court does not follow a system of precedents is a function of Article 59 or another provision of the Statute of the Court. The more compelling view, as has been shown in the present chapter, is that it is not. The fact is that, irrespective of the rule that there is no *stare decisis* before the International Court of Justice, the legal effects of decisions are not only constraining on the parties. Evidently, the effects are felt also by third parties, including States that are not necessarily involved directly with the litigation, especially in relation to any determination of the existence and content of treaties, custom or general principles of law. The Court refers to its own case law for reasons of consistency and predictability.[295]

202. At this stage, it might be useful to make a couple of additional observations concerning the practice of States and the International Court of Justice on the link between Article 38, paragraph 1 (*d*), and Article 59. First, irrespective of the purpose of the latter provision, which was included to qualify the former, it is clear that, under the Statute of both the Court and its predecessor, there is no doctrine of *stare decisis* in international law. However, as the practice of the Permanent Court of International Justice and the International Court of Justice has shown, there is no need to resort to such doctrines of binding force of precedent, which are more suitable for hierarchical systems at the national level. There is no need to get into the common law versus civil law debates. The Court, inspired by both, has developed its own system that has worked well in general.

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[293] *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, Dissenting Opinion by Judge Zoričić, p. 98, at p. 104.

[294] Shahabuddeen, *Precedent in the World Court*, p. 109.

[295] For commentary, see Gilbert Guillaume, "The use of precedent by international judges and arbitrators", *Journal of International Dispute Settlement*, vol. 2, No. 1 (2011), pp. 5–23, at p. 9. See also Armin von Bogdandy and Ingo Venzke, "The spell of precedents: lawmaking by international courts and tribunals", in Cesare P.R. Romano, Karen J. Alter and Yuval Shany, eds., *The Oxford Handbook of International Adjudication* (Oxford, Oxford University Press, 2014), pp. 503–522; and Adolfo Miaja De la Muela, "Mutación de jueces y continuidad jurisprudencial en el Tribunal Internacional de Justicia", *Revista Española de Derecho Internacional*, vol. 15, No. 1-2 (1962), pp. 11–34.

203. Second, despite the formal non-binding nature of precedent, the International Court of Justice looks at previous rulings not so much as binding precedents but rather for their persuasive and practical value in helping to resolve subsequent legal disputes, much in the same way as its predecessor did. That is possible because there is in practice an essential distinction between the narrow decision in relation to which Article 59 will apply, meaning that it only binds the parties in respect of their particular case, and the principles and rules of international law articulated in a decision that, in many cases, will be of a more general application. The former would be limited to the parties, but the latter need not be. That would be the case irrespective of the original source of the rule in a treaty, customary international law or general principle of law. The point is that, once found to be a correct statement of the law, then the conduct of other States that are parties to the relevant treaty or acting under customary international law or invoking a general principle of law would have to conform to that statement of the law until the rule is no longer seen as a correct interpretation of the law. A failure to comply with it could then constitute a breach of obligations owed to other States.

G. Approach to precedent of the International Tribunal for the Law of the Sea

204. Other international courts, charged with settling disputes between States, such as the International Tribunal for the Law of the Sea, may have a different statutory basis when compared with the International Court of Justice. But they, in their applicable statutes and jurisprudence, reflect a similar stance to the Court, essentially indicating that there is no formal rule of precedent for their decisions. In the present part of the report, the Special Rapporteur will analyse the practice of the International Tribunal for the Law of the Sea.

205. While the Special Rapporteur seriously considered examining the approach of inter-State arbitral bodies to the question of precedent and the practice of other international tribunals, such as the Dispute Settlement Body of the World Trade Organization,[296] and contrasting that to the approach of international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, which has unique features,[297] the Special Tribunal for Lebanon and, of course, the

[296] A thoughtful study of the question of precedent in the context of the World Trade Organization can be found in Niccolò Ridi, "Rule of precedent and rules on precedent", in Eric De Brabandere, ed., *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach* (Cambridge, United Kingdom, Cambridge University Press, 2021), pp. 354–400. The Special Rapporteur extends his gratitude to his academic colleague for helpfully offering and sharing the relevant case law of the World Trade Organization and arbitral tribunals with him.

[297] For example, article 20, paragraph 3, of the Statute of the Special Court for Sierra Leone required it "to be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda" and, in relation to it use of national law, to also "be guided by the decisions of the Supreme Court of Sierra Leone". However, in the subsequent case law of the Special Court for Sierra Leone, the Appeals Chamber determined that it had the discretion to make persuasive use of the decisions of those courts and others without being bound by them. For example, in Special Court of Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2003-14-08_PT, Decision on the prosecutor's motion for immediate protective measures for witnesses and victims and for non-public disclosure, 23 May 2004, para. 11, the Court held: "Without meaning to detract from the precedential or persuasive utility of decisions of the ICTR and the ICTY, 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. Such an approach would inhibit the evolutionary jurisprudential growth of the Special Court consistent with its own distinctive origins and features. On the contrary, the Special Court is empowered to develop its own jurisprudence having regard to some of the unique and different

International Criminal Court, for reasons related to reducing the length of the present report, he ultimately decided against such an analysis. That decision was based on the fact that (a) the members of the Commission already have access to that practice, as carefully catalogued in the second memorandum by the Secretariat; and (b) the Special Rapporteur can always return to the most relevant practice of those tribunals in future reports.

206. With that caveat aside, it seems timely to now examine the practice of the International Tribunal for the Law of the Sea. Article 293 of the United Nations Convention on the Law of the Sea, which addresses the "applicable law", confirms that the Tribunal is required to apply the Convention "and other rules of international law not incompatible" with it.[298] Interestingly, Article 38 of the Statute of the Tribunal on "applicable law" for the Seabed Disputes Chamber reads as follows: "In addition to provisions of article 293, the Chamber shall apply: (a) the rules, regulations and procedures of the Authority adopted in accordance with this Convention; and (b) the terms of contracts concerning activities in the area in matters relating to those contracts."

207. In addition articles 74, paragraph 1, and 83, paragraph 1, of the United Nations Convention on the Law of the Sea reads, in near identical provisions, addressing the delimitation of the exclusive economic zone and the continental shelf, respectively, as follows: "The delimitation of the [exclusive economic zone] [continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in *Article 38 of the Statute of the International Court of Justice*, in order to achieve an equitable solution" (emphasis added).

208. It is clear that a combined reading of the above provisions and article 293 of the United Nations Convention on the Law of the Sea addressing the "applicable law" confirms that the International Tribunal for the Law of the Sea is required both to apply Article 38 of the Statute of the International Court of Justice, essentially as the sources of law that it can rely upon, in addition to its ability to apply its Convention, "and other rules of international law not incompatible with it", thereby expressly importing into its legal framework both the framework of the Court and the general rules of international law. It is self-evident that the applicable law and the other rules of international law both directly and indirectly bring us back to those sources contained in subparagraphs (*a*) to (*c*) of Article 38, paragraph 1, of the Court's Statute and the subsidiary means mentioned in subparagraph (*d*).

209. The legal effect of the reference to Article 38 of the Statute of the International Court of Justice and the other rules of international law not incompatible with the United Nations Convention on the Law of the Sea thus extends to the International Tribunal for the Law of the Sea the provision on the sources of law contained in the Court's Statute, which is in any event also reflective of customary international law. Any doubts that may exist in that regard have been resolved, somewhat ironically in a judicial decision constituting a subsidiary means, when, in the context of the *Bay of Bengal* case, the Tribunal itself determined – both in relation to maritime delimitation specifically and its broader approach to all such matters – that: "Decisions of international courts and tribunals, referred to in article 38 of the Statute of the International Court of Justice, are also of particular importance in determining the

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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 ICTR and ICTY 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" (emphasis added).

[298] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3.

content of the law applicable to maritime delimitation under articles 74 and 83 of the Convention."[299]

210. The founding documents of the International Tribunal for the Law of the Sea also reflect an equivalent to Article 59 of the Statute of the International Court of Justice providing, interestingly compared with the International Court of Justice provision, for both finality and the binding force of decisions under which the "[t]he decision of the Tribunal is final and shall be complied with by all the parties to the dispute" under article 33, paragraph 1, of the Statute of the Tribunal and "[t]he decision shall have no binding force except between the parties in respect of that particular dispute" pursuant to article 33, paragraph 2, thereof. Much like the regime of the International Court of Justice, for intervening States, to the extent that their request to intervene is granted, "the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party"[300] to the extent that it concerns matters in respect of which that State party intervened. Similarly, again like the International Court of Justice, the Statute recognizes the potential systemic impact of decisions when matters concerning the interpretation of international agreements are concerned. It requires that, in such circumstances, all States parties would be invited to participate in the proceedings and those that decide to do so will also be bound by the decision of the Tribunal.[301]

211. From the above, and as can be seen also from the second memorandum by the Secretariat, in relation to arbitral tribunals, there is no formal rule obligating the use of prior judicial decisions by the International Tribunal for the Law of the Sea or other courts as binding precedents when resolving disputes in the Tribunal. Conversely, there is no rule that prohibits the Tribunal from using the decisions of other bodies to the extent that it finds them persuasive. However, in practice, essentially for reasons of legal security, the Tribunal also examines both its own prior decisions and those of the International Court of Justice, especially given the partial overlap in their jurisdiction.

212. From a broader perspective, given the above, it is unsurprising that academics, such as Eric De Brabandere, have identified decisions of the International Tribunal for the Law of the Sea that rely on decisions of the Permanent Court of International Justice and the International Court of Justice in both procedural and substantive matters, especially on questions of maritime delimitation.[302] The principal judicial organ of the United Nations has an extensive body of jurisprudence on both procedural matters and, perhaps of even more significance for the Tribunal, in maritime boundary delimitation. In that context, the Tribunal consistently refers to the International Court of Justice for the persuasiveness of its findings in a manner that seems to go beyond comity. That reflects the similarity of their procedures and the questions that come before the Tribunal to issues previously addressed by the International Court of Justice and its predecessor.

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[299] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, Reports of Judgments, Advisory Opinions and Orders (ITLOS Reports) 2012*, p. 4, at p. 56, para. 184.

[300] Statute of the International Tribunal for the Law of the Sea, art. 31, para. 3.

[301] *Ibid*., art. 32, para. 3.

[302] Eric De Brabandere, "The use of precedent and external case law by the International Court of Justice and the International Tribunal for the Law of the Sea", *Law and Practice of International Courts and Tribunals*, vol. 15 (2016), pp. 24–55.

1. Decisions of the International Tribunal for the Law of the Sea on procedural matters that draw on its own prior decisions and those of the International Court of Justice

213. In the *Southern Bluefin Tuna* case, New Zealand and Australia initiated arbitral proceedings against Japan in 1999, claiming that Japan violated its obligations under the United Nations Convention on the Law of the Sea by conducting unilateral experimental fishing for southern bluefin tuna in 1998 and 1999. In the course of its opinion, the International Tribunal for the Law of the Sea adopted and applied the definition of a "dispute" by the Permanent Court of International Justice and the International Court of Justice in the following terms without any explanation stating: "*Considering* that, *in the view of the Tribunal,* a dispute is a 'disagreement on a point of law or fact, a conflict of legal views or of interests' (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11), and '[i]t must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328)".[303] It went on to prescribe specific provisional measures pending the decision of the arbitral tribunal on the dispute.

214. Similarly, in the case concerning the *Grand Prince*, a fishing vessel flying the flag of Belize, was seized in 2000 for unauthorized fishing in the exclusive economic zone of the Kerguelen Islands, under French jurisdiction. The vessel was escorted to Reunion and a violation report was issued against the Master for fishing without authorization and failing to declare fish onboard. The court of first instance at Saint-Paul confirmed the seizure and set a bond, but the applicant argued against it, leading to a jurisdictional dispute. The Tribunal concluded that the evidence failed to establish Belize as the flag State. It therefore lacked jurisdiction to hear the case. In making that determination, the Tribunal very interestingly invoked "the *settled jurisprudence in international adjudication*", under which "a tribunal must at all times be satisfied that it has jurisdiction to entertain the case submitted to it. For this purpose, it has the power to examine *proprio motu* the basis of its jurisdiction".[304]

215. The International Tribunal for the Law of the Sea went on to cite two authorities for that legal proposition. First, it recalled its own observation in the *M/V "Saiga" (No. 2)* case that, "even where there is no disagreement between the parties regarding the jurisdiction of the Tribunal, 'the Tribunal must satisfy itself that it has jurisdiction to deal with the case as submitted' (Judgment of 1 July 1999, paragraph 40)".[305] Second, it recalled that: "Likewise, the International Court of Justice has observed: 'The Court must however always be satisfied that it has jurisdiction, and must if necessary go into the matter *proprio motu*.' (*Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46 at p. 52)." The Tribunal went on to draw the conclusion that, as a consequence, it possessed "the right to deal with all aspects of the question of jurisdiction, whether or not they have been expressly raised by the parties".[306]

216. A third example can be found in the *Land Reclamation in and around the Straits of Johor* case,[307] which concerned land reclamation by Singapore in and around the

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[303] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at p. 293, para. 44 (emphasis added).

[304] "*Grand Prince" (Belize v. France), Prompt Release, Judgment, ITLOS Reports 2001*, p. 17, at p. 41, para. 77 (emphasis added).

[305] *Ibid*., para. 78.

[306] *Ibid*., para. 79.

[307] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at p. 20, para. 52 (citing *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 303, para. 56).

Straits of Johor and was instituted by Malaysia on 4 July 2003 pursuant to article 287 of the United Nations Convention on the Law of the Sea and article 1 of annex VII thereto. Malaysia alleged that the land reclamation works infringed its rights in the area. An order for provisional measures was issued by the International Tribunal for the Law of the Sea. At the parties' joint request, the Tribunal rendered an award in the terms set out in a Settlement Agreement, which was entered into by the parties on 26 April, 2005. It did so by attaching the text of the Settlement Agreement as an annex to the award. The Tribunal referred to both the Permanent Court of International Justice and the International Court of Justice in the following manner in paragraph 52: "*Considering that*, as stated by the International Court of Justice, '[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court.'"[308]

217. A fourth and final example concerns the approach of the International Tribunal for the Law of the Sea to the question of jurisdiction. Interestingly, the position of the Tribunal on both contentious and advisory matters draws heavily from the jurisprudence of the International Court of Justice. For instance, in the case concerning the *M/V "Louisa"*, it had to address whether it had jurisdiction by assessing if there was a link between the applicant's factual claims and the relevant provisions of the United Nations Convention on the Law of the Sea to determine whether such provisions could sustain the claims. In resolving the matter, the Tribunal referred to the case law of the International Court of Justice, specifically, the *Oil Platforms* judgment.[309] However, it went further to invoke decisions of the International Court of Justice when determining that, in situations in which there is a dispute concerning the existence of jurisdiction, "jurisdiction exists only to the extent to which the substance of the declarations [under article 287 of the United Nations Convention on the Law of the Sea] of the two parties to a dispute coincides".[310] Going even further, the Tribunal (almost like the International Court of Justice has done in a long line of cases) implied that "special circumstances" needed to exist for it to depart from jurisprudence.[311]

218. The citation pattern can be found also in relation to advisory, not just contentious, matters. In the Responsibilities and obligations of States with respect to activities in the Area and Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission cases,[312] where it first had to determine whether it had jurisdiction to issue the requested advisory opinion, the Seabed Disputes

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[308] *Ibid*., para. 52

[309] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, at p. 34, para. 99 (citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at p. 810, para. 16).

[310] *Ibid.*, para. 81 (citing the *Case of Certain Norwegian Loans, Judgment of July 6th, 1957: I.C.J. Reports 1957*, p. 9, at p. 23). See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at p. 39, para. 88.

[311] *M/V "Louisa"* (see footnote 309 above), para. 147. For further contentious proceedings before the Tribunal that have referred to the decisions of the International Court of Justice, see *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010, ITLOS Reports 2008–2010,* p. 58, at p. 68, para. 64 (in terms of the obligation to exchange views (article 283 of the United Nations Convention on the Law of the Sea)); and *"Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation), Order of 22 November 2013, ITLOS Reports 2013*, p. 230, at pp. 242 and 243, paras. 48, 51 and 52 (in terms of non-appearance).

[312] *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10; and *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4.

Chamber examined the provisions of the United Nations Convention on the Law of the Sea. The Chamber noted that: "The questions put to [it] concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice … has stated that 'questions "framed in terms of law and rais[ing] problems of international law … are by their very nature susceptible of a reply based on law"'."[313]

219. Similarly, in the *Sub-Regional Fisheries Commission* advisory opinion, where the Tribunal was asked by some States parties to decline to exercise its advisory jurisdiction, it relied upon various rulings by the International Court of Justice in the course of interpreting article 138 of the Rules of the Tribunal. It observed that, while it had discretion to decline to provide an advisory opinion, even if the requirements of the relevant article were met, it would not lightly do so. Here, reference was made to decisions of the International Court of Justice for the proposition it put thus: "It is well settled that a request for an advisory opinion should not in principle be refused except for 'compelling reasons'."[314]

220. Similarly, as regards the argument by some States that the questions put before it were abstract, the Tribunal responded – again on the basis of the case law of the International Court of Justice – that: "It is *also well settled* that an advisory opinion may be given 'on any legal question, abstract or otherwise'."[315]

2. Decisions on substantive matters taken by the International Tribunal for the Law of the Sea that rely on the case law of the International Court of Justice

221. As argued above, despite the absence of a formal system of binding precedent, the International Tribunal for the Law of the Sea has relied on both its own prior decisions and those of the International Court of Justice when addressing issues of substance. Just a few out of many possible examples should be sufficient to make the point.[316]

222. For instance, it has done so to determine the applicability of considerations of humanity in the context of the law of the sea in the "*Enrica Lexie*" case,[317] to uphold prior interpretations of certain provisions of the United Nations Convention on the Law of the Sea regarding the conservation and management of living resources in the

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[313] The passage appears in both *Responsibilities and obligations of States with respect to activities in the Area* (see previous footnote), para. 39; and *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (see previous footnote), para. 65. In both cases, the Chamber cited *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, *I.C.J. Reports 2010*, p. 403, at p. 414 and 415, para. 25; and *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 18, para. 15.

[314] *Sub-Regional Fisheries Commission* (see footnote 312 above), para. 71, referring to *Legality of the Threat or Use of Nuclear Weapons* (see footnote 149 above), para. 14.

[315] *Ibid*., para. 72 (emphasis added), referring to *Admission of a State to Membership in the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948*, p. 57, at p. 61.

[316] For additional examples in which the Tribunal relied upon the decisions of the International Court of Justice, see, on the matter of State responsibility: *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999,* p. 10, at pp. 56 and 65, paras. 133 and 170, respectively; and *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 312 above), p. 62, para. 194. On the interpretation of treaties, see *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 312 above), p. 29, paras. 59 and 60. On customary international law, see *Responsibilities and Obligations of States* (see footnote 312 above), p. 28, para. 57. On alleged rights (plausibility), see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015,* p. 146, at pp. 158 and 159, paras. 57 and 63, respectively.

[317] *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 182, at p. 204, para. 133 (citing *M/V "SAIGA" (No. 2)* (see previous footnote), para. 155).

exclusive economic zone under article 62, paragraph 4,[318] to refer to the precautionary approach, as articulated by the International Court of Justice in *Pulp Mills*,[319] and to confirm the customary international law status of the rules of interpretation in the Vienna Convention on the Law of Treaties, which it had only implicitly adopted,[320] but which had already been confirmed by the International Court of Justice and other international courts and tribunals. Indeed, to complete the series of examples, in the *Bay of Bengal* case, in situating its acceptance of the jurisprudence of other courts and tribunals, such as the International Court of Justice, and arbitral bodies that it subsequently relied upon, the Tribunal recalled that: "International courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end."[321]

H. Observations on the practice of the International Tribunal for the Law of the Sea regarding precedent

223. The analysis above confirms that the International Tribunal for the Law of the Sea, much like the International Court of Justice, has no system of binding precedent. However, it has developed a practice whereby it will routinely rely on the decisions of the Permanent Court of International Justice and the International Court of Justice, as well as other courts and tribunals. As a newer court, citing the established case law of those Courts contributes to its ability to solve legal problems and helps to boost its legitimacy. At this stage, at least two more observations need to be made.

224. First, given that it is a relatively new tribunal, specialized in issues relating to the law of the sea, the International Tribunal for the Law of the Sea has a much more limited body of case law. That said, from that case law, involving both contentious matters and a handful of advisory opinions, two broad patterns seem discernible. The first pattern reflects a practice whereby the Tribunal, much like the International Court of Justice, will cite its own case law even though it is not formally required to do so. That pattern has developed especially in cases concerning the prompt release of vessels. There are several examples of this and, while only some of them were used as illustrations, reference to additional ones can be found in the second memorandum by the Secretariat.

225. The second broad pattern concerns the wide consultation, and use, by the International Tribunal for the Law of the Sea of decisions of other courts and tribunals without treating them as binding legal precedents. A wide range of decisions and sources of legal arguments have been referred to in that regard, ranging from those by arbitral tribunals to a number of national court decisions to the work of the Commission. The predominant source of persuasive subsidiary means, especially early on, comes from the International Court of Justice. That makes sense given the measure of jurisdictional overlap. In many instances, the judicial decisions and materials of other courts are being used, without express reference to their precedential value or the rationale for following that practice. On the other hand, in addition to situating itself within the wider network of international courts upholding the application of international law and building up its own legitimacy, it should be

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[318] *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at pp. 67 and 68, paras. 212 and 213.

[319] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment, I.C.J. Reports 2010*, p. 14, at pp. 55, 56 and 71, paras. 101 and 164.

[320] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 312 above), para. 57.

[321] *Delimitation of the maritime boundary in the Bay of Bengal* (see footnote 299 above), para. 226.

self-evident that legal security and stability, as well as the legitimate expectations of States, are better fulfilled by ensuring a measure of consistency between the decisions of the Tribunal and those of other international courts and tribunals.

I. Proposed draft conclusions

226. On the basis of the above analysis, which has demonstrated how two international tribunals both formally and informally approach the doctrine of binding precedent, the Special Rapporteur proposes the following draft conclusions:

Draft conclusion 7
Absence of a rule of precedent in international law

International courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents.

Draft conclusion 8
Persuasive value of decisions of other courts or tribunals

International courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, may follow their own prior decisions and those of other international courts or tribunals on points of law where those decisions address analogous factual and legal issues and are found persuasive for resolution of the issue at hand.

V. Future programme of work on the topic

227. As indicated in the first report, and subsequently supported by the Commission, in the third report, to be submitted in 2025, the Special Rapporteur will analyse teachings and other subsidiary means. In the report, the Special Rapporteur will focus on the role played by the works of both private and public (or State-empowered) bodies, as well as regional and other codification bodies, as subsidiary means in the determination of the rules of international law.

228. That said, given the 2023 debate both within the Commission and the Sixth Committee, as well as the decision to limit the present report to discrete issues regarding judicial decisions, the Special Rapporteur considers that there are additional issues concerning both judicial and other decisions, and possibly other aspects of the topic, that could merit further examination in future reports. Those aspects were flagged earlier in the present report. Thus, depending on the progress made during the seventy-fifth session of the Commission, including the outcome of the plenary debate and the work of the Drafting Committee, the Special Rapporteur may consider proposing adjustments to the tentative programme of work. Any such adjustments, including the likely further elaboration of aspects of judicial decisions in the next or future reports, will be duly shared with the Commission and the Sixth Committee.

Annex I

Draft conclusions provisionally adopted by the Commission during its seventy-fourth session

Conclusion 1
Scope

The present draft conclusions concern the use of subsidiary means for the determination of rules of international law.

Conclusion 2
Categories of subsidiary means for the determination of rules of international law

Subsidiary means for the determination of rules of international law include:

(a) decisions of courts and tribunals;

(b) teachings;

(c) any other means generally used to assist in determining rules of international law.

Conclusion 3
General criteria for the assessment of subsidiary means for the determination of rules of international law

When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*:

(a) their degree of representativeness;

(b) the quality of the reasoning;

(c) the expertise of those involved;

(d) the level of agreement among those involved;

(e) the reception by States and other entities;

(f) where applicable, the mandate conferred on the body.

Annex II

Draft conclusions provisionally adopted by the Drafting Committee during the seventy-fourth session of the Commission

Draft 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.

Draft 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.

Annex III

Draft conclusions proposed in the present report

Draft conclusion 6
Nature and function of subsidiary means

(a) Subsidiary means are auxiliary in nature vis-à-vis the sources of international law found in treaties, customary international law and general principles of law.

(b) Subsidiary means are mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law.

Draft conclusion 7
Absence of a rule of precedent in international law

International courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents.

Draft conclusion 8
Persuasive value of decisions of courts and tribunals

International courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, may follow their own prior decisions and those of other international courts or tribunals on points of law where those decisions address analogous factual and legal issues and are found persuasive for resolution of the issue at hand.