United Nations A/CN.4/760*

General Assembly

Distr.: General
13 February 2023

Original: English

International Law Commission
Seventy-fourth session
Geneva, 24 April–2 June and 3 July–4 August 2023

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

By Charles Chernor Jalloh, Special Rapporteur**

* Second reissue for technical reasons (16 May 2023).

** The Special Rapporteur is grateful to Florida International University College of Law, in particular Dean Antony Page, for supporting the symposium on "The Current and Future Work of the International Law Commission" held in Miami, USA on 4-5 November 2022, where he presented early draft chapters of his first report. He thanks all the discussants and participants in that symposium for their valuable insights. He is grateful to three academic colleagues for their valuable assistance with research on some of the issues covered in this report: Eirik Bjorge, Sondre Torp Helmersen and Niccolò Ridi. Gratitude is also owed to Michael Wood, Marcelo Vázquez-Bermúdez and Dire Tladi, the ILC special rapporteurs on the related topics, for reading his first draft of the current report and making useful suggestions. Clea Strydom provided superb research assistance, while Jennifer Croslow, Lisa Ndyulo, Lauryn Reed, Ashira Vantrees, Adam Weiss and Sidney Young assembled research and assisted with footnotes. He thanks them all. Last but not least, he is grateful to the Codification Division of the Office of Legal Affairs of the United Nations, especially the subsidiary means team, Huw Llewellyn, Arnold Pronto, Paola Patarroyo and Raissa Urquiza for their hard work preparing the February 2023 Secretariat memorandum on this topic.

23-02596* (E) 160523

Contents

I
Introduction

A. Inclusion of the topic in the International Law Commission's programme of work

1. During its seventy-second session (2021), the International Law Commission decided to include the topic "Subsidiary means for the determination of rules of international law" in its long-term programme of work.[1] In approving the syllabus[2] for the topic, the Commission was guided by the criteria for the selection of new topics agreed at its fiftieth session (1998), namely, that: (a) the topic should reflect the needs of States; (b) the topic should be at a sufficiently advanced stage in terms of State practice; and (c) the topic should be concrete and feasible.[3] The Commission, which has historically devoted significant time to clarifying the various sources of law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, concluded that consideration of the subsidiary means for the determination of rules of international law "would constitute a useful contribution to the progressive development of international law and its codification".[4]

2. The General Assembly, during its seventy-sixth session (2021), adopted resolution 76/111 in which it *took note* of the inclusion of the topic on the Commission's long-term programme of work.[5] Consistent with its practice, in the same resolution, the General Assembly also called upon the Commission to take into consideration the comments, concerns and observations expressed by Governments during the debate in the Sixth Committee.[6]

3. At its seventy-third session (2022), taking into account the ripeness of the topic of subsidiary means, the generally positive response to the topic from commenting States and the availability of space on the work programme due to the completion of several of its topics, the Commission decided to place the topic "subsidiary means for the determination of rules of international law" on its *current* programme of work.[7] It appointed Mr. Charles Chernor Jalloh as the Special Rapporteur for the topic.[8]

4. In the same session, on the recommendation of the Special Rapporteur, the Commission requested information from States, international organizations and others on their practice concerning the use of subsidiary means within the meaning of Article 38, paragraph 1 (d), of the ICJ Statute.[9] This could include such information as may be discerned from the decisions of national courts, legislation and any other relevant practice at the domestic level drawing upon judicial decisions and the teachings of the most highly qualified publicists of the various nations in the process of determining the rules of international law. The information could also encompass practice on the subsidiary means in relation to their interpretation of treaties, custom and general principles of law as well as in statements made in international

[1] Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10 (A/76/10), chap. X, sect. B, para. 302, and annex.
[2] Ibid., annex.
[3] Ibid., para. 302.
[4] Ibid.
[5] General Assembly resolution 76/111 of 9 December 2021, para. 7.
[6] Ibid.
[7] Provisional summary record of the 3172nd meeting, p.8.
[8] Ibid.
[9] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), chap. III, sect. C, para. 29.

organizations and other forums, including pleadings before international courts and tribunals.

5. The Commission also further requested the Secretariat to prepare a memorandum on the present topic in two parts. In the first part, a memorandum that would identify elements of the previous work of the Commission, from 1947– to the present, that could be particularly relevant to the topic.[10] This was to be submitted in time for the preparation of the first report of the Special Rapporteur to be debated at the seventy-fourth (2023) session. In the second part, the Commission, taking into account the capacity constraints of the Secretariat, also requested a memorandum surveying the case law of international courts and tribunals and other bodies which could be particularly relevant to the topic for submission before the next session of the Commission (the seventy-fifth session, in 2024).[11]

6. During the Sixth Committee debate, in its seventy-seventh (2022) session, the participating States generally supported the study of subsidiary means for the determination of rules of international law and welcomed its addition to the current programme of work.[12] Consequently, in its resolution 77/103, the General Assembly took note of the inclusion of the topic in the current work programme.[13] It also drew to the attention of Governments the importance of the Commission having their views on the topics on its agenda and the specific issues identified in chapter III of the 2022 report of the Commission, including on "subsidiary means for the determination of rules of international law."[14]

7. The Special Rapporteur would welcome, consistent with the Commission's request, any information from States concerning their practice in relation to subsidiary means for the determination of rules of international law. Such information, whether within or outside the initial deadline suggested for submissions, would constitute useful material for his future reports and the Commission's work on the topic. In this regard, the Special Rapporteur notes the submissions of the United States of America[15] and the Republic of Sierra Leone. Both States provided useful information on aspects of their practice concerning the use of subsidiary means for the determination of rules of international law within their national courts. Their respective submissions have been taken into account. The Special Rapporteur is grateful to the United States and Sierra Leone delegations for their submissions and would welcome additional information that may be submitted by other States. Any such information, especially when representative of the different geographical regions and legal systems of the world, would form a vital part of the important dialogue

---

[10] Ibid., chap. X, sect. B, para. 245.

[11] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/77/10), chap. X, sect. B, para. 245.

[12] See state comments by France (24 Oct); Australia (25 Oct.); Nigeria (on behalf of Africa Group) (25 Oct.); Austria (25 Oct.); Brazil (25 Oct.); Czech Republic (25 Oct.); India (25 Oct.); Jordan (25 Oct.); Malaysia (25 Oct.) Norway (on behalf of the Nordic Countries) (25 Oct.); Philippines (25 Oct.); Romania (25 Oct.); Slovakia (25 Oct.); Armenia (26 Oct); Estonia (26 Oct.) Portugal (26 Oct.); Sierra Leone (26 Oct.); South Africa (26 Oct.); Thailand (26 Oct.); United Kingdom of Great Britain and Northern Ireland (26 Oct.); Lebanon (27 Oct.); Uganda (27 Oct.) (Available on the website of the Sixth Committee in the language of submission only). See the Topical Summary of the debate, prepared by the Secretariat and available in all official languages: Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-seventh session, prepared by the Secretariat, A/CN.4/755.

[13] General Assembly resolution A/77/103, 7 December 2022, para. 7.

[14] Ibid., at para. 5.

[15] See Submission from the United States to the International Law 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", 12 January 2023.

between the Commission and States on this topic and will also be duly taken into account in future reports.

B. Purpose and structure of the present report

8. This first report is introductory. It seeks to accomplish two main objectives. First, building on the syllabus for the topic, it will attempt to offer a basic conceptual foundation for the work of the Commission on "subsidiary means for the determination of rules of international law" by setting out the Special Rapporteur's initial views of the topic. Following the discussion of key issues that are raised by the topic, on the basis of a review of the most relevant practice and the literature, the report will propose a possible scope for the Commission's work on the topic. Second, taking into account the coincidence of the start of the work on the present topic during the seventy-fourth session, in 2023, and the beginning of a new quinquennium with significant turnover in the composition of the Commission, the present report should serve as a strong basis to obtain the views of the members on their approach towards the topic.

9. That said, a word of caution seems warranted at this early stage. Since the present report is introductory in nature, developing some of the main elements in the approved syllabus for the topic as well as the issues arising from State practice and the primary and secondary legal literature, both the conceptual issues and the general approach of the Special Rapporteur are tentative and subject to change. They will necessarily need to be flexible to accommodate the needs of the topic as the work progresses.

10. In terms of structure, the present report is divided into 10 chapters, followed by an annex. The current part, that is, chapter I, is general in nature. It discusses the addition of the topic to the *long-term* and *current* programme of work of the Commission as well as the purpose and organization of the present report.

11. Although the generally positive views of the commenting States on the topic are already featured in the 2021[16] and 2022[17] topical summaries prepared by the Secretariat of the Sixth Committee, consistent with Commission practice, chapter II of the present report will also analyse the main views of States on the topic during the General Assembly debate in the seventy-sixth session (2021). The comments by States during the General Assembly's seventy-seventh session (2022) largely mirror the initial comments from the year before. For that reason, this chapter largely focuses on the 2021 debate.

12. Chapter III will set out in a preliminary way, taking into account the approved syllabus for the topic, the potential scope of the topic. The issues identified in the scope are the aspects which, in the initial assessment of the Special Rapporteur, could be addressed in the Commission's work on the present topic. The suggestions of issues in the present report are without prejudice to the consideration of additional issues. As regards the final outcome, consistent with the decision taken on the matter in 2021 and the Commission's recent practice on sources-related issues,[18] the appropriate form of output is draft conclusions with commentaries. There is, as of writing, no single definition of draft conclusions in the practice of the Commission. Consequently, for reasons both of clarity and of transparency, a working definition is

[16] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-sixth session, prepared by the Secretariat, A/CN.4/746, para. 115.

[17] Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-seventh session, prepared by the Secretariat, A/CN.4/755.

[18] United Nations, International Law Commission, "Methods of work" at https://legal.un.org/ilc/methods.shtml (visited 12 February 2023).

offered by the Special Rapporteur as a potential basis of understanding "draft conclusions" – at least for the purposes of this topic.

13. Chapter IV addresses issues of general methodology. It suggests that the Commission should follow its by now settled approach for its studies, focusing on the practice of States and, as appropriate, that of international organizations and others. Nonetheless, the specificities of this topic should always be borne in mind. In particular, by its nature and perhaps more so than many of its other recent topics, the present study requires the Commission to pay special attention to – and to give special weight to – the decisions and practices of judicial and quasi-judicial bodies, whether international, regional or national, and to the works of scholars and legal expert bodies. The responses of States and others to such subsidiary means would be of particular interest in providing effective guidance for the Commission in its further work on the topic.

14. Chapter V surveys key elements of the previous work of the Commission on the subsidiary means for the determination of rules of international law. The Special Rapporteur is grateful to the Secretariat for its timely submission of its memorandum concerning the practice of the Commission on subsidiary means, as it provided a sound basis for the preparation of this chapter. The memorandum confirms that the Commission has, over the past several decades, routinely referenced decisions of courts and tribunals and the teachings of publicists of the various nations in almost all the topics it has completed, even if not all such uses fall necessarily within the scope of Article 38, paragraph 1 (d), of the ICJ Statute. The memorandum prepared by the Secretariat, which should be read together with this chapter for a fuller picture, should be an important resource for the members of the Commission and the delegates to the Sixth Committee as they further engage with this topic. It will also likely be a key point of reference for other jurists, including practitioners and legal scholars, as well as anyone who may have reason to address the substance of subsidiary means for the determination of rules of international law.

15. Chapter VI is more theoretical. It seeks to conceptually situate subsidiary means within the wider context of sources discourse by explaining why sources hold a distinctive place in international law compared to municipal legal systems. It also addresses key terminology, including provision of a basic definition of "sources", the distinction frequently drawn in legal literature between "formal" and "material" sources, and the question of hierarchy of sources as well as the distinction between "sources of law" and "sources of obligations." A number of the issues introduced in this chapter will be addressed in later parts of the current report but, in the main, will be subject to further analysis in future reports on this topic.

16. Without purporting to be exhaustive, chapter VII examines the origins and elements of subsidiary means. It suggests that there are two foundational blocks or prongs upon which Article 38, subparagraph 1 (d), of the ICJ Statute rest, namely, "judicial decisions" and the "teachings of the most highly qualified publicists of the various nations." This part of the report examines in detail the drafting history of this provision, which is obviously central to this project, with a view to identifying the core debate and the common ground among the drafters of the provision about a century ago on the appropriate place of subsidiary means in the determination of rules of law.

17. Chapter VIII then turns to the ordinary meaning of the most essential aspects of Article 38, paragraph 1. In this regard, we first analyse the *chapeau* of paragraph 1 of Article 38, which addresses the function of the Court to decide, in accordance with international law, the disputes submitted to it. Thereafter, we turn to subparagraph 1 (d) with a view to distilling the ordinary meaning of its key terms in relation to 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.

18. Chapter IX of the report then considers whether, taking into account the developments in State practice and in the practice of international courts and tribunals, there could be additional subsidiary means implicit in Article 38 of the ICJ Statute that might merit further examination by the Commission. For example, the question frequently arises in the literature, including in introductory international law textbooks, whether practices such as unilateral acts of States and resolutions or decisions of international organizations may be considered as sources of obligations which may be evidenced in the subsidiary means for the determination of rules of international law. The Special Rapporteur transparently discusses those two issues to provide some context, in order to elicit comments by members of the Commission on the propriety of addressing those matters. The views expressed will, of course, be taken into account in future reports.

19. Chapter X of the report concludes and proposes a tentative future programme of work for the topic. The Special Rapporteur invites views on the proposed workplan, which like the other aspects of the topic highlighted above, remains subject to change.

20. The annex reproduces, for the convenience of members, the five draft conclusions that the Special Rapporteur proposes given the analysis contained in this first report. He notes, in passing, his intention to fully adhere to the traditional working methods of the Commission in this topic. Thus, it is hoped that the Commission, as per its current practice, would, following the usual plenary debate during the first half-session in 2023, transmit the proposed draft conclusions to the Drafting Committee. It is further hoped that consideration of the proposed draft conclusions will be completed during the first half-session and reported back to the plenary in time for provisional adoption by the Commission in the second half-session. The provisional adoption of the proposed draft conclusions by the end of the first half-session in June 2023 should enable the Special Rapporteur’s preparation of commentaries during the intersessional period and, with the cooperation of the Secretariat, the translation of those commentaries into the six official languages of the United Nations by the usual submission date of the Commission’s report to the General Assembly in September 2023. His ultimate goal is to provide States with the opportunity to offer their important perspectives on the topic, accompanied by the basis for the draft conclusions, from the earliest stages of the Commission’s consideration of the topic.

II
The debate on the topic in the Sixth Committee of the United Nations General Assembly

21. As with other Commission topics, the debate on the subsidiary means topic in the Sixth Committee of the General Assembly took place in two parts over the course of two years. The first debate occurred in 2021 when the Commission added the item to its *long-term* programme of work. The second debate on the topic followed a year later, in 2022, in response to the Commission's decision to move the item to the *current* work programme and to appoint a special rapporteur. The summary below will also follow the two-part structure, although, to avoid unnecessary repetition, the report will primarily highlight the main views expressed during the 2021 debate.

A. The 2021 debate in the General Assembly

22. In the debate of the topic in the Sixth Committee of the General Assembly during the seventy-sixth session, in 2021, an overwhelming majority of the participating States' comments were positive. They reflected strong support for the Commission's decision to add and prioritize the topic "subsidiary means for the determination of rules of international law" to the long-term programme of work. In the main, delegations underlined that work on the topic would be consistent with the Commission's prior work on the sources of international law and that it could serve as a vehicle to help remedy certain consequences of the fragmentation of international law. Of the twenty-eight (28) statements addressing the Commission's decision, approximately seventeen (17), representing a total of twenty-three (23) States, were positive.[19] The support seems notable for being generally representative of all five geographical regions of the United Nations.

23. For example, the Kingdom of Sweden, on behalf of itself and the other Nordic countries (Denmark, Finland, Iceland and Norway) "agree[d] with the Commission that the work on the topic would constitute a useful contribution to the progressive development of international law and its codification".[20] They further noted that this topic "would also complete the Commission's work on sources of international law" and consequently urged "its speedy inclusion in the active work programme of the Commission".[21] Portugal, for its part, noted that the Commission had devoted much of its work to "the classical topic of the sources of international law" and thus welcomed "further clarification by the Commission" of "the role of judicial decisions

[19] See the statements by Belarus (A/C.6/76/SR.16 para. 80); Colombia (A/C.6/76/SR.16, para. 90); China (A/C.6/76/SR.17, para. 5); Ecuador (A/C.6/76/SR.17, para. 84); Egypt (A/C.6/76/SR.23, para. 57); Germany (A/C.6/76/SR.17, para. 73); Italy (A/C.6/76/SR.17, para. 22); Jamaica (A/C.6/76/SR.18, para. 45); Latvia (on behalf of Baltic States) (A/C.6/76/SR.16, para. 52); Peru (A/C.6/76/SR.18, para. 7); Philippines (A/C.6/76/SR.19, para. 64) ("We support the recommendation of the ILC on the inclusion of the topic 'Subsidiary means for the determination of rules of international law' in the long-term programme of work of the Commission."); Portugal (A/C.6/76/SR.16, para. 93); Republic of Korea (A/C.6/76/SR.18, para. 40); Sierra Leone (A/C.6/76/SR.20, para. 30); Sweden (on behalf of the Nordic countries) (A/C.6/76/SR.16, para. 45); Türkiye (A/C.6/76/SR.18, para. 59) ("[T]his delegation welcomed the Commission's decision to include the topic 'Subsidiary means for the determination of rules of international law' in its long-term programme of work."; United Kingdom (A/C.6/76/SR.18, para. 13) ("[T]he United Kingdom notes the Commission's decisions to recommend the inclusion of the topic 'Subsidiary means for the determination of rules of international law' in the long-term programme of work of the Commission.").

[20] Sweden (on behalf of the Nordic Countries), verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].

[21] Ibid., see Sixth Committee, A/C.6/76/SR.16 (10 December 2021), para. 45.

and teachings of the most highly qualified publicists" in the determination of existing rules of international law.[22] This delegation also expressed the hope that the work on the topic could help to alleviate "certain negative consequences of the fragmentation of international law".[23]

24. The United States of America also supported the proposal to include the present topic in the long-term agenda, observing that reliance on subsidiary means has been somewhat unclear and inconsistent in practice.[24] In the view of its delegation, taking into account the prior work of the Commission on the other aspects of Article 38 of the ICJ Statute, "it makes sense to complete the project by examining subsidiary means".[25] Likewise, Germany considered that the topic "would certainly contribute immensely to deepening our common understanding" of the functions of subsidiary means in Article 38, paragraph 1 (d), and their interplay with the sources in Article 38, paragraph 1 (a), (b) and (c).[26] Italy noted that, considering the "growing 'judicialization' of international law and the increasing production of academic literature",[27] it would be useful for States "to receive rigorous guidance from the Commission on how those subsidiary means for the determination of rules of international law should be applied".[28]

25. Latvia, on behalf of the Baltic States, also remarked that the topic fulfilled the Commission's criteria and highlighted its relevance for legal practitioners in both domestic, regional and international tribunals in the following terms: "Latvia, Estonia, and Lithuania welcome the Commission's decision to include in its long-term program also the topic subsidiary means for the determination of rules of international law. This topic meets the criteria for the selection of topics and is likely to be of particular importance for practitioners in and before domestic courts and specialized and regional international tribunals and review bodies."[29]

26. The People's Republic of China underlined that subsidiary means raised a "fundamental issue in the field of international law", recalled that the Commission's prior work has covered Article 38 of the ICJ Statute and encouraged the Commission "to carry out this topical research in a rigorous, prudential, tolerant and balanced attitude to ensure the scientific and rationality of research conclusions".[30] In a similar vein, the Republic of Korea also welcomed the Commission's decision to include the topic in its long-term programme of work. The hope was expressed that "... the work of the Commission on this topic serves to shed light on the important yet subtle issue of the role of judicial decisions and scholarly works in identifying international legal norms".[31]

27. Egypt also added its voice of support for the topic on the basis of its belief that "a study by the ILC of this matter will generate a great deal of practical benefit for

[22] Portugal, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].
[23] Ibid.
[24] United States of America, A/C.6/76/SR.17, para. 13.
[25] United States of America, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].
[26] Germany, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division]; see A/C.6/76/SR.17, para. 73.
[27] Italy, A/C.6/76/SR.17, para. 22.
[28] Italy, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].
[29] Latvia (also on behalf of Estonia and Lithuania), verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].
[30] China, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division]]; see A/C.6/76/SR.17, para. 5.
[31] Republic of Korea, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].

States".[32] In addition to the practical utility of the topic, the delegation considered that addressing subsidiary means "significantly complements the draft conclusions on the general principles of law".[33] Sierra Leone too concurred with the Commission that the topic fulfilled all its relevant criteria for the addition of new topics.[34] In the view of its delegation, which, like several other States, also urged the early inclusion of the topic in the current work programme, subsidiary means is a "classical topic" for the Commission which could enable it to "continue its known contributions clarifying the sources of international law".[35]

28. Similarly, Jamaica and Peru both welcomed the Commission's decision to add the topic to the long-term programme of work. The former underlined "the important work done in respect of the other areas relevant to the sources of law",[36] whereas the latter delegation considered that the analysis of judicial decisions and doctrine "would allow the Commission to complete its important systematic study of the sources of international law listed in Article 38, paragraph 1, of the Statute of the International Court of Justice".[37] The Ecuadorian delegation likewise expressed "satisfaction" with the Commission's decision to add the topic to the long-term work programme.[38]

29. A relatively small group of States seemed cautious about the Commission's addition of the topic to the long-term programme of work.[39] Among them were France and Ghana (on behalf of the African Group).[40] The French delegation only took due note of the topic, but then constructively offered assistance to the Commission in the following terms: "France is ready to collaborate with the Commission, and the university institutions interested in this subject, to provide it with any element of

[32] See Egypt, verbatim statement, cluster III, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division]; see A/C.6/76/SR.23, para. 57.

[33] See Egypt, verbatim statement, cluster III, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division]; see A/C.6/76/SR.23, para. 57.

[34] Sierra Leone, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].

[35] Sierra Leone, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].

[36] Jamaica, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division]; see A/C.6/76/SR.18, para. 45.

[37] Peru, A/C.6/76/SR.18, para. 7.

[38] Ecuador, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml, [on file with the Codification Division].

[39] Brazil, A/C.6/76/SR.17, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml [on file with the Codification Division] ("Brazil notes the recent inclusion, in the long-term programme of work of the commission, [ ] the topic 'subsidiary means for the determination of rules of international law.' Brazil takes note with interest the ILC decision, which might offer guidance on the interpretation of Article 38 (1)(d) of the ICJ Statute."); Czech Republic, A/C.6/76/SR.17, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml [on file with the Codification Division]("Czech Republic notes with interest the inclusion of the topic 'Subsidiary means for determination of rules of international law' in the long-term programme of work of the Commission."); France, A/C.6/76/SR.16, para. 73; Ghana (on behalf of the African Group), A/C.6/76/SR.16, para. 34; Slovakia, A/C.6/76/SR.17, para. 42.

[40] See France, A/C.6/76/SR.16, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml [on file with the Codification Division] (". . . [M]y delegation has taken note of the Commission's listing of its long-term work programme on the subject 'Subsidiary means of determining rules of international law' following its recommendation by the Working Group on long-term work programme. France is ready to collaborate with the Commission, and the university institutions interested in this subject, to provide it with any element of useful practice for dealing with this subject, in particular the relevant elements of case law and French-speaking doctrine."); Ghana (on behalf of the African Group), verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml [on file with the Codification Division] ("The African Group takes note of the decision of the Commission to place the topic 'Subsidiary means for the determination of rules of international law' . . . on its long-term programme of work").

useful practice for dealing with this subject, in particular the relevant elements of case law and French-speaking doctrine".[41] The Special Rapporteur welcomes that offer and looks forward to any submissions that could enable the consideration of case law and other materials in the French language. As regards the statement on behalf of the African States, it might be observed that Ghana was speaking on behalf of a regional coalition. The practice of the African States in the context of their group statements on the Commission's annual reports appears to be to take note of rather than to endorse items proposed for inclusion in the long-term programme of work. That seems to allow the individual delegations to express their support (as Egypt, Sierra Leone and others did) in their statements, or not, for a particular topic.[42]

30. Slovakia, although agreeing with many others that the topic was consistent with the continuation of the Commission's work clarifying the sources of international law in Article 38 of the ICJ Statute, cautioned on "the complexity of the subject and the actual workload of the Commission" and proposed that "this topic should be included in the programme of work only after the conclusion of the consideration of 'General principles of law'".[43]

31. The Czech Republic "noted with interest" the topic's inclusion on the long-term programme of work, but stated that, it "would like to underline that moving any of the topics from the already existing long-term programme list on the active programme of the Commission should be done only after careful consideration and proper explanation why the Commission gives preference to a particular topic over other topics on the long-term programme list".[44]

32. About five commenting States appeared to express some doubts.[45] In particular, the Netherlands remarked that, although it understood the Commission's wish to continue the examination of the ICJ Statute, it preferred "that the ILC focus on issues that are more pertinent for international practice".[46] Austria, although supportive of the topic by the 2022 debate, put it more directly when it suggested that a study of subsidiary means was not "as pressing and practically relevant for [S]tates as other topics on the long-term programme of work".[47] Thailand suggested that the limited use of subsidiary means for the determination of rules of international law might pose some challenges to gaining interest and inputs from Member States.[48]

---

[41] Ibid.

[42] There could even be an argument of implicit support since the African Group statement further on called for the Commission to consider a balanced approach to topics, when deciding to add new topics, as well as in the appointment of special rapporteurs. See Ghana (on behalf of the African Group), verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml [on file with the Codification Division].

[43] See Slovakia, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml [on file with the Codification Division]. It is to be noted that, in the 2022 debate, Slovakia lent its support for the topic.

[44] Czech Republic, A/C.6/76/SR.17, para. 81.

[45] See the statements by Austria (A/C.6/76/SR.18, para. 56); Iran (A/C.6/76/SR.16, para. 66); The Netherlands (A/C.6/76/SR.18, para. 50); Romania (A/C.6/76/SR.17, para. 28); Thailand (A/C.6/76/SR.18, para. 21).

[46] The Netherlands, A/C.6/76/SR.18. In the 2022 debate, the Netherlands did not comment on the subsidiary means for the determination of rules of international law. See, in this regard, A/C.6/77/SR.23, paras. 120-123.

[47] Austria, A/C.6/76/SR.18, para. 56. Austria, in its 2022 statement, supported the topic as discussed in the next section summarising the 2022 debate. It is highly likely that Austria's initial hesitation actually reflects its longstanding view, expressed for several years in the Sixth Committee, that the Commission should prioritise adding to its current work programme the topic "universal criminal jurisdiction." The latter topic was added to the long-term work programme in 2018 based on a proposal of the current author.

[48] Thailand, A/C.6/76/SR.18, para. 21.

33. Whether the States mentioned fully endorsed the topic or shared some misgivings, a number of them offered useful feedback. The Special Rapporteur values all comments. Thus, although in the nature of things he may not always agree with all delegations on the points of substance, he will always consider them with sensitivity and deep reflection. Indeed, the constructive comments and criticisms of those States that may be perceived as more critical have in the past offered special rapporteurs and the Commission the opportunity to strengthen their work on many of its topics. Substantive State engagement with the topics under consideration is therefore always valued. After all, States and their various organs are intended as the primary beneficiaries of the Commission's work. The same will also be true for this topic as well.

34. As to the scope of the topic, most of the commenting States generally welcomed the Commission's wish to provide greater clarity on Article 38 (1) (d). However, a handful of delegations suggested that the Commission's analysis should be restricted to that provision. The Islamic Republic of Iran requested that the Commission "take into account its constraints on the subsidiary means, particularly the one which is determined in Article 59 of the same Statute regarding the relative effect of the decisions of the court. The Commission also shall avoid any over-developing regarding both judicial decisions and teachings of the most highly qualified publicists. Hence, the study shall be limited to the identification and application of both prongs".[49]

35. Brazil, implicitly addressing the criticism found in the international law literature about possible overreliance on judicial decisions and the scholarly works from certain parts of the world, urged the Commission to "tak[e] due regard to the contributions of all regions of the world to the [topic's] development".[50]

36. Similarly, Belarus recommended that "there must be a use of fair and normative criteria for identifying norms based on doctrinal sources that reflect the extent of their acceptance and recognition in different regions of the international community".[51] Like Brazil, although welcoming the possible study, another Asian delegation also encouraged the Commission to take into account a wide range of national practices.[52] The Special Rapporteur will offer his initial proposals on the scope of the topic in the relevant parts of the present report and invites the feedback of States in that regard. In the meantime, he strongly agrees that the work of the Commission, as the principal codification body of diverse Nations, should be representative of the main legal systems and regions of the world. That is also consistent with the Statute and practice of the Commission. Consequently, he will always bear this important consideration in mind.[53] Needless to say, he is also committed to scientific rigour.

[49] Iran, A/C.6/76/SR.16, para. 66.

[50] Brazil, A/C.6/76/SR.17, para. 27.

[51] Belarus, A/C.6/76/SR.16, verbatim statement, cluster I, https://www.un.org/en/ga/sixth/76/ilc.shtml [on file with the Codification Division].

[52] China, A/C.6/76/SR.17, para. 5.

[53] See Statute of the International Law Commission, art. 8. Although the statute refers to the composition of the Commission's elected members, it can be implied that the Commission's work should also be reflective of "the main forms of civilizations and the principal legal systems of the world."

B. The 2022 debate in the General Assembly

37. The views of States in the 2022 debate largely mirror the comments from the 2021 debate. For that reason, to avoid repetition, the focus below will be to only highlight two discernible trends.

38. First, as a review of the Sixth Committee debate (in 2022) during the seventy-seventh session of the General Assembly confirms, most of the States commenting on the topic expressed their strong support for the Commission's decision to add the topic to the current programme of work. Unsurprisingly, many of the same States that favoured the topic's addition to the long-term programme of work essentially reiterated their support for moving it to the active agenda. In a number of cases, some of the delegations that had expressed some initial hesitation described in the previous section, for example, Austria, Brazil, Romania and Slovakia, seemed to embrace the Commission's decision to undertake a study and to appoint a special rapporteur. There were also a number of delegations that had not participated in the 2021 debate of the General Assembly. They too endorsed the topic.

39. In the 2022 debate, a list of twenty-four (24) States expressed support for the Commission's decision to take the topic forward. This included Armenia,[54] Australia,[55] Austria,[56] Brazil,[57] Colombia,[58] Estonia,[59] India,[60] Jordan,[61] Malaysia,[62] Norway (on behalf of the Nordic Countries),[63] the Philippines,[64] Portugal,[65] Romania,[66] Sierra Leone,[67] Slovakia[68], South Africa,[69] Türkiye,[70] Uganda,[71] the United Kingdom[72] and the United States of America.[73]

---

[54] Armenia, A/C.6/77/SR.24, para. 13.
[55] Australia, A/C.6/77/SR.21, para. 82.
[56] Austria, A/C.6/77/SR.22, para. 43.
[57] Brazil, A/C.6/77/SR.22, para. 87.
[58] Colombia, A/C.6/77/SR.22, para. 124.
[59] Estonia, A/C.6/77/SR.22, para. 105.
[60] India, A/C.6/77/SR.22, para. 48.
[61] Jordan, A/C.6/77/SR.29, para. 108.
[62] Malaysia, A/C.6/77/SR.22, para. 31.
[63] Norway (on behalf of the Nordic countries), A/C.6/77/SR.21, para. 43; see A/C.6/77/SR.29, para. 91 (The Nordic Countries also addressed a point of substance, arguing that "[w]hile the Nordic countries agreed with the basic assertions in draft conclusions 8 and 9 [of the draft conclusions on general principles of law], "they considered their inclusion to be unnecessary and inappropriate. The relevance of judicial decisions and teachings in the determination of international law was a matter best considered in the context of work specifically concerning subsidiary means for the determination of rules of international law, a topic which had recently been added to the Commission's programme of work.").
[64] Philippines, A/C.6/77/SR.22, para. 25.
[65] Portugal, A/C.6/77/SR.23, para. 7.
[66] Romania, A/C.6/77/SR.22, para. 111.
[67] Sierra Leone, A/C.6/77/SR.23, para. 37. Sierra Leone, like a number of other delegations, also stressed its view that the Commission should have added the topic "universal criminal jurisdiction" to its current programme of work.
[68] Slovakia, A/C.6/77/SR.22, para. 97.
[69] South Africa, A/C.6/77/SR.23, para. 82.
[70] Türkiye, A/C.6/77/SR.23, para. 66.
[71] Uganda, A/C.6/77/SR.25, para. 5.
[72] United Kingdom, A/C.6/77/SR.23, para. 86.
[73] United States, A/C.6/77/SR.22, para. 12.

40. Second, and flowing from the above, the number of previously neutral or hesitant delegations changed. Still, the comments of the Czech Republic,[74] France[75] and Thailand[76] reflected views similar to their 2021 positions, while at least one delegation that spoke on the topic in 2021 did not address the issue in 2022. A couple of delegations raised points of substance that will be duly taken into account.

41. Overall, to conclude this chapter highlighting key aspects of the General Assembly's debate of this topic in 2021 and 2022, it seems readily apparent that an overwhelming number of States commenting on the inclusion of the topic of subsidiary means for determination of rules of international law either in the long-term or current work programme generally welcomed or supported the Commission's decision to identify and address the issues in the topic. The Special Rapporteur is grateful to all the delegations that provided input on the topic and looks forward to their further engagement on it in future debates. He also expresses the hope that additional delegations, from all regional groups, will take advantage of the annual opportunity offered to share their views on the Commission's work on the present topic.

[74] Czech Republic, A/C.6/77/SR.22, para. 122. It is possible that this delegation was also in a similar position to Austria discussed above. This delegation has long held the view, expressed for several years in the Sixth Committee, that the Commission should prioritise adding to its current work programme the topic "universal criminal jurisdiction" which topic was added to the long-term work programme in 2018 based a on a proposal of the current author.

[75] France, A/C.6/77/SR.25, para. 44.

[76] Thailand, A/C.6/77/SR.23, para. 114.

III
The scope and outcome of the topic

A. Issues proposed for consideration by the Commission

42. The syllabus for the present topic, approved by the Commission at its seventy-first session, in 2021, and the basis upon which the current study is being undertaken, recalls the centrality of sources to the international legal system. It also highlights the pivotal role that the Commission has played systematically studying and clarifying the foundational sources of international law identified in Article 38, paragraph 1, of the ICJ Statute. The Commission's march through Article 38 of the ICJ Statute began with the preparation of a set of draft articles on the law of treaties in the 1960s (1 (a)), continued with customary law, on which work began in 2012, and led to the adoption of a set of draft conclusions on the identification of customary international law in 2018 (1 (b)), and most recently, general principles of law (1 (c)). The work on the latter topic began in 2019 and is expected to accomplish a first reading in 2023. A second and final reading should follow in 2025. At this stage, over the course of several decades, the Commission has undertaken systematic consideration of the first three subparagraphs of Article 38, paragraph 1, of the ICJ Statute addressing the sources of international law: treaties, customary international law and general principles of law. The present and future reports on this topic will, as appropriate, take those prior contributions into account.

43. But, as the 2021 syllabus for this topic also explained, other aspects of Article 38, paragraph 1, mentioned in subparagraph 1 (d) remain understudied, that is to say, *judicial decisions* and the *teachings of the most highly qualified publicists of the various nations* which are to be applied by the Court as subsidiary means for the determination of rules of law. These subsidiary means, which evidently fall into two distinct categories but were intended to perform a similar assistive function, have not been comprehensively studied by the Commission with a view to clarifying the significant role that they play in the development of diverse areas of international law. Yet, as with the Commission's prior work on the sources themselves, there are aspects of subsidiary means and their interaction and relationship to the sources that are uncertain. There is, indeed, some debate on the nature and place of judicial decisions in the determination of rules of international law as well as similar issues with respect to the role of teachings of the most highly qualified publicists of the various nations. Consequently, to avoid leaving a gap in the clarity, predictability and uniformity of international law, it has been thought useful by the Commission (and some States in the Sixth Committee) to complete the consideration of Article 38, paragraph 1, by also focusing specifically on the subsidiary means for the determination of the rules of international law.

44. At this stage, taking into account the 2021 syllabus, the Special Rapporteur proposes that the Commission address the following issues. These are illustrative rather than exhaustive. The idea here is to provide a sufficient basis for the members of the Commission and States to provide their feedback on the proposed scope of the topic. It follows that the discussion of the issues identified below is not meant to be a straitjacket on the topic since, to be useful, other potential related questions or aspects of the topic should naturally remain open for the Commission's possible consideration.

45. Overall, as regards the main issues to be addressed, it is proposed that the Commission study should cover the key underlying issues with subsidiary means to clarify and elucidate how judicial decisions, teachings and possibly other subsidiary means have been used in the practice of States, international courts and tribunals, as well as by other relevant actors such as expert bodies, in the process of identifying,

determining and applying rules of international law. Without in any way excluding other questions or aspects which may become clearer as the work on the topic progresses, it can be suggested that the Commission could in the main analyse three fundamental planks or prongs of the topic.

1. The origins, nature and scope of subsidiary means

46. The first plank or prong of the topic would seek to clarify the nature of the subsidiary means category in the process of determination of rules of international law. Three sub-elements are quite important here: first, clarification of the origins of subsidiary means; second, issues of terminology; and third, the related question of scope. The issue of whether to take a narrow (traditional) or broad (modern) approach is important and carries significant implications for the possible utility of the Commission's contribution on this topic. The fundamental question to be addressed is whether the universe of subsidiary means is limited only to judicial decisions and teachings of the most highly qualified publicists of the various nations or, alternatively, whether they also encompass additional subsidiary means, taking into account the non-exhaustive nature of Article 38, paragraph 1 (d), of the ICJ Statute and, quite importantly, the practices of States and international courts and tribunals.

47. In establishing the scope of the topic and clarifying the terminology, in respect of which there appears to be some confusion in practice, consideration could be given to both the ordinary meaning of Article 38 (1) (d) as well as its drafting history and, most importantly, how it has been applied over the past several decades. This includes clarifying the ambit of key terms such as "judicial decisions" and "teachings of the most highly qualified publicists". On the former, consideration should be given to those decisions issued by courts of law and other tribunals, to whether such decisions would include advisory opinions and to the role of national courts vis-à-vis international court decisions in addressing questions of international law. The scope of "teachings", how broad or narrow the category is and who can produce them, as well as their weight, could be examined. For instance, to bring greater clarity to the area, when it comes to the works of the extensive variety of expert bodies, how are they to be classified? Do their works count as teachings? What about the decisions or pronouncements of some of those expert bodies, especially those exercising an official mandate, and how do their outputs compare to those issued by private expert groups or courts of law simpliciter? The interaction and relationship of such bodies with States should also be taken into account. Some of these issues are preliminarily discussed in later parts of the present report.

2. The relationship of subsidiary means to the sources of international law

48. The second plank or prong of the topic, which in some respects could be read as the heart of the possible added value of the topic, centres on the function and relationship between subsidiary means listed in subparagraph 1 (d) and the sources of international law, namely, treaties, customary law and general principles of law listed in subparagraphs 1 (a) to (c) of Article 38 of the ICJ Statute. In this regard, questions to be considered include the weight and value assigned to the subsidiary means, especially judicial decisions of international courts and tribunals in clarifying and developing international law and the teachings of the most highly qualified publicists of the various nations. The notion that the findings of judicial bodies when interpreting and applying treaties, customary law and general principles of law can identify or serve as sources of binding legal obligations for States, international organizations and other bodies should be examined. The relationship between Articles 38 and 59 and the notion of precedent, or the alleged lack thereof, in international law, as well as the link to the rights of third parties would need to be clarified. The question of judicial precedent is an old one. But it seems particularly

important to the topic, given both the theory in relation to it and the reality of practice which has necessarily been acquiesced to by States. Increasingly empirical legal scholarship mapping the de facto development of precedents in international courts and tribunals would help to establish, or at least confirm, the patterns that may be found in practice which could enable the Commission to draw useful conclusions.

3. Additional subsidiary means for the determination of rules of international law

49. The third plank or prong of the topic, depending on whether a narrow or broad approach is taken to the subsidiary means topic, could be the opportunity to clarify the additional subsidiary means that are neither judicial decisions nor teachings of the most highly qualified publicists of the various nations. Here, the Commission could step back to frame a wider picture, beyond the strict confines of the two separate baskets mentioned in Article 38 (1) (d). With the apparently non-exhaustive nature of that provision taken into consideration, it should be possible to reflect on the development of subsidiary means over time in the practice of States and international organizations and international courts and tribunals. Such reflection is likely to show that, over the past several decades, international tribunals have been asked by States to employ a variety of legal tools to resolve contentious disputes between States. In so doing, they have examined sources of obligations for States that are related but not limited to the sources of law expressly mentioned in Article 38, paragraph 1. In this regard, arguably, the two most frequently cited modern sources of obligations for States in international law are unilateral acts/declarations of States and/or resolutions of international organizations. These will therefore be discussed in the present report. We could also consider, consistent with practice and literature on the point, whether there are additional subsidiary means such as equity, religious law or agreements between States and international enterprises.

50. One final issue, the question of the coherence[77] and unity of international law, could also affect the scope and thus the utility and complexity of the present topic. It therefore needs to be mentioned. The issue arises because there is no doubt that one of the foundations of this topic is analysis of judicial decisions. In the 2021 syllabus, it was explained that, in some instances, concerns have arisen that different international courts and tribunals might concurrently address the same dispute, and when they do so, they might reach conflicting decisions/conclusions with respect to the same international legal issue. This then leads to, among other things, debates regarding their respective institutional competences and their hierarchical relations *inter se*.[78] The syllabus accepts that these issues do arise in practice but took the view that, while such concerns about conflicting judicial decisions are of some importance, they fall outside the scope of the present topic. That conclusion was reached without a thorough debate on that specific issue.

51. Given the significance of the issue, which seems to naturally arise from a study of the role of judicial decisions as subsidiary means for the determination of the rules of international law and appears implied in the comments of at least one State (i.e. Portugal), the Special Rapporteur considers that it is for the Commission as a whole

[77] For an analysis of the various phases of the debate, and where international lawyers may be now on the perceived fragmentation resulting from the increasing "judicialization" of international law, see Chiara Giorgetti and Mark Pollack (eds) *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (Cambridge: Cambridge University Press, 2022), p. 6. An early thorough treatment of the possible jurisdictional competitions, in the context of the seeming proliferation of international courts and tribunals, see Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford: Oxford University Press, 2003).

[78] See *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), annex, chap. IV, para. 27.

to now determine whether this issue should be kept outside the scope of the present topic. The Special Rapporteur feels obliged to raise the matter with the sole aim of obtaining the guidance of the Commission on it. He stands willing to provide more details on this matter which, depending on the views expressed, he could engage with in a more substantive manner in future reports.

B. Draft conclusions as the final outcome

52. The Special Rapporteur supports the 2021 decision of the Commission indicating that draft conclusions accompanied by commentaries are the most appropriate form of output for this topic. As indicated in the syllabus,[79] the preference for draft conclusions is consistent with and complements the Commission's previous approach on several recent topics addressing the sources and related issues of international law, namely, subsequent agreements and subsequent practice in relation to the interpretation of treaties,[80] identification of customary international law,[81] general principles of law[82] and the identification and legal consequences of peremptory norms of general international law (*jus cogens*).[83]

53. That said, the question of what "draft conclusions" mean in practice has arisen in the context of the other mentioned topics both in the Commission and among States in the Sixth Committee. Part of the concern appears to stem from the Commission's increasing use of draft conclusions, as opposed to the traditional draft articles more familiar to States, as the final form of output in various studies. The other concern is the practical import of the choice. The matter therefore warrants two brief but important observations.

54. First, it should be stressed that, even before the calls for the Commission to clarify the meaning of draft conclusions came from some delegates in the Sixth Committee, the Commission was already deliberating on the complex issue of the implications of the choice of draft conclusions as a form of output compared to other outcomes in other topics such as draft articles. The issue had arisen in the context of its work in relation to other types of outputs. The matter was then publicly mentioned in the report of the proper subsidiary body dealing with such issues: its standing working group on methods of work.[84] The deliberations of that working group on the issue of the nomenclature and various other issues, as was indicated in the Commission's 2022 report to the General Assembly, will continue in the remaining years of the 2023–2027 quinquennium.[85] Any conclusions drawn will, as usual, be relayed to States and the General Assembly for their feedback. It follows that, as important as it is, the present report is not the place to take up, let alone resolve, that issue.

55. Second, and in any event, there is, as of yet, no one-size-fits-all definition of "draft conclusions" in the Commission's practice. The guiding light on the choice of output seems to be driven primarily by the specific needs of the topic under

[79] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), annex, para. 8.
[80] *Yearbook … 2018*, vol. II (Part Two), chap. IV, p. 23-82, paras. 39-52.
[81] *Yearbook … 2018*, vol. II (Part Two), chap. V, p. 89-112, paras. 53-66.
[82] *Official Records of the General Assembly, Seventy-seventh Session*, *Supplement No. 10* (A/77/10), chap. VIII, p. 306-322 (First reading intended to be concluded by the end of the current quinquennium).
[83] Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10), chap. IV, p. 10-89.
[84] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), chap. X(C)(2), p. 344, para. 255.
[85] Ibid., chap. X(C)(2), p. 344, para. 256.

consideration. That said, to assuage any concerns that may arise about the intention behind using draft conclusions in this topic, a key clarification should be made. In the meaning used here, draft conclusions should be understood as a reference to the outcome of a process of reasoned deliberation and a restatement in relation to the practices found on subsidiary means in the determination of the rules of international law. Their essential characteristic is to clarify the law based on the current practice. Thus, the content of such draft conclusions, in line with the Statute and settled practice of the Commission on recent sources and related topics, reflects primarily codification and possibly elements of progressive development of international law.

56. Overall, to conclude on this point, considering that, when it comes to the Commission's substantive engagement with Article 38, subparagraph 1 (b) and (c), of the ICJ Statute, it has adopted draft conclusions as the final form, it is logical for the Commission to use the same form of output in relation to the subsidiary means for the determination of rules of international law in subparagraph 1 (d). Any deviation from that approach already decided by the Commission in 2021 would cause unnecessary confusion and generate unnecessary doubts.

C. Terminological clarifications

57. The last aspect of this chapter concerns terminology. In the preparation of the present report, the Special Rapporteur found that a wide range of terminology is used in practice and literature when it comes to discussions of the present topic. From that perspective, in the hope of avoiding, or at least minimizing, ambiguity when engaging with the present report and this topic in the Commission, he considers that it would be useful to have a shared understanding of key terms. In this regard, two observations are worth making.

58. First, as a starting point, when referring to "subsidiary means for the determination of rules of law" in this topic, the reference is to the term as found in Article 38 (1) (d) of the ICJ Statute. For our purposes, the term "subsidiary means for the determination of rules of *international* law" will be used in the present report and this topic but should, for all intents and purposes, be deemed equivalent to the term "subsidiary means for the determination of rules of *law*". In other words, the term "rules of law" found in the ICJ Statute will often, though not always, be substituted for the term "rules of international law". This is for the sake of consistency with the title of the topic, the choice of which was intended to emphasise that the thrust of the current project is the determination of the rules of *international* law. Importantly, the fact that the term "rules of law" can be seen as broader than the term "rules of international law" was never intended and does not therefore in any way act as a limitation on the scope of the topic.

59. Plainly, and this is the second and final point on terminology, Article 38 (1) (d) of the ICJ Statute expressly mentions two categories of "means" that were described as "subsidiary" during the drafting of the Statute of the Permanent Court of International Justice and the ICJ Statute: "judicial decisions" and "the teachings of the most highly qualified publicists of the various nations". The term "judicial decisions" may be expressed in shorthand as "decisions", while "teachings" may sometimes be referred to as doctrine, writings, scholarship, literature, works or even outputs or pronouncements. Both terms should be understood in their broadest senses. Occasionally, the term "publicists", which sounds somewhat archaic, might be substituted with other terms more prevalent in modern usage such as scholars, jurists,

authors, writers or commentators. The above understandings are essentially in line with the prior work of the Commission.[86]

60. In conclusion, by taking up this topic and addressing the main questions above and any other related issues that may arise in the course of the work, it is anticipated that the Commission's study will provide useful guidance to States, international organizations, national and international courts and tribunals and all those, including legal scholars and practitioners of international law, who may have reason to address the substance of subsidiary means for the determination of the rules of international law.

[86] The terms used generally follow the Commission's similar use of terminology in the conclusions on the identification of customary international law. See, in that regard, conclusions 13 and 14 and their accompanying commentaries in the 2018 report of the Commission to the UN General Assembly as discussed in the Secretariat memorandum.

IV
Methodology

61. Turning now to methodology. The Special Rapporteur proposes that the Commission, consistent with its statute and established practice,[87] should also follow its established methodology for its work on this topic. This would require it to examine, as comprehensively and as objectively as possible, a wide variety of primary and secondary materials and legal literature on the topic in an integrated fashion. In this regard, the research by the Special Rapporteur for his reports would be complemented by the input of the other members of the Commission. Any submissions of States, whether in statements made in the annual debates of the topic in the Sixth Committee of the General Assembly or in response to specific requests, will be carefully taken into account. The same would also apply to the studies that the Secretariat undertakes in fulfilment of the Commission's requests.

62. The work on the topic should primarily be guided by State practice. This might raise the question of what State practice entails. State practice can, of course, take many different forms. The Commission has sought to clarify the most common forms of State practice in the context of its 2018 conclusions on the identification of customary international law. It has clarified that State practice would *include* conduct of the State whether in the exercise of its executive, legislative, judicial, or other functions such as public statements, decisions of relevant international and national courts and tribunals; as well as national laws, decrees and other documents; treaties and other international instruments, including *travaux préparatoires* where available; diplomatic exchanges as well as pleadings before international courts and tribunals of a universal or regional character. To the extent relevant, for the purposes of the topic, the practice of international organisations,[88] whether of a universal or regional character, will also be considered.

63. Given the nature of the present topic, focusing as it does on the subsidiary means for the determination of rules of law starting with *judicial decisions*, special attention should be given to the jurisprudence of international courts and tribunals. After all, Article 38 is intended as guidance for the judicial process in the context of a particular court. In this regard, as with related prior studies of the Commission on the sources of international law, attention will be given to the work of the International Court of Justice and its predecessor on whose decisions it frequently relies, the Permanent

[87] See, in this regard, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/76/10), annex, paras. 32–34, 39 (citing, *inter alia*, to Articles 20 and 24 of the ILC Statute).

[88] As will be seen presently, a distinction is here being drawn between the practice of international organisations as such as opposed to the practice of international courts and tribunals including their decisions.

Court of International Justice.[89] The decisions of inter-State arbitral tribunals, though not *per se* judicial decisions, will be considered in this topic – as they also were in prior Commission topics. This seems justified, since inter-State and other arbitral tribunals often apply international law, and in any case, both States and international courts refer to them when addressing disputes on issues of international law.[90]

64. Without casting doubt on the general relevance of the decisions of municipal courts, which must also be taken into account, the case law of international(ized) courts and tribunals warrants consideration. These would include, for instance, the International Court of Justice, the International Tribunal for the Law of the Sea, the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the dispute settlement bodies of the World Trade Organization. Reference will also be made to the case law of regional courts and tribunals such as the African Court and Commission on Human and Peoples' Rights, the Court of Justice of the European Union, the European Court of Human Rights and the Inter-American Court and Commission on Human Rights as well as to the human rights treaty bodies. Nonetheless, while we shall refer to the jurisprudence of particular courts and tribunals, the aim is to develop conclusions of a general nature applicable equally to all courts, not just those currently in existence but also those that may be established in the future.

65. In the view of the Special Rapporteur, taking into account that the present study is about subsidiary means, at least two important considerations are always worth bearing in mind when drawing on such diverse jurisprudence. First, as regards other international courts, the question might be asked whether those tribunals apply a methodology like that of the International Court of Justice, especially given their own distinctive legal basis. Second, although it is not technically bound to follow them, it would be important to consider whether the International Court of Justice and States treat the decisions of such courts, when dealing with questions of international law, as a form of persuasive subsidiary means autonomously from their possible role as evidence of State practice.

66. Naturally, in addition to State practice, relevant scholarly works on the topic of sources and the subsidiary means for the determination of rules of international law will also be examined. A wide variety of scholarly works would appear important to examine, especially given the nature of the present topic as well as the letter and spirit

[89] See, out of many possible examples in decisions and advisory opinions, *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter)*, Advisory Opinion, I.C.J. Reports 1948, p. 57 at p. 63 ("The Court considers that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself") and *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p.174 at p. 182 ("under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter are conferred upon it by necessary implication as being essential to the performance of its duties." It went on to note that "this principle of law was applied by the Permanent Court of International Justice to the International Labour Organization in its Advisory Opinion No. 13 of July 23rd 1926 (Series B, No. 13, p. 18), and must be applied to the United Nations."). Underlining its fidelity to that jurisprudence, the Court has also, in other decisions, even distinguished its own rulings from those of the PCJI as it did, for example, in *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 at p. 270, para. 54.

[90] The point was contentious in the early literature, with there being considerable debate about whether the decisions of arbitral tribunals constitute 'judicial decisions' in Article 38, paragraph 1 (d). While this matter will be taken up later on in this report, at this stage, it suffices to underline that this issue has not been a real challenge in practice since the Court in practice refers to such decisions. For an excellent analysis, see Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Grotius Publications, Cambridge University Press, 1996), p. 35.

of Article 38, subparagraph 1 (d), of the Statute. Best efforts will be made to take into account the diversity of viewpoints on the topic. This would include, again in line with settled practice, the works of individual scholars but also of groups of experts, whether established privately or by States.

67. The Special Rapporteur would be immensely grateful for any suggestions of relevant materials in various languages from the members of the Commission and States. That should help to ensure greater representativeness of the principal legal systems and languages and regions of the world.

68. Finally, as with other recently completed studies, the Commission could, at the end of its study, include a multilingual bibliography. The value of a bibliography stems primarily from providing a starting point for research for jurists and other researchers who may have reason to address the issue of subsidiary means. The risk, of course, is that a bibliography is, by its nature, frozen in time. It can thus become quickly outdated. At the same time, a comprehensive bibliography compiled at the end of the work on this topic may prove useful to the extent that it offers future researchers a convenient guide to the main scholarly works published to date on the topic.[91] Given the sheer wealth of publications on the present topic, a measure of selectivity would likely be warranted. The follow-up question then becomes about the guiding criteria for such selectivity. It can be proposed that the quality and representativeness of the works in relation to the principal legal systems and regions and languages of the world could be part of the main criteria for inclusion. Again, any suggestions by members of the Commission and States of relevant primary and secondary materials suitable for the multilingual bibliography would be greatly appreciated by the Special Rapporteur.

[91] The idea of a bibliography was already set out in the syllabus for the topic. *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), annex, chap. VI, para. 38 (v).

V
Previous work of the Commission on subsidiary means

69. For the purpose of the present report, it is essential to recall the previous work of the Commission that seems particularly relevant for the consideration of this topic. Thus, in this chapter, the Special Rapporteur, drawing heavily on the Secretariat memorandum, seeks to provide some background that should enable the Commission to build on the prior work where appropriate. He integrates key observations and accompanying explanations in the present report. However, due to space limitations, not all aspects are discussed. To obtain a fuller picture, members are urged to read this chapter alongside the Secretariat memorandum.

70. Unsurprisingly, considering its extensive work on the sources of international law over the past several decades, the Commission has relied on subsidiary means in nearly all of the topics it has completed. However, as will be seen in due course, such uses are not always necessarily within the scope of Article 38 (1) (d).[92] This is confirmed by the Secretariat memorandum, which "takes a broad approach in the sense that examples of such references to judicial decisions and teachings are included without the Secretariat taking a view on whether the Commission was or was not relying on these materials as subsidiary means within the meaning of Article 38, paragraph 1 (d)".[93] That is as it should be. Since it is ultimately for the Commission to review its own past work, as compiled by the Secretariat, in order to determine whether it had expressly or implicitly determined that a "particular reference in its work to judicial decisions or teachings"[94] was a use, or not, of such materials as subsidiary means within the meaning of Article 38 (1) (d) of the ICJ Statute.

71. In terms of form, the Secretariat memorandum provides a series of observations on the previous work of the Commission that could be particularly relevant to the topic. In this regard, after discussing a few preliminary issues (Introduction), the memorandum, firstly, addresses the Commission's conceptualization and understanding of judicial decisions and teachings for the determination of rules of international law (chap. II) including the elements concerning "subsidiary means", "judicial decisions" and "teachings of the most highly qualified publicists of the various nations", followed, secondly, by an assessment of the Commission's use of judicial decisions and teachings in its work (chap. III, sect. A). Chapter III included examples of the use of judicial decisions and teachings to determine rules of treaty law, customary international law and general principles of law (sect. B). The memorandum then offers an overview of the Commission's reliance on judicial decisions and teachings when considering broader questions concerning the international legal system and interactions among the sources and rules of international law (chap. III, sect. C), before concluding with a discussion of the ways in which the Commission has incorporated judicial decisions and teachings into its methods of work (chap. IV).[95]

72. While all the areas covered by the Secretariat memorandum may offer valuable insights that should inform the Commission's work on this topic, for the purposes of the present report, this chapter will focus on the use of judicial decisions and teachings in the practice of the Commission. Other aspects explained by the memorandum, especially its conceptualization of subsidiary means, may be relevant

[92] Memorandum by the Secretariat, Subsidiary means for the determination of rules of international law - Elements in the previous work of the International Law Commission that could be particularly relevant to the topic (Secretariat Memo), A/CN.4/759, para. 3.
[93] Secretariat Memo, A/CN.4/759, para. 3.
[94] Secretariat Memo, A/CN.4/759, para. 3.
[95] Secretariat Memo, A/CN.4/759, summary.

to other parts of the present report focusing on the theoretical issues. The Commission's use of subsidiary means on the bigger questions concerning the international legal system and the interactions among the sources of international law, as well as the criteria to determine the value to be given to various subsidiary means, will largely be taken up in future reports of the Special Rapporteur.

A. The Commission's assessment of Article 24 of its Statute and subsidiary means

73. Before turning to the memorandum's key observations on the Commission's practice using subsidiary means, it is vital to consider some preliminary observations about Article 24 of the Statute of the Commission,[96] which are also flagged by the Secretariat, highlighting the following.

74. The Commission submitted a report to the General Assembly in 1950 addressing "[w]ays and means for making the evidence of customary international law more readily available" that highlighted the statutory distinction:[97]

> Article 24 of the Statute of the Commission seems to depart from the classification of article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts.[98]

75. The above-mentioned report of the Commission further stated that:

> Evidence of the practice of States is to be sought in a variety of materials. The reference in article 24 of the Statute of the Commission to "documents concerning State practice" (documents établissant la pratique des Etats) supplies no criteria for judging the nature of such "documents". Nor is it practicable to list all the numerous types of materials which reveal State practice on each of the many problems arising in international relations.[99]

76. The Commission did, however, provide a non-exhaustive list of "rubrics", or types, of evidence of customary international law, including the texts of international instruments, decisions of international courts, decisions of national courts, national legislation, diplomatic correspondence, opinions of national legal advisors and practice of international organizations.[100]

B. The Commission's routine uses of subsidiary means in its work

77. Against the above background, noting the Commission's recognition of the importance of subsidiary means, especially judicial decisions in the context of customary international law, the memorandum addressed the general approach of the Commission to the use of judicial decisions. It also provided specific examples of

[96] Article 24 of the Statute of the Commission provides that:
"The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter."

[97] Secretariat Memo, A/CN.4/759, para. 10.

[98] *Yearbook… 1950*, vol. II, p. 368, para. 30.

[99] *Yearbook… 1950*, vol. II, p. 368, para. 31.

[100] Ibid., para. 31, and at pp. 368-372, paras. 32-78.

how the Commission has used judicial decisions and judgments of courts, but also teachings, including the works of individual scholars and expert bodies.

78. The Secretariat offers two assessments of the Commission's approach to using judicial decisions and teachings. First, that the nature and extent of the Commission's reliance on judicial decisions and teachings vary depending on the nature of the topic under consideration and the means by which the law has developed in that area.[101] For example, in the Unilateral Declarations of States topic, where the law primarily developed through inter-State practice and International Court of Justice decisions arising from that practice, the Commission relied primarily on International Court of Justice decisions. The Commission described the commentaries to the Guiding Principles subsequently adopted by the Commission as "…explanatory notes reviewing the jurisprudence of the International Court of Justice and pertinent State practice".[102]

79. In contrast, in the State responsibility topic, the Commission, in determining the basic rules of international law concerning the responsibility of States for their internationally wrongful acts, considered a wide range and volume of materials that were available, including Permanent Court of International Justice and International Court of Justice cases, arbitral awards, the decisions of regional human rights courts, the pronouncements of expert treaty bodies, claims commission cases and national judicial decisions and teachings.[103] Furthermore, in the articles on diplomatic protection, "where the State may exercise its right to pursue international claims against other States on behalf of its injured nationals, provided they have exhausted domestic remedies, the Commission again considered not only relevant rules and principles identified by the Permanent Court of International Justice and International Court of Justice,[104] together with a range of decisions of other courts and tribunals and teachings relevant to its determination of the rules and principles contained in the draft articles".[105]

80. The Commission often relied on Permanent Court of International Justice and International Court of Justice decisions and a range of other materials to confirm or support rules and principles drawn from numerous multilateral treaties, declarations and other such international instruments, regulations and resolutions of international organizations relevant to the topic international liability in case of loss from transboundary harm arising out of hazardous activities.[106]

81. The Secretariat's second assessment of the Commission's general approach to using subsidiary means found that the Commission has relied on both judicial decisions and teachings in the context of both codification of international law and its progressive development.[107] This is reflected in many topics and, more recently, was especially reflected in the principles on protection of the environment in relation to armed conflicts where the Commission relied, *inter alia*, on judicial decisions and teachings as support for its formulation of the principles which contain "provisions

[101] See, Secretariat Memo, A/CN.4/759, observation 20, para. 65-69.

[102] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook … 2006*, vol. II (Part Two), p. 161, footnote 873.

[103] See the commentaries to the articles on the responsibility of States for internationally wrongful, *Yearbook…*2001, vol. II (Part Two), para. 77.

[104] See, for example, commentary to article 1, paragraphs (3) and (4), on diplomatic protection, second reading text with commentaries, *Yearbook … 2006*, vol. II (Part Two), p. 27.

[105] Secretariat Memo, A/CN.4/759 para. 68.. See, for example, paras. (6) and (7) of the commentary to article 4, para. (3) of the commentary to article 6, and para. (3) of the commentary to article 7 on Diplomatic Protection, *Yearbook … 2006*, ibid, p. 30 and pp.33-34.

[106] See para. (3) of the General Commentary to the Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook … 2001*, vol. II (Part Two), p.148.

[107] See Secretariat Memo A/CN.4/759 observation 21, para. 70-78.

of different normative value, including those that reflect customary international law, and those containing recommendations for its progressive development".[108]

82. In the commentary to principle 3, paragraph 1, the Commission, beyond referring to the relevant international treaties, refers to two International Court of Justice cases[109] as well as a number of International Committee of the Red Cross (ICRC) studies, guidelines and commentaries[110] to support the customary international law obligations in principle 3, which contains the overall duty to enhance the protection of the environment in relation to armed conflicts, including the duty to disseminate the law of armed conflict to armed forces, and for States to exert their influence to prevent and stop violations of the law of armed conflict, to the extent possible.[111]

83. An interesting observation is made by the Secretariat regarding the Commission's reliance on supporting materials in the principles on protection of the environment in relation to armed conflicts:

> [A]spects of the draft principle that are characterized as reflecting existing legal obligations (*lex lata*) are supported primarily by references to treaty provisions and decisions of the ICJ, whereas those aspects that go beyond existing legal obligations (*de lege ferenda*) are supported primarily by teachings.[112]

84. This observation also finds support in the commentary to articles on the protection of persons in the event of disasters, which not only rely on core international instruments[113] and relevant non-binding international instruments "but

---

[108] Secretariat Memo, A/CN.4/759 para. 71. See, for example, commentary 4 to article 3, articles concerning law of the sea with commentaries, *Yearbook ... 1956,* vol. II, p. 265. Paragraph (4) of the commentary to principle 3; and, principles on protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), p. 101.

[109] Paragraphs (1) to (10) of the commentary to principle 3, principles on protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), pp. 101-104, footnotes 345 – 360, referring to *Military and Paramilitary Activities in and against Nicaragua*, and the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion.

[110] Paragraphs (1) to (10) of the commentary to principle 3, ibid., pp. 101-104, footnotes 345 – 360, referring to the ICRC *Study of Customary International Humanitarian Law*, the ICRC *Guidelines on the Protection of the Natural Environment in Armed Conflict*, and the ICRC *Commentaries on the 1949 Geneva Conventions and the 1977 Additional Protocols*.

[111] Secretariat Memo, A/CN.4/759 para. 72. The ICRC teachings are "also referred to in support of paragraph 2 of principle 3 which, as stated in the commentary thereto, extends in some respects to voluntary measures, and therefore beyond the customary and treaty-based obligations of States", See paragraphs (11) to (13), footnotes 361 to 363 of the commentary to principle 3, A/77/10, pp. 104-105.

[112] Secretariat Memo, A/CN.4/759 para. 74, "This approach is demonstrated also, for example, in paragraph (4) of the commentary to principle 4 concerning the designation of protected zones, where the Commission's relies, *inter alia,* on the ICRC *Guidelines on the Protection of the Natural Environment in Armed Conflict* and the *San Remo Manual on International Law Applicable to Armed Conflicts* to illustrate the types of environmental area that may fall within the scope of the principle; see paragraph (4) of the commentary to principle 4 of the principles on protection of the environment in relation to armed conflicts, A/77/10, p. 106. See also paragraph (11) of the commentary to principle 8 concerning human displacement, where the Commission relies variously on publications of UNHCR, OHCHR, UNEP and the International Organization for Migration in support of a broad interpretation of the terms "location" and "transit" in relation to the areas where measures should be taken to prevent, mitigate and remediate harm to the environment, see paragraph (11) of the commentary to principle 8 of the principles on protection of the environment in relation to armed conflicts, A/77/10, p. 120."

[113] Including the Charter of the United Nations, the 1948 Universal Declaration of Human Rights and the 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights.

also on a number of publications and other documents that may be regarded as 'teachings'".[114]

85. In the commentary to article 10 of the articles on the effects of armed conflicts on treaties, the Commission relied on Article 43 of the Vienna Convention on the Law of Treaties as well as the *dictum* in the International Court of Justice case, *Military and Paramilitary Activities in and against Nicaragua*, to contend that customary international law obligations continue to apply independently of treaty obligations that are terminated or suspended.[115]

86. The Secretariat, however, suggests that, while the above examples may illustrate a certain tendency in the Commission's approach to rely primarily on treaty provisions, other international instruments and international judicial decisions when codifying existing international law, it should not be considered as the Commission's uniform practice. For example, in the commentary to article 3 (General principle) of the articles on the effects of armed conflicts on treaties, which is described as one of overriding significance, the Commission, in establishing the general principle of legal stability and continuity, relied entirely on national judicial decisions (from the United Kingdom and the United States) and on teachings, including a 1985 resolution of the *Institut de droit international* on the effects of armed conflicts on treaties, *Oppenheim's International Law*, and McNair on *The Law of Treaties*, to determine the existence of a legal rule: "it has become evident that, under contemporary international law, the existence of an armed conflict does not *ipso facto* put an end to or suspend existing agreements".[116]

C. The Commission's reliance on judicial decisions from international and other courts

87. The memorandum includes several observations on the use of judicial decisions by the Commission confirming their prevalence in its work. Six general observations specifically focus on the Commission's use of Permanent Court of International Justice and International Court of Justice decisions. They are briefly set out below.

88. *First*, the memorandum confirms that, among the judicial decisions that the Commission has relied on, it has placed particular significance on Permanent Court of International Justice and International Court of Justice decisions, which can be gleaned from the fact that Permanent Court of International Justice and/or International Court of Justice decisions have been referred to in most of the topics considered by the Commission since 1949.[117] The particular significance of these decisions can also be seen in the prominence and weight attached to them in the Commission's commentaries, including those on some of its foundational works, including the articles on the responsibility of States for internationally wrongful acts

[114] Including the International Federation of Red Cross and Red Crescent Societies Guidelines for the Domestic Facilitation of International Disaster Relief and Initial Recovery Assistance, the *Institut de droit international* resolution on humanitarian assistance, and the OCHA ("Oslo") Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, See generally the commentaries to articles 4 and 5, articles on the protection of persons in the event of disasters, *Yearbook ... 2016*, vol. II (Part Two), pp. 32-35.

[115] Secretariat Memo, A/CN.4/759 p. 78; Paragraphs (1) and (2) of the commentary to article 10 of the articles on the effects of armed conflicts on treaties, with commentaries, *Yearbook ... 2011*, vol. II (Part Two), p. 116.

[116] Secretariat Memo, A/CN.4/759 para. 77, Paragraph (2) of the commentary to article 3 of the articles on the effects of armed conflicts on treaties, with commentaries, *Yearbook ... 2011*, vol. II (Part Two), pp. 111–112.

[117] Secretariat Memo, A/CN.4/759 observation 22, para. 79-83.

and the articles on the law of treaties.[118] Examples provided in the memorandum can be found in the commentary to article 1 of the articles on the responsibility of States for internationally wrongful acts,[119] in the commentary to article 6 of the articles on the law of treaties[120] and in the topic of unilateral acts of States.[121]

89. *Second*, the Commission has, on many occasions, regarded Permanent Court of International Justice and International Court of Justice decisions as statements of existing international law and relied directly on the text of those decisions to formulate provisions or based its formulations closely thereon.[122] Some of the Commission's formulations of draft articles, conclusions, principles, etc. are taken from such decisions.[123] For example, in the articles on the law of the sea, the commentary notes that some of the rules were reformulated from the first reading text to conform with the findings of the International Court of Justice in the *Fisheries* case.[124] The same articles also include "a clause formally prohibiting interference with passage through straits used for navigation between two parts of the high seas. The expression "straits" normally used for international navigation between two parts of the high seas "was suggested by the decision of the International Court of Justice in the Corfu Channel Case".[125]

90. The articles on the responsibility of States for internationally wrongful acts contains numerous examples of provisions based on decisions of the Permanent Court of International Justice and the International Court of Justice, as well as the decisions

---

[118] Secretariat Memo, A/CN.4/759 para. 80.

[119] See the articles on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II (Part Two): para. (2) of the commentary to article 1, para. 77, citing the *Phosphates* in *Morocco* case, 1938 P.C.I.J., Series A/B, No. 74, p. 10 at p. 28; the *Corfu Channel* case, Merits, Judgment, *I.C.J. Reports 1949*, p. 4, at p. 23; the *Military and Paramilitary activities in and against Nicaragua* case *(Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 142, para. 283, and p. 149, para. 292; and the *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 38, para. 47; the *Factory at Chorzow* case, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and ibid*.,* Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29. 1938 P.C.I.J., Series A/B, No. 74, p. 10 at p. 28.

[120] See the articles on the law of treaties, *Yearbook…1966*, vol. II: para. (2) of the commentary to article 6, para. 38, *Legal Status of Eastern Greenland* case, P.C.I.J, (1933) Series A/B, No. 53, p. 71; and para. (1) of the commentary to article 15, para. 38, *Certain German* Interests *in Polish Upper Silesia* case, P.C.I.J (1926), Series A, No. 7, p. 30.

[121] See guiding principles applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook…2006*, vol. II (Part Two): para.(2) of the general commentary, p. 162, *referring* to *Nuclear Tests, (Australia v France),* Judgment, I.C.J. Reports 1974, p. 253 and *Nuclear Tests (New Zealand v France),* ibid. p. 457; and para. (1) of the commentary to guiding principle 4, p. 163, referring to *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. 28.

[122] Secretariat Memo, A/CN.4/759 observation 23, para. 84-100.

[123] Secretariat Memo, A/CN.4/759 para. 84.

[124] Articles on the law of the sea*, Yearbook…1956*, vol. II: para. (2) of the commentary to article 5, p. 267, concerning straight baselines, indicates *that* "[t]he Commission interpreted the Court's judgement, which was delivered on the point in question by a majority of 10 votes to 2, as expressing the law in force; it accordingly drafted the article on the basis of this judgement…"; para. (4) of the commentary to article 5, p. 267, it is noted that at its seventh session in 1955, "…the Commission made a number of changes designed to bring the text even more closely into line with the Court's judgement in the above-mentioned Fisheries Case"; para. (1) of the commentary to article 7, concerning bays, p. 269, the Commission noted that "In adopting this provision, the Commission repaired the omission to which attention had already been drawn by The Hague Codification Conference of 1930 and which the International Court of Justice again pointed out in its judgement in the Fisheries Case."

[125] Para. (3) of the commentary to article 17, ibid., p. 273.

of other international courts and tribunals.[126] This included the obligation of a State to make reparations as the consequence of the commission of a wrongful act and the form of such reparation, which were derived from the *Factory at Chorzów* case as well as the reliance on *Barcelona Traction* in Article 48 of the State responsibility articles.

91. Two further examples of the Commission relying directly on the text of International Court of Justice decisions to formulate provisions can, firstly, be found in the articles on the non-navigational uses of international watercourses, where the Commission states in the commentary that the wording of paragraph 2 of article 17, concerning negotiations… "is inspired chiefly by the judgment of the [International Court of Justice] in the *Fisheries Jurisdiction (United Kingdom v. Iceland)* case and by the award of the arbitral tribunal in the *Lake Lanoux case*".[127] Secondly, the commentary to the articles on the nationality of natural persons in relation to the succession of States emphasizes that the requirement of an "effective" link between the individual and the State was intended "to use the terminology of the [International Court of Justice] in the *Nottebohm* case".[128]

92. The *third* observation made by the Secretariat on the use of Permanent Court of International Justice and International Court of Justice decisions by the Commission is that, on many occasions, the Commission has relied on Permanent Court of

---

[126] Secretariat Memo, A/CN.4/759 para. 86. See articles on the responsibility of states for internationally wrongful acts, *Yearbook…2001*, vol. II (Part Two): para. (2) of the commentary to article 2 p. 34, referring to United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at p. 29, para. 56. Cf. page 41, para. 90. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986*, p. 14, at pp. 117–118, para. 226; and *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 54, para. 78; para. (4) of the commentary article 3, p. 37., citing *Fisheries, Judgment, I.C.J. Reports 1951*, p. 116, at p. 132; *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 111, at p. 123; *Application of the Convention of 1902 Governing the Guardianship of Infants, Judgment, I.C.J. Reports 1958*, p. 55, at p. 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988,* p. 12, at pp. 34–35, para. 57; and *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports* 1989, p. 15, at p. 51, para. 73; para. (3) of the commentary to article 3*,* pp. 36-37, referring to S.S. *"Wimbledon", 1923, P.C.I.J., Series A, No. 1*, p. 15, at, pp. 29–30; para. (1) of the commentary to article 53, p. 94 ("The text of the present article is identical to article 51 on the responsibility of States for internationally wrongful acts It reproduces, with a few additional words, the requirement stated by the International Court of Justice in *the Gabcíkovo-Nagymaros Project* case, that "the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question".); para. (7) of the commentary to article 2*,* p. 35, referring to *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and ibid., Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29. *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184; *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), p. 251, para. 75; para. (3) of the commentary to article 31, p. 91, citing *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21; and ibid., Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47; para. (8) of the commentary to article 48, p. 127, referring to the ICJ case of *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3.

[127] See para. (3) of the commentary to article 17 on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), p. 116, referring to Fisheries Jurisdiction cases (United Kingdom v. Iceland) (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974, pp. 3 and 175, and Lake Lanoux Arbitration, UNRIAA, vol. XII (Sales No. 63.V.3), pp. 281 *et seq*.

[128] Para. (5) of the commentary to article 19 on the nationality of natural persons in relation to succession of States, *Yearbook…1999*, vol. II (Part Two), p. 40.

International Justice and International Court of Justice decisions to inform or provide the rationale for provisions without necessarily basing its formulations thereon.[129] These decisions have been used by the Commission to inform and underpin its work on almost all topics. It has sometimes referred, for example, to its work being "consistent" with the jurisprudence of the International Court of Justice[130] or inspired by it.[131] Unlike the previous observation, the reliance on the Permanent Court of International Justice and International Court of Justice under this observation is usually discussed in the commentary.

93. For example, in the articles on the responsibility of States for internationally wrongful acts, the Commission indicated in the general comment to chapter V, which addresses the circumstances precluding wrongfulness, that such circumstances do not annul or terminate the obligation in question; rather, they provide a justification for non-performance while the circumstance in question subsists. The Commission found that "[t]his distinction emerges clearly from the decisions of international tribunals",[132] in particular, the *Gabčíkovo-Nagymaros Project* International Court of Justice case. This distinction underlies the articles of chapter V but is only discussed in the commentary.

94. In the articles on diplomatic protection, a Permanent Court of International Justice decision was relied on in the commentary as the basis for the principle that it is for each State to decide who its nationals are.[133] This principle informs the text of article 4 but is not reproduced in the article itself. Furthermore, examples of this practice can be found in the guiding principles to unilateral declarations of States

[129] Secretariat Memo, A/CN.4/759, observation 24, para. 101-105.

[130] Para. (9) of the commentary to guideline 1.5.3. on reservations, *Yearbook…2011*, vol. II, part 3, p. 74. ("These observations are consistent with the jurisprudence of the International Court of Justice and, in particular, its judgment of 4 December 1998 in the Fisheries Jurisdiction case between Spain and Canada.")

[131] See, for example, para. (7) of the commentary to principle 9 on the protection of the environment in relation to armed conflicts, A/77/10, p. 122-123. ("Paragraph 1 of the draft principle is furthermore inspired by the judgment of the International Court of Justice in the *Certain Activities (Costa Rica v. Nicaragua)* case, in which the Court found that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused to the environment, in and of itself".). See also para. (5) of the commentary to principle 19 on the protection of the environment in relation to armed conflicts, A/77/10, p. 161. ("The reference to environmental considerations is drawn from and inspired by the Advisory Opinion of the International Court of Justice on *Legality of the Threat or Use of Nuclear Weapons*.")

[132] Paras. (2) and (3) of the general comment to chapter V of the articles on the responsibility of States for internationally wrongful acts, *Yearbook*…2001, vol. II (Part Two), p. 71, citing cases concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair, UNRIAA, vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), p. 251, para. 75,. *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 63, para. 101; see also page 38, para. 47.

[133] Para. (2) of the commentary to article 4 on diplomatic protection, *Yearbook…2006*, vol. II (Part Two), p. 29, *Nationality Decrees Issued in Tunis and Morocco (French Zone),* Advisory Opinion, P.C.I.J. Reports, Series B, No. 4, 1923, p. 6, at p. 24.

capable of creating legal obligations[134] and the articles on prevention of transboundary harm from hazardous activities.[135]

95. *Fourth*, on some occasions, the Commission has relied on International Court of Justice decisions as authoritative bases to support the objective of the topic in question,[136] as illustrated by the Commission's reliance on the International Court of Justice advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, together with principle 2 of the Rio Declaration on Environment and Development, in the articles on prevention of transboundary harm from hazardous activities, in order to confirm that the objective of the topic, the prevention of transboundary harm from hazardous activities, is an objective "forming part of the corpus of international law".[137]

96. *Fifth*, on some occasions, the Commission has also relied on Permanent Court of International Justice and International Court of Justice decisions as authoritative bases to demonstrate or recognize that there has been a development in international law.[138] In this regard, the Commission, in the articles on diplomatic protection, "relied on [Permanent Court of International Justice] and [International Court of Justice] decisions in the commentaries to demonstrate that international law had developed from the position in 1924 (the [Permanent Court of International Justice] *Mavrommatis* case) where States were regarded, by taking up the claims of their nationals, to be asserting their own rights,[139] to the current position (the *LaGrand* and *Avena* [International Court of Justice] cases) where international law recognises the existence of certain rights, as a matter of either existing treaty or customary international law, aimed at the protection of individuals".[140]

97. The Secretariat provides further examples that support this observation that can be found in the articles on the responsibility of States for internationally wrongful acts relating to the Permanent Court of International Justice articulation of the role of compensation in international law.[141] In the commentaries to the guidelines on the protection of the atmosphere, the Commission noted that the *Pulp Mills* case "indicated that an environmental impact assessment had to be undertaken where there was a risk that the proposed industrial activity may have a 'significant adverse impact

---

[134] Para. (3) of the commentary to guiding principle 5 applicable to unilateral declarations of States capable of creating legal obligations, *Yearbook…2006*, vol. II (Part II), p.164, referring to *Nuclear Tests, (Australia v France),* Judgment, I.C.J. Reports 1974, p.269 para. 49, and *Nuclear Tests (New Zealand v France)*, Judgement, I.C.J Reports, p.474, para. 51.

[135] Para. (14) of the commentary to article 1 on prevention of transboundary harm from hazardous activities, *Yearbook…2001*, vol. II (Part Two), p.151, referring to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p.16, at p.54, para. 118.

[136] See Secretariat Memo, A/CN.4/759, observation 25, para. 106.

[137] General Commentary, paragraph (3), articles on prevention of transboundary harm from hazardous activities, *Yearbook … 2001*, vol. II, part. two, p.148, referring to *Legality of the Threat or Use of Nuclear Weapons,* I.C.J. Reports 1996, p. 226 at pp. 241-242, para. 29.

[138] Secretariat Memo, A/CN.4/759, observation 26, para. 107-110.

[139] Para. (3) of the commentary to article 1 on diplomatic protection, *Yearbook … 2006*, vol. II (Part Two), p. 27, referring to *Mavrommatis Palestine Concessions,* Judgment No. 2, 1924, PCIJ, Series A, No. 2, p.12.

[140] Para. (4) of the commentary to article 1 on diplomatic Protection, *Yearbook … 2006*, vol. II (Part Two), p. 27, referring to *LaGrand (Germany v United States of America)* Judgment, I.C.J. Reports 2001, p.466 at pp. 493-494, paras. 76-77; and *Avena and Other Mexican Nationals (Mexico v United States of America),* Judgment of 31 March 2004, I.C.J. Reports 2004, p. 12, at pp. 35-36, para. 40.

[141] Para. (3) of the commentary to article 36 on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II (Part Two), p. 99.

in a transboundary context, in particular on a shared resource'"[142] and in the commentaries to the guidelines on the protection of the environment in relation to armed conflicts, where the Commission referred to the *Gabčíkovo-Nagymaros Project* case in relation to the development of the legal framework for the exploitation and conservation of natural resources, environmental considerations and sustainability.[143]

98. The *final* observation made by the Secretariat that is especially applicable to International Court of Justice and Permanent Court of International Justice decisions is that it is rare for the Commission to indicate expressly that it disagrees with an International Court of Justice decision.[144] A prominent example of this is found in the commentary to article 48 of the articles on the responsibility of States for internationally wrongful acts, concerning the invocation of responsibility by a State other than an injured State. The Commission referred to the "much-criticised decision" of the 1966 judgment of the International Court of Justice in the *South West Africa, Second Phase*, case "from which article 48 is a deliberate departure".[145] In doing so, the Commission laid the foundation for the inclusion in the articles of the concept of *erga omnes* obligations and, accordingly, the right of third States (i.e. other than the injured State) enjoying a legal interest in the performance of such obligations to invoke the responsibility of the wrongdoing State.[146]

99. While the following observations in the Secretariat memorandum do not specifically or exclusively mention Permanent Court of International Justice and International Court of Justice decisions, as the preceding six observations did, the underlying use of judicial decisions by the Commission on which the observations are based, are still primarily International Court of Justice and Permanent Court of International Justice decisions. That, however, should not be taken as an indication that the decisions of other international courts and tribunals are not important or featured in the work of Commission.

100. The Secretariat memorandum observed that the Commission has also taken decisions of other dispute settlement bodies, both judicial and non-judicial, into consideration,[147] explaining that "the Commission has often referred extensively to the decisions of regional courts[148] and tribunals, arbitral tribunals, domestic courts,

[142] Para. (4) of the commentary to guideline 4 on the protection of the atmosphere, *Official Records of the General Assembly, Seventy-sixth Sixtieth Session, Supplement No. 10* (A/76/10), p. 29-30.

[143] Para. (7) of the commentary to principle 20 on the protection of the environment in relation to armed conflicts *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), pp. 168.

[144] See A/CN.4/759, observation 27, para. 111.

[145] Para. (7) of the commentary to article 48 on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II (Part Two), ft. 725.

[146] Secretariat Memo, A/CN.4/759 para. 111.

[147] See Secretariat Memo, A/CN.4/759, observation 28, para. 112-122.

[148] Para. (5) of the commentary to principle 5 on the protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), p. 109, noting that para. 1 of such principle "builds on the jurisprudence of regional courts and tribunals, referring to the case law of the Inter-American Court of Human Rights and the African Court on Human and People's Rights concerning the protection of indigenous communities.

claims commissions[149] and sometimes to the decisions of conciliation commissions".[150]

101. The memorandum firstly provides various examples where the Court has used the decisions of international and regional bodies, before moving on to the examples where domestic case law was referred to. In terms of the former, in the commentary to article 1 on the responsibility of States for internationally wrongful acts, the Commission cites arbitral awards and conciliation commission cases that have "repeatedly affirmed" the principle that every internationally wrongful act of a State entails the international responsibility of that State.[151]

102. The commentary to article 4 on diplomatic protection cites an advisory opinion of the Inter-American Court of Human Rights to support the Commission's conclusion that "[t]oday, conventions, particularly in the field of human rights, require States to comply with international standards in the granting of nationality".[152] The same topic also relies on the decisions of the European Court of Human Rights "in support of a broad approach to the remedies under domestic law that must be

[149] See, for example, articles on the expulsion of aliens, *Yearbook…2014*, vol. II (Part Two): para. (1) of the commentary to article 3, p. 27, noting that the right of expulsion "has been recognized in particular in a number of arbitral awards and decisions of claims commissions and in various decisions of regional courts and commissions", referring among others, to decisions of the Mexican Claims Commission, the Mixed Claims Commission Italy-Venezuela, Mixed Claims Commissions Belgium-Venezuela and the Iran -United States Claims Tribunal; para. (6) of the commentary to article 20, p. 57, that noted that while the issue of the property rights of enemy in time of armed conflict is not addressed specifically in such provision, "[i]t should be noted that the issue of property rights in the event of armed conflict was the subject of extensive discussion in the Eritrea- Ethiopia Claims Commission".
See also references to the work of the United Nations Compensation Commission at the principles on the protection of the environment in relation to armed conflicts, for example, at para. (6) of the commentary to principle 9, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), pp. 122-123.

[150] Secretariat Memo, A/CN.4759 para. 112. See for example, para. (8) of the commentary to guideline 2.9.8. of the guide to practice on reservations, referring to the decision regarding delimitation of the border between Eritrea and Ethiopia, decision of 13 April 2002, Permanent Court of Arbitration, United Nations, Reports of International Arbitral Awards, vol. XXV (United Nations publication, Sales No. E/F.05.V.5), p. 111, para. 3.9, noting that "it is particularly difficult to determine when and in what specific circumstances inaction with respect to an interpretative declaration is tantamount to consent", *Yearbook..2011*, vol II (Part Two), p. 197.

[151] See the articles on the responsibility of States for internationally wrongful acts, *Yearbook...2001*, vol. II (Part Two), para. (2) of the commentary to article 1, para. 77, citing the *Claims of Italian nationals resident in Peru* cases, UNRIAA, vol. XV (Sales No. 66. V.3) pp. 399-411; and the *Dickson Car Wheel Company* case, (USA v United Mexican States) UNRIAA, Vol. IV, (Sales No. 1951.V.1) p.669 at p. 678 (1931). See also, para. (2) of the commentary to article 1, para. 77, citing *Case concerning the difference between New Zealand concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair,* UNRIAA Vol. XX (Sales No. E/F.93.V.3), p. 215 (1990), and Para. (1) of the commentary to article 13, p. 57, citing *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928).

[152] Para. (6) of the commentary to article 4 on diplomatic protection, second reading text with commentaries, *Yearbook … 2006*, vol. II, (Part Two), p. 30, citing the Advisory Opinion of the Inter-American Court of Human Rights on *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica,* (Advisory Opinion OC-4/84 of 19 January 1984, Series A, No.4, para. 38).

exhausted, including administrative remedies, before the State of nationality may take up a claim on behalf of its national".[153]

103. The Commission has relied on the arbitral award in the *Trail Smelter* case, in the general commentary to the articles on prevention of transboundary harm from hazardous activities, as "highlighting" the "well-established principle of prevention", which was later reiterated in principle 21 of the Stockholm Declaration, principle 2 of the Rio Declaration and General Assembly resolution 2995 (XXVII) of 15 December 1972.[154] The *Trail Smelter* arbitration was again relied on as the origin of "the basic principle that a State should ensure payment of prompt and adequate compensation for hazardous activities".[155]

104. In the articles on diplomatic protection, the commentary relies on claims commission cases to support the Commission's conclusions in several respects, which include certain aspects of the rules concerning claims by dual nationals[156] and claims by corporations.[157]

105. The final example of the Commission's use of international adjudication bodies, is the decisions of the United Nations Compensation Commission relied upon in the principles on the allocation of loss to support a broad interpretation of "environmental damage" and the payment of compensation for damage to natural resources without commercial value.[158]

106. The memorandum also addresses the circumstances where the Commission relied on domestic case law. The first of these examples related to the articles on diplomatic protection, where the Commission relies on domestic case law "to support the Commission's conclusion that there is some obligation on the State of nationality, however limited, to protect its nationals abroad when they have been subjected to

---

[153] Secretariat Memo, A/CN.4/759 para. 114, referencing Paras. (3) to (5) of article 14 on diplomatic protection, second reading text with commentaries, *Yearbook ... 2006*, vol II, (Part Two), pp. 44-45, citing *De Becker v Belgium, Application No. 214/56, Decision of 9 June 1958,* European Commission and Court of Human Rights, Yearbook of the European Convention on Human Rights 1958-1959, p. 238.

[154] Secretariat Memo, A/CN.4/759 para. 115, referring to para. (4) of the general commentary to the articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol II, (Part Two), p.148, citing *Trail Smelter,* UNRIAA, vol. III, (Sales No. 1949. V.2), pp. 1905 *et seq.*

[155] Para. (6) of the commentary to principle 4, on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook…2001, vol. II (Part Two), p. 77, citing Trail Smelter, UNRIAA, vol. III, (Sales No. 1949. V.2), pp. 1905 et seq.*.

[156] See Para. (3) of the commentary to article 7 on diplomatic protection, *Yearbook ... 2006*, vol. II, (Part Two), p. 34, citing *Mathison, Stevenson* (British-Venezuelan Mixed Claims Commission), *Brignone and Miliani,* (Italian-Venezuelan Mixed Claims Commission) cases, UNRIAA, vol. IX, (Sales No. 59.V.5), pp. 485 and 494, and vol. X (Sales No. 60.V.4) pp. 542 and 584 respectively. See also, para. (3) of the commentary to article 7, p. 34-35, citing the *Mergé claim,* Italy-United States Conciliation Commission, 10 June 1955, UNRIAA, vol. XIV (Sales No. 65.V.4), p.236.

[157] Paras. (1) to (3) of the commentary to article 10 on diplomatic protection, ibid., p. 39, citing the *Orinoco Steamship Company Case,* American-Venezuelan Mixed Claims Commission, UNRIAA, vol. IX, p.180.

[158] Para. (18) of the commentary to principle 2 on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II, (Part Two), p.69, citing the report and recommendations made by the Panel of Commissioners concerning the fifth instalment of "F4" claims, (S/AC.26/2005/10): "The UNCC was a subsidiary organ of the Security Council established in 1991 under Security Council resolution 687 (1991) to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's invasion and occupation of Kuwait. It was not a judicial body, but consisted of panels of Commissioners who reviewed and evaluated claims submitted by governments, international organizations, companies and individuals." See also, para. (11) of the commentary to principle 6, p. 88. The other international claims tribunals referred to in these Commentaries are the Iran-United States Claims Tribunal and the Marshall Islands Nuclear Claims Tribunal.

serious human rights violations. This underlay the Commission's formulation in article 19 to the effect that the State 'should' exercise diplomatic protection in appropriate cases".[159]

107. In the commentaries to the draft code of crimes against the peace and security of mankind, the Commission referred to domestic judicial decisions concerning the question of "whether the laws of war imposed on an army commander a duty to take such appropriate measures as were within his power to control the troops under his command and prevent them from committing acts in violations of the laws of war".[160]

108. The final examples in the memorandum concerned with the use of domestic law can be found in the commentary to article 10 on the prevention of transboundary harm from hazardous activities,[161] the commentary to the principles on allocation of loss in the case of transboundary harm[162] and the first reading of the articles on the immunity of State officials from foreign criminal jurisdiction.[163]

109. The Secretariat memorandum observed that the Commission has often taken into account the meanings given to particular terms by international courts and tribunals,[164] especially "where they shed light on the meaning to be given to particular terms that the Commission is considering".[165] This can be seen in the articles on the responsibility of States for internationally wrongful acts, where the Commission referred to the case law of the Inter-American Court of Human Rights, which "has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for".[166]

110. The Secretariat provides three further examples to support this observation, starting with the Commission reference to the use of the terms "organ" and "agent"

---

[159] Secretariat Memo, A/CN.4/759 para. 118, referring to para. (3) of the commentary to article 2 on diplomatic protection, *Yearbook ... 2006*, vol. II, (Part Two), p. 28, citing the *Rudolf Hess case,* ILR, vol. 90 (1992), p.387; *Abbasi and Juma v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, Decision of the Supreme Court of Judicature-Court of Appeal (Civil Division) of 6 November 2002, ILM, vol. 42 (2003), p.358; *Kaunda and Others v President of the Republic of South Africa and Others*, Constitutional Court Decision of 19 and 20 July 2004 and 4 August 2004, The South African Law Reports 2005, p.235.

[160] Para. (2) of the commentary to article 6 of the code of crimes against the peace and security of mankind, *Yearbook…1996*, vol. II (Part Two), p. 17, referring to the *Yashamita case* at the United States Supreme Court, the *German High Command Trial* and the *Hostages Trial* at the United States Military Tribunal.

[161] A/CN.4/759 para. 119, referring to the articles on the prevention of transboundary harm from hazardous activities, *Yearbook*…2001, vol. II (Part Two): para. (4) of the commentary to article 10, p.162, citing *Streitsache des Landes Wurttemberg und des Landes Preussen gegen das Land Baden (Wurttemberg and Prussia v Baden), betreffend die Donauversinkung,* German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix pp.18 et seq; and para. (14) of the commentary to principle 2, p. 68, citing *Burgess v M/V Tamano,* opinion of 27 July 1973, United States District Court, Maine, Federal Supplement, vol. 370 (1973), p. 247.

[162] Secretariat Memo, A/CN.4/759, para. 119, referring to Para. (8) of the commentary to principle 3 on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II, (Part Two), *citing Blue Circle Industries PLC v Ministry of Defence,* The All England Law Reports 1998, vol. 3, p.385; and *Merlin and another v British Nuclear Fuels PLC,* The All England Law Reports 1990, vol. 3, p.711.

[163] Para. (31) of the commentary to article 2 on the immunity of State officials from foreign criminal jurisdiction, p. 212, referring to decisions of national courts in France, Germany, Italy, the United States, and the United Kingdom.

[164] Secretariat Memo, A/CN.4/759 observation 29, para. 123-126.

[165] Secretariat Memo, A/CN.4/759 para. 123.

[166] Secretariat Memo, A/CN.4/759 para. 123. Para. (4) of the commentary to article 14 on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II, part. two, p. 60, citing Blake, *Inter-American Court of Human Rights*, Series C, No. 36, para. 67 (1998).

in the articles on the responsibility of international organizations, where the Commission stated that the International Court of Justice, when it "was addressing the status of persons acting for the United Nations, considered relevant only the fact that a person had been conferred functions by an organ of the United Nations".[167]

111. Furthermore, in the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission stated that the general rule on "subsequent practice in the application of a treaty" had been formulated by the Iran-United States Claims Tribunal, which had determined that such practice must be "…a practice of the parties to the treaty and one which establishes the agreement of the parties regarding the interpretation of the treaty".[168]

112. Lastly, in the articles on the prevention and punishment of crimes against humanity, the Commission referred to the interpretation of the terms "widespread" and "systematic" in the definition of "crimes against humanity" in the jurisprudence of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice.[169]

113. The Secretariat observed that, in some cases, the Commission has referred to separate or dissenting opinions that expressed a view or explained in further detail the reasoning of a court or tribunal in a particular decision,[170] where these assist in understanding the decision of the court or tribunal in question or its underlying reasoning.[171] In this regard, in the commentary to the articles on the responsibility of States for internationally wrongful acts, the Commission referred to a dissenting opinion of Judge Schwebel in support of the position that the doctrine of "clean hands" has been invoked principally in the context of admissibility of claims before international courts and tribunals, though rarely applied.[172]

114. Furthermore, "[i]n the final report of the study group on the obligation to prosecute or extradite (*aut dedere aut judicare*), the Commission referred to the dissenting and separate opinions to decisions at the International Court of Justice which addressed the typology of treaties containing the '*aut dedere aut judicare* formula'".[173]

115. Another example underlying this observation can be found in the commentary to the articles on diplomatic protection, which referred to the separate opinions of

[167] Para. (2) of the commentary to article 6 on the responsibility of international organizations, *Yearbook…2011*, vol. II, (Part Two), p. 55, also see para. (4) of the commentary to article 6.

[168] Para. (9) of the commentary to conclusion 5 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook…2018*, vol. II, (Part Two), p. 40, citing, among others, Iran-United States Claims Tribunal, *United States of America et al. v. Islamic Republic of Iran et al.*, Award No. 108-A-16/582/591-FT, *Iran-United States Claims Tribunal Reports*, vol. 5 (1984), p. 57, at p. 71.

[169] Paras. (10) to (16) of the commentary to article 2 on the prevention and punishment of crimes against humanity, *Official* Records *of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), pp. 31-34.

[170] Secretariat Memo, A/CN.4/759, observation 30, para. 127-130.

[171] Secretariat Memo, A/CN.4/759 para. 127.

[172] See para. (9) to the commentary to Chapter V and footnote 319, articles on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II (Part Two), para. 77, referring to the dissenting opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v United States of America) Merits, Judgment, I.C.J. Reports 1986*, p.14 at pp. 392-394.

[173] Secretariat Memo, A/CN.4/759 para. 128, referring to the final report of the study group on the obligation to extradite or prosecute (*aut dedere aut judicare*), *Yearbook … 2014*, vol. II, (Part Two), p. 95, para. 11: "In his separate opinion in the judgment of 20 July 2012 of the International Court of Justice in the case concerning Questions relating to the Obligation to Prosecute or Extradite, Judge Yusuf also addressed the typology of "treaties containing the formula aut dedere aut judicare" and divided them into two broad categories.")

International Court of Justice judges, for example, "in favour of an exception that would allow the State of nationality of shareholders in a corporation to claim against the State of incorporation when that State is responsible for the injury to the corporation".[174] In the same topic, the Commission referred to a dissenting opinion of Judge Oda in the *Elettronica Sicula S.p.A* International Court of Justice case as supporting reliance on "'the general principles of law concerning companies' rather than municipal law to ensure the rights of foreign shareholders in circumstances where the company is incorporated in the wrongdoing State".[175]

116. The Commission also referred to a separate opinion of Judge Alvarez in the *Corfu Channel* case in its commentaries to the articles on the protection of persons in the event of disasters,[176] and to separate opinions of judges to the views of various judges in the *Oil Platforms* case.[177]

117. The Secretariat's penultimate observation pertaining to judicial decisions is that, in some cases, the Commission has referred to judicial decisions to recall the practice of States in their pleadings or referred directly to such pleadings before an international tribunal on a particular point of law.[178] The Secretariat adds that the Commission has also referred to statements of States before international courts and

[174] Secretariat Memo, A/CN.4/759 para. 129, referring to Para. (10) of the commentary to article 11 on diplomatic protection, *Yearbook ... 2006*, vol. II, (Part Two), p.41, referring to the separate opinions of Judges Fitzmaurice, Jessup and Tanaka in the *Barcelona Traction*, *Light and Power Company Limited*, *Second phase*, Judgment, I.C.J. Reports 1970, p.3 at p.48; "The Commission, however, decided on an exception that was more limited in scope," See Article 11, paragraph (b) on diplomatic protection, ibid., p. 42.

[175] Secretariat Memo, A/CN.4/759 para. 129, referring to Para. (4), footnote 162, of the commentary to article 12 on diplomatic protection, *Yearbook ... 2006*, ibid., p. 43, citing *Elettronica Sicula S.p.A (ELSI),* Judgment, I.C.J. Reports 1989, p.15.

[176] Paragraph (4) of the commentary to article 10, articles on the protection of persons in the event of disasters, *Yearbook…2016*, vol. II (Part Two), para. 49, citing the separate opinion of Judge Alvarez in the *Corfu Channel* case, Merits, Judgment, *I.C.J. Reports 1949*, p. 39 at p. 43.

[177] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, at pp. 278-279 (separate opinion of Judge Buergenthal), 326-34 (separate opinion of Judge Simma), 236-240 (separate opinion of Judge Higgins), 261 (separate opinion of Judge Koojimans). Final report of the study group on the fragmentation of international law, *Yearbook…2006*, vol. I, (Part Two), addendum two, p. 93, paras. 455-457. The Commission had also referred to the separate opinions of judges when referring to article 103 of the United Nations Charter, ibid., p. 74, para. 356, referring, for example, Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of 28 November 1958, I.C.J. Reports 1958, p. 55, at p. 107 (separate opinion of Judge Moreno Quintana); South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 319, at p. 407 (separate opinion of Judge Jessup); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 99 (separate opinion of Judge Ammoun); Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985, p. 192, at pp. 232–233 (separate opinion of Judge Ruda).

[178] Secretariat Memo, A/CN.4/759, observation 31, para. 131-136.

tribunals, or the decisions of international courts and tribunals reflecting the views and practice of States in relation to a specific point of law.[179]

118. For example, in the articles on the law of treaties, the Commission considered "[t]hat the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the Court itself in the *Reservations to the Genocide Convention* case spoke of 'very great allowance' being made in international practice for 'tacit assent to reservations'".[180]

119. In the commentary to article 12 on the succession of States in respect of treaties, the Commission referred to the pleadings of Thailand and Cambodia in the *Temple of Preah Vihear* case,[181] and in the articles on the most favoured nation clause, the Commission referred to the pleadings of the United States before the International Court of Justice in the case concerning *Rights of Nationals of the United States of America in Morocco*.[182]

120. In the commentaries to the articles on the responsibility of international organizations for internationally wrongful acts, the Commission noted that "[t]he view that member States cannot generally be regarded as internationally responsible for the internationally wrongful acts of the organization has been defended by several States in contentious cases".[183]

121. The final observation made by the Secretariat regarding judicial decisions is that the Commission has observed that decisions of international tribunals may, despite their lack of formal precedent value, influence decision-making by other international tribunals.[184] This is illustrated by an analysis of multiple arbitral decisions in the final report of the Study Group on Most-Favoured-Nation clause, where the Commission stated that:

> While tribunals have noted that there is no formal precedential value in decisions of other tribunals, the desire for consistency clearly has had an influence on decision-making.[185]

---

[179] Secretariat Memo, A/CN.4/759, para. 131, See also, observation 17 of the report on the Formation and evidence of customary international law, Elements in the previous work of the International Law Commission that could be particularly relevant to the topic, Memorandum by the Secretariat, 14 March 2013, Document A/CN.4/659, p. 26, citing, among others, para. (10) of the commentary to article 5 on the non-navigational uses of international watercourses, *Yearbook…1994*, vol. II (Part Two), p. 98 (including "decisions of international courts and tribunals" in its "survey of all available evidence of the general practice of States, accepted as law"). See also para. (4) of the commentary to article 39 on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II (Part Two), p. 110 (relying on the Delagoa Bay Railway and the S.S. "Wimbledon" cases as evidence of "State practice" with respect to "[t]he relevance of the injured State's contribution to the damage in determining the appropriate reparation").

[180] Para. (23) of the commentary to articles 16 and 17 on the law of treaties, *Yearbook…1996*, vol II, p. 208, citing *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J, Reports 1951*, p. 15, at p. 21, also see para. (4) of the commentary to article 59, p. 257, referring to the pleadings of France in the *Nationality Decrees issued in Tunis and Morocco* case and of China in *Denunciation of the Treaty of 2 November 1865 between China and Belgium*, and France in the *Free Zones of Upper Savoy and the District of Gex* case.

[181] Para. (7) of the commentary to article 12 on the succession of States in respect of treaties, *Yearbook … 1974*, vol. II (Part One), p. 198.

[182] Para. (21) of the commentary to article 10 on the most favoured nation clauses, *Yearbook…1978*, vol. II, (Part Two), p. 37.

[183] Para. (3) of the commentary to article 62 on the responsibility of international organizations for internationally wrongful acts, Yearbook…2011, vol. II (Part Two), p. 100.

[184] Secretariat Memo, A/CN.4/759, observation 32, para. 137.

[185] Final report of the Study Group on the most-favoured-nation clause, *Yearbook…2015*, vol. II, (Part Two), p. 109, para. 135.

D. The Commission's reliance on teachings and the works of expert bodies

122. On the Commission's use of judicial decisions and teachings, the Secretariat memorandum concludes with a handful of observations on the second foundational plank of Article 38, subparagraph (1) (d), namely, teachings of the most highly qualified publicists. In the first instance, it observed that the Commission has referred to writings, doctrine or scholarship and the views of scholars to indicate that there is approval or support for a particular approach to a rule of international law contained in its work.[186]

123. The Secretariat memorandum also observes that, on certain occasions, the Commission has sought to clarify that it was not following the approach taken in various writings.[187] In this regard, the Commission, in its work on the guide to practice on reservations to treaties, indicated that it "chose not to use in this guideline the term 'agreements in simplified form', which is commonly used in French writings but does not appear in the Vienna Conventions".[188]

124. The Commission also referred to writings as providing "some support" for the view that, where a national dies before the official presentation of a claim, the claim may nevertheless continue because it has assumed a "national character" in the commentary to the articles on diplomatic protection.[189] However, owing to the existence of contrary Claims Commission decisions, the Commission concluded that there was an inconclusiveness of authorities that made it unwise to propose a rule on this matter.[190]

125. The Commission, again as per the Secretariat memorandum, relied extensively on writings in the allocation of loss topic.[191]

126. Furthermore, the memorandum notes that in some topics, the Commission has referred to teachings to provide background information concerning the area of the law in question and its development. Examples were provided of this.[192]

---

[186] Secretariat Memo, A/CN.4/759, observation 33, para. 138- 142, See for example, Para. (2) of the commentary to guideline 2.2.4 on reservations to treaties, *Yearbook…2011*, vol. II, part 3, p. 112, where the Commission noted that the rule that the expression of consent to be bound to a treaty is the last time when a reservation may be formulated "is unanimously recognized in legal writings".

[187] Secretariat Memo, A/CN.4/759, observation 34, para. 143-144.

[188] Secretariat Memo, A/CN.4/759, para. 143; Para. (4) of the commentary to guideline 2.2.2. on reservations to treaties, *Yearbook…2011*, vol. II, part 3, p. 109.

[189] Para. (14) of the commentary to article 5 on diplomatic protection, *Yearbook … 2006*, vol. II, (Part Two), p.33, referring to Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims,* (New York: The Banks Law Publishing Co., 1922), p.628.

[190] Para. (14) of the commentary to article 5, on diplomatic protection, *Yearbook … 2006*, ibid., p. 33, referring to the *Eschauzier claim, (Great Britain v United Mexican States),* Decision of 24 June 1931, UNRIAA, vol. V (Sales No. 1952.V.3), p. 209.

[191] See the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook … 2006*, vol. II, (Part Two): para. (9) and footnote 306 of the general commentary, p. 60, referring to Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment,* 2nd ed. (Oxford: Oxford University Press, 2002), p.113, and para. (7) of the commentary to principle 1, p. 63, referring to P. Wetterstein, "A proprietary or possessory interest: A *condition sine qua non* for claiming damages for environmental impairment?", in P. Wetterstein (ed), *Harm to the Environment: the Right to Compensation and Assessment of Damage,* (Oxford: Clarendon Press, 1997), pp. 29-54, at p.30; and Hanqin Xue, *Transboundary Damage in International Law,* (Cambridge: Cambridge University Press, 2003), pp. 19-105 and 113-182.

[192] Secretariat Memo, A/CN.4/759, observation 35, para. 145-146.

127. The Secretariat also observed that, in some situations, the Commission has taken account of the interpretation of treaty provisions by expert treaty bodies in the formulation of its own texts.[193] In general, the Commission has referred to interpretations made by expert treaty bodies, including the Human Rights Committee,[194] the Committee against Torture[195] and the Committee on Economic, Social and Cultural Rights,[196] in various texts.[197]

128. Relatedly, the Commission has referred to the work of the Human Rights Committee on several points, including the right to truth[198] and the right to a fair trial, noting that "the Human Rights Committee has found the right to a fair trial to be a 'key element of human rights protection' and a 'procedural means to safeguard the rule of law'",[199] in the articles on crimes against humanity.

129. In the commentary to articles on the expulsion of aliens, the Commission referred to the guidelines developed by the Committee against Torture when considering claims arguing that expulsion of aliens to particular States was contrary to the Convention against Torture.[200]

130. On certain occasions, the Commission has drawn upon developments by treaty bodies in the interpretation of certain instruments. For example, in the draft code of crimes against the peace and security of mankind, the Commission included in the

---

[193] Secretariat Memo, A/CN.4/759, observation 36, para. 147-152.

[194] See, for example, para. 6 of the commentary to article 18 on the expulsion of aliens, *Yearbook…*2011, vol. II, (Part Two), p. 40, where the Commission noted that "[t]he criterion of "fair balance" also seems compatible with the approach taken by the Human Rights Committee for the purpose of assessing whether expulsion measures are in conformity with article 17 of the International Covenant on Civil and Political Rights."

[195] Para. (3) of the article 8 on the prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), p. 88, indicated that such provision "requires that the investigation be carried out whenever there is "reasonable ground to believe" that the offence has been committed. According to the Committee against Torture, such a belief arises when relevant information is presented or available to the competent authorities but does not require that victims have formally filed complaints with those authorities."

[196] See, for example, para. (3) of the commentary to article 11 on the protection of persons in the event of disasters, *Yearbook…2016*, vol. II, (Part Two), p. 47, referring to General Comment no. 12 of the Committee on Economic, Social and Cultural Rights concerning the right to adequate food. Para. (14) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook…2018*, vol. II, (Part Two), p. 94. See also, para. (11) of the commentary to principle 10 on the protection of the environment in relation to armed conflict, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), pp. 130-131 annex IV, para. 30, referring to the decisions that have drawn a link between environmental degradation and human health at Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health (art. 12).

[197] Secretariat Memo, A/CN.4/759, para. 147.

[198] Para. (24) of the commentary to article 12 on the prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10* (A/74/10), pp. 109-110, referring to the right to information or the right to truth in the decisions of the Human Rights Committee "as a way to end or prevent the occurrence of psychological torture of families of victims of enforced disappearances or secret executions."

[199] Secretariat Memo, A/CN.4/759, p. 45: "Consequently, draft article 11, paragraph 1, refers to fair treatment 'including a fair trial'"; Para. (5) of the commentary to article 11 on the prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth session, Supplement No. 10* (A/74/10), p. 99, citing Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second session, Supplement No. 40* (A/62/40), vol. I, annex VI, para. 2.

[200] Paras. (2) to (4) of the commentary to article 24 on the expulsion of aliens, *Yearbook…2014*, vol. II, (Part Two), p. 48-49.

proposed definition of the crime of genocide "imposing measures intended to prevent births within the group", noting that the phrase "imposing measures" was used to indicate the necessity of an element of coercion, citing article II, subparagraph (d) of the Convention on the Prevention and Punishment of the Crime of Genocide and the work of the Committee on the Elimination of All Forms of Discrimination against Women.[201]

131. In the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Commission referred to the use of the pronouncements of expert treaty bodies by the International Court of Justice[202] and various regional human rights courts;[203] and, in the commentary to the articles on the protection of persons in the event of disasters, the Commission referred, for example, to various general comments by the Committee on Economic, Social and Cultural Rights in the context of the duty of cooperation among States.[204]

132. The Commission has also referred to the works of expert bodies and other institutions in the consideration of several topics.[205] On certain occasions, the Commission has referred to the work of private institutions as part of doctrine.[206] In the study of multiple topics, the Commission has referred to the work of private institutions in the development of its own study, for example in the following topics:

- Law of treaties[207]

[201] Para. (16) of the commentary to article 17 of the draft code of crimes against the peace and security of mankind, Yearbook …1996, vol. II, (Part Two), citing *Report of the Committee on the Elimination of Discrimination against Women (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38* (A/47/38)), chap. I, para. 22.

[202] Para. (21) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, *Yearbook…2018*, vol. II, (Part Two), p. 86.

[203] Para. (22) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, ibid., pp. 86-87.

[204] Paragraph (2) of the commentary to article 7 on the protection of persons in disasters, Yearbook…2016, vol. II (Part Two), para. 49, referring in fn. 84 to general comment nos. 2, 3, 7, 14 and 15 of the Committee on Economic, Social and Cultural Rights.

[205] Secretariat Memo, A/CN.4/759, observation 37, para. 153-155, see para. (7) of the commentary to draft conclusion 9 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* (A77/10), pp. 45-46. ("The paragraph lists, as examples of other subsidiary means, the works of expert bodies and teachings of the most highly qualified publicists of the various nations, also referred to as scholarly writings.")

[206] See, for example, para. (12) of the commentary to guideline 1.4. of the guide to practice on reservations, footnote 243, at *Yearbook … 2011*, vol. II, part 3, p. 65. (The inherent conditional character of reservations is stressed in numerous doctrinal definitions, including that of the Harvard Law School (Research in International Law of the Harvard Law School, "Draft Convention on the Law of Treaties", AJIL, 1935, Supplement No. 4, p. 843…"),

[207] The articles on the law of treaties noted in para. (1) of the commentary to draft 28 that "[i]n 1956, the Institute of International Law adopted a resolution in which it formulated, if in somewhat cautious language, two articles containing a small number of basic principles of interpretation." *Yearbook … 1966*, vol. II, p. 218. References to the Harvard Draft on the law of treaties are found in para. (3) of the Commentary 3 to guideline 2.2.1 from the Guide to Practice on Reservations, *Yearbook … 2011*, vol. II, part three, p. 108.

- Nationality of natural persons in relation to the succession of States[208]
- Most-favoured-nation clauses in treaties[209]
- Prevention and punishment of crimes against diplomatic agents and other internationally protected persons[210]
- Responsibility of States for internationally wrongful acts[211]

[208] See for example, para. (4) of the commentary to article 26 on nationality of natural persons in relation to the succession of States, *Yearbook…1999*, vol. II, (Part Two), p. 46, mentioning that the rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory, noting that "an analogous provision regarding the case of separation was included in paragraph (b) of article 18 of the Draft Convention on Nationality prepared by Harvard Law School", referring to Harvard Law School, Research in International Law. I. Nationality, Supplement to the *American Journal of International Law*, vol. 23 (Cambridge, Mass., 1929), p. 13. The text referred to the resolution of the International Law Institute concerning conflict of laws in relation to nationality (naturalization and expatriation), *Annuaire de l'Institut de droit international,* vol. 15, part II (1896), pp. 270-271), at para. (2) of the commentary to article 12 on the nationality of natural persons in relation to the succession of States, *Yearbook…1999*, vol. II, (Part Two), p. 46.

[209] In the articles on most-favoured-nation clauses, the Commission referred several times to the work concluded by the Institute of International Law in 1936. See, for example, para. (2) of the commentary to article 16, *Yearbook … 1978*, vol. II, part two, p. 42 ("The rule proposed in the article applies to most-favoured-nation clauses irrespective of whether they belong to the unconditional type or take the form of a clause conditional upon any form of compensation, in particular reciprocal treatment. The rule was formulated in paragraph 2 of the resolution adopted by the Institute of International Law at its fortieth session, in 1936…").

[210] See, for example, footnote 473 to the para. (3) of the commentary of article 7 on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook… 1972*, vol. II, p. 319, referring to "...article 2 of the draft convention on extradition prepared by the Research in International Law of the Harvard Law School (Supplement to the *American Journal of International Law*, Washington D.C. (January and April 1935), vol. 29, Nos. 1 and 2, p. 21)".

[211] See, for example, para. (6) of the commentary to article 50 on the responsibility of States for internationally wrongful acts, *Yearbook…2001*, vol. II, (Part Two), p. 132, noting that "The Institut de droit international in its 1934 resolution stated that in taking countermeasures a State must "abstain from any harsh measure which would be contrary to the laws of humanity or the demands of the public conscience", citing *Annuaire de l'Institut de droit international*, vol. 38 (1934), p. 710.

- Law of the non-navigational uses of international watercourses[212]
- Fragmentation of international law[213]
- Law of transboundary aquifers[214]
- Responsibility of international organizations[215]

[212] See para. (12) of the commentary to article 2 on the law of the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II, part two, p. 92, at footnote 184 referring to the New York resolution, adopted in 1958 by ILA, Report of the Forty-eighth Conference, New York, 1958 (London, 1959), annex II, p. 99, The Helsinki Rules on the Uses of the Waters of International Rivers Report of the Fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 484 et seq.; reproduced in part in A/CN.4/274, pp. 357 et seq., para. 405). See the Salzburg resolution adopted by the Institute of International Law, at its Salzburg session in 1961, entitled "Utilization of non-maritime international waters (except for navigation)" (Annuaire de I'Institut de droit international (Basel), vol. 49, part II (1961), pp. 381-384), and the Athens resolution adopted by the Institute of International Law, at its Athens session in 1979, entitled "The pollution of rivers and lakes and international law" (ibid., vol. 58, part II (1980), p. 196). A private group of legal experts, the Inter-American Bar Association, adopted a resolution in 1957 dealing with "every watercourse or system or rivers or lakes ... which may traverse or divide the territory of two or more States ... referred to hereinafter as a 'system of international waters'" (Inter-American Bar Association, Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957 (2 volumes) (Buenos Aires, 1958), pp. 82-83; reproduced in A/5409, p. 208, para. 1092.). See also para. (5) of the commentary to article 24 on the law of the non-navigational uses of international watercourses, *Yearbook ... 1994*, vol. II, part two, p. 126, referring to the resolution on international regulations regarding the use of international watercourses (Madrid resolution) (on which article 5 of the Declaration of Montevideo was based) adopted by the Institute of International Law at its Madrid session, in 1911 (Annuaire de l'Institut de droit international, 1911 (Paris), vol. 24, p. 366), reproduced in A/5409, p. 200, para. 1072.

[213] See final report of the study group on fragmentation, *Yearbook…2006*, vol. II, part one, addendum two, p. p. 88, para. 431, referring to the Resolution of the Institute of International Law on the interpretation of treaties, Annuaire de l'Institut de droit international, vol. 46 (Session of Granada), pp.364-365.

[214] See para. (5) of the general comment ("The Commission also held an informal meeting in 2004 with the Water Resources Law Committee of the International Law Association and wished to acknowledge its comments on the Commission's draft articles adopted on first reading, as well as its appreciation of the International Law Association Berlin Rules of 2004."), and para. (1) of the commentary to draft article 2 on the law of transboundary aquifers with commentaries, *Yearbook ... 2008*, vol. II, (Part Two), p. 25.

[215] The articles on the responsibility of international organizations referred to a resolution of the Institute of International Law entitled "The Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations toward Third Parties", at para. (5) of article 62, *Yearbook… 2011*, vol. II, (Part Two), p. 100. The Commission also referred to a draft suggested by the Committee on Accountability of International organisations of the International Law Association. (Report of the Seventy-first Conference Held in Berlin, 16–21 August 2004, London, 2004, p. 200.) See para. (1) of the commentary to article 14, (*Yearbook… 2011*, vol. II, (Part Two), p. 69., para. (8) of the commentary to article 7 (*Yearbook… 2011*, vol. II, (Part Two), p. 57), commentary 7 to article 8 (*Yearbook… 2011*, vol. II, (Part Two), p. 61), commentary to article 11 (Yearbook… 2011, vol. II, (Part Two), p. 64), para. (7) of the commentary to article 45, *Yearbook… 2011*, vol. II, (Part Two), p. 87.

- Succession of States in respect of State property[216]
- Expulsion of aliens[217]
- Effects of armed conflicts on treaties[218]
- Protection of persons in the event of disasters[219]
- Subsequent agreement and subsequent practice in relation to the interpretation of treaties[220]
- Protection of the environment in relation to armed conflicts[221]

133. The above trend is not limited to the more recent topics. In its work on the law of the sea, from the mid-1950s, the Commission referred to the work of private expert codification bodies and collective efforts by scholars. Some examples in that regard

[216] See para. (27) of the commentary to article 31 on succession of States in respect of State property, archives and debts with commentaries, *Yearbook…1981*, vol. II, (Part Two), p. 76, referring to ILA, Report of the Fifty-fourth Conference, held at The Hague, 23rd-29th August 1970 (London, 1971), p. 108.
See also para. (7) of guideline 5.1.1 of the guide to practice on reservations to treaties, *Yearbook … 2011*, vol. II, part three, p. 329. See Para. (6) of the commentary to article 3 on the protection of persons in the event of disasters, *Yearbook…2016*, vol. II, (Part Two), p. 30, referring to the element of "widespread loss of life" inspired by the 1995 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief, at *International Review of the Red Cross*, vol. 36 (1996), No. 310, annex VI.
[Maintenance of the predecessor State's reservations] had already been proposed by Mr. D. P. O'Connell, Rapporteur of the International Law Association on the topic "The Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", one year before Sir Humphrey Waldock endorsed the concept."); see *Yearbook… 2011*, vol. II (Part Three), p. 329.

[217] Para. (2) of the commentary to article 5 on the expulsion of aliens, *Yearbook…2014*, p. 29, referring to the Règles internationales sur l'admission et l'expulsion des étrangers [International Regulations on the Admission and Expulsion of Aliens], adopted on 9 September 1892 at the Geneva session of the Institute of International Law, art. 30

[218] Para. (2) of the commentary to article 3 on the effects of armed conflicts on treaties, *Yearbook…2011*, vol. II, (Part Two), p. 111, footnote 407, referring to Institute of International Law, *Yearbook*, vol. 61, Part I, Session of Helsinki (1985), pp. 8–9.
See also para. (4) of the commentary to article 3 on the protection of persons in the event of disasters, *Yearbook…2016*, vol. II, (Part Two), p. 29, referring to the resolution on humanitarian assistance adopted by the Institute of International Law, *Yearbook*, vol. 70 Part. II, Session of Bruges (2003), p. 263.

[220] See, for example, para. (11) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Yearbook…2018, vol. II (Part Two), p. 84 ("Pronouncements of expert treaty bodies may, however, give rise to, or refer to, a subsequent agreement or a subsequent practice …. This possibility has been recognized by States, by the Commission and also by the International Law Association and by a significant number of authors.")

[221] Referring to the work of the Institute of International Law concerning the use of force, para. (3) of the commentary to guideline 20 on the protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10* (A/77/10), p. 167 (footnote 784. As summarized by the Institute of International Law, "the occupying power can only dispose of the resources of the occupied territory to the extent necessary for the current administration of the territory and to meet the essential needs of the population". See Institute of International Law, Yearbook, vol. 70, Part II, Session of Bruges (2003), pp. 285 et seq.; available from www.idi-iil.org, Declarations, at p. 288.); and to the ICRC Guidelines on the Protection of the Natural environment, at para. (4) of the commentary guideline 4, ibid., p. 106. ("Most recently, the ICRC Guidelines on the Protection of the Natural Environment in Armed Conflict recommended that areas of particular environmental significance or fragility could be designated as demilitarized zones.")

can be found in relation to aspects concerning the law of the sea in respect of the use of the flag[222] and piracy.[223]

134. Lastly, in the articles on diplomatic protection, the Commission referenced the relevant Harvard draft convention and resolution of the *Institut de droit international*.[224]

135. The Secretariat further observed that, in some topics, the Commission has resorted to formulations inspired by or drawing upon the work of specialized private codification or other expert bodies.[225] Examples of this date back to 1994, where, in the draft statute for a permanent international criminal court, the Commission drew from a document first prepared by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, to note in the commentary that, "while prison facilities would continue to be administered by the relevant national authority, the terms and conditions of imprisonment should be in accordance with international standards, notably the Standard Minimum Rules for the Treatment of

[222] Para. (2) of the commentary to article 29 concerning the law of the sea, *Yearbook ... 1956*, vol. II, p. 279. ("On this principle, the Institute of International Law, as long ago as 1896, adopted certain rules governing permission to fly the flag. At its seventh session the Commission deemed these rules acceptable in slightly amended form, while realizing that, if the practical ends in view were to be achieved, States would have to work out more detailed provisions when incorporating these rules in their legislation.")

[223] See para. (1) of the commentary to article 38 on the law of treaties, *Yearbook ... 1956*, vol. II, p. 282. ("In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary, prepared in 1932 under the direction of Professor Joseph Bingham. In general, the Commission was able to endorse the findings of that research.")

[224] Para. (3) of the commentary to article 6, and para. (2)of the commentary to article 7 on diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), pp. 33-34, referring to paragraph 5 of article 23 of the 1960 Harvard draft convention on the international responsibility of States for injuries to aliens, reproduced in L.B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", AJIL, vol. 55, No. 3 (July 1961), p.548; and article 4(a) of the resolution on the national character of an international claim presented by a State for injury suffered by an individual adopted by the Institute of International Law at its Warsaw session in 1965, *Tableau des résolutions adoptées (1957-1991)*, Paris, Pedone, 1992, p. 56 at p. 58.

[225] Secretariat Memo, A/CN.4/759 observation 38, para. 156-162. See, for example, para. (1) of the commentary to article 4 on the nationality of natural persons in relation to the succession of States, *Yearbook…1999*, vol. II (Part Two), p. 28, referring to the Report of the experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation (Council of Europe (Strasbourg, 2 April 1996), document DIR/JUR(96)(4), para. 54. See also the Final report of the Study group on the obligation to extradite or prosecute (*aut dedere aut judicare*), *Yearbook ... 2014*, vol. II (Part Two), p. 97, para. 18, footnote 447, referring, among others, to the Report of the African Union-European Union Technical *ad hoc* expert group on the Principle of Universal Jurisdiction (8672/109/Rev.1).
See also, para. (2) of the commentary to article 19 on the expulsion of aliens, *Yearbook…2014*, vol. II (Part Two), p.41, where the Commission referred to "the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment in the annex to General Assembly resolution 43/173 of 9 December 1988."
See also reference to the report requested by the Secretary-General of the United Nations to the Office of the Coordination of Humanitarian affairs, at para. (9) of draft article 13 on the Protection of Persons in the event of Disasters, *Yearbook…2016*, vol. II, part two, p. 51.

Prisoners".[226] A further early example can be found in the 1994 commentary to the articles on the non-navigational uses of international watercourses.[227]

136. Later examples include the Commission's reliance on the International Law Association's prior work to support "significant" as being the threshold for transboundary damage caused by hazardous activities.[228]

137. In the articles on the protection of persons in the event of disasters, in the commentary to subparagraph (e) of article 3, the Commission stated that "the formulation is based on both the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief (also known as the 'Oslo Guidelines') and the Framework Convention on Civil Defence Assistance".[229] In the same articles, the Commission referred on a few occasions to other instruments developed by private expert bodies.[230]

138. Lastly, in the commentary to the principles on the protection of the environment in relation to armed conflict, the Commission noted that principle 10, concerning the duty of due diligence by business enterprises, contains elements "inspired by the concept of 'conflict-affected and high-risk areas' used in the OECD [Organisation for Economic Co-operation and Development] Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and

[226] Para. (2) of the commentary to article 59 of the draft statute for an international criminal court, Yearbook…1994, vol. II (Part Two), p. 67, footnote 111, referring to the first version of the rules: *First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 22 August-3 September 1955* (United Nations publication, Sales No. 1956.IV.4), annex I, pp. 67-73.

[227] Para. (2) of the commentary to article 12 on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II, part two, p. 111, referring to the "Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious *utilization* of natural resources shared by two or more States", adopted by the Governing Council of UNEP in 1978 (decision 6/14 of 19 May 1978), define the expression "significantly affect" as referring to "any appreciable effects on a shared natural resource and [excluding] *de mini- mis* effects" (UNEP, *Environmental Law: Guidelines and Principles,* No. *2, Shared Natural Resources* (Nairobi, 1978)).

[228] Article X of the Helsinki Rules on the Uses of the Waters of International Rivers, International Law Association, Report of the Fifty-second Conference, Helsinki, 1966, London, 1967, p.496; and article 16 of the Berlin Rules on Equitable Use and Sustainable Development of Waters, Report of the Seventy-first Conference, Berlin, 16-21 August 2004, London, 2004, p. 334.

[229] Para. (24) of the commentary to article 3 on the protection of persons in the event of disasters, *Yearbook…2016*, vol. II (Part Two), p. 32.

[230] See the articles on the protection of persons in the event of disasters, *Yearbook…2016*, vol. II (Part Two): para. (6) of the commentary to article 4, pp. 33-34, referring to the Guiding Principles on Internal Displacement, 11 February 1998, E/CN.4/1998/53/Add.2, annex and the Mohonk Criteria for Humanitarian Assistance in Complex Emergencies: Task Force on Ethical and Legal Issues in Humanitarian Assistance; and Para. (2) of the commentary to article 5, p. 34, footnote 59, citing the 9 Inter-Agency Standing Committee, IASC Operational Guidelines on the Protection of Persons in Situations of Natural Disasters (Washington, D.C., The Brookings–Bern Project on Internal Displacement, 2011); para. (7) of the commentary to article 6, p. 36, referring to the IFRC [International Federation of Red Cross and Red Crescent Societies] Guidelines; and para. (3) of the commentary to article 15, referring to 2013 Model Act for the Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance.

High-Risk Areas, as well as in the conflict minerals regulation of the European Union".[231]

139. A further observation in the memorandum is that, in some topics, the Commission has sought to make it clear that it was not following the approach taken by private expert bodies.[232]

E. The Commission's reliance on its own prior work

140. The Secretariat also observed that the Commission has frequently referred to its own prior work.[233] This is especially illustrated by the references to the Commission's work on the Nuremberg Principles. In the consideration of topics related to international criminal law, the Commission has often referred to its prior work on the Nuremberg principles and the Nuremberg judgment. In the draft code of crimes against the peace and security of mankind, the Commission noted in 1951 that article 1, concerning the principle of individual responsibility for crimes under international law, was contained in the Charter and the judgment of the Nuremberg Tribunal, referring to the formulation of the Nuremberg principles stating that "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment".[234]

141. In 1996, the Commission again referred to the statement from the judgment and the work of the Commission in the Nuremberg Principles noting "that individuals can be punished for violations of international law",[235] or that "individuals have international duties which transcend the obligations of obedience imposed by the individual State".[236]

142. In the articles on crimes against humanity, the Commission referred to the Nuremberg Principles,[237] concerning general rules of criminal accountability of individuals under international law. Moreover, the Commission also referred to the draft Code of Offences against the Peace and Security of Mankind of 1954 and the draft Code of Crimes against the Peace and Security of Mankind of 1996, among other topics, to refer to the fact that the criminal offence was committed by a person holding an official position does not exclude substantive criminal responsibility.[238]

---

[231] See principles on the protection of the environment in relation to armed conflicts, *Official Records of the General Assembly, Seventy-third Session, Supplement No. 10* (A/77/10): para. (6) of the commentary to principle 10, p. 127; para. (8) of the commentary to principle 10, 128-129; para. (10) of the commentary to principle 10, p. 130, referring to Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (A/HRC/17/31, annex), and the OECD, "Environment and the OECD Guidelines for Multinational Enterprises. Corporate tools and approaches". Available at https://oecd.org/env/34992954.pdf.

[232] Secretariat Memo, A/CN.4/759, observation 39, para. 163-164.

[233] Secretariat Memo, A/CN.4/759, observation 40, para. 165-171.

[234] Commentary to article 1 of the draft code of crimes against the peace and security of mankind, *Yearbook…1951*, vol. II (Part Two), p. 135, referring to Principle I of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, *Yearbook…1950*, vol. II, para. 97.

[235] See, para. (7) of the commentary to article 1 of the draft code of crimes against the peace and security of mankind, *Yearbook…1996*, vol. II, (Part Two), p. 17.

[236] Para. (11) of the commentary to article 1 of the draft code of crimes against the peace and security of mankind, *Yearbook…1996*, vol. II (Part Two), p. 18.

[237] See para. (2) of the commentary to article 6 on the prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), p. 67.

[238] See paras. (28) and (29) of the commentary to article 6 on the prevention and punishment of crimes against humanity, ibid., p. 76.

143. Further examples where the Commission referred to its own work can be found in its work on the use of subsequent agreements and subsequent practice in relation to the interpretation of treaties,[239] and in the principles on the expulsion of aliens, where it refers to its own work on the responsibility of States for internationally wrongful acts.[240]

144. In the draft conclusions on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), the Commission relied on some of its previous outputs. For example, in draft conclusion 17, concerning the relationship between such norms and obligations *erga omnes*, the Commission indicated that the "wording is based on the Commission's articles on responsibility of States for internationally wrongful acts, in which obligations *erga omnes* are described as including those obligations which 'arise under peremptory norms of general international law'".[241]

145. Furthermore, in the same draft conclusions on peremptory norms, the Commission decided to include an annex including "a non-exhaustive list of norms previously referred to by the Commission as having peremptory character". The Commission emphasized that it was including, "by reference to previous work of the Commission, the types of norms that have routinely been identified as having peremptory character, without itself, at this time, making an assessment of those norms".[242] The Commission thereby referred to its previous work in the articles on the law of treaties, the articles on the responsibility of States for internationally wrongful acts and the final report of the study group on the fragmentation of international law.[243]

146. Lastly, in terms of the Commission's use of judicial decisions and teachings, the Secretariat briefly observes that the Commission has referred to certain types of teachings of the most highly qualified publicists as reflecting the practice of States.[244] This includes references to the work of private codification bodies and other expert bodies as reflective of the practice of States, such as publications by treaty

[239] Para. (23) of the commentary to conclusion 13 on subsequent agreements and subsequent practice in relation to treaty interpretation, *Yearbook…2018*, vol. II (Part Two), p. 87.

[240] See para. (2) of the commentary to article 30 of the principles on the expulsion of aliens, *Yearbook…2014*, vol. II (Part Two), p. 57. It was noted that "The fundamental principle of full reparation by the State of the injury caused by an internationally wrongful act is stated in article 31 of the articles on State responsibility, while article 34 sets out the various forms of reparation, namely restitution (article 35), compensation (article 36) and satisfaction (article 37)."

[241] Para. (4) of the commentary to draft conclusion 17 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), pp. 66-67, citing para. (7) of the general commentary to Part Two, chapter III, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 111–112. A similar example can be found in the commentary to draft conclusion 19, where the Commission noted that "Paragraph 1 of the draft conclusion, which is based on article 41, paragraph 1, of the articles on responsibility of States for internationally wrongful acts, provides that States shall cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law (*jus cogens*)", para. (2) of the commentary to draft conclusion 19, ibid., pp. 70-71, referring to para. (3) of the commentary to article 41 of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 114.

[242] Para. (3) of the commentary to draft conclusion 23 on the identification and legal consequences of peremptory norms of general international law (*jus cogens*), ibid., p. 85.

[243] See ibid. paras. (7) to (14) at pp. 86-88.

[244] Secretariat Memo, A/CN.4/759, observation 41, paras. 172-174.

depositaries of ratification, declarations, reservations etc. by States.[245] Other examples include scholarly publications comprising compilations of domestic court decisions. For instance, the Commission referred to compilations of decisions of national courts and noted that State practice on the treatment of constituent units and political subdivisions of federal States had not been uniform, in the articles on jurisdictional immunities of States and their property.[246]

147. In the commentary to the articles on crimes against humanity, the Commission referred to the practice of States as well as a study published by ICRC and noted that, "[b]ased on a detailed analysis of State practice, as well as of international and national jurisprudence, the 2005 ICRC study on Customary International Humanitarian Law formulated a general standard for war crimes …"[247] and that "[d]raft article 6, paragraph 3, uses similar language to express a general standard for addressing command/superior responsibility in the context of crimes against humanity".[248]

F. The Special Rapporteur's observations on the Commission's use of subsidiary means

148. In conclusion, for this chapter, on the basis of the above discussion, at least *four* preliminary reflections may be offered on the Commission's practice concerning the use of subsidiary means for the determination of rules of international law.

149. *First*, subsidiary means, which seem to be generally understood to be encompassed by the two main categories of judicial decisions and the teachings of the most highly qualified publicists, are prevalent in the work of the Commission. But the nature and extent of their use, alongside other materials, vary and are largely dependent on the needs of the topic under consideration. They reflect overwhelmingly substantive but also methodological aspects, with the Commission drawing extensively on both judicial decisions and teachings for the purposes of exercising its mandate to assist States with the codification and progressive development of international law.

150. *Second*, as regards judicial decisions as subsidiary means, the Commission's work indicates that they play very important roles in its work assisting States in the

[245] Secretariat Memo, A/CN.4/759, para. 172. See, for example, in the guide to practice on reservations, commentary 3 to guideline 1.5.1, footnote 270, *Yearbook* … 2011, vol II, part 3, p. 69., citing the ICRC document entitled "Geneva Conventions of 12 August 1949 for the Protection of War Victims – Reservations, declarations and communications made at the time of or in connection with ratification, accession or succession" (DDM/JUR/91/1719-CRV/1).

[246] See, for example, para. (11) of the commentary to article 2 on jurisdictional immunities of states and their property, *Yearbook … 1991*, vol. II (Part Two), p. 16, footnote 34, some of the decisions included the practice of France, for example, in Etat de Ceard v. Dorr et autres (1932) (Dalloz, Recueil periodique et critique de jurisprudence, 1933 (Paris), part 1, p. 196 et seq.).. See also Dumont v. State of Amazonas (1948) (Annual Digest. . ., 1948 (London), vol. 15, case No. 44, p. 140). For Italy, see Somigli v. Etat de Sao Paulo du Bresil (1910) (Revue de droit international privé et de droit penal international (Darras) (Paris), vol. VI (1910), p. 527). For Belgium, see Feldman v. Etat de Bahia (1907) (Pasicrisie beige, 1908 (Brussels), vol. II, p. 55 or Supplement to AJIL (Washington, D.C.), vol. 26, No. 3 (July 1932), p. 484). See also the case, in the United States, Molina v. Comision Reguladora del Mercado de Henequen (1918) (Hackworth, op. cit., vol. II, pp. 402-403), and in Australia, Commonwealth of Australia v. New South Wales (1923) (Annual Digest. . ., 1923-1924 (London), vol. 2 (1933), case No. 67, p. 161).

[247] Para. (21) of the commentary to article 6 on the prevention and punishment of crimes against humanity, *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10* (A/74/10), p. 72.

[248] Para. (22) of the commentary to article 6 on the prevention and punishment of crimes against humanity, ibid.

codification and progressive development of international law. The judicial decisions are not only relied upon to identify or confirm the existence and content of rules of international law, but they also serve as a basis in some instances for the actual formulation of the rules and principles of international law as well as the sources of rights or obligations. This would suggest that, while in principle judicial decisions are labelled as "subsidiary", the reality found in the Commission's practice suggests that they could be akin to the primary sources of international law. If this contention is correct, the question that should be considered later is whether the apparent mismatch between theory and reality is also reflected in the practice of international courts and tribunals, in particular that of the International Court of Justice. It would stand to reason that it does. The more difficult issue might then be assessing the implications.

151. A related point on the Commission's use of judicial decisions is this: it would appear, on the basis of the extensive examples provided in the Secretariat memorandum, that the Commission relies more on Permanent Court of International Justice and International Court of Justice cases than other judicial decisions, from which it may infer that they are afforded more authority. This, on one level, is natural. As the Commission has emphasized in its own work, decisions of the International Court of Justice as the principal judicial organ of the United Nations carry great weight. It also may reflect the complementarity between the work of the Commission as the principal codification body of the United Nations and the work of the Court as the main judicial body settling disputes of a general character between States in contemporary international law.

152. That said, the choice of the Commission as to which judicial body to refer to would, in the normal course, largely be driven by the topic under consideration and the availability of relevant jurisprudence. For example, there are various other topics where the decisions of other international courts such as the international criminal tribunals are quite prominent and, in some cases, serve as the predominant basis for its work. This is the case, to take a handful of examples, in the field of international criminal law as reflected in the formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, the draft Code of Crimes against the Peace and Security of Mankind, the Draft articles on Prevention and Punishment of Crimes Against Humanity and the draft articles of immunity of State Officials from foreign criminal jurisdiction. The point is that, whether it was formulating principles from the judgment of one tribunal and its constitutive instrument, as was the case for the Nuremberg Principles, or codifying or taking inspiration from a judgment of an international court to present articles, most of the mentioned topics naturally contain ample references to the judicial decisions of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the International Criminal Court. The same can be said, on matters relating to the law of the sea, of the decisions of the International Tribunal for the Law of the Sea. It is also noteworthy that the decisions of national and regional courts and tribunals and other adjudicative bodies are also used to elucidate the applicable law and commentary.

153. The *third* tentative observation of the Special Rapporteur, which may be extrapolated from the wide-ranging observations made in the Secretariat memorandum on the Commission's use of judicial decisions and legal writings, respectively, is that the Commission makes more use of the former rather than the latter. This is neither surprising nor an indication that judicial decisions are more important or more relevant than teachings. Rather, in the view of the Special Rapporteur, it is a function of the different roles played by each. It may also reflect the fact that, in the nature of things and even setting aside questions of legitimacy, it

is, in the normal course, judicial decisions that tend to be more specific in elucidating a possible international legal rule, whether in the process of interpreting a treaty or determining the existence or lack thereof of customary international law or a general principle of law. Some of these issues are discussed later in the present report.

154. The *fourth and final* tentative observation is that, as concerns teachings of publicists, the Commission's work seems, in some cases, to rely on them to identify the practice of States. It also attaches different types of weight to the works of individual scholars versus those of expert groups. Though a systematic analysis of expert bodies has not been done in the present report as it will be the subject of a future report, on balance, it would appear that the concurrence of views in academic works would carry greater weight than a single or few authorities. Expert groups would, in the nature of things, enjoy greater endorsement, likely because of not only the higher quality of their works but also in some cases their relationships and interactions with States. Such types of uses of expert works, which are also manifest in the works of international courts and tribunals, align with the drafting history. The Special Rapporteur will return to this issue in the relevant parts of the present report.

VI
The nature and function of sources in the international legal system

A. Brief overview of the place of sources in international law

155. The question of the nature and function of sources is fundamental to any discussion of international law. Therefore, before addressing the subsidiary means for the determination of the rules of law, which by their nature must be considered in relation to the sources of international law, it seems helpful to start with some general observations on the wider context regarding the nature of the international legal system in contrast to domestic legal systems. The aim here is not to be comprehensive but rather to address a select set of theoretical matters that frequently arise in scholarly debates on the sources of international law and that appear particularly relevant. It is the purpose neither of the present report nor of the consideration of this topic to resolve the sometimes heated theoretical debates on the sources of international law. What is at stake here is an appreciation of some of the key issues surrounding the sources of international law to the extent that they will likely later have relevance for the Commission's practical work on the present topic.

156. As a preliminary point, it is axiomatic that international law, as a body of law that primarily governs the relations between sovereign States, does not have centralized organs such as a legislature, executive or judiciary which are the norm in national legal systems. In domestic legal systems, which are hierarchical in character, a legislature may enact a constitution, legislation or statute which could then be given effect by the executive branch. The legislature may be thought of as the formal source of law because it is typically vested with the law-making power in the State. When disputes over the interpretation and application of the law arise, between the subjects of the law, whether natural or legal persons, or both, courts with compulsory jurisdiction generally serve as the arbiters to resolve the disputes.

157. In contrast to national legal systems, where there are definite methods for identifying the sources of the law, international law is decentralized. There is no global legislature or authority capable of adopting universal laws that are automatically binding on all the subjects of the law, primarily the States, but also international organizations and other relevant actors. The absence, in the international field, of a legislature carries various consequences.[249]

158. Neither is there, in international law, the equivalent of an executive branch of government to enforce the law. Equally, there are no international courts with automatic compulsory jurisdiction to settle disputes between litigants through the interpretation and application of the law. The system of dispute settlement at the international level is based on consent, reflecting the nature of sovereignty, as are the alternative means of dispute settlement highlighted in Article 33 of the Charter of the United Nations, which include negotiation, conciliation, arbitration and judicial settlement. In such a horizontal, as opposed to vertical, legal system, the method of finding the law is "much more complicated".[250] Indeed, as Malcolm Shaw has rightly explained, in international law, "one is therefore faced with the problem of

[249] Gerald Fitzmaurice, "Some problems regarding the formal sources of international law" in Jill Barrett and Jean-Pierre Gauci (eds.) *British Contributions to International Law, 1915-2015*, 3rd ed. (Leiden; Boston: Brill Nijhoff, 2021) pp. 476-496 at p. 479.

[250] Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 9th ed. (New York: Routledge, 2022), p. 35.

discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule".[251]

159. Matters become even more complicated considering that, in a non-hierarchical system such as that of international law, the "same subjects of international law that are bound by international rules and principles have created them themselves".[252] Indeed, as Robert Y. Jennings argued in 1981, "there has never been a time when there has been so much confusion and doubt about the tests of the validity – or sources – of international law, than the present".[253] Furthermore, as Hugh Thirlway has rightly reminded us, there is the "anarchic nature of world affairs" which international lawyers must take into account as well as the periodic clash of "sovereignties".[254] In short, by its nature, the international legal system is distinct from municipal legal systems and poses challenges to the identification of the sources of the law binding on the subjects of that law.

160. Today, despite the above and related doubts to the contrary, it is settled that "international law does exist and is ascertainable".[255] It, therefore, has "sources" from which the rules that are applicable to a given situation to govern the relations between the subjects of the law, primarily States (but also international organizations), may be derived. The doctrine of "sources" has, in this respect, become, as Oscar Schacter, writing in 1991, explained, "[t]he principal intellectual instrument in the last century for providing the objective standards of legal validation" and "today lays down verifiable conditions for ascertaining and validating legal prescriptions".[256] The conditions in this context are, of course, the observable manifestations of the will of States as can be found in the sources, in particular, the rules found in treaties, customary international law and general principles of law. The latter may also be reflected in the subsidiary means for the determination of rules of law, for example, when a decision of a court expresses a rule of international law.

B. Defining "sources" in international law

161. Identifying and clarifying sources is paramount for any legal system, whether it be national or international, as law-making is not a static endeavour but rather a dynamic and continuous process. The *Max Planck Encyclopedia of International Law* notes that "speaking of 'sources of international law' presupposes that there exist legal, i.e. binding, rules in international law".[257]

162. But, contrary to what one might expect for such a foundational concept for the international legal order as sources of international law, even the term "sources" creates some difficulties. There is simply no single universally accepted definition.[258] The term, which in Latin is *fons juris*, and its relatives "source of law" or "*source de*

[251] Malcom N. Shaw, *International Law*, 9th ed. (Cambridge: Cambridge University Press, 2021), p. 59.
[252] Orakhelashvili, Akehurst's Modern Introduction to International Law, p. 35.
[253] R.Y. Jennings, "What is International Law and how do we tell when we see it?" in Basil S. Markesinis and JHM Willems (eds), *The Cambridge-Tilburg Law Lectures, Third Series 1980* (New York: Kluwer 1983), pp. 3–32 at p. 5.
[254] Thirlway, "The sources of international law," in Malcolm Evans, *International Law*, 3rd ed. (Oxford: Oxford Univ. Press, 2010), pp. 95-109 at p. 97.
[255] Shaw, International Law, p. 59.
[256] Oscar Schachter, *International Law in Theory and Practice*,1st ed. (Springer, 1991), pp. 35-37.
[257] R. Wolfrum, "Sources of International Law"*, Max Planck Encyclopedia of International Law*, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1471?rskey=2OJLVE&result=1&prd=MPIL.
[258] As early as 1925, P.E. Corbett argued we should get rid of the term "sources," because of the extreme diversity of its meanings. See, in this regard, Percy E. Corbett, "*The Consent of States and the Sources of the Law of Nations*", 6 Br. Yearb. Int. Law, vol. 6 (1925) p. 20 at p. 30.

droit", are understood in multiple ways.[259] For present purposes, it appears sufficient to adopt the definition that Shaw offers when he describes "sources" as a reference to "those provisions operating within the legal system on a technical level".[260] Or, as Ian Sinclair put it more even more conveniently, "that which gives to the content of rules of international law their character as law".[261] In other words, when international lawyers speak of sources, they usually mean in the technical sense of where the law derives its force.

C. The distinction between "formal" and "material" sources

163. The foregoing definition of sources, under which they can be seen as the norms of international law that carry binding legal effect for States, seems simple enough. For his part, like many others, Ian Brownlie understood sources as defined in the preceding paragraph. But he then goes further to distinguish between two usages of the term sources. That distinction is between the so-called "material" and "formal" sources. In his view, the latter "may refer to the *source of the binding quality of international law as such* and also to *the literary sources of the law as sources of information*" (emphasis added). Oppenheim's *International Law* describes the difference as formal sources being the source from which the legal rule derives its legal validity and material sources providing the substantive content of that rule.[262]

164. Put slightly differently as formulated by Alain Pellet, the formal sources of international law are "the processes through which international law rules become legally relevant", while the material sources "can be defined as the political, sociological, economic, moral or religious origins of the legal rules".[263] On both above understandings, "ultimate sources as reason or morality are excluded, as are more functional sources such as libraries and journals".[264] Basically, when international lawyers allude to sources, "what is intended is a survey of the process whereby rules of international law emerge".[265] For his part, Herbert Briggs, recognizing the difficulties of the term "sources", described it as "the methods or procedures by which international law is created".[266]

165. The "material" or "historical sense" of the word sources is often contrasted with the "formal" or "legal" sense of the term. As James Crawford explained, whereas the "material sources provide evidence of the existence of rules which, when established, are binding and are of general application", the *formal* sources "are those methods for the creation of rules of general application which are legally binding on their

[259] For a further discussion of the sources of international law, in particular the moyens auxiliaires des determination des regles de droit, see Mathias Forteau, Alina Miron and Alain Pellet, *Droit International Public* (Paris, LGDJ, 9th edition, 2022), p. 492-511.

[260] Shaw, International Law, p. 66.

[261] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester Univ. Press, 1984), p. 2.

[262] Sir Robert Jennings & Sir Watts Arthur, *Oppenheim's International Law*, 6th ed. (Oxford: Oxford Univ. Press, 1996), p. 23; cited by: Shagufta Omar, "Sources of International law In the light of the Article 38 of the International Court of Justice", *Int'l Islamic Univ*. (2011), available at http://ssrn.com/abstract=1877123.

[263] A Pellet, "Article 38 of the Statute of the International Court of Justice" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds) *The Statute of the International Court of Justice: A Commentary*, 3rd ed. (Oxford: Oxford Univ. Press, 2019) pp.677-792 at p. 774, para. 111.

[264] Shaw, International Law, p. 66.

[265] Ibid.

[266] Herbert Briggs, *The Law of Nations: cases, documents, and Notes*, 2nd ed., (New York, Appleton-Century-Crofts, 1952), p. 44.

addresses".[267] In this regard, the *material* and non-legal sense of sources is a reference to "a causal or historical influence explaining the factual existence of a given rule of law at a given place and time", while, in the legal sense, "the term means the criteria under which a legal rule is valid in the given legal system at issue".[268]

166. In sum, the formal sources are said to give the rules their obligatory character, while the material sources reflect the actual content of the rules. The essential difference is "between the thing which inspires the content of the law, and the thing which gives that content the obligatory character as law".[269] This distinction is not only theoretical. It is also practical. It essentially serves as a basis to separate binding law from legally non-binding norms, the law *de lege lata* (the law as it is) and the law *de lege ferenda* (the law as it ought to be).

167. But in the context of international law, as opposed to municipal law, the notion of a "formal source" can and has been criticized as both "awkward and misleading".[270] This is because the idea of a formal source is said to evoke for a reader "the constitutional machinery of law-making which exists within states", which simply does not exist for "the creation of rules of international law".[271] On this view, from the perspective of international law, the distinction between *formal* and *material* sources seems rather difficult to sustain, since it may distract attention from some of the more important problems by its attempt to establish a clear separation of substantive and procedural elements.[272] In any event, at the end of the day, what should matter more are the sources which evidence the existence of consensus among States concerning the existence of particular rules and practices.[273] It, therefore, presents squarely the question of where the rules binding upon States may be found and returns us to the central issue concerning where international lawyers may go to identify the sources of international law obligations.

D. The role of Article 38, paragraph 1, and sources of international law versus sources of obligations

168. Against the above backdrop, of a decentralized international legal system, it might not be surprising that it was in the context of Article 38 of the ICJ Statute that we have what is widely recognized "as the most authoritative and complete statement"[274] of the sources of international law. Article 38, paragraph 1, which has been described as a "famous – or infamous – provision",[275] establishes a rule which asks the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, to apply treaties, whether general or particular, establishing rules expressly recognized by the contesting States; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by "civilised nations", and "as subsidiary means for the determination of rules of law", judicial decisions and the teachings of the most highly qualified

[267] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), p. 20-23.
[268] Orakhelashvili, Akehurst's Modern Introduction to International Law, p. 35.
[269] Fitzmaurice, Some Problems Regarding the Formal Sources of International Law, p. 479.
[270] Ian Brownlie, *Principles of public international law*, 6th ed. (Oxford: Oxford Univ. Press, 2003), p. 3.
[271] Ibid.
[272] Shaw, International Law, p. 60.
[273] R. Goodman, "Human Rights Treaties, Invalid Reservations and State Consent", *Amsterdam J Int'l L.*, vol. 96 (2002), p. 531 at p. 531.
[274] See also Antonio Cassese, *International Law*, 2nd ed. (United States of America: Oxford Univ. Press, 2003) - "This is the most authoritative definition, although a number of scholars have questioned it."
[275] Pellet, "Article 38", p. 774, para. 111.

publicists of various nations. Judicial decisions are subject to the provisions of Article 59, which provides that the decision of the Court has no binding effect except between the parties in respect of the particular case.

169. While Article 38 basically reflected the writing down of a long-standing practice of arbitral tribunals, which had emerged as ad hoc means of settling disputes between States until the formal creation of the Permanent Court of International Justice in 1921, the provision does not expressly mention the term sources. Nor does the Article in general turn on the confusing and arguably unhelpful distinction between formal and material sources, although it has been argued that treaties and customs are formal sources, while general principles of law and judicial decisions and teachings are material sources or quasi-formal sources.[276] Article 38 actually "strictly deals with 'court law'".[277] Indeed, as a purely technical matter, Article 38 is only a specific directive to the Court concerning the sources of law on which it shall rely when resolving disputes between States.

170. However, Article 38 is significant not only because of its status as the applicable law provision of the ICJ Statute. Rather, it stems from its broad and general acceptance as reflective of customary international law. That broad acceptance, in relation to the institution itself, is both explicit and implicit. Explicitly, in terms of the Charter of the United Nations, Article 92 establishes the Court as the principal judicial organ of the community of nations – anchoring judicial settlement of disputes within the collective security eco-system of the United Nations. Thus, once a State acquires membership, it automatically accepts the jurisdiction of the International Court of Justice. As Ademola Abass argues, "since the job of the Court is to settle disputes among the UN members (which are its own members as well), it is important that the Court applies the rules of international law – as found in Article 38 (1)".[278]

171. In addition, and this is explicit, there are express references to Article 38 in other international instruments, for example, in Article 28[279] of the 1928 General Act for the Pacific Settlement of International Disputes and Article 33[280] of the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States. Other specialized legal instruments draw inspiration from Article 38, for instance, in Article 21 of the Rome Statute of the International Criminal Court addressing applicable law before that tribunal and in Article 31 of the Protocol on the Statute of

[276] Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", p. 493.

[277] R.Y Jennings, "General Course on Principles of International Law", in *Collected Courses of the Hague Academy of International Law*, Vol. 121 (Leiden: Sijthoff, 1967), p.121.

[278] Ademola Abass, *Complete International Law: Text, Cases and Material*, 2nd ed. (Oxford: Oxford Univ. Press, 2014), p. 28.

[279] General Act of Arbitration (Pacific Settlement of International Disputes) (Geneva, 26 September 1928), League of Nations, *Treaty Series*, vol. 93, p. 343, Art. 28.

[280] Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two States, 32 I.L.M. 572 Cambridge Univ. Press, 1993)), art. 33, at https://www.cambridge.org/core/journals/international-legal-materials/article/abs/permanent-court-of-arbitration-optional-rules-for-arbitrating-disputes-between-two-states/84C1DC6592E5EC2657D0A38EEC22B891.

the African Court of Justice and Human Rights addressing applicable law before the African Court of Justice and Human and Peoples' Rights.[281]

172. A similar example may be found in Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which directs the tribunal to decide a dispute in accordance "with such rules of law as may be agreed by the parties" and, absent such an agreement, through the application of "the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".[282] Setting aside questions concerning the characterization of the issue calling for the choice of rules of domestic or international law, and the fact that the tribunals may also not bring in findings of *non liquet* and are empowered also to decide a dispute *ex aequo et bono*, it is undisputed that the expression "international law" in the provision "should be understood in the sense given to it by Article 38 (1) of the ICJ Statute, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes".[283]

173. Although Article 38, paragraph 1, of the ICJ Statute has some generality of application, it is not the only provision concerning the relevance of judicial decisions for adjudicators. Three examples are worth mentioning here. The first, and most distant from it is that concerning the Caribbean Court of Justice, which, when operating in its 'original jurisdiction', is bound to a strict rule of stare decisis. According to Article 221 of the *Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy*, "[j]udgments of the Court shall be legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219".[284]

174. A similar approach is also employed in the context of the EEA Agreement, where Article 6 provides that provisions of the Agreement that are substantially identical to provisions of European Law "be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to

[281] Article 31 of the Malabo Protocol provides as follows: "In carrying out its functions, the Court shall have regard to: a) The Constitutive Act; b) International treaties, whether general or particular, ratified by the contesting States; c) International custom, as evidence of a general practice accepted as law; d) The general principles of law recognized universally or by African States; e) Subject to the provisions of paragraph 1, of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law; f) Any other law relevant to the determination of the case. 2. This Article shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto." African Union, *Protocol on the Statute of the African Court of Justice and Human Rights* (1 July 2008), available at https://au.int/sites/default/files/treaties/36398-treaty-0045__protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf. For a comprehensive commentary on the Malabo Protocol, see Charles C. Jalloh, Kamari M. Clarke and Vincent O. Nmehielle (eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge: Cambridge University Press, 2019).

[282] International Center for Settlement of Investment Disputes (ICSID), "Convention on the Settlement of Investment Disputes" (14 October 1966), U.N.T.S 8359, Art. 45, at https://icsid.worldbank.org/sites/default/files/ICSID_Convention_EN.pdf (visited 7 February 2023).

[283] ICSID, "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States" (1993) vol. 1, ICSID Reports, pp. 23-34 at p. 31. See also *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003, para. 300.

[284] See CARICOM Secretariat, Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (Bahamas, 5 July 2001), available online at: https://caricom.org/documents/4906-revised_treaty-text.pdf.

the date of signature of this Agreement".[285] This provision also includes a qualifier ("without prejudice to future developments of case law") which effectively incorporates a cut-off date.

175. The second, intermediate model, is embodied by Article 21 of the Rome Statute, mentioned above, which spells out the law to be applied by the International Criminal Court. In this regard, Article 21 (2) addresses more specifically the question of the application of judicial decisions of the International Criminal Court. These are not listed as subsidiary means as in Article 38 (1) (d). The provision differs from Article 38 in several respects: first, it refers only to the decisions of the International Criminal Court, with no hierarchy between them; second, it stipulates that the Court *may*, rather than "shall", apply this material; third, it clarifies that what is being applied is the "principles and rules of law as interpreted in its previous decisions", rather than the decisions themselves.

176. Other examples exist. For example, trade agreements routinely incorporate provisions to the effect that the text of the FTA itself be interpreted in accordance with available case law. For example, Article 516 of the EU-UK Trade and Cooperation Agreement provides that "[t]he interpretation and application of the provisions of this Part shall take into account relevant interpretations in reports of WTO panels and of the Appellate Body adopted by the Dispute Settlement Body of the WTO as well as in arbitration awards under the Dispute Settlement Understanding".[286] Such provisions are common where issues are not just of textual similarity, but rather of equivalent protection under the rules of more than one agreement (or sets of agreements) of which both States are parties.

177. As the foregoing sections have shown, Article 38, paragraph 1, and, with it, its treatment of the role of judicial decisions are, in principle, provisions of limited application, which may be displaced by the other statutory provisions constituting *lex specialis*. However, Article 38 ICJ Statute is understood to be a provision of more general application for two interrelated reasons. The first, as indicated before, is that it is routinely seen as an authoritative statement of the sources of international law; the second is that it is, as such, frequently incorporated by reference or as a fallback provision in instruments concerning non-International Court of Justice adjudication.

178. Brierly's *Law of Nations* goes even further when he argues that the provision "is a text of the highest authority, and we may fairly assume that it expresses the duty of any tribunal which is called upon to administer international law".[287] This position affirming the centrality of Article 38 would find support in Articles 74 and 83 of the United Nations Convention on the Law of the Sea.[288] The authoritative nature of the Article has given rise to an apparent consensus that it does in fact reflect customary international law. The Commission's own previous and recent work, while in some cases reflecting a wider array of sources, take as a point of departure Article 38 and does acknowledge both its general applicability and its authoritative status.[289] This

[285] Agreement on the European Economic Area, OJ No L 1, 3.1.1994, p. 3; and EFTA States' official gazettes, (efta.int).

[286] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Brussels and London, 30 December 2020. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01)&from=EN.

[287] Andrew Clapham, Brierly's Law of Nations An Introduction to the Role of International Law in International Relations, 7th ed. (Oxford: Oxford Univ. Press 2012), p. 56.

[288] Convention on the Law of the Sea (Montego Bay, 10 December 1982), 1833 U.N.T.S. 397.

[289] See article 12 of the 1953 Draft Convention on Arbitral Procedure, *Yearbook …1953*, vol. II, p. 210, and article 10 of the 1958 Draft Convention on Arbitral Procedure, *Yearbook… 1958*, vol. II, p. 84.

was especially notable in its work on two other provisions of Article 38, namely the identification of customary international law and general principles of law.[290]

179. On the other hand, as phrased, although we shall in due course more fully examine the provision, Article 38 has been criticized on many different grounds. As Pellet correctly notes, "[f]ew provisions of treaty law, if any, have called for as much comment, debate, criticism, praise, warnings, passion, as Art. 38 of the Statute".[291] For our limited purposes, at this stage, the core of the criticism centre on three key aspects.

180. First, the manner of its drafting. Those critical of the provision have asserted that it is "not well drafted",[292] that it is "unclear", "defective" or even "abusively formalistic".[293] It is true that, as one author suggests, there are many ways to think about Article 38, including "as a superfluous and useless provision, at best a clumsy and outmoded attempt to define international law, at worst a corset paralysing the world's highest judicial body".[294] On the other hand, as the same author rightly observed, the truth about Article 38 may lie somewhere in the middle. From that perspective, Article 38 "deserves neither excessive praise nor harsh criticism", since it can also be seen more positively "as a most successful and concise description" of the law that the International Court of Justice "must apply, providing helpful guidance for avoid *non liquet* as well as arbitrariness and fantasy in interpretation and implementation of rules of international law".[295]

181. Second, and more substantively, Article 38 has been criticised because it is thought to reflect, in the words of Jennings, a "logical difficulty, on any view of the meaning of the list in Article 38, in accepting it as a statement of the sources of international law".[296] That difficulty would stem from the fact that the Statute of the Court itself, being a treaty, would belong to the first item on the three-part list in Article 38 paragraph 1.

182. A third query of Article 38 often found in the literature is whether it is exhaustive in containing a list of all the sources of international law. At least two interpretations appear possible. There are those, among whom is Georg Schwarzenberger, who suggested that the provision is indeed exhaustive of the sources of international law.[297] A second, and more plausible interpretation, is that Article 38 is non-exhaustive.

---

[290] See "Several members reiterated that Article 38, paragraph 1 (c), of the Statute of the International Court of Justice was widely considered as an authoritative statement on the sources of international law, and that the point of departure of the work of the Commission was general principles of law in the sense of Article 38 as a source of international law," ILC Report, A/77/10, 2022, chap. VIII, para. 106., p. 310. The Special Rapporteur for the ILC's work on General principles of International Law expressed a view that "the position that Article 38 was limited to the applicable law of the Court implied that there were no sources of international law of a general character […] was unsustainable as it would result in an unacceptable fragmentation of international law, as well as in legal uncertainty, making it impossible for the international legal system to operate," ILC Report, A/77/10, 2022, chap. VIII, para. 132, p. 314.

[291] Pellet, "Article 38", p. 679.

[292] Certain Norwegian Loans (France v. Norway), Judgment, Dissenting Opinion of Judge Basdevant, (July 6, 1957).

[293] Pellet, "Article 38", p. 677.

[294] Ibid., p. 680.

[295] Ibid., p. 679.

[296] Jennings, "General Course on Principles of International Law", p. 121 ("Moreover, there is a logical difficulty, on any view of the meaning of the list in Article 38, in accepting it as a statement of the sources of international law; for the Statute of the International Court of Justice being a treaty belongs itself to the first category of the list.")

[297] G. Schwarzenberger, "International Law as Applied by International Courts and Tribunals" in Jill Barrett and Jean-Pierre Gauci (eds.) *British Contributions to International Law, 1915-2015*, 3rd ed. (Leiden; Boston: Brill Nijhoff, 2021), pp. 96-106 at p. 96.

Since it does not, and never was intended, to list all the sources of international law as much as to set out a directive for the judges in terms of where to primarily look when determining the applicable rules of international law – a point strongly argued by Fitzmaurice.[298]

183. That said, if the claim of incompleteness were hard to argue back in the early 1920s, when the provision was drafted, it would not be difficult to do so today. John Dugard and Dire Tladi suggest that while the list contained in Article 38 may have been complete at drafting during the late 1920s, "it no longer accurately reflects all the materials and forms of State practice that comprise today's sources of international law".[299] With the passage of time since the Statute of the Court was adopted, and the dynamism of international relations leading to adaptations in State practice, the apparent lacunae in the provision have become more readily discernible. They go further to opine that efforts "to bring new developments in respect of sources of law within the categories of sources recognised in Article 38" will inevitably lead "to the expansion of these sources beyond those originally contemplated in 1920".[300] On the other hand, Ross and others have suggested that Article 38 cannot formally constitute the foundation for the doctrine of sources of international law.[301] At best, Article 38 is the formal source of what the Court has to apply, and in this view, "clearly reflects an abstract view of what the sources of international law in general are".[302]

184. The arguments problematizing Article 38 go deeper, however, in the sense that, of the sources that it does actually include within its ambit, it is thought to include some that are not "genuine sources".[303] By the same token, while it is obvious that the present report is not the place to settle old scholarly debates on the provision, as another author has rightly pointed out, all the criticism of that much cited applicable law clause notwithstanding the reality is that all the alternative formulations proffered to replace it to date have not gained traction.[304] Proposals have even been made to amend it without success. Thus, as of this writing and taking into account its century long history, the place of Article 38 in the Statute of the International Court of Justice seems quite secure.

185. Part of the reason is not only that it is said to now firmly be embedded in customary international law, and this is probably the most important point, it has for the most part worked well in practice. That, in many ways, is the key consideration. Indeed, as those jurists who had the opportunity to revisit it concluded in the lead up to the establishment of the International Court of Justice as far back as in 1945, the fact is that the provision has "given rise to more controversies in doctrine than difficulties in practice".[305] That observation continues to be equally apposite today, a century after its language was crafted. Thus, despite the apparent deficiencies of Article 38 including in relation to the aspects that could today be seen as more acceptable if it were amended to eliminate the by now embarrassing

[298] Fitzmaurice, "Some problems regarding the formal sources of international law", p. 494.

[299] J Dugard and D Tladi "Sources of International Law" in John Dugard, Max Du Plessis, Tiyanjana Maluwa, Dire Tladi (ed.), *Dugard's International Law: A South African Perspective*, 5th ed. (South Africa: Juta & Company Ltd. 2019), pp. 28-48 at p. 28.

[300] Dugard et. al, "Sources of International Law", p. 28.

[301] Quoted by Fitzmaurice, Fitzmaurice, "Some problems regarding the formal sources of international law", p. 494.

[302] Fitzmaurice, "Some problems regarding the formal sources of international law", p. 494.

[303] Ibid.

[304] Pellet, "Article 38", p. 681.

[305] Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (18 July 2006); UNCIO (Selected Documents version, US Government Printing Office, 1946), 843/868.

civilized/uncivilized distinction,[306] the fact is that the perceived problems have not "prevented" the International Court of Justice – and for that matter other international courts – "from deciding international disputes submitted to it or from giving advisory opinions and adopting, when need be, innovative or creative solutions".[307]

186. A final theoretical point in sources discourse, which seems relevant to the present chapter and the future work on this topic, is the distinction sometimes made in the scholarly literature between sources of international law and sources of international obligations. Here, the principal argument draws on the writings of Fitzmaurice who famously argued in an influential article that Article 38 could *not* be a reference to the *sources* of international law.[308] He, instead, suggested that the formal sources of obligations are to be separated from the formal sources of law, and that while the two may coincide, they are not necessarily the same. The formal sources, in his view, draw their inherent validity from natural law. In this view, for instance, treaties, properly understood, are *sources of obligations*, not of law, and from that perspective, even so-called "law making treaties" do not really create law; rather, they establish obligations.[309]

187. What appears to be the basis of this distinction, which apparently may also reflect a difference between civil law and common lawyers' approach to international law (with the former allegedly preferring treaties and the latter customary law), is that to call the provision sources would require that it speak to rules of general validity for and application to the subjects of the legal system, instead of, particular obligations or undertakings on their part. In being among those that have contested the distinction, between sources of law and sources of obligations, some appear to have rejected the notion the law would necessarily be limited to rules of general validity, since States' rights and obligations may stem from both general and particular treaties as well as customary law.[310]

188. In any event, when it comes to the subsidiary means, it is not proposed that this study attempt, assuming it were possible, to settle such theoretical debates, which at their bottom become about defining the place of positivism and that of natural law in international law, but rather that it is simply taken note of by the Commission. Once taken note of, consideration should then be given to their possible implications for the practical aspects of the work on this topic. That is the only reason to here broach what could otherwise be an abstract sources of law versus sources of obligations debate.

189. In the view of the Special Rapporteur, without entering fully the academic debate, the distinction between sources of law and sources of obligation is relevant to this topic because it also bears practical consequences. It not only provides a useful device to think of sources and their related subsidiary means. The reason is that rules found in treaties, customary law and general principles of law are important, but in and of themselves, are not the only possible basis for States to assume legal obligations under international law. This proposition can be illustrated, for instance,

---

[306] Statute of the International Court of Justice, Art. 38(1)(c)(1945)("the general principles of law recognized by civilized nations"); and S. Yee, "Article 37 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases", J. Int. Disp. Settlement, vol. 7(2) (2016), p. 472.

[307] Pellet, "Article 38", p. 680.

[308] Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", p. 494..

[309] Ibid. A similar view has been expressed by others in relation to unilateral acts.

[310] For examples of others who have expressed (serious) doubts about Fitzmaurice's distinction, see Hugh Thirlway, *International Customary Law and Codification* (Leiden: Sijthoff, 1971), pp. 25-27; George Abi-Saab, "Cours general de droit international public", *Recueil des cours*, vol. 207 (1987), pp. 194-195; M.H. Mendelson, "Are Treaties Merely a Source of Obligation?", in William E. Butler (ed.), *Perestroika and International Law* (Leyden: Martinus Nijhoff Publishers, 1990), pp. 81-88 at p. 87.

by reference to practice concerning unilateral declarations which, under certain circumstances, are capable of creating legal obligations. The same can be said about resolutions of international organizations. Setting aside whether such acts or resolutions could be considered formal sources of obligations, akin to those derived from the list in the formal sources contained in Article 38 of the ICJ Statute, the distinction does at the least ensure the focus is not so much on the formal source in a treaty or international custom or general principles of law as much as the legal effects in relation to the obligation of States. We shall return to this issue in chapter IX of the present report, which it will be recalled, addresses the possible existence of additional subsidiary means.

E. The absence of a formal hierarchy in the sources

190. As already indicated in the preceding section of this chapter, jurists have posed a number of questions concerning Article 38. We now focus on two aspects that seem especially relevant for the topic at hand; first, whether paragraph 1, which lists in a particular sequence, treaties (subparagraph 1 (a)), international custom (subparagraph 1 (b)) and general principles of law (subparagraph 1 (c)), establishes a hierarchy of sources of international law. Second, the role and status of "subsidiary means" within the context of Article 38, paragraph 1, namely the distinction between primary and secondary sources, or so-called "law creating" and "law determining" agencies. Or, stated differently, whether the Court by fiat of subparagraph 1 (d) can develop or even make law.

191. Concerning the first issue: hierarchy. During the drafting of Article 38, a proposal was made that the article provide that the sources contained in the provision be considered "in the undermentioned order".[311] Ultimately, as will be shown in the next chapter setting out the drafting history of the provision, the drafters of the Statute considered a sequence. They also considered the question of hierarchy. But, after some debate, they did not resolve to maintain a formal hierarchy between the sources. The general view was that all the sources could be considered, and in some cases, even at the same time. Treaties, custom and general principles of law were therefore placed on an equal legal footing within the Statute.[312] Even if, as a practical matter, some of these sources may prove to have more utility and to be given more practical import.

192. There is also no particular general rule in international law that provides for a hierarchy among sources.[313] However, "the absence of rigid and formal hierarchies in the doctrine of sources should not, however, serve to conceal the fact that States, adjudicators and legal scholars have, historically, expressed clear preferences for particular sources, and have thus established informal hierarchies, if not of validity, at the very least of importance or pre-eminence among law-making processes".[314] This sentiment is echoed by some scholars, who have noted that "as a matter of practice, there is greater reliance on treaties and customary international law. The empirical superiority of these two sources, both of which are founded on the consent of States, emphasises the consensual basis of international law. Modern international law has seen important developments in the hierarchy of norms. Whereas in classical international law all norms and rules enjoyed equal ranking, today, certain norms,

[311] Alexander Orakhelashvili, *Akehurst Modern Introduction to International Law*, (Routledge, 2022), p. 56.

[312] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), Annex "Subsidiary Means for the Determination of Rules of International Law", para. 9.

[313] Dugard et. al., "Sources of International Law" pp. 28-29.

[314] M. Prost, *Hierarchy and the Sources of International Law: A Critical Perspective*, at https://core.ac.uk/download/pdf/76978461.pdf (visited 8 February 2023).

known as peremptory norms of general international law (*jus cogens*), enjoy a higher status in the normative hierarchy of sources. Obligations under the Charter of the United Nations also enjoy normative superiority over other rules of international law".[315] David Kennedy, for his part, suggests that "some hierarchy seems to need to be established in order to develop an internally coherent and sufficiently independent scheme of authority. Otherwise, the scheme might produce equally authoritative norms among which one would then be obliged to choose on the basis of their content".[316]

193. Scholarly views seem divided on this even though as Fitzmaurice argued back in 1958, it is doubtful whether the debate about hierarchy of sources is even "a fruitful line of inquiry".[317] That said, at least formally, the majority of scholars do not seem to consider that there to be a formal hierarchy of sources in Article 38. Importantly, the Commission, in its own previous work, has also taken the same view. There does not appear to be a compelling reason to reconsider that posture at this stage.

194. While one might perhaps argue that there is no hierarchy among treaties (subparagraph 1 (a)), custom (subparagraph 1 (b)) and general principles of law (subparagraph 1 (c)), at least formally as intended by the provision, a reading of Article 38, paragraph 1, in its entirety denotes a dividing line between the first three subparagraphs of Article 38, paragraph 1, and subparagraph 1 (d) containing subsidiary means. The subsidiary means, which is a reference to judicial decisions and the teachings of publicists, may be thought to be, but are not actually intended to be, subordinated to the other sources mentioned in the article. They have been considered material or documentary sources.[318] They are like formal sources in the sense that they may serve as a place where judges can find the rules that they are bound to apply, much like they can under the three other subparagraphs, even though technically the decisions are binding on the parties to the dispute only in respect of the particular case. In the latter role, when relied upon despite the lack of formal precedent, the subsidiary means are used to verify the existence of a rule of law or a binding obligation for States under international law.[319]

195. Nevertheless, there seems to be some variance in the literature on the interpretation of the list contained in Article 38, paragraph 1. On one side, it is postulated that the Article contains one "global" list of sources of international law, meaning that the judicial decisions and the teachings of the most highly qualified publicists referred to in subparagraph d may constitute as much a source of law as any of the other sources listed in sub-paragraphs (a) to (c) of Article 38, paragraph 1.[320] This view is supported by Jennings, who asserts: "I see the language of Article 38 as essential in principle and see no great difficulty in seeing a subsidiary

[315] Dugard *et. al.*, "Sources of International Law", pp. 28-29.

[316] D. Kennedy, "The Sources of International Law", AJIL, vol 2 (1) (1987), pp. 1-96 at pp. 19-20.

[317] Fitzmaurice, "Some problems regarding the formal sources of international law", p. 495.

[318] Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", 490 (arguing "[t]hat arbitral and judicial decisions constitute material sources of law no one will dispute……Yet further reflexion seems to indicate that if such decisions cannot be classed as direct formal sources of law, it is also not satisfactory to regard them as being simply one amongst various material sources of law.").

[319] In his article cited in the previous footnote, Fitzmaurice illustrates the point by reference to practice using an ICJ example of the *Anglo-Norwegian Fisheries* Case.

[320] A.Z. Borda, "A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals", Eur. J. Int. Law, vol. 24(2) pp. 649–661 at p. 652.

means for the determination of rules of law as being a source of the law, not merely by analogy but directly."[321]

196. Despite the position that Article 38, paragraph 1, presents just one list of sources, the first three sources are most often considered as primary or formal sources, while the sources contained in subparagraph (d) are often described as secondary or auxiliary sources. "Subsidiary" and "secondary" are, after all, synonyms in the English language.

197. However, others are of the view that the inclusion of "subsidiary means for the determination of rules of law" in Article 38, paragraph 1, indicates that judicial decisions and teachings are not sources of law at all. This view is supported by James Crawford, who opines that "[j]udicial decisions are not strictly a formal source of law, but in many instances, they are regarded as evidence of the law. A coherent body of previous jurisprudence will have important consequences in any given case. Their value, however, stops short of precedent as it is understood in the common law tradition".[322] The same approach is supported by Dugard and others, who write that "judicial decisions…do not themselves constitute rules of international law but are only a way of identifying the rules of international law".[323] This argument would presumably also apply, perhaps with even greater force, to the other subsidiary means, namely, the "teachings of the most highly qualified publicists".

198. According to this school of thought, Article 38, paragraph 1, establishes two separate lists, with the first (subparagraphs (a) to (c)) being the formal sources from which rules of international law may be extracted, and the second providing means by which these rules can be identified and determined. This view is supported by Schwarzenberger, who posited that Article 38, paragraph 1, "deals with two different issues. Subparagraphs (a) to (c) are concerned with the pedigree of the rules of international law. In subparagraph (d), some of the means for the determination of alleged rules of international law are enumerated".[324] On the other hand, Fitzmaurice perceived a "defect" in Article 38 in that it, *inter alia*, failed to distinguish between formal and material sources and, save one exception, failed to establish "any system of priority of application".[325] He considered that treaties and custom in subparagraphs (a) and (b) were intended to specify the formal sources, while general principles of law and judicial decisions in subparagraphs (c) and (d) were the *material* sources. Notably, that same author did not consider judicial decisions and teachings as being on the same level. The former were more important since, in his view, the decisions of international courts were at the least a "quasi-formal" source of law.[326]

F. Subsidiary means as "law-creating processes" and "law-determining agencies"

199. There is, in principle, no hierarchy in the formal sources in Article 38, paragraph 1. The first three are formal sources. The last, the subsidiary means, are said to be material sources. Irrespective of how qualified, the drafting history of

[321] R. Y. Jennings, "The Judiciary, International and National, and the Development of International Law", ICLQ, *Quarterly*. Vol. 45(1) (1996) pp. 1-12 at pp. 3-4. See also M. 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.

[322] Crawford, Brownlie's Principles of Public International Law, p. 35.

[323] Dugard, et. al., "Sources of International Law", p. 45.

[324] Schwarzenberger, "International Law as Applied by International Courts and Tribunals", p. 96-98.

[325] Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law", p. 494.

[326] Ibid. p. 495.

Article 38, paragraph 1,[327] as well as decisions of some international courts and tribunals bear out a practical differentiation of the sources listed. For instance, although Article 20 (3) of the Statute of the Special Court for Sierra Leone specifies that "[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda", the Special Court for Sierra Leone has underscored that this provision should not, in any way, be construed as implying that the judicial decisions of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda may constitute direct sources.[328] Similarly, in the Trial Chamber of the International Tribunal for the Former Yugoslavia, it was held, in the case of Kupreškić et al., 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".[329]

200. These two categories/lists have been classified as "law-creating processes", referring to the formal sources of international law contained in subparagraphs (a) to (c) of Article 38, paragraph 1, and "law-determining agencies", denoting the subsidiary means for determining the rules of international law as contained in subparagraph (d).[330] Schwarzenberger explains that, "[…] in the case of the law-creating processes, the emphasis lies on the forms by which any particular rule of international law is created, in the case of the law-determining agencies it is on how an alleged rule is to be verified".[331]

201. This posture is supported by the actual wording of Article 38 (1) (d), specifically "the determination of rules of law", which former International Court of Justice Judge Shahabuddeen suggests "is arguably limited to a determination in the sense of finding out what is the existing law".[332] Considering the drafting history of the provision, "[t]he argument is strong […] that the reference to 'the determination of rules of law' visualised a decision which would merely elucidate the existing law, and not bring new law into being".[333]

202. The consequence of this approach, that judges cannot create international law but merely elucidate what the law is, may arguably understate the influence that judicial decisions have in international law.[334] Van Hoof has warned against interpreting the classification of judicial decisions as "subsidiary" as meaning that they are less important, because "the authority and persuasive power of judicial

[327] See Godifridus. J.H. Van Hoof, *Rethinking the Sources of International Law*, (Netherlands: Kluwer Law and Taxation Publishers, 1986).

[328] *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao,* Judgment, Case No. SCSL-04-15-T, SCSL, Trial Chamber, 2 Mar. 2009, at 295 ('RUF Trial Judgment'). For commentary on the jurisprudential contributions of the SCSL, see Charles C. Jalloh, *The Legal Legacy of the Special Court for Sierra Leone* (Cambridge: Cambridge University Press, 2020).

[329] Prosecutor *v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, Vladimir Santic,* also known as 'Vlado', Judgment, IT-95-16-T, ICTY Trial Chamber, 14 Jan. 2000, at 540 ('Kupreskic et al. Trial Judgment') at p. 540.

[330] Schwarzenberger, "International Law as Applied by International Courts and Tribunals", pp. 96-98.

[331] Ibid., pp. 26-27.

[332] Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge Univ. Press 1996), p. 76.

[333] Shahabuddeen, Precedent in the World Court, p. 77.

[334] Shane Darcey, Judges, Law and War: The Judicial Development of International Humanitarian Law, (Cambridge: Cambridge Univ. Press 2014), p. 21.

decisions may sometimes give them greater significance than they enjoy formally".[335] Rudolf Bernhardt also cautions that classifying judicial decisions as subsidiary "underestimates the role of decisions of international courts in the norm creating process".[336]

203. For his part, Shahabuddeen, in the work cited above argued that the subsidiary means, in particular judicial decisions, may operate on a higher level than is often apparent. This is because, in the first place, they can serve as material for the determination of the existence and content of a rule of law to the extent drawn from the International Court of Justice and other court decisions. In the second place, though the point is subtle, judicial decisions (at least those of the International Court of Justice itself) may play a bigger role by effecting the determination of a rule of law on the basis of an earlier decision: "The new decision by which a rule of law has been determined on the basis of an earlier decisions is not a subsidiary means; it is the source of a new rule of international law; it is made by the Court alone. Once the determination has been made in a new decision, the Court would in later cases be applying the rule of law as determined in that decision; outside of that decision, it may not be obvious that the rule of law exists".[337] Antonio Cassese, the first President of the International Tribunal for the Former Yugoslavia, expressed a similar sentiment ascribing greater weight to judges and, by implication, their decisions when it comes to international law, since in his view, "lawmakers are very often utterly impotent. Lawmakers often cannot make decisions, and the judges step in and decide, in lieu of lawmakers".[338]

204. While Oppenheim's *International Law* in 1905, before the Statute of the Permanent Court of International Justice and the ICJ Statute were adopted, only recognized treaties and custom as the two "exclusive" sources of international law, he recognized that judicial decisions and scholarly writings can "influence the growth of International Law 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".[339] The author observes that, while judicial decisions cannot create international law, they play an important part in developing it.[340] Shahabuddeen rightly points out a fallacy in this argument: "if decisions of the Court cannot make law but can contribute to its development, presumably that development ultimately results in the creation of new law; and however minute this might be in any one instance, incrementally it acquires mass. It does not accord with reality to suggest that the Court may develop the law only in the limited sense of bringing out the true meaning of existing law in relation to particular facts […]."[341]

205. The second issue, which has been widely debated in the relevant literature, is whether subsidiary means, and in particular judicial decisions, can develop or mould international law. This raises interesting and sometimes sensitive topics concerning the role of judges, and judicial decision-making, in adjudication. At least three sets

[335] Van Hoof, *Rethinking the Sources of International Law*, p.170. See also Schwarzenberger, "International Law as Applied by International Courts and Tribunals" p. 96-98 (Noting that "the practical significance of the label "subsidiary means" in Article 38(1)(d) is not to be exaggerated".

[336] R. Bernhardt, "Custom and treaty in the law of the sea", in *Collected Courses of The Hague Academy of International Law*, vol. 205 (1887), p. 270.

[337] Shahabuddeen, Precedent in the World Court, p. 68.

[338] Robert Badinter & Stephen Breyer, *Judges in Contemporary Democracy*, (New York: NYU Press, 2004), p. 33.

[339] Lassa F.L. Oppenheim, *International Law*, (London: Longmans, Green and Co., 1905), p. 24.

[340] Lassa F.L. Oppenheim, *International Law*, 9th ed (London: Longman, Green and Co., 1992), ch. I, p. 41.

[341] Shahabuddeen, Precedent in the World Court, p. 76.

of views are discernible. First, there are the writers expressing the opinion that judicial decisions can create law, while Fitzmaurice links the question of whether a decision of the Court is a formal or quasi-formal source of law to the question of whether it "is authoritative and binding".[342] Judicial decisions, including of national courts, have carried weight in a number of International Court of Justice cases. Examples in this context include the following judgments: *Arrest Warrant of 11 April 2002 (Democratic Republic of the Congo v. Belgium)*,[343] *Congo v. France*,[344] the French Cour de Cassation in the *Gaddafi* case and the *Germany v. Italy* case.[345] Similarly, judicial decisions and judgments of various international courts actually contain numerous references to national court decisions as well as to one another's case law and are often seen to offer interpretations of the law that carry significant purchase in shaping core aspects of some bodies of law.[346]

206. The importance of judicial decisions in ascertaining the existence, or otherwise, of rules of international law may be illustrated with reference to the work of the Commission. This includes, as indicated in chapter V of the present report on the identification of customary international law, general principles of law and the identification of peremptory norms of general international law (*jus cogens*). In the commentary to conclusion 13 on the identification of customary international law, for instance, the Commission noted that, while "'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) […] at the same time, the use of that term 'does not suggest that such decisions are not important for the identification of customary international law'".[347] The above discussions can be recalled to the extent that they confirm, as indicated in the Secretariat memorandum, that the Commission has even relied on judgments of the Court to formulate rules of international law in substantive topics including the State responsibility articles.

207. Hersch Lauterpacht has noted that "many an act of judicial legislation may in fact be accomplished under the guise of the ascertainment of customary international law".[348] But, while that is probably true, concerns may also arise with unchecked judicial authority. In the context of international criminal law, to take a concrete example, Ilias Bantekas has been quite critical of the reliance on judicial decisions and teachings effectively as a source of international law, noting that the "selectivity and stealth of international criminal tribunals has elevated in the past decade decisions of international and domestic courts, as well as opinions of jurists, to essentially primary sources of international law".[349] He criticizes the "exalted status of judicial decisions and the opinions of jurists" and, in pointing out the lack of a coherent methodology in some ad hoc tribunal case law, adds that the "selectivity and the use

[342] Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', p. 493.
[343] Arrest Warrant of 11 April 2000 (Congo v. Belgium), Judgment, ICJ Reports 2000, at p. 3.
[344] Certain Criminal Proceedings in France (Congo v. France), discontinued by Order of 16 November 2010.
[345] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99.
[346] Darcy, Judges, Law and War: The Judicial Development of International Humanitarian Law, p. 28.
[347] Conclusions on the identification of customary international law with commentaries, *Yearbook of the International Law Commission, 2018*, vol. II, Part II, at p. 149.
[348] Hersch Lauterpacht, *Development of International Law by the International Court*, (London: Stevens & Sons Ltd, 1958), p. 368.
[349] I. Bantekas, "Reflections on Some Sources and Methods of International Criminal and Humanitarian Law", Int. Crim. Law Rev., vol 6 (2006), pp. 121–136 at p. 129.

of supplementary sources and their slow elevation to primary sources is worrying, if not frightening".[350]

208. In summary, the above discussion situating the subsidiary means in the wider context of the wealth of practice and literature on sources was intended to illustrate that there are aspects of subsidiary means and their interaction and relationship to the sources that may seem uncertain and unsettled. The confusion begins with the notion of source of international law. It continues in debates arising from scholarly attempts to distinguish between formal and material sources, between primary and secondary sources or between sources of law and sources of obligations, and ultimately arrives at questions about hierarchy, or lack thereof, of the sources. The issue of whether, within the subcategory of subsidiary means, there is a difference between the weight to attach to judicial decisions and teachings seems related to the effort of differentiation that could allow the reliance on the most authoritative sources. With the above backdrop in mind, the status and role of subsidiary means within Article 38, paragraph 1, and the interplay and relationship between the subsidiary means and treaties, international custom and general principles of law will need to be explored further in the Special Rapporteur's second report. It would be helpful, in that context, to reflect upon the observations in the memorandum of the Secretariat on how the Commission itself has used the subsidiary means in the process of assisting States with the codification and progressive development of international law. It is only at that stage that firm conclusions should be drawn. Nonetheless, it should be apparent that, at a minimum, the formal "subsidiary" status of judicial decisions belie in practice their fundamental role and importance in the development and consolidation of international law.

[350] Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law', p. 132.

VII
The drafting history of Article 38, subparagraph 1 (d), of the Statute of the International Court of Justice

209. Article 38 of the ICJ Statute, which is widely seen as an authoritative statement of the sources of international law and the material foundation for the Commission's work on the current topic,[351] is worth setting out in full. It provides as follows:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) *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. (Emphasis added)
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

210. In addition to Article 38, also relevant is Article 59, which corresponds to the caveat to subparagraph 1 (d) stating as follows:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

211. Before turning to a detailed analysis of the above provisions, focusing on the ordinary meaning to be given to the terms in their context and in light of their object and purpose, it seems useful to first closely examine the drafting history. In line with Article 32 of the Vienna Convention on the Law of Treaties, recourse may be had to the supplementary means of interpretation.[352] This would include the preparatory work of the treaty and the circumstances of its conclusion.[353] Any interpretations derived from the *travaux préparatoires* may serve to confirm the meaning to be given to the provisions.

212. Preliminarily, two background arguments are necessary. First, as is widely known but is perhaps nonetheless useful to recall, the above provisions are derived from two interrelated instruments in particular, the Statute of the Permanent Court of

---

[351] Indeed, as Jennings puts it, "So Article 38 can be looked at in two ways. It has to be applied by the International Court itself because it is part of the Statute by which it is governed; but it may also be referred to by other tribunals and generally, because it can now be regarded as an authoritative statement of sources of international law as a consequence of the backing of general practice accepting it as such. It governs the International Court because it is in its Statute: it guides generally because it has come to be regarded as a convenient statement of accepted practice." See R.Y Jennings, "General Course on Principles of International Law", in *Collected Courses of the Hague Academy of International Law*, Vol. 121 (Leiden: Sijthoff, 1967), p. 331.

[352] Art. 32 of the Vienna Convention on the Law of Treaties provides "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."; Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, p. 331.

[353] Ibid.

International Justice and the ICJ Statute. It is uncontroversial that the latter was based on the former. The connection between the two stems from not only their shared statutory framework but also the continuity by the latter of the work of the former including in terms of the jurisprudence.

213. Second, as a historical matter, the Permanent Court was established in accordance with Article 14 of the Covenant of the League of Nations.[354] The Court, which was affiliated with but independent of the League of Nations, was intended to serve as the organ for the judicial settlement of disputes of an international character submitted to it by the parties. This was to be in addition to the Court of Arbitration organized by the 1899[355] and 1907[356] conventions. The Statute of the Court once adopted provided, *inter alia*, in Article 38, the law that the Court shall apply. Thus, an examination of the drafting history must account for the various forums where the statute was considered in the lead-up to the establishment of the Permanent Court. This essentially implicated three main bodies: firstly, the Council, and secondly, the Assembly of the League of Nations, both of which were organs of the League supported by a permanent secretariat; and thirdly, an ad hoc Advisory Committee of Jurists established pursuant to the mandate in Article 14 of the Covenant of the League.[357]

A. Drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists (1920)

214. Unlike the sources, such as treaties, customary law and general principles of law, it does not appear that there were State proposals to include subsidiary means as a source of law before the work of the Advisory Committee of Jurists began. In this regard, even at the expert level, the initial proposal did not seem to address the role of judicial decisions and teachings.[358] These seemed tangential to the main task and, as such, did not preoccupy the drafters. At the Advisory Committee of Jurists level, the first part of the discussions of the draft statute was concerned with the organization and structure of the Court. By about the 13th meeting, on 1 July 1920, when the broad outlines of the future tribunal had been set out, the Committee turned to the law that could be applied by the new court.

---

[354] Art. 14 states as follows "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."; League of Nations, *Covenant of the League of Nations* (Paris, 28 June 1919).

[355] Convention (II) with Respect to the Laws and Customs of War on Land (The Hague, 29 July 1899).

[356] Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907).

[357] The Council decided at its second meeting, held in London in February 1920, to appoint a Committee to prepare plans for the establishment of the Permanent Court of International Justice as provided for under Article 14 of the Covenant: "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." The following legal experts were appointed: Mineichiro Adatchi (Japan); Rafael Altamira (Spain); Clovis Bevilaqua (Brazil) who was later replaced by Raoul Fernandes; Baron Descamps (Belgium); Francis Hagerup (Norway); Albert de Lapradelle (France) B.C. J. Loder (Netherlands); Lord Phillimore (United Kingdom); Arturo Ricci-Busatti (Italy) and Elihu Root (USA).

[358] See also Sondre Torp Helmersen, *The Application of Teachings by the International Court of Justice* (Cambridge: Cambridge University Press, 2021), p. 21.

215. Baron Descamps, the President of the Advisory Committee of Jurists, proposed the following provision:

> The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the undermentioned order:
>
> 1. conventional international law, whether general or special, being rules expressly adopted by the States;
>
> 2. international custom, being practice between nations accepted by them as law;
>
> 3. the rules of international law as recognised by the legal conscience of civilised nations;
>
> 4. international jurisprudence as a means for the application and development of law.[359]

216. The aspects of President Descamps's proposal concerning "conventional international law" (that is, treaties) and "international custom" (that is, customary international law) did not seem to generate substantial controversy.[360] Mr. Elihu Root, the American member of the Advisory Committee of Jurists, opened the debate expressing support for the empowerment of the Court in relation to the application of rules contained in conventions and positive international law. He had doubts about the other aspects, which were not shared by Mr. Loder, the Dutch member, who disagreed with Mr. Root and considered that it would be the Court's duty to develop law, to "ripen" customs and principles universally recognized and to crystallize them into positive rules; in a word, to "establish international jurisprudence".[361] Professor de Lapradelle, the French member of the Advisory Committee, did not consider it useful to have such a provision as proposed by the President, and if a clause were required, would prefer a much shorter formulation, simply stating that "[t]he Court shall judge in accordance with law, justice, and equity".[362]

217. What seemed more controversial and deemed the "crucial issue" was "what law, if any, the judges should apply when neither treaty law nor international custom provided for a rule".[363] This generated a lengthy debate about general principles of law and, particularly important for our purposes, their relationship to "international jurisprudence".[364] There was no mention, at that early stage, of the role of doctrine or scholarship, let alone their subsidiary status. The addition followed later when Descamps proposed to include "the concurrent teaching of the authors whose opinions have authority" as a source of law.[365] He sought to strike a balance, on the one hand, agreeing that the Court is not to act as a legislator and at the same time not precluding it from ruling on the basis of justice and equity. At the same meeting, Mr. Hagerup, the Norwegian member, recalled prior relevant precedents and noted the need to establish a rule to avoid the possibility of the Court declaring itself incompetent (*non*

[359] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, pp. 293, 306.
[360] Ibid., p. 295.
[361] Ibid., p. 294.
[362] Ibid., pp. 295-96.
[363] A. Pellet, "Article 38 of the Statute of the International Court of Justice" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds) *The Statute of the International Court of Justice A Commentary*, 3rd ed. (Oxford: Oxford Univ. Press, 2019) pp.677-792 at p. 828, and also O. Spiermann, "The History of Article 38", Samantha Besson and Jean d'Aspremont (eds) *The Oxford Handbook on the Sources of International Law*, (Oxford University Press, 2017).
[364] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, pp. 310–315.
[365] Ibid., p. 323. "[I]t is absolutely impossible and supremely odious to say to the judge that, although in a given case a perfectly just solution is possible: 'You must take a course amounting to a refusal of justice' merely because no definite convention or custom appeared."

liquet) because of the lack of rules. He would accept, as reflected in the Scandinavian proposal, for the Court to have recourse to equity but only if so agreed by the parties.[366]

218. During the 14th meeting,[367] on 2 July 1920, the drafters returned to the issue. President Descamps's speech addressed the law to be applied by the Court, observing that the "principles which must guide the judge, in the solution of the disputes submitted to him, are of vital importance".[368] As regards international jurisprudence, he submitted that "not to allow the judge to make use of existing international jurisprudence as a means of defining the law of nations" would be to "deprive him of one of his most valuable resources".[369] He stressed that, to him, the only question that remained was whether "objective justice should be added as a complement to the others under conditions which are calculated to prevent arbitrary decisions".[370] After all, objective justice, at least to him, was "the natural principle to be applied by the judge".[371] He underlined that, as compared to the views of Mr. Root, he differed in allowing the judge to "make use of the concurrent teaching of the authors whose opinions have authority".[372] He considered that, like Chancellor Kent, "when the greater part of jurisconsults agree upon a certain rule – the presumption in favor of that rule becomes strong, that only a person who makes a mock of justice would gainsay it".[373]

219. At the 15th meeting, on 3 July 1920, the debate on how international judges should apply the law continued. The effort became about how to reach a compromise given the opposing positions of some of the members from the preceding days' discussions. Mr. Raoul Fernandez, the Brazilian (alternate) representative to the Advisory Committee of Jurists, sought to reconcile the views of the President and Mr. Root. He agreed that the task of judges was not to legislate; on the other hand, he considered that limiting them to only the sources denied them the possibility of rendering justice involving the legal relations between States in many cases. He considered that international judges, like national judges, could bring to light a latent rule by applying principles that had not been rejected before by the legal traditions of the disputing States.[374]

220. Mr. Root and Lord Phillimore, the British representative on the Advisory Committee of Jurists, submitted an alternate draft mentioning "the opinions of writers

[366] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 296.

[367] At the 12th meeting, on 30 June 1920, Mr. Ricci-Busatti in the context of the discussion about the jurisdiction of the Permanent Court pointed out that they were yet to discussion the question of the substantive law to be applied. *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920*, p. 270.

[368] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 322.

[369] Ibid., p. 322.

[370] Ibid., pp. 322-323.

[371] Ibid., p. 323.

[372] *Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920*, p. 323.

[373] Ibid.

[374] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, pp. 331, and 346.

as a means for the application and development of law".[375] Notable in it was that it presented the four-part structure in what would eventually be Article 38, paragraph 1. Descamps suggested that, in number 3, he could accept the clause proposed by Mr. Root, and that in number 4, "the judge must use the authority of judicial decisions, and the coinciding doctrines of jurists, as auxiliary and supplementary means, only".[376] A key point was that the judges were to first apply the rules of international law. And, thereafter, they could take up subsidiary means as an element albeit only *in interpretation*; ranking subsidiary means in a hierarchy vis-à-vis the sources.

221. Mr. Ricci-Busatti of Italy did not have a concern with the substance of the project. He agreed with Root's views "in several respects, especially concerning the impossibility of the Court acting as legislator".[377] But he did have concerns about the successive order in which the sources were mentioned and some of the sources of law mentioned. In his view, the judges could consider the sources mentioned simultaneously. As to the actual sources, he had no difficulty with treaties and custom (mentioned, respectively, in numbers 1 and 2) and, on general principles of law (number 3), had expressed himself on his understanding of their meaning the previous day,[378] namely that "it is not a question of creating rules which do not exist, but applying the general rules which permit the solution in question",[379] and he regretted that the principle of equity had not been included.[380] As to number 4, he "hardly thought that it would be possible to find coinciding doctrines concerning points in relation to which no generally recognized rules existed".[381] Further, "he denied most emphatically that the opinions of authors could be considered as a *source of law*, to be applied by the Court".[382] He was surprised that Mr. Root would accept such text and presented his preferred alternative text for consideration.[383]

---

[375] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, Annex 1 p. 344. Amended text submitted by Mr. Root:
"The following rules are to be applied by the Court within the limits of its competence, as described above, for the settlement of international disputes; they will be considered in the undermentioned order:
1. conventional international law, whether general or special, being rules expressly adopted by the States which are parties to a dispute;
2. international custom, being recognised practice between nations accepted by them as law;
3. the general principles of law recognised by civilized nations;
4. the authority of judicial decisions and the opinions of writers as a means for the application and development of law."

[376] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 332.

[377] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 314.

[378] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 332

[379] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 315.

[380] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 332

[381] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 332.

[382] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 332.

[383] His proposal was an amendment to the proposal by the President and Lord Phillimore, which provided as follows:
"The rules to be applied by the Court for the settlement of any international dispute brought before it, arise from the following sources:
1. international conventions, either general or special, as constituting rules expressly adopted by the States which arc parties to a dispute;
2. international custom as evidence of common practice among said States, accepted by them as law;
3. the general principles of law recognized by civilised nations.
The Court shall take into consideration the judicial decisions rendered by it in analogous Cases, and the opinions of the best qualified writers of the various countries, as means for the application and development of law."
See Annex 4 Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 351.

222. For his part, Professor de Lapradelle, while generally supporting the draft, expressed concerns with certain textual proposals by Ricci-Busatti. For instance, he found the qualifier in the proposal that the Court should take into account 'as much as possible'[384] judicial decisions was not sufficiently precise. As regards publicists, they were hardly ever agreed upon a point of law. This, to him, suggested that a provision as provided in point 4 of Root's proposal "took away the importance of their works".[385] In any case, in his view, "jurisprudence was more important than doctrine, since the judges in pronouncing sentence had a practical end in view".[386] To him, if there was a wish to include doctrine as a source it should be at any rate "limited to coinciding doctrines of qualified authors in the countries concerned in the case".[387] Furthermore, "it certainly would be necessary to make a classification: the various expressions of doctrine would be arranged according to their importance".[388] In this regard, the "resolutions of the Institute of International Law" would have to be taken into account to a considerable extent. Here, he suggested that both the works of individual scholars and a collective of experts could be consulted but felt more weight would likely have to be accorded to the latter.

223. In reply, President Descamps agreed that, depending on the case, judges could examine the sources simultaneously. He clarified his position in relation to how treaties and custom related to general principles, as a gap filler to avoid *non-liquet*, and finally in relation to judicial decisions and doctrine, was astonished that Ricci-Busatti "did not accept doctrine as an element of interpretation".[389] Descamps had earlier expressed the view that the elements in number 4 were "elements of interpretation".[390] For, in his view, "[t]his element could only be of a subsidiary nature; the judge should only use it in a supplementary way to clarify the rules of international law. Doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve as *elucidation*".[391]

224. Regarding the importance of doctrine, Lord Phillimore observed that it is "universally recognized as a source of international law".[392] Indeed, in his view, there was "no need to say, that only the opinions of widely recognised authors were in question".[393] But Ricci-Busatti expressed doubts that States would "accept rules which would be the result of the doctrine rather than of their own will, or of their usages".[394] In a later expansion of this point, the latter thought it possible to take "jurisprudence and doctrine into account"[395] but felt it would be "inadmissible to put them on the same level as positive rules of law".[396]

225. In responding to De Lapradelle, on the various issues he had raised, President Descamps regretted that De Lapradelle did not appreciate the value of accepting doctrine as an element of interpretation. Indeed, that element "could only be of a subsidiary nature; the judge should only use it in a supplementary way to clarify the rules of international law".[397] To him, "[d]octrine and jurisprudence do not create law;

[384] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 334.
[385] Ibid., 336.
[386] Ibid.
[387] Ibid.
[388] Ibid.
[389] Ibid.
[390] Ibid., p. 334.
[391] Ibid., p. 336.
[392] Ibid., p. 333.
[393] Ibid.
[394] Ibid., pp. 333 – 334.
[395] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 334.
[396] Ibid.
[397] Ibid., p. 336.

they assist in determining rules which exist. He observed that "[a] judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation".[398] He stressed that the "judge's right to make use of the elements mentioned in this paragraph is not a dangerous one as it would only be for elucidating and supplementary purposes".[399]

226. Additional debate and negotiation on the text led to an amendment to remove the language of "coinciding" to meet the concerns of De Lapradelle. The underlying disagreement between Descamps and Ricci-Busatti was not ultimately resolved. As reworded, following the further exchange of views by Descamps, De Lapradelle and Phillimore, the proposal for the updated paragraph 4 was agreed to be as follows:

> "The authority of judicial decisions and the doctrines of the best qualified writers of the various nations".[400]

Still, Ricci-Busatti believed this text should be further revised. Therefore, he expressed a preference for a shorter formulation. He also took issue with including the reference to "in the following order", in relation to the text of the whole article, since that opening phrase was both superfluous and implied a hierarchy. In his view, the formula proposed, for the article, would not recognize that the various sources "may be applied simultaneously" and that "the nature of each source" differed.[401] At any rate, after making textual suggestions, his view was that "jurisprudence and doctrine may not be placed on the same level as the other sources and must not be used in the same way; although they must always be borne in mind by the judge".[402]

227. Following the above discussions, taking into account the debate, Root's proposal as amended was provisionally adopted on the first reading as follows:

> The following rules are to be applied by the Court within the limits of its competence, as described above, for the settlement of international disputes; they will be considered in the undermentioned order:
>
> 1. conventional international law, whether general or special, being rules expressly adopted by the States which are parties to a dispute;
>
> 2. international custom, being recognized practice between nations accepted by them as law;
>
> 3. general principles of law recognized by civilized nations;
>
> 4. the authority of judicial decisions and the opinions of writers as a means for the application and development of law.

A footnote to the above text was inserted, to reflect the debate and to provide more explanation. It provided as follows:

> This text was provisionally adopted, except as concerned final drafting for the second reading, and with the following alterations:
>
> a. Preamble; read: "The following rules *of law* are to be applied"
>
> b. No. 4; read: "the authority of judicial decisions, and the doctrines of the best qualified writers of the various nations, as" etc.

228. A subsequent version of the applicable law proposal as presented by President Descamps and Lord Phillimore, and as amended by Mr. Ricci-Busatti, would adjust

[398] Ibid.
[399] Ibid., p. 337.
[400] Ibid.
[401] Ibid.
[402] Ibid., p. 338.

some of the language. This included the opening *chapeau*, and three paragraphs on international conventions, international custom and general principles of law. As a final paragraph, without number, it was proposed that:

> The Court shall take into consideration the judicial decisions rendered by it in analogous cases, and the opinions of the best qualified writers of the various countries, as means for the application and development of law.[403]

229. At the 27th meeting, on 19 July 1920, the Committee discussed the text of the above revised proposal. The President proposed the following addition to what was then Article 31, adding to paragraph 4: "As subsidiary means for the determination of rules of law".[404] The proposal was met with objections. Lord Phillimore, in a position that would be much later contested,[405] "pointed out that judicial decisions state, but do not create, law".[406] Ricci-Busatti maintained his original objections to the original draft of the article, mentioned above.[407] De Lapradelle was opposed to any modification of the first three sources and would delete the fourth paragraph in its entirety. In his view, laws, customs and general principles of law could "not be applied without reference to jurisprudence and teaching[s]".[408] He thus felt that the phrase ought to be deleted, arguing that: "The source of law referred to under this heading could not be clearly defined".[409] He voted against the fourth paragraph.

230. The article was adopted as it already had majority support of the Committee. But, as one author has suggested,[410] the final outcome text can be seen as intentionally ambiguous language that did not resolve the substantive disagreements between the two camps (Root and Phillimore; Descamps and Ricci-Busatti). However, considering the text that was ultimately adopted, its reference to subsidiary means may actually indicate that the position that subsidiary means could not be accorded the status of sources was ultimately incorporated into Article 38.[411]

231. At the 30th meeting, on 21 July 1920, Descamps, with reference to the French version of the text, proposed to substitute the expression: "en ordre successif" for the word "successivement".[412] This modification was agreed to. On the substance of paragraph 4, he proposed, as a compromise:

---

[403] See Annex 4 Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 351:
"The rules to be applied by the Court for the settlement of any international dispute brought before it, arise from the following sources:
1. international conventions, either general or special, as constituting rules expressly adopted by the States which are parties to a dispute;
2. international custom as evidence of common practice among said States, accepted by them as law;
3. the general principles of law recognised by civilised nations.

[404] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 584.

[405] Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Grotius Publications, Cambridge University Press, 1996) pp. 587-602.

[406] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 584.

[407] Ibid.

[408] Ibid.

[409] Ibid.

[410] Michael Peil, "Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice", *Cambridge Journal of International and Comparative Law*, vol. 1 (2012), p. 136.

[411] Godifridus J.H. Van Hoof, *Rethinking the Sources of International Law*, (Netherlands: Kluwer Law and Taxation Publishers, 1986), p. 169-170.

[412] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 620.

> The Court shall take into consideration 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.[413]

232. Ricci-Busatti wished to substitute the expression "judicial interpretation" for the expression "determination of rules of law".[414] The proposal was rejected. Ricci-Busatti voted against the Article which, at this stage, read as follows:

> Article 31 – The Court shall, within the limits of its jurisdiction as defined in Article 29, apply in the order the following:
>
> 1. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> 2. international custom, as evidence of a general practice, which is accepted as law;
>
> 3. general principles of law recognized by civilized nations;
>
> 4. rules of law arising from judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

233. On 22 July 1920, as the Committee approached the end of its discussion of this article, the now renumbered Article 35 was adopted. De Lapradelle maintained his concerns.[415] He argued that, in his view, paragraph 3 of the above should read: "The general principles of Law recognized by civilised nations as interpreted by judicial decisions and by the teaching of the most highly qualified publicists of the various countries".[416] Nonetheless, since he was aware that his preference for that clause was not shared by his colleagues, he abstained from the vote along with Hagerup. Ricci-Busatti voted against the article. Article 35 was adopted. The final version of the text, as adopted by the Committee, which became Article 38, provided that:

> The Court shall, within the limits of its competence as defined in Article 34, apply in the following order:
>
> …
>
> 4. judicial decisions and the teachings of the most highly qualified publicists of the various nations, being subsidiary means for the determination of rules of law.

234. On 24 July 1920, the Advisory Committee of Jurists adopted a report which contained draft articles of the Statute of the Permanent Court of International Justice, which it submitted to the Council of the League of Nations. A number of proposals were made by several States to amend the Statute of the Permanent Court of International Justice.[417] Among them was Argentina's. The Argentine amendment proposed a new text for Article 38.

235. A subcommittee of the Third Committee of the First Assembly of the League of Nations, which was the body to which the Council ultimately referred the draft articles, rejected Argentina's proposed new text for the draft article. The proposal sought, *inter alia*, "to limit the power of the Court to attribute the character of

[413] Ibid.

[414] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 620.

[415] Ibid. p. 645.

[416] Ibid.

[417] For a discussion, see Ole Spiermann and Malgosia Fitzmaurice, "History of Article 38 of the Statute of the International Court of Justice" in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of Sources of International Law* (Oxford: Oxford University Press, 2017) pp. 179-202 at p. 190.

precedents to judicial decisions".[418] To the contrary, the subcommittee held that it was "considered that it would be one of the Court's important tasks to contribute, through its jurisprudence, to the development of international law".[419]

236. The subcommittee did make two textual proposals for changes to the articles. First, at the opening, it found it unnecessary to keep the words "the limits of the Court's jurisdiction as defined in Article 34" and also the phrase "in the order following".[420] A final more substantive amendment was the addition of a new clause intended to give the Court greater flexibility by permitting it, if necessary and with the consent of the parties, to make an award *ex aequo et bono*.[421] This became the origin of paragraph 2 of what is current Article 38: "These provisions shall not prejudge the power of the Court to decide a case *ex auque et bono* if the parties so agree thereto".

237. Beyond these amendments, the changes to draft Article 35, which in this process became Article 38, were not significant and were recommended to the General Assembly of the League, which ultimately adopted them. The Statute of the Permanent Court of International Justice was opened for signature on 16 December 1920, and by the time of the next meeting of the Assembly in September 1921, it had been ratified by a majority of Member States and thus entered into force.

B. Amendments by the Committee of Jurists (1929)

238. The Statute of the Permanent Court of International Justice was amended once, in 1929. In view of the re-election of the members of the Court to be held in 1930, the French delegate suggested, at the 1928 session of the Assembly, that the Statute of the Court be re-examined. Pursuant to a resolution adopted by the Assembly on 20 September 1928, on 13 December the same year, the Council established a Committee of Jurists to "report what amendments appear desirable in the various provisions of the Court's Statute".[422]

239. The Committee of Jurists held meetings between 11 and 19 March 1929. Specifically on subsidiary means, during their discussions, on 15 March 1929, Sir Cecil Hurst "pointed out that there was no equivalent expression in the French text of paragraph 1 of Article 35 for the words "of the various nations" in the English text.[423] Dionisio Anzillott also had reflections on the discrepancy. He observed that, in the Italian text, there were words corresponding with the additional words in the English text. To address the issue, "the Committee decided to insert in the French text the words "des diverses nations"[424] in order to bring it into literal conformity with the English (and Italian) text. There was no need for an amendment to the English text.

240. During the further debate regarding the revision of the Statute of the Permanent Court of International Justice, as presented in the proposed amendments to the Statute

[418] League of Nations, Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption of the Assembly of the Statute of the Permanent Court (1921), p. 50.
[419] Ibid., p. 68.
[420] Ibid., p. 145.
[421] Ibid., p. 157.
[422] League of Nations Committee of Jurists on the Statute of the Permanent Court of International Justice, "Minutes of the Session held at Geneva, March 11th – 19th, 1929" (C. 166. M. 66. 1929) Annex 9. p. 110, available at https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_D/D_minutes_statut_PCIJ_11au19march_1929.pdf.
[423] Ibid., p. 62.
[424] Ibid.

of the Court, it was noted that only one proposal had been made to amend Article 38. The President of the Committee of Jurists explained that it had:

> only a very slight and purely formal amendment to propose to No. 4 of Article 35. It consists in restoring in the French text a few words which appear in the English text. In the said No. 4 of Article 38, after the words "la doctrine des publicistes les plus qualifiés", the words "des différentes nations" should be added. Article 35, No. 4, would then read in the French text as follows:
>
> > "Sous réserve de la disposition de l'article 59, les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit."[425]

C. The minor additions to Article 38 during the United Nations Conference (1945)

241. The next step of the evolution of Article 38 occurred during the negotiations to establish the United Nations and elaboration of the ICJ Statute, which to a large extent, subsumed the Statute of the Permanent Court of International Justice. In discussions of Commission IV, on judicial organization, Article 38 of the Statute of the Permanent Court of International Justice was left largely untouched. Within the First Committee, which had been part of Commission IV charged with the preparation of a draft of the Statute of the International Court of Justice, the prevailing sentiment was reflected by France's observation, which carried the day, that, "while Article 38 was not well drafted, it would be difficult to make a better draft in the time at the disposal of the Committee".[426] This sentiment was echoed in a communication of the Informal Inter-Allied Committee: "…although the wording of this provision is open to criticism, it has worked well in practice and its retention is recommended".[427]

242. There were two minor exceptions. In a 12 May 1945 proposal, the delegation of Chile considered that it would be necessary to expressly mention the application of international law, among other reasons, because this "would better define the functions of the Court as an organ of international law in accordance with the reiterated jurisprudence of the Court and the history of its formulation".[428] Chile thus proposed the following text for the *chapeau*:

> The Court, whose mission is to decide in accordance with international law such disputes as are submitted to it, shall apply:…

243. A slightly modified version of the proposal was unanimously adopted by the Committee, deleting "mission" and replacing it with "function".[429] As the First Committee report explained, "[t]he lacuna in the old Statute with reference to this point did not prevent the [Permanent Court of International Justice] from regarding itself as an organ of international law; but the addition will accentuate that character of the new Court".[430] The change was a clarification that, in fact, cured a gap that had already been attended to through judicial practice. Indeed, in several cases, for example *Certain German Interests in Polish Upper Silesia, Merits*, the Permanent Court of International Justice addressed itself from "the standpoint of International

[425] Ibid., p. 116.
[426] Pellet, "Article 38," p. 689.
[427] Documents of the United Nations Conference on International Organization, vol. XIV, at p. 435. (1945).
[428] Ibid., at p. 493.
[429] Ibid., at p. 285.
[430] Ibid., at p. 392.

Law and of the Court which is its organ".[431] In *Brazilian Loans*, the same court considered itself "a tribunal of international law".[432] This line of thinking has been reiterated by the current Court which, in *Corfu Channel, Merits*, considered itself as bearing a duty "to ensure respect for international law, of which it is the organ".[433]

244. A second proposal for an amendment of Article 38 also came from the Americas. In returning to an issue that had been expressly addressed by the Advisory Committee of Jurists in the 1920s, Colombia flagged the question of the order of the sources listed in Article 38, proposing the addition of the phrase "in consecutive order" in paragraph 1.[434] It had been inspired by the need to clarify that the Court's decisions would be rendered with due regard for the contractual obligations of the parties. Colombia in fact observed that, while a similar proposal had been made in 1920, the representatives of the Court at the time had explained that no difficulty had arisen in that connection with the use of Article 38. The proposal was ultimately dropped. Colombia, in its statement, agreed that its amendment would not produce any substantial change in the interpretation of the article and felt convinced that the new Court would give the utmost importance to the contractual engagements of States, as had been the case with the Permanent Court of International Justice.[435]

D. The Special Rapporteur's observations from the drafting history of Article 38

245. Overall, on the basis of the above discussions of the fascinating drafting history of Article 38, subparagraph 1 (d), of the Statute of the Permanent Court of International Justice (which was substantially carried over into the ICJ Statute), the following four preliminary observations can be offered for the Commission's consideration.

246. First, regarding subparagraph 1 (d), the drafting history provides useful clarifications behind the intention of the drafters. In this regard, the history confirms that there were differences of view from the time of drafting of Article 38 concerning the role of *judicial decisions* and *the teachings of the most highly qualified publicists* as subsidiary means in the process of determination of the rules of international law. The different members of the Advisory Committee of Jurists were divided on whether judges merely apply the law or whether, in the course of application of the positive law, they were permitted to clarify or to develop or even to create new law. Some of the experts saw the role of developing the law as inevitable and, to a great extent, as inherent in the judicial function. This seems to be borne out in the practice of the Permanent Court of International Justice and the International Court of Justice. It also seems to be borne out by the practice of other international courts and tribunals. In the final analysis, in the view of those experts in this camp, the international court judge was not to be put at a disadvantage vis-à-vis national court judges.

247. To the contrary, as reflected in the comments of some of the experts, it was even more important a function for the international judge than national court judges to develop the law given legislative gaps in international law and the slow formation process for customary law. A particular concern for all the Advisory Committee of

[431] Certain German Interests in Polish Upper Silesia (Germany v. Poland), Merits, P.C.I.J. Series A 1926, No. 7 at 19.

[432] The Payment in Gold of Brazilian Federal Loans Contracted in France (France v. Brazil), Merits, P.C.I.J. Series A, No. 15 at 124.

[433] Corfu Channel Case, Merits, Judgment, I.C.J. Reports 1949, p. 4 at 35.

[434] Documents of the United Nations Conference on International Organization, vol. XIII, at p. 287 (1945).

[435] See Pellet, "Article 38", p. 690.

Jurists experts on which there indeed seemed to be unanimity was that judges of an international court would lightly declare the Court's incompetence to rule on cases because they were unable to find a rule of positive law that would apply. Declarations of *non-liquet* would undermine the existence of a judicial tribunal. It would also undermine peaceful dispute settlement, for which reason, as in national systems, they were to do their utmost to avoid such situations and to render a decision on issues before them by resorting to, as may be necessary, the guidance that could be obtained from subsidiary means. Here, it would appear that there were Advisory Committee of Jurists members that perceived close connections between the functions performed by general principles of law and subsidiary means for the determination of rules of international law.

248. Second, as regards teachings, the members of the Advisory Committee of Jurists apparently believed first and foremost that scholarly opinions would assist with *objectively* determining which rules exist and had been agreed to by States in treaties or through customary international law or manifested in general principles of law. Scholarly writings were to be subsidiary in the sense of possibly scientifically providing a basis for a finding of the existence of a legal rule that could be applied in a concrete case. In that sense, the mere advocacy of a certain position or principle by individual authors was not necessarily evidence of its existence. Rather, the agreement of a number of authors individually or expert groups on the existence of a principle or rule could serve as a basis for a presumption in favour of the existence of that rule since the likelihood would be high that the rule would be correct where the analysis was objective and the balance of views of authors coincided. In this connection, the works of expert bodies would, on balance, carry greater weight. The notion of a presumption suggests that the scholarly views would be rebuttable to the extent that they are not well supported. In the end, at the level of the Advisory Committee of Jurists as a whole and ultimately the League, it was accepted that judicial decisions and doctrine could be used in a supplementary way to determine the existence and content of rules of international law. This observation is today reflected in the practice and would be hard to contest.

249. Third, as to a frequently encountered question of whether the category of judicial decisions is more important than the category of teachings, which debate resonates in some scholarship even today, the debate in the Advisory Committee of Jurists demonstrates that there was such a view that judicial decisions are more important. But that seemed to be a minority position. The majority of the other members held the view that, at least at the level of principle, both were useful in the process of determining the existence, or otherwise, of a rule of international law. Significantly, the practice has borne out that international courts, as with national courts, prefer to rely on judicial decisions over the writings of scholars. This should be hardly surprising, although there are nuances to that proposition as well, depending for instance on the specific tribunal or field of international law under consideration. That is not, however, to suggest that teachings are less relevant or less important. In the view of the Special Rapporteur, as will be explained later and developed further in future reports, as appropriate, the issue is not so much about whether judicial decisions or teachings are in some type of normative hierarchy between each other as much as appreciating that the two expressly mentioned subsidiary means actually perform functions that are complementary to each other under Article 38, subparagraph 1 (d). They are united in purpose by serving as a way to help international courts ensure a principled resolution of a practical legal problem.

250. Fourth, speaking more generally about paragraph 1 of Article 38, there was some Advisory Committee of Jurists debate about the amount of emphasis that should be placed on establishing a successive order of application of sources. We shall return to this point further below. For now, it is sufficient to note that some members of the

Advisory Committee believed that explicit wording providing the successive order of application was necessary, in relation to treaties, custom and general principles of law, as a way to guide if not frame or control the judicial task, while others believed that this was implied by the listing that they could go through systematically. There was also a more nuanced view, by some of the Advisory Committee experts, that each of the three sources could be applied simultaneously and that a wide measure of judicial discretion should be permitted. Indeed, it was felt by at least one member that such matters as the order by which to review the applicable law could be best left to the judges for their determination. Another member considered that a broader framing that left to the judge an even wider margin of means to use was even better. That said, in relation to the primary sources, even though judicial decisions and teachings were thought to be relevant, a clarification that they were "subsidiary means" served to highlight, more or less, that the sources associated with that term were supplementary, auxiliary, or otherwise not the primary sources of law as much as means for identifying or, in the language of the provision, "determining" the applicable rules of law. That observation could align with the views of those who claim that the subsidiary means are material sources. What it means to qualify subsidiary means as a material source will be briefly taken up in chapter IX.

251. Having discussed in detail the historical evolution of Article 38, specifically subparagraph 1 (d), it would now seem profitable to examine both the text of the provision and how it has been applied in the practice of the Permanent Court of International Justice and the Court, in the next chapter. This textual analysis is intended to focus on the ordinary meaning of the terms.

VIII
Textual analysis of the elements of Article 38, subparagraph 1 (d), of the Statute of the International Court of Justice

A. The chapeau of paragraph 1: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply"

252. Article 38, paragraph 1, of the Statute provides that the "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply…". Two preliminary observations must be made. First, this *chapeau* is contained in chapter II of the Statute. That chapter is itself comprised of five articles and addresses the "competence of the Court" and speaks to the main function that "the Court"[436] is entrusted with. That is to say, "to decide"[437] the disputes submitted to it. That is in key respects its primary function. Paragraph 1 also implicitly underlines the importance of the contentious jurisdiction, which is based on the consent of the States that must submit a dispute on which a decision is then to be made. This clarifies that the Court has no general competence to settle inter-State disputes, only a limited competence where the parties agree to submit their disputes to judicial settlement. Relatedly, the Court can resort outside the sources expressly mentioned in Article 38, paragraph 1, of the Statute, which obviously would include subsidiary means, to decide on a dispute on the basis of what is reasonable and fair (*ex aequo et bono*). This power contained in paragraph 2 of Article 38, which is arguably misplaced in the applicable law instead of jurisdiction provision,[438] has not been invoked by States and may even be a dead letter.[439]

253. Second, and this speaks more to the means by which the Court is required to act when deciding a dispute, is that it is to do so "in accordance with international law". On the face of it, under this express directive, it can be argued that the Court may not rely on the *national laws*[440] of the disputing States to resolve their substantive disputes. It can only do so in accordance with *international law*, which is the legal

[436] The provision is addressed to "the Court" as a whole. It is the body as a whole that is directed in this way, although of course, individual judges acting in their individual capacities may approach the use of judicial decisions and teachings in a wide variety of ways.

[437] Statute of the International Court of Justice (ICJ Statute), Article 38, at www.ijc-cij.org/en/statute.

[438] Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2015*, vol. II (Boston: Martinus Nijhoff Publishers, 2016), p. 593, 596 (arguing, inter alia, that "the provision relates more to the Court's jurisdiction rather than to the law to be applied by the Court…" and "the fact that the Statute contains an express provision on the power of the Court to decide a case ex aequo et bono may, to some extent, have impaired the general ability of the Court to decide disputes.").

[439] The power to decide cases on the basis of *ex aequo et bono* power has not occurred in the Court. However, the power has been invoked in other tribunals, as for example, in two Latin American boundary disputes decided by arbitrators in the 1930s. See A. Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 9th ed. (New York: Routledge, 2022), p. 55. It might be noted that the Court has addressed this power and the relationship between paragraph 2 and paragraph 1 of article 38 in several cases, most notably, in *South West Africa* (Second Phase) [1966] 6, 48 (paras. 89-90), the *North Sea Continental Shelf Case* [1969] 3, 48 (para. 88); *Territorial and Maritime Dispute* (Nicaragua v. Honduras)[2007] 659, 741, 748 (paras. 271 and 294) and in *Fronter Dispute* (Burkina Faso/Mali) [1986] 554, 567 (paras. 27-28).

[440] Here, a distinction could be drawn between reliance on national law from reliance on the decisions of national courts applying international law. In the end, however, the distinction is not of much consequence since decisions of national courts may be interpreting national law as well. The takeaway is that national court decisions, especially when dealing with questions of international law, remain relevant also for international courts and tribunals.

regime that regulates the relations between the States concerned. That said, the practice is clear that the Court may draw on judicial *decisions of national courts* applying international law and even on *national law*, as was the case in relation to the latter, for example in *Barcelona Traction.*[441] National law may remain relevant even for international courts, especially when domestic law might be the basis to regulate certain matters. In any event, this part of the provision, as discussed above, was added to the ICJ Statute in 1945 on the basis of a Chilean proposal intended to "better define the functions of the Court as an organ of international law in accordance with the reiterated jurisprudence of the Court and the history of its formation".[442]

254. The First Committee, while observing that the lack of such a reference in the old statute had not prevented the predecessor court from "regarding itself as an organ of international law", inserted the proposed text because it considered that the addition would "accentuate the character of the new Court" as an organ of international law.[443] This focus, given the need to develop judicial dispute settlement as a means to resolve differences of views among States, is understandable. But it also clearly stresses the function of the Court in resolving the contentious disputes between States.

255. It may be useful to illustrate how the provision has been invoked in practice. Both the predecessor and the International Court of Justice have referred to Article 38 in a number of cases. For instance, in *Military Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, it was stated that "the sources of international law which Article 38 requires the Court to apply" and "sources of law enumerated in Article 38 of the Statute".[444] The references to Article 38 interact with aspects that relate to the specific cases that arise. In the *Continental Shelf (Tunisia/Libya)* case, the International Court of Justice recalled that "[w]hile the

[441] See *Barcelona Traction, Light and Power Company Limited,* Judgment, I.C.J. Reports 1970, p. 3 at paras. 38 and 50. Where the Court determined that, in the context of settling that dispute between Belgium and Spain, in determining the corporate personality of the companies concerned that that international law "had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This in turn requires that, whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law. Consequently, in view of the relevance to the present case of the rights of the corporate entity and its shareholders under municipal law, the Court must devote attention to the nature and interrelation of those rights." And further, at para. 50, the Court stated: "In turning now to the international legal aspects of the case, the Court must, as already indicated, start from the fact that the present case essentially involves factors derived from municipal law-the distinction and the community between the company and the shareholder-which them. Parties, however widely their interpretations may differ, each take as the point of departure of their reasoning. If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers. In referring to such rules, the Court cannot modify, still less deform them.")

[442] Observations by the Chilean Delegation on Article 38 of the Statute of the Proposed International Court of Justice, 13 Doc. U.N. Conf. on Int'l Org. 493, 493 (1945).

[443] See Manley O. Hudson, "The Twenty-Fourth Year of the World Court", AJIL, vol. 40 (1946), p. 1 at p. 35 (arguing that no "doubt had ever been expressed on this point; indeed, the Permanent Court had without challenge often referred to itself as an "organ of international law" or as possessing a mandate to apply international law". Essentially the same view was reiterated in his major treaties: See Manley O Hudson, *The Permanent Court of International Justice 1920-1942 – A Treatise* (New York: The Macmillan Company, 1943), p. 605, para. 545.

[444] *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. 38; p. 82.

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".[445]

256. Similarly, in the *Gulf of Maine* case,[446] a Chamber of the Court 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".[447]

257. Finally, in terms of a choice of a handful out of many possible examples, in *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, the Court examined "the sources listed in Article 38 of the Statute of the Court", which it determined it "must consider" in relation to "the law applicable to the fishery zone".[448]

258. Notwithstanding the above, the *chapeau* of paragraph 1 is said to underplay two additional functions of the Court. Firstly, paragraph 1 of Article 38 understates the important function that the Court plays as the principal judicial organ of the United Nations in giving *advisory opinions* at the request of relevant organs and specialized agencies. Article 38, which as already noted above is part of the chapter of the Statute on the competence of the Court, omits a mention of its advisory jurisdiction. Furthermore, the more specific chapter on advisory opinions in the Statute of the Court does not expressly mention Article 38.

259. But even in the absence of a formal reference to its advisory function[449] in Article 38, paragraph 1, the Court also performs that important *advisory function* "in accordance with international law". It could not be otherwise, as it would be odd for the Court to rely primarily on a body of law other than international law when performing its judicial function. The issue of whether, in fact, the latter addition to Article 38, paragraph 1, also applies to advisory opinions in fact arose when the proposed Chilean amendment was adopted. The deliberations drew attention to another article of the Statute, which, as a matter of principle, seemingly settles the point.[450] That this was the correct legal position is underlined by the fact that Article 68 provides expressly that "[i]n the *exercise of its advisory functions the Court shall*

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

[446] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), Merits, Judgment, I.C.J. Reports 1984, p. 246.

[447] Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), Merits, Judgment, I.C.J. Reports 1984, p. 246 at p. 290-91.

[448] Case Concerning Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway), Merits, Judgment, I.C.J. Reports 1993, p. 38 at 61, para. 52.

[449] For a thoughtful analysis, see M. Bennouna, "The Advisory Function of the International Court of Justice in the Light of Recent Developments", in M. Cherif Bassiouni, Gomula Joanna, Paolo Mengozzi, John G. Merrills, Rafael Nieto Navia, Anna Oriolo, William Schabas, Anna Vigorito (eds.), *The Global Community Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice Essays in Honour of Professor Giuliana Ziccardi Capaldo* (Oxford: Oxford University Press, 2013).

[450] Nineteenth Meeting of Committee IV/1, June 6 1945, 13 Doc. U.N. Conf. on Int'l Org. p. 279, at p. 285 (1945). See Alain Pellet 'Article 38' in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, and C. Tams (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2012) pp. 853–854 and 868–870.

further be guided by the provisions of the present Statute which apply in contentious cases to the extent it recognizes them to be applicable" (emphasis added).[451]

260. Secondly, and although this could prove to be a sensitive issue and therefore merits proceeding with caution, in the views of some writers, paragraph 1 of Article 38 also "ignores important implied or derivative functions such as the Court's contribution to the development of international law through its law-making, or certainly, its law-ascertaining role".[452] This issue was already debated at the Advisory Committee of Jurists level, as indicated in the preceding chapter. Despite the fact that the Court does not have "a formal mandate to develop international law, the Court has had an immense impact on the development of international law" and "[m]any rules that international lawyers take for granted emerged or evolved from the jurisprudence of the court".[453]

261. As to the formulation directing that the Court "shall apply" judicial decisions and teachings, as subsidiary means for the determination of rules of law, the question has been posed as to whether "shall apply" was intended to apply only to the sources in subparagraphs (a) to (c) or whether they also encompass the subsidiary means under subparagraph (d). The argument can and has been made that it is only to the former, not to the latter, that the language of "shall apply" relates. Judge Shahabuddeen, writing in an academic capacity, has observed that the Court can directly apply treaties, custom and general principles of law when deciding disputes submitted to it – subject only to a possible qualification in relation to general principles of law.[454] The Court cannot, on the other hand, "apply" judicial decisions and the teachings of the most highly qualified publicists of the various nations, as those are intended to serve as mere subsidiary means "for the *determination* of rules of law".[455] Indeed, and this is a nuanced distinction, it is "in the application of the rules of law, and not of subsidiary means for the determination of rules of law', that the dispute has to be decided".[456]

262. A textual reading consistent with ordinary rules of treaty interpretation might suggest that "shall apply" can also cover what falls within subparagraph (d). If this argument is correct, the further question would then be whether, in relation to the latter which are expressly said to be "subsidiary means", the text makes consultations of "judicial decisions" and "the teachings of the most highly qualified publicists of the various nations" obligatory or mandatory for the Court. It is difficult to see how, in a textual reading, the Court can be said to be required to apply teachings. Indeed, in practice, it is more likely that scholarship will serve as confirmatory of the results arrived at following an assessment of the existence of a rule in a treaty, customary international law or general principles of law.

---

[451] Statute of the ICJ, Article 68, at www.ijc-cij.org/en/statute.

[452] Pellet and Müller, "Article 38 of the Statute of the International Court of Justice" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds) *The Statute of the International Court of Justice A Commentary*, 3rd ed. (Oxford: Oxford Univ. Press, 2019), pp.677-792 at p. 837.

[453] Dire Tladi, "The Role of the International Court of Justice in the Developing of International Law" in Carlos Esposito and Kate Parlett (eds) *The Cambridge companion to the International Court of Justice* (United Kingdom: Cambridge University Press, 2023), pp. 68-85 at p. 68, 84.

[454] Moisés Montiel Mogollón, "The Content-Based Problems Surrounding the Persistent Objector Doctrine", *Mich J. Int'l L.* (2022), p.301 at p. 339.

[455] Mogollón, "The Content-Based Problems Surrounding the Persistent Objector Doctrine", p. 339.

[456] See T. Treves, "Aspects of legitimacy of decisions of international courts and tribunals" in Rüdiger Wolfrum and Volker Röben (eds) *Legitimacy in international law* (Berlin: Springer, 2008), pp. 169–188; M. Sourang, "Jurisprudence and Teachings" in Mohammed Bedjaoui (ed) *International Law: Achievements and Prospects* (Dordrecht: Martinus Nijhoff Publishing, 1991), pp. 283-287 at p.285.

263. Differing viewpoints have been advanced on this. Both Jennings and Lauterpacht seemed to suggest that the Court is required to consult the writings of the most eminent publicists. But, as has been pointed out by Helmersen and others, the Court's practice of not necessarily citing teachings does not mean that it might not be consulting such works but without citing them.[457] If the latter reading is correct, there would, from that perspective, appear to be a conflict in the drafting of Article 38. This is because the Statute directs the Court to *apply* judicial decisions and the teachings of publicists for the determination of rules of international law and also at the same time to *use* them only *as a subsidiary means* for the *determination* of rules of law.[458]

264. Put differently, the subsidiary means category does not, properly speaking, consist of elements which the Court applies. Rather, it serves instead as an aid for the Court in the *identification* of the sources enumerated in Article 38 (1) (a) to (c).[459] This is why some have argued that they are material sources. That said, a different reading has been offered by others who have proposed that subparagraph (d) has to be read in light of the *chapeau*. The *chapeau* requires the Court, in all cases, to decide disputes in accordance with international law, meaning that it must decide in accordance with the rules of law determined by it on the basis of judicial decisions as subsidiary means for the determination of those rules.[460]

265. In sum, paragraph 1 is a directive to the Court that, when resolving disputes in accordance with international law, it is required to apply the sources listed in (a) to (c), and in the process of doing so, it could have regard to subparagraph (d) addressing judicial decisions and scholarly works as subsidiary means in the determination of the rules.

B. The meaning of the term "judicial decisions"

266. Article 38 (1) (d) of the ICJ Statute requires the Court to apply, "subject to the provisions of Article 59", "judicial decisions" as "subsidiary means for the determination of rules of law". Neither the Charter of the United Nations (Chapter XIV) nor the Statute or the secondary documents of the Court, for example the Rules of Court or the Practice Directions, contain any definitions of the term "judicial decision". While this might mean that this is because the answer is obvious, which is a possibility, it might still be useful to engage the question of what the term "judicial decisions" means. Besides the obvious elements, there are questions concerning the scope of the term "judicial decisions", which raises several related issues that may bear further examination by the Commission.

267. We can, at this stage, stress three apparent concerns. First, whether the term covers the decisions of the Court itself. Second, whether it covers advisory opinions and arbitral awards or the decisions of arbitral tribunals. Third, and finally, whether it covers national or municipal court decisions. These issues are considered further below. We start with the ordinary meaning of the key terms, considered separately and then taken together.

268. There are various ordinary meanings of each of the terms "judicial" and "decisions". Let us examine those that are most relevant for our purposes. "Judicial" means, according to the Oxford English Dictionary, "of or relating to proceedings in

[457] Helmersen *The Application of Teachings by the ICJ*, p. 45.

[458] P. Allott, "Language, Method and the Nature of International Law", Br. Yearb. Int. Law, vol. 45 (1971), pp. 79–135 at p. 118.

[459] P. Tomka, "Article 38 du Statut de la CIJ: *incomplet*" in *Dictionnaire des idées reçues en droit international* (Paris, Pedone, 2017), pp. 39–42 at p. 40.

[460] Mohamed Shahabuddeen, *Precedent in the World Court*, (Cambridge: Cambridge University Press, 1996), p. 80.

a court of law, to a judge's function in such proceedings, or to the administration of justice; resulting from or fixed by a judgment in court; that has been said or done in court, and thus regarded as valid or admissible".[461]

269. A second meaning of the term "judicial" is "[o]f, relating to, or befitting a judge or judges". A further range of understandings is "[o]f a person, body of people, or institution: having the function of judging; invested with authority to judge cases; "a judgment, decision, or determination."; "[a] legal judgment; a decision made, or sentence passed, in law"; and "[t]hat pronounces judgment or makes a decision about something; forming or expressing a judgment; disposed to pass judgment; relative to judgement; critical".

270. According to the same dictionary, the term "decision" means "[t]he action, fact, or process of deciding or bringing to an end a contest, controversy, etc.; judgment with regard to a matter in dispute; settlement, resolution". Another related sense is: "The action, fact, or process of arriving at a conclusion regarding a matter under consideration; the action or fact of making up one's mind as to an opinion, course of action, etc.; an instance of this".[462] A final relevant sense is "[t]he result of this action or process; that which has been decided; a conclusion, a judgement, a resolution; a choice".[463]

271. The term "decision" appears fourteen times in the ICJ Statute. It seems to be used as synonymous with "a judgement rendered by the Court".[464] All States members of the United Nations are *ipso facto* parties to it, and in subscribing to the Charter of the United Nations, each of them undertakes to comply with "the decision" of the Court in any case to which they are parties. That is about all that can be found in the Statute on the meaning of decision. This reading, however, conforms to the ordinary dictionary meaning discussed above.

272. The related term "judgment" appears nineteen times in the Statute. It speaks, *inter alia*, to the many procedural steps before the tribunal. In this regard, provision is made that, following the conclusion of hearings, the chamber retires "to consider the judgment"[465] (Art. 54 (2)), which can be delivered in the official languages of the Court in either English or French (Art. 39), "shall state the reasons on which is based (Art. 56) and "is final and without appeal",[466] without any prejudice to the parties, in the event of dispute as to the meaning or scope of the judgment, requesting the Court to "construe it"[467] (Art. 60) or to revise it (Art. 61).[468]

273. Taken as a whole, while to some extent obvious, the term "judicial decisions" is to be taken to be a reference to a judgment, decision or determination by a court of law or a body of people or institution, as part of deciding or bringing to an end a controversy or settling a matter. While, in the normal course, such a decision, especially a judicial one, will be issued by a court of law, it seems possible to have a decision by another type of appropriate body. Thus, in the view of the Special Rapporteur, the broader term "decisions" could encompass decisions issued by arbitral panels, whether ad hoc or permanent. It would also encompass decisions such

[461] "Judicial." Oxford English Dictionary (OED 3d ed. 2013). Available at www.oed.com. Judicial: "Senses relating to the administration of justice, or to the exercise of judgment generally."
[462] "Decision." Oxford English Dictionary (OED 3d ed. 2013). Available at www.oed.com.
[463] Ibid.
[464] Compare Statute of the International Court of Justice, at www.ijc-cij.org/en/statute with "Judicial." Oxford English Dictionary (OED 3d ed. 2013). Available at www.oed.com.
[465] Statute of the ICJ, Article 54(2), at www.ijc-cij.org/en/statute.
[466] Statute of the ICJ, Articles 39, 56, 60.
[467] Ibid., Articles 60.
[468] Ibid., Articles 60.

as those issued by the Dispute Settlement Body of the World Trade Organization.[469] At the least, such decisions can also be understood as quasi-judicial decisions and would encompass those decisions taken in relation to individual complaints procedures of the treaty bodies such as the Human Rights Committee. The above understanding generally accords with the position of the Commission on these issues in other related topics.

274. Two further concerns bear further consideration. First, whether the term "judicial decisions" covers the decisions of the Court itself. The qualifier of the opening of Article 38 (1) (d), "subject to the provisions of Article 59",[470] implies that the decisions of the Court in issue must be previous decisions of the Court, which, as interpreted, has also included the decisions of its predecessor, the Permanent Court of International Justice. That formal position confirms that International Court of Justice decisions should, in principle, have no binding effect except between the parties, and even then only in respect of the case in question. The "decision" is a narrow technical term and not necessarily the same as the reasons in support thereof. It is the decision that is limited by the qualifier in Article 59.

275. The issue of the interaction between Article 59 and Article 38 will be further considered in future reports. For now, since there is no explicit limitation to the meaning of judicial decisions in Article 38 (1) (d), the broad interpretation of the category of judicial decisions being sufficient to conclude that judicial decisions include decisions of the Court itself. This is supported by Dire Tladi, who notes that, "[n]eedless to say, the term 'judicial decisions' includes decisions of the International Court of Justice…".[471] Indeed, the reference to Article 59, in the words of some authors, "clearly encourages the Court to take into account its own case law as a privileged means of determining the rules of law to be applied in a particular case".[472] As a court of law, and irrespective of the formal position in the Statute, reasons of logic, consistency, predictability and legal stability would all require the International Court of Justice as a court of law to follow its past decisions. The same would likely be true of other international judicial bodies. The practice, in many areas of international law, serves to confirm this. To the contrary, commitment to precedent has apparently led to the counter-intuitive phenomenon of adjudicators relying so much on prior decisions that they sometimes fail to even properly interpret distinctive treaty text.[473]

276. Second, from its earliest days, jurists have debated whether the term "judicial decisions" would be inclusive of advisory opinions. An advisory opinion, as

[469] For early analysis of the interpretation of the term "decisions" in international economic law, and in particular in relation to the World Trade Organisation dispute settlement system under GATT 1994 as analogised to article 38(1)(d) of the ICJ Statute by the Appellate Body, see David Palmeter and Petros C. Mavroidis, "The WTO Legal System: Sources of Law" AJIL, vol. 92 (1998), p. 398. A recent treatment of the question of precedent in the WTO context can be found in Niccolo Ridi, "Rule of Precedent and Rules on Precedent" in Eric De Brabandere (ed.), *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach* (Cambridge: Cambridge University Press, 2021), pp. 354-400,

[470] Ibid., Article 38(1)(d).

[471] Tladi, The Role of the International Court of Justice in the Developing of International Law", p. 70.

[472] Pellet, "Article 38", p. 855.

[473] See, in this regard, Wolfgang Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (Oxford: Oxford University Press, 2022) (arguing that "discusses how precedent grounds the interpretation of new treaties in old case law thereby creating a final means for rolling back innovation in new-generation treaties"; explaining "that tribunals' preference for following prior cases, institutional incentives that favor citing past awards, ineffective controls, and the self-reinforcement of case law make precedent sticky in investor-state dispute settlement").

suggested by its ordinary wording, is a judicial opinion on a legal question.[474] Various international courts and tribunals, including regional courts, have been given competence to issue advisory opinions.[475] But the most prominent and relevant of these, for our purposes, has been the Court which is expressly endowed with that power under Article 96 of the Charter of the United Nations, which provides that both the General Assembly and the Security Council "may request the [International Court of Justice] to given an advisory opinion on any legal question".[476] The power is not exclusive, however, since the General Assembly may also authorize other United Nations organs and specialized agencies to make such requests "on legal questions arising within the scope of their activities".[477] Yet, as a matter of principle, an advisory opinion does not fall within the scope of "decisions"[478] of the International Court of Justice in Article 94 (1) of the Charter of the United Nations.

277. Lauterpacht has observed that Article 38 (1) (d), by referring to "decisions", might seem to exclude, inadvertently, advisory opinions.[479] This argument could be supported by the drafting history of the Statute of the Permanent Court of International Justice, which, formally, had been denied such a provision at the level of the League of Nations, even though at the original drafting by the Advisory Committee of Jurists, such advisory opinion function had been contemplated. It was through the adoption of rules of court that the advisory function would eventually make its way back, ending ultimately in formal inclusion in the Statute of the International Court of Justice. The point would gain support to the extent that the qualifier, in what eventually became Article 38, paragraph 1, regarding Article 59 had been introduced at a time when the predecessor court had been endowed only with contentious jurisdiction. On the other hand, when Article 38, paragraph 4, was being drafted, it was – at the expert level – inclusive of advisory opinions. In any case, and this is perhaps the most important point, although in principle advisory opinions are only advisory in character and carry no binding effects on the organ requesting them, the Court's approach to them in its practice has not treated them differently. Thus, "it is as authoritative a statement of the law as a judgment rendered in contentious proceedings".[480]

278. The role of the Court's advisory opinions deserves special attention. There has been a long-standing debate on the "effect" of advisory opinions, which may provide them also with a particular character under Article 38 (1) (d) of the ICJ Statute.[481] As stated, textually, International Court of Justice advisory opinions like other advisory opinions of other international courts are not binding. This means that neither the requesting United Nations organ nor the States affected by the determinations in the advisory opinion are under an obligation to comply with the opinion. As Robert Jennings stated: "The advice is simply advice and is not a binding decision of the

[474] "Advisory opinion." Oxford English Dictionary (OED 3d ed. 2011). Available at www.oed.com. "Compounds: *advisory opinion*: n. Law (originally U.S.) a non-binding statement on a point of law given by a court before a case is tried or with regard to a hypothetical issue or situation."

[475] "An advisory opinion, like a judgment, states the law on the basis of the facts as made available to the Court at the time of the decision." See S. Rosenne, *The Law and Practice of the International Court*, (Leyden, A.W. Sijthoff, 1965), p. 310.

[476] United Nations Charter, Article 96(a), at https://www.un.org/en/about-us/un-charter/chapter-14.

[477] United Nations Charter, Ibid., Article 96(b).

[478] Ibid, Article 94(1).

[479] H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", *Brit. Y.B. Int'l L.*, vol. 10 (1929), p. 65 at p. 65.

[480] Lauterpacht, "Decisions of Municipal Courts as a Source of International Law", p. 185.

[481] See e.g., Pierre D'Argent, "Advisory Opinions," Article 65 of the Statute of the International Court of Justice in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm, Christian Tomuschat (eds) *The Statute of the International Court of Justice A Commentary*, 3rd ed. (Oxford: Oxford Univ. Press, 2019), paras 48-51.

Court."[482] Nonetheless, it is acknowledged that advisory opinions which stand at the end of a comprehensive briefing process are elaborated with the same rigour as decisions in contentious cases by the International Court of Justice. The Court's status as the primary judicial organ of the United Nations has raised questions as to the "precedential value" of International Court of Justice advisory opinions that may affect the legal affairs of States beyond their non-binding nature.

279. In the recent decision in *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*,[483] a Special Chamber of the International Tribunal for the Law of the Sea ascribed "legal effect" to the International Court of Justice's *Chagos* advisory opinion.[484] The argument was that, while an individual opinion does not legally oblige any States as the *dispositif* of a judgment in a contentious case would, it has been drafted in an elaborate procedure and with the same rigour as any judgment by the International Court of Justice.[485] The special persuasiveness that this lends to International Court of Justice advisory opinions has been widely accepted in scholarship.[486] Accordingly, "[t]he legal issues clarified by the Court are, from a positivist perspective, "the law" and "become fully part of the Court's jurisprudence".[487] On the basis of these insights, the Special Chamber considered parts of the International Court of Justice's *Chagos* advisory opinion as *de facto* precedent in *Mauritius/Maldives*.[488] This view stands in tension with their technically non-binding nature, the subsidiary character of Article 38 (1) (d) of the ICJ Statute and the formal lack of precedent in international law.

280. From the above discussion of the ordinary meaning of the term "judicial decisions", and as borne out in the practice of the Court, it is clear that judgments and decisions of the Court are generally similar in their legal character. They therefore carry considerable weight.[489] It follows that the judicial decision would include not just a final judgment rendered by a Court but also advisory opinions as well as any orders issued as part of incidental or interlocutory proceedings in *limine litis*. The latter would include, at least since the *La Grand Case*, provisional measures orders issued by the Court. The above reading is consistent with the Commission's position in the topic of the identification of customary international law, where, in the commentary to Conclusion 13 addressing subsidiary means, it explained that "the term 'decisions' includes judgments and advisory opinions, as well as orders on

[482] R.Y. Jennings, "Advisory Opinions of the International Court of Justice" in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber* (Bruylant, 1998) p.531 at p. 532.

[483] Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) (Preliminary Objections) (International Tribunal for the Law of the Sea, Case No 28, 28 January 2021) ('Delimitation in the Indian Ocean').

[484] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95.

[485] Karin Oellers-Frahm, "Lawmaking Through Advisory Opinions?" Ger. Law J., vol. 12 (5) (2011), p. 1033 at 1046.

[486] D'Argent, "Article 65", p. 1808.

[487] Oellers-Frahm considers advisory opinions an 'erga omnes judicial statement of what is – in the view of the court – the law at large', see Oellers-Frahm, "Lawmaking Through Advisory Opinions?, p. 1053.

[488] For a good discussion, see Fabian Simon Eichberger, "The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case – Judgment on Preliminary Objections", Melb. J. Int.'l L., vol. 22 (2) (2021), p. 383, pp.396–400.

[489] Manley O. Hudson, "Advisory Opinions of National and International Courts" Harv. L. Rev., vol. 37(8) (1924), pp. 970-1001 ("It is true that such opinions do not call for action as a judgment of the Court calls for action. But they do constitute a formulation of law and opinion which carries with it great moral authority. And to this extent it would seem that they have some binding force."); later on "Under these circumstances, it is difficult to see what the advisory opinions of the PCIJ lack to give them the quality of "juridicality" in a full sense of that term."

procedural and interlocutory matters".[490] This point, along with other related matters, is further explained in the Secretariat memorandum (see chapter V of the present report).

281. The above discussion concerns decisions of the Court or by a Chamber acting as a collegiate body.[491] It does not apply to separate opinions.[492] Such opinions are given by the individual judges. They may be either concurring or dissenting, or perhaps even partly concurring and partly dissenting. They can also be declarations.[493] Such opinions "do not form part of the Court's decision; whatever their intrinsic merits, it is the decision of the Court which has legal effect".[494] In relation to those, as well as to declarations, or separate or dissenting opinions to Orders of the Court, it should be stressed that such opinions play a useful role in that they may clarify the basis of a decision or provide additional reasons or even address points raised by the parties or by the decision of the court or tribunal concerned. As the Court itself has explained in an informal document:

> [A]n indissoluble relationship exists between [its] decisions and any separate opinions, whether concurring or dissenting, appended to them by individual judges. The statutory institution of the separate opinion... afford[s] an opportunity for judges to explain their votes. In cases as complex as those generally dealt with by the Court, with operative paragraphs sometimes divided into several interlinked issues upon each of which a vote is taken, the bare affirmative or negative vote of a judge may prompt erroneous conjecture which his statutory right of appending an opinion can enable him to forestall or dispel... Not only do the appended opinions elaborate or challenge the decision, but the reasoning of the decision itself, reviewed as it finally is with knowledge of the opinions, cannot be fully appreciated in isolation from them.[495]

282. That said, since they are the opinions of the individual judges, they are attributable to the named judge rather than the tribunal or court as a whole. This means that a measure of caution would be warranted. Insofar as they reflect the particular views of the individual judge and, in some cases, go further in addressing issues not discussed or addressed by the court or tribunal as a whole. At the same time, individual judicial opinions are often useful in explaining elements for which there might be no explanation in the judgment itself. They are in that sense likely equivalent to teachings.

283. The third concern flagged above regarding whether the subsidiary means for the determination of rules of law mentioned in Article 38 (1) (d) also covers national or municipal court decisions is not new. For reasons of clarity, by national courts (in contrast to international courts and tribunals), the reference here is to the courts or

---

[490] *Yearbook…2018*, vol. II (Part Two), p. 4.

[491] Art. 95, ICJ Rules ("The judgment, which shall state whether it is given by the Court or by a Chamber, shall contain", inter alia, "the names of the judges participating in it;" and "the number and names of the judges constituting the majority"). It might be noted that some of these requirements, for example listing the names and numbers of judges, reflect changes made to the rules of the Court in 1978.

[492] Statute of the ICJ, Article 57 provides "If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion."

[493] Ibid., Art. 95(2) provides for "any judge" to "attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration. The same shall apply to orders made by the Court."

[494] Shahabuddeen, Precedent in the World Court, p. 192.

[495] See UN General Assembly, forty-first session, agenda items 110 and 114, Programme Budget for the Biennium 1986-1987, Joint Inspection Unit, Publications of the International Court of Justice, Note by the Secretary-General, Addendum, Observations of the International Court of Justice, 5 December 1986, UN Doc A/41/591/Add.1 of 5 December 1986, Ann. II.

tribunals that may operate within a domestic legal system operating usually on the basis of national law, including so-called "hybrid" courts with mixed subject matter jurisdiction and composition.[496] The views on the question, which one might have thought would have been settled by now, as to whether judicial decisions of national courts fall within the ambit of the provision may be said to fall into three camps. The first camp would be those who argue that the reference to decisions include those of municipal courts.[497] The second camp includes those who do not see municipal court decisions as falling within the parameters of Article 38 (1) (d).[498] Finally, there are those for whom national court decisions are better seen as constituting elements of State practice, or perhaps as sitting at the intersection of evidence of practice and *opinio juris*.[499] The latter view seems overly narrow.

284. Turning then to the role of judicial decisions from national courts: for our purposes, it seems unnecessary to belabour the discussion on that issue for the three following compelling reasons. Firstly, just as a purely textual matter, there is nothing in Article 38 (1) (d) to suggest that a qualification of the term warrants limiting "judicial decisions" only to decisions of international courts and tribunals. In fact, the practice of international courts, including of the International Court of Justice, puts the matter beyond any dispute.

285. Secondly, while the language of "international jurisprudence" could be suggestive, there is nothing in the drafting history of the provision confirming the intention to limit judicial decisions in a manner that excludes national court decisions. Indeed, as Lauterpacht notes, writing almost a century ago in 1929, "there is hardly a branch of international law" that "has not received judicial treatment at the hands of municipal tribunals".[500] In that context, to avoid examining such decisions may indeed reflect a challenge, a "harmful attitude"[501] which may have "diminished the opportunities for taking advantage of the lesson of judicial treatment of international law in a world in which those opportunities are not frequent".[502]

286. Thirdly, though doubts have sometimes been expressed in the literature, it is clear that, in practice, international courts and other actors frequently invoke the decisions of national courts as subsidiary means for the determination of rules of international law, for example, in relation to debates about the context or existence of rules of customary international law. Here, it can be noted that national court decisions perform a dual function in the sense that, in addition to serving as subsidiary means, they are also indications of State practice and can be a basis to find *opinio juris* as well. In the conclusions on the identification of customary international law, the Commission noted that State practice consists of conduct of the State, whether exercised in its executive, legislative, judicial or other functions.[503] National court decisions were thought relevant as a form of proof of State judicial practice. They could also be subsidiary means.

---

[496] The Commission, in the context of the identification of customary international law topic, has offered working definitions of the terms "international courts and tribunals" and "hybrid" courts which is a convenient starting point for our purposes.

[497] Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2019), p. 124.

[498] Ibid.

[499] Pellet, "Article 38", p. 854.

[500] H. Lauterpacht, "Decisions of Municipal Courts as a Source of International Law" Brit. Yearb. Int. Law, vol. 10 (1929), p. 65 at p. 67.

[501] Ibid.

[502] Ibid.

[503] Conclusions on the Identification of customary international law, with Commentaries, *Yearbook…2018*, vol. II (Part Two), p. 2., Conclusion 5.

287. While practice may take a wide range of forms, and there is no predetermined hierarchy, it includes "decisions of national courts".[504] This pattern is manifest in the extensive practice of the International Court of Justice as well as the Permanent Court of International Justice. For instance, in the *Arrest Warrant* case,[505] the Court ruled on the question of whether there is immunity for foreign ministers on the basis, *inter alia*, of a review of national court decisions such as the House of Lords decision in the *Pinochet* case and the *Gaddafi* case in France as a form of State practice under customary international law in the following terms:

> The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[506]

288. In another case, *Jurisdictional Immunities of State (Germany v. Italy: Greece intervening)*, the Court, in holding that a State is entitled to immunity in respect of *acta jure imperii* committed by its armed forces on the territory of another State, reviewed *in extenso* the decisions of national courts from Egypt, Italy and the United Kingdom, and of German courts, *inter alia*, when making its determination.[507] There are additional examples reflecting this type of approach.

289. The same reliance on the decisions of national courts can be found in the *Lotus* case.[508] In that classic case, the Permanent Court of International Justice considered the role of national court decisions in the formation of the international law on jurisdiction.[509] However, the Permanent Court also held that the directions provided for in Article 38 (1) (d) "merely conform to the well-settled rule that international

---

[504] *Yearbook…2018*, vol. II (Part Two), p. 120.

[505] *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Merits, Judgment, I.C.J. Reports 2002, No. 121, p. 3.

[506] Ibid. p. 24, para. 58.

[507] "The Court next turns to State practice in the form of the judgments of national courts regarding State immunity in relation to the acts of armed forces. The question whether a State is entitled to immunity in proceedings concerning torts allegedly committed by its armed forces when stationed on or visiting the territory of another State, with the consent of the latter, has been considered by national courts on a number of occasions. Decisions of the courts of Egypt (Bassionni Amrane v. John, Gazette des Tribunaux mixtes d'Egypte, January 1934, p. 108; Annual Digest, Vol. 7, p. 187), Belgium (S.A. Eau, gaz, électricité et applications v. Office d'aide mutuelle, Cour d'appel, Brussels, Pasicrisie belge, 1957, Vol. 144, 2nd Part, p. 88; ILR, Vol. 23, p. 205) and Germany (Immunity of the United Kingdom, Court of Appeal of Schleswig, Jahrbuch für Internationales Recht, 1957, Vol. 7, p. 400; ILR, Vol. 24, p. 207) are earlier examples of national courts according immunity where the acts of foreign armed forces were characterized as acta jure imperii. Since then, several national courts have held that a State is immune with respect to damage caused by warships (United States of America v. Eemshaven Port Authority, Supreme Court of the Netherlands, Nederlandse Jurisprudentie, 2001, No. 567; ILR, Vol. 127, p. 225; Allianz Via Insurance v. United States of America (1999), Cour d'appel, Aix-en-Provence, 2nd Chamber, judgment of 3 September 1999, ILR, Vol. 127, p. 148) or military exercises (FILT-CGIL Trento v. United States of America, Italian Court of Cassation, Rivista di diritto internazionale, Vol. 83, 2000, p. 1155; ILR, Vol. 128, p. 644). The United Kingdom courts have held that customary international law required immunity in proceedings for torts committed by foreign armed forces on United Kingdom territory if the acts in question were acta jure imperii (Littrell v. United States of America (No. 2), Court of Appeal, [1995] 1 Weekly Law Reports (WLR) 82; ILR, Vol. 100, p. 438; Holland v. Lampen-Wolfe, House of Lords, [2000] 1 WLR 1573; ILR, Vol. 119, p. 367)."

[508] *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, P.C.I.J., Series A 1927, No 10, pp. 23, 26 and 28–9.

[509] Ibid. para. 254.

tribunals, whether permanent or temporary, sitting in judgment between independent States, are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries".[510]

290. In some areas of international law, for example in international criminal law, it is actually the national court decisions which have enabled or enriched the application of international law. The reason is that both the substantive and procedural aspects of international criminal law are still at a relatively rudimentary stage in international law. The latter is partly because of difficulties for international lawmakers "to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions".[511] On the other hand, by contrast, especially after World War II, "a copious amount of case law has developed on international crimes".[512] That body of case law has been of "invaluable importance for the determination of existing law"[513] and served as the backbone for the concrete application of international criminal law. This goes back to the earliest days of the emergence of the field around the Second World War.

291. For example, at the International Military Tribunal at Nuremberg, in the course of its judgment, the Tribunal, in discussing sources of law, determined that the law of war is to be found not only in treaties but also "in the customs and practices of States, which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by *military courts*".[514] Many decades later, a similar approach was taken by the International Tribunal for the Former Yugoslavia, wherein, for instance, a Trial Chamber in the *Kupreškić* case determined that, being "international in nature and applying international law *principaliter*",[515] it was bound to rely upon the well-established sources of international law and, within that framework, judicial decisions.

292. Here, citing Article 38 (1) (d), which it considered "declaratory of customary international law",[516] the Trial Chamber of the International Tribunal for the Former Yugoslavia considered that they (that is to say, judicial decisions) should only be used as a "subsidiary means for the determination of rules of law".[517] It thereafter addressed the relevance and weight to attach to the decisions of *national* courts as compared to the decisions of *international* courts. It determined that "great value"[518] can be attached to the decisions of international criminal courts and tribunals, and in many instances, "no less value may be given to decisions on international crimes delivered by national courts"[519] in certain circumstances. Indeed, the war crimes trials carried out by the allied powers under Control Council Law No. 10, in their respective zones of occupation, provided an important body of case law that has proven to be of great relevance to modern international criminal courts, not just the International Tribunal

[510] Ibid. para. 253.
[511] *Prosecutor v. Zoran Kupreškić*, *ICTY Trial Judgment*, Case No. IT-95-16-T. 14 January 2000, p. 133, para. 539. https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.
[512] Ibid., p. 213, para. 537. https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.
[513] Ibid., p. 215, para. 541.
[514] Judgment of the Nuremberg International Military Tribunal International Military Tribunal, October 1946, p. 54: IMTJudgment.Endversion+Deckblatt (crimeofaggression.info).
[515] *Prosecutor v. Zoran Kupreškić*, *ICTY Trial Judgment*, Case No. IT-95-16-T. 14 January 2000, para. 540.
[516] Ibid.
[517] Ibid.
[518] Ibid., para. 541.
[519] Ibid.

for the Former Yugoslavia but also the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court.

293. Moreover, the experience of national courts in applying criminal law and procedure is much deeper, so that national courts serve not only as a source of general principles of law, which as a source of law may be applied in the context of concrete proceedings, but also as a basis for judicial gap filling where international law standards may be missing or are inadequately developed. The point being that, in examining the judicial practice of States, as evidenced by national court decisions, rules of customary law as well as general principles of law could be derived. While it is true that the penal aspects of international law derive from the sources set out in Article 38 of the ICJ Statute, as Bassiouni has argued, it is equally true that the scope of those sources has expanded and involves a high degree of cross-fertilization from national criminal law.[520] That process helps to harmonize both the substantive and procedural aspects in the international and national criminal justice systems.

294. The extensive practice of international criminal courts demonstrates the proposition. It would be sufficient to provide just a few examples. In the *Pavle Strugar* case,[521] for instance, the Appeals Chamber of the International Tribunal for the Former Yugoslavia upheld the approach of the Trial Chamber in determining whether the accused was fit to stand trial. The issue had not been contemplated under the Statute of the Tribunal. The judges therefore carried out an analysis of, *inter alia*, the case law of *national* courts in various common law and civil law jurisdictions before making a determination that such a rule must necessarily form part of international law.

295. Similarly, in *Erdemović*,[522] the Appeals Chamber of the International Tribunal for the Former Yugoslavia examined whether there was a rule of customary international law concerning the availability, or lack thereof, of duress as a defence. After canvassing the status of duress as a partial or complete defence in common and civil law systems, the Appeals Chamber also discussed some case law on duress in national courts. That case law informed the determination of whether the defence was available and, if so, how it ought to be applied in the context of an international tribunal.

296. In *Furundžija*,[523] the Appeals Chamber of the International Tribunal for the Former Yugoslavia examined not only national legal systems but also the case law of various common law jurisdictions, including the United Kingdom, Australia, South Africa, Canada and the United States, and some civil law jurisdictions, such as Germany and Sweden, in the process of determining how national legal systems interpret the requirement of impartiality of judges. This included a comparative examination of the application of an appearance of bias test. It ultimately determined that there is a general rule that a judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias.[524]

---

[520] M. Cherif Bassiouni, *Introduction to International Criminal Law*, 2nd ed. (Netherlands: Martinus Nijhoff Publishers, 2013), p. 11. (The author goes on to explain the specificities of international criminal law and the challenges of a discipline that intersects on the one hand with a sovereignty-oriented Westphalian system on the one hand and at the same time aims to direct liability to individuals).

[521] Pavle Strugar, ICTY Appeals Chamber, Case No. IT-01-42-A, 23 June 2008, available at https://www.icty.org/x/cases/strugar/acord/en/080623.pdf.

[522] *Dražen Erdemović, ICTY Appeals Chamber*, Case No. IT-96-22-A, 7 October 1997, available at https://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf.

[523] *Prosecutor v. Anto Furundžija, ICTY Appeals Chamber*, Case No. IT-95-17/1-A, 21 July 2000, available at https://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf.

[524] Ibid., para. 189.

297. In any case, consistent with the above, the Commission, in its studies on the ways and means of making the evidence of customary international law more readily available,[525] and more recently on the identification of customary international law,[526] has taken the view that decisions of national courts may also be relevant in the process of determining the existence and content of rules of international law, although these are only subsidiary means for the determination of such rules.[527] In other words, as observed by the Secretariat memorandum discussed in chapter V of the present report, the decisions of national courts have a "dual role": "as a form of State practice and also as subsidiary means for the determination of rules of international law".[528] There are no strong reasons for the current rapporteur to recommend the Commission's deviation from that considered position which also found support among States.

298. That said, even though it should by now be self-evident that national court decisions do play an important role, three additional points, if not qualifiers, should be taken into account. Firstly, the potential value of such decisions will vary and would turn on numerous considerations. This will include the nature of the legal question that the decision addresses, the quality of the reasoning in the decision, and the court or body that issues it (all things being equal, on the latter point, the higher the court is, the more likely it will be perceived to have greater weight). These aspects are, to some extent, about the internal coherence of the decision and the level to which it conforms to the standards expected of the tribunal when determining the existence, or otherwise, of applicable rules of international law. For example, a decision that purports to apply a rule of customary international law to resolve a given matter would likely be deemed more acceptable if it flows from a thorough examination of whether there is a general practice that is accepted as law. For the same reason, a poorly reasoned decision that fails to conform to that test will unlikely gain acceptance.

299. A more external aspect of the decision that is also indicative of the quality of the decision is whether it has been followed by other courts or tribunals within, or more significantly outside of, the jurisdiction concerned and also by States. As the Commission concluded in relation to customary international law, which point may perhaps be made much more broadly, "[o]ther considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and the procedures applied by the court or tribunal".[529]

300. Secondly, and despite the above merits of invoking such decisions as subsidiary means, the decisions of national courts purporting to state rules of international law should be examined with caution. This is because they may reflect a parochial view or be based on peculiarities of their relevant legal systems.[530] This is recognized by the Commission in relation to its two sources-related topics.[531] The Chamber of the International Tribunal for the Former Yugoslavia Trial, in the *Kupreškić* case cited above, also warned that international criminal courts "must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing

[525] International Law Commission, "Ways and means for making the evidence of Customary International Law more readily available". Available at https://legal.un.org/ilc/guide/1_4.shtml.

[526] International Law Commission, "Identification of customary international law". Available at https://legal.un.org/ilc/guide/1_13.shtml.

[527] Conclusions on the identification of customary international law, at p. 2, para. 2, Conclusion 3, commentary para. 3, Conclusion 6, para. 2.

[528] Secretariat Memo, A/CN.4/759, para. 15.

[529] *Yearbook…2018*, vol. II (Part Two).

[530] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), p. 41

[531] Conclusions of identification of customary international law, with commentaries, *Yearbook of the International Law Commission, 2018*, vol. II (Part Two), p. 2

law".[532] Furthermore, it considered that they should "apply a stricter level of scrutiny to national decisions than to international judgments, as the latter are at least based on the same corpus of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation".[533]

301. Thirdly and finally, more recent practice of States indicates that, at least in certain subject areas, it might be difficult to draw a line between the decisions of national courts and those of international courts. This is because, especially in some subfields such as international criminal law, there is increasing State practice of establishing courts described as "hybrid" or "mixed" in character.

302. While it may be useful, from the perspective of Article 38 (1) (d) of the ICJ Statute, to separate different categories of judicial decisions into two categories (of national and international court decisions) and perhaps even a mixed category (of hybrid court decisions), in many respects, the crucial consideration is probably not between judicial decisions of national courts and judicial decisions of international courts, as such, "but rather between judicial decisions of courts and tribunals primarily applying national law ('national judicial decisions') and those of courts and tribunals[534] primarily applying international law ('international judicial decisions')".[535] In this view, rather than unduly focus on the categorization, the emphasis should not unduly be on the nature or type of court or tribunal itself but rather on the *nature* or *type of law* that it is applying. This position appears consistent with the reading of the Trial Chamber of the International Tribunal for the Former Yugoslavia in the *Kupreškić* case.[536]

C. The meaning of the term "teachings"

303. Article 38 (1) (d) of the ICJ Statute directs the Court to apply "…the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". Like the category of "judicial decisions", which forms the first part of this subparagraph, neither the Charter of the United Nations (Chapter XIV), nor the Statute or the secondary documents of the Court, in particular the Rules of Court or the Practice Directions, contain any definitions of the term "teachings". Descamps, who, as discussed above, had proposed the initial text for what became this article, was the only member of the Advisory Committee that used the term "*teachings* of jurisconsults of authority".[537] The Court, and its predecessor, did not have a reason to define teachings as a category in their practice. Nor has the term teachings been defined in the individual opinions of the judges who more frequently cite teachings in their separate opinions. It would therefore seem useful to examine the ordinary meaning of the term with a view to clarifying the intended purpose of this part of the directive to the Court.

304. The text of the *chapeau* in paragraph 1 states that the Court "shall apply" teachings as a subsidiary means for the determination of rules of law. Before turning to a textual analysis, a threshold question arises as to whether the text of Article 38

[532] *Prosecutor v. Zoran Kupreškić*, ICTY Trial Judgment, Case No. IT-95-16-T. 14 January 2000,, para. 542.

[533] Ibid., pp. 213-215, para. 537–541.

[534] Tribunals in this sense would presumably include decisions of the Dispute Settlement Bodies of the World Trade Organisation.

[535] Aldo Z. 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 (2013), p. 649 at p. 658.

[536] *Prosecutor v. Zoran Kupreškić*, ICTY Trial Judgment, Case No. IT-95-16-T. 14 January 2000.

[537] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 324.

requires or *permits* the Court to examine teachings. As with other aspects of probably the most-discussed provision of the ICJ Statute, scholarly views seem divided. The text, at first sight, would appear to obligate the judges to do so. For instance, Lauterpacht argues that the article "is mandatory in its reference to the 'teachings of publicists' as a subsidiary source of law to be applied by the Court".[538] Citing Sorensen, he felt that the drafting history "does not bear out any suggestion that the authority thus conferred upon the Court *ought to* remain *nominal*" (emphasis added).[539] In other words, he pointed out that, while there was a practice of "indiscriminate citation of authors in the writing and oral pleadings of parties", he did not consider that "the problem can always be solved by ignoring altogether the views of writers".[540] The implication is that the extensive citation of scholarly works in the briefs and during the oral pleadings was understood as not helpful and may perhaps even be seen as problematic. Another author, Jennings, would appear to agree that there is an obligation to consider teachings. He submits that the Court "is required … to consult the writings of the most eminent publicists".[541]

305. But, as yet another author has observed more recently, consulting scholarly works does not necessarily mean that the judges acknowledge or cite those works.[542] The anecdotal evidence that he found, including interviews of judges, seems to confirm the contrary; that in fact, there is more consultation of academic works than formal citations of them – at least in so far as the Court itself is concerned in its majority opinions.[543] We shall return to the practical use of teachings further below. For now, it appears useful to first clarify what a teaching is.

306. The dictionary meaning of the noun "teaching", which is *un*defined in the Article 38 (1) (d) context because it may be obvious, is "the work of a teacher"; and "teachings" (in the plural), "the ideas of a particular person or group, especially about politics, religion or society, that are taught to other people".[544] For our purposes, then, teachings would be ideas of a particular person or group on international legal issues that are taught to others. Helmersen, in the context of his detailed study of teachings, considers that the "definition is clear in its core: academic books and articles in journals that are not produced by States, intergovernmental organizations, or courts and tribunals and that may be used to answer legal questions".[545]

307. If the meaning of teachings is obvious, and it does seem to be so, what then is the scope. That is the more challenging issue. Teachings, both in their ordinary meaning and by their synonyms, are evidently a broad category. Their meaning includes written works as well as lectures. But while those may be the immediate aspects that come to mind when one hears a reference to teachings, it need not be understood so narrowly. In fact, they are perhaps better understood more broadly given the possibilities that technological advancements may offer. Indeed, in its prior work, the Commission has determined that both "teachings" or "writings" are "to be understood in a broad sense".[546] It also considered that the category would include

[538] Hersch Lauterpacht, *The Development of International Law by the International Court*, (Cambridge: Cambridge University Press, 1982), p. 24.
[539] Ibid. p. 25.
[540] Lauterpacht, The Development of International Law, p.25.
[541] Robert Y, Jennings, "The Progressive Development of International Law and its Codification", *The British Yearbook of International Law*, vol. 24 (1947), p. 301 at p. 308.
[542] Sondre Torp Helmersen, "Scholarly-Judicial Dialogue in International Law", *Law and Practice of International Courts and Tribunals*, vol. 16 (2017), p. 464 at pp. 472-473.
[543] Ibid. p. 474.
[544] See Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.com.
[545] Helmersen *The Application of Teachings by the ICJ*, p. 45.
[546] International Law Commission, (A/CN.4/710/Rev.1) Conclusion 14 para. 1, [conclusions on identification of customary international law] [2018].

"teachings in non-written form, such as lectures and audio-visual materials".[547] The Special Rapporteur agrees. Thus, we can conclude that teachings are comprised of writings or doctrine as well as recorded lectures, audiovisual materials and, for that matter, any other dissemination format that might be developed in the future.

308. Whatever form teachings may take, the reasons for referring to scholarly works are many. For our purposes, three points seem particularly important. First, teachings can play a role as a key element of the interpretation of rules of international law. We might, for convenience, label this the interpretation function of teachings. Writings were intended to serve only as auxiliary elements for interpretation; they cannot be a source. This can be seen from the drafting process of the provision wherein, much as with general principles of law, the proponents saw teachings as a way to help the judges to identify, interpret, determine or clarify the existence of rules or principles that could then help them to avoid declaring a *non-liquet*. In that sense, as President Descamps explained, the judges could resort to treaties in the process of determining how best to apply treaties, custom and general principles of law and, in so doing, could consult scholarly works as evidence of the existence of positive rules of international law.[548] They are, to put it simply, subsidiary in nature but stand as useful resources in identifying the applicable rules of international law.

309. Second, teachings may advance, depending on the prestige and persuasiveness of the author, views that could "influence the conduct of states and thus indirectly in the course of time help to modify the actual law".[549] This is what we might here call the persuasive function of teachings. That function, in historical terms, means that systematic analysis of legal points can be useful and offer a measure of influence to certain authors, although that would depend on how much authority they are perceived to have.

310. Third, teachings, especially those produced by a collective of experts, may lead the way in codifying or progressively developing the law or advocating reform of law even before States and other international actors may be willing to do so.[550] This we might characterize as a codification or progressive development function of teachings. To take some examples, there is probably no one in international law that can deny the foundational influence of writers like Grotius, or to take a relatively more recent example, of Gidel, who is said to be the first to have propounded the theory of the contiguous zone as a way of systematically harmonizing State practice in the area of the law of the sea, or of Cherif-Bassiouni in the area of international criminal law.[551] Similarly, it would be hard to deny the influence of the teachings produced by the International Law Association, Harvard Research in International Law, ICRC or the experts in State-empowered United Nations treaty bodies in certain areas of international law. Here, the works of individual scholars might even intersect with the works of expert groups to produce enormous influence shaping core rules of international law, as Bonaya Godana has argued, for example, in relation to the law of international watercourses.[552] Godana observed that the opinions of writers such as

[547] International Law Commission, (A/CN.4/710/Rev.1) Conclusion 14 para. 1. See also Michael Wood "Third report on Identification of Customary International Law by the Special Rapporteur" (A/CN.4/682), p. 121, and Charles C. Jalloh "Statement on the Identification of Customary International Law Statement of the Chairperson of the Drafting Committee", p. 15.

[548] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 318-319.

[549] James L Brierley, *The Law of Nations*, (Oxford University Press, 1955) 5th ed., p. 66.

[550] See, in this regard, Sandesh Sivakumaraan, "Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law", *Colombia J. of Trans'l L.*, vol. 55 (2017), p. 343.

[551] See F. Woolridge, *Contiguous Zone*, EPIL I (1993), 779-83.

[552] Bonaya Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems* (Boulder: Lynne Rienner, 1985), p. 24.

H.A. Smith[553] and the *Institut de droit International* in its adoption of the 1911 Madrid resolution and of the 1966 Helsinki Rules were particularly influential in the development of that body of law.[554] That, of course, is just one out of many possible examples. Additional examples, from a different subfield of international law and involving a different type of entity with close links to States, could be given. In the law of armed conflict, no one can gainsay the significant role of ICRC, which, among its many contributions, produced, after about a decade of expert-led work, a monumental restatement of the Customary International Humanitarian Law applicable in both international and non-international armed conflicts.[555] In the area of the law of the sea, while pointing to the dialectical relationship between teachings, practice and judicial decisions and specific examples, Penelope Ridings has argued that scholarly works may be directly or indirectly influential in shaping and contributing to the development of the law of the sea in international tribunals.[556]

311. It is remarkable that State practice at the national level, including judicial practice, contemplated a similar role for teachings. This can be confirmed by the opinion of Mr. Justice Gray of the United States Supreme Court, who observed in the much-quoted passage in the *Paquete Habana* case, which predated the drafting of the Statute of the Permanent Court of International Justice by 20 years, and confirms the auxiliary role of teachings also for national courts:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose,

[553] See Herbert Arthur Smith, *The Economic Uses of International Rivers*, (London: P.S. King, 1931) (a work that has been described as a "milestone in the development of the doctrine of equitable apportionment"), C.B. Bourne, "The Right to Utilize the Waters of International Rivers", *Canadian Yearbook of International Law*, vol. 3 (1965), pp. 187-264. There are other examples in other areas of international law, for example the law of armed conflict, in relation to which the Institute of International Law adopted a manual at Oxford on 9 September 1880. The Institute, which did not propose a treaty, sought to state clearly the accepted ideas of its age which it felt could be used as a basis for national legislation. The document proved enormously influential. The Laws of War on Land. Oxford, 9 September 1880. (umn.edu). A similar influence on the law of war by an international law scholar was the work of Professor Francis Lieber of Colombia Law School, which set out the rules governing the conduct of hostilities promulgated by President Abraham Lincoln for the US federal army during the American Civil War on 24 April 1863. The Lieber Code, as General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field came to be known, later proved influential in inspiring and shaping codification efforts of the laws of war in many other countries. These included Prussia, Netherlands (1871), France (1887), Switzerland (1878), Serbia (1879), Spain (1889), Portugal (1890), Italy (1896) and the United Kingdom (1884). It would later form the basis for the Brussels Declaration of 1874 and the Hague Conventions on Land Warfare of 1899 and 1907. For commentary, see R. Baxter, "The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100" IRRC, vol. 25 (1964), p. 25 and Theodor Meron, "Francis Lieber's Code and Principles of Humanity" Colum. J. of Transnat'l L. vol. 36 (1998), p. 269. See

[554] See International Law Association, Report of the Fifty-Second Conference, Helsinki, 1966.

[555] See, in this regard, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) Vols. I and II. See also Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict," IRRC vol. 87 (2005), p. 175. On the other hand, given the dynamic interactions between the work of expert bodies and States, aspects of the ICRC study were not necessarily embraced by all States. See, for example, John B. Bellinger III & William J. Haynes II, "A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law", IRRC, vol. 89 (2007), p. 443; and Jean-Marie Henckaerts, "Customary International Humanitarian Law: A Response to US Comments", IRRC, vol. 89 (2007) 473.

[556] Penelope J. Ridings, "The Influence of Scholarship on the Shaping and Making of the Law of the Sea", *Int'l J. of Marine and Coastal Law* 38 (2023), p. 11-38.

> 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, not for the speculations of their authors concerning what the law ought to be, *but for trustworthy evidence of what the law really is.*[557] (Emphasis added)

312. Subsequent case law from United States courts has affirmed commitment essentially to the same understanding of the place of teachings in determinations of the applicable rules of international law. For example, in the relatively more recent case of *Flores v. Southern Peru Copper Corporation*, the United States Court of Appeals for the Second Circuit cited Article 38 of the ICJ Statute as listing the sources and stressed the place of the sources in paragraph 1 (d), namely judicial decisions and teachings, as secondary or subsidiary to the first three sources.[558]

313. Similarly, in *Sosa v. Alvarez-Machain*, the United States Supreme Court ruled that determination of the current state of international law is to be made by reference first to treaties, where those are available, followed by assessments of whether there are controlling legislative acts or judicial decisions and, in their absence, the works of jurists and commentators.[559]

314. Finally, in *United States v. Yousef*, the Second Circuit determined that, while writings are not sources, they are "useful in explicating or clarifying an established legal principle or body of law" and in that regard may help 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, law, and instructions to its agents".[560]

315. The practice of other States reflects a similar approach. In Sierra Leone, the matter has been conveniently explained as follows: "the treatment of questions of international law by the national courts of Sierra Leone suggest reliance is often placed on judicial decisions of other national and international courts addressing the same question".[561] These points were illustrated by reference to the judgment of the Supreme Court of Sierra Leone in case S.C. No. 1/2003, *Issa Hassan Sesay et al vs. The President of the Special Court, the Registrar of the Special Court and the Attorney-General and Minister of Justice*, wherein, in relation to a question of immunity of officials, the judges referred to the *Pinochet*[562] decision of the courts of the United Kingdom and to the International Court of Justice's *Arrest Warrant* case.[563] The same decision also exemplified how the courts of that State used academic works, which, in essence, permitted the conclusion to the effect that "[t]eachings of publicists may be used to elucidate the relevant points or to confirm the interpretation adopted by the courts".[564]

---

[557] U.S. Supreme Court, *The Paquete Habana*; *The Lola*, 175 US 677, 8 January 1900, p. 720. Chief Justice Fuller, dissenting, warned of writers that "[t]heir lucubrations may be persuasive, but not authoritative".

[558] United States, Second Circuit Court of Appeals, 406 F.3d 65, Judgment, 2003, p. 83.

[559] United States, U.S. Supreme Court, 542 U.S. 734, 2004, p. 730, 734. (quoting *The Paquete Habana*, 175 U.S. at 700). Note that in this case, the Court did not address the role of *non-controlling* judicial decisions such as those referred to in ICJ Statute Article 38(1)(d).

[560] 327 F.3d 56 (2d Cir. 2003).

[561] See Sierra Leone submission to the International Law Commission, 18 January 2023, para. 8.

[562] United Kingdom, House of Lords, R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte, Case no. [2002] 1 AC 61, 25 November 1998; Ex parte Pinochet Ugarte (No 2), Case no. [2002] 1 AC 119, 17 December 1998; Ex parte Pinochet Ugarte (No. 3), Case no. [2000] 1 AC 147, 24 March 1999.

[563] Case Concerning the Arrest Warrant of 11 April 2000.

[564] See Sierra Leone submission to the International Law Commission, 18 January 2023, para. 8.

316. The above-discussed functions of teachings (i.e. their interpretation, persuasive and codification functions) does not suggest that they have or can claim any authority to make law. Certainly not directly. That their views play an indirect evidentiary function, and even in that regard remain subordinate to the primary sources, is discernible from the practice of States and national and international courts and tribunals.[565] Such a role, of interpreters, analysers and codifiers and even reformers of the law, is not unique. It is universally recognized and is consistent with the function that scholarship performs more generally in any other legal system whether national, regional or international.

317. As regards the practice of international courts, when it comes to the use of scholarship within the meaning of Article 38 (1) (d) of the ICJ Statute, different approaches seem manifest. For the Court, and for that matter its predecessors, teachings are known to, so far, hardly feature in the judgments/majority opinions. According to one empirical study, out of well over 155 cases at the time of the study, it has only cited teachings on seven occasions.[566] The cases are so few vis-à-vis the 70-plus year history of the International Court of Justice that they can briefly be mentioned. They include the findings in *Land, Island and Maritime Frontier Dispute*,[567] the *Namibia* advisory opinion,[568] the *Kasikili/Sedudu Island* case,[569] the *Nicaragua* judgment,[570] the *Bosnia Genocide* case,[571] the *Nottebohm* case (Second Phase)[572] and the *Nuclear Weapons* advisory opinion.[573] Its predecessor in a sense developed that practice,[574] as seems evident from the handful of references to teachings in the *Lotus* case,[575] *Certain German Interests in Polish Upper Silesia*,[576] the *Jaworzina* case,[577] the *Wimbledon* case[578] and the advisory opinion on the Austro-German Customs Union.[579]

318. The seeming tradition to not proffer copious references to teachings in International Court of Justice judgments can be misleading. It should not lead to the erroneous conclusion that scholarship is not consulted or useful to the judges. To the contrary, scholarship seems to be used extensively, not only in the pleadings of

[565] See, in this regard, the submission of the United States, which in turn, referred to the decisions of U.S. courts in *The Paquete Habana* ("the work of jurists and commentators can be looked at as trustworthy evidence of what the law really is only when there is no applicable treaty or controlling domestic law) and in *Sosa v. Alvarez-Machain* ("the Court evaluated the current state of international law as evidenced first and foremost treaties and "controlling legislative acts or judicial decision", and in their absence, "the work of jurists and commentators").

[566] Sondre Torp Helmersen, *The Application of Teachings by the ICJ*, p. 45.

[567] Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990, p.92.

[568] Legal Consequences for States of Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 267 (1970), Advisory Opinion, I.C.J, 1971, p. 16.

[569] Kasikili/Sedudu Island (Bots. V. Namib.), 1999 I.C.J. 1045 (Dec. 13).

[570] Military and paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14.

[571] 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.

[572] Nottebohm Case (second phase), Judgment of April 6th, 1955: I.C.J. Reports 1955, p. 4.

[573] Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996, p. 66.

[574] A/CN.4/691, pp. 9-11, para. 18.

[575] The Case of the S.S. "Lotus" (France v. Turkey).

[576] Certain German Interests in Polish Upper Silesia (Germany v. Poland).

[577] *Question of Jaworzina*, Advisory Opinion, P.C.I.J. Series B 1923, No. 8 (Dec. 6).

[578] *S.S Wimbledon (U.K. v. Japan)*, Advisory Opinion, P.C.I.J. Series A 1923, No. 1. (Aug. 17).

[579] *Customs Regime between Germany and Austria*, Advisory Opinion, P.C.I.J. Series A/B 1923, No. 41 (Sept. 5).

State[580] advocates and jurists before the International Court of Justice and other international courts but also as part of clarifying the context of given legal rules. Indeed, it is well known that, inasmuch as citations to teachings are generally limited in the Court's judgments, the individual opinions of individual judges frequently cite teachings. This pattern, which also manifests a practice from the Permanent Court of International Justice days, also suggests that they may have arisen during deliberations but not been retained in majority opinions. The value of teachings, used as background materials, indicates that they in fact carry greater weight than can be presumed from citation counts alone. There is even anecdotal evidence suggesting that drafts of judicial decisions may in early versions contain citations to doctrine which are later removed from court judgments for a variety of complex reasons. Moreover, in marked contrast, in some international courts, there are often ample references to teachings, if not in support of legal propositions as a form of confirmation of them.

319. If teachings are not generally cited in International Court of Justice cases, as the principal judicial organ of the United Nations which can be seen as the apex court, one might be tempted to assume that such a hesitancy to openly use scholarly works would be the same also in other international courts. Such an assumption, to the extent made, would be mistaken. Some international courts and tribunals, for example the international criminal tribunals as well as regional human rights commissions and courts, are more open to use and acknowledge academic authorities in their decisions and judgments.[581] For example, the Trial Chamber of the Special Court for Sierra Leone, in the *Revolutionary United Front* case, cited, in its section on legal findings, several academic works. In interpreting article 6 (3) of the Statute of the Special Court for Sierra Leone, providing for superior responsibility, the Chamber, citing a leading textbook on international criminal law, "subscribe[d] to the principle that superior responsibility is today anchored firmly in customary international law"[582] without itself carrying out any independent assessment of the existence of State practice and *opinio juris* to that effect. Similar uses of writings can be found in the International Tribunal for the Former Yugoslavia in, *inter alia*, the *Tadić, Kunarac* and *Krnojelac* cases[583] and the International Criminal Tribunal for Rwanda in *Akayesu*,[584]

[580] For example, in its submission for this topic discussed in Chapter II of this report, the United States confirms it often cites scholarly works in its pleadings in international cases.

[581] For a thoughtful analysis, see Nora Stappert, 'A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals', LJIL, vol. 31 (2018), p. 963.

[582] See SCSL, *The Prosecutor v. Issa Hasan Sesay, Morris Kallon and Augustine Gbao* (*RUF case*), SCSL-04-15 para. 282, fn. 507 citing to Gerhard Werle, *Principles of International Criminal Law* (The Hague: T.M.C. Asser Press, 2005), p. 372. The Chamber, in the next sentence, invoked the ICTY Appeals Chamber Judgment in *Celibici* (at para. 195 – "the principle that military and other superiors may be held criminally responsibility for the acts of their subordinates is well-established in conventional and customary law.").

[583] A/CN.4/691, paras 45-46; See *Prosecutor v. Duško Tadić*, Opinion and Judgment, Case No. IT-94-1-T, T.Ch., 7 May 1997 paras. 638-643, 650-655, 657-658, 669, 678-687, 694 and 696; Prosecutor v. Kunarac et al., Judgment, Case No. IT-96-23-T and IT-96-23/1-T, T.Ch., 22 February 2001. Para. 519 – 537. See also *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-T, T.Ch.II, 15 March 2002, para. 58, footnote 197.

[584] See *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T.Ch.I, 2 September 1998.

Musema,[585] *Bagilishema*,[586] *Nahimana et al*,[587] *Gacumbitsi*,[588] *Bagosora et al*,[589] *Seromba*,[590] *Bikindi*[591] and *Nsabonimana*.[592]

320. In the International Criminal Court, ample references to academic journals and monographs were made in the *Lubanga Trial Judgment*.[593] The same is true of many other International Criminal Court judicial decisions too numerous to mention. Moreover, in the International Criminal Court, evidently building on the practice of the ad hoc tribunals such as the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia which preceded it, there appears to have emerged a practice that gives greater prominence to the works of academics through the *amicus curiae* or friend of the court process.

321. Three aspects of that process stand out. First, the International Criminal Court, including its Appeals Chambers, invites the views of scholars under rule 103 to apply for formal standing as *amicus curiae* or friends of the court on substantive legal issues such as reparations and immunity. Remarkably, while it is ordinarily open for academics to apply for such standing to offer their views, as they do in some cases, in some of those cases, the invitation is extended by decision of the International Criminal Court itself. The rule 103 process is the same mechanism that others, including States parties to the Rome Statute and international organizations (as well as non-governmental organizations) use (and are also invited to use), to provide views to the International Criminal Court.

322. Second, and in an emerging practice that may be lauded by some and chastised by others, the International Criminal Court integrates the scholarly arguments and opinions in its process, with academics being given specific questions and time to argue legal points before the chambers during oral hearings.[594] This arguably gives considerable influence to certain scholars acting as interveners.

323. Finally, although it is difficult to draw firm conclusions regarding the extent to which the International Criminal Court has relied on those academic works that it has invited in its final judgments, it is apparent that the views of the invited academics have been used to, at a minimum, confirm the correctness of certain legal interpretations. This is evident, for example, in the debate about the International Criminal Court's interpretation of the elements of crimes against humanity.[595]

---

[585] *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13-A, T.Ch.I, 27 January 2000.

[586] *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-T, T.Ch.I, 7 June 2001; Prosecutor v. Bagilishema, Judgment, Case No. ICTR-95-1A-A, A.Ch., 3 July 2002.

[587] *Prosecutor v. Nahimana et al*., Judgment and Sentence, Case No. ICTR-99-52-T, T.Ch.I, 3 December 2003; *Prosecutor v. Nahimana et al*., Judgment, Case No. ICTR-99-52-A, A.Ch., 28 November 2007.

[588] *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, A.Ch. 7 July 2006.

[589] *Prosecutor v. Bagosora and Nsengiyumva*, Judgment, Case No. ICTR-98-41-A, A.Ch., 14 December 2011.

[590] *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66-A, A.Ch., 12 March 2008.

[591] *Prosecutor v. Bikindi*, Judgment, Case No. ICTR-01-72-T, T.Ch.III, 2 December 2008.

[592] *Prosecutor v. Nzabonimana*, Judgment, Case No. ICTR-98-44D-A, A.Ch., 29 September 2014.

[593] *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Judgment, Case No. ICC-o0//04/ol/o6, Trial Chamber I, 14 March 2012.

[594] See, for a work raising questions about fairness, representativeness and legitimacy arising from this practice, see Sarah Williams, Hannah Woolaver and Emma Palmer, *The Amicus Curiae in International Criminal Justice* (Hart Publishing, 2021).

[595] See, for one example of this, the *Amicus Curiae Observations of Professors Robinson*, *DeGuzman*, *Jalloh and Cryer*, Prosecutor v. Laurent Gbagbo, ICC-02-/11-01/11, 9 October 2013 (raising concerns about unnecessarily stringent approaches to interpretations of crimes against humanity and offering broader interpretations).

D. The meaning of "the most highly qualified publicists"

324. As already mentioned above, Article 38 (1) (d) lays down that the Court must look to the teachings of the most highly qualified publicists. The object of the assessment, which is necessarily linked to the determination of the rules of law, is the "publicists". The latter, that is scholars, must be among the most highly qualified. This raises the antecedent question of who exactly a publicist or scholar is. Interestingly, the dictionary meaning of the term "publicists" is "an expert or writer on the law of nations or international law".[596] For the Commission, in one of its related projects, the term "publicist" basically evokes the same meaning.[597] In the commentary to conclusion 14 on the identification of customary international law, it explains that the term "covers all those whose writings may elucidate questions of international law".[598] There does not appear to be any good reason to depart from that understanding.

325. Clearly, however, by the plain terms of the ICJ Statute, being an expert in the subject (of international law) is a necessary but not sufficient condition. This is because of the qualifier, which indicates that reliance can only be placed on the *most highly qualified of the publicists* – which, in the words of the Commission, and without excluding others or turning the focus away from the quality of the work itself, is a reference emphasizing that "attention ought to be paid to the writings of those who are eminent in the field".[599] That said, in the final analysis, it was also clarified that it was the quality of the writing in issue that matters more than the reputation of the author. Among the factors to be considered in assessing the quality are the approach adopted by the author and the rigour of the work.

326. The preceding understanding is confirmed by the etymology of the term "publicist", which is partly French. The term "publicist" was apparently used in France, around the mid-eighteenth century, to describe an expert in public law. If the term, in ordinary parlance, refers to a "writer" and is synonymous with "author", the use of it in the plural form (that is, publicists), especially when taken alongside the word "teachings", would appear to suggest that the intent was to draw on not so much one author as much as the collective views of multiple writers.[600] The latter ordinary meaning is consistent with the drafting history discussed above where, in the initial proposals and the subsequent discussions of the Advisory Committee of Jurists, the focus was to be on "the concurrent teaching of the authors whose opinions have authority".[601] References were also made to "coinciding doctrine".[602] To one author, "[i]t seems clear the members of the [Advisory Committee of Jurists]…probably had in mind the writings of only a handful of distinguished writers, and perhaps the major treatises. The exponential proliferation of international legal writing would happen only later".[603]

327. Expert groups would, in the nature of things, be more authoritative producers of teachings. In this regard, a distinction should be made between "private" expert

[596] "Publicists." Oxford English Dictionary (OED 3d ed. 2013). Available at www.oed.com.
[597] Ibid.
[598] International Law Commission, Ways and means for making the evidence of customary international law more readily available, A/CN.4/710/Rev.1, Conclusion 14 para. 4.
[599] Ways and means for making the evidence of customary international law more readily available, A/CN.4/710/Rev.1, Conclusion 14 para. 4.
[600] See Omri Sender, "The Importance of Being Earnest: Purpose and Method in Scholarship on International Law" *Case W. Res. J. Int'l L.*, vol. 53 (2022), p.54 at p. 58.
[601] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, p. 323.
[602] Procès-verbaux of the Proceedings of the Committee, June 16th – July 24th 1920, pp. 332 and 336.
[603] Sender, "The Importance of Being Earnest: Purpose and Method in Scholarship on International Law", p. 57.

bodies in contrast to "public" expert bodies. Another helpful way to think of these entities, as Sandesh Sivakmuran has argued, is whether they are "State-empowered" or not.[604] Examples of private expert groups would include the *Institut de droit international*, the Hague Academy of International Law, the International Law Association and the Harvard Law Research Institute. Examples of the latter, namely State-empowered bodies, would perhaps most prominently include the work of independent expert bodies which benefit from a dialogue or interaction with States.[605] A good example of the latter is ICRC, which has played an important role in the development of contemporary international humanitarian law.[606]

328. That said, the two-part categorization suggested here is not exhaustive and may even be subject to exceptions. For one thing, there may be bodies that appear to have characteristics that are both public and private. For another thing, there are such bodies such as the Commission or the United Nations Commission on International Trade Law which stand in a special relationship with States partly owing to their express mandate to assist States with the codification and development of international law. The latter institutions, as well as other State-created bodies, could be better thought of in a category of their own, given their official mandates, rather than as expert groups of scholars producing scholarship. The Commission's own work, as indicated by the Secretariat memorandum, has ascribed greater weight to expert bodies than scholarship which, intuitively, would also seem to be correct.

E. The meaning of "the various nations"

329. The publicists must be "of the various nations". The synonyms for the term "various"[607] indicate "different, diverse, several and many", while nations is clearly a reference to a group of people forming a State. The Commission has interpreted the phrase as used in the Statute and "highlights the importance of having regard" to "writings representative of the principal legal systems and regions of the world and in various languages".[608]

330. The effort to be representative flows from the universalist nature, or at least universalist aspiration, of international law as a body of law that primarily regulates

[604] See Sandesh Sivakumaraan, "Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law", Colombia J. of Trans'l L., vol. 55 (2017), p. 351 ("A State-empowered entity is essentially an entity that States have empowered to carry out particular functions").

[605] A. Pellet, "Le droit international à la lumière de la pratique", *Collected Courses of the Hague Academy of International Law*, vol. 414 (2021), at p. 182; see also M. Sourang, "Jurisprudence and Teachings" in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Paris, UNESCO and Dordrecht, Nijhoff, 1991), pp. 283–288, at pp. 283–284, 285; T. Treves, "The Expansion of International Law", *Collected Courses of the Hague Academy of International Law*, vol. 398 (2020), pp. 9–398, at p. 190.

[606] The ICRC has been accorded a high level of authority, for example by the ICTY Appeals Chamber in the *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995) at para. 109 ("As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. …. his shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.").

[607] "Various.", Oxford English Dictionary (OED 3d ed. 2013). Available at www.oed.com.

[608] A/CN.4/710/Rev.1, Conclusion 14 para. 4.

relations between diverse sovereign States. While, during the drafting of the Statute of the Permanent Court of International Justice, there were less than a third of the number of States that exist today, and even less diversity in the "invisible college of international law"[609] from which to plausibly draw the most highly qualified publicists, today, it makes sense that the judges, to the extent that they reference or take into account academic works, consult the writings of authors from the various nations of the world.[610] This requirement, which has sensibly not been read to mean that the Court must examine the individual works of hundreds of authors in the process of determining each minute rule of law to apply, does suggest that strenuous efforts must be undertaken – more so than at present – to at least loosely be representative of the various nations and regions of the world.

331. The foregoing arguments align with the rules laid down for the representative composition of the World Court and with the other provisions of Article 38, which link the formation of international law with the notion of general assent.[611] In this regard, it has been observed that: "It is very necessary, in considering the teachings of publicists, to take account of opinions originating or prevailing in all the various regions of the world; and it is for this reason too that, apart from individual works, the labours of learned societies with an international composition, such as the *Institut de droit international*, have special authority".[612]

332. At the same time, while the statutes of international courts such as that of the International Court of Justice may say one thing, the actual citation practices of international courts and tribunals suggest that there are certain views and certain authors whose works are more prevalent in international tribunals. This issue may give rise to uncomfortable conversations. But, in the view of the Special Rapporteur, it should be addressed head-on instead of brushed under the carpet. In this regard, to take one example, the Court, in the rare instances that it references scholars, tends to cite essentially the same group of authors. It is reported that the 10 most cited writers are all from Western States and all of them are men.[613]

---

[609] Oscar Schachter, "The Invisible College of International Lawyers" NULR, vol. 72 (1977), p. 217. But see A Peters, 'International Legal Scholarship under Challenge', in J d'Aspremont, T Gazzini, A Nollkaemper & W Werner (eds) *International Law as a Profession* (Cambridge University Press, Cambridge, 2017) at p. 119 (arguing that the invisible college can be understood as "an elite college of scholars of the developed world, a college in which academics from the so-called Global South are relegated to the role of the eternal students.").

[610] When the League of Nations was founded, it had 41 members. By the time of its demise, it had risen to 63 members. While that meant that most of the countries of the world were its members, and even though it had universalist aspirations, it failed to accomplish that goal since many countries were colonised. The P.C.I.J. had jurisdiction to hear disputes in relation to 45 States.

[611] M. Virally, "The Sources of International Law" in M. Sørensen (ed.), *Manual of Public International Law* (London, Macmillan, 1968), pp. 116–174, at p. 153.

[612] Ibid.

[613] In a focused study of teachings, and their use by the Court, Helmersen shows that the ten most cited writers are Shabtai Rosenne, Hersh Lauterpacht, Gerald Fitzmaurice, Manley O. Hudson, Lassa Oppenheim, Robert Jennings, Charles de Visscher, Ian Brownlie, Arthur Watts and Julius Stone. Most of the authors are UK or US nationals. The number only marginally improved, in terms of diversity, when the author expanded the study to identify the top 40 most cited persons. Of the 40, only one (Eduardo Jimenez de Arechaga) is from a global south country – Uruguay. Everyone else was from the Western European and Others Group. See *The Application of Teachings by the ICJ*.

333. A more fundamental problem, of course, has been pointed out by critical scholars such as James Thuo Gathii[614] and Anthea Roberts,[615] among others, who have questioned the extent to which international law can be seen as truly international both in the manner in which the law has developed, historically, but also in the manner in which knowledge about international law is produced. The practitioners shaping the arguments before the Court tend to be from certain regions. In an empirical study of the first 50 years[616] of the International Court of Justice, between 1948 and 1998, scholars showed many years ago the predominance of lawyers from Organisation for Economic Co-operation and Development countries in litigating cases before the Court. Many years later, under the American president, Judge Joan E. Donoghue,[617] the issue of the representativeness of International Court of Justice counsel appears to have gained in prominence and seems to now be part of the conversation by court officials regarding questions of representation. Ironically, for decades before, judges[618] and scholars[619] mostly from Africa, Asia, the Middle East and Latin America

---

[614] James Thuo Gathii, "The Promise of International Law: A Third World View" *Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law* (29 August 2020).

[615] See, for an illuminating book challenging the orthodoxy about the universality of international law, see Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017).

[616] See, for example, Kurt Taylor Gaubatz and Matthew MacArthur, "How International is International Law?", *Michigan J. of Int'l Law*, vol. 22 (2001), p. 239 (arguing that "the extent of the Western monopoly of international legal practice at the ICJ and argue that this domination suggests that "international" law is not as *international* as its name implies"; and "the Western domination of international legal practice will not come as a surprise to anyone who has studied ICJ proceedings."). The claim by Gaubatz and MacArthur that the overrepresentation of Western lawyers in the ICJ cases can partly be due to lack of counsel with sufficient expertise from developing countries litigating before the ICJ has been contested. See James Thuo Gathii, "Decolonizing the ICJ Mafia" (unpublished manuscript, on file with author, forthcoming 2023). More recent empirical include Shashank P. Kumar & Cecily Rose, "A Study of Lawyers Appearing before the International Court of Justice, 1999- 2012," *Eur. J. Int'l L.*, vol. 25 (2014) 893.

[617] Judge Joan E. Donoghue, President, Int'l Ct. Just., *Reflections on the 75th Anniversary of the International Court of Justice*, U.N. Chron. (Apr. 16, 2021), https://www.un.org/en/un-chronicle/reflections-75th-anniversaryinternational-court-justice (last visited 11 February 2023) ("Each time that I gaze out at the delegations representing parties, however, I am struck that their composition bears too much resemblance to the groups of persons who gathered in 1945 to draft the Charter of the United Nations and the Statute of the Court. Very few of the counsel are from developing countries and almost all, regardless of nationality, are men.").

[618] See, for an early critical voice on this, Christopher Weeramantry, "A Response to Berman: In the Wake of Empire," in Weeramantry & Nathaniel Berman, *The Grotius Lecture Series*, vol. 14, *Am. U. Int'l L. Rev.* (1999), p. 1555, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1339&context=auilr (last visited 11 February 2023).

[619] See Antony Anghie, *Imperialism, Sovereignty And International Law* (2005); Alejandro Alvarez, *American Problems In International Law* (Michigan: Gale Publisinh, 1909); R. P. Anand, "New States and International Law" JILI, vol. 15(3) (1972), pp. 522-524; Wang Tieya, "The Third World and International Law" in R. St. J. Macdonald & D. M. Johnston, *The Structure and Process of International Law* (The Hague: Martinus Nijhof, 1983); Onuma Yusaki, *International Law In A Transcivilizational World* (Cambridge: Cambridge University Press, 2017); Georges Abi-Saab, "The Newly Independent States and the Rules of International Law: An Outline", *Howard L.J.* vol. 8 (1962) p. 95; Mohammed Bedjaoui, *Towards A New International Order* (New York: Holmes & Meier Publishing, 1976); Taslim O. Elias, *Africa and the Development Of International Law* (Netherlands: Martinus Nijhof, 1974); B.S Chimni, *International Law And World Order: A Critique Of Contemporary Approaches*, 2nd ed. (Cambridge: Cambridge University Press, 2017); Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford: Oxford University Press, 2009); Christopher G. Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (Oxford: Oxford University Press, 1992); Cynthia Farid, "Legal Scholactivists in the Third World: Between Ambition, Altruism and Access," *Windsor Yearbook of Access to Justice*, vol. 33 (2016), p.57.

had been challenging the extent to which the universalists' claims of international law can be sustained without meaningfully accounting for the views of the global South.[620]

F. The meaning of "subsidiary means"

334. Regarding the term in Article 38 (1) (d), "as subsidiary means for the determination of rules of law", in particular the words "subsidiary means", three brief comments are justified. First, the term "subsidiary" is borrowed from the Latin "*subsidiaries*" which refers to something that provides assistance, that is "subordinate", "supplementary" or "secondary", "[a] subsidiary or subordinate thing; something which provides additional support or assistance; an auxiliary, an aid",[621] whereas the second term, "means", is a reference to an "intermediary agent or instrument"; "something interposed or intervening".[622] The takeaway meaning of the terms suggests the existence of something else, a contrast to that which is subsidiary, for example, the words "primary" means or "principal" means. But none of those alternates are included in the Statute. For our purposes, like some authors, we could use "primary" or "principal". Schwarzenberger has noted this, arguing that the existence of a subsidiary category implies that "principal means for the determination of rules of law must exist".[623]

335. Second, and more substantively, the French version of subsidiary means (*moyen auxilaire*) stresses the supplementary nature of these means. This indicates, if not confirms, that both judicial decisions and teachings are subordinate in status to the primary means listed in Article 38, paragraph 1 (a) to (c), namely, treaties, custom or general principles of law. In other words, they are subsidiary because they are not sources in and of themselves. In any case, as between the two "subsidiary means", in the category, there appears to be no formal distinction made between judicial decisions and teachings. Writers express different views on this. Some view the two as equally important and without meaningful normative difference, whereas other writers consider judicial decisions to be more important; teachings less so. The debate carries some practical consequences.

336. For example, both Fitzmaurice and Schwarzbenger have expressed doubts about teachings in favour of judicial decisions. The former famously argued that "[a] decision is a fact: an opinion, however cogent, remains an opinion".[624] He went on to argue that it is not so much that judicial decisions necessarily intrinsically carry more weight than scholarship but that they have "a more direct and immediate impact on the realities of international life".[625] He thus concluded that it was an error to place judicial decisions "on the same footing as the teachings of the most highly qualified publicists, and still more in conjointly characterizing them as 'subsidiary means for the determination of rules of law'".[626] He found the phrasing for teachings "quite inappropriate" in relation to judicial decisions, which in his view could never be a subsidiary means of determination.[627] Schwarzenberger, for his part, held that the

[620] For an helpful article explaining the origins of TWAIL and compiling a useful starting bibliography on it, see James T. Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography" *Trade L. and Dev*., vol. 3 (2011), p. 26.

[621] "Subsidiary." Oxford English Dictionary (OED 3d ed. 2013). Available at www.oed.com.

[622] "Means." Oxford English Dictionary (OED 3d ed. 2013). Available at www.oed.com.

[623] Schwarzenberger, "International Law as Applied by International Courts and Tribunals", p. 122.

[624] Fitzmaurice, "Some problems regarding the formal sources of international law" in Jill Barrett and Jean-Pierre Gauci (eds.) *British Contributions to International Law, 1915-2015*, 3rd ed. (Leiden; Boston: Brill Nijhoff, 2021)pp. 476- 496 at p. 494.

[625] Fitzmaurice, "Some problems regarding the formal sources of international law", p. 494.

[626] Ibid. 495.

[627] Ibid.

reference to teachings of publicists in Article 38, paragraph 1, had to be approached with caution – arguing that scholars had been accorded an "inflated position".[628]

337. Third, while this issue may be taken up in a later Special Rapporteur report, a number of authors have suggested that the qualification of the term "subsidiary" in Article 38 (1) (d) "serves to qualify the means in relation to the court or tribunal undertaking the determination".[629] This is because "[w]here the court or tribunal undertakes the determination of rules of law through first-hand means, such as through judicial interpretation, such means may be characterized as 'principal'".[630] On the other hand, if the court or tribunal "relies on second-hand means" in the course of verifying the existence, or not, of a rule, such means can be thought of as "subsidiary".[631] In other words, both judicial decisions and teachings can only be used "to interpret a treaty, as well as to ascertain the content of customary international law or a general principle of law".[632] This operation can also apply within the subsidiary means category itself, such that "[t]eachings can also be used when determining the content of other subsidiary means, which can in turn be used to interpret a treaty or ascertain the content of customary international law or a general principle of law".[633]

338. Finally, as the Secretariat memorandum explains, the Commission has elaborated on the meaning of the term "subsidiary means" in both the text of conclusions and commentary in the topic identification of customary international law as well as in the identification and legal consequences of peremptory norms of general international law (*jus cogens*).[634]

G. The meaning of "for the determination of rules of law"

339. The phrase "the determination of rules of law", when read together with the *chapeau* of paragraph 1 of Article 38 directing the Court to apply treaties, customary law and general principles of law, is essentially the end goal of the provision. The earlier terms speak to the earlier stages of the process. In this regard, as already discussed above, the text accords to both categories, judicial decisions and teachings, the status of "subsidiary means for the *determination* of rules of law" (emphasis added). On the plain, ordinary meaning of the provision, the judicial task is clear: to determine the rule of law to apply. "Determination" has a dual meaning, when considering it in its noun form "determination" and as a verb, "determine". As a noun it can mean "ascertainment" (a means of ascertaining what the rule is, a piece of evidence).

340. In accordance with this meaning, Shahabuddeen argues that "'determination" is […] limited to a determination in the sense of finding out what is the existing law". Relying on the *travaux préparatoires* of the Advisory Committee of Jurists, he notes that "[t]he argument is strong therefore that the reference to 'the determination of rules of law' visualised a decision which would merely elucidate the existing law, and not bring new law into being".[635]

---

[628] Georg Schwarzenberger "The Inductive Approach to International Law", *Harvard Law Review*, vol. 60, (1947), p.539 at p. 560.

[629] A.Z. Borda, "A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals", Eur. J. Int. Law, vol. 24(2) pp. 649–661 p. 650.

[630] Ibid., at p.656.

[631] Helmersen, The Application of Teachings by the ICJ, at p. 27.

[632] Ibid.

[633] Ibid.

[634] Secretariat Memo, A/CN.4/759, observation 2, para. 17-20.

[635] Shahabuddeen, Precedent in the World Court, p. 77.

341. But "determine" as a verb can mean "decide" (laying down the law).[636] To determine is to "ascertain definitely by observation, examination, calculation, etc". It also means to "lay down decisively or authoritatively, to pronounce, declare, state" or to "settle or fix beforehand; to ordain, decree".[637] Shahabuddeen considers, without necessarily accepting, that the meaning of "determine" set out above may be applicable here, noting that "[i]n a legal context, the meaning is not limited to a finding or discovering of what already exists; it may include the bringing into being of a new legal phenomenon. This is the way the word is often used in legal documents; but for the 'determination', the matter determined may not have any existence in law".[638]The difference in meanings may just reflect the fine line between law-making and law-determining, the difference between which Jennings believes "is one of degree rather than one of kind".[639] Given the foregoing, Shahabuddeen concludes that "it seems arguable that the reference in Article 38, paragraph 1 (d), of the Statute to 'the determination of rules of law' may be read as including a determination of new rules of law by a decision of the Court itself which is based on earlier judicial decisions or the writings of publicists".[640]

342. Article 38 directs the Court to "apply" judicial decisions and teachings, as subsidiary means for the determination of rules of law. There is an apparent conflict in the drafting of Article 38 in this regard, as the Statute tells the Court to *apply* judicial decisions and the teachings of publicists and also to *use* them *as a means* for the determination of rules of law.[641] The category does not, properly speaking, consist of elements which the Court applies: it serves instead to aid the Court in the identification of the sources enumerated in Article 38 (1) (a) to (c).[642]

343. It seems that, as compared with the previous three subparagraphs, namely (a) to (c), Article 38 (1) (d) marks a change of register.[643] The formal sources of law, set out in the first three subparagraphs, are sources, while the last subparagraph addresses "means for the determination of rules of law", that is to say, proof of their existence and content. Judicial decisions and teachings do not give rise to rules of law: they can be said to have a role to play only downstream, with a view to assisting in the determination of the existence, and in the interpretation, of rules of law.[644] Put differently, both categories are applied, but only as a vehicle for the ascertainment of the existence of a treaty rule, a customary law rule, a general principle of law or another source of obligation that constitutes positive law.[645]

---

[636] M. Mendelson, "The Formation of Customary International Law", *Collected Courses of the Hague Academy of International Law*, vol. 272 (1998), pp. 155–410, at p. 202, footnote 95, also E. Roucounas, "Rapport entre 'moyens auxiliaires' de determination du droit international", *Thesaurus Acroasium*, vol. 19 (1992), pp. 259–284, at p. 263.

[637] "Determine." Oxford English Dictionary (2nd edn., 1989), IV, p. 550.

[638] Shahabuddeen, Precedent in the World Court, p. 77.

[639] R.Y Jennings, "General Course on Principles of International Law" in *Collected Courses of the Hague Academy of International Law*, Vol. 121 (Leiden: Sijthoff, 1967), p. 341.

[640] Shahabuddeen, *Precedent in the World Court*, p. 78.

[641] P. Allott, "Language, Method and the Nature of International Law", Br. Yearb. Int. Law, vol. 45 (1971), pp. 79–135 at p. 118.

[642] P. Tomka, "Article 38 du Statut de la CIJ: *incomplet*" in *Dictionnaire des idées reçues en droit international* (Paris, Pedone, 2017), pp. 39–42, at p. 40.

[643] Pellet, "Le droit international à la lumière de la pratique" in *Collected Courses of the Hague Academy of International Law*, Vol. 414 (Leiden: Sijthoff, 1967), pp. 9–547, at p. 181.

[644] Ibid.

[645] Helmersen, *The Application of Teachings by the International Court of Justice*, p. 29.

H. The Special Rapporteur's observations on the elements of subsidiary means

344. While the Special Rapporteur intends to return to some of the above issues in later reports, as necessary, for now, he wishes to offer a couple of tentative observations drawing on the text and practice concerning subsidiary means.

345. First, as confirmed by the text of Article 38, subsidiary means are not sources, at least not in the formal sense as the first three sources listed in the Article. As Rosenne has indicated, the subsidiary means in subparagraph 1 (d) are the "the storehouse from which the rules in of heads (a), (b) and (c) can be extracted".[646] In this sense, judicial decisions and teachings are not sources of law as such. Rather, they are "documentary 'sources' indicating where the Court can find evidence of the existence of the rules it is bound to apply by virtue of the three other sub-paragraphs".[647]

346. That said, in practice, as has been shown above, courts including the International Court of Justice do rely on their prior judicial decisions more so than teachings. This is natural. For after all, there is no point for judges to reinvent the wheel when resolving a new dispute. Indeed, prior jurisprudence is "frequently used to identify or elucidate a rule of law, not to make such a rule, i.e. not so much in the quality of binding precedents as having persuasive influence".[648] As Lauterpacht has noted, "'many an act of judicial legislation may in fact be accomplished under the guise of the ascertainment of customary international law".[649] This is despite the apparent formal limitation stemming from Article 59 that decisions of the Court carry no binding force except between the parties in respect of that particular case. There is a certain "ambiguity in the role of the Court in the development of international law – on the one hand the Statute excludes stare decisis, while, on the other hand, it is accepted that the Court has a central role in the development of international law".[650] Indeed, through practice, "the constant accretion of judicial precedents is creating what is now a substantial body of caselaw".[651] Not only that, "the effect of this has been the incorporation of a sensible modification into the apparent rigidity of Article 38, paragraph 1 (d)".[652] The consequence has extended to other international courts.

347. The Court's and other tribunals' use of prior judicial decisions have proven to be influential in standard-setting for themselves and even for States,[653] for other bodies with a role in the codification and progressive development of international law such as the General Assembly (which for instance adopted the Nuremberg Principles on the basis of the Commission's work which relied essentially on the

---

[646] Shabtai Rosenne, *The Law and Practice of the International Court*, *1920-2005*, vol. III, (Boston: Martinus Nijhoff Publishers, 2006), p. 1553. There is increasing empirical studies clarifying the practice of the ICJ and other international tribunals. See, for instance, Ridi, "The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication", 10 *Journal of International Dispute Settlement* (2019) 200; and Alschner and Charlotin, "The Growing Complexity of the International Court of Justice's Self-Citation Network", 29 *European Journal of International Law* (2018) 83.

[647] Pellet and Müller, "Article 38", p. 854.

[648] Rosenne, *The Law and Practice of the International Court*, *1920-2005*, p. 1609.

[649] Hersch Lauterpacht, *Development of International Law by the International Court*, (London: Stevens & Sons Ltd, 1958), p. 368.

[650] Tladi, "The Role of the International Court of Justice in the Developing of International Law", p. 70.

[651] Rosenne, *The Law and Practice of the International Court*, 1920-2005, p. 1553.

[652] Ibid.

[653] See Secretariat Memo, A/CN.4/759, observation 32, para. 137-138.

statute and judgment of a single tribunal), the Commission itself (which draws heavily on the rulings of the Permanent Court of International Justice and International Court of Justice), the United Nations Commission on International Trade Law (UNCITRAL) and for national courts.[654] Conversely "one exception to the apparent disregard of the Court for the legal doctrine: the Court's judgments and advisory opinions resort increasingly to the work of the International Law Commission, in order to interpret the codification conventions that the Commission has prepared, or to give evidence of the existence of customary rules by quoting the Commission's Draft Articles".[655]

348. A second tentative observation, and linked to the point made above, is that as a doctrinal matter, the two subsidiary sources, namely judicial decisions and teachings, are placed on the same footing in subparagraph 1 (d) of Article 38 of the ICJ Statute. There was no differentiation between the two, since, at the drafting stage in 1920, it was felt – at least by some members of the Advisory Committee of Jurists – that both could serve as sources of evidence to elucidate the existence or lack thereof of rules of positive law. However, as to teachings, the practice seems to show, in terms of how infrequently they are cited in majority decisions as opposed to individual opinions, that they are relatively less important compared to judicial decisions. Indeed, some have questioned whether it was appropriate to place the two on the same level.[656] But, while it can cogently be argued that they should not be, Pellet rightly notes that the criticism against placing judicial decisions and teachings on the same level is intellectually misplaced: "in the abstract, both perform the same function; they are means of ascertaining that a given rule is of a legal character because it pertains to the formal source of law. However, concretely, they can certainly not be assimilated; while the doctrine has a discreet (but probably efficient) role to that end, the use of the jurisprudence by the Court goes, in fact, far beyond what the expression 'auxiliary means' implies."[657]

349. Despite the criticisms against Article 38, it has "had an unquestionable influence on the development of international law and the law of international adjudication".[658] As expressed by Sørensen regarding the purported accord between Article 38 and international law, common ground has been consolidated by virtue of the very existence of Article 38 and its inherent authority.[659]

350. Finally, on this issue, the Special Rapporteur would welcome the views of members of the Commission on the implications of these tentative observations and in particular the relationship between subsidiary means and the principal sources.

[654] Rosenne, *The Law and Practice of the International Court*, 1920-2005, p. 1617.

[655] Pellet and Müller, *The Statute of the International Court of Justice: A Commentary*, "Article 38", p. 792.

[656] See Fitzmaurice, "Some problems regarding the formal sources of international law", pp. 496.

[657] Pellet, "Article 38", p. 784.

[658] Ibid. at p. 69. See also Charles Rousseau, Droit International Public, Tome 1 (Paris: Sirey,1970), at p. 59; Max Sørensen, Les sources du droit international: étude sur la jurisprudence de la Cour permanente de justice internationale, (Copenhagen: Einar Munksgaard, 1946), p. 40.

[659] Sørensen, Les sources du droit international, p. 40: 'la concordance prétendue entre cet article et le droit international commun s'est consolidée en vertu de l'existence même de l'article 38 et de son autorité inhérente'.

IX
Additional subsidiary means for the determination of rules of international law

A. The non-exhaustive nature of Article 38 raises questions about the existence of other subsidiary means

351. As must by now be well settled, on the basis of the foregoing chapters, Article 38 (1) (d) of the ICJ Statute essentially provides that "judicial decisions" and "the teachings of the most highly qualified publicists" are to be applied "as subsidiary means for the determination of rules of law". However, such subsidiary means for the determination of the rules of law are not expressly limited to judicial decisions and teachings. This is because – as discussed in in relation to the drafting history – Article 38, paragraph 1, is a directive to the Court and not necessarily an exhaustive enumeration of the sources of international law.

352. Since Article 38 is not exhaustive, nor was it ever intended to be so, the question should then arise as to what other sources of law remain. And, once those other sources of law are identified, consideration could be given to which of them are akin to the formal sources found in subparagraphs 1 (a) to (c) and which of them would be within the subsidiary means under subparagraph 1 (d). If there are some that may fall within the latter category, of subsidiary means, the further concern should be whether they may be considered within the bounds of this topic.

353. At least two views are possible. In the first place, for the Commission to add more value for international law through its efforts to clarify the place of subsidiary means in the determination of the rules of international law, further consideration should be given to the subsidiary means not expressly mentioned in the ICJ Statute. These are not sources drawn from thin air. Rather, they are those that are concrete and identifiable in the practice of international courts, in particular the International Court of Justice as the principal judicial organ of the United Nations. Conversely, the argument could be made that, even after the other subsidiary means invoked by States are identified, those subsidiary means not explicitly mentioned in Article 38 (1) (d) could be considered outside the scope of this topic.

354. Overall, taking into account the discussion in chapter III regarding the two possible paths of taking either a narrow or broad scope to the present topic, the Special Rapporteur will now, in full transparency, briefly (for reasons of space) address the basis for possible consideration of additional subsidiary means for the determination of the rules of international law. Therefore, with the sole intention of generating feedback from the members of the Commission, in the below, he will present some useful background which should assist in charting a way forward on this important issue. Pending the outcome of the debate on the issue, first giving members and States in the Sixth Committee the opportunity to share their reflections, he has not considered it appropriate to formulate any draft conclusions.

B. The scope of other subsidiary means within the established categories

355. There are various candidates given in the literature of what could possibly be considered additional sources of international law. This should not be surprising given the character of Article 38, paragraph 1. The main examples found in scholarship are said to be unilateral acts, resolutions or decisions of international organizations, agreements between States and international enterprises, religious law (including

sharia and Islamic law), equity, and soft law.[660] The issue is which, if any, of these would fall within the sources category, and of those, which of them would be subsidiary such as to potentially fall within the scope of the current topic. There are two levels of argument here. On the first level, it can be considered which subsidiary means fall within or outside the scope of Article 38, paragraph 1, would be dependent upon how broadly "judicial decisions" and "teachings" are construed. At the second level of argument, it will depend on the extent to which, as suggested in chapter VI of the present report, one accepts the Fitzmaurice argument that international lawyers focusing on the sources of obligations rather than on the sources of law is a potentially more promising route to follow in identifying the rules that can bind States as the primary subjects of international law.

356. So far, in the earlier part of the present report, judicial decisions have been defined as meaning judgments of international courts and tribunals as well as advisory opinions and incidental orders issued in the course of the proceedings. They also include decisions of municipal and regional courts on questions of international law. Teachings generally refer to the works of scholars, whether written individually or as part of groups of writers forming expert groups. That said, judicial decisions by national courts are generally recognized as falling under Article 38 (1) (d).[661] Judicial decisions and the teachings of publicists may, in some cases, be said to "practically converge or overlap in relation to the separate and dissenting opinions" of individual judges.[662]

357. Texts produced by State-empowered or better yet State-created bodies, such as the Commission, should be considered separate from the "teachings of publicists". Their texts are produced under the auspices of official institutions and may reflect the involvement of States and/or their representatives in the work. This makes them different from the "teachings of publicists".[663] Of course, despite what might be an official role, the pronouncements of experts are not "judicial decisions". They therefore do not fit under that plank of Article 38, paragraph 1. Since they do not generally create but do sometimes elucidate or deduce rules that can be said to be binding on States and are not issued in the context of concrete cases, they could be considered subsidiary means for the determination of rules of international law.

358. The Commission's *Survey of International Law in Relation to the Work of Codification of the International Law Commission* of 1949 holds that some International Law Commission (ILC) texts "would be at least in the category of writings of the most highly qualified publicists, referred to in Article 38" but adds that "their authority would be considerably higher", in part owing to "the resources of the United Nations".[664]

359. The Special Rapporteur's *Third report on identification of customary international law* discusses ILC texts under the heading "writings",[665] but this is not done in the later draft *Customary International Law Conclusions* (adopted on the first

[660] Thirlway, *The Sources of International Law* (2nd edition, Oxford University Press, 2019) p. 24-34.

[661] E.g. Thirlway, *The Sources of International Law*, p. 140, but see Pellet and Müller, "Article 38", in Andreas Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd Edition, 2019) p. 819, p. 954.

[662] Thirlway, *The Sources of International Law*, p. 133.

[663] Helmersen, *The Application of Teachings by the ICJ*, pp. 38-39.

[664] Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission - Memorandum submitted by the Secretary-General, A/CN.4/Rev.1, p. 16.

[665] Michael Wood, Third report on identification of customary international law, A/CN.4/682, paras. 55-67.

reading).[666] The commentaries did say that the Commission's works "merit special consideration" in the context of the identification of customary international law[667] but did not mention such works under the draft conclusion on the teachings of publicists.[668] Some writers argue that ILC works are teachings,[669] while others take the opposite view.[670] Yet others seem unsure.[671]

360. The Commission has taken a view of its own works. Consistent with its mandate, it did not consider them to be teachings, much less judicial decisions. But a measure of authority has been ascribed to its outputs. In that regard, in part five of the conclusions on the identification of customary international law, the Commission addressed the matter in the general commentary.[672] It found its own mandate to assist States in progressively developing and codifying international law, status as a subsidiary organ of the General Assembly, comprehensive working methods and close interaction with the General Assembly among the relevant considerations (even though the ultimate weight to be derived from its works would depend on several additional factors).

361. To be sure, the Commission has a particular mandate and does produce various documents, including reports by Special Rapporteurs and recommendations and conclusions from the Commission as a whole. The final outcomes of its deliberative process, whether styled draft articles or draft principles or draft conclusions, are often ascribed a measure of authority. The reports by the Special Rapporteurs are closer in nature to teachings than texts adopted by the Commission collectively. Even so, reports by Special Rapporteurs are produced under the auspices of an official institution, often based on at least an informal mandate, which may arguably distinguish them from the regular "teachings of publicists".[673] Such reports are then debated by the Commission as a whole and their outcomes reported to States, which in turn may express views on those outcomes.

362. There are many other State-created bodies. These include UNCITRAL and treaty bodies created pursuant to multilateral human rights treaties (the Human Rights Committee,[674] the Committee on Economic, Social and Cultural Rights,[675] the

[666] Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10), Chapter V, p. 111–112.

[667] *Yearbook…2018*, vol. II (Part Two), p. 104-105.

[668] Ibid. at p. 110.

[669] E.g. Michael Wood, "Teachings of the most Highly Qualified Publicists (Art. 38 (1) ICJ Statute) in *Max Planck Encyclopedia of International Law*, (2017) para. 11; American Law Institute, *Restatement of the Foreign Relations Law of the United States*, 3d ed. (Philadelphia, PA: American Law Institute Publishers, pg. 38; Fernando Lusa Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law", ICLQ, vol. 63 (2004), p. 535 at p.537.

[670] G. Fitzmaurice, "The Contribution of the Institute of International Law to the Development of International Law" in *Collected Courses of the Hague Academy of International Law*, vol. 138 (1973) p.203 at p. 220.

[671] André Oraison, "L'Influence des Forces Doctrinales Academiques sur les Prononces de la C.P.J.I. et de la C.I.J" RBDI, vol. 32 (1999) p. 205 at 208; J Dugard and D Tladi "Sources of International Law" in John Dugard, Max Du Plessis, Tiyanjana Maluwa, Dire Tladi (ed.), *Dugard's International Law: A South African Perspective*, 5th ed. (South Africa: Juta & Company Ltd. 2019), pp. 28-48 at 37–38; Borda, "A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals", p. 656–657.

[672] Conclusions on the identification of customary international law with commentaries, *Yearbook of the International Law Commission, 2018*, vol. II, Part II, at p. 149.

[673] Helmersen, *The Application of Teachings by the ICJ*, p. 39.

[674] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, p.171.

[675] International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 993, p.171.

Committee on the Elimination of Racial Discrimination,[676] the Committee against Torture,[677] the Committee on the Elimination of Discrimination against Women,[678] the Committee on the Rights of the Child,[679] the Committee on Migrant Workers,[680] the Committee on Enforced Disappearances[681] and the Committee on the Rights of Persons with Disabilities[682]). These expert bodies play a variety of functions, including the authoritative interpretation of obligations of States under the relevant instruments through, for instance, the issuance of general comments and in some cases the hearing of individual complaints brought against States. The Commission's *conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* found that the work of such treaty bodies "may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32" of the Vienna Convention on the Law of Treaties.[683]

363. Reports from the special procedures of the Human Rights Council may also count as State-created bodies. There are also regional codification bodies created by States or international organizations, such as the Inter-American Juridical Committee, the Asian-African Legal Consultative Organization, the Committee of Legal Advisers on Public International Law and the African Union Commission on International Law.

364. Text produced by private bodies, such as the *Institut de droit international*, should, by contrast, be considered "teachings".[684]

365. ICRC claims to have a "hybrid nature"[685] as a Swiss-incorporated "private association" whose "functions and activities" are nonetheless "mandated by the international community of States".[686] States have little, if any, role in the creation of ICRC texts.[687] Texts produced by ICRC could, as a starting point, qualify as "the teachings of publicists".[688] This was the view taken by the English Court of Appeals in *Serdar Mohammed and others v. Secretary of State for Defence*, where it held that "[t]he institutional views of the ICRC also qualify as 'the teachings of the most highly qualified publicists of the various nations', so that they qualify as a subsidiary source for the determination of rules of international law: ICJ Statute, Article 38(1)(d)".[689]

---

[676] International Covenant on The Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, p.1.

[677] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, p.85.

[678] Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, p.1.

[679] Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, p.3.

[680] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990), United Nations *Treaty Series*, vol. 2220, p.3.

[681] International Convention for the Protection All Persons from Enforced Disappearance (20 December 2006), United Nations *Treaty Series*, vol. 2716, p.3.

[682] Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), United Nations, *Treaty Series*, vol. 2515, p.3.

[683] *Yearbook…2018*, vol. II (Part Two), p. 25.

[684] Conclusion 14 para. 5 includes "[t]he output of international bodies engaged in the codification and development of international law" under a discussion of "teachings".

[685] Gabor Rona, "The ICRC"s status: in a class of its own", ICRC (17 February 2004) <icrc.org/eng/resources/documents/misc/5w9fjy.htm>.

[686] Gabor Rona, "The ICRC"s status: in a class of its own", ICRC (17 February 2004) <icrc.org/eng/resources/documents/misc/5w9fjy.htm>; similarly Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 204–205.

[687] Alan Boyle and Christine Chinkin, *The Making of International Law*, p. 205.

[688] Gideon Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar 2012) p. 115.

[689] *Serdar Mohammed and others v. Secretary of State for Defence* [2015] EWCA Civ 843, para. 171.

366. Other private expert bodies include, in addition to the *Institut de droit international*, the International Law Association, Harvard Research, the American Law Institute and the TMC Asser Institute. All of them frequently publish different types of outputs, and in the case of the American Law Institute, former, authoritative restatements on various topics including international law.

367. Most of the above bodies have been cited by the Commission in the course of its work, as detailed in the Secretariat memorandum. In some instances, the Commission has relied on or relied upon their findings and in some cases disagreed with their findings. References to such bodies can also be seen in the works of special rapporteurs. For instance, the *Second report on general principles of law* considered that "public and private codification initiatives, have also been considered when determining the existence and content of a principle common to national legal systems".[690]

C. Potential candidates for subsidiary means

368. As indicated earlier, based on practice, there are various possible sources of international law to the extent that our concern is to identify the basis for binding legal obligations for States under international law. As earlier noted, for the purposes of commencing the debate on this matter, two of the more common examples usually found in literature are briefly considered in turn in the paragraphs that follow, those being unilateral acts of States, including statements made by State officials which may give rise to legal obligations, and resolutions and decisions of international organizations, both being the basis of obligations that can and have been recognized in judicial decisions which, as argued earlier in the present report, could be thought of as material sources.

369. Regarding unilateral acts, as a theoretical matter, they can be thought of either as a primary source of obligations for States or as auxiliary means for the determination of rules of law. Unilateral acts can, of course, be binding on States, as the International Court of Justice confirmed in the *Nuclear Tests* cases. There, the Court stated that "[i]t is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations".[691] Being recognized, in a decision of the International Court of Justice, the question is whether the decision itself could be seen as the subsidiary means for determining the existence and content of a rule of international law.

370. The Commission's *guiding principles applicable to unilateral declarations of States capable of creating legal obligations* presuppose the same, as the first guiding principle takes as its starting point that "[d]eclarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations".[692] Since such declarations are legally binding, when certain conditions are fulfilled, they should not be considered "subsidiary means". The more plausible view is likely that they simply fall outside the ambit of Article 38, paragraph 1.[693] In the preliminary view of the Special Rapporteur, these may not have a natural place in Article 38, paragraph 1, of the ICJ Statute. They could even be considered "inchoate treaties",[694] or more broadly,

[690] International Law Commission, Second report on general principles of law, A/CN.4/741, p.55, para. 180

[691] Nuclear Tests (*Australia v. France; New Zealand v. France*), Judgments, ICJ Reports (1974), p. 253 and 457, para. 43 and para. 46. See also Legal Status of Eastern Greenland, Judgment, PCIJ, Series A/B, No. 53, p. 22, 73.

[692] *Yearbook…2006*, vol. II (Part Two), p. 161, para. 176.

[693] E.g. Alain Pellet and Daniel Müller, "Article 38", in Andreas Zimmermann and others (eds.), *The Statute of the International Court of Justice: A Commentary* (3rd Edition, 2019) p. 819, p. 853.

[694] Thirlway, *The Sources of International Law*, p. 51.

sources of legal obligations in certain circumstances. Why, as sources of binding legal obligations, they would have to be qualified as subsidiary means as opposed to primary sources of international law, would appear unclear. There is therefore, taking into account the prior work of the Commission on the topic, likely no need to include such possible sources of obligations for States under international law in the present study focused on subsidiary means for determination of rules of international law.

371. The provisions of resolutions or decisions adopted by international organizations or intergovernmental conferences can be binding or non-binding. Where the provisions of resolutions are binding, they will be sources of binding obligations for the relevant States. In this regard, it is well known that certain resolutions of the Security Council are binding on United Nations Member States. This follows from the operation of Chapter VII of the Charter of the United Nations and Articles 24 and 25, where Member States "agree to accept and carry out the decisions of the Security Council". There are also resolutions of the Security Council that may be non-binding, for example, those taken on the basis of Chapter VI of the Charter of the United Nations which may produce other legal effects. The classification of the resolutions as binding or non-binding carries legal consequences for Member States of the United Nations and, in relation to binding resolutions, implicates article 103 of the Charter, which provides that conflicting obligations owed under any other international agreements will give way to those prevailing under the Charter. Security Council resolutions are not treaties, even though they derive their binding authority from a treaty.[695]

372. The General Assembly, as the plenary organ of that body, may adopt resolutions on a variety of questions under Articles 10 to 14 of the Charter of the United Nations. Article 10 empowers the General Assembly to "discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter", and to "make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters".[696] Article 13 contains a more specific power to "initiate studies and make recommendations for the purpose of, among other things, "the progressive development of international law and its codification".[697] For this purpose, by a resolution to which was annexed the Statute, the General Assembly established the Commission, whose "object [is] the promotion of the progressive development of international law and its codification", but the General Assembly may also do its own independent work in this area – as it has done in the past through the Sixth (Legal) Committee.

373. Historically, when the General Assembly has adopted resolutions on general matters of international law, their degree of acceptance in that universal forum has served as evidence of the views of States in the identification of rules of international law as recognized by both the International Court of Justice and the Commission. Some so-called law-making resolutions include the Nuremberg Principles,[698] the Declaration on the Granting of Independence to Colonial Countries and Peoples,[699] the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[700] the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space,[701] the Rio Declaration on Environment and

[695] Pellet and Müller, "Article 38", p. 857.

[696] United Nations, *Charter of the United Nations*, 1945, 1 UNTS XVI, Article 10.

[697] *Charter of the United Nations*, Article 13.

[698] GA Resolution 95(I), 11 December 1946.

[699] GA Resolution 1514 (XV), 14 December 1960.

[700] GA Resolution 2625 (XXV), 24 October 1970.

[701] GA Resolution 1962 (XVIII), 13 December 1963.

Development[702] and the United Nations Declaration on the Rights of Indigenous Peoples.[703]

374. Given the above discussion and the Commission's assessment of the role of resolutions in other topics, the question is whether they could (also) be characterized as a form of subsidiary means to the extent that a rule of international law is articulated in a judgment or decision of an international court or tribunal based on recognition of the views or provisions expressed in a resolution adopted by a universal membership body. If the resolution is considered a material source, like a judicial decision, then it could well be argued that it is a subsidiary means for determining a rule of international law. The International Court of Justice has in various cases pronounced on both matters, and to the extent that a study of them is decided by the Commission in this topic, those decisions and opinions and the prior conclusions in other related topics will be the primary basis for our consideration.

D. Distinguishing between subsidiary means and evidence of the existence of rules of international law

375. If a decision is made to address one of the above issues, for instance the place of resolutions of international organizations, such subsidiary means will have be distinguished from sources that serve as evidence of the existence of a rule or the elements of a rule. While this issue could be addressed in a future report, as necessary, it may be helpful to lay down a number of points at this stage.

376. A treaty collection may be used to show that a treaty exists. It would not be correct to call the treaty collection a subsidiary means for the determination of rules of law. The treaty collection as such plays no role in the interpretation of the treaty. Subsidiary means for the determination of rules of international law are means that are, by contrast, used for the content, quality and persuasiveness of their ideas about the law. They may, for example, aid in the interpretation of a treaty.

377. Non-binding resolutions and similar documents can be used as evidence of the existence of a rule of customary law or of a general principle of law. They may alternatively be used for the content, quality and persuasiveness of their ideas about general principles of law. The Special Rapporteur's first report on general principles of law recognized that, in order "to identify a general principle of law, a careful examination of available evidence showing that it has been recognized is required".[704] The second report noted that "[o]ther types of materials" (than judicial decisions and the teachings of publicists), "such as public and private codification initiatives, have also been considered when determining the existence and content of a principle common to national legal systems".[705]

378. To conclude the present section, the definition of subsidiary means depends not only on a typology of instruments but also on their application in a particular case. Any source, instrument or text, whether binding or non-binding, that can inspire legal arguments can be used as a subsidiary means for the determination of rules of law in a particular case. At the same time, an instrument that has the potential to be used as a subsidiary means may instead be used as evidence of the existence of rules of international law.

[702] GA Resolution 47/190, 22 December 1992.
[703] GA Resolution 61/295, 13 September 2007.
[704] Marcelo Vazquez-Bermudez, First report on general principles of law (5 April 2019), A/CN.4/732, p. 49, para. 165.
[705] Marcelo Vazquez-Bermudez, Second report on general principles of law (9 April 2022), A/CN.4/741, p. 55, para. 180.

E. Questions of weight

379. Different subsidiary means will have varying levels of "weight" or "authority". This may also vary between systems, in the sense that one subsidiary means may have different weight in different contexts. For example, decisions by one international court or tribunal usually have great significant to that court or tribunal itself, but they may be considered less important by a different court or tribunal, which may instead give priority its own decisions. We also see this in the practice of the Commission.

380. The weight of "other" subsidiary means may depend on the "care and objectivity" with which they are drafted. This is suggested by the Commission's *conclusions on the identification of customary international law*, when discussing the "value" of "the output of international bodies engaged in the codification and development of international law", along with "the extent to which the output seeks to state existing law".[706] The Commission has also suggested that its own output "merits special consideration" in part owing to "the thoroughness of its procedures",[707] but that its "weight" in part depends on "the sources relied upon".[708] The "weight" also depends on "the stage reached in its work",[709] which may be taken to mean that the later stages benefit more from the thoroughness of the drafting process. Individual International Court of Justice opinions seem to consider "quality" relevant to the weight of teachings.[710] The same may apply to other subsidiary means. Quality seems to be one reason that works produced by the Commission are considered important to the International Court of Justice, as these are produced by a thorough drafting process.[711] Bordin suggests that a thorough drafting "procedure […] may establish a presumption in favour of the view endorsed in the non-legislative codification".[712]

381. The expertise of the individuals involved in drafting a text is another factor that may influence its weight.[713] This is mentioned by the Commission in the *conclusions on the identification of customary international law* as a factor influencing the "value" of "the output of international bodies engaged in the codification and development of international law".[714] This too is suggested by the Commission in the *conclusions on the identification of customary international law* and is considered by individual International Court of Justice judges applying the teachings of publicists.[715] This is another reason that works produced by the Commission are considered important, as members must be "persons of recognized competence in international law".[716] Bordin also suggests "authorship" as a factor that "may establish a presumption in favour of the view endorsed in the non-legislative codification".[717]

---

[706] Conclusion 14, para. 5. Official Records of the General Assembly, Seventy-third session, Supplement No. 10. (A/73/10), p. 151.
[707] Ibid., p. 142-143.
[708] Ibid.
[709] Ibid.
[710] Helmersen, *The Application of Teachings by the ICJ*, pp. 110-114.
[711] Ibid., p. 87-88.
[712] Fernando Lusa Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law" ICLQ, vol. 63 (2014), p. 535 at p. 560.
[713] Helmersen, *The Application of Teachings by the ICJ*, p. 129.
[714] Conclusion 14, para. 5. Official Records of the General Assembly, Seventy-third session, Supplement No. 10. (A/73/10), p. 151.
[715] Helmersen, *The Application of Teachings by the ICJ*, pp. 107-110.
[716] ILC, Statute of the International Law Commission, 1947, Article 2(1).
[717] See Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law".

382. Another relevant factor may be how well any subsidiary means fit within an institution's mandate. "Mandate" is mentioned by the Commission in the *conclusions on the identification of customary international law* as a factor influencing the "value" of "the output of international bodies engaged in the codification and development of international law".[718] The Commission has, in the same document, suggested that its own output "merits special consideration" in part owing to its "unique mandate". Subsidiary means are often produced by organizations that have been given a mandate by States. A subsidiary means that falls squarely within such a mandate may have more weight than one that falls outside it. Some institutions have a general mandate, such as the Commission, which is empowered to develop and codify "international law" whether public or private.[719] Other institutions may have a narrower and more specialized mandate. That the International Court of Justice in *Diallo* believed "that it should ascribe great weight to the interpretation adopted by" the Human Rights Committee,[720] which was within the Committee's narrow mandate, supports this view. In the *Committee on the Elimination of Racial Discrimination* case, by contrast, the Court "carefully considered the position taken by the CERD Committee" but did not follow it.[721]

383. The level of agreement or disagreement behind a subsidiary means may also matter. The Commission mentioned "support...within the body" as a factor influencing the "value" of "the output of international bodies engaged in the codification and development of international law" in its *conclusions on the identification of customary international law*.[722] International Court of Justice judges seem to consider this relevant to the weight of the teachings of publicists.[723] The level of unanimity behind a judicial decision may influence its weight.[724] When it comes to other subsidiary means, resolutions from international organizations are usually adopted with States either voting for or against or abstaining from voting. A resolution with fewer negative votes or abstentions should have relatively more weight. A high level of agreement may be particularly significant if the concurring parties represent different geographical regions or cultures.[725] Bordin lists "representation" as a final factor that "may establish a presumption in favour of the view endorsed in the non-legislative codification".[726]

384. A related factor that may influence the "value" of "the output of international bodies engaged in the codification and development of international law", also mentioned in the *conclusions on the identification of customary international law*, is "the reception of the output by states and others", i.e. the level of agreement *outside* the relevant body.[727] The Commission has suggested that its own output "merits

[718] Conclusion 14, para. 5. Official Records of the General Assembly, Seventy-third session, Supplement No. 10. (A/73/10), p. 151.
[719] ILC, Statute of the International Law Commission Statute, 1947, Article 1(1).
[720] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 66.
[721] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 71, para. 101.
[722] Conclusion 14, para. 5. Official Records of the General Assembly, Seventy-third session, Supplement No. 10. (A/73/10), p. 151.
[723] Helmersen, *The Application of Teachings by the ICJ*, pp. 120-123.
[724] E.g. Daniel Naurin and Øyvind Stiansen, "The Dilemma of Dissent: Split Judicial Decisions and Compliance With Judgments From the International Human Rights Judiciary", Comparative Political Studies, vol. 53 (2020), p. 959 at p. 960.
[725] Helmersen, *The Application of Teachings by the ICJ*, pp. 122-123.
[726] Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law", p. 560.
[727] Conclusion 14, para. 5. Official Records of the General Assembly, Seventy-third session, Supplement No. 10. (A/73/10), p. 151.

special consideration" in part due to its "close relationship with the General Assembly and States", but that their value depends "above all upon States'" reception of its output.[728]

385. This appears to suggest that subsidiary means that fall outside Article 38, paragraph 1, of the ICJ Statute may be subject to the same factors that determine weight as those that fall within Article 38, paragraph 1. While Article 38, paragraph 1, is not exhaustive, in some respects, it ultimately does not matter what falls inside or outside. The same operation must be performed in either case. One of the above issues will merit further engagement, again, depending on whether the decision is taken to include the additional subsidiary means that are not expressly mentioned in the ICJ Statute. That will be a decision for the Commission to make to the extent that members offer views in support of its consideration within the scope of this topic. In the view of the Special Rapporteur, there seem to be compelling considerations in favour of addressing resolutions and many countervailing considerations against inclusion of unilateral acts capable of creating binding legal obligations, which, after all, have already been separately addressed as a topic by the Commission.

[728] Ibid, pp.142-143.

X
Conclusion and future programme of work

386. Given the extensive analysis contained in the various chapters of this first report, rooted in the practice and grounded in the most relevant and admittedly vast literature on the topic, the Special Rapporteur is pleased to now be in a position to propose the following draft conclusions for consideration by the Commission:

Draft conclusion 1
Scope

The present draft conclusions concern the way in which subsidiary means are used to determine the existence and content of rules of international law.

Draft conclusion 2
Categories of subsidiary means for the determination of rules of law

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

(a) Decisions of national and international courts and tribunals;

(b) Teachings of the most highly qualified publicists of the various nations;

(c) Any other means derived from the practices of States or international organizations.

Draft conclusion 3
Criteria for the assessment of subsidiary means for the determination of rules of law

Subsidiary means used to determine a rule of international law are assessed on the basis of the quality of the evidence presented, the expertise of those involved, conformity with an official mandate, the level of agreement among those involved and the reception by States and others.

Draft conclusion 4
Decisions of courts and tribunals

(a) Decisions of international courts and tribunals on questions of international law are particularly authoritative means for the identification or determination of the existence and content of rules of international law;

(b) For the purposes of paragraph (a), particular regard shall be had to the decisions of the International Court of Justice;

(c) Decisions of national courts may be used, in certain circumstances, as subsidiary means for the identification or determination of the existence and content of rules of international law.

Draft conclusion 5
Teachings

Teachings of the most highly qualified publicists of the various nations, especially those reflecting the coinciding views of scholars, may serve as subsidiary means for the identification or determination of the existence and content of rules of international law.

387. Although it is subject to change, on the basis of the actual progress of the work on the topic and the decision on the scope outlined in the preceding chapters (in particular chaps. III and IX), the Special Rapporteur proposes the following tentative programme for the work of the Commission.

388. In the second report, to be submitted in 2024, the Special Rapporteur will return to the discussion of the function of subsidiary means focusing in particular on judicial decisions and their relationship to the primary sources of international law, namely treaties, customary international law and general principles of law.

389. The third report, to be submitted in 2025, proposes to analyse teachings and, as appropriate, other subsidiary means. This would include the role played by the works of individual but also State-created or State-empowered bodies and private expert bodies as well as regional and other codification bodies as subsidiary means in the determination of the rules of international law. The same report will then address miscellaneous issues that arise from the debate within the Commission and comments from States. It will thus constitute an opportunity to assess the draft conclusions already adopted with a view to enhancing their overall coherence.

390. If the above timetable is maintained, it is hoped that a first reading of the entire set of draft conclusions could be completed in 2025, and taking into account the usual one-year time frame provided to States and others to submit their written comments, a completion of the second reading in 2027.

Annex

Draft conclusions proposed by the Special Rapporteur

Draft conclusion 1
Scope

The present draft conclusions concern the way in which subsidiary means are used to determine the existence and content of rules of international law.

Draft conclusion 2
Categories of subsidiary means for the determination of rules of law

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

(a) Decisions of national and international courts and tribunals;

(b) Teachings of the most highly qualified publicists of the various nations;

(c) Any other means derived from the practices of States or international organizations.

Draft conclusion 3
Criteria for the assessment of subsidiary means for the determination of rules of law

Subsidiary means used to determine a rule of international law are assessed on the basis of the quality of the evidence presented, the expertise of those involved, conformity with an official mandate, the level of agreement among those involved and the reception by States and others.

Draft conclusion 4
Decisions of courts and tribunals

(a) Decisions of international courts and tribunals on questions of international law are particularly authoritative means for the identification or determination of the existence and content of rules of international law;

(b) For the purposes of paragraph (a), particular regard shall be had to the decisions of the International Court of Justice;

(c) Decisions of national courts may be used, in certain circumstances, as subsidiary means for the identification or determination of the existence and content of rules of international law.

Draft conclusion 5
Teachings

Teachings of the most highly qualified publicists of the various nations, especially those reflecting the coinciding views of scholars, may serve as subsidiary means for the identification or determination of the existence and content of rules of international law.