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Subsidiary means for the determination of rules of international law

Memorandum by the Secretariat

Summary

This memorandum was prepared in response to a request made by the International Law Commission at its seventy-third session (2022). It endeavours to identify elements in "the case law of international courts and tribunals, and other bodies, which would be particularly relevant for its future work on the topic for submission at the seventy-fifth session".

The introduction addresses preliminary issues, following which the memorandum is presented in the form of observations and accompanying explanations concerning examples of judicial decisions and other materials found in the case law of international courts, tribunals and other bodies that may assist the Commission.

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Contents

I. Introduction

1. At 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] At its seventy-third session (2022), the Commission included the topic in its current programme of work.[2] Also at that session, the Commission requested that the Secretariat first prepare a memorandum for submission at the seventy-fourth session identifying elements in the previous work of the Commission that could be particularly relevant for the topic and, second, prepare a memorandum surveying the case law of international courts and tribunals and other bodies, which would be particularly relevant for the Commission's future work on the topic, for submission at the seventy-fifth session.[3] The first such memorandum was issued on 8 February 2023.[4] The present memorandum has been prepared pursuant to the second request.

2. The basis of this topic is Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, which provides that the Court shall apply "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

3. To fulfil the request from the Commission, the Secretariat has engaged in a review of the case law of certain international courts and tribunals, and other bodies, with a view to identifying materials that are useful for the Commission in its consideration of the current topic. Given the volume of material relevant to the preparation of this memorandum, the Secretariat has followed a pragmatic and expedient methodology by presenting observations with illustrative supporting examples, not comprehensive supporting material.

4. Also due to the volume of material potentially within the scope of this memorandum, it was not possible to study the decisions of all international courts, tribunals and bodies. The Secretariat has focused on the following: the Permanent Court of International Justice, the International Court of Justice, the International Tribunal for the Law of the Sea, arbitral tribunals in cases between States and between States and international organizations, the International Criminal Court, the International Criminal 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, the Special Tribunal for Lebanon and nine United Nations human rights treaty bodies: the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child, the Committee on Enforced Disappearances, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities and the Committee on Migrant Workers.

5. The study does not therefore include decisions or awards: of investor-State arbitral tribunals; of the Dispute Settlement Body of the World Trade Organization; under the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization; or of regional courts and tribunals.

[1] *Official Records of the General Assembly, Seventy-sixth Session, Supplement No. 10* (A/76/10), para. 302. By its resolution 76/111 of 17 December 2021, the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work.

[2] *Ibid.*, *Seventy-seventh Session, Supplement No. 10* (A/77/10), para. 20.

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

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

Submissions of the parties to disputes and the separate and dissenting opinions of judges and arbitrators have not been systematically included within the scope of the study both because they are not "decisions" as such and to keep the volume of material involved within reasonable limits.[5]

6. It is important to highlight that, except in a small number of examples, the courts, tribunals and other bodies included in the present study have not stated expressly whether their reliance on judicial decisions or other materials was in fact a use of them as subsidiary means within the meaning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. The inclusion of the large number of examples where there is no express reference to subsidiary means nor to Article 38, paragraph 1 (d), should not be understood as the Secretariat expressing a view on whether or to what extent such examples constitute a use of decisions or other materials as subsidiary means for the determination of rules of international law. These examples are included so that the Commission has access to a wide range of material to assist it with its consideration of the topic. The use of the terms "judicial decisions", "decisions" or "teachings" in any of the observations or examples below should similarly not be understood as the Secretariat expressing a view on whether the observation or example in question is one where the material has been relied on as subsidiary means within the meaning of Article 38, paragraph 1 (d). In general, the term "writings" has been used rather than "teachings" to avoid any such confusion.

7. The Secretariat has included examples where international courts, tribunals and other bodies have referred to materials that have been discussed within the Commission as possibly constituting subsidiary means, such as references to the works of expert bodies, arbitral awards and resolutions of international organizations. The Secretariat should again not be understood as expressing a view on whether these other materials are references to subsidiary means. They are included so that the Commission has access to a wide range of material to assist it with its consideration of the topic.

8. Three further matters should be borne in mind when considering the examples presented in the present memorandum.[6]

9. First, each of the international courts and tribunals referred to in the present study has applicable law provisions contained in its constituent instrument or statute. In some instances, these applicable law provisions may permit the court or tribunal in question to refer to decisions of other courts or tribunals for certain purposes. The content of these various applicable law provisions is explained below in the respective sections of the present study. The general point to make in the present introduction is that, in circumstances where such an applicable law provision applies, it is possible that references by the court or tribunal in question to decisions of other courts or tribunals might be examples of the use of the applicable law provision rather than examples of reliance on those decisions as subsidiary means for the determination of rules of law within the meaning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

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[5] As noted in earlier studies conducted by the Secretariat, it is the case that frequent references to judicial decisions and writings may be found in such submissions by parties and opinions. See, for example, Secretariat study on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, *Yearbook of the International Law Commission, 2016*, vol. II (Part One), document A/CN.4/691, observation 10 and paras. 28-30.

[6] These matters were drawn attention to by members of the Commission during the debate on the Special Rapporteur's report. See, for example, the statements of Mr. Forteau (A/CN.4/SR.3626 (provisional), pp. 8-13), Mr. Fife (A/CN.4/SR.3628 (provisional), pp. 3-9) and Mr. Akande (A/CN.4/SR.3632, pp. 6-10).

10. Second, a number of the examples in the present study concern judicial decisions and other materials that are relied on for the purpose of the interpretation of rules of international law, in particular, the interpretation of the provisions of treaties in accordance with articles 31 and 32 Vienna Convention on the Law of Treaties.[7] The Commission has not yet determined what is the relationship between reliance on materials for such interpretative purposes and reliance on them as subsidiary means within the meaning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, including whether the same materials may be relied on for both purposes.

11. Third, a number of the examples in the present study may concern judicial decisions that are referred to by the court, tribunal or other body in the context of the process of formation of rules of international law, often rules of customary international law. As stated in the commentaries to the conclusions on the identification of customary international law, decisions of national courts may provide evidence of State practice and/or of *opinio juris* relevant to the formation of rules of customary international law.[8] Further, as stated in the commentaries to the draft conclusions on the general principles of law as adopted on first reading, decisions of national courts may provide evidence that a principle exists within the various national legal systems of the world.[9] The Commission has not yet determined what is the relationship between reliance on judicial decisions as constituent elements in the process of formation of rules of international law and reliance on them as subsidiary means within the meaning of Article 38, paragraph 1 (d), of the Statute of the International Court of Justice, including whether the same decisions may be relied on for both purposes.

12. With these important caveats, the Secretariat has presented examples in the present study in the form of observations and accompanying explanations.

II. Decisions of international courts and tribunals

A. Permanent Court of International Justice

13. Subsidiary means for the determination of rules of law were referred to in Article 38, paragraph 4, of the Statute of the Permanent Court of International Justice in identical terms to the successor provision – Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. As commented upon by the Secretariat in its memorandum on the identification of customary international law, the Permanent Court of International Justice dealt mainly with treaties; it seldom had recourse to determine rules of customary international law (or general principles of law). Further, given the period of time in which the Permanent Court of International Justice operated (from 1922 to 1940), there are few, if any, examples of references to the decisions of other international tribunals. Such examples as there are refer to the Court's own previous decisions, decisions of arbitral tribunals and decisions of national courts. These matters should be borne in mind when considering the examples presented in the present section.

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

[8] Para. (8) of the commentary to conclusion 3 on the identification of customary international law, *Yearbook … 2018*, vol. II (Part Two), para. 52.

[9] Commentary to draft conclusion 3 of the draft conclusion on general principles of law, *Official Records of the General Assembly, Seventy-eighth* Session, Supplement No. 10 (A/78/10), para. 41.

1. No express reference to subsidiary means under Article 38 of the Permanent Court of International Justice Statute

Observation 1

The Permanent Court of International Justice did not make express reference in any of its decisions or advisory opinions to subsidiary means for the determination of rules of law nor to Article 38, paragraph 4, of its Statute.

Observation 2

The Court did not explain why no reference was made to "subsidiary means" or "Article 38, paragraph 4" in its cases.

14. The Permanent Court of International Justice did not make any express reference to subsidiary means nor to Article 38, paragraph 4, of its Statute in any of its decisions or advisory opinions, nor explain why it did not do so. The Secretariat should not be understood as taking a view on whether or to what extent the examples presented in the present section may constitute a use of decisions of courts and tribunals and other materials as subsidiary means for the determination of rules of international law.

2. Reliance of the Permanent Court of International Justice on its own previous decisions when considering its jurisdiction

Observation 3

The Permanent Court of International Justice referred to its own prior decision when (partially) dismissing a challenge to its jurisdiction.

15. In the *Mavrommatis Palestine Concessions* case,[10] the British Government challenged the basis of the Court's jurisdiction to hear the case brought by Greece (on behalf of its national) on the basis that, although the conditions laid down in Articles 34 and 36 of the Court's Statute were met (i.e. that both parties were States members of the League of Nations and the case arose out of a treaty in force – the Mandate for Palestine[11]), the terms of the dispute settlement provision contained in the Mandate were not met. That provision required that there be a "dispute" which "cannot be settled by negotiation". The Permanent Court of International Justice, relying on its own prior Advisory Opinion No. 4, decided that the prior negotiations between Mr. Mavrommatis (a private individual) and the British Government formed part of the required negotiations.[12]

Observation 4

The Permanent Court of International Justice referred to its own previous decision when reframing a legal question that had been presented to it.

16. In the Advisory Opinion on the *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*,[13] a series of treaties between Greece and Turkey had established a Mixed Commission to deal with issues arising from the transfer of populations between the two countries following the First World War. The

[10] *Mavrommatis Palestine Concessions, Judgment, 30 August 1924, P.C.I.J., Series A, No. 2*, p. 5.

[11] Approved at a meeting of the Council of the League of Nations (London, 22 July 1922), *Mandate for Palestine, together with a Note by the Secretary-General relating to its application to the Territory known as Trans-Jordan, under the provisions of Article 25* (London, His Majesty's Stationery Office, 1922).

[12] *Mavrommatis Palestine Concessions* (see footnote 10 above), pp. 13–15.

[13] *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV), Advisory Opinion, 28 August 1928, P.C.I.J. Series B, No. 16*, p. 3.

particular provision that the Court was called upon to interpret concerned reference of issues by the Mixed Commission to the Greco-Turkish Arbitral Tribunal, whose decisions would be binding. The question put to the Court concerned the conditions for reference of an issue to the Arbitral Tribunal. The Court determined that this was not the correct question, which should rather have been by whom such reference could be made. The Court, "following the precedent afforded by its Advisory Opinion No. 3", rephrased the question before it to be able to provide an advisory opinion regarding the powers of the Mixed Commission.[14]

3. Treaty interpretation

Observation 5

The Permanent Court of International Justice relied on its own previous decisions to indicate that recourse to the *travaux préparatoires* of a treaty should occur only when the treaty text was unclear.

17. In the *S.S. "Lotus"* case,[15] the Court recalled "what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."[16]

18. In *Interpretation of the Convention of 1919 concerning Employment of Women during the Night*,[17] the Court referred to the opinions expressed by certain delegates with expert knowledge of the discussions held in Geneva in 1930 and 1931 as to the scope of the Convention. The Court stated that "in doing so, the Court does not intend to derogate in any way from the rule which it has laid down on previous occasions that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself."[18]

Observation 6

The Permanent Court of International Justice relied on its prior decisions when determining that restrictions on sovereign rights accepted by treaty are not an infringement of sovereignty.

19. In the Advisory Opinion concerning *Jurisdiction of the European Commission of the Danube*,[19] the Court stated that, as it has "had occasion to state in previous judgments and opinions, restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty".[20]

4. Formation and identification of rules of customary international law

20. The study carried out by the Secretariat in 2016 concerning the use of national court decisions for the identification of rules of customary international law highlighted that, in so far as the Permanent Court of International Justice looked at questions concerning the determination of rules of customary international law, it did so primarily in the *S.S. "Lotus"* case.[21]

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[14] *Ibid*., pp. 15–16.
[15] *Case of the S.S. "Lotus", Judgment, 7 September 1927, P.C.I.J. Series A., No. 10*.
[16] *Ibid*., p. 16.
[17] *Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 15 November 1932, P.C.I.J., Series A/B, No. 50*, p. 364.
[18] *Ibid*., p. 378.
[19] *Jurisdiction of the European Commission of the Danube between Galatz and Braila, Advisory Opinion, 8 December 1927, P.C.I.J., Series B, No 14*, p. 5.
[20] *Ibid*., p. 36.
[21] *Case of the S.S. "Lotus"* (see footnote 15 above).

Observation 7

The Permanent Court of International Justice examined national court decisions when determining the possible formation of a rule of customary international law.

21. In the *S.S. "Lotus"* case, the Court referred to national court decisions when assessing the claim by France that a customary rule had formed to the effect that, in criminal proceedings in cases of collision at sea, jurisdiction fell exclusively to the flag State. The Court considered several decisions of national courts referred to by the parties, but dismissed their relevance on account of their inconsistency. The Court used the language of the two-element approach for the formation of customary international law by examining the "conduct" of the States concerned and whether their "conception of that law" was "generally accepted".[22] The Court determined that "as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law".[23] It did so "[w]ithout pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law".[24] The Court concluded that "there is no principle of international law … which precludes the institution of the criminal proceedings under consideration."[25]

Observation 8

The Permanent Court of International Justice referred to writings and arbitral awards when considering the above possible formation of a rule of customary international law.

22. In the *S.S. "Lotus"* case, when considering whether exclusive jurisdiction of the flag State could be considered a rule of customary international law, the Court also considered writings and stated that "apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law", it was the case that all or nearly all writers considered that ships on the high seas were subject to the exclusive jurisdiction of the flag State.[26]

23. The Court also considered arbitral awards when concluding that there was insufficient evidence to establish the asserted rule of customary international law.[27]

5. Determination of an essential principle of international law

Observation 9

The Permanent Court of International Justice referred to its previous decision and decisions of arbitral tribunals concerning the existence and content of the duty to make reparations under international law.

24. In the judgment on the merits of the *Factory at Chorzów* case,[28] the Court recalled that, in its Judgment No. 8, it had "already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself".[29]

[22] *Ibid*., p. 29.
[23] *Ibid*.
[24] *Ibid*., p. 28.
[25] *Ibid*., p. 31.
[26] *Ibid.*, p. 26.
[27] *Ibid*., p. 27.
[28] *Case concerning the Factory at Chorzów (Merits), Judgment, 13 September 1928, P.C.I.J., Series A., No. 17*, p. 3.
[29] *Ibid*., p. 29.

25. The Court then emphasized that the "essential principle" contained in the notion of an illegal act:

> which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[30]

6. The identification of "principles"

Observation 10

The Permanent Court of International Justice relied on its own decisions and decisions of arbitral tribunals and national courts a number of times to identify "principles", without assigning any particular legal value to such principles.

26. In the *Electricity Company of Sofia and Bulgaria*,[31] the Court referred to:

> the principle universally accepted by international tribunals and likewise laid down in many conventions … to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.[32]

27. In the decision on jurisdiction in the *Factory at Chorzów* case,[33] the Court noted that it is:

> a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.[34]

28. In the *Brazilian Loans* case,[35] the Court noted that, as it had "explained in its judgment in the case of the *Serbian loans*, it is a generally accepted principle that a State is entitled to regulate its own currency".[36]

7. Approach of the Permanent Court of International Justice to precedent and consistency

Observation 11

The Permanent Court of International Justice referred on a number of occasions to the importance of consistency with its prior decisions in the absence of sufficient reason to depart from them.

29. In *Certain German Interests in Polish Upper Silesia (Merits)*,[37] the Court stated that the claim of Poland to have acquired certain property had already been addressed in its Advisory Opinion No. 6. The principle that, in the event of change of sovereignty, private rights must be respected "is clearly recognized by the Treaty [of

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[30] *Ibid.* p. 47.
[31] *Electricity Company of Sofia and Bulgaria, Order (Request for the Indication of Interim Measures of Protection), 5 December 1939, P.C.I.J, Series A/B*, *No. 79*, p. 193.
[32] *Ibid*., p. 199.
[33] *Factory at Chorzów (Jurisdiction)*, Judgment, 26 July 1927, Series A, No. 9, p. 3.
[34] *Ibid*., p. 31.
[35] *Brazilian Loans, Judgment, 12 July 1929, P.C.I.J., Series A, No. 21*, p. 92.
[36] *Ibid*., p. 122.
[37] *Certain German Interests in Polish Upper Silesia (Merits), Judgment, 25 May 1926, P.C.I.J., Series A, No. 7*, p. 3.

Versailles]. Nothing has been advanced in the course of the present proceedings calculated to alter the Court's opinion on this point".[38]

30. In the *Readaptation of the Mavrommatis Concessions* case,[39] the Court held that the interpretation of articles 11 and 26 of the Mandate for Palestine had been established in its Judgments No. 2 and 5, where it had addressed challenges to its jurisdiction over questions concerning concessions for the supply of water and electricity to Jerusalem.[40] The Court indicated that it saw "no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound".[41]

Observation 12

On some occasions, the Permanent Court of International Justice referred to its reasoning in prior cases and applied the same approach.

31. In the *Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*,[42] the Court recalled its Judgment No. 7, where it had indicated that "a measure prohibited by an international agreement cannot become lawful under that instrument simply by reason of the fact that the State concerned also applies the measure to its own nationals".[43]

32. In its Advisory Opinion on *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV),* the Court considered that:

> any interpretation or measure capable of impeding the work of the [Mixed] Commission in this domain must be regarded as contrary to the spirit of the clauses providing for the creation of this body. The Court has already adopted this standpoint in its Advisory Opinion No. 10.[44]

B. International Court of Justice

33. The study of the present topic by the Commission is based on Article 38, paragraph 1 (d), of the Statute of the International Court of Justice. Article 38, paragraph 1, is the applicable law clause for disputes brought before the International Court of Justice.[45]

[38] *Ibid*., p. 31.
[39] *Readaptation of the Mavrommatis Jerusalem Concessions (Jurisdiction), Judgment, 10 October 1927, P.C.I.J., Series A, No. 11*, p. 3.
[40] *Ibid*., p. 14.
[41] *Ibid.*, p. 18.
[42] *Appeal from a Judgment of the Hungaro/Czecoslovak Mixed Arbitral Tribunal (The Peter Pázmány University)*, *Judgment, 15 December 1933 P.C.I.J., Series A/B, No. 61*, p. 207.
[43] *Ibid*., p. 243.
[44] *Interpretation of the Greco-Turkish Agreement* (see footnote 13 above), p. 18.
[45] In a limited number of examples of cases submitted to the International Court of Justice by special agreement, the parties to the dispute have agreed to the application of specific rules or principles. See, for example, article 6 of the Special Agreement seising the International Court of Justice of the Boundary Dispute between Burkina Faso and the Republic of Niger (Niamey, 24 February 2009, United Nations, *Treaty Series*, vol. 2707, No. 47966, p. 49) jointly notified to the Court on 20 July 2010, which stated that "The rules and principles of international law applicable to the dispute are those referred to in Article 38, paragraph 1, of the Statute of the International Court of Justice, including: the principle of the intangibility of boundaries inherited from colonization and the Agreement of 28 March 1987."

1. Express references to subsidiary means or Article 38, paragraph 1 (d), of the Statute of the International Court of Justice

Observation 13

The International Court of Justice has expressly referred to "subsidiary means" or "Article 38, paragraph 1 (d)" on only three occasions, and one of these was in fact a reference to supplementary means of treaty interpretation.

Observation 14

The International Court of Justice has not explained why "subsidiary means" or "Article 38, paragraph 1 (d)" were not referred to in the great majority of its cases, nor why these terms were referred to in the limited number of examples below.

34. Although the International Court of Justice has referred on many occasions to the decisions of courts and tribunals, including primarily its own previous decisions and advisory opinions, it has only expressly referred to "subsidiary means" or "Article 38, paragraph 1 (d)" on three occasions.

35. In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, the International Court of Justice referred to a 1917 judgment of the Central American Court of Justice. The International Court of Justice considered that:

> the *Chamber should take the 1917 Judgement into account as a relevant precedent decision of a competent court, and as, in the words of Article 38 of the Court's Statute, a subsidiary means for the determination of rules of law"*. In short, the Chamber must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit.[46]

36. In *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, the Court indicated that it would interpret the Vienna Convention on Diplomatic Relations[47] using the canons of interpretation reflected in the Vienna Convention on the Law of Treaties:

> [u]nder these rules of customary international law, the provisions of the Vienna Convention on Diplomatic Relations must be interpreted in good faith in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the Convention. To confirm the meaning resulting from that process, to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, *recourse may be had to subsidiary means of interpretation, which include the preparatory work of the Convention and the circumstances of its conclusion*.[48]

[46] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 351, at para. 403 (emphasis added).

[47] Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961), United Nations, *Treaty Series*, vol. 500, No. 7310, p. 95.

[48] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Judgment, I.C.J. Reports 2020*, p. 300, at para. 61 (emphasis added).

It is clear that in this example, the Court is in fact referring to the materials that can be used as supplementary means of interpretation pursuant to the rules reflected in article 32 of the Vienna Convention on the Law of Treaties.[49]

37. In the *Gulf of Maine* case, the Court indicated that:

> 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.[50]

In this example, therefore, the Court expressly referred to its own judicial decisions and arbitral awards in the context of Article 38, paragraph 1 (d), of its Statute.

38. Express references to subsidiary means or Article 38, paragraph 1 (d), of the Statute have been made more often in separate and dissenting opinions of the Court's judges. These are not dealt with systematically in the present study as they are not "decisions".

39. In the remaining examples in the present section, the Court has not made any express references to subsidiary means nor to Article 38, paragraph 1 (d), nor explained why it has not done so. The Secretariat should not be understood as taking a view on whether or to what extent the examples presented below may constitute a use of judicial decisions or other materials as subsidiary means for the determination of rules of international law.

2. Reliance of the International Court of Justice on its previous decisions and those of the Permanent Court of International Justice when considering its jurisdiction or competence

Observation 15

The International Court of Justice has relied on its own previous decision to determine that it has inherent judicial authority.

40. The Court referred in the *Nuclear Tests* case[51] to its own prior judgment in the *Northern Cameroons* case[52] to support its determination that the Court has "inherent judicial authority". This authority "derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded".[53] The purpose of these powers is broad: to safeguard the Court's basic judicial functions, and to enable it to take "such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits … shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute…. [T]he Court is fully empowered to make whatever findings may be necessary for [these] purposes".[54] The Court has

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[49] Article 32 of the Vienna Convention on the Law of Treaties reads (emphasis added): "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."

[50] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at para. 83.

[51] *Nuclear Tests (Australia v France), Judgment, I.C.J. Reports 1974*, p. 253.

[52] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C. J. Reports 1963*, p. 15, at p. 29.

[53] *Nuclear Tests (Australia v France)* (see footnote 51 above), para. 23.

[54] *Ibid*.

relied, at least to some extent, on inherent judicial authority in relation to the independent assessment of facts [55] and the legally binding nature of interim measures.[56]

41. As will be seen in later sections of the present study, inherent judicial authority was also relied on by the International Criminal Tribunal for the Former Yugoslavia and other United Nations criminal tribunals when determining that they had authority to determine the legality of their own establishment (*compétence de la compétence*).

Observation 16

The International Court of Justice has referred to its own decisions and those of the Permanent Court of International Justice to interpret its Statute in relation to the exercise of discretion to give an advisory opinion.

42. The International Court of Justice has stated that it "has always been guided by the principle which the Permanent Court stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923: 'The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court'".[57]

43. It has emphasized, referring to its decision in *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, that "only 'compelling reasons' should lead it to refuse to give a requested advisory opinion".[58] Further, the Court has relied on its own decisions to interpret Article 65 of its Statute to indicate that its power to give an advisory opinion "is permissive and, under it, that power is of a discretionary character".[59]

44. In *Legal Consequences of the Separation of the Chagos Archipelago*,[60] the Court relied on its previous decisions and those of the Permanent Court of International Justice to indicate that, "it may depart from the language of the question put to it where the question is not adequately formulated"[61] or "does not reflect the 'legal questions really in issue'".[62] It also noted that "where the question asked is ambiguous or vague, the Court may clarify it before giving its opinion"[63] and "[a]lthough, in exceptional circumstances, the Court may reformulate the questions referred to it for an advisory opinion, it only does so to ensure that it gives a reply 'based on law'".[64]

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[55] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, at para. 60.

[56] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at paras. 102–103.

[57] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151, at p. 155, citing *Status of Eastern Carelia, Advisory Opinion, 23 July 1923, P.C.I.J., Series B, No. 5*, p. 29.

[58] *Ibid.*, p. 155, citing *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., I.C.J. Report 1956*, p. 77, at p. 86.

[59] *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1987*, p. 18, at para. 25, citing *Western Sahara, Advisory Opinion, 1.C.J. Reports 1975*, p. 12, at para. 23.

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

[61] *Ibid*., para. 135, citing (*Interpretation of the Greco-Turkish Agreement* (see footnote 13 above)).

[62] *Ibid*., citing *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at para. 35.

[63] *Ibid*., citing *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325, at para. 46.

[64] *Ibid*., citing *Western Sahara* (see footnote 59 above), para. 15.

Observation 17

The International Court of Justice has referred to its own decisions and those of the Permanent Court of International Justice in the determination of the scope of its jurisdiction.

45. In the *Norwegian loans* case,[65] the International Court of Justice relied on its previous decisions and those of the Permanent Court of International Justice when determining that, "[a]s the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself".[66]

Observation 18

The International Court of Justice has relied on its own decisions to determine that it has jurisdiction to deal with submissions alleging non-compliance with provisional measures.

46. The International Court of Justice has referred on a number of occasions to its own decision in *LaGrand*, in which it determined that, where it has jurisdiction to decide a case, "it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the rights of the Parties to this dispute has not been complied with".[67]

Observation 19

The International Court of Justice has referred to its previous decisions when interpreting declarations and reservations.

47. In *Fisheries Jurisdiction (Spain v. Canada),* the Court noted that:[68]

> Every declaration "must be interpreted as it stands, having regard to the words actually used" (*Anglo-Iranian Oil Co., Preliminary Objection, Judgment, I.C.J. Reports 1952*, p. 105). Every reservation must be given effect "as it stands" (*Certain Norwegian Loans, Judgment, I.C.J. Reports 1957*, p. 27). Therefore, declarations and reservations are to be read as a whole. Moreover, "the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text." *(Anglo-lranian Oil Co., Preliminary Objection, Judgment, I. C. J. Reports 1952*, p. 104.)

3. Interpretation of treaties

Observation 20

The International Court of Justice has not expressed a view on the relationship between subsidiary means for the determination of rules of law, on the one hand, and the rules and principles applicable to the interpretation of treaties, on the other.

48. In none of its decisions or advisory opinions has the International Court of Justice expressed itself regarding the relationship between subsidiary means for the

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[65] *Case of Certain Norwegian Loans, Judgment of July 6th, 1957: I.C. J. Reports 1957*, p. 9.

[66] *Ibid*., pp. 23-24, referring to the *Anglo-Iranian Oil Co. case (jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports 1952*, p. 93, at p. 103, *Phosphates in Morocco, Judgment, June 14th, 1938, P.C.I.J., Series A/B, No. 74*, p. 9, at p. 22; *Electricity Company of Sofia and Bulgaria, Judgment, April 4th, 1939, P.C.I. J., Series A/B, No. 77*, p. 63, at p. 81.

[67] *LaGrand (Germany v. United States of America), Judgment* (see footnote 56 above), para. 45.

[68] *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 432, at para. 47.

determination of rules of law within the meaning of Article 38, paragraph 1 (d), of its Statute and the rules and principles applicable to treaty interpretation under articles 31 and 32 of the Vienna Convention on the Law of Treaties which reflect customary international law.

Observation 21

The International Court of Justice has relied on its own previous decisions to identify principles for the interpretation of treaties.

49. For example, the Court has held that "the interpretation of a treaty should seek to give effect to every term in that treaty and that no provision should be interpreted in a way that renders it devoid of purport or effect".[69]

50. In the Advisory Opinion on the *Competence of the General Assembly regarding admission to the United Nations*, referring to *Polish Postal Service in Danzig,* the International Court of Justice indicated that it is a "cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd".[70]

51. The Court has on occasion referred to its own decisions and those of the Permanent Court of International Justice to refer to a principle of treaty interpretation "consistently upheld by the international jurisprudence, namely that of effectiveness".[71] The Court has also cited the reasoning of the Permanent Court of International Justice in *Acquisition of Polish Nationality* indicating that it should directly apply a clause which "leaves little to be desired in the nature of clearness".[72]

Observation 22

The International Court of Justice has referred to its own previous decision when determining that it did not need to consider supplementary means for the interpretation of a treaty.

52. In the *Gambia v. Myanmar* case,[73] the Court referred to the *Bosnia Genocide* case[74] when determining that the terms of article VIII of the Convention on the

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[69] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 100, para. 41, also referring to *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at para. 133; *Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949*, p. 4, at p. 24.

[70] *Competence of the General Assembly regarding admission to the United Nations, Advisory Opinion: I.C.J. Reports 1950*, p. 4, at p. 8, referring to *Polish Postal Service in Danzig, Advisory Opinion, 16 May 1925, P.C.I.J., Series B, No. 11*, p. 5, at p. 39.

[71] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at para. 51, citing the *Lighthouses Case between France and Greece, Judgment, 17 March 1934, P.C.I.J., Series A/B. No. 62*, p. 3, at p. 27; *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 para. 66; and *Aegean Sea Continental Shelf, I.C.J. Reports 1978*, p. 3, at para. 52.

[72] *Acquisition of Polish Nationality, Advisory Opinion, 15 September 1923, P.C.I.J., Series B, No. 7*, p. 5, at p. 20, cited in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 71 above), para. 51.

[73] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477.

[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at para. 159.

Prevention and Punishment of the Crime of Genocide,[75] considered in their context, did not refer to the seisin of the Court. In light of that finding, the Court determined that it did not need to examine supplementary means for interpretation, such as the *travaux préparatoires* of the Convention.[76]

4. Formation and identification of rules of customary international law.

Observation 23

The International Court of Justice has not expressed a view on the relationship between subsidiary means for the determination of rules of law and the formation and identification of rules of customary international law.

53. In none of its decisions or advisory opinions has the International Court of Justice expressed itself regarding the relationship between subsidiary means for the determination of rules of law within the meaning of Article 38, paragraph 1 (d), of its Statute and the formation and identification of rules of customary international law under Article 38, paragraph 1 (b).

Observation 24

The International Court of Justice has referred to its own previous decisions and the decisions of other international courts and tribunals on many occasions when determining the existence and content of rules of customary international law.

54. For example, the Court has referred to its own decisions to indicate that certain provisions of the United Nations Convention on the Law of the Sea[77] contain rules of customary international law. For example, in *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia beyond 200 nautical miles from The Nicaraguan Coast*, the Court referred to its own decisions indicating that "the rights and duties of coastal States and other States in the exclusive economic zone set out in Articles 56, 58, 61, 62 and 73 of [the United Nations Convention on the Law of the Sea] reflect customary international law",[78] and the definition of the continental shelf in article 76, paragraph 1.[79]

55. Another example can be found in *Certain Activities* and *Construction of a Road* where the Court noted that, as "restated in the *Pulp Mills* case, under customary international law, '[a] State is … obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State'".[80]

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[75] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.

[76] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (see footnote 73 above), paras. 88–90.

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

[78] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment, 13 July 2023, General List No. 154, para. 69, citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2022*, p. 266, at para. 57.

[79] *Ibid*., para. 52, citing *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 624, at para. 118.

[80] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665, at para. 118, citing *Pulp Mills in the Uruguay River (Argentina v. Uruguay)*, *I.C.J. Reports 2010*, p. 14, at para. 101; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at para. 29.

Observation 25

On occasion, the International Court of Justice has referred to some of the rules on State responsibility codified by the International Law Commission as part of customary international law.

56. In the *Pulp Mills* case, the International Court of Justice cited, among others, the 2001 articles on the responsibility of States for internationally wrongful acts (articles on State responsibility) and noted that:

> customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both.[81]

57. In *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, the Court stated that, "even if the [wrongful] act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed … This rule is reflected in Article 35 of the International Law Commission's Articles."[82]

58. In the judgment on reparations in *Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda),* the Court noted that article 31 of the articles on State responsibility "reflects customary international law".[83] The International Court of Justice also referred to the commentary to articles 31 and 47 and noted that:

> in certain situations in which multiple causes attributable to two or more actors have resulted in injury, a single actor may be required to make full reparation for the damage suffered … In other situations, in which the conduct of multiple actors has given rise to injury, responsibility for part of such injury should instead be allocated among those actors.[84]

Observation 26

On various occasions, the International Court of Justice has relied on its own decisions identifying certain treaty rules as part of customary international law.

59. For example, the Court has repeatedly stated that the rules of treaty interpretation contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties are part of customary international law.[85]

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[81] *Pulp Mills* (see footnote 80 above), para. 273. The articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76-77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

[82] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at para. 137.

[83] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022*, p. 13, at para. 70.

[84] *Ibid*., para. 98.

[85] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Preliminary Objections, Judgment, 6 April 2023, General List No. 171, para. 87. See also *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Judgment* (footnote 48 above), para. 61; *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 292, at para. 91; *Jadhav (India v. Pakistan), Judgment, I.C.J. Reports 2019*, p. 418, at para. 71; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004,* p. 12, at para. 83.

5. Identification of "principles"

Observation 27

The International Court of Justice has occasionally referred to its own decisions in support of determining or confirming the existence of a general principle of law.

60. In *Pedra Branca/Pulau Batu Puteh*, the Court noted that it "is a general principle of law, confirmed by the jurisprudence of this Court, that a party which advances a point of fact in support of its claims must establish that fact".[86]

61. In a number of judgments, the Court has referred to its own previous decisions to elaborate on the elements and scope of the principle of *res judicata,* which, "as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal",[87] which "establishes the finality of the decision adopted in a particular case".[88] The Court has built on its own decisions to explain the scope and application of such principle, indicating that "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of *res judicata* attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it".[89]

Observation 28

The International Court of Justice has often relied on its own previous decisions when determining or confirming the existence of established rules or principles of international law.

62. Examples of rules or principles developed by the Court and frequently relied on in its subsequent decisions include:

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[86] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 12, at para. 45.

[87] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018*, p. 139, at para. 68, also referring to *Delimitation of the Continental Shelf between Nicaragua and* (see footnote 69 above), para. 58, which in turn refers to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 116.

[88] *Arbitral Award of 3 October 1899* (see footnote 85 above), para. 65, referring to *Delimitation of the Continental Shelf* (see footnote 69 above), para. 58. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), paras. 115 and 117; *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections *(Nigeria v. Cameroon), Judgment, I.C.J. Reports 1999*, p. 31, at para. 12; *Corfu Channel case, Judgment of 15th, 1949, I.C.J. Reports 1949*, p. 244, at p. 248.

[89] *Delimitation of the Continental Shelf* (see footnote 69 above), para. 60, referring to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 126.

– The notion of "dispute" in the *Mavrommatis* case,[90] and that "it is for the Court *itself to determine the subject-matter of the dispute before it, taking account of the submissions of the parties".*[91]

– *The notion of restitutio in integrum in the Factory at Chorzów case.*[92]

– *The methodology for maritime delimitation (Black Sea).*[93] *The Court has also noted that* other international tribunals have applied the rules it has developed on the methodology for the delimitation of maritime spaces.[94]

– The *Monetary gold* principle, namely the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".[95]

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[90] *Mavrommatis Palestine Concessions* (see footnote 10 above), p. 11. See, for example, *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022*, p. 614, at para. 39; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* (see footnote 73 above), para. 63; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022*, p. 211, at para. 28; *Delimitation of the Continental Shelf* (see footnote 69 above); *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar), Judgment, I.C.J. Reports 2020*, p. 96, para. 29.

[91] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 832, at para. 38, citing *Fisheries Jurisdiction (Spain v. Canada)* (see footnote 68 above), paras. 29-32.

[92] See, for example, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 100; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15, at paras. 29-30; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at para. 161; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at para. 259; *Avena* (see footnote 85 above), para. 119; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at para. 150; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 106.

[93] See for example, *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Judgment, I.C.J. Reports 2021*, p. 206, at para. 122, where the Court has indicated that: "Since the adoption of the Convention, the Court has gradually developed a maritime delimitation methodology to assist it in carrying out its task. In determining the maritime delimitation line, the Court proceeds in three stages, which it described in the case *concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine) Judgment, I.C.J. Reports 2009*, pp. 101-103, paras. 115-122)." See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (see footnote 79 above), para. 190; *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014*, p. 3, at para. 180; *Maritime Delimitation* and *Land Boundary* (see footnote 87 above), para. 135.

[94] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (see footnote 93 above), para. 128, the Court noted that, "The three-stage methodology for maritime delimitation has also been used by international tribunals (see *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 67, para. 239; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), Award of 7 July 2014, UNRIAA*, vol. XXXII, p. 106, para. 346; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 96, para. 324."

[95] *Case of the monetary gold removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954, I.C.J. Reports 1954*, p. 19, at p. 32. In the case of the *Arbitral Award of 3 October 1899* (*Guyana v. Venezuela)* (see footnote 85 above), the Court noted that: "For example, in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, the Court concluded that 'the Court [could] decline to exercise its jurisdiction' on the basis of the principle referred to as 'Monetary Gold' … (*Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 262, para. 55)". *Monetary gold*, p. 32, also cited in *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at para. 34, and *Jurisdictional Immunities* (see footnote 82 above), para. 127. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015,* p. 3, at para. 116; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at para. 88.

– The Court's interpretation of the scope of the duty to negotiate for the purpose of dispute settlement.[96]

– The Court has also noted that the "principle of *non ultra petita* is well established in the jurisprudence of the Court".[97]

63. In the Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement*, the Court recalled the "fundamental principle of international law that international law prevails over domestic law".[98] This principle was endorsed by judicial decisions as long ago as the arbitral award of 14 September 1872 in the *Alabama* case between Great Britain and the United States, and has frequently been recalled since, for example in the case concerning the *Greco-Bulgarian "Communities"* in which the Permanent Court of International Justice stated that:[99]

> it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

Observation 29

The Court has referred to its own decisions in support of the existence of "principles", without necessarily ascribing any particular legal value to such principles.

64. In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court recalled "that it is a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy' and the continued existence of that régime is not dependent upon the continuing life of the treaty under which the régime is agreed" citing its decision in *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*.[100]

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[96] *ICAO Council (Bahrain, Egypt and United Arab Emirates v. Qatar)* (see footnote 91 above), para. 94: The Court has considered that such duty to negotiate:

> "'could not be understood as referring to a theoretical impossibility of reaching a settlement. It rather implies that … 'no reasonable probability exists that further negotiations would lead to a settlement'" (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012* (II), p. 446, para. 57, quoting *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 345). In past cases, the Court has found that a negotiation precondition was satisfied when the parties' "basic positions ha[d] not subsequently evolved" after several exchanges of diplomatic correspondence and/or meetings (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II*), p. 446, para. 59; see also *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I),* p. 317, para. 76). The Court's inquiry into the sufficiency of negotiations is a question of fact to be considered in each case (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I),* p. 133, para. 160).

See also *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports* 2011, p. 664, at para. 132.

[97] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand), Judgment, I.C.J. Reports 2013*, p. 281, at para. 71, referring to *Request for interpretation of the Judgment of November 20th, 1950, in the* Asylum *case, Judgment of November 27th, 1950: I.C.J. Reports 1950*, p. 395, at p. 402; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at para. 43.

[98] *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 para. 57.

[99] *The Greco-Bulgarian "Communities", Advisory Opinion, July 31st, 1930, P.C.I.J, Series B, No. 17*, p. 32.

[100] *Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections* (see footnote 91 above), para. 89, citing *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 71 above), p. 37, paras. 72–73.

65. The Court has referred to its earlier decisions to indicate that the principle of the land dominates the sea is applicable in relation to the continental shelf.[101] In the *Aegean Sea Continental Shelf* case, the Court referred to its decision in the *North Sea Continental shelf* case to indicate that:

> the continental shelf is a legal concept in which "the principle is applied that the land dominates the sea" (*I.C.J. Reports 1969*, p. 51, para. 96); and it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law.[102]

6. Interpretation of unilateral acts of States.

Observation 30

The Court has referred to its own previous decisions when considering the interpretation of unilateral acts of States.

66. Since the *Nuclear Tests* case, the Court has held that:[103]

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.

67. The International Court of Justice has referred on occasion to this decision to support the position that, when "States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for".[104] In the *Frontier Dispute (Burkina Faso v. Mali*), the Court built on *Nuclear Tests* and emphasized that "it all depends on the intention of the State in question".[105]

68. The Court has also referred to its decision in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, where it noted that to determine the legal effect of a statement by a person representing the State, one must "examine its actual content as well as the circumstances in which it was made".[106]

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[101] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007*, p. 659, para. 113; see also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Merits, Judgment, I.C.J. Reports 2001*, p. 40, at para. 185.

[102] *Aegean Sea* (see footnote 71 above), para. 86, citing *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at para. 96.

[103] *Nuclear Tests (Australia v. France)* (see footnote 51 above), para. 43, cited, *inter alia*, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility* (see footnote 95 above), para. 59; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, Judgment, I.C.J. Reports 2006*, p. 6, at para. 49; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, at para. 146.

[104] *Nuclear Tests (Australia v. France)* (see footnote 51 above), para. 44; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 473, at para. 47, cited in *Pedra Branca/Pulau Batu Puteh* (see footnote 86 above), para. 229.

[105] *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554, at para. 39.

[106] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility* (see footnote 103 above), para. 49, referred to in *Obligation to Negotiate Access to the Pacific* (see footnote 103 above), para. 146.

7. Approach of the International Court of Justice to precedent and consistency

Observation 31

The International Court of Justice has relied on its own previous decisions and those of the Permanent Court of International Justice on a number of occasions to confirm that there is no system of binding precedent before the International Court of Justice.

69. In the *Libya/Malta Continental Shelf* case, for example, the International Court of Justice referred to the rule in Article 59 of the Statute, pursuant to which a decision of the International Court of Justice has no binding force except between the parties and in respect of that particular case. The Court stated that the object of Article 59 was to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes.[107]

Observation 32

The International Court of Justice has also emphasized that, although a State is not bound by previous decisions in cases of the Court to which it was not a party, the Court will follow its previous decisions unless there is cause not to follow their reasoning or conclusions.

70. In *Land and Maritime Boundary (Cameroon v. Nigeria),* for example, the Court determined that:

> It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is *cause not to follow the reasoning and conclusions of earlier cases.*[108]

Observation 33

The International Court of Justice has relied on its own prior decisions more frequently than decisions of non-International Court of Justice courts and tribunals and arbitral awards.

The International Court of Justice has on a number of occasions relied on its own prior decisions using terms such as "settled jurisprudence", "consistent jurisprudence", "established jurisprudence", "established case law" and "constant jurisprudence".[109]

71. Although the Secretariat has not been able to conduct a comprehensive or statistical survey of all International Court of Justice decisions for the reasons set out in the introduction to the present memorandum, it is readily apparent from the large number of such decisions that have been examined that the Court most often refers to its own prior decisions, more so than the decisions of other international courts and tribunals or

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[107] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3, at para. 42.

[108] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at para. 28 (emphasis added). A similar text is found in S*outh 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. 334, where the Court referred the advisory opinion in *International status of South-West Africa, Advisory Opinion: I.C.J. Reports 1950*, p. 128, at p. 138, and noted that: "The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950."

[109] The Court has also the used the terms "*jurisprudence constante*" in many cases, with various translations to English.

of national courts. When referring to its own decisions, the Court has on a number of occasions used the term "settled jurisprudence" in relation to various matters, including:

– that jurisdiction must be determined at the time at which the application is filed with the Court;[110]

– maritime delimitation, where the "first stage of the Court's approach is to establish the provisional equidistance line";[111]

– that "a dispute must exist for a request for interpretation to be admissible";[112]

– that "the Court must examine *propio motu* the question of its own jurisdiction" to consider the application made by a State.[113]

72. In the case concerning *United States Diplomatic and Consular Staff in Tehran*, the Court referred to its "settled jurisprudence" to reject the position that it should decline to resolve legal questions in the context of a broader political dispute between the parties, which "would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes".[114]

73. The Court has also referred to its "settled jurisprudence" in the Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, indicating that such jurisprudence "establishes that if … a question submitted in a request [for an advisory opinion] is one that otherwise falls within the normal exercise of its judicial process, the Court has not to deal with the motives which may have inspired the request".[115]

74. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court discussed whether it would apply the effective control test developed in the case concerning *Military and Paramilitary Activities in and against Nicaragua* for the

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[110] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (see footnote 78 above), para. 41; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 97 above), para. 26.

[111] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), para. 118. See also *Maritime Delimitation* and *Land Boundary* (see footnote 87 above), para. 98 ("In accordance with its established jurisprudence, the Court will proceed in two stages: first, the Court will draw a provisional median line; second, it will consider whether any special circumstances exist which justify adjusting such a line"), citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 101 above), para. 176; and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (see footnote 101 above), para. 268.

[112] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v. United States of America) *(Mexico v. United States of America), Judgment, I.C.J. Reports 2009*, p. 3, at para. 21, citing *Request for interpretation of the Judgment of November 20th, 1950, in the* Asylum *case* (see footnote 97 above), p. 402, and *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia v. Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985*, p. 192, at para. 44; and *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections *(Nigeria v. Cameroon)* (see footnote 88 above), para. 12.

[113] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, *Decision, 2 February 1973,* General List No. 56, p. 49, at para. 13; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973*, p. 3, at para. 12; *Aegean Sea* (see footnote 71 above), para. 15.

[114] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, at para. 37.

[115] *Interpretation of the Agreement of 25 March 1951* (see footnote 62 above), para. 33, referring to *Admission of a State to the United Nations (Charter, Art. 4), Advisory Opinion: I.C.J. Reports 1948*, p. 57, at pp. 61-62; *Competence of the General Assembly regarding admission to the United Nations* (see footnote 70 above), pp. 6-7; *Certain expenses of the United Nations* (see footnote 57 above), p. 155.

attribution of State responsibility for internationally wrongful acts. An argument was presented to the Court that the "overall control test" developed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case should be applicable. The Court decided that it was "on the basis of its settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the [International Law Commission] Articles on State Responsibility".[116]

75. The Court used the term "consistent jurisprudence" on various occasions when referring to its own decisions and those of the Permanent Court of International Justice:

– to indicate that in "accordance with its consistent jurisprudence, only 'compelling reasons' should lead the Court to refuse [to give] its [advisory] opinion";[117]

– to refer to the "consistent jurisprudence"[118] and "established case law"[119] concerning the definition of a dispute in the *Mavrommatis* case;

– to indicate that "in accordance with its consistent jurisprudence … it is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the State merely by virtue of exercising their functions, including for the performance, on behalf of the said State, of unilateral acts having the force of international commitments".[120]

Observation 34

On a number of occasions, the International Court of Justice has referred to the value of consistency of judicial decisions and of international law.

76. On occasion, the Court has referred to the value of consistency and predictability of the judicial function. For example, when referring to the application of equitable principles in the delimitation of the continental shelf, recalling its decision in *North Sea Continental Shelf* in 1969, the Court indicated that the application of the rule of law[121] "should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application".

77. In *Jan Mayen*, the Court referred to its previous decisions when determining a maritime boundary. The Court that, in undertaking such exercise, a court has to determine the relative weight to be accorded to different considerations in the case, including the case's circumstances, "but also previous decided cases and the practice of

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[116] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 407.

[117] *Legal Consequences of the Separation of the Chagos Archipelago* (see footnote 59 above), para. 65, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at para. 30; *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), para. 14.

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

[119] See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 833, para. 37; *Application of the International Convention … (Georgia v. Russian Federation)* (see footnote 69 above), para. 30.

[120] *Armed Activities on the Territory of the Congo (New Application: 2002 (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility* (see footnote 103 above), para. 46.

[121] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, at para. 45.

States. In this respect the Court recalls the need, referred to in the *Libya/Malta* case, for 'consistency and a degree of predictability' (*I.C.J. Reports 1985*, p. 39, para. 45)."[122]

Observation 35

The International Court of Justice has indicated that there should be particular reasons to depart from its own "settled jurisprudence".

78. In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the Court indicated that:

> To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.[123]

Observation 36

The International Court of Justice has referred to circumstances in which its decisions may have a "continuing applicability".

79. In *Northern Cameroons* the Court referred to the possible effect of its decisions, and noted that, "if in a declaratory judgment it expounds a rule of customary law or interprets a treaty which remains in force, its judgment has a continuing applicability".[124]

7. References to the International Court of Justice distinguishing its own previous decisions

Observation 37

On occasion, the International Court of Justice has distinguished its own previous decisions and those of the Permanent Court of International Justice.

80. In the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* case, the International Court of Justice noted that it "had occasion to note the development which has occurred in the customary law of the continental shelf, and which is reflected in Articles 76 and 83 of the [the United Nations Convention on the Law of the Sea]".[125] The Court stressed that, while in the past it had "recognized the relevance of geophysical characteristics of the area of delimitation if they assist in identifying a line of separation between the continental shelves of the Parties", it considered that to rely on its decisions in the *North Sea Continental Shelf* case and *Tunisia/Libya* case:

> would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a régime of the title itself which used to allot those factors a place which now belongs to the past, in so far as sea-bed areas less than 200 miles from the Coast are concerned.[126]

81. In the *Avena* case, the Court distinguished the *Arrest Warrant* case. In the *Arrest Warrant* case, the Court had ordered the cancellation of an arrest warrant issued by a Belgian judicial official, which the Court determined to be in violation of the immunity of the Congo Minister for Foreign Affairs. In that case, the legality under

[122] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38, at para. 58.
[123] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), *Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 412, at para. 53; see also para. 76.
[124] *Northern Cameroons* (see footnote 52 above), p. 37.
[125] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 121 above), p. 13, at para. 77.
[126] *Ibid.*, para. 40.

international law of issuing the arrest warrant was the subject matter of the dispute. In the *Avena* case, by contrast, the Mexican Government requested the annulment of the conviction and sentencing of a number of Mexican nationals in the United States, but it was not the conviction and sentencing of these individuals that were allegedly contrary to international law, but rather breaches of certain treaty obligations that preceded those acts.[127]

82. In *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece),* the Court noted that the such case could

> be distinguished from the *Monetary Gold* case since the Respondent's conduct can be assessed independently of [the] decision [of the North Atlantic Treaty Organization (NATO)], and the rights and obligations of NATO and its member States other than Greece do not form the subject-matter of the decision of the Court on the merits of the case … nor would the assessment of their responsibility be a "prerequisite for the determination of the responsibility" of the Respondent.[128]

8. Reliance by the International Court of Justice on its own decisions when determining procedural matters

Observation 38

The International Court of Justice has relied on its own previous decisions when developing the criteria required to grant interim measures.

83. The Court has referred in its own decisions to the requirement that it must establish whether it had jurisdiction at the time when the application was filed.[129] Since the *Nuclear Tests* case, the Court has relied on its own decisions to indicate that it will not order interim measures in the absence of "irreparable prejudice … to rights which are the subject of dispute".[130]

84. The Court first introduced the criterion of "plausibility" in its decision on provisional measures in the *Belgium v. Senegal* case,[131] and it has been applied extensively in subsequent decisions.[132]

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[127] *Avena* (see footnote 85 above), para. 123, distinguishing *Arrest Warrant of 1 I April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 97 above).

[128] *Interim Accord (the former Yugoslav Republic of Macedonia v. Greece)* (see footnote 96 above), para. 43, citing *Monetary gold* (see footnote 95 above); *East Timor (Portugal v. Australia)* (see footnote 95 above), para. 34; *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at para. 55. See also *Interim Accord (the former Yugoslav Republic of Macedonia v. Greece)*, para. 53.

[129] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment* (see footnote 108 above), p. 344; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 69, at para. 66; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9, at para. 43.

[130] *Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 99, at para. 20; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7, at para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, at para. 34; *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248, at para. 36; *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9, at para. 23.

[131] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009*, p. 139, at para. 60.

[132] See, for example, *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Provisional Measures, Order, 1 December 2023, para. 19. See also, *Allegations of Genocide* (see footnote 90 above), para. 50; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 6, at para. 53.

85. The requirement of urgency was first introduced in the *Passage through the Great Belt* case, "in the sense that action prejudicial to the rights of either party is likely to be taken before such final decision is given".[133]

86. The Court has also referred to interim measures for the preservation of "the rights which may subsequently be adjudged by the Court to belong either to the Applicant or to the Respondent".[134]

Observation 39

The International Court of Justice has referred to its own decisions in support of the binding effect of provisional measures orders under Article 41 of its Statute.

87. Since the decision in the *LaGrand* case, the Court has consistently held that "orders on provisional measures under Article 41 have binding effect".[135] In that decision, the Court mentioned as a related reason for the binding character of provisional measures orders "the existence of a principle which has already been recognized by the Permanent Court of International Justice",[136] citing the *Electricity Company of Sofia and Bulgaria*,[137] concerning the non-aggravation or extension of the dispute.

Observation 40

The International Court of Justice has relied on its own decisions in relation to the admissibility of counterclaims.

88. Article 80 of the Rules of the International Court of Justice indicates that "the Court may entertain a counter-claim only if it comes within the jurisdiction of the Court and is directly connected with the subject-matter of the claim of the other party".[138] The Court has characterized these requirements "as relating to 'the admissibility of a counter-claim as such' and has explained that the term 'admissibility' must be understood 'to encompass both the jurisdictional requirement and the direct connection requirement'".[139]

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[133] *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12, at para. 23, cited in *Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003*, p. 102, at para. 22; *Pulp Mills* (see footnote 80 above), para. 32; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 353, at para. 129; *Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures* (see footnote 131 above), para. 62.

[134] *Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures* (see footnote 131 above), para. 56, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, at para. 34, which is also referred to in *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996,* p. 13, at para. 35; *Application of the International Convention … (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008* (see previous footnote), para. 118.

[135] *LaGrand (Germany v. United States of America), Judgment* (see footnote 56 above), para. 109.

[136] *Ibid*., para. 103.

[137] *Electricity Company of Sofia and Bulgaria, Order (Request for the Indication of Interim Measures of Protection)* (see footnote 31 above), p. 199.

[138] Rules of the International Court of Justice, art. 80, para. 1.

[139] *Silala (Chile v. Bolivia)* (see footnote 90 above), para. 131, citing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 200, at para. 20. See also *Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, p. 310, at para. 14, citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 190, at para. 33, and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Order of 29 November 2001, I.C.J. Reports 2001*, p. 660, at para. 35.

Observation 41

The International Court of Justice has relied and elaborated on its own decisions when developing rules concerning the burden and standard of proof.

89. For example, the Court has indicated that it has "long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive", and required that "it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts".[140]

90. The Court has referred to the reasoning in its own decisions emphasizing the need to assess whether there is a "sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant", to give rise to a duty of reparation.[141]

91. On occasion, the Court has also relied on its own decisions to indicate that "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage".[142]

9. Interpretation by the International Court of Justice of its own previous decisions or those of the Permanent Court of International Justice

Observation 42

The International Court of Justice has referred to its own decisions providing guidance in the interpretation of its judgments.

92. On occasion, the Court has referred to its own decisions and those of the Permanent Court of International Justice in relation to the interpretation of the *dispositif*. The International Court of Justice cited the Advisory Opinion of the Permanent Court of International Justice in the *Polish Postal Service in Danzig* case to indicate that "all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion".[143] It further stressed that "the Court, in accordance with its practice, will have regard to the reasoning of that Judgment to the extent that it sheds light on the proper interpretation of the operative clause".[144]

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[140] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 209, citing *Corfu Channel case* (see footnote 69 above), p. 17.

[141] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), paras. 180 and 382, referring to *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment* (see footnote 92 above), para. 32; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 324, at para. 14; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 462.

[142] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 360, citing *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment* (see footnote 92 above), para. 35.

[143] *Delimitation of the Continental Shelf* (see footnote 69 above), para. 75, citing *Polish Postal Service in Danzig* (see footnote 70 above), p. 30.

[144] *Ibid.*, citing *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (see footnote 97 above), para. 68.

10. References by the International Court of Justice to the decisions of other international courts and tribunals.

Observation 43[145]

The International Court of Justice has increased its references to decisions of other (non-Court) international courts and tribunals over time.

The International Court of Justice has in general referred to the decisions and awards of (non-Court) international courts, tribunals and bodies in order to support its reasoning or conclusions.

Observation 44

The International Court of Justice has not required "particular reasons" to depart from decisions and awards of (non-Court) international courts and tribunals.

93. In early decisions, the Court tended to use fewer and more generic references without indicating which (non-International Court of Justice) decisions in particular it was referring to. For example, in the *Corfu Channel* case, the Court referred to "international decisions" concerning the admissibility of indirect evidence without any specific case references.[146] In the *Nottebohm* case, the Court referred to the arbitral award in the *Alabama* case to confirm the application of the principle of *compétence de la compétence* at the preliminary objections stage,[147] and to principles concerning nationality referred to by "international arbitrators".[148] In the *Maritime Safety Committee* Advisory Opinion, the Court referred to "international jurisprudence".[149]

94. In more recent decades, perhaps with the increase in international courts and tribunals and greater access to reports of international decisions and awards, the Court has referred to non-Court decisions more often and in more specific terms to support its reasoning or conclusions.

95. In the *Application of the Interim Accord of 13 September 1995*, for example, the Court referred to the *Tacna-Arica* arbitral award in relation to "bad faith",[150] and in the *Diallo* case, concerning compensation for moral damages, the Court referred to the arbitral awards in the *Lusitania* cases and decisions of the Inter-American Court of Human Rights, the Human Rights Committee, the African Commission on Human and Peoples' Rights and the European Court of Human Rights.[151]

96. In the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, the International Court of Justice cited decisions of arbitral tribunals and the International Tribunal for the Law of the Sea, in relation to the right of a State to establish a territorial sea of 12 nautical miles around an island.[152]

97. The Court has referred to the decisions of international criminal tribunals on various occasions. For example, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and*

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[145] For a full analysis, see Eric de Brabandere, "The use of precedent and external case law by the International Court of Justice and the International Tribunal for the Law of the Sea", *The Law and Practice of International Courts and Tribunals*, vol. 15 (2016), pp. 24-55.

[146] *Corfu Channel case* (see footnote 69 above), p. 18.

[147] *Nottebohm case (Preliminary Objection), Judgment of November 18th, 1953: I.C.J. Reports 1953*, p. 111, at p. 119.

[148] *Nottebohm Case (second phase) Judgment of April 6th, 1955: I.C.J. Reports 1955*, p. 4. p. 21-22.

[149] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960: I.C.J. Reports 1960*, p. 150, at p. 169.

[150] *Interim Accord (the former Yugoslav Republic of Macedonia v. Greece)* (see footnote 96 above), para. 132.

[151] *Diallo, Compensation, Judgment* (see footnote 141 above), paras. 18, 24, 33, 40 and 49.

[152] *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (see footnote 79 above), para. 178.

Montenegro), the Court referred to the "consistent rulings" of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the commentary to the Commission's draft Code of Crimes against the Peace and Security of Mankind when interpreting the elements of the crime of genocide.[153]

98. In the *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, the Court referred to the reasoning of the Court of Justice of the European Communities in the interpretation of the Treaty Establishing the European Economic Community "which states that 'rights and obligations' under prior agreements 'shall not be affected by' the provisions of the treaty".[154]

99. The Court has referred to the decisions of specialized courts, tribunals and bodies in the consideration of reparations. For example, in the *Diallo* case, the Court noted that it:[155]

> has taken into account the practice in other international courts, tribunals and commissions (such as the International Tribunal for the Law of the Sea, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission), which have applied general principles governing compensation when fixing its amount, including in respect of injury resulting from unlawful detention and expulsion.

100. In the judgment on compensation in the *Armed Activities* case, the Court referred to the decisions of the Eritrea-Ethiopia Claims Commission in relation to the reparation of damage caused in the context of an armed conflict,[156] as well as the approach of the International Criminal Court in the context of mass violations carried out in an armed conflict.[157]

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[153] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 198, referring to International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33, Judgment, 19 April 2004, Appeals Chamber, paras. 8-11, and the cases of *Kayishema* (International Criminal Tribunal for Rwanda, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, Trial Chamber, *Reports of Orders, Decisions and Judgements, 1999*, p. 824), *Bagilishema* (International Criminal Tribunal for Rwanda, *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A, Judgment, 7 June 2001, Trial Chamber), and *Semanza* (International Criminal Tribunal for Rwanda, *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20, Judgment, 15 May 2003, Trial Chamber) there referred to; and the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook of the International Law Commission, 1996*, vol. II (Part Two), para. 51, at p. 45, para. (8) of the commentary to draft article 17. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), paras. 199 and 200.

[154] *Interim Accord (the former Yugoslav Republic of Macedonia v. Greece)* (see footnote 96 above), para. 109, referring to Court of Justice of the European Communities, *Commission of the European Economic Community v. Italian Republic*, Case 10/61, Judgment, 27 February 1962, *European Court Reports 1962*, p. 10; see also Court of Justice of the European Communities, *Commission of the European Communities v. Kingdom of Sweden*, Case C-249/06 *European Court Reports 2009*, p. 1338, at para. 34.

[155] *Diallo, Compensation, Judgment* (see footnote 141 above), para. 13.

[156] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), paras. 107, 110, 164, 189, 214, 382 and 384, referring to Eritrea–Ethiopia Claims Commission, *Final Award, Eritrea's Damages Claims*, Decision, 17 August 2009, *Reports of International Arbitral Awards* (UNRIAA), vol. XXVI (Sales No. B.06.V.7), pp. 505–630, at p. 516.

[157] *Ibid*., para. 123, referring to International Criminal Court, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute, 24 March 2017, Trial Chamber, para. 84

101. In *Pedra Branca/Pulau Batu*, the Court referred to the Eritrea-Ethiopia Boundary Commission to note that a map "stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest".[158]

102. The Court has not stated, as it has in relation to its own previous decisions and opinions, that it will follow non-International Court of Justice decisions and awards unless there are particular reasons not to follow them, or where there is cause not to follow their reasoning or conclusions. As will be seen below, the Court has followed the decisions of international criminal tribunals only in some respects, and has stated that interpretations by human rights treaty bodies of the treaty under which they were established carry "great weight".

Observation 45

On occasion, the International Court of Justice has referred to the practice of other international courts and tribunals in relation to the granting of pre- and post-judgment interest over the amounts owed as compensation for internationally wrongful acts.

103. In *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* the Court referred to article 38 on State responsibility and noted that "in the practice of international courts and tribunals, pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires. Nevertheless, interest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case."[159]

104. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* the Court indicated that "the award of post-judgment interest is consistent with the practice of other international courts and tribunals".[160]

Observation 46

On occasion, the International Court of Justice has referred to its own decisions to determine the appropriate forms of reparation for internationally wrongful acts.

105. In various decisions, the Court has noted that "in general, a declaration of violation is, in itself, appropriate satisfaction in most cases".[161]

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[158] *Pedra Branca/Pulau Batu Puteh* (see footnote 86 above), para. 271. See also *Certain Activities* and *Construction of a Road, Judgment* (see footnote 80 above), para. 85.

[159] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment* (see footnote 92 above), para. 151, referring to the commentary to article 38 of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 107. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 401.

[160] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 402, citing *Diallo, Compensation, Judgment* (see footnote 141 above), para. 56.

[161] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 387, referring to *Pulp Mills* (see footnote 80 above), para. 282 (1); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment, I.C.J. Reports 2008*, p. 177, at para. 204; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), paras. 463 and 471 (9); *Corfu Channel case* (see footnote 69 above), p. 35.

Observation 47

The International Court of Justice has, on occasion, distinguished the awards of other international courts and tribunals.

(a) *Arbitral tribunals*

106. In *Barcelona Traction*, the Court rejected references made by the Parties to the decisions of other tribunals concerning compensation for the nationalization of foreign property: "To seek to draw from them analogies or conclusions held to be valid in other fields is to ignore their specific character as *lex specialis* and hence to court error". Further:

> [t]he Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.[162]

(b) *International criminal tribunals*

107. In the *Croatia Genocide* case, the Court stated that:

> State responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon it by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person. It is for the Court, in applying the Convention, to decide whether acts of genocide have been committed, but it is not for the Court to determine the individual criminal responsibility for such acts. … The Court will nonetheless take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the [International Criminal Tribunal for the Former Yugoslavia], as it did in 2007, in examining the constituent elements of genocide in the present case. If it is established that genocide has been committed, the Court will then seek to determine the responsibility of the State, on the basis of the rules of general international law governing the responsibility of States for internationally wrongful acts.[163]

108. In the *Bosnia Genocide* case, the Court considered that the test of "overall control" used by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case was unsuitable in the context of the attribution of State responsibility because "it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility".[164] Instead, the Court considered that it was on the basis of its "settled jurisprudence that the Court will determine whether the Respondent has incurred responsibility under the rule of customary international law set out in Article 8 of the [Commission's] Articles on State Responsibility".[165]

109. The Court thus relied on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia mainly in respect of its factual findings and evaluation of

[162] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 3, at paras. 62-63.

[163] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* (see footnote 95 above), para. 129.

[164] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 406.

[165] *Ibid*., para. 407.

them,[166] but also when examining the constituent elements of the crime of genocide, for example in respect of how to define a group,[167] and to clarify the notion of "causing serious mental harm to members of the group",[168] and relied on the judgment of the Trial Chamber in the *Kupreškić* case to define the specific intent required for genocide.[169]

11. Examples of references to decisions of national courts.

Observation 48

As highlighted in the 2016 Secretariat study on customary international law, the International Court of Justice has occasionally referred to decisions of national courts as forms of evidence of State practice or, less frequently, acceptance as law (*opinio juris*). These references are often in conjunction with other forms of evidence such as legislation or treaty provisions.[170]

Observation 49

As also highlighted in the 2016 Secretariat study, decisions of national courts have been particularly relevant forms of evidence of the formation of customary international law in subject areas that are closely linked with domestic law or implementation by national courts.[171]

110. In the 2016 study, the Secretariat stated that:

> although the possibility was never excluded as a matter of principle, there seems to be no clear precedent in the case law of the Court for decisions of national courts to be referred to explicitly as subsidiary means for the determination of rules of customary international law under Article 38, paragraph 1 (*d*), of the Statute of the Court.[172]

12. Examples of references to the decisions of human rights treaty bodies.

Observation 50

The International Court of Justice has referred to the outputs of human rights treaty bodies in several of its decisions when addressing questions related to international human rights law.

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[166] *Ibid.,* para. 223 and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* (see footnote 95 above), paras. 182, 248, 254, 261-264, 277 and 354.

[167] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), paras. 195-200, and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* (see footnote 95 above), para. 142.

[168] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment* (see footnote 95 above), paras. 157-158.

[169] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 188.

[170] Secretariat study on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, *Yearbook of the International Law Commission, 2016*, vol. II (Part One), document A/CN.4/691, observations 5 and 6 and paras. 19–23, referring for example to the *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116, at p. 134; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 97 above), paras. 56-58, and the *Nottebohm Case (second phase)* (see footnote above), p. 22.

[171] Secretariat study on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, *Yearbook of the International Law Commission, 2016*, vol. II (Part One), document A/CN.4/691, observation 7 and para. 23, referring for example to *Jurisdictional Immunities* (see footnote 82 above), Separate Opinion of Judge Keith, para. 4.

[172] *Ibid.*, para. 27.

Observation 51

The International Court of Justice has indicated that it ascribes "great weight" to interpretations made by human rights treaty bodies when interpreting the treaty whose application they were established to supervise.

111. The Court has referred to the outputs of international human rights treaty bodies in seven of its decisions, including five judgments and two advisory opinions.[173] The human rights treaty bodies referred to are the Committee against Torture, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights. The references are variously to general comments, general recommendations, decisions (referred to as "communications" by the International Court of Justice) and concluding observations.

112. The International Court of Justice ascribes "great weight" to the interpretations and views of human rights treaty bodies. In the *Ahmadou Sadio Diallo* case, it stated that:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[174]

113. Further, in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, the Court recalled that "in its jurisprudence, it has taken into account the practice of committees established under human rights conventions, as well as the practice of regional human rights courts, in so far as this was relevant for the purposes of interpretation"[175] while reiterating that it is under no obligation to adhere to the interpretations of human rights treaty bodies.[176]

114. The Court further emphasized the importance of consistency in the context of the interpretation of regional human rights instruments, by taking "due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question".[177]

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[173] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 117 above); *Diallo, Merits* (see footnote 92 above); *Diallo, Compensation, Judgment* (see footnote 141 above); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 71; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 188.

[174] *Diallo, Merits* (see footnote 92 above), para. 66.

[175] *Application of the International Convention ... (Qatar v. United Arab Emirates)* (see footnote 173 above), para. 77, citing *Diallo, Compensation, Judgment* (see footnote 141 above), paras. 13 and 24; *Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment* (see footnote 173 above), para. 101; *Diallo, Merits* (see footnote 92 above), para. 66; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 117 above), paras. 109 and 136.

[176] *Application of the International Convention ... (Qatar v. United Arab Emirates)* (see footnote 173 above), para. 101.

[177] *Diallo, Merits* (see footnote 92 above), para. 67, citing African Commission on Human and People's Rights, *Kenneth Good v. Republic of Botswana*, No. 313/05, Decision of the Commission, 26 May 2010, para. 204; *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights v. Rwanda*, Nos. 27/89-46/91-49/91-99/93, 31 October 1996.

Observation 52

The International Court of Justice referred to a general comment of the Committee on the Elimination of Racial Discrimination when determining its jurisdiction *rationae materiae* under the International Convention on the Elimination of All Forms of Racial Discrimination.[178]

115. In the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* case, the Court, when considering its jurisdiction *rationae materiae* under the International Convention on the Elimination of All Forms Racial Discrimination, referred to a general comment of the Committee on the Elimination of Racial Discrimination to illustrate that the Court's approach to interpreting a provision in the light of the object and purposes of Convention was in line with that of the Committee.[179] The Court nevertheless arrived at a different conclusion to that of the Committee on the Elimination of Racial Discrimination, determining that the term "national origin" did not encompass current nationality and fell outside the scope *rationae materiae* of the Convention.[180]

Observation 53

The International Court of Justice has referred to outputs of human rights treaty bodies in relation to the merits of cases in some of its decisions.

116. In the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court referred to a communication and concluding observations of the Human Rights Committee, as well as concluding observations of the Committee on Economic, Social and Cultural Rights.[181] These references were made to shed light on the compatibility of the Court's interpretation of the applicability of the obligations under the two Covenants outside a State's national territory with the practice of the Committees.

117. In the *Ahmadou Sadio Diallo* case, the Court referred to two general comments and one communication of the Human Rights Committee. These references, combined with decisions of regional human rights courts, were used to demonstrate that the International Court of Justice's interpretation regarding the requirements for the lawful expulsion of an alien, as stipulated under the ICCPR and African Charter, aligned with the views of the Human Rights Committee.[182] They were also used to explain the meaning of an arbitrary arrest for the purposes of interpreting the required safeguards.[183]

118. In the judgment in *Questions relating to the Obligation to Prosecute or Extradite*, the International Court of Justice relied on a communication of the Committee against Torture to determine the temporal scope of the obligation to prosecute acts of torture under the Convention against Torture and Other Cruel,

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[178] International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965), United Nations, Treaty Series, vol. 660, No. 9464, p. 195.

[179] *Application of the International Convention … (Qatar v. United Arab Emirates)*, para. 100.

[180] *Ibid*., paras. 77-101.

[181] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 117 above), paras. 109-112, referring to the application of the International Covenant on Civil and Political Rights (New York, 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171), the International Covenant on Economic, Social and Cultural Rights (New York, 16 December 1966, United Nations, *Treaty Series*, vol. 993, No. 14531, p. 3) and the Convention on the Rights of the Child (New York, 20 November 1989; United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3).

[182] *Diallo, Merits* (see footnote 92 above), para. 66.

[183] *Ibid.*, para. 77, referring to Human Rights Committee, general comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session*, Supplement No. 40 (A/37/40), annex V.

Inhuman or Degrading Treatment or Punishment.[184] While noting that the Committee against Torture considers that "torture" under the Convention refers to torture occurring after the Convention's entry into force, the Court concluded that the obligation to prosecute does not apply to acts before entry into force of the Convention for the State concerned.[185]

Observation 54

The International Court of Justice has referred to the outputs of the Committee against Torture when considering its approach to reparations.

119. In considering its approach to reparations, the Court in the *Armed Activities on the Territory of the Congo* case referred to a communication from the Committee against Torture, together with a decision of the International Criminal Tribunal for the Former Yugoslavia and the general practice of the African Commission on Human and People's Rights.[186] In *Ahmadou Sadio Diallo,* the Court referred to a communication of the Human Rights Committee, along with decisions of regional courts (the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights), to stress the significance of equitable considerations in the quantification of compensation for non-material injury.[187]

Observation 55

The International Court of Justice has referred to outputs of the Human Rights Committee to support its interpretation of the principle of equality of access to court.

120. In the *Advisory Opinion on Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization concerning a Complaint Filed against the International Fund for Agricultural Development*, the Court referred to two general comments of the Human Rights Committee to support its reasoning. The provision that had been referred to the Court allowed recourse to the Court for only one party in the dispute. In addressing the "inequality of access to the Court" inherent in that provision, the Court underlined the principle of equality of the parties in judicial proceedings that had been upheld by the Human Rights Committee. Basing its interpretation on the Committee's general comments, the Court interpreted this principle as requiring that "if procedural rights are accorded they must be provided to all parties unless distinctions can be justified on objective and reasonable grounds".[188]

13. Examples of references to writings

Observation 56

There are few references to writings in the decisions of the International Court of Justice.

121. In the Advisory Opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court referred to a writing when studying

[184] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85.
[185] *Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment* (see footnote 173 above), para. 101.
[186] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 188.
[187] *Diallo, Compensation, Judgment* (see footnote 141 above), para. 24.
[188] *Judgment No. 2867* (see footnote 173 above), para. 39.

whether the revocability of a League of Nations mandate for misconduct by the Mandatory was envisaged in the context of the League, and therefore of the United Nations. The Court stated as follows:[189]

> "In case of any flagrant and prolonged abuse of this trust the population concerned should be able to appeal for redress to the League, who should in a proper case assert its authority to the full, even to the extent of removing the mandate and entrusting it to some other State if necessary." (J. C. Smuts, *The League of Nations: A Practical Suggestion*, 1918, pp. 21 -22.)

122. In the case of *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua (intervening)),* the Court decided that the Gulf of Fonseca was a historic bay and referred to works and a Secretariat study carried out following the 1958 United Nations Conference on the Law of the Sea:

> successive editors of Oppenheim's *International Law,* from the first edition of Oppenheim himself (1905) to the eighth edition by Hersch Lauterpacht (1955), were consistently of the view that "All gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial", a note was added in the third edition (1920, p. 344, n. 4) making the general qualification, "except in the case of such bays as possess the characteristics of a closed sea". … There is also the authority of Gidel for the proposition that the Gulf of Fonseca is an historic bay (G. Gidel, *Le droit intemational public de la mer* (1934), Vol. 3, pp. 626-627).[190]

123. In the same judgment, the Court referred to another writing to put into context the use of the term "territorial waters", which "did not necessarily, or even usually, indicate what would now be called 'territorial sea'." [191]

124. In the *Bosnia Genocide* case, the Court referred to the etymology of the term "genocide", noting that: "Raphael Lemkin has explained that he created the word from the Greek genos, meaning race or tribe, and the termination "-cide", from the Latin *caedere*, to kill (*Axis Rule in Occupied Europe* (1944), p. 79)."[192]

14. Examples of references to the work of the International Law Commission

Observation 57

The International Court of Justice has referred on multiple occasions to the work of the International Law Commission for a number of purposes.

125. These references to the outputs of the Commission have included: (a) references to rules or principles that the Commission has identified as customary international law; (b) references to the work of the Commission as a basis upon which the Court determined the existence or content of international law; (c) references to the work of the Commission as a basis upon which the Court developed its reasoning; (d) use of the work of the Commission as *travaux préparatoires* of treaties that were negotiated on the basis of an output of the Commission; (e) use of the work of the Commission to interpret other treaties concerning the same subject matter.

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[189] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 71 above), para. 100.

[190] *Land and Maritime Frontier Dispute* (see footnote 46 above), para. 394, also referring to the study prepared by the Secretariat following the 1958 Conference on the Law of the Sea, *Yearbook … 1962*, vol. II, document A/CN.4/143, para. 147.

[191] *Ibid*., para. 392, footnote 1: "See, for example, an article by Sir Cecil Hurst, later President of the Permanent Court of International Justice ("The Territoriality of Bays", *British Year Book of International Law*, Vol. 3 (1922-1923), p. 43)."

[192] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 193.

Observation 58

The Court has referred to the outputs of the Commission in its analysis of the existence and content of rules of customary international law.

126. On a number of occasions, the Court has referred to the work of the Commission when determining whether a rule is part of customary international law.

127. For example, in the *North Sea Continental Shelf* case, the Court referred to the attitude of the Commission in relation to article 6 of the Geneva Convention on the Continental Shelf[193] concerning delimitation and noted that:[194]

> The normal inference would therefore be that any articles that do not figure among those excluded from the faculty of reservation under Article 12 [of the Geneva Continental Shelf Convention], were not regarded as declaratory of previously existing or emergent rules of law; and this is the inference the Court in fact draws in respect of Article 6 (delimitation), having regard also to the attitude of the International Law Commission to this provision, as already described in general terms. Naturally this would not of itself prevent this provision from eventually passing into the general corpus of customary international law by one of the processes considered in paragraphs 70-81 below.

128. In *Military and Paramilitary Activities in and against Nicaragua*, the Court referred to the customary character of the prohibition of the use of force in Article 2, paragraph 4, of the Charter of the United Nations, and referred, *inter alia*, to the commentary of the Commission to the draft articles on the law of treaties and noted that the Commission "in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogen*s'".[195]

129. In *Jurisdictional Immunities*, the Court was analysing "whether customary international law has developed to the point where a State is not entitled to immunity in the case of serious violations of human rights law or the law of armed conflict."[196] The Court noted that there is no limitation of State immunity by reference to the gravity of the violation or the peremptory character of the rule breached in and emphasized that its absence in:

> the United Nations Convention is particularly significant, because the question whether such a provision was necessary was raised at the time that the text of what became the Convention was under consideration. In 1999 the International Law Commission established a Working Group which considered certain developments in practice regarding some issues of State immunity which had been identified by the Sixth Committee of the General Assembly. In an appendix to its report, the Working Group referred, as an additional matter, to developments regarding claims "in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*" and stated that this issue was one which should not be ignored, although it did not recommend any amendment to the text of the International Law Commission Articles (*Yearbook of the International Law Commission*,

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[193] Geneva Conventions on the Law of the Sea (Geneva, 29 April 1958): Convention on the Continental Shelf, United Nations, *Treaty Series*, vol. 499, No. 7302, p. 311.

[194] *North Sea Continental Shelf* (see footnote 102 above), para. 64.

[195] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits* (see footnote 55 above), para. 190, citing para. (1) of the commentary of the Commission to draft article 50 of its draft articles on the law of treaties, *Yearbook … 1966*, vol. II, p. 247.

[196] *Jurisdictional Immunities* (see footnote 82 above), para. 83.

> 1999, Vol. II (2), pp. 171-172). … During the subsequent debates in the Sixth Committee no State suggested that a jus cogens limitation to immunity should be included in the Convention. The Court considers that this history indicates that, at the time of adoption of the United Nations Convention in 2004, States did not consider that customary international law limited immunity in the manner now suggested by Italy.[197]

130. In *Certain Iranian Assets*, when analysing an objection to jurisdiction based on the "clean hands" doctrine, the Court mentioned that it had not recognized such doctrine as a rule of customary international law nor a general principle of law and noted:

> that the [Commission] declined to include the "clean hands" doctrine among the circumstances precluding wrongfulness in its articles on the responsibility of States for internationally wrongful acts …, on the ground that this "doctrine has been invoked principally in the context of the admissibility of claims before international courts and tribunals, though rarely applied".[198]

131. In *Silala*, the parties agreed that article 14 of the Convention on the Law of Non-navigational Uses of International Watercourses[199] reflected customary international law, but the parties had different interpretations of it. The Court took into account the commentary of the Commission to the draft articles on the law of the non-navigational uses of international watercourses[200] that were used as the basis for the negotiation of the Convention. The Court examined, in particular, the sources used by the Commission in the commentary:

> Unlike the commentaries to certain other provisions of the [Commission's] Draft Articles, the commentary to Article 11 (which was to become Article 11 of the 1997 Convention) does not refer to any State practice or judicial authority that could suggest the customary nature of this provision. The Commission merely states that illustrations of instruments and decisions "which lay down a requirement similar to that contained in article 11" are provided in the commentary to Article 12 … Thus, the Commission did not appear to consider that Article 11 of [its] Draft Articles reflected an obligation under customary international law. In the absence of any general practice or *opinio juris* to support this contention, the Court cannot conclude that Article 11 of the 1997 Convention reflects customary international law.[201]

Observation 59

The International Court of Justice has referred to its own previous decisions that determined that certain outputs of the Commission reflect rules of customary international law.

132. Examples include:

– On various occasions, the Court has indicated that "it is well established that [articles 31 to 33 of the Vienna Convention on the Law of Treaties] reflect rules

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[197] *Ibid*., para. 89.

[198] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment, 30 March 2023, General List No. 164, para. 81, citing para. (9) of the commentary on Chapter V of Part One of the articles on State responsibility, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 72.

[199] Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997), United Nations, *Treaty Series*, vol. 2999, No. 52106, p. 77.

[200] Draft articles on the law of the non-navigational uses of international watercourses, *Yearbook … 1994*, vol. II (Part Two), paras. 222–223.

[201] *Silala (Chile v. Bolivia)* (see footnote 90 above), para. 111.

of customary international law".[202] In various cases the Court also held that articles 60 to 62 concerning the termination and the suspension of the operation of treaties contain rules of customary international law.[203]

– Certain parts of the articles on State,[204] such as articles 3,[205] 4, 8, 16,[206], 31,[207] 34 to 37.[208]

133. In *Diallo* and *Certain Iranian Assets*, the Court determined that article 1 of the articles on diplomatic protection[209] reflects customary international law,[210] and in *Certain Iranian Assets* the Court also considered that article 15 reflected customary international law, addressing the exceptions to the local remedies rule.[211]

Observation 60

The Court has relied on the work of the Commission as *travaux préparatoires* to interpret certain treaties that were negotiated on the basis of the Commission's draft articles.

134. In certain instances, the Court has referred to the work of the Commission as part of the *travaux préparatoires* of treaties that were negotiated on the basis of draft articles prepared by the Commission. For example, when interpreting the following treaties:

– Convention on the Continental Shelf,[212]

– Vienna Convention on the Law of Treaties,[213]

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[202] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020*, p. 455, at para. 70. See also *Delimitation of the Continental Shelf* (see footnote 69 above), para. 33, citing *Avena* (see footnote 85 above), para. 83; *LaGrand (Germany v. United States of America), Judgment* (see footnote 56 above), para. 101; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II),* p. 803, at para. 23; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 71 above), para. 41; *Arbitral Award of 31 July 1989, Judgment, I.C.J. Reports 1991*, p. 53, at para. 48.

[203] *Gabčíkovo-Nagymaros* (see footnote 92 above), para. 46, referring to *Legal Consequences for States of the Continued Presence* of *South Africa in Namibia* (see footnote 71 above), p. 47, and *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment* (see footnote 113 above), p. 18, and also *Interpretation of the Agreement of 25 March 1951* (see footnote 62 above), paras. 48–49.

[204] For a full compilation of all Court decisions referring to the articles on State responsibility, see *Materials on the Responsibility of States for Internationally Wrongful Acts*, 2nd ed. (ST/LEG/SER.B/25/Rev.1; United Nations publication, Sales No. E.23.V.6).

[205] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 95 above), para. 128.

[206] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), paras. 388, 398 and 420.

[207] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations* (see footnote 83 above), para. 70.

[208] *Pulp Mills* (see footnote 80 above), para. 273.

[209] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), paras. 49-50. See also General Assembly resolution 62/67 of 6 December 2007, annex.

[210] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007*, p. 582, para. 39; *Certain Iranian Assets* (see footnote 198 above), para. 61.

[211] *Certain Iranian Assets* (see footnote 198 above), para. 68.

[212] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 18, at para. 41.

[213] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment* (see footnote 108 above), para. 31; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 303, at para. 265; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999*, p. 1045, at paras. 48-49; *Pulp Mills* (see footnote 80 above), para. 141.

– Vienna Convention on Consular Relations,[214]

– United Nations Convention on Jurisdictional Immunities of States and their Property,[215]

– Certain provisions of the United Nations Convention on the Law of the Sea, that were similar to those contained in the 1958 Conventions on the Law of the Sea.[216]

Observation 61

On occasion, the International Court of Justice has referred to the work of the Commission on the draft Code of Crimes against the Peace and Security of Mankind when interpreting the Convention on the Prevention and Punishment of the Crime of Genocide.

135. In the *Genocide case (Croatia v. Serbia),* the Court referred to the Commission's commentary to the draft Code of Crimes against the Peace and Security of Mankind, among other materials, including the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide, when determining whether causing serious bodily or mental harm to members of a group must contribute to the destruction of the group. The Court noted that the Commission adopted a similar interpretation according to which "[t]he bodily or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part".[217]

136. In *Bosnia Genocide (Bosnia v. Serbia and Montenegro)*, the Court also referred to the commentary to the draft Code of Crimes against the Peace and Security of Mankind when interpreting the elements of the crime of genocide in the Convention on the Prevention and Punishment of the Crime of Genocide.[218]

Observation 62

The International Court of Justice has relied on the commentary of the Commission to the articles on State responsibility to elaborate on the scope of compensation that could be granted in a given context.

137. In the judgment on compensation in the *Diallo* case, the Court cited, *inter alia*, article 36 of the articles on State responsibility to indicate that: "[w]hile an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative".[219]

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[214] *Avena* (see footnote 85 above), para. 86; and *Jadhav* (see footnote 85 above), paras. 77-83 and 108. Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261.

[215] *Jurisdictional Immunities* (see footnote 82 above), para. 69. United Nations Convention on Jurisdictional Immunities of States and Their Property (New York, 2 December 2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 49* (A/59/49), vol. I, resolution 59/38, annex.

[216] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (see footnote 101 above), para. 280; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), para. 134. See also *Alleged Violations of Sovereign Rights and Maritime spaces in the Caribbean Sea (Nicaragua v. Colombia)* (see footnote 78 above), paras. 151-152 and 184.

[217] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 95 above), para. 157.

[218] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), paras. 186 and 198, citing the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook … 1996*, vol. II (Part Two), para. 50, at pp. 44–45, paras. (5) and (8) of the commentary to draft article 17, respectively.

[219] *Diallo, Compensation, Judgment* (see footnote 141 above), para. 49.

138. In the reparations judgment in *Armed Activities on the Territory of the Congo*, the Court held that the forms of satisfaction mentioned in article 37, paragraph 2, of the articles on State responsibility were "not exhaustive". "In principle, satisfaction can include measures such as 'disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act'".[220]

Observation 63

On occasion, the Court has referred to the work of the Commission while it was still under consideration.

139. For example, in the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, the Court was tasked to determine the rules applicable to the conditions of a transfer of the Regional Office of the World Health Organization from Egypt. The Court considered, among other rules, that it was for the parties in each case to determine the length of the periods of consultation and negotiation in good faith and noted that some indication was given, *inter alia*, in article 56 of the Vienna Convention on the Law of Treaties, concerning the denunciation of or withdrawal from a treaty, and "in the corresponding article of the International Law Commission's draft articles on treaties between States and international organizations or between international organizations".[221]

140. In *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the Court took into consideration that the parties agreed that the existence of a State of necessity "must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading".[222] The Court further considered "that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis".[223] The Court also relied, *inter alia*, on draft articles 47 to 50, as adopted by the Commission on first reading, to establish the conditions relating to resort to countermeasures.[224]

141. In the advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, the Court referred to draft article 6 of the draft articles on responsibility of States, adopted by the Commission on first reading, when determining that the rule that conduct of any organ of a State is regarded as an act of that State reflected customary international law.[225]

15. Examples of references to other expert bodies, such as the International Committee of the Red Cross and the Institute of International Law

Observation 64

On occasion, the Court has referred to the work of the International Committee of the Red Cross in the context of the interpretation of the Fourth Geneva Convention.[226]

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[220] *Armed Activities in the Territory of the Congo (Democratic Republic of Congo v. Uganda), Reparations* (see footnote 83 above), para. 389.
[221] *Interpretation of the Agreement of 25 March 1951* (see footnote 62 above), para. 49.
[222] *Gabčíkovo-Nagymaros* (see footnote 92 above), para. 50.
[223] *Ibid*., para. 51.
[224] *Ibid*., para. 83.
[225] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at para. 62.
[226] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Convention IV), United Nations, *Treaty Series*, vol. 75, No. 973, p. 287.

142. In the *Legality of the Construction of a Wall* advisory opinion, the Court referred to the work of the International Committee of the Red Cross (ICRC) after addressing other supplementary means of interpretation, including the *travaux préparatoires*, to confirm its reading of the Fourth Geneva Convention:

> Moreover, the Court would observe that the ICRC, whose special position with respect to execution of the Fourth Geneva Convention must be "recognized and respected at all times" by the parties pursuant to Article 142 of the Convention, has also expressed its opinion on the interpretation to be given to the Convention. In a declaration of 5 December 2001, it recalled that "the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem".[227]

Observation 65

The International Court of Justice has, on occasion, referred to the outputs of the Institute of International Law.

143. In the *Kasikili/Sedudu Island (Botswana/Namibia)* case, the Court referred to the "Draft concerning the international regulation of fluvial navigation", by the Institute of International Law, adopted at Heidelberg on 9 September 1887, where it was indicated that: "'The boundary of States separated by a river is indicated by the thalweg, that is to say, the median line of the channel' (*Annuaire de l'Institut de droit international*, 1887-1888, p. 182)".[228]

Observation 66

On occasion, the Court has referred to the practice of States as reflected in multilateral treaties and draft treaties prepared by expert bodies.

144. In the *Jurisdictional Immunities of the State* case, the Court noted that many States distinguish between *acta jure gestionis* and *acta jure imperii*, an approach "followed in the United Nations Convention and the European Convention (see also the draft Inter-American Convention on Jurisdictional Immunity of States drawn up by the Inter-American Juridical Committee of the Organization of American States in 1983 (***ILM***, Vol. 22, p. 292))".[229]

Observation 67

On occasion, the Court has referred to the work of expert technical bodies.

145. For example, in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, the Court referred to the United Nations Environment Programme's "Guidance Manual on Valuation and Accounting of Ecosystem Services for Small Island Developing States", noting that there are various methods to assess environmental damage, beyond those proposed by the parties and used by international tribunals.[230]

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[227] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 117 above), para. 97.

[228] *Kasikili/Sedudu Island* (see footnote 213 above), para. 25.

[229] *Jurisdictional Immunities* (see footnote 82 above), para. 59.

[230] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Compensation, Judgment* (see footnote 92 above), para. 52. See the details of the United Nations Environment Programme secretariat units, the World Bank and various universities that prepared the Guidance Manual, available at https://wedocs.unep.org/bitstream/handle/20.500.11822/9341/Guidance_Manual_SIDS_Full_Report.pdf?sequence=4&amp%3BisAllowed=y%2C.

16. Examples of references to resolutions of international organizations and international conferences

Observation 68

On occasion, the Court has referred to resolutions of the General Assembly and of the Security Council, and the expert documents attached to them, to determine the meaning of certain terms.

146. In the *Bosnia Genocide* case, the Court considered the legal significance of the text in General Assembly resolution 47/121 of 18 December 1992 which referred to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", in Bosnia and Herzegovina. The Court referred to a definition found in an interim report by a Commission of Experts established pursuant to Security Council Resolution 780 (1992) of 6 October 1992: "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area".[231] While such concept was not included in the Convention on the Prevention and Punishment of the Crime of Genocide, the Court agreed with the International Criminal Tribunal for the Former Yugoslavia that certain conduct, including ethnic cleansing, could constitute a crime of genocide if the elements of such crime were present.[232]

Observation 69

On occasion, the Court has referred to resolutions of the International Conference of the Red Cross.

147. In *Military and Paramilitary Activities in and against Nicaragua*, the Court referred to a resolution of the International Conference of the Red Cross when indicating that "the provision of strictly humanitarian aid … cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross".[233]

Observation 70

On occasion, the International Court of Justice has referred to the value of resolutions of the General Assembly to determine the scope of certain rules, including rules of customary international law.

148. Since the Advisory Opinion on the *Legality of the Threat of Nuclear Weapons*, the Court has referred to the legal value of General Assembly resolutions and on occasion relied on them when determining the scope and content of certain rules. The Court considered that such resolutions "even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*."[234] In some

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[231] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 190, referring to annex IV to the Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992) (S/1994/674/Add.2) and Interim Report by the Commission of Experts (S/25274 (1993)), para. 55.

[232] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 74 above), para. 190; *Krstić*, Case No. IT-98-33, Judgment, 2 August 2001, Trial Chamber, para. 562; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24, Judgment, 31 July 2003, Trial Chamber, para. 519.

[233] *Military and Paramilitary Activities in and against Nicaragua, Merits* (see footnote 55 above), para. 242.

[234] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), para. 70, cited in *Legal Consequences of the Separation of the Chagos Archipelago* (see footnote 59 above), para. 151.

cases, the Court has referred to resolutions of the General Assembly when interpreting the Charter of the United Nations,[235] and the principle of non-intervention.[236]

149. In *Questions relating to the Obligation to Prosecute or Extradite* the Court considered that "the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)". It considered that it is grounded in widespread practice and *opinio juris* of States and referred to in:

> numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.[237]

150. In the *Chagos* Advisory Opinion, the Court analysed General Assembly resolution 1514 (XV) of 14 December 1960 and considered that it:

> represents a defining moment in the consolidation of State practice on decolonization … [it] *clarifies the content and scope of the right to self-determination* ... In the Court's view, there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption.[238]

151. The Court considered that "although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption",[239] and "has a normative character, in so far as it affirms that '[a]ll peoples have the right to self determination'".[240]

152. The Court further stressed that the nature and scope the right to self-determination of peoples, were reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which was annexed to General Assembly resolution 2625 (XXV) and adopted by consensus. The Court concluded that "[b]y recognizing the right to self-determination as one of the 'basic principles of international law', the Declaration confirmed its normative character under customary international law".[241]

C. International Tribunal for the Law of the Sea

153. The applicable law at the International Tribunal for the Law of the Sea is determined by article 293 of the United Nations Convention on the Law of the Sea, which provides that the Tribunal "shall apply this Convention and other rules of international law not incompatible with this Convention". There is no provision equivalent to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

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[235] See *Obligation to Negotiate Access* (footnote 103 above), para. 166.
[236] See *Military and Paramilitary Activities in and against Nicaragua, Merits* (footnote 55 above).
[237] *Obligation to Prosecute or Extradite (Belgium v. Senegal)* (see footnote 173 above), para. 99.
[238] *Legal Consequences of the Separation of the Chagos Archipelago* (see footnote 59 above), para. 150 (emphasis added).
[239] *Ibid*., para. 152.
[240] *Ibid*., para. 153.
[241] *Ibid*., para. 155.

154. The Tribunal has referred implicitly to subsidiary means only once to date, without using the terms "subsidiary means" or "Article 38, paragraph 1 (d)" of the Statute of the International Court of Justice. There are no references thus far to writings in the decisions of the Tribunal.

1. Reference to subsidiary means under Article 38 of the Statute of the International Court of Justice

Observation 71

To date, the International Tribunal for the Law of the Sea has made reference on one occasion to "decisions of international courts and tribunals, referred to in article 38 of the Statute of the International Court of Justice".

155. In the *Bay of Bengal* case, the Tribunal stated that the "[d]ecisions of international courts and tribunals, referred to in Article 38 of the Statute of the [International Court of Justice], are also of particular importance in determining the content of the law applicable to maritime delimitation under articles 74 and 83 of the Convention".[242]

156. As the Tribunal has not made any further such references in its decisions or advisory opinions, the Secretariat should not be understood as taking a view on whether or to what extent the examples presented in the present section may constitute a use of judicial decisions and other materials as subsidiary means for the determination of rules of international law.

2. Examples concerning the interpretation of the Statute of the International Tribunal for the Law of the Sea Statute (Annex VI to the United Nations Convention on the Law of the Sea).

Observation 72

On occasion, the International Tribunal for the Law of the Sea has referred to the decisions of the Permanent Court of International Justice and the International Court of Justice when interpreting its own Statute.[243]
The International Tribunal for the Law of the Sea stated that "special circumstances" would be needed to depart from those decisions.

157. In the case of the *M/V Louisa*, the Tribunal considered possible claims presented by the parties during the proceedings that were not included in the original application. While analysing article 24, paragraph 1, of its Statute concerning the duties of the coastal State in relation to innocent passage through the territorial sea, the Tribunal referred to various decisions of the Permanent Court of International Justice[244] and the International Court of Justice[245] where those Courts had considered that parties in the course of proceedings could not transform the dispute before the

[242] *Bangladesh/Myanmar* (see footnote 92 above), para. 184.
[243] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain), Judgment, ITLOS Reports 2013*, p. 4, para. 144.
[244] *Ibid.*, para. 145, citing *Prince von Pless Administration, Order, 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 11, at p. 14, and *Société commerciale de Belgique, Judgment, 15 June 1939, P.C.I.J., Series A/B, No. 78*, p. 160, at p. 173.
[245] *Ibid.*, para. 146, citing *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment* (see footnote 128 above), para. 67, and also *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections* (see footnote 128 above), para. 63, and *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003*, p. 161, at para. 117.

court into one of a different character.[246] The Tribunal concluded that there were "no special circumstances in [that] case to warrant a departure from this jurisprudence".[247]

158. In the *Hoshinmaru* case, the Tribunal noted that, while in principle the decisive date to determine issues of admissibility is the date of the filing of the application, it referred to various decisions of the International Court of Justice to indicate that "events subsequent to the filing of an application may render an application without object".[248]

159. In the *M/V Louisa* case, the Tribunal indicated that to determine whether it had jurisdiction it must be established that there is a link between the facts advanced by the applicant and the provisions of the United Nations Convention on the Law of the Sea referred to and "show that such provisions can sustain the claim or claims submitted". In doing so, the Tribunal referred to the *Oil Platforms* judgment of the International Court of Justice.[249] In the same case, the Tribunal relied on decisions of the International Court of Justice when determining that, where there was a dispute concerning the existence of jurisdiction, "jurisdiction exists only to the extent to which the substance of the declarations [under article 287 of the United Nations Convention on the Law of the Sea] of the two parties to a dispute coincides".[250]

160. In the Advisory Opinions on *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission* and *Responsibilities and obligations of States with respect to activities in the Area*, the Tribunal referred to advisory opinions of the International Court of Justice and followed the Court's rationale that "questions 'framed in terms of law and rais[ing] problems of international law … are by their very nature susceptible of a reply based on law'".[251]

161. In the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission,* the Tribunal relied on various decisions of the International Court of Justice while interpreting article 138 of its own Rules to the effect that "the Tribunal has a discretionary power to refuse to give an advisory opinion, even if the conditions of [that Article] are satisfied". It referred also to decisions of the International Court of Justice that indicated that "[i]t is well settled that a request for an advisory opinion should not in principle be refused except for 'compelling reasons'",[252] and noted that there should be a "sufficient connection".[253] The Tribunal also noted that "[i]t is also

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[246] *Ibid.*, para. 149.

[247] *Ibid*., para 147.

[248] *"Hoshinmaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005-2007*, p. 18, at para. 64, referring to *Nuclear Tests (Australia v. France)* (see footnote 51 above), para. 62; *Border and Transborder Armed Actions (Nicaragua v. Honduras)* (see footnote 129 above), para. 66; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 182, at para. 55.

[249] *M/V "Louisa"* (see footnote 243 above), para. 99, citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment* (see footnote 202 above), para. 16.

[250] *M/V "Louisa"* (see footnote 243 above), para. 81, citing *Certain Norwegian Loans* (see footnote 65 above), p. 23; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility* (see footnote 103 above), para. 88.

[251] *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4, at para. 65, and *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011*, p. 10, at para. 39, citing *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see footnote 117 above), para. 25; *Western Sahara* (see footnote 59 above), para. 15.

[252] *Sub-Regional Fisheries Commission* (see footnote 251 above), para. 71, referring to *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), para. 14.

[253] *Ibid.*, para. 68, citing *Legality of the Use of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at para. 22.

well settled that an advisory opinion may be given ‘on any legal question, abstract or otherwise’”.[254]

Observation 73

The International Tribunal for the Law of the Sea has relied on its own decisions and those of the International Court of Justice when addressing procedural aspects of its cases.

162. For example, in *Grand Prince*, the Tribunal recalled that, even where there was no disagreement between the parties concerning the jurisdiction thereof, it should be satisfied that it has jurisdiction to deal with the case as submitted, citing the International Court of Justice in this regard, and noting that it “must if necessary go into the matter *proprio motu*”.[255]

163. In *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, the Tribunal recalled the argument of the International Court of Justice that “[n]either in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court”.[256]

164. The Tribunal has referred to the decisions of other international courts and tribunals when determining that the non-appearance of a party to the case as not constituting a bar to the proceedings, nor precluding the possibility of the tribunal ordering provisional measures.[257] The Tribunal also referred to an International Court of Justice case when indicating that the non-appearing parties are parties to the proceedings,[258] and that they will be bound by the decisions rendered in the case.[259]

165. The Tribunal relied on its own decisions when determining that the applicant party should not be put at a disadvantage because of the non-appearance of the other party, and that the Tribunal “must therefore identify and assess the respective rights of the Parties involved on the best available evidence”.[260]

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[254] *Ibid.*, para. 72, referring to *Admission of a State to the United Nations (Charter, Art. 4)* (see footnote 115 above), p. 61.

[255] “*Grand Prince” (Belize v. France), Prompt Release, Judgment, ITLOS Reports 2001*, p. 17, at para. 78, citing *M/V “Saiga” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999*, p. 10, at para. 40, and *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972*, p. 46, at para. 13.

[256] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10, at para. 52, citing *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment* (see footnote 108 above), p. 303.

[257] *Case concerning the detention of three Ukrainian naval vessels (Ukraine v. Russian Federation), Provisional Measures*, Order of 25 May 2019, List of cases No. 26, para. 27, relying on *“Arctic Sunrise” case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, ITLOS Reports 2013*, p. 229, at para. 48, which in turns cites *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 12, at para. 11; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 30, para. 11; *Nuclear Tests (Australia v. France), Interim Protection* (footnote 130 above), para. 11; *Nuclear Tests (New Zealand v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 135, at para. 12; *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3, at para. 13; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979* (see footnote 130 above), paras. 9 and 13.

[258] *Three Ukrainian Naval Vessels* (see footnote 257 above), para. 123, citing *Nuclear Tests (Australia v. France), Interim Protection* (footnote 130 above), para. 24.

[259] *“Arctic Sunrise”* (see footnote 257 above), para. 52 citing *Military and Paramilitary Activities in and against Nicaragua, Merits* (see footnote 55 above), para. 28.

[260] *Ibid*., para. 29, citing *“Arctic Sunrise”* (see footnote 257 above), paras. 56 and 57.

166. The Tribunal has relied on its own decisions to affirm that the United Nations Convention on the Law of the Sea does not require that its provisional measures "must be confined to the period prior to the constitution of the Annex VII arbitral tribunal".[261]

167. The Tribunal has cited the decision of the International Court of Justice in *Barcelona Traction* to indicate that the object of a preliminary objection is to "avoid not merely a decision on, but even any discussion of the merits".[262]

168. In the *Bay of Bengal*, the Tribunal referred to *Territorial and Maritime Dispute (Nicaragua v. Honduras)*, concerning the weight to be given to witness statements produced as affidavits, recalling that the International Court of Justice had indicated that several factors should be taken into account, including "whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events".[263]

3. Examples that relate to interpretation of the United Nations Convention on the Law of the Sea

Observation 74

The International Tribunal for the Law of the Sea has relied on its own previous interpretations of various provisions of the United Nations Convention on the Law of the Sea.

169. For example, in the *Advisory Opinion submitted by the Sub-Regional Fisheries commission,* the Tribunal recalled that, in *Southern Bluefin Tuna*, it had made the following interpretation of article 92 of the United Nations Convention on the Law of the Sea: "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".[264]

170. In the same advisory opinion, the Tribunal referred to its reasoning in the *M/V "Virginia G"* case where it indicated that, in accordance with the United Nations Convention on the Law of the Sea, coastal States may regulate activities in the exercise of its sovereign rights for the purpose of conserving and managing living resources in the exclusive economic zone, [265] and that "it is apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing".[266]

171. The Tribunal has also relied on its own decisions when assessing the conduct of a State as the flag State of a vessel.[267]

172. In some decisions, the Tribunal has referred to its own previous decisions to determine that considerations of humanity must be taken into account in the context

[261] *"Arctic Sunrise"* (see footnote 257 above), para. 84, citing *Straits of Johor (Malaysia v. Singapore)* (see footnote 256 above), para. 67.
[262] *M/V "Norstar" (Panama v. Italy), Judgment, ITLOS Reports 2018–2019*, p. 10, at para. 152, citing *Barcelona Traction* (see footnote 162 above), pp. 43–44.
[263] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (see footnote 101 above), para. 244.
[264] *Sub-Regional Fisheries Commission* (see footnote 251 above), paras. 120 and 216, citing *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999*, p. 280, at para. 70.
[265] *Ibid.*, para. 98, citing *M/V "Virginia G" (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014*, p. 4, at paras. 212 and 213.
[266] *Ibid.*, para. 100, citing *M/V "Virginia G"* (see previous footnote), para. 215.
[267] *"Grand Prince"* (see footnote 255 above), para. 89, referring to *M/V "Saiga" (No. 2)* (see footnote 255 above), para. 68.

of the law of the sea,[268] and "holds the view that States are required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances".[269]

Observation 75

The International Tribunal for the Law of the Sea has relied on a decision of the International Court of Justice that refers to the precautionary approach as relevant in the interpretation of a treaty.

173. In the Advisory Opinion on the *Activities in the Seabed Area*, for example, the Seabed Disputes Chamber referred to the use of the precautionary principle in the interpretation of international obligations, referring to the *Pulp Mills* case where the International Court of Justice had indicated that "a precautionary approach may be relevant in the interpretation and application"[270] of the provisions of the bilateral treaty in that case. The Chamber added that such statement should be read as consistent with the rules of interpretation in article 31 of the Vienna Convention on the Law of Treaties, to take into account any relevant rules of international law applicable in the relations between the parties.[271]

4. Examples concerning the identification of rules of customary international law

Observation 76

The International Tribunal for the Law of the Sea has referred to the decisions of the International Court of Justice, the Permanent Court of International Justice and other international courts and tribunals that have determined the customary international law status of rules.

174. In the Advisory Opinion on *Activities in the Seabed Area*, the Tribunal noted that the rules of interpretation of the Vienna Convention on the Law of Treaties "are to be considered as reflecting customary international law", adding that:

> [a]lthough the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the "Volga" Case (ITLOS Reports 2002, p. 10, at paragraph 77). The [International Court of Justice] and other international courts and tribunals have stated this view on a number of occasions.[272]

175. The Tribunal has indicated that the obligation "to provide for a full compensation or *restitutio in integrum* is currently part of customary international law. This conclusion was first reached by the Permanent Court of International Justice in the *Factory [at] Chorzów* case."[273]

176. In the Advisory Opinion concerning *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, the Chamber referred to the decision of the International Court of Justice in *Pulp Mills* as reflecting customary international law, where the International Court of Justice had indicated

[268] *"Enrica Lexie" (Italy v. India), Provisional Measures, Order of 24 August 2015, ITLOS Reports 2015*, p. 185, at para. 133, citing *M/V "SAIGA" (No. 2)* (see footnote 255 above), para. 155.
[269] *M/V "Louisa"* (see footnote 243 above), para. 155, citing *"Juno Trader" (Saint Vincent and the Grenadines v. Guinea-Bissau), Prompt Release, Judgment, ITLOS Reports 2004*, p. 17, at para. 77, and *"Tomimaru" (Japan v. Russian Federation), Prompt Release, Judgment, ITLOS Reports 2005–2007*, p. 74, at para. 76.
[270] *Pulp Mills* (see footnote 80 above), para. 164.
[271] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 251 above), para. 135.
[272] *Ibid.*, para. 57.
[273] *Ibid.*, para. 194, citing *Factory at Chorzów (Merits)* (see footnote 28 above), p. 47.

that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[274] The Tribunal added that "general international law does not 'specify the scope and content of an environmental impact assessment'"[275] and concluded that, while the United Nations Convention on the Law of the Sea gives some indication of the scope and content of such obligation, as well as other applicable regulations, "obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of the specific provisions of the [regulations of the International Seabed Authority]".[276]

5. Examples that concern the approach of the International Tribunal for the Law of the Sea to precedent and consistency

177. The Statute of the International Tribunal for the Law of the Sea has a provision equivalent to Article 59 of the Statute of the International Court of Justice in its article 33, paragraph 2: "The decision [of the Tribunal] shall have no binding force except between the parties in respect of that particular dispute". It is clear that the Tribunal has no formal system of binding precedent. The jurisdiction of the Tribunal to some extent overlaps with that of the International Court of Justice and it has from the outset (its first judgment was delivered in 1997) often referred to International Court of Justice decisions. This has particularly been the case in relation to procedural questions, many of which had already been dealt with by the International Court of Justice, and in matters of maritime delimitation, on which the International Court of Justice has developed a considerable body of decisions.

Observation 77

The International Tribunal for the Law of the Sea has referred to the "well-established jurisprudence" of the International Court of Justice, the Permanent Court of International Justice and other international tribunals in the methodology to be applied in the context of maritime delimitation.

178. In the *Bay of Bengal*, its first case concerning maritime delimitation, the Tribunal noted that the United Nations Convention on the Law of the Sea indicates that the delimitation of the exclusive economic zone and the continental shelf must be done "on the basis of international law in order to achieve an equitable solution, without specifying the method to be applied".[277] The Tribunal stated that "[i]nternational courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end".[278] It then referred to a list of cases before international courts and tribunals that had elaborated on the methodology for such delimitation, including decisions of the International Court of Justice and arbitral tribunals,[279] and decided that this methodology should be applied.[280]

179. In the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, the Special Chamber of the Tribunal referred to its own decisions, judgments of the International Court of Justice and arbitral awards in considering that "[i]t is now well established that the methodology to

[274] *Ibid*., para. 147, citing *Pulp Mills* (see footnote 80 above), para. 204.
[275] *Pulp Mills* (see footnote 80 above), para. 205.
[276] *Ibid*., paras. 149-150.
[277] *Bangladesh/Myanmar* (see footnote 92 above), para. 225.
[278] *Ibid*., para 226.
[279] *Ibid*., paras. 227-234.
[280] *Ibid*., para. 238.

be applied for delimiting the exclusive economic zone and the continental shelf within 200 nm is the 'equidistance/relevant circumstances' method, unless recourse to it is not feasible or appropriate".[281] The Tribunal further referred to a three-stage approach developed by international courts and tribunals when applying the equidistance/relevant circumstances method to delimitation.[282]

180. The Special Chamber also referred to the *Black Sea* and the *Bay of Bengal* cases to indicate that "[i]t is well established that relevant coasts in maritime delimitation refer to those coasts that generate projections which overlap with those of the coast of the other party".[283]

181. In the same decision, the Special Chamber considered that its jurisdiction necessarily covered the continental shelf within or beyond 200 nautical miles and added that such view was supported by the "well-established jurisprudence" that "there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf", referring to the *Barbados v. Trinidad and Tobago* arbitration.[284]

Observation 78

The International Tribunal for the Law of the Sea has often followed decisions of the International Court of Justice and the Permanent Court of International Justice on procedural matters.[285]

182. This is the case, for example, in the *Southern Bluefin Tuna* case, where the Tribunal referred to decisions of the Permanent Court of International Justice and the International Court of Justice in relation to the definition of a dispute,[286] and in the *Grand Prince* case, where the Tribunal referred to the decision of the International Court of Justice in *Appeal Relating to the Jurisdiction of the ICAO Council* regarding entering into a *proprio motu* examination of its own jurisdiction.[287] Other procedural decisions of the Permanent Court of International Justice and the International Court of Justice followed by the Tribunal include the absence in general international law of the need to exhaust negotiations before submitting a case to an international court or tribunal,[288] the rules concerning the decisive date for determining issues of admissibility,[289] the need for two declarations accepting the jurisdiction of a court or tribunal to coincide in substance[290] and the general principle that a court or tribunal

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[281] *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Judgment, 28 April 2023, List of Cases No. 28, para. 96, citing *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (see footnote 94 above) para. 339; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 4, para. 281; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (see footnote 93 above), para. 128.

[282] *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (see previous footnote 281), para 97, citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), paras. 115-122; *Bangladesh/Myanmar* (see footnote 92 above), para. 240.

[283] *Ibid.*, para. 144, citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), para. 77; *Bangladesh/Myanmar* (see footnote 92 above), para. 198.

[284] *Ibid*., para. 338, citing *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision, 11 April 2006, UNRIAA, vol. XXVII (Sales No. E.06.V.8), pp. 147–251, at para. 213.

[285] For a full analysis, see De Brabandere, "The use of precedent and external case law …" (footnote 145 above).

[286] *Southern Bluefin Tuna* (see footnote 263 above), para. 44.

[287] *"Grand Prince"* (see footnote 255 above), para. 78, referring to *Appeal Relating to the Jurisdiction of the ICAO Council* (see footnote 255 above), para. 13.

[288] *Straits of Johor (Malaysia v. Singapore)* (see footnote 256 above), para. 52.

[289] *"Hoshinmaru"* (see footnote 248 above), para. 64.

[290] *M/V "Louisa"* (see footnote 243 above), para. 81.

has no jurisdiction beyond the subject-matter of the case as defined in the application.[291]

Observation 79

The International Tribunal for the Law of the Sea has not made express reference to the desirability of consistency in its decisions or with the decisions of other international courts and tribunals.

183. There are no express mentions in the decisions of the Tribunal of the desirability of consistency or predictability equivalent to those in the decisions of the International Court of Justice quoted above. The former President of the Tribunal has, however, stated that the Tribunal's practice in referring to the decisions of the International Court of Justice, the Permanent Court of International Justice and other international tribunals "has thereby helped to strengthen the development of a corpus of jurisprudence. In my view, this demonstrates a constructive manner of maintaining consistency in international law and reinforcing the necessary coherence between general international law and the law of the sea".[292]

6. Examples of references to decisions of the International Court of Justice, the Permanent Court of International Justice or the International Tribunal for the Law of the Sea that determine the existence or content of rules or principles of international law

Observation 80

The International Tribunal for the Law of the Sea has referred to a number of legal rules and principles identified in decisions of the International Court of Justice, the Permanent Court of International Justice and its own decisions.

184. In the *M/V "Saiga" (No. 2)*, the *M/V "Virginia G"* and the *M/V "Norstar"* cases, the Tribunal referred to the right of a State to obtain reparations for the damage suffered as a consequence of an internationally wrongful act of another State, citing the *Factory at Chorzów* case.[293]

185. The Tribunal has referred to the definition of "dispute"[294] formulated by the Permanent Court of International Justice in *Mavrommatis* – a "disagreement on a point of law or fact, a conflict of legal views or of interests"[295] – and complemented by the International Court of Justice in the *South West Africa* case, where "it must be shown that the claim of one party is positively opposed by the other".[296]

186. While considering the request for provisional measures in the case of the *M/T "San Padre Pio"*, the Tribunal referred to the case of the International Court of Justice *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* and its own decisions, stating that the International Court of Justice had noted that, "in the determination of the existence of a dispute, as in other matters, the position or

[291] *Ibid*., para. 145.
[292] Statement by the former President of the International Tribunal for the Law of the Sea, H.E. Judge Rüdiger Wolfrum, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, pp. 6-7, available at https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_291007_eng.pdf.
[293] *M/V "Saiga" (No. 2)* (see footnote 255 above), para. 170, citing *Factory at Chorzów (Merits)* (see footnote 28 above), p. 47; *M/V "Norstar", Judgment* (see footnote 262 above), para. 316; and *M/V "Virginia G"* (see footnote 265 above), para. 428.
[294] *Southern Bluefin Tuna* (see footnote 263 above), para. 44.
[295] *Mavrommatis Palestine Concessions* (see footnote 10 above), p. 11.
[296] *South West Africa, Preliminary Objections, Judgment* (see footnote 108 above), p. 328.

the attitude of a party can be established by inference, whatever the professed view of that party". [297]

187. In the *M/V "Norstar"* case, the Tribunal referred to the *Gabčíkovo-Nagymaros Project* case, in which the International Court of Justice had indicated that an injured State which failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for the damage that could have been avoided, and determined that, while such principle "might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act".[298]

188. In the Advisory Opinion on *Activities in the Seabed Area*, the Special Chamber of the Tribunal referred to the connection between obligations of due diligence and obligations of conduct as emerging clearly from the judgment of the International Court of Justice in the *Pulp Mills* case.[299] The Tribunal noted that the Court had characterized a due diligence obligation as "an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators".[300] The Tribunal also referred to the due diligence obligation and the *Pulp Mills* case in the *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission*.[301]

189. The Special Chamber of the Tribunal relied on its previous decision in *Southern Bluefin Tuna* when deriving a link between the obligation of due diligence and the precautionary approach.[302]

190. Other rules and principles from decisions of the International Court of Justice that the Tribunal has relied on include:

– Freedom of navigation (the Tribunal in *M/V "Norstar"* added that "another corollary of the open and free status of the high seas is that, save in exceptional cases, no State may exercise jurisdiction over a foreign ship on the high seas" citing the *S.S. "Lotus"* case);[303]

– The principle that the land dominates the sea in relation to maritime areas;[304]

[297] *M/T "San Padre Pio" (Switzerland v. Nigeria), Provisional Measures, Order of 6 July 2019, ITLOS Reports 2018–2019*, p. 375, at para. 57, citing *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment* (see footnote 108 above), para. 89; see also *M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment, ITLOS Reports 2016*, p. 44, at para 100; and *Three Ukrainian Naval Vessels* (see footnote 257 above), para. 43.

[298] *M/V "Norstar", Judgment* (see footnote 262 above), para. 382, citing *Gabčíkovo-Nagymaros* (see footnote 92 above), para. 80.

[299] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 251 above), para. 111, citing *Pulp Mills* (see footnote 80 above), para. 187.

[300] *Ibid.*, para. 115, citing *Pulp Mills* (see footnote 80 above), para. 197.

[301] *Sub-Regional Fisheries Commission* (see footnote 251 above), para. 131, citing *Pulp Mills* (see footnote 80 above), para. 197.

[302] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 251 above), para. 132, citing *Southern Bluefin Tuna* (see footnote 263 above), para. 80.

[303] *M/V "Norstar", Judgment* (see footnote 262 above), para. 216, citing *Case of the S.S. "Lotus"* (see footnote 15 above), p. 25.

[304] *Bangladesh/Myanmar* (see footnote 92 above), para. 185, citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), para. 77, and *North Sea Continental Shelf* (see footnote 102 above), para. 96. See also *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (see footnote 281 above), para. 108, citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), para. 77.

– Existence of a single continental shelf, rather than an inner and extended continental shelf;[305]

– The requirements for the application of *estoppel*.[306]

191. In the *Hoshinmaru* case, the Tribunal considered that tacit consent or acquiescence could not be presumed of Japan since the "situation is not one where Japan would have been under an obligation to react according to a rule", referring to the decision of the International Court of Justice in *Temple of Preah Vihear*.[307]

7. Examples concerning reference by the International Tribunal for the Law of the Sea to its own previous decisions in procedural matters

Observation 81

The International Tribunal for the Law of the Sea has often relied on its own previous decisions in the interpretation of the application of the requirements for the granting of provisional measures.

192. The Tribunal has relied on its prior decisions to address various aspects of provisional measures. These include the need for *prima facie* jurisdiction over the case,[308] that the rights claimed by the party requesting the provisional measures are at least "plausible",[309] and the need for the existence of "a real and imminent risk that irreparable prejudice may be caused to the rights of parties to the dispute before the constitution and functioning of the Annex VII arbitral tribunal."[310]

193. In indicating that the posting of a bond or security may be necessary in some cases "in view of the nature of the prompt release proceedings",[311] the Tribunal recalled its view in *"Monte Confurco"* that:

> article 73 of the Convention establishes a balance between the interests of the coastal State in taking appropriate measures as may be necessary to ensure compliance with the laws and regulations adopted by it on the one hand and the interest of the flag State in securing prompt release of its vessels and their crew upon the posting of a bond or other security on the other.[312]

194. In the context of provisional measures, the Tribunal has developed through its cases a list of relevant factors to be considered in the assessment of the reasonableness

[305] *Bangladesh/Myanmar* (see footnote 92 above), paras. 361–362, citing *Barbados v. the Republic of Trinidad and Tobago* (see footnote 284 above), para. 213, also quoted by the International Tribunal for the Law of the Sea in *Bangladesh/Myanmar* (see footnote 92 above), para. 362.

[306] *Bangladesh/Myanmar* (see footnote 92 above), para. 124, citing *North Sea Continental Shelf* (see footnote 102 above), para. 30, and *Gulf of Maine* (see footnote 50 above), para. 145.

[307] *"Hoshinmaru"* (see footnote 248 above), para. 87, citing *Case concerning Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6, at p. 23.

[308] *M/T "San Padre Pio"* (see footnote 297 above), para. 45. See also *Three Ukrainian Naval Vessels* (see footnote 257 above), para. 36, citing *"ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012*, p. 332, at para. 60.

[309] *M/T "San Padre Pio"* (see footnote 297 above), para. 77, citing *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015*, p. 146, at para. 58; *"Enrica Lexie"* (see footnote 268 above), para. 84; *Three Ukrainian Naval Vessels* (see footnote 257 above), para. 91.

[310] *M/T "San Padre Pio"* (see footnote 297 above), para. 111, citing *"Enrica Lexie"* (see footnote 268 above), para. 87.

[311] *"Juno Trader"* (see footnote 269 above), para. 97, citing *M/V "SAIGA" (Saint Vincent and the Grenadines), Prompt release, Judgment, ITLOS Reports 1997*, p. 16, at para. 81.

[312] *"Tomimaru"* (see footnote 269 above)para. 74, citing *"Monte Confurco" (Seychelles v. France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 86, para. 70.

of bonds or other financial securities.[313] These include the "gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form".[314]

Observation 82

On occasion, the International Tribunal for the Law of the Sea has referred to its own decisions and those of other international courts and tribunals when considering the burden and standard of proof for certain claims.

195. The Tribunal relied on its own previous decision and an International Court of Justice decision when determining that evidence of a tacit agreement for the delimitation of maritime areas "must be compelling",[315] that the sole existence of oil concessions does not prove the existence of such agreement,[316] and that the existence of fisheries activities in the area is not determinative of the extent of the boundary.[317]

8. Examples of references to decisions of national courts.

Observation 83

The International Tribunal for the Law of the Sea has referred to the possible use of the decisions of national courts to elucidate the facts of a case.

196. In the *M/V "Norstar"* case, the Tribunal acknowledged "that the decisions of the Italian courts may help elucidate the facts of the present case"[318] and cited the *Case concerning Certain German Interests in Polish Upper Silesia*, where it was noted that: "municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."[319] The same reference is also found in *M/V "Virginia G"*.[320]

9. Examples of references to the work of the International Law Commission

Observation 84

On occasion, the International Tribunal for the Law of the Sea has referred to the work of the International Law Commission.

197. In *M/V "Saiga" (No. 2)*, the Tribunal referred to several of the draft articles on State responsibility as adopted on first reading. For example, the decision referred to draft article 22 in support of the rule that local remedies must be exhausted

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[313] *"Hoshinmaru"* (see footnote 248 above), para. 82; *"Juno Trader"* (see footnote 269 above), paras. 82-85; *"Volga" (Russian Federation v. Australia), Prompt Release, Judgment, ITLOS Reports 2002*, p. 10, para. 64, citing *"Monte Confurco"* (see footnote 312 above), para. 76. See also *M/V "Virginia G"* (see footnote 265 above), para. 292.

[314] *"Volga"* (see footnote 313 above), para. 63, citing *"Camouco" (Panama v. France), Prompt Release, Judgment, ITLOS Reports 2000*, p. 10, at para. 67.

[315] *Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment* (see footnote 281 above), para. 212. See also *Bangladesh/Myanmar* (see footnote 92 above), para. 117, citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (see footnote 101 above), para. 253.

[316] *Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, para. 215, citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (see footnote 101 above), para. 253, and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 625, at para. 79.

[317] *Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (see footnote 281 above), para. 226, citing *Maritime Dispute (Peru v. Chile)* (see footnote 93 above), para. 111).

[318] *M/V "Norstar", Judgment* (see footnote 262 above), para. 229.

[319] *Certain German Interests in Polish Upper Silesia (Merits)* (see footnote 37 above), p. 19.

[320] *M/V "Virginia G"* (see footnote 265 above), para. 226.

(corresponding to article 44 of the second reading text).[321] In the same decision, the Tribunal cited draft article 42 to refer to the forms of reparation (corresponding to article 34 of the text in second reading) that could take place under international law,[322] and draft article 33 concerning necessity as a ground to preclude wrongfulness of an act (corresponding to article 25 of the second reading text).[323]

198. In the *Responsibilities and obligations of States with respect to activities in the Area* Advisory Opinion, the Seabed Disputes Chamber of the Tribunal made reference to article 34 of the articles on State responsibility concerning the forms of reparation,[324] and article 2 noting that damage is not a requirement for the international responsibility of States.[325] In the same case, the Tribunal referred to articles 5 and 11 affirming that "the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the … Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the … Articles on State Responsibility)."[326]

199. In the same advisory opinion, the Seabed Disputes Chamber stated that it "is aware of the efforts made by the International Law Commission to address the issue of damages resulting from acts not prohibited under international law. However, such efforts have not yet resulted in provisions entailing State liability for lawful acts."[327] The Advisory Opinion also referred to article 48 of the articles on State responsibility while noting that "[e]ach State Party [to the United Nations Convention on the Law of the Sea] may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area."[328]

200. In the *"Norstar"* case, in further references to the articles on State responsibility of States for internationally wrongful acts, the Tribunal referred to articles 1, 31, 36 (compensation of financially assessable damage should include loss of profits)[329] and 38 (interest).[330] Additionally, the Tribunal referred to the commentary to article 38 concerning interest on amounts determined as compensation to the effect that there is no uniform approach to the quantification and assessment of the amounts payable as interest.[331]

Observation 85

On occasion, the International Tribunal for the Law of the Sea has referred to some of the articles on State responsibility as reflecting customary international law.

201. For example, the Tribunal has held that the following are part of customary international law: the rule that every international wrongful act of a State entails international responsibility of that State (art. 1),[332] the elements of State responsibility

[321] *M/V "Saiga" (No. 2)* (see footnote 255 above), para. 98.
[322] *Ibid*., para. 171. See also *M/V "Norstar", Judgment* (see footnote 262 above), para. 319.
[323] *Ibid.*, para. 133.
[324] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 251 above), para. 196.
[325] *Ibid*., para. 210.
[326] *Ibid.,* para. 182.
[327] *Ibid.*, para. 209.
[328] *Ibid.*, para. 180.
[329] *M/V "Norstar", Judgment* (see footnote 262 above), paras. 314, 317, 318, 333 and 431.
[330] *Ibid*., paras. 457-458.
[331] *Ibid*., para. 458.
[332] *Ibid*., para. 317, and *M/V "Virginia G"* (see footnote 265 above), para. 429.

(art. 2),[333] the duty to provide full reparation for the injury caused by an internationally wrongful act (art. 31).[334]

202. The Advisory Opinion on the *Activities in the Seabed Area* indicated that, when interpreting article 304 of the United Nations Convention on the Law of the Sea (responsibility and liability for damage), the articles on State responsibility should be taken into account as forming part of the rules regarding responsibility and liability under international law.[335]

Observation 86

On occasion, the International Tribunal for the Law of the Sea has referred to the work of the Commission when interpreting the text of the United Nations Convention on the Law of the Sea.

203. For example, in the *M/V "Saiga" (No. 2)*, the Tribunal analysed article 91 of the United Nations Convention on the Law of the Sea and recalled that article 29 of the draft articles on the law of the sea adopted by the Commission in 1956 had included a "genuine link" criterion on the nationality of the ship and as a criterion for the recognition by other States of the nationality of a ship. The Tribunal observed that the text of article 5 of the Convention on the High Seas of 1958[336] contained an obligation regarding a genuine link between the State and the ship, but did not include "that the existence of a genuine link should be a basis for the recognition of nationality".[337] Since the United Nations Convention on the Law of the Sea followed the same approach as the 1958 Convention on the High Seas, the Tribunal concluded that the need for a genuine link between a ship and its flag State was not a criterion "by reference to which the validity of the registration of ships in a flag State may be challenged by other States".[338]

204. In the Advisory Opinion concerning *Activities in the Seabed Area*, the Seabed Disputes Chamber referred to the terms "liability" and "responsibility" used across the language versions of the articles on State responsibility when interpreting articles 139 and 235 of the United Nations Convention on the Law of the Sea (concerning responsibility and liability). The Chamber indicated that "the term 'responsibility' refers to the primary obligation whereas the term 'liability' refers to the secondary obligation, namely, the consequences of a breach of the primary obligation".[339]

205. In the same advisory opinion, when interpreting the obligation of States "to ensure" found in articles 139 and 194 of the United Nations Convention on the Law of the Sea, the Seabed Disputes Chamber referred to article 8 of the articles on State responsibility when stating that:

> The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable

[333] *Sub-Regional Fisheries Commission, Advisory Opinion* (see footnote 251 above), para. 144.
[334] *M/V "Norstar"* (see footnote 262 above), para. 318, citing *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 251 above), para. 194. See also *Sub-Regional Fisheries Commission, Advisory Opinion* (see footnote 251 above), para. 144.
[335] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 251 above), para. 169.
[336] Geneva Conventions on the Law of the Sea (Geneva, 29 April 1958): Convention on the High Seas, United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.
[337] *M/V "Saiga" (No. 2)* (see footnote 255 above), para. 80.
[338] *Ibid*., para. 83.
[339] *Responsibilities and obligations of States with respect to activities in the Area* (see footnote 251 above), para. 66.

to the State under international law (see … Articles on State Responsibility, Commentary to article 8, paragraph 1).[340]

D. Arbitral tribunals

206. As indicated in the introduction, the present section focuses primarily on the arbitral awards contained in the *Reports of International Arbitral Awards*, focusing mainly on inter-State arbitral awards. The applicable law in each case depends on the scope of the arbitral agreement between the parties, as contained in a treaty or other instrument.

1. Express reference to subsidiary means under Article 38 of the Statute of the International Court of Justice

Observation 87

On a few occasions, inter-State arbitral tribunals have made express reference to subsidiary means, *moyens auxiliaires* or Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

207. In the award on *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India,* the Tribunal recalled the principles of transparency and predictability to ensure an equitable result in maritime delimitation, referred to by the International Tribunal for the Law of the Sea in the *Bangladesh/Myanmar* case,[341] and added that:

> transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process. The ensuing—and still developing—international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the [United Nations Convention the Law of the Sea].[342]

Observation 88

Some references in arbitral awards to the term "subsidiary means" appear in fact to be references to materials that are "supplementary means" in the context of the interpretation of treaties.

208. For example, the award on the *Interpretation of the air transport services agreement between the United States of America and France*, which predates the draft articles on the law of treaties concluded by the Commission in 1966,[343] referred to a request made by the United States which was considered relevant "from the point of view of that ascertaining of 'the purposes of the treaty' to which the Parties have referred in their pleadings and which is in its turn recognized as a legitimate subsidiary means of interpreting treaties".[344] The award referred in a footnote on such terms indicating that the International Court of Justice in the *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants*

[340] *Ibid*., para. 112, also cited in *Sub-Regional Fisheries Commission* (see footnote 251 above), para. 128.
[341] *Bangladesh/Myanmar* (see footnote 92 above), para. 184.
[342] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India* (see footnote 94 above), para. 339.
[343] Draft articles on the law of treaties, *Yearbook … 1966*, vol. II, pp. 177-274.
[344] *Interpretation of the air transport services agreement between the United States of America and France*, 22 December 1963, UNRIAA, vol. XVI (Sales No. E.69.V.1), pp. 5–74, at p. 56.

(Netherlands v. Sweden) "used the consideration of the 'purpose' of a Convention as a criterion of interpretation".[345]

209. In the same award, the tribunal indicates that in the *Case concerning the Temple of Preah Vihear*, the International Court of Justice:

> seems to have taken into consideration the conduct of the Parties not only as a subsidiary means in case of doubt as to the interpretation to be given to the instrument under examination, but also as a possible source of a modification in the juridical situation, in the event that it had been sought to draw a different conclusion from the simple interpretation of the instrument in question.[346]

Observation 89

Arbitral tribunals have rarely referred expressly to "subsidiary means" in their decisions.

210. A rare example of an express reference to the term "subsidiary means" (*moyens auxiliaires*) can be found in the *Affaire Goldenberg,* where the sole arbitrator was identifying what could be regarded as comprising the law of nations, for the purpose of the determination of reparations under Annex IV to articles 297 and 298 of the Treaty of Versailles,[347] and mentioned that:[348]

> il est évident qu'il a tacitement admis que l'arbitre unique suivrait, dans l'application du droit des gens, la pratique de ces Cours. Or, cette pratique a toujours été basée, non seulement sur les normes écrites du droit international, mais sur la coutume internationale, les principes généraux reconnus par les nations civilisées et les décisions judiciaires, envisagées comme moyens auxiliaires de déterminer les règles de droit.
>
> [(it) makes it clear that it tacitly accepted that the sole arbitrator should follow the practice of those tribunals in the application of the law of nations. That practice has always been based not only on the written rules of international law but also on international custom, the general principles recognized by civilized nations, and judicial decisions, the last named as subsidiary means for the determination of rules of law.]

Observation 90

On one occasion thus far, an arbitral tribunal referred to the interaction between the supplementary means of interpretation of treaties referred to in the Vienna Convention on the Law of Treaties and the subsidiary means mentioned in Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

211. An arbitral award in a case between the United States and Canada deciding a dispute related to the Soft Lumber Agreement considered that the supplementary means of interpretation of treaties in the Vienna Convention on the Law of Treaties should be understood broadly, so as to include the materials listed in Article 38, paragraph 1 (d),

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[345] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India* (see footnote 94 above), footnote 1, citing the *Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), I.C.J. Reports 1958,* p. 55, at pp. 68 and 69.

[346] *Ibid*.

[347] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) (Versailles, 28 June 1919), *British and Foreign State Papers*, 1919, vol. CXII (London, His Majesty's Stationery Office, 1922), p. 1.

[348] *Affaire Goldenberg (Allemagne contre Roumanie)*, sentence, 27 September 1928, UNRIAA, vol. II (Sales No. 1949.V.1), pp. 901–910, at pp. 908-909.

of the Statute of the International Court of Justice as additional supplementary means of interpretation, indicating that:

> On the other hand, Article 32 [of the Vienna Convention on the Law of Treaties] permits recourse, as supplementary means of interpretation, not only to a treaty's "*preparatory work*" and the "*circumstances of its conclusion*", but indicates by the word "*including*" that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 [of the Vienna Convention on the Law of Treaties]. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as "*subsidiary means*". Therefore, these legal materials can also be understood to constitute "*supplementary means of interpretation*" in the sense of Art. 32 [of the Vienna Convention on the Law of Treaties].[349]

212. The arbitral tribunal considered that:

> it is not evident how far arbitral awards are of determinative relevance to the Tribunal's task. It is at all events clear that the decisions of other tribunals are not binding on this Tribunal. …
>
> … However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case.[350]

213. As there are no further express references to subsidiary means or to Article 38, paragraph 1 (d), in the arbitral awards referred to in the remainder of the present section, the Secretariat should not be understood as taking a view on whether or to what extent the examples presented below may constitute a use of judicial decisions and other materials as subsidiary means for the determination of rules of international law.

2. Examples related to jurisdiction or competence

Observation 91

On occasion, arbitral tribunals have referred to decisions of other international tribunals referring to the principle of *compétence de la compétence*.

214. The arbitral tribunal in the *Arbitration Between the Republic of Croatia and the Republic of Slovenia* referred to decisions of the International Court of Justice,[351] the International Criminal Tribunal for the Former Yugoslavia,[352] and several decisions

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[349] London Court of International Arbitration, *United States v. Canada*, Award, Case No. 7941, Award on remedies, 23 February 2009, para. 83.

[350] *Ibid*., paras. 84-85.

[351] *Arbitration between the Republic of Croatia and the Republic of Slovenia*, Case No. 2012-04, Partial Award, 30 June 2016, para. 148, citing *Nottebohm Case (Preliminary Objection) (Liechtenstein v. Guatemala)* (see footnote above), p. 119. See also *Interpretation of the Greco-Turkish* (see footnote 13 above), p. 20; *Arbitral Award of 31 July 1989* (see footnote 202 above), para. 46.

[352] *Ibid*., referring to International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić a/k/a "Dule*," Case No. IT-94-1, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Appeals Chamber, para. 18.

of arbitral tribunals in support of the principle of *compétence de la compétence* of international tribunals.[353]

Observation 92

On occasion, arbitral tribunals have referred to decisions of other international tribunals when interpreting the scope of their power to accede to requests for interpretation of their decisions.

215. In *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic,* the arbitral tribunal:

> subscribe[d] to the view taken by the Permanent Court of International Justice in the *Chorzów Factory* case that to require undue formality, such as the exhaustion of diplomatic negotiations, in establishing the existence of a dispute would be out of place in the context of a request for the interpretation of a judgment.[354]

216. In the *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile),* the arbitral tribunal analysed the scope of its power to interpret the arbitral award issued on 21 October 1994. It indicated that, besides the provisions of the Treaty of Peace and Friendship between the parties and the rules of procedure applicable in the case,[355] "[t]he international legal precedents also require a disagreement between the Parties in order for a request for interpretation of a decision to be admissible", referring to the decisions of the Permanent Court of International Justice in the *Interpretation of Judgments No. 7 and 8*,[356] and the International Court of Justice in the *Request for interpretation of the* Asylum *case*.[357]

217. The tribunal concluded that such "precedents have also established that it is sufficient for the two parties to have expressed themselves differently concerning the meaning and scope of the judgement, but it is not required, however, that the difference should be openly expressed in a specific manner".[358] The tribunal added that "interpretation must be requested with respect to a specific term or paragraph and

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[353] *Ibid*., paras. 149-154, citing Permanent Court of Arbitration, *Award in the Arbitration regarding the delimitation of the Abyei Area between the Government of Sudan and the Sudan People's Liberation Movement/Army,* Final Award, 22 July 2009, UNRIAA, vol. XXX, p. 300, at para. 499; *Affaire du Guano (Chili/France)*, Awards, 20 January 1896, 10 November 1896, 20 October 1900, 8 January 1901, and 5 July 1901, UNRIAA, vol. XV (Sales No. B.13.V.4), pp. 77–387, at p. 100; *The Walfish Bay Boundary Case (Germany, Great Britain),* Award, 23 May 1911, UNRIAA, vol. XI (Sales No. 61.V.4), pp. 263–308, at p. 307, para. LXVII; *Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Award, 28 November 1923, UNRIAA, vol. VI (Sales No. 1955.V.3), pp. 131–138, at pp. 135-136; *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision, 15 December 1933, UNRIAA, vol. VIII (Sales No. 58.V.2), pp. 160–190, at p. 186; *Affaire de la Société Radio-Orient (États du Levant sous mandat français contre Égypte)*, Award, 2 April 1940, UNRIAA, vol. III (Sales No. 1949.V.2), pp. 1871–1881, at p. 1878.

[354] *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Award, 14 March 1978, UNRIAA, vol. XVIII (Sales No. E.80.V.7), pp. 288–413, at para. 12, referring to *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)*, Judgment, 16 December 1927, Series A, No. 13, p. 3, at pp. 10-11.

[355] *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile),* 13 October 1995, UNRIAA, vol. XXII (Sales No. E.00.V.7), pp. 151–207, para. 132.

[356] *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)* (see footnote 354 above), p. 11.

[357] *Request for interpretation of the Judgment of November 20th, 1950, in the* Asylum *case* (see footnote 97 above), p. 403.

[358] *Application for revision and subsidiary Interpretation of the Award of 21 October 1994* (see footnote 355 above), para. 132, referring to *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)* (see footnote 354 above), pp. 10-11, and *Application for Revision and Interpretation of the Judgment of 24 February 1982* (see footnote 112 above), p. 218.

cannot be requested with respect to the decision in general",[359] and referred to a decision of the Peru-United States Mixed Commission and a decision of the Inter-American Court of Human Rights.[360]

218. In some cases, arbitral tribunals have distinguished between their powers, based on the arbitral agreement, and those of other international courts such as the International Court of Justice. For example, the arbitral tribunal in the *Indus Waters* arbitration, in a decision on the request for clarification or interpretation by India of a partial award noted that:

> although the Parties have referred to the case law of the [International Court of Justice] on the admissibility of a request for interpretation, this Court notes that the body of [the Court's] practice on the matter is based specifically on [that Court's] Statute and [its] Rules of Court, which include substantive preconditions to the exercise of [the Court's] interpretative power.[361]

Observation 93

On occasion, arbitral tribunals have referred to decisions of the International Court of Justice when analysing the scope of their competence to interpret or identify rules of international law.

219. For example, the tribunal in the *Arbitration between the Republic of Ecuador and the United States of America* referred to the judgment of the International Court of Justice in *Northern Cameroons* and noted that the Court:

> deemed it "undisputable" that "the Court may, in an appropriate case, make a declaratory judgment ... [that] expounds a rule of customary law or interprets a treaty which remains in force, [which] judgment has a continuing applicability." The issue is whether the context of such a decision grants it the necessary practical consequence, beyond the mere elucidation of the meaning of the treaty itself, for the parties before the tribunal.[362]

Observation 94

On occasion, arbitral tribunals have referred to the decisions of other arbitral tribunals in support of the existence of inherent power to consider counter-claims.

220. In the *Enrica Lexie* case, the tribunal held that, while the rules of procedure it had adopted at the beginning of the proceedings did not:

> expressly provide for, and regulate, the right to present counter-claims, the Arbitral Tribunal has no doubt that arbitral tribunals established pursuant to Annex VII to the Convention have the inherent power to hear counter-claims. This is consistent with the view previously taken by arbitral tribunals in the

[359] *Ibid*., para. 137, referring to *Request for interpretation of the Judgment of November 20th, 1950, in the* Asylum *case* (see footnote 97 above), p. 403.

[360] *Ibid*., indicating that: "The Court would cite, by way of example, the decision of 26 February 1870 of the Peru-United States Mixed Commission (Moore, *History and Digest of International Arbitrations to which the United States has been a Party*, Washington, 1898, vol. II, pp. 1630 et seq. and 1649); and the decisions of the Inter-American Court of Human Rights of 17 August 1990, which interpret a specific term in the awards pronounced in the Velasquez Rodriguez and Godinez Cruz cases (Inter-American Court of Human Rights, Series C, No. 9, para. 31; Series C, No. 10, para. 31)."

[361] *Indus Waters Kishenganga* arbitration, Decision on India's Request for Clarification or Interpretation, 20 May 2013, UNRIAA, vol. XXXI, pp. 296–314, at para. 22.

[362] *Arbitration between the Republic of Ecuador and the United States of America*, Award, 29 September 2012, UNRIAA, vol. XXXIV, pp. 1-123, at para. 196, citing *Northern Cameroons* (see footnote 52 above).

Annex VII arbitrations of *Barbados v. The Republic of Trinidad and Tobago* and *Guyana v. Suriname*.[363]

Observation 95

On occasion, arbitral tribunals have referred to decisions of the International Court of Justice in relation to their role in identifying and characterizing an international dispute.

221. For example, in the *South China Sea* arbitration, the tribunal referred to various decisions of the International Court of Justice when noting that, "[w]here a dispute exists between parties to the proceedings, it is further necessary that it be identified and characterised"[364] and that "the Tribunal is required to 'isolate the real issue in the case and to identify the object of the claim'".[365] The tribunal also added that "[a]s set out in *Fisheries Jurisdiction (Spain v. Canada),* it is for the Court itself 'to determine on an objective basis the dispute dividing the parties, by examining the position of both parties'".[366]

222. In the *Enrica Lexie* case, the tribunal also referred to the decisions of the International Court of Justice concerning the method of determining the issue in dispute. It was noted that in "*Fisheries Jurisdiction (Spain v. Canada)*, the [International Court of Justice] observed that, in order to identify its task in any proceedings, the court 'must begin by examining the Application' and 'look at the Application as a whole'".[367]

Observation 96

On occasion, arbitral awards have referred to the decisions of international courts and tribunals in relation to the scope of their powers of review of fact finding bodies.

223. In the *Abyei* arbitration, the tribunal referred to multiple decisions of international courts and tribunals when determining whether the experts of the Abyei Boundaries Commission, established pursuant to the Comprehensive Peace Agreement signed by the Parties on 9 January 9 2005 had exceeded their mandate. In particular, the tribunal noted that:

> In public international law, it is an established principle of arbitral and, more generally, institutional review that the original decision-maker's findings will be subject to limited review only. … A reviewing body that is seized of the issue of putative excess of powers will not "pronounce on whether the [original]

[363] *The "Enrica Lexie" Incident (Italy v. India)*, PCA Case No. 2015-28, Award, 21 May 2020, para. 254, citing *Barbados v. the Republic of Trinidad and Tobago* (see footnote 284 above), paras. 213-217, and *Award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award, 17 September 2007, UNRIAA vol. XXX, pp. 1–144.

[364] *The South China Sea Arbitration between the Republic of the Philippines and the People's Republic of China*, Award on Jurisdiction and Admissibility of 29 October 2015, UNRIAA, vol. XXXIII, pp. 1–152, para. 150. See also *The "Enrica Lexie" Incident (Italy v. India)*, Award, (see footnote 363 above), para. 231.

[365] *Ibid*., citing *Nuclear Tests (New Zealand v. France)* (see footnote 104 above), para. 30, and also *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case, I.C.J. Reports 1995*, p. 288, at para. 55.

[366] *Ibid*., citing *Fisheries Jurisdiction (Spain v. Canada)* (see footnote 68 above), para. 30.

[367] *The "Enrica Lexie" Incident (Italy v. India)*, Award (see footnote 363 above), para. 233, citing *Fisheries Jurisdiction (Spain v. Canada)* (see footnote 68 above), paras. 29–30, and *Mutual Assistance in Criminal Matters (Djibouti v. France)* (see footnote 161 above), para. 70.

> decision was right or wrong," as this question is legally irrelevant within an excess of powers inquiry.[368]

224. The tribunal noted that "partial annulment of a decision or award has long been recognized by international jurisprudence as within the authority of a court or arbitral tribunal seized with a review function" referring to multiple decisions of various international courts and tribunals.[369] Moreover, the tribunal concluded that: "the [International Court of Justice's] analysis in the Case concerning the Arbitral Award of 31 July 1989, which is based on explicitly reasoned legal principles that apply by analogy to these proceedings, provides the best method for establishing the appropriate standard of review."[370]

3. Examples that relate to treaty interpretation

Observation 97

On occasion, arbitral tribunals have referred to decisions of the International Court of Justice regarding the determination of the binding or non-binding nature of an agreement.

225. For example, the tribunal in the *Chagos Marine Protected Area* case referred to the International Court of Justice *Aegean Sea* case:[371]

> As recalled by the [International Court of Justice] in *Aegean Sea Continental Shelf*, "in determining what was indeed the nature of the act or transaction embodied in the [agreement], the [Tribunal] must have regard above all to its actual terms and to the particular circumstances in which it was drawn up" (*(Greece v. Turkey), Judgment, I.C.J. Reports 1978*, p. 3 at p. 39, para. 96).

226. In the *South China Sea* arbitration, the tribunal referred to various decisions of the International Court of Justice to indicate that:[372]

> To constitute a binding agreement, an instrument must evince a clear intention to establish rights and obligations between the parties. Such clear intention is determined by reference to the instrument's actual terms and the particular circumstances of its adoption. The subsequent conduct of the parties to an instrument may also assist in determining its nature.

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[368] *Abyei* arbitration (see footnote 353 above), para. 403, citing *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960: I.C.J. Reports 1960,* p. 192, at p. 214, cited with approval in *Arbitral Award of 31 July 1989* (see footnote 202 above), para. 25.

[369] *Abyei* arbitration (see footnote 353 above), para. 416, citing *The Orinoco Steamship Company Case (United States, Venezuela)*, Award, 25 October 1910, UNRIAA, vol. XI, pp. 227–241, at p. 234; see also *ibid*., para. 418, citing International Centre for Settlement of Investment Disputes, C*ompañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie générale des eaux) v. Argentine Republic*, Case No. ARB/97/3, Decision on annulment, 3 July 2002, paras. 68–69.

[370] *Abyei* arbitration (see footnote 353 above), para. 507, citing *Arbitral Award of 31 July 1989* (see footnote 202 above).

[371] *Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland*, Award, 18 March 2015, UNRIAA, vol. XXXI, pp. 359–606, at para. 426.

[372] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above), para. 213, referring to *Aegean Sea* (see footnote 71 above), para. 96; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995*, p. 6, paras. 23-29; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (see footnote 213 above), paras. 258 and 262-263.

Further, "[t]he form or designation of an instrument is thus not decisive of its status as an agreement establishing legal obligations between the parties".[373]

Observation 98

On occasion, arbitral tribunals have referred to decisions of other international tribunals that have concluded that the rules of interpretation of treaties contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties are part of customary international law.

227. For example, the arbitral tribunal in *The Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands/France)* referred to multiple decisions of the International Court of Justice and arbitral tribunals indicating that articles 31 and 32 of the Vienna Convention on the Law of Treaties were a codification of customary international law.[374] The tribunal also referred to various decisions of the International Court of Justice[375] and arbitral tribunals[376] to indicate that recourse to the means mentioned in article 32 of the Vienna Convention on the Law of Treaties is not limited to cases "in which the result of the application of the provisions of Article 31 would be ambiguous, obscure or manifestly absurd or unreasonable. Recourse may in fact be had to these means in order to 'confirm the meaning resulting from the application of Article 31'", noting that, while not necessary, in many cases, the review of the supplementary means of interpretation confirmed the interpretation of the text of the treaty.[377]

228. A similar statement can be found in the *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*[378] and the award on competence in the *Indus*

[373] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above), para. 214, referring to *Aegean Sea* (see footnote 71 above), para. 96; *Maritime Delimitation and Territorial Questions (between Qatar and Bahrain, Jurisdiction and Admissibility* (see footnote 372 above), paras. 23–29; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (see footnote 213 above), paras. 258 and 262–263; and also Vienna Convention on the Law of Treaties, art. 2, para. 1 (a).

[374] *Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976*, Award, 12 March 2004, UNRIAA, vol. XXV (Sales No. E.05.V.5), pp. 267–344, at paras. 59-61, citing, among others: *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment* (see footnote 202 above), para. 23; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 71 above), para. 41; *Maritime Delimitation and Territorial Questions (between Qatar and Bahrain, Jurisdiction and Admissibility* (see footnote 372 above), para. 33; *Kasikili/Sedudu Island* (see footnote 213 above), para. 18; *LaGrand (Germany v. United States of America), Judgment* (see footnote 56 above), para. 99; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 316 above), para. 37.

[375] *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* (see footnote 71 above), para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 101 above), para. 40; *Kasikili/Sedudu Island* (see footnote 213 above), para. 46; *Sovereignty over Pulau Ligitan and Pulau Sipadan* (see footnote 316 above), para. 53; *LaGrand (Germany v. United States of America), Judgment* (see footnote 56 above), para. 41.

[376] *Air Services Agreement of 27 March 1946 between the United States of America and France*, Award, 9 December 1978, UNRIAA, vol. XVIII (Sales No. E.80.V.7), pp. 417–493, at para. 44; Agreement on German External Debts, *Revue générale de droit international public*, vol. 84, 1980, para. 37.

[377] *Case concerning the audit of accounts between the Netherlands and France* (see footnote 374 above), para. 70. See also *Tax regime governing pensions paid to retired UNESCO officials residing in France (France – UNESCO*), Decision, 14 January 2003, UNRIAA, vol. XXV (Sales No. E.05.V.5), pp. 31–266, para. 41, citing *Kasikili/Sedudu Island* (see footnote 213 above), para. 18; *Award in the Arbitration regarding the Iron Rhine ("Ijzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award, 24 May 2005, UNRIAA, vol. XXVII, pp. 35–125, para. 45.

[378] *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Decision, 14 February 1985, UNRIAA, vol. XIX (Sales No. E.90.V.7), pp. 149–196, at para. 41.

Waters case, referring to the commentary of the Commission's conclusions on subsequent agreements and subsequent practice in the interpretation of treaties.[379]

Observation 99

On occasion, arbitral tribunals have referred to decisions of international courts and tribunals in the consideration of subsequent practice in the interpretation of treaties.

229. In *Interpretation of the air transport services agreement between the United States of America and France*, which predated the Vienna Convention on the Law of Treaties, the tribunal referred to the decisions of the Permanent Court of International Justice and the International Court of Justice to indicate that the conduct of the parties after the conclusion of the agreement could be of great importance.[380] The tribunal considered that:[381]

> This method may be susceptible of either confirming, or contradicting, and even possibly of correcting the conclusions furnished by the interpretations based on an examination of the text and the preparatory work, for the purposes of determining the common intention of the Parties when they concluded the Agreement.

230. In the arbitration concerning *Tax regime governing pensions paid to retired UNESCO officials residing in France (France – UNESCO)*, the tribunal referred to the decisions of the Permanent Court of International Justice, the International Court of Justice and legal doctrine and noted that the question of the analysis of subsequent practice as a means of interpretation was solidly established before the Vienna Convention on the Law of Treaties.[382] It noted that the Commission included such a practice as an authentic means of interpretation at the same level as interpretative agreements.[383] The Tribunal noted that the Commission's commentary had not determined specifically whose practice could be considered as a subsequent practice that could be used as a means of interpretation and added that the question was addressed by the International Court of Justice in various decisions including the *Temple of Preah Vihear* and *Kasikili/Sedudu*.[384]

231. In the *South China Sea* arbitration, the tribunal referred to the consideration of subsequent agreements and subsequent practice of the parties to a treaty as provided in article 31, paragraph 3, of the Vienna Convention on the Law of Treaties and referred to several decisions elaborating on the criteria to assess such materials in the interpretation process, and noted that:

> the [International Court of Justice] establishes for accepting an agreement on the interpretation by State practice is quite high. The threshold is similarly high in the jurisprudence of the World Trade Organisation, which requires "a

[379] *Indus Waters Treaty Arbitration (Pakistan v. India),* PCA Case No. 2023-01, Award on the Competence of the Court, 6 July 2023, para. 122, citing para. (4) of the commentary to conclusion 2 on subsequent agreements and subsequent practice in the interpretation of treaties, *Yearbook … 2018*, vol. II (Part Two), para. 52, at p. 27.

[380] *Interpretation of the air transport services agreement* (see footnote 344 above), p. 60.

[381] *Ibid*., citing *Competence of the International Labour Office, Advisory Opinion, 12 August 1922, P.C.I.J., Series B, Nos. 2 and 3*, p. 39; *Jurisdiction of the Courts of Danzig, Advisory Opinion, 3 March 1928, P.C.I.J., Series B, No. 15*, p. 18; and *Temple of Preah Vihear* (see footnote 307 above), pp. 32 and 33.

[382] *Tax regime governing pensions paid to retired UNESCO officials* (see footnote 377 above), para. 71.

[383] *Ibid*., referring to the draft articles on the law of treaties with commentaries, *Yearbook … 1966*, vol. II, p. 242.

[384] *Temple of Preah Vihear* (see footnote 307 above), pp. 32-33; and *Kasikili/Sedudu Island* (see footnote 213 above), pp. 1075-1092.

> ‘concordant, common and consistent’ sequence of acts or pronouncements” to establish a pattern implying agreement of the parties regarding a treaty’s interpretation.[385]

Observation 100

On occasion, arbitral tribunals have referred to the practice of international courts and tribunals, and to writings to explain changes over time in the rules of treaty interpretation.

232. The arbitral award in the *Iron Rhine* case indicated that in “the *Free Zones* case and in *Case of the S.S. Wimbledon* (*P.C.I.J. Series A, No. 1 (1923)* at p. 24) the Permanent Court [of International Justice] said that in case of doubt about a limitation on sovereignty that limitation is to be interpreted restrictively”,[386] “[t]he object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation”.[387] It was indicated that:

> [r]estrictive interpretation thus has particularly little role to play in certain categories of treaties – such as, for example, human rights treaties … some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted.[388]

The tribunal concluded that the rights of the parties were to be interpreted not by invoking the principle of restrictive interpretation, but instead by applying the rules contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties.[389]

Observation 101

On occasion, arbitral tribunals have referred to the interpretative principles mentioned in the decisions of other international tribunals and in writings, and highlighted the relevance of the rules contained in the Vienna Convention on the Law of Treaties.

233. For example, the tribunal in the *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal* relied on writings compiling jurisprudence to indicate that the treaty concluded between France and Portugal in 1960 concerting the maritime border between Senegal and Guinea-Bissau, should be interpreted in light of the law in force at the time of its conclusion.[390]

234. The tribunal noted that, while the Permanent Court of International Justice in the *Free Zones* case and the S.*S. Wimbledon* case indicated that in case of doubt, a limitation to sovereignty should be interpreted restrictively, in *S.S. Wimbledon* it was noted that the Permanent Court of International Justice felt “obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted”.[391]

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[385] *The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China*, PCA Case No. 2013-19, Award, 12 July 2016, UNRIAA, vol. XXXIII, para. 552.

[386] *Iron Rhine (“Ijzeren Rijn”) Railway* (see footnote 377 above), para. 52.

[387] *Ibid*., para. 53.

[388] *Ibid*., citing Rudolf Bernhardt, “Evolutive treaty interpretation, especially of the European Convention on Human Rights”, *German Yearbook of International Law*, vol. 42 (1999), p. 11, at p. 14.

[389] *Ibid*., para. 55.

[390] *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision, 31 July 1989, UNRIAA, vol. XX, pp. 119–213, at para. 85, referring to *International Law Reports*, 1951, p. 161 et seq.; *The International and Comparative Law Quarterly*, 1952, p. 247.

[391] *Iron Rhine (“Ijzeren Rijn”) Railway* (see footnote 377 above), para. 52, citing *S.S. Wimbledon, Judgment, 17 August 1923, P.C.I.J. Series A, No. 1*, pp. 24–25.

235. The arbitral tribunal emphasized the relevance of the principles of interpretation included in the Vienna Convention on the Law of Treaties, noting that:

> [t]he doctrine of restrictive interpretation never had a hierarchical supremacy, but was a technique to ensure a proper balance of the distribution of rights within a treaty system. The principle of restrictive interpretation, whereby treaties are to be interpreted in favour of state sovereignty in case of doubt, is not in fact mentioned in the provisions of the Vienna Convention. The object and purpose of a treaty, taken together with the intentions of the parties, are the prevailing elements for interpretation.[392]

236. The tribunal referred to writings noting that "a too rigorous application of the principle of restrictive interpretation might be inconsistent with the primary purpose of the treaty"[393] and that restrictive interpretation has had a limited approach in certain areas of international law such as human rights, adding that some authors note that the principle has not been relied upon in any recent jurisprudence of international courts and tribunals and that its contemporary relevance is to be doubted.[394]

237. In the *Indus Waters* arbitration, the tribunal referred to various decisions concerning international environmental law and noted that "it is established that principles of international environmental law must be taken into account even when (unlike the present case) interpreting treaties concluded before the development of that body of law". Notably, the tribunal referred to the *Iron Rhine* arbitration where the tribunal:

> applied concepts of customary international environmental law to treaties dating back to the mid-nineteenth century, when principles of environmental protection were rarely if ever considered in international agreements and did not form any part of customary international law. Similarly, the International Court of Justice in *Gabčíkovo-Nagymaros* ruled that, whenever necessary for the application of a treaty, "new norms have to be taken into consideration, and … new standards given proper weight."[395]

For the purpose of the case before it, the arbitral tribunal concluded that it was "therefore incumbent upon this Court to interpret and apply this 1960 Treaty in light of the customary international principles for the protection of the environment in force today".[396]

Observation 102

On occasion, arbitral tribunals have referred to other arbitral awards while considering the rules of interpretation contained in the Vienna Convention on the Law of Treaties.

238. In *Arbitration regarding the Indus Waters Kishenganga between Pakistan and India*, the arbitral tribunal was considering the arguments of the parties, concerning the permissible diversion of the waters, the tribunal referred to a "letter from the Chairman of India's Central Water and Power Commission to India's Ministry for Irrigation and Power dated 16 May 1960, which shows that India was contemplating, at the time the Treaty was concluded, a diversion scheme on the Kishenganga/Neelum River similar to the KHEP as now presented". The tribunal noted that "Article 32 of the [Vienna Convention on the Law of Treaties] was not meant to close the category

[392] *Ibid.*, para. 53.
[393] *Ibid*., citing Robert Jennings and Arthur Watts, eds., *Oppenheim's International Law*, 9th ed. (London, Longmans, 1992), p. 1279.
[394] *Ibid*., citing Bernhardt, "Evolutive treaty interpretation …", p. 14.
[395] *Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India*, Partial Award, 18 February 2013, UNRIAA, vol. XXXI, para. 452, citing *Gabčíkovo-Nagymaros* (see footnote 92 above), p. 78. See also Final Award, 20 December 2013, *ibid*., para. 111.
[396] *Ibid*., para. 452.

of supplementary means that may be utilized in treaty interpretation to those enumerated therein",[397] referring to the award of the arbitral tribunal in *HICEE B.V. v. the Slovak Republic*.[398]

Observation 103

On occasion, arbitral tribunals have referred to the interpretative principles indicated in the decisions of other courts in relation to the interpretation of arbitral awards and other decisions.

239. In the *Application for revision and subsidiary Interpretation of the Award of 21 October 1994 submitted by Chile (Argentina, Chile)*, the tribunal referred to "precedents … concerning interpretation of treaties in which the court has declared that it is called upon to interpret the treaty and not to revise it" and the considered that "[f]ollowing these precedents this Court can declare that, in connection with the request for 'a subsidiary interpretation' submitted by Chile, it may interpret its Award but may not change it".[399]

240. In the *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, the tribunal indicated that international law has principles to interpret any legal instrument.[400] In relation to arbitral awards, the tribunal referred to the award in the *Argentine-Chile Frontier Case*, which had indicated that: "it is proper to apply stricter rules to the interpretation of an Award determined by an Arbitrator than to a treaty which results from negotiation between two or more Parties, where the process of interpretation may involve endeavouring to ascertain the common will of those Parties."[401]

241. Furthermore, the Tribunal also referred, *inter alia*, to the decisions of the Inter-American Court of Human Rights,[402] and the award in the *Delimitation of the continental shelf between Great Britain and France*,[403] and concluded that "[i]n the specific case of international awards, whose legal validity is not in dispute and which have the force of *res judicata*, they must be interpreted in such a way that they do not produce the result that the judge or arbitrator has handed down his decision in violation of rules of the law of nations."[404]

Observation 104

On occasion, arbitral awards have relied on decisions of international courts and tribunals when interpreting the text of the United Nations Convention on the Law of the Sea.

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[397] *Ibid*., para. 380.

[398] *HICEE B.V. v. the Slovak Republic*, PCA Case No. 2009–11, Partial Award, 23 May 2011, paras. 117 and 135.

[399] *Application for revision and subsidiary Interpretation of the Award of 21 October 1994* (see footnote 355 above), para. 134, citing *Interpretation of Peace Treaties (second phase), Advisory Opinion: I.C.J. Reports 1950*, p. 221, at p. 229; *Case concerning rights of nationals of the United States of America in Morocco, Judgment of August 27th, 1952: I.C.J. Reports 1952*, p. 17, at p. 196; Arbitral Tribunal, Arbitral Award of 31 July 1989, *Revue Générale de Droit International Publique*, 1990, p. 270.

[400] *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Decision, 21 October 1994, UNRIAA, vol. XXII (Sales No. 63.V.3), pp. 3–149, at p. 25, para. 72.

[401] *Argentine-Chile Frontier Case*, Award, 9 December 1966, UNRIAA, vol. XVI (Sales No. E.69.V.1), pp. 109–182, at p. 174.

[402] Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Judgment (Interpretation of the Judgment of Reparations and Costs), 17 August 1990, para. 26.

[403] *Delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* (see footnote 354 above), pp. 3–413, at p. 295.

[404] *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy* (see footnote 400 above), para. 76.

242. For example, in the *Guyana v. Suriname* case, the arbitral tribunal referred to the criteria used in the practice of international courts and tribunals to order interim measures, when interpreting the obligation not to jeopardize the reaching of a final agreement contained in articles 74, paragraph 3, and 83, paragraph 3, of the United Nations Convention on the Law of the Sea. The tribunal referred to the provisional measures of the International Court of Justice in the *Aegean sea* case, where the International Court of Justice had indicated that the power to grant such measures was exceptional and limited to activities that can cause irreparable damage.[405] The tribunal concluded that the "criteria used by international courts and tribunals in assessing a request for interim measures, notably the risk of physical damage to the seabed or subsoil, therefore appropriately guide this Tribunal's analysis of an alleged violation of a party's obligations under Articles 74(3) and 83(3) of the Convention".[406]

243. In the *Artic Sunrise* arbitration, the tribunal referred to the decisions of other courts and tribunals when interpreting the obligation to exchange views in article 283 of the United Nations Convention on the Law of the Sea. The tribunal considered that this provision required that the parties exchange views regarding the means by which a dispute that has arisen between them may be settled, however, it "does not require the Parties to engage in negotiations regarding the subject matter of the dispute".[407] It added that a "party is 'not obliged to continue with an exchange of views when it [has] concluded that this exchange could not yield a positive result'".[408]

244. In the *South China Sea* arbitration, the arbitral tribunal referred to various decisions where international courts and tribunals have interpreted the United Nations Convention on the Law of the Sea. In the analysis of the duty to cooperate to protect the marine environment, for example, the tribunal referred to the duty "to cooperate on a regional basis to formulate standards and practices for the protection and preservation of the marine environment" contained in article 197 of the United Nations Convention on the Law of the Sea, and the duty to cooperate in the protection of the marine environment in semi-enclosed areas.[409]

The tribunal also referred to article 206 of the United Nations Convention on the Law of the Sea, which requires that when States have reasonable grounds to believe that the activities planned under its jurisdiction may cause significant harm to the marine environment, "'they shall as far as practicable assess the potential effects of such

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[405] *Delimitation of the maritime boundary between Guyana and Suriname* (see footnote 363 above), para. 468; *Aegean Sea Continental Shelf, Interim Protection* (see footnote 257 above), para. 30.

[406] *Delimitation of the maritime boundary between Guyana and Suriname* (see footnote 363 above), para. 469.

[407] *Award in the Arbitration regarding the* Arctic Sunrise, Award on the Merits, 14 August 2015, UNRIAA, vol. XXXII, pp. 183–353, at para. 151, referring to *Chagos Marine Protected Area* (see footnote 371 above), para. 378.

[408] *Ibid*., para. 154, citing *Straits of Johor (Malaysia v. Singapore)* (see footnote 256 above), para. 48, and noting also *MOX Plant (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001*, p. 95, at para. 60; *"ARA Libertad"* (see footnote 308 above), para. 71.

[409] *South China Sea Arbitration*, Award (see footnote 385 above), para. 984, noting that "[t]he importance of cooperation to marine protection and preservation has been recognised by the International Tribunal for the Law of the Sea on multiple occasions", referencing *The MOX Plant Case* (see previous footnote), para. 82; *Straits of Johor (Malaysia v. Singapore)* (see footnote 256 above), para. 92; *Sub-Regional Fisheries Commission* (see footnote 251 above), para. 140; also *South China Sea Arbitration*, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, Transcript, pp. 40–41. The International Court of Justice, also recognized, in *Pulp Mills*, that "by co-operating ... the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or [the] other of them, so as to prevent the damage in question" (*Pulp Mills* (see footnote 80 above), para. 77); also *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. V, International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities).

activities on the marine environment' and also 'shall communicate reports of the results of such assessments'".[410]

Observation 105

On occasion, arbitral tribunals have referred to the decisions of international courts and tribunals concerning the criteria to grant interim measures when applying article 290 of the United Nations Convention on the Law of the Sea.

245. For example, in the *Enrica Lexie* case, the tribunal held that:

> [a]lthough urgency is not expressly mentioned in Article 290, paragraph 1, of the Convention, as it is in paragraph 5, the Arbitral Tribunal is mindful of the international jurisprudence developed by courts and tribunals on this question, which supports the view that urgency is an important element in considering a request for provisional measures.[411]

246. The arbitral tribunal cited decisions of the International Tribunal for the Law of the Sea[412] and noted that while the requirement of urgency is also absent in Article 41 of the Statute of the International Court of Justice, which concerns provisional measures, the Court "has consistently held that it would only exercise its power to indicate provisional measures if there is urgency".[413] Thus, it concluded that "a showing of urgency in some form is inherent in provisional measures proceedings".[414]

Observation 106

In some cases prior to the Vienna Convention on the Law of Treaties, arbitral awards relied on the principles of interpretation identified in decisions of international tribunals and in writings.

247. For example, in *The Diverted Cargoes Case*, the arbitral tribunal referred to the principles of international law concerning treaty interpretation, which had been identified by decisions and legal doctrine in the following terms:

> CONSIDÉRANT que les principes du droit international qui gouvernent l'interprétation des traités ou accords internationaux ainsi que l'administration des preuves, ont été dégagés par la doctrine et surtout par la jurisprudence internationale en correspondance étroite avec les règles d'interprétation des contrats adoptées à l'intérieur des nations civilisées (voir E. Hambro, The Case of the International Court, 1952, p. 26 à 56, et, pour la France, art. 1134, 1156 et s., 1315 C. civ.).[415]
>
> [*Considering* that the principles of international law that govern the interpretation of treaties or international agreements and the taking of evidence have been identified in doctrine and, in particular, in international jurisprudence,

[410] *South China Sea Arbitration*, Award (see footnote 385 above), para. 987.
[411] *The "Enrica Lexie" Incident (Italy v. India),* PCA Case No. 2015-28, Order regarding the Request for the Prescription of Provisional Measures, 29 April 2016, para. 85.
[412] *Ibid*., para. 86, citing *Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures* (see footnote 309 above), paras 41-43.
[413] *Ibid*., para. 87, referring to *Certain Activities* and *Construction of a Road, Provisional Measures* (see footnote 132 above), paras. 63-64; and also *Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures* (see footnote 131 above), para. 62; *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 133 above), para. 22. See also *The "Enrica Lexie" Incident (Italy v. India)*, para. 88, citing *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014*, p. 147, at paras. 31-32.
[414] *The "Enrica Lexie" Incident (Italy v. India)* (see footnote 411 above), para. 89.
[415] *The Diverted Cargoes Case (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award, 10 June 1955, UNRIAA, vol. XII (Sales No. 63.V.3), pp. 53–81, at p. 70.

in close correspondence with the rules adopted by civilized nations with regard to the interpretation of contracts (see E. Hambro, *The Case of the International Court*, 1952, pp. 26-56, and, for France, art. 1134, 1156 *et seq*., 1315 of the Civil Code).]

248. Another example can be found in *Interpretation of the air transport services agreement between the United States of America and France*, where the tribunal held that "[t]he documentary history of the negotiations, or as it is generally called, the 'legislative history', is in fact rightly considered by case law and doctrine to be a proper subsidiary guide for the interpretation of treaties",[416] referring to the decision of the Permanent Court of International Justice in *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig Territory*,[417] and adding that "[t]he same principle was subsequently formulated in the most explicit manner by the Court" in the *Lighthouses Case between France and Greece*".[418]

Observation 107

On occasion, arbitral tribunals have relied on the interpretation of the same treaty by other international tribunals.

249. In the *Affaire Goldenberg*, the arbitrator referred to the interpretation of annex IV of articles 297 and 298 of the Treaty of Versailles made by other tribunals.[419] The arbitrator was deciding the question whether the obligation to provide reparation contained in the clause of the Treaty of Versailles extended to any harmful act or only those contrary to the law of nations and in any case unlawful. The arbitrator relied on the reasoning of the Anglo-German Mixed Arbitral Tribunal in *Chatterton v. Germany* to indicate that the treaty did not limit unlawful conduct to those contrary to the written rules of the law of nations.[420]

Observation 108

On occasion, arbitral awards have relied on national court decisions when interpreting treaty provisions.

250. For example, in the *Artic Sunrise* case, the tribunal was determining whether the signals given to a vessel in the context of a hot pursuit had complied with the requirements of article 111 of the United Nations Convention on the Law of the Sea. The tribunal noted that "municipal courts have recognised that radio messages may constitute valid signals under the 1958 Convention".[421] The tribunal then concluded

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[416] *Interpretation of the air transport services agreement* (see footnote 344 above), p. 52.

[417] *Treatment of Polish nationals and other persons of Polish origin or speech in the Danzig Territory*, Judgment, 4 February 1932, P.C.I.J., Series A/B, No. 44, p. 3, at p. 33.

[418] *Lighthouses Case* (see footnote 71 above), p. 13.

[419] *Affaire Goldenberg* (see footnote 348 above), pp. 906–909, citing *Arrêt rendu le 12 septembre 1924 entre le Gouvernement bulgare et le Gouvernement hellénique relativement à l'interpretation du Traité de Neuilly, article 179, annexe, paragraphe 4*, *Recueil des Décisions des Tribunaux arbitraux mixtes*, vol. IV, pp. 577 et seq.; *H. Chatterton v. German Government*, Award, 8 November 1923 (unpublished); *J. Mellentin v. German Government*, 28 December 1925, etc.; *Karmatzucas contre Etat allemand*, Award, 23 August 1926, *Recueil des Décisions des Tribunaux arbitraux mixtes*, vol. VII, pp. 17 et seq.; *Portugal v. Germany,* Award concerning Germany's liability for damage caused in the Portuguese colonies in southern Africa, 31 July 1928, *Recueil des Décisions des Tribunaux arbitraux mixtes*, vol. VIII, pp. 277–441.

[420] *Affaire Goldenberg* (see footnote 348 above), pp. 908–909; *Chatterton v. German Government* (see previous footnote); *Mellentin v. German Government* (see previous footnote).

[421] *Arbitration regarding the* Arctic Sunrise, Award on the Merits (see footnote 407 above), para. 260, referring to United Kingdom, *R. v. Mills* (UK), 1995, Unreported, Croydon Crown Court, Judge Devonshire., summarized in *International Comparative and Legal Quarterly*, vol. 44 (1995), p. 949, at pp. 956–957; and Canada, *R v. Sunila and Soleyman*, 1986, 28 *Dominion Law Reports* (4th) 450 133, 216.

that the Artic Sunrise vessel had been given an 'auditory signal,' which allowed the commencement of the pursuit, when it transmitted its first radio message to stop."[422]

4. Examples concerning the formation or identification of rules of customary international law

Observation 109

Arbitral tribunals have emphasized that the determination of rules of customary international law requires sufficient evidence of the two constitutive elements of such rules.

251. For example, in the *Barbados/Trinidad and Tobago* case, the arbitral tribunal rejected a claim of Barbados, which had requested the tribunal to adjust the equidistance line based on various circumstances, including traditional fishing rights. The arbitral tribunal mentioned that the determination of a maritime boundary on the basis of traditional fishing rights by its nationals on the high seas was exceptional. It added that:

> support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case (I.C.J. Reports 1993, p. 38). That is insufficient to establish a rule of international law.[423]

Observation 110

On occasion, arbitral tribunals have referred to rules of customary international law determined in decisions of other international courts and tribunals.

252. In the *Iron Rhine* case, the tribunal referred to the decision of the International Court of Justice in the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* and noted that:

> [m]uch of international environmental law has been formulated by reference to the impact that activities in one territory may have on the territory of another. The International Court of Justice expressed the view that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment".[424]

253. In the *Indus Waters* arbitration, the tribunal recalled that the tribunal in the *Iron Rhine* arbitration had identified the duty to prevent or at least mitigate significant environmental damage in the context of construction activities, as a principle of general international law.[425]

254. In the *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges,* the arbitral tribunal mentioned the customary status of the rule on the exhaustion of local remedies, noting that it "has been codified in conventions such as the European Convention on Human Rights (Article 26) and has been recognized by

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[422] *Ibid*.

[423] *Barbados v. the Republic of Trinidad and Tobago* (see footnote 284 above), para. 269.

[424] *Iron Rhine ("Ijzeren Rijn") Railway* (see footnote 377 above), para. 222, citing *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), para. 29.

[425] *Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India*, Partial Award (see footnote 395 above), para. 451, citing *Iron Rhine ("Ijzeren Rijn") Railway* (see footnote 377 above), para. 59.

international courts and tribunals" such as the International Court of Justice in the *Interhandel* case.[426]

255. The tribunal referred to the separate opinions of judges and other writings to determine the scope of application of such rule and concluded that, while the exhaustion of local remedies is applicable in cases of diplomatic protection, it does not apply to "cases of direct injury where the State is protecting its own interests".[427] The tribunal also referred to writings[428] and the judgment of the International Court of Justice in the *ELSI* case to determine the distinction between cases of diplomatic protection and direct injury and concluded that "the most relevant consideration for the [International Court of Justice] is whether or not the State's claim before the international adjudicatory body is distinct from and independent of that of its nationals".[429]

256. The arbitral tribunal in the *Guyana v. Suriname* case analysed whether actions carried out by Suriname could constitute a threat of the use of force.[430] The tribunal referred to the:

> findings of the International Court of Justice in the *Nicaragua* case where it had occasion to refer to the application of the "customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations" to what the Court termed "less grave forms of the use of force".[431]

257. The tribunal in the *Indus Waters* arbitration noted that, before the treaty of the Indus Waters between India and Pakistan was negotiated, "a foundational principle of customary international environmental law had already been enunciated in the *Trail Smelter* arbitration",[432] where the tribunal had referred to the duty to avoid transboundary harm. The *Indus Waters* tribunal referred to the restatement of such rule in Principle 21 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), adding that "[t]here is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State."[433]

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[426] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges (United States-United Kingdom),* Award on the First Question, Decision, 30 November 1992 (Revised 18 June 1993), UNRIAA, vol. XXIV (Sales No. E.04.V.18), para. 6.5, referring to *Interhandel Case, Judgment of March 21st, 1959: I.C.J. Reports 1959*, p. 6, at p. 27.

[427] *Ibid*., para. 6.6, referring to *Norwegian Loans* (see footnote 65 above), Dissenting Opinion of Judge Read, p. 9; *Interhandel* (see previous footnote), Opinion of Judge Armand Ugon, pp. 87-89; *Case concerning the Air Service Agreement of 27 March 1946 (United States v. France)*, *International Law Reports*, vol. 54, p. 324; and C.F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990), pp 112-113 (citing numerous authorities in support).

[428] For example, Theodor Meron, "The incidence of the rule of exhaustion of local remedies", *British Year Book of International Law*, vol. 35 (1959), pp. 83–101, at pp. 86-90; Amerasinghe, *Local Remedies in International Law* (see previous footnote), pp. 128-129; A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (Cambridge, Cambridge University Press, 1983), pp. 128-130.

[429] *United States-United Kingdom Arbitration concerning Heathrow Airport User Charges* (see footnote 426 above), para. 6.9, citing *Elettronica Sicula S.p.A. (ELSI), I.C.J. Reports 1989*, p. 15, at para. 51.

[430] *Delimitation of the maritime boundary between Guyana and Suriname* (see footnote 363 above), para. 432.

[431] *Ibid*., para. 440, citing *Military and Paramilitary Activities in and against Nicaragua, Merits* (see footnote 55 above), paras. 190-191.

[432] *Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India*, Final Award (see footnote 395 above), para. 448, citing *Trail Smelter case (United States, Canada)*, Award, 16 April 1938 and 11 March 1941, vol. III, pp. 1905–1982, at p. 1965.

[433] *Ibid*., para. 449.

5. Examples of references to decisions of other international courts or tribunals that establish or confirm rules or principles of international law.

Observation 112

Arbitral awards have often referred to decisions of international courts and tribunals when identifying rules or principles of international law.

258. Some examples of rules or principles that arbitral tribunals have used include the definition of a dispute, in the *Mavrommatis* case.[434] For example, in the *Arbitration between the Republic of Ecuador and the United States of America*, the tribunal noted that the parties acknowledged that "the term 'dispute' has a specific meaning in international law and practice and [we]re largely in agreement on the legal framework to be applied, aptly and succinctly summarized by the [International Court of Justice] in its judgment in *Georgia v. Russia*".[435]

259. In the *South China Sea* arbitration, the tribunal referred to the definition of a dispute found in *Mavrommatis*[436] and subsequent developments of the concept in decisions of the International Court of Justice, noting that the existence of a disagreement was a matter "for objective determination" and it did not suffice just to have an assertion of the existence of the dispute by one party.[437] Instead, "it must be shown that the claim of one party is positively opposed by the other",[438] and the dispute must have existed when the proceedings were commenced.[439]

260. Another example is the *Monetary gold* principle, referring to the decision of a tribunal not to proceed in the absence of a necessary third party who would be affected by the outcome of the case. For example, the tribunal in the *South China Sea* case referred to the concept and its development in subsequent decisions, such as *East Timor* and the *Larsen v. Hawaiian Kingdom* arbitration.[440] The tribunal distinguished the conclusions in the other cases and noted that "here none of the Philippines' claims entail allegations of unlawful conduct by Viet Nam or other third States", while in the other decisions cited "the rights of the third States (respectively Albania, Indonesia, and the United States of America) would not only have been affected by a decision in the case, but would have 'form[ed] the very subject-matter of the decision'".[441]

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[434] See, for example, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation),* PCA Case No. 2017-06, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, para. 163; *The "Enrica Lexie" Incident (Italy v. India)*, Award (see footnote 363 above), para. 220; *The "Enrica Lexie" Incident (Italy v. India),* Order regarding the Request for the Prescription of Provisional Measures (see footnote 411 above), para. 53, citing *Mavrommatis Palestine Concessions* (see footnote 10 above), p. 11; *Chagos Marine Protected Area* (see footnote 371 above), para. 379; *Barbados v. the Republic of Trinidad and Tobago* (see footnote 284 above), para. 199; *Discriminatory and Restrictive Measures on Trade in Tobacco and Tobacco Products (Uruguay v. Brazil),* Arbitral Award, 5 August 2005, para. 58.

[435] *Arbitration between the Republic of Ecuador and the United States of America* (see footnote 362 above) para. 212, citing *Application of the International Convention … (Georgia v. Russian Federation)* (see footnote 69 above), para. 30.

[436] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above), para. 149, citing *Mavrommatis Palestine Concessions* (see footnote 10 above), p. 11.

[437] *Interpretation of Peace Treaties* [First Phase]*, Advisory Opinion, I.C.J. Reports 1950*, p. 65, at p. 74.

[438] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment* (see footnote 108 above), p. 328.

[439] *Application of the International Convention … (Georgia v. Russian Federation)* (see footnote 69 above), para. 30.

[440] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above), para. 181, referring to *Monetary gold* (see footnote 95 above), p. 32; *East Timor (Portugal v. Australia)* (see footnote 95 above); *Larsen v. Hawaiian Kingdom*, Award, 5 February 2001, *International Law Reports*, vol. 119 (2002), p. 566.

[441] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above), para. 181, citing *Monetary gold* (see footnote 95 above), p. 32; *East Timor (Portugal v. Australia)* (see footnote 95 above), para. 34; *Larsen v. Hawaiian Kingdom* (see previous footnote), paras. 11.8 and 12.17.

261. The arbitral tribunal in the *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, indicated that "a decision with the force of *res judicata* is legally binding on the parties to the dispute. This is a fundamental principle of the law of nations repeatedly invoked in the legal precedents, which regard the authority of *res judicata* as a universal and absolute principle of international law", citing various decisions of arbitral tribunals.[442]

262. In the *Bay of Bengal Maritime Boundary Delimitation*, the arbitral tribunal referred to the decision of the International Court of Justice in *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*,[443] and also to the Court's decision in *Territorial and Maritime Dispute (Nicaragua v. Honduras)*, noting that the methodology of equidistance/relevant circumstances method should be applied, unless there are "factors which make the application of the equidistance method inappropriate".[444]

263. In the same case, the arbitral tribunal relied on decisions of other international tribunals concerning maritime delimitation, noting that the "principles underpinning the identification of the relevant coast are well established", and referred to the wording of the decision of the International Court of Justice in the *North Sea Continental Shelf* case indicating that "it is axiomatic to the delimitation of a maritime boundary that the 'land dominates the sea'".[445] The tribunal added that "coastal projections in the seaward direction generate maritime claims", referring to the reasoning of the International Court of Justice in the *Black Sea* case.[446]

264. The arbitral tribunal in the arbitration between *Barbados and the Republic of Trinidad and Tobago* referred to the importance of the developments in the law of maritime delimitation, referring to articles 74 and 83 of the United Nations Convention on the Law of the Sea concerning the delimitation of the exclusive economic zone and the continental shelf, respectively. The tribunal considered that the text of such provisions:

> allows in fact for a broad consideration of the legal rules embodied in treaties and customary law as pertinent to the delimitation between the parties, and allows as well for the consideration of general principles of international law and the contributions that the decisions of international courts and tribunals and learned writers have made to the understanding and interpretation of this body of legal rules.[447]

265. In the *Guyana v. Suriname* arbitration, the tribunal indicated that "it is generally acknowledged that the concept of the single maritime boundary does not have its origin in the Convention but is squarely based on State practice and the law as developed by international courts and tribunals".[448] The tribunal further noted that

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[442] *Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy* (see footnote 400 above), para. 68, referring to Mixed Franco-Bulgarian Court of Arbitration, Award, 20 February 1923, *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. II, p. 936; *Trail Smelter case* (see footnote 432 above), p. 1950.

[443] *The Bay of Bengal Maritime Boundary Arbitration between the People's Republic of Bangladesh and the Republic of India* (see footnote 94 above), para. 341, referring to the *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), para. 116, and also to *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (see footnote 121 above), para. 60 *et seq*.

[444] *Ibid*., para. 345, referring to *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (see footnote 101 above), para. 272.

[445] *Ibid*., para. 279, citing *North Sea Continental Shelf* (see footnote 102 above), para. 96.

[446] *Ibid.*, citing *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (see footnote 93 above), para. 99.

[447] *Barbados v. the Republic of Trinidad and Tobago* (see footnote 284 above), para. 222.

[448] *Delimitation of the maritime boundary between Guyana and Suriname* (see footnote 363 above), para. 334, referring to *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (see footnote 101 above), para. 173; and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (see footnote 213 above), para. 286.

"[t]hat is why the Tribunal has to be guided by the case law as developed by international courts and tribunals in this matter",[449] and took account of the "dictum of the *Barbados/Trinidad and Tobago* tribunal's award in drawing a single maritime boundary".[450]

266. In the *Argentine-Chile Frontier Case* the tribunal considered that:

> it seems clear from the decision of the International Court of Justice in the *Case concerning the Temple of Preah Vihear* ... and especially from the learned Separate Opinion of Vice-President Alfaro in that case, that there is in international law a principle, which is moreover a principle of substantive law and not just a technical rule of evidence, according to which "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation". [451]

267. The tribunal added that "[t]his principle is designated by a number of different terms, of which "*estoppel*" and "preclusion" are the most common. But it is also clear that these terms are not to be understood in quite the same sense as they are in municipal law. With that qualification in mind, this Court will employ the term "*estoppel*".[452]

268. In *Chagos Marine Protected Area*, the arbitral tribunal referred to multiple materials in relation to the definition of *estoppel* as a general principle of law, including writings, noting that:

> *Estoppel* is a general principle of law that serves to ensure, in the words of Lord McNair, "that international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold—*allegans contraria non audiendus est*." The principle stems from the general requirement that States act in their mutual relations in good faith and is designed to protect the legitimate expectations of a State that acts in reliance upon the representations of another.[453]

269. The tribunal further noted that the scope of the principle in international law differed from that of national law, referring to the Separate Opinion of Vice-President Alfaro in the *Temple of Preah Vihear* case,[454] and noted that "its frequent invocation in international proceedings has added definition to the scope of the principle", referring to decisions of the Permanent Court of International Justice[455] and the International Court of Justice.[456]

270. In the *South China Sea Arbitration* and the *Duzgit* arbitration, the tribunal held that it is a fundamental principle of international law that "bad faith is not presumed", quoting the award in the *Chagos Marine Protected Area Arbitration* and the *Lac Lanoux* arbitration, and also referring to Annex VII of the United Nations Convention on the Law of the Sea. In *South China Sea*, the tribunal concluded that both parties

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[449] *Ibid*.
[450] *Ibid*., para. 334, citing *Barbados v. the Republic of Trinidad and Tobago* (see footnote 284 above), para. 244.
[451] *Argentine-Chile Frontier Case* (see footnote 401 above), p. 164.
[452] *Ibid*.
[453] *Chagos Marine Protected Area* (see footnote 371 above), para. 435, citing Arnold D. McNair, "The legality of the occupation of the Ruhr", *British Year Book of International Law*, vol. 5 (1924), pp. 17–37, at p. 35.
[454] *Temple of Preah Vihear* (see footnote 307 above), Separate Opinion of Vice President Alfaro, p. 39; see also *ibid*., Separate Opinion of Sir Gerald Fitzmaurice, p. 52, at p. 62.
[455] *Payment of Various Serbian Loans Issued in France, Judgment, 12 July 1929, P.C.I.J. Series A, Nos. 20/21*, p. 5, at p. 39.
[456] *Barcelona Traction* (see footnote 162 above), p. 25; *Gulf of Maine Area* (see footnote 50 above), pp. 307–308; and *North Sea Continental Shelf* (see footnote 102 above), para. 30.

were obliged to resolve their disputes peacefully and comply with the United Nations Convention on the Law of the Sea and the arbitral award in good faith. [457]

Observation 113

Arbitral tribunals have referred to the decisions of international courts in support of the existence of the duty of non-aggravation by the parties to a dispute.

271. The tribunal in the *South China Sea* arbitration referred to various decisions of the Permanent Court of International Justice,[458] the International Court of Justice[459] and the International Tribunal for the Law of the Sea[460] where the courts had directed the parties to refrain from any actions that could aggravate or extend the dispute in the context of provisional measures orders.

Observation 114

Arbitral tribunals have referred to a decision of the International Court of Justice concerning the duty to negotiate.

272. An arbitral tribunal in the *Claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles* case considered "that the underlying principle of the *North Sea Continental Shelf* Cases is pertinent to the present dispute", referring to the International Court of Justice's interpretation of the duty to negotiate. The tribunal indicated that "[t]o be meaningful, negotiations have to be entered into with a view to arriving at an agreement. Though, as we have pointed out, an agreement to negotiate does not necessarily imply an obligation to reach an agreement, it does imply that serious efforts towards that end will be made."[461]

273. The arbitral tribunal in the *Chagos Marine Area* case considered it:

> to be settled international law that "it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument," but that "the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a

[457] *South China Sea Arbitration*, Award (see footnote 385 above), para. 1200, citing *Chagos Marine Protected Area* (see footnote 371 above), para. 447, which in turn quotes *Affaire du lac Lanoux (Spain, France),* Award, 16 November 1957, UNRIAA, vol. XII (Sales No. 63.V.3), pp. 281–317, at p. 305. See also *Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, Award on Reparation, 18 December 2019, para. 211.

[458] *South China Sea Arbitration*, Award (see footnote 385 above), para. 1167, referring to *Electricity Company of Sofia and Bulgaria, Order (Request for the Indication of Interim Measures of Protection)* (see footnote 31 above), p. 199.

[459] *Nuclear Tests (Australia v. France), Interim Protection* (see footnote 130 above), p. 106; *Nuclear Tests (New Zealand v. France), Interim Protection* (see footnote 257 above), p. 142; *Frontier Dispute, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 3, at paras. 18 and 32, sect. 1 A; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979* (see footnote 130 above), para. 47 B; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Provisional Measures, Order of 8 April 1993* (see footnote above), para. 52 B; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Provisional Measures, Order of 15 March 1996* (see footnote 134 above), para. 49 (1); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 111, at para. 47 (1)).

[460] *Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Provisional Measures* (see footnote 309 above), para. 108 (1) (e).

[461] *Claims arising out of decisions of the Mixed Graeco-German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (between Greece and the Federal Republic of Germany*), Award, 26 January 1972, UNRIAA, vol. XIX (Sales No. E.90.V.7), para. 65.

claim is made to identify that there is, or may be, a dispute with regard to that subject-matter".[462]

6. Examples concerning reparations

Observation 115

On occasion, arbitral tribunals have relied on the decisions of international courts and tribunals in relation to the determination of the appropriate forms of reparation for the damage caused by an internationally wrongful act.

274. In *Norwegian Shipowners' Claims*, the arbitral tribunal noted that claimants had requested compound interest as part of the compensation. The tribunal considered that it was competent to "allow interest as part of the compensation *ex aequo et bono*, if the circumstances are considered to justify it". The tribunal noted that the parties had made arguments based on writings on the law of eminent domain, but concluded that "compound interest has not been granted in previous arbitration cases, and the Tribunal is of opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made".[463]

275. In the *Difference between New Zealand and France concerning the interpretation or application of two agreements*, the arbitral tribunal noted that "[t]he recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued".[464]

Observation 116

On occasion, arbitral tribunals have referred to decisions of other tribunals in relation to the protection of procedural rights.

276. For example, in *South China Sea*, the tribunal referred to the decisions of the International Tribunal for the Law of the Sea in relation to the need to put in place measures to protect the procedural rights of one State in a situation of non-appearance of the other party to the dispute. The tribunal indicated that, as noted by the International Tribunal for the Law of the Sea in the *Artic Sunrise* case, "a participating party 'should not be put at a disadvantage because of the non-appearance of the [non-participating party] in the proceedings'".[465] The Tribunal also referred to the

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[462] *Chagos Marine Protected Area* (see footnote 371 above), para. 379, referring, *inter alia*, to *Application of the International Convention ... (Georgia v. Russian Federation)* (see footnote 69 above), para. 30; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility* (see footnote 95 above), at para. 83.

[463] *Norwegian Shipowners' Claims (Norway v. USA)*, Award, 13 October 1922, UNRIAA, vol. I (Sales No. 1948.V.2), pp. 307–346, at p. 341.

[464] *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, Award of 30 April 1990, UNRIAA, vol. XX (Sales No. E.93.V.3), pp. 215–284, at para. 114, citing *United States Diplomatic and Consular Staff in Tehran Case, Provisional Measures, Order of 15 December 1979* (see footnote 130 above), paras. 38–41, and *Judgment* (see footnote 114 above), para. 95; *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* (see footnote 95 above), p. 187, and *Military and Paramilitary Activities in and against Nicaragua, Merits* (see footnote 55 above), para. 292, at p. 149.

[465] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above), para. 118, and *South China Sea Arbitration*, Award (see footnote 385 above), para. 122, citing *"Arctic Sunrise"* (see footnote 257 above), para. 56.

practice of other international tribunals, of "taking notice of public statements or informal communications made by non-appearing Parties".[466]

277. The tribunal in the *Indus Waters* arbitration also referred to the decisions of international courts and tribunals in relation to the effects of non-appearance of one of the parties to the dispute and noted that:

> fewer propositions in international law can be more confidently advanced than that the non-appearance of a party does not deprive a properly constituted court or tribunal of its competence. Whether a court has been properly constituted in a specific instance is not a matter that can be subjectively determined by a party to a dispute and then resolved simply through non-appearance by that party.[467]

The tribunal further emphasized that "the relationship between a non-appearing party and an international court or tribunal was cogently described" by the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, where the Court indicated that the non-participation of a party does not affect the validity of the Court's judgment and the non-appearing State is bound by the eventual judgment.[468]

278. In the same award, the tribunal noted that it had the duty to verify that it had jurisdiction and competence over the dispute before it, including in cases of non-appearance, and added that "the wealth of judicial and arbitral decisions on the matter confirms that this duty is undoubtedly part of *jurisprudence constante*".[469]

7. Examples concerning arbitral tribunals' approach to precedent and consistency

Observation 117

On occasion, arbitral awards have noted that, while not bound by the decisions of other international courts and tribunals, there is a value in consistency.

279. In the *Arbitration between the Republic of Ecuador and the United States of America*, the tribunal noted that:

> an arbitral tribunal, even though not bound by any strict doctrine of stare decisis, should try as far as possible to decide in a manner consistent with other applicable judicial decisions. However, when evaluating the authorities cited by the Parties in these proceedings—parsing through the *obiter dictae* and restricting oneself to the conclusions actually employed to reach a resolution of the case—the Tribunal has concluded that the case at hand is truly a novel one. While the jurisprudence guides and informs the Tribunal's decision, the Tribunal has not found any decision that truly qualifies as precedent on the fundamental questions posed by the Parties' arguments.[470]

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[466] *Ibid*., para. 122, referring to Procedural Order No. 4, p. 5 (21 April 2015), citing as examples "*Arctic Sunrise"* (see footnote 257 above), para. 54; *Arbitration regarding the* Arctic Sunrise, Award on Jurisdiction, 26 November 2014, UNRIAA, vol. XXXII, pp. 187–209, at para. 44; *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 3; *Nuclear Tests (Australia v. France)* (see footnote 51 above); A*egean Sea* (see footnote 71 above).

[467] *Indus Waters Treaty Arbitration (Pakistan v. India),* Award on the Competence of the Court (see footnote 379 above), para. 126, citing *Military and Paramilitary Activities in and against Nicaragua, Merits* (see footnote 55 above); *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above); *Arbitration regarding the* Arctic Sunrise, Award on Jurisdiction (see footnote 466 above).

[468] *Ibid*., para. 127; *Military and Paramilitary Activities in and against Nicaragua* (see footnote 55 above), paras. 27–28.

[469] *Ibid*., para. 135, citing *Military and Paramilitary Activities in and against Nicaragua* (see footnote 55 above); *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above); *Arbitration regarding the* Arctic Sunrise, Award on Jurisdiction (see footnote 466 above); *Aegean Sea* (see footnote 71 above), para. 15.

[470] *Arbitration between the Republic of Ecuador and the United States of America* (see footnote 362 above), para. 188.

8. Examples of references to writings

Observation 118

On occasion, arbitral tribunals have referred to writings containing instruments, including treaties, compilations of domestic jurisprudence and of international decisions.

280. In the *Ambatielos* case, where the arbitral tribunal considered that:

> it is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal. International tribunals have so held in numerous cases (Oppenheim — Lauterpacht — *International Law*, 7th Edition, I, paragraph 155c; Ralston— *The Law and Procedure of International Tribunals*, paragraphs 683-698, and *Supplement*, paragraphs 683 (a) and 687 (a)). L'Institut de Droit international expressed a view to this effect at its session at The Hague in 1925.[471]

Observation 119

In some cases, arbitrators have referred to writings when interpreting terms found in a treaty.

281. In *Norwegian Shipowners' Claims*, the tribunal referred to writings when interpreting the terms "law and equity" used in a special agreement of 1921 between the United States and Norway. The tribunal concluded that:

> The words "law and equity" used in the special agreement of 1921 cannot be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence.
>
> The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State.[472]

282. In the *Guyana v. Suriname* case, the tribunal referred to the "Virginia Commentary" to the United Nations Convention on the Law of the Sea when indicating that the obligation in articles 74, paragraph 3, and 83, paragraph 3, of the United Nations Convention on the Law of the Sea concerning the duty to make every effort not to jeopardise or hamper the reaching of a final agreement "was not intended to preclude all activities in a disputed maritime area".[473]

283. In *South China Sea* arbitration, the tribunal also referred to the "Virginia Commentary" to indicate that the distinctions between articles 281 and 282 of the United Nations Convention on the Law of the Sea concerning the means to settle disputes are "consistent with the overall design of the Convention as a system whereby compulsory dispute resolution is the default rule and any limitations and exceptions are carefully and precisely defined in Section 3 of Part XV".[474]

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[471] *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award, 6 March 1956, UNRIAA, vol. XII (Sales No. 63.V.3), pp. 83–153, at p. 103.

[472] *Norwegian Shipowners' Claims* (see footnote 463 above), p. 331.

[473] *Delimitation of the maritime boundary between Guyana and Suriname* (see footnote 363 above), para. 465.

[474] *South China Sea Arbitration*, Award on Jurisdiction and Admissibility (see footnote 364 above), para. 224, citing Myron H. Nordquist, ed., *United Nations Convention on the Law of the Sea 1982. A Commentary*, vol. V (Dordrecht, Martinus Nijhoff, 1989), para. XV.4 ("[U]niformity in the interpretation of the Convention should be sought ... [and] a few carefully defined exceptions should be allowed").

Observation 120

On occasion, arbitral tribunals have referred to writings containing the texts of treaties.

284. For example, the arbitral tribunal in the *"Kronprins Gustaf Adolf"* case, which predates the Statute of the International Court of Justice, referred to treaties concluded by the United States at around the same time as the treaty that was being interpreted in that case, noting that: "the same provision appears in more or less similar terms in two other treaties of the United States concluded at almost the same time, i.e. the treaty with France of February 6, 1778, Article XXX (28)".[475]

Observation 121

On occasion, arbitral tribunals have referred to law dictionaries when interpreting certain terms.

285. The tribunal in *Tax regime governing pensions paid to retired UNESCO officials residing in France (France – UNESCO)* referred to various legal dictionaries to attempt to define the term "officials" in article 22 of the Agreement between France and the United Nations Educational, Scientific and Cultural Organization (UNESCO) regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory.[476] The tribunal concluded that the term "staff" ("*fonctionnaires*") used in article 22 (b) of the treaty, concerning emoluments exempted from taxes in France, did not extend to former staff members.

Observation 122

On occasion, arbitral awards have referred to writings and texts proposed by Special Rapporteurs of the International Law Commission when addressing aspects of State responsibility.

286. For example in the case of the *Différend concernant l'interprétation de l'article 79, par. 6, lettre c, du Traité de Paix*, the tribunal relied on writings to indicate that a decision of a domestic court is an act of a State organ, in the same way as an act of the legislative and the executive and thus the non-observance of a rule of international law by a tribunal implies the international responsibility of the State as a whole, even if such tribunal applied a rule of domestic law.[477]

287. In the case concerning *Agreements related to the Rainbow Warrior Affair*, the arbitral tribunal referred to the Commission's work at that time (1990) and noted that "recent studies on State responsibility undertaken by the Special Rapporteurs of the International Law Commission have led to an analysis in depth of the distinction between an order for the cessation of the unlawful act and *restitutio in integrum*".[478]

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[475] *The "Kronprins Gustaf Adolf" (Sweden, USA)*, Award, 18 July 1932, UNRIAA, vol. II (Sales No. 1949.V.1), pp. 1239–1305, at p. 1261, referring to Hunter Miller, ed., *Treaties and Other International Acts of the United States of America*, vol. 2, p. 26, and the Treaty of Amity and Commerce between Prussia and the United States (The Hague, 10 September 1785), *ibid*., p. 166, art. VI.

[476] *Tax regime governing pensions paid to retired UNESCO* (see footnote 377 above), para. 47.

[477] French-Italian Conciliation Commission, *Différend concernant l'interprétation de l'article 79, par. 6, lettre c, du Traité de Paix (Biens italiens en Tunisie — Échange de lettres du 2 février 1951) — Décisions nos 136, 171 et 196,* Awards, 25 June 1952, 6 July 1954 and 7 December 1955, UNRIAA, vol. XIII (Sales No. 64.V.3), p. 438, citing Paul Guggenheim, *Traité de Droit international public*, vol. II (Geneva, Librarie de l'Université, Georg & Cie, 1954), p. 11; Louis Cavoré, *Le Droit International public positif*, vol. II (Paris, Pédone, 1951), p. 381; Charles Rousseau, *Droit international public* (Paris, Recueil Sirey, 1953), pp. 370 and p. 374; Alfred Verdross, *Völkerrecht*, 2nd ed. (Vienna, Springer, 1950), p. 2.

[478] *Difference between New Zealand and France concerning the interpretation or application of two agreements* (see footnote 464 above), para. 113.

The tribunal referred to the work of Special Rapporteurs, including Professors Riphagen and Arangio-Ruiz, and to the work of scholars.[479] The tribunal referred also to decisions of the International Court of Justice, noting that "[t]he recent jurisprudence of the International Court of Justice confirms that an order for the cessation or discontinuance of wrongful acts or omissions is only justified in case of continuing breaches of international obligations which are still in force at the time the judicial order is issued".[480]

Observations 123

On occasion, arbitral tribunals have referred to separate and dissenting opinions of judges when analysing the scope and application of the principle of *estoppel*.

288. For example, in the *Chagos Marine Area* arbitration, the tribunal referred to the Separate Opinion of Sir Gerald Fitzmaurice in the *Temple of Preah Vihear*, and noted "with approval Judge Fitzmaurice's observation … that estoppel is most at home in situations in which the existence of a formal agreement may be in doubt, but the course of the Parties' subsequent conduct has consistently been as though such an agreement existed".[481] The arbitral tribunal then emphasized that the:

> sphere of *estoppel*, however, is not that of unequivocally binding commitments (for which a finding of estoppel would in any event be unnecessary (see *Temple of Preah Vihear (Cambodia v. Thailand), Judgment of 15 June 1962, Separate Opinion of Sir Gerald Fitzmaurice, I.C.J. Reports 1962*, p. 52 at p. 63)), but is instead concerned with the grey area of representations and commitments whose original legal intent may be ambiguous or obscure, but which, in light of the reliance placed upon them, warrant recognition in international law.[482]

289. Also, in *Chagos Marine Area*, the tribunal indicated that the principle of *estoppel* as it exists in international law was summarized by Judge Spender in the *Temple of Preah Vihear*, noting that it:[483]

> operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.

Observation 124

On occasion, arbitral tribunals have referred to memorandums prepared by the Secretariat of the United Nations in the context of the law of the sea.

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[479] Christian Dominicé, "Observations on the rights of a State that is the victim of an internationally wrongful act" in Christian Dominicé and Milan Sahović, *Droit international 2* (Paris, Pedone, 1982), p. 1–70, at p. 27.

[480] *Difference between New Zealand and France concerning the interpretation or application of two agreements* (see footnote 464 above), para. 114, citing *United States Diplomatic and Consular Staff in Tehran Case, Provisional Measures, Order of 15 December 1979* (see footnote 130 above), paras. 38–41, and *Judgment* (see footnote 114 above), para. 95, sect. A; *Military and Paramilitary Activities in and Against Nicaragua, Jurisdiction and Admissibility* (see footnote 95 above), p. 187, and *Military and Paramilitary Activities in and against Nicaragua, Merits* (see footnote 55 above), para. 292, at p. 149.

[481] *Chagos Marine Protected Area* (see footnote 371 above), para. 444, citing *Temple of Preah Vihear* (see footnote 307 above), Separate Opinion of Sir Gerald Fitzmaurice, p. 63.

[482] *Chagos Marine Protected Area* (see footnote 371 above), para. 446.

[483] *Ibid.*, para. 435, citing *Temple of Preah Vihear* (see footnote 307 above), Dissenting Opinion of Sir Percy Spender, p. 101, at pp. 143–44.

290. The tribunal in *South China Sea* recalled that:

> the process for the formation of historic rights in international law is well summarised in the [United Nations] Secretariat's 1962 *Memorandum on the Juridical Regime of Historic Waters, including Historic Bays* and requires the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States".[484]

The document had been prepared prior to the first United Nations Conference on the Law of the Sea, and the tribunal considered that although it "discussed the formation of rights to sovereignty over historic waters, as the Tribunal noted …, historic waters are merely one form of historic right and the process is the same for claims to rights short of sovereignty".[485]

9. Examples of references to the work of the Commission

Observations 125

On occasion, arbitral awards have relied on the draft articles on the responsibility of States for internationally wrongful acts while they were under consideration by the Commission.

291. For example, in the case of the *Air Service Agreement of 27 March 1946 between the United States of America and France*, the tribunal referred to draft article 22 of the draft articles on State responsibility "as provisionally adopted in first reading by the International Law Commission in 1977, [which] establishes the requirement of exhaustion of local remedies only in relation to an obligation of 'result'".[486]

292. In the case concerning *Agreements related to the Rainbow Warrior Affair*, the arbitral tribunal referred extensively to draft articles 31 and 32 of the draft articles on State responsibility, as they were in 1990, referring to distress and *force majeure* and their commentaries.[487] Based on these drafts, and explanations found in writings,[488] the tribunal determined the elements that would be required to prove the defence raised by France in that case.[489]

293. In the same decision, the tribunal referred to the distinction made by the Commission between an instantaneous breach and a breach of a continuing character and noted that:[490]

> [t]he Commission distinguishes the breach which does not extend in time, or instantaneous breach, defined in Article 24 of the draft, from the breach having a continuing character or extending in time. In the latter case, according to paragraph 1 of Article 25, "the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation".

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[484] *South China Sea Arbitration*, Award (see footnote 385 above) para. 265, citing Historic Bays: Memorandum by the Secretariat of the United Nations, A/CONF.13/1, *Official Records of the United Nations Conference on the Law of the Sea*, Volume I: *Preparatory Documents*.

[485] *Ibid*.

[486] *Air Service Agreement of 27 March 1946 between the United States of America and France* (see footnote 376 above), para. 31.

[487] *Difference between New Zealand and France concerning the interpretation or application of two agreements* (see footnote 464 above), paras. 76-78.

[488] See *ibid*., para. 78, citing, *inter alia*, Max Sørensen, ed., *Manual of Public International Law* (London, MacMillan, 1968), p. 543.

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

[490] *Ibid.*, para. 101.

Observation 126

On occasion, arbitral tribunals have referred to certain provisions in the articles on State responsibility as codifying customary international law.

294. For example, an arbitral tribunal in an *ad hoc* arbitration under the Protocol of Brasilia for the Settlement of Disputes[491] referred to article 4 of the articles on State responsibility, indicating that it codified an existing rule of international law under which "the conduct of any State organ shall be considered an act of that State, whether the organ exercises legislative, executive, judicial or any other functions".[492]

Observation 127

On occasion, arbitral tribunals have referred to the work of the International Law Commission when determining attribution of international responsibility to States.

295. The arbitral award in the *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention* considered that its proposed interpretation of article 9 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),[493] concerning access to information "is consistent with contemporary principles of state responsibility". [494] In support of such interpretation the tribunal noted that:

> Amongst others, this submission is confirmed by Articles 4 and 5 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts, providing for rules of attribution of certain acts to States. On the international plane, acts of "competent authorities" are considered to be attributable to the State as long as such authorities fall within the notion of state organs or entities that are empowered to exercise elements of the governmental authority. As the [International Court of Justice] stated in the *LaGrand* case, "the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be."[495]

296. The arbitral tribunal in the *Enrica Lexie* case referred to article 4 of the articles on State responsibility to indicate that "there exists a presumption under international law that a State is right about the characterisation of the conduct of its official as being official in nature".[496]

Observation 128

On occasion, arbitral tribunals have referred to the articles on State responsibility when considering situations of possible *ultra vires* acts of State officials.

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[491] MERCOSUR (Argentina, Brazil, Paraguay and Uruguay): Protocol of Brasilia for the Settlement of Disputes (Brasilia, 17 December 1991), *International Legal Materials*, vol. 36 (1997), pp. 691–699.

[492] *Import ban on remolded tires from Uruguay (Uruguay v. Brazil)*, Arbitral Award, 9 January 2002, para. 113.

[493] Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (Paris, 22 September 1992), United Nations, *Treaty Series*, vol. 2354, No. 42279, p. 67.

[494] *Proceedings pursuant to the OSPAR Convention (Ireland –United Kingdom)*, Final Award, 2 July 2003, UNRIAA, vol. XXIII (Sales No. E/F.04.V.15), pp. 59–151, at para. 144.

[495] *Ibid*., para. 145, citing *LaGrand (Germany v. United States of America), Provisional Measures* (see footnote 130 above), para. 28.

[496] *The "Enrica Lexie" Incident (Italy v. India),* Award (see footnote 363 above), para. 858.

297. In the *Enrica Lexie* case, the tribunal noted that even if State agents were acting "*ultra vires* or contrary to their instructions or orders…, this would not preclude them from enjoying immunity *ratione materiae* as long as they continued to act in the name of the State and in their 'official capacity'", referring to the second report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction.[497] The tribunal indicated that "[t]his is corroborated by Article 7 of the … Draft Articles on State Responsibility, which provides that conduct by a State organ acting in its official capacity shall be attributable to the State 'even if it exceeds its authority or contravenes instructions'".[498]

Observation 129

On occasion, arbitral tribunals have referred to the articles on State responsibility when considering countermeasures.

298. For example, in the *Guyana v. Suriname* case, the tribunal held that it "is a well established principle of international law that countermeasures may not involve the use of force" and emphasized that:

> this is reflected in the … Draft Articles on State Responsibility at Article 50(1)(a) … As the Commentary to the … Draft Articles mentions, this principle is consistent with the jurisprudence emanating from international judicial bodies. It is also contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the adoption of which, according to the [International Court of Justice], is an indication of State's *opinio juris* as to customary international law on the question.[499]

Observation 130

On occasion, arbitral tribunals have referred to the articles on State responsibility when addressing the responsibility for composite acts and their effects over time.

299. In the *Duzgit* arbitration, the tribunal recalled that "a breach of an obligation by way of a composite act 'extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation'", citing article 15, paragraph 2, of the articles on State responsibility.[500]

Observation 131

On occasion, arbitral tribunals have relied on the articles on the responsibility of international organizations.[501]

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[497] *Ibid.*, para. 860. Art. 7 of the articles on State responsibility and the commentaries thereto, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 45.

[498] *Ibid*., citing art. 7 of the articles on State responsibility and the commentaries thereto, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 45, and *Diallo, Compensation, Judgment* (see footnote 141 above).

[499] *Delimitation of the maritime boundary between Guyana and Suriname* (see footnote 363 above), para. 446, citing James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002); *Corfu Channel case* (see footnote 69 above), p. 35; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits* (see footnote 55 above), paras. 191 and 249; General Assembly resolution 2625 (XXV) of 24 October 1970, first principle, para. 6.

[500] *Duzgit Integrity Arbitration* (see footnote 457 above), para. 86.

[501] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2011*, vol. II (Part Two), paras. 87-88. See also General Assembly resolution 66/100 of 9 December 2011, annex.

300. The arbitration panel in *Southern African Customs Union (SACU) – Safeguard Measures on Frozen Chicken from the European Union* considered that, as provided in draft article 32, "an 'international organization may not rely on its rules as justification for failure to comply with its obligations'".[502] The tribunal concluded that the internal rules within the organization could not excuse the delay of SACU in adopting a definitive measures in the case. The panel further indicated further that, "[w]hile these articles have not been adopted by SACU or the [European Union], Article 32 mirrors the corresponding provision in the Articles on State Responsibility, as well as Article 27 [of the Vienna Convention on the Law of Treaties], all of which have customary character".[503]

Observation 132

On occasion, arbitral tribunals have referred to the commentaries of the International Law Commission in relation to the determination of interest as part of the reparations for an internationally wrongful act.

301. For example, the arbitral tribunal in the *Artic Sunrise* case noted that neither the United Nations Convention on the Law of the Sea nor the articles on State responsibility:

> provide specific rules regarding how interest should be determined. Moreover, as is noted in the [Commission's] commentary on the Articles on State Responsibility, there is no uniform approach in the practice of international courts and tribunals. Thus, as is well established, the Tribunal has a wide margin of discretion to determine questions of interest.[504]

In that case, the tribunal added that it was "guided by the principle that the injured State is entitled to such interest as will ensure full reparation for the injury it has suffered as a result of the internationally wrongful measures of the injuring State", also referring to article 38 of the articles on State responsibility.[505]

Observation 133

On occasion, arbitral awards have referred to the work of the International Law Commission in relation to the interpretation of unilateral acts of States.

302. The arbitral tribunal in the *Chagos Marine Area* case considered "that Mauritius was entitled to rely upon the representations made by the United Kingdom which were consistently reiterated after independence in terms which were capable of suggesting a legally binding commitment and which were clearly understood in such a way". The tribunal considered that there was:

> no evidence that Mauritius should have considered the United Kingdom's undertakings revocable" and noted that "[t]he [International Law Commission] considered the question of revocability generally in the course of its examination of unilateral acts. In the absence of an express indication, the [International Law Commission] concluded that a unilateral promise may not be revoked arbitrarily and that a significant factor in whether revocation would be

[502] *Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-In Chicken Cuts from the European Union*, Final Report of the Arbitration Panel, 3 August 2022, para. 344.
[503] *Ibid*., footnote 684.
[504] *Arbitration regarding the* Arctic Sunrise, Award on Compensation, 10 July 2017, UNRIAA, vol. XXXII, pp. 317–353, at para. 118, referring to Iran–United States Claims Tribunal, *The Islamic Republic of Iran v. The United States of America*, Decision No. Dec 65-A19-FT, 30 September 1987, *Iran–United States Claims Tribunal Reports*, vol. 16 (1988), p. 285, at p. 290.
[505] *Ibid*., para. 119.

considered arbitrary is "[t]he extent to which those to whom the obligations are owed have relied on such obligations."[506]

Observation 134

On occasion, arbitral tribunals have referred to the International Law Commission's articles on State responsibility in support of the obligation of non recognition of a situation arising out of a serious violation of a *jus cogens* norm.

303. In the *Dispute concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait (Ukraine v. Russia)*, the tribunal indicated that article 41 of the articles on State responsibility "imposes upon all States an obligation not to recognise as lawful a situation created by a gross or systematic failure by the responsible State to fulfil an obligation arising under a peremptory norm of general international law".[507]

10. Examples of references to collective works of expert bodies

Observation 135

On occasion, arbitral tribunals referred to collective works of expert bodies in relation to the rules on the interpretation of treaties.

304. In *Différend concernant l'interprétation de l'article 79, par. 6, lettre c, du Traité de Paix,* which predated the Vienna Convention on the Law of Treaties, the arbitral tribunal referred to the 1950 *Yearbook* of the Institut de Droit International (Institute of International Law) containing a report on the rules of the interpretation of treaties, and noted that the report prepared by Mr. Lauterpacht as rapporteur, which had received nearly unanimous support by the members of the respective commission in that institute, reflected the prevailing view in the doctrine of public international law, noting that for the purpose of interpretation there is no difference between normative treaties and other treaties ("*les traités-lois ou traités normatifs*").[508]

305. The arbitration commission in the *Case of the Government of the Kingdom of Greece (on behalf of Apostolidis) v. the Federal Republic of Germany* referred to the use of *travaux préparatoires* as tools for the interpretation of treaties indicated that it shared:

> the opinion of the Institut de Droit International which, in its Resolution adopted at the Granada session of April 19, 1956, brought about a decisive advance in international law by deciding that the problem of resorting to the *travaux préparatoires* of a multilateral treaty, even if they had not been published or made accessible to one of the Parties, must be left to the discretion of the judge and solved according to the special circumstances of the case at issue (*Annuaire*, 1956, p. 347).[509]

306. In the case of the *Interpretation of the air transport services agreement between the United States of America and France*, the tribunal referred to the consideration of the purpose of the treaty as a criterion for interpretation and referred to the judgment of the International Court of Justice in the *Case concerning the Application of the*

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[506] *Chagos Marine Area* (see footnote 371 above), para. 447, referring to the Guiding principles applicable to unilateral declarations of states capable of creating legal obligations, principle 10 (b), *Yearbook … 2006*, vol. II (Part Two), para. 176.

[507] *Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait* (see footnote 434 above), para. 170.

[508] *Différend concernant l'interprétation de l'article 79, par. 6, lettre c, du Traité de Paix* (see footnote 477 above), p. 396.

[509] *Case of the Government of the Kingdom of Greece (on behalf of Apostolidis) v. the Federal Republic of Germany*, decision of the Second Chamber, 11 May 1960, UNRIAA, vol. XXIX, pp. 445–484, at p. 468.

Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden) and stated that:

> Article 19 of the "Draft Convention" of Harvard Law School in point of fact begins with the assertion that "A treaty is to be interpreted in the light of the general purpose which it is intended to serve". The "taking into consideration of the purpose of the treaty" also figures under c) of Article 2 of the Resolution of Granada of the Institut de Droit International.[510]

11. Examples of references to resolutions of international organisations

Observation 136

On occasion, arbitral tribunals have referred to resolutions of international organizations when determining rules of international law.

307. For example, in the case of the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, the tribunal referred to *Legality of the Threat or Use of Nuclear Weapons* considered that "while [General Assembly] resolutions are not binding *per se*, they can be relevant for ascertaining the existence and contents of a rule of customary international law".[511]

E. International criminal tribunals

1. International Criminal Tribunal for the Former Yugoslavia

308. Article 1 of the Statute of the International Criminal Tribunal for the Former Yugoslavia provides that the Tribunal has the power to "prosecute persons responsible for serious violations of international humanitarian law" and the relevant offences are set out in articles 2 to 5 of the Statute.[512] In his report regarding the establishment of the International Criminal Tribunal for the Former Yugoslavia, which was later endorsed in its entirety by the Security Council, the Secretary-General indicated that the Tribunal would apply only existing international humanitarian law rules which were beyond any doubt part of customary international law, so that the *nullum crimen sine lege* principle would be respected.[513] In the *Vasiljević* case, the Trial Chamber confirmed that the Statute of the Tribunal was not intended to create new criminal offences and that the "Tribunal only has jurisdiction over any listed crime if it was recognised as such by customary international law at the time the crime is alleged to have been committed".[514] Determination of relevant rules of customary international law thus comprised a significant part of the decision-making of the Tribunal.

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[510] *Interpretation of the air transport services agreement* (see footnote 344 above), p. 56.

[511] *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (see footnote 434 above), para. 173, referring to *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), para. 70.

[512] On 3 May 1993, the Secretary-General presented a report to the Security Council pursuant to paragraph 2 of Security Council resolution 808 (1993) regarding the establishment of an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), S/25704, 3 May 1993). On 25 May 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted resolution 827 (1993), establishing the International Criminal Tribunal for the Former Yugoslavia on the basis of that report.

[513] S/25704, paras. 29 and 33.

[514] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgment, Trial Chamber II, 29 November 2002, para. 198. See also International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997, Trial Chamber, *Judicial Reports 1997*, p. 3, at para. 654; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 141.

(a) Express references to subsidiary means

Observation 137

The International Criminal Tribunal for the Former Yugoslavia referred expressly to "subsidiary means" for the determination of rules of law or "Article 38, paragraph 1 (d)" in only three cases, primarily in relation to the applicable law before the Tribunal.

309. The Trial Chamber in *Kupreškić* referred to the international law applicable before the ITribunal in addition to that set out in its Statute, stating that the Tribunal "cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions". Such judicial decisions "should only be used as a 'subsidiary means for the determination of rules of law' (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law)".[515] The Trial Chamber went on to state that "judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes."[516]

310. The Tribunal gradually reduced its recourse to decisions of national courts over time as its own decisions and those of other international criminal courts and tribunals became available. In *Delalić*, the Trial Chamber stated that:

> [r]ecourse would be had to the various sources of international law as listed in Article 38 of the Statute of the [International Court of Justice], namely international conventions, custom, and general principles of law, as well as other subsidiary sources such as judicial decisions and the writings of jurists. Conversely, it is clear that the Tribunal is not mandated to apply the provisions of the national law of any particular legal system.[517]

311. In *Vasiljević*, the Trial Chamber referred to works of the International Law Commission in the field of international criminal law when distinguishing between subsidiary means for the determination of rules of law and State practice relevant to the formation of a rule of customary international law. The Trial Chamber underlined that:

> when it comes to sources of international law, Draft Codes of the International Law Commission merely represent a subsidiary means for the determination of rules of law. They may reflect legal considerations largely shared by the international community, and they may expertly identify rules of international law, but they do not constitute state practice relevant to the determination of a rule of customary international law.[518]

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[515] *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT 95-16-T, Judgment, 14 January 2000, Trial Chamber, *Judicial Reports 2000*, p. 1399, at para. 540.

[516] *Ibid.*, para. 540.

[517] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, *Judicial Reports 1998*, p. 951, at para. 414. See also *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber, *Judicial Reports 1998*, p. 467, at para. 196, where the Chamber stated that the pronouncements of the British military courts for the trials of war criminals were "less helpful in establishing rules of international law" as the law applied was domestic.

[518] *Vasiljević* (see footnote 514 above), para. 200.

(b) Examples referring to interpretation of the Statute and Rules of the International Criminal Tribunal for the Former Yugoslavia

Observation 138

The International Criminal Tribunal for the Former Yugoslavia referred to its own previous decisions and a decision of the International Court of Justice when determining that its Statute (although a resolution of the Security Council) and its Rules of Procedure should be interpreted in accordance with the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties.

312. The Appeal Chamber in the *Aleksovski* case referred to its own previous decisions when determining that the Statute and Rules of Procedure of the Tribunal should be interpreted in a manner "which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 Vienna Convention on the Law of Treaties".[519] One of the previous decisions referred to in this respect was the appeal judgment in *Tadić*, which had itself referred to the Advisory Opinion of the International Court of Justice in *Competence of the General Assembly regarding admission to the United Nations*.[520]

313. In the *Kordić and Čerkez* case, the Tribunal's Appeals Chamber determined that:

> interpretation of the Rules of Evidence should "best favour a fair determination of the matter" and be "consonant with the spirit of the Statute and the general principles of law." In interpreting a particular Rule, a Trial Chamber should ensure that it is interpreted in accordance with its "ordinary meaning" and "in the light of [the] object and purpose" of the Statute and Rules.[521]

Observation 139

The International Criminal Tribunal for the Former Yugoslavia determined that its Rules must be interpreted in the light of the International Covenant on Civil and Political Rights, the European Convention on Human Rights[522] and "the relevant jurisprudence".

314. In the *Limaj* case, the Appeals Chamber stated that the Tribunal:

> is entrusted with bringing justice to the former Yugoslavia. First and foremost, this means justice for the victims, their relatives and other innocent people. Justice, however, also means respect for the alleged perpetrators' fundamental rights. Therefore, no distinction can be drawn between persons facing criminal procedures in their home country or on an international level.[523]

On this basis, the Appeals Chamber determined that the Tribunal's Rules "must therefore be read in the light of the [International Covenant on Civil and Political Rights] and [the European Convention on Human Rights] and the relevant jurisprudence".[524]

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[519] *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, Appeals Chamber, para. 98.

[520] See footnote 70 above.

[521] *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-AR73.6, Decision on Appeal regarding the admission into evidence of seven affidavits and one formal statement, 18 September 2000, Appeals Chamber, *Judicial Reports 2000*, p. 1335, para. 22.

[522] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221.

[523] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-AR65, Decision on Fatmir Limaj's Request for Provisional Release, 31 October 2003, para. 11.

[524] *Ibid*., para. 12.

Observation 140

The International Criminal Tribunal for the Former Yugoslavia referred to its own previous decision when determining the relationship between the Statute of the Tribunal and customary international law.

315. In the *Hadžihasanović* case, the Appeals Chamber referred to its own decision in *Milutinović, Šainović & Ojdanić*, in which it had stated that:

> [t]he scope of the Tribunal's jurisdiction *ratione materiae* may therefore said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.[525]

Observation 141

The International Criminal Tribunal for the Former Yugoslavia referred to a decision of a national court and its own previous decision when determining that the Statute of the Tribunal in some respects departed from customary international law.

316. The Trial Chamber in *Kupreškić* considered that the use of the term "civilian" in the definition of the victims of crimes against humanity in article 5 of the Statute of the Tribunal was a departure from customary international law.[526] The Trial Chamber considered that the term "civilian" in such context should be read broadly and considered that such view was supported by case law, referring to the *Barbie* case before the French Court of Cassation "admittedly based on general international law", which had considered that acts "not only against persons by reason of their membership of a racial or religious community but also against the opponents of that policy, whatever the form of their 'opposition'' could be considered a crime against humanity".[527] The Trial Chamber also recalled the decision of the Trial Chamber in the *Vukovar* Rule 61 Decision where it was "held that crimes against humanity may be committed even where the victims at one time bore arms".[528]

(c) Jurisdiction, *compétence de la compétence* and independence

Observation 142

In determining that it had competence to assess the lawfulness of its own establishment by the Security Council (*compétence de la compétence*), the International Criminal Tribunal for the Former Yugoslavia referred to International Court of Justice and other international and national decisions, and outputs of the Human Rights Committee.

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[525] *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, para. 44, citing *Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragolub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, Appeals Chamber, para. 9.

[526] *Kupreškić*, Trial Judgment (see footnote 514 above), paras. 547-548.

[527] *Ibid*., para. 548, citing France, *Barbie,* Court of Cassation (Criminal Chamber), 20 December 1985, *International Law Reports*, vol. 78, p. 124.

[528] *Ibid*., citing *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, para. 29, citing Report of the Commission of Experts established pursuant to Security Council resolution 780 (S/1994/674), para. 78.

317. In the *Tadić* case, [529] the defendant challenged the lawfulness of the establishment of the Tribunal by the Security Council. In dismissing the challenge, the Appeals Chamber referred variously to International Court of Justice decisions, a decision of the Human Rights Committee, decisions of regional human rights courts, decisions of national courts and a general comment of the Human Rights Committee. The Appeals Chamber relied in particular on the *Nottebohm* and *Effects of awards of compensation* decisions by the International Court of Justice to determine that the Tribunal had competence to determine its own competence (*compétence de la compétence*), which was inherent in all international judicial bodies. [530] The *Effect of awards of compensation* decision was further relied on to support the conclusion that the Council had the authority to establish a judicial body even though it did not itself have judicial powers or functions, and that the nature of the Tribunal as a subsidiary organ of the Council was not determinative of whether the Tribunal could issue judgments binding upon the parent organ. [531]

318. In determining that the establishment of the Tribunal satisfied the requirement under international human rights instruments that tribunals be "established by law", the Tribunal's Appeals Chamber referred [532] to the Trial Chamber's characterization of the International Military Tribunals at Nuremberg and Tokyo as having provided the defendants with procedural fair trial guarantees, [533] decisions of the Human Rights Committee, [534] a general comment of the Human Rights Committee, [535] decisions of the European Commission of Human Rights [536] and the approach taken by the Inter-American Commission on Human Rights. [537] The important consideration in determining whether a tribunal had been "established by law" was whether it had been set up by a competent organ in keeping with the relevant legal procedures, and that it observed the requirements of procedural fairness. [538]

Observation 143

The International Criminal Tribunal for the Former Yugoslavia referred to its own "jurisprudence" to emphasize the importance of the separation of powers for the independent judicial functioning of the Tribunal.

319. In the *Čelebići* case, the Tribunal stated that:

> The fundamental importance of the independence of the judiciary has been emphasised in the jurisprudence of the Appeals Chamber. This jurisprudence has also recognised that the principle of judicial independence in domestic and international systems generally demands that those persons or bodies exercising

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[529] *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above).

[530] *Ibid*., paras. 18-22, citing the *Nottebohm Case (Preliminary Objection) (Liechtenstein v. Guatemala)* (see footnote above), p. 119; and *Effect of awards of compensation made by the U.N. Administrative Tribunal, Advisory Opinion of July 13th, 1954: I.C.J. Reports 1954*, p. 47, at p. 56.

[531] *Ibid*., para. 16, citing the *Effect of awards of compensation* (see footnote 530 above), pp. 60-61.

[532] *Ibid*., paras. 43-45.

[533] *Tadić*, Opinion and Judgement, 7 May 1997, Trial Chamber (see footnote 514 above), para. 34.

[534] *Cariboni v. Uruguay* (A/39/40, annex VII, sect. A).

[535] General comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, *ibid*., annex VI, para. 4.

[536] *Leo Zand v. Austria*, Application No. 7360/76, Report, 12 October 1978, *European Commission of Human Rights Reports and Decisions*, vol. 15 (1979), p. 70, at p. 80; *Piersack v. Belgium*, Application No. 8692/79, Report, 13 May 1981, p. 12; *Camillo Crociani, Bruno Palmiotti, Mario Tanassi and Antonio Lefebvre D'Ovidio v. Italy*, Applications Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined), Decision on the admissibility of the applications, 18 December 1980, *European Commission of Human Rights Reports and Decisions*, vol. 22 (1981), p. 147, at p. 219.

[537] Inter-American Commission on Human Rights: *Annual Report*, OEA/Ser.P, AG/doc. 305/73 rev.1, 14 March 1973, p. 1; and *Annual Report*, OEA/Ser.P, AG/doc. 409/174, 5 March 1974, pp. 2-4.

[538] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Judgment, 15 July 1999, Appeals Chamber, para. 45.

judicial powers do not also exercise powers of the executive or legislative branches of those systems.[539]

(d) Examples that relate to treaty provisions and their relationship with customary international law

Observation 144

The International Criminal Tribunal for the Former Yugoslavia referred to its own decisions when determining its approach to the interplay between relevant treaty provisions and customary international law.

320. In the *Kordić and Čerkez* case, the Appeals Chamber referred to previous Tribunal decisions when stating that "[t]he maxim of *nullum crimen sine lege* is […] satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary international law".[540] In the *Galić* case, the Tribunal's Appeals Chamber clarified that, "while binding conventional law that prohibits conduct and provides for individual criminal responsibility could provide the basis for the … Tribunal's jurisdiction, in practice the … Tribunal always ascertains that the treaty provision in question is also declaratory of custom".[541]

(e) Examples concerning the formation or identification of rules of customary international law and general principles of law

Observation 145

The International Criminal Tribunal for the Former Yugoslavia referred to decisions of national courts as evidence of State practice and *opinio juris*.

321. In concluding that customary international law permitted a conviction for a crime against humanity through participation in a joint criminal enterprise, the Tribunal's Appeals Chamber in the *Tadić* case determined that the recognition in decisions of national courts following World War II of that mode of liability for crimes against humanity and war crimes constituted evidence of State practice and *opinio juris*.[542]

Observation 146

The International Criminal Tribunal for the Former Yugoslavia referred to decisions of the International Military Tribunal and of national courts (under Allied Control Council Law No. 10) when determining that "the case law" indicated that a rule of customary international law was firmly established.

322. The Appeals Chamber also referred to proceedings before the International Military Tribunal and decisions of tribunals operating under Allied Control Council Law No. 10 when determining that "the case law" indicated that "common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal".[543]

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[539] *Prosecutor v. Zejnil Delalić et al.("Čelebići case")*, Case No. IT-96-21-A, Judgment, 20 February 2001, Appeals Chamber, para. 689.

[540] *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, Appeals Chamber, para. 44.

[541] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, 30 November 2006, Appeals Chamber, para. 85.

[542] *Tadić*, Judgment, Appeals Chamber (see footnote 538 above), paras. 195-220.

[543] *Ibid*., para. 220. See also *Furundžija*, Trial Judgment (see footnote 517 above), paras. 195, 211 and 217.

Observation 147

The International Criminal Tribunal for the Former Yugoslavia has distinguished between the use of decisions of courts and tribunals as evidence of the formation of a rule of customary international law or a general principle of law and their use as persuasive authority in the determination of such rule or principle after it has formed.

323. The Trial Chamber in *Kupreškić* stated that "precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law". The Trial Chamber added that the Tribunal may, for example, "have to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world".[544] "Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law".[545]

Observation 148

The International Criminal Tribunal for the Former Yugoslavia referred to its previous decisions when determining that a principle of customary international law could be applied to new situations that reasonably fall within its application.

324. In the *Hadžihasanović* case, the Appeals Chamber reaffirmed that, to hold that a principle was part of customary international law, it had to be "satisfied that State practice recognized the principle on the basis of supporting *opinio juris*". It went on to state that:

> where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle. Also, in determining whether a principle is part of customary international law and, if so, what are its parameters, the Appeals Chamber may follow in the usual way what the Tribunal has held in its previous decisions.[546]

Observation 149

The International Criminal Tribunal for the Former Yugoslavia has referred to the decisions of national courts among the forms of evidence for the formation of customary international law and general principles of law.

Observation 150

The International Criminal Tribunal for the Former Yugoslavia has referred to national court decisions to indicate that there has been an evolution in the content of a rule of customary international law.

Observation 151

The International Criminal Tribunal for the Former Yugoslavia has emphasized that national legislation and national court decisions can only reflect a general principle of law when most, if not all, States recognize the same principle.

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[544] *Kupreškić*, Trial Judgment (see footnote 514 above), para. 540.
[545] *Ibid*.
[546] *Hadžihasanović* (see footnote 525 above), para. 12.

325. In the *Tadić* case, the Appeals Chamber held that "[i]n appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions".[547] The Appeals Chamber went on to state that:

> in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion.[548]

326. In *Šainović*, the Appeals Chamber similarly recalled that:

> under the doctrine of general principles of law recognised by nations, national legislation and case law may be relied upon as a source of international principles or rules in limited situations. Such reliance, however, is permissible only where it is shown that most, if not all, countries accept and adopt the same approach to the notion at issue. More specifically, it would be necessary to show that the major legal systems of the world take the same approach to that notion.[549]

The Appeals Chamber determined that the requirements for criminal responsibility for aiding and abetting varied among national courts and jurisdictions such that no general principle of law could be said to have arisen.[550]

Observation 152

The International Criminal Tribunal for the Former Yugoslavia has referred to its own previous decisions as consistent with customary international law and general principles of international criminal law.

327. In the *Blaškić* case, for example, the Trial Chamber concurred with the "views deriving from the Tribunal's case-law" that individuals may be held responsible for their participation in the commission of any offences under any of the heads of individual criminal responsibility in article 7, paragraph 1, of the Statute. This approach "is consonant with the general principles of criminal law and customary international law".[551]

Observation 153

The International Criminal Tribunal for the Former Yugoslavia has referred to the "concept of contempt" as a general principle common to the major legal systems of the world, as developed in international jurisprudence.

328. In the *Tadić* case, the Appeals Chamber, after determining that contempt was not part of its Statute, and that contempt did not form part of customary international

[547] *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), para. 99.
[548] *Tadić*, Judgment, Appeals Chamber (see footnote 538 above), para. 225.
[549] *Prosecutor v. Nikola Šainović* et al., Case No. It-05-87-A, Judgment, 23 January 2014, Appeals Chamber, para. 1643.
[550] *Ibid*., para. 1644.
[551] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber, *Judicial Reports 2000*, p. 557, at para. 264.

law, referred to the "concept of contempt" as a general principle common to the major legal systems of the world, as developed in international jurisprudence:

> It is otherwise of assistance to look to the general principles of law common to the major legal systems of the world, as developed and refined (where applicable) in international jurisprudence. Historically, the law of contempt originated as, and has remained, a creature of the common law. The general concept of contempt is said to be unknown to the civil law, but many civil law systems have legislated to provide offences which produce a similar result.[552]

5. Examples concerning the approach of the International Criminal Tribunal for the Former Yugoslavia to precedent and consistency.

Observation 154

The International Criminal Tribunal for the Former Yugoslavia has confirmed on a number of occasions that, although decisions of the Appeals Chamber are binding on the Trial Chambers, there is otherwise no system of binding precedent (*stare decisis*) applicable to the Tribunal.

329. In the *Aleksovski* case, the Appeals Chamber referred to the practice of national courts in civil and common law jurisdictions in relation to the effects of appellate court decisions in relation to lower courts, noting that, while in "common law jurisdictions, decisions of a higher court are binding on lower courts,… [i]n civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts." The Appeals Chamber considered that the *ratio decidendi* of its decisions should be binding on the Trial Chambers, as the Statute of the International Criminal Tribunal for the Former Yugoslavia "establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers".[553]

330. The Appeals Chamber added that the mandate of the Tribunal would not be achieved if the accused and the prosecution did not have certainty and predictability in the application of the law. The right to a fair trial would not be guaranteed if "each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit". Differing approaches of the Trial Chambers would be inconsistent with the intention of the Security Council to establish "three Trial Chambers and one Appeals Chamber, applying a single, unified, coherent and rational corpus of law".[554] The Appeals Chamber stressed the need for coherence in the work of the tribunal "where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced".[555]

331. In the same case, the Appeals Chamber decided that decisions of the Trial Chambers are not binding among themselves, "although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive".[556] It also concluded that "in the interests of certainty and predictability, the Appeals Chamber should follow its own previous decisions, but should be free to depart from them for cogent reasons in the interests of justice" including "where the previous

[552] *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, Appeals Chamber, para. 15. See also paras. 13 to 17.
[553] *Aleksovski,* Appeal Judgment (see footnote 519 above), para. 113.
[554] *Ibid*.
[555] *Ibid.*
[556] *Ibid.*, para. 114.

decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given per incuriam, that is a judicial decision that has been 'wrongly decided, usually because the judge or judges were ill-informed about the applicable law.'"[557]

332. In the *Hartmann* case, the Appeals Chamber rejected the claim of the appellant that the Trial Chamber had failed to take notice of a binding precedent which reflected a general principle of law. The Appeals Chamber noted that it "is not bound by the findings of regional or international courts and as such is not bound by [the European Court of Human Rights] jurisprudence".[558]

Observation 155

The International Criminal Tribunal for the Former Yugoslavia has discussed the relative persuasive weights to be accorded to decisions of international courts and tribunals, on the one hand, and national courts and tribunals, on the other.

333. In *Kupreškić*, the Trial Chamber stated that "the value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. whether or not the Tribunal is an international court proper".[559] It added that:

> [i]t cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, … These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law. In many instances no less value may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Genocide Convention, or the 1949 Geneva Conventions or the 1977 Protocols or similar international treaties. In these instances the international framework on the basis of which the national court operates and the fact that in essence the court applies international substantive law, may lend great weight to rulings of such courts. Conversely, depending upon the circumstances of each case, generally speaking decisions of national courts on war crimes or crimes against humanity delivered on the basis of national legislation would carry relatively less weight.[560]

334. The Trial Chamber went on to emphasize the primary importance of decisions of international courts and tribunals, stating that:

> the … Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, 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.[561]

[557] *Ibid.*, paras. 107-108.
[558] *Prosecutor v. Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgment, 19 July 2011, Appeals Chamber, paras. 120 and 159. See also memorandum by the Secretariat on general principles of law (A/CN.4/742), para. 139.
[559] *Kupreškić*, Trial Judgment (see footnote 514 above), para. 538.
[560] *Ibid*., para. 541.
[561] *Ibid*., paras. 540-542.

Observation 156

The International Criminal Tribunal for the Former Yugoslavia has referred to decisions of the International Court of Justice in a number of cases, regarding them as non-binding but according them considerable weight.

335. Decisions and opinions of the International Court of Justice have a different purpose and focus to decisions of the Tribunal, being primarily concerned with the responsibility of States for internationally wrongful acts rather than the criminal responsibility of individuals. Nevertheless, the Tribunal has relied on decisions of the International Court of Justice in several of its cases and accorded them considerable weight, particularly as they relate to the customary law nature of provisions of international humanitarian law and authoritative interpretation of relevant treaties.

336. In the *Tolimir "Srebrenica"* case, the Tribunal's Appeals Chamber noted that, although it was not bound by legal determinations of the International Court of Justice, "the [Court] is the principal organ of the United Nations and the competent organ to resolve disputes relating to the interpretation of the Genocide Convention". The Appeals Chamber determined that the Court's interpretation of article II (c) of the Convention on the Prevention and Punishment of the Crime of Genocide reflected the applicable law.[562]

337. In the *Čelebići* case, the Appeals Chamber, when considering whether common article 3 of the 1949 Geneva Conventions applies to both international and non-international armed conflicts, referred to its own decision in the *Tadić* case, in which it had relied on the International Court of Justice decision in the *Nicaragua* case to the effect that "the rules set out in common Article 3 reflect 'elementary considerations of humanity' applicable under customary international law to any conflict … 'Therefore at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.'"[563]

338. The International Court of Justice *Nicaragua* case was referred to in the Tribunal's *Furundžija* case in the context of determining that the prohibition of torture against persons taking no active part in hostilities forms part of customary international law.[564] In the *Galić* case, the Tribunal referred to the International Court of Justice Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, which found that the principles of distinction and of the protection of the civilian population are "the cardinal principles contained in the texts constituting the fabric of humanitarian law" and that "States must never make civilians the object of attack", and further that "these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[565]

339. In the *Aleksovski* case, the Tribunal referred to the weight to be accorded to decisions of the International Court of Justice and their nature as precedents as follows:

> Despite the non-operation of the principle of *stare decisis* in relation to the International Court of Justice, its previous decisions are accorded considerable weight. This may be due to their perceived status as authoritative expressions of

[562] *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015, para. 226.

[563] *Delalić ("Čelebići case")*, Appeal Judgment (see footnote 539 above), para. 140, citing *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), para. 102 (which had referred to *Nicaragua*, para. 218), and referring to elementary considerations of humanity in the *Corfu Channel case* (see footnote 69 above), p. 22, and *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), para. 79.

[564] *Furundžija*, Trial Judgment (see footnote 517 above), para. 138.

[565] *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), paras. 78–79.

> the law. As Judge Zoričić stated in his Dissenting Opinion in the *Peace Treaties* case, while "it is quite true that no international court is bound by precedents ... there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long as the principle retains its value". This is confirmed by Judge Mohamed Shahabuddeen, who offers the view that "there is an acceptable sense in which, subject to a power to depart, decisions of the Court may be regarded as authoritative".[566]

340. In *Karadžić,* the Appeals Chamber of the Tribunal indicated that "it is bound neither by the legal determinations nor by the evidentiary assessments reached by trial chambers of this Tribunal or by the [International Court of Justice]".[567] Instead, it underscored "that findings of criminal responsibility made in a case before the Tribunal are binding only for the individual accused in that specific case".[568]

341. The Tribunal demonstrated its willingness to depart from an International Court of Justice decision in the *Tadić* case, the majority of the Appeals Chamber disagreeing with the decision of the International Court of Justice in the *Nicaragua* case in respect of the "effective control" test for the international responsibility of a State with respect to military or paramilitary operations. The International Court of Justice had decided that the international responsibility of a State could arise only if control is exercised ("directed or enforced") with respect to specific military or paramilitary operations.[569] The majority of the Tribunal's Appeals Chamber considered that this test agreed neither with "the logic of the law of State responsibility" nor with "judicial and State practice", and preferred an "overall control" test, which required an assessment of all the elements of control taken as a whole, and a determination to be made on that basis.[570] This broader control test was later upheld, but also nuanced, by the Tribunal's Appeals Chamber in the *Aleksovski* case.[571] The Appeals Chamber in *Tadić* concluded that, although the *Nicaragua* test accorded with State and judicial practice in respect of unorganized groups or individuals, such practice applied another test when military or paramilitary groups were at issue. The international rules applicable "do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having a status of a State official under internal legislation can be regarded as a *de facto* organ of the State".[572]

Observation 157

The International Criminal Tribunal for the Former Yugoslavia has referred to decisions of the International Criminal Court on relatively few occasions, primarily in relation to procedural matters, and has drawn attention to the differing applicable law provisions in the respective Statutes.

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[566] *Aleksovski,* Appeal Judgment (see footnote 519 above), para. 96, citing the *Interpretation of Peace Treaties* [First Phase](see footnote 437 above), Dissenting Opinion by Judge Zoričić, p. 104, and Shahabuddeen, *Precedent in the World Court* (Cambridge, Cambridge University Press, 1996), p. 239.

[567] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR98bis.l, 11 July 2013, Appeals Chamber, para. 94.

[568] *Ibid*.

[569] *Military and Paramilitary Activities in and against Nicaragua, Merits* (see footnote 57 above), para. 115.

[570] *Tadić*, Appeal Judgment (see footnote 538 above), chap. IV, sect. B 3 (a) (ii) a. and b., and para. 120.

[571] *Aleksovski,* Appeal Judgment (see footnote 519 above), paras. 125–134.

[572] *Tadić*, Appeal Judgment (see footnote 538 above), paras. 124 and 137.

342. Although there are a number of footnote references to International Criminal Court decisions in the later decisions of the Tribunal, they mainly concern procedural matters and many are not elaborated on in the text of the decisions. One of the few more significant references is in the *Milutinović* case, in which Trial Chamber referred to the International Criminal Court decision in the *Dyilo* case concerning procedural practices for witness proofing.[573]

343. In that case, the Trial Chamber also discussed the different applicable law provisions provided for in the Rome Statute compared to those in the Tribunal's Statute:

> Under its governing Statute, the [International Criminal Court], unlike the [International Criminal Tribunal for the Former Yugoslavia], must apply, in the first instance, its Statute, Elements of Crimes, and its Rules of Procedure and Evidence; in the second instance, principles of international law; and finally, national law, including the national law of the States that would normally exercise jurisdiction over the crime.[574]

The Tribunal's Statute, by contrast, did not specifically enumerate the sources of law to which a Chamber should have resort. Although the Tribunal Chamber could consider national law, it was not bound by it. The decision in *Dyilo* was not an authority binding on the Chamber, nor was the process by which the Chamber of the International Criminal Court in *Dyilo* came to its decision applicable.[575]

344. The Tribunal has on a few occasions departed from International Criminal Court decisions on substantive matters, bearing in mind the differences in the applicable law provisions between the two courts. In *Kordić and Čerkez*, for example, the Tribunal referred to its *Kupreškić* Trial Chamber decision to the effect that the requirement under the Rome Statute of the International Criminal Court (Rome Statute)[576] that "persecution" be connected to another crime within the jurisdiction of the Court was "more restrictive than is necessary under customary international law".[577] Similarly, in the *Krstić* case, the Tribunal's Appeals Chamber overturned the Trial Chamber decision, which had relied on the definition of genocide in the Elements of Crimes adopted by the International Criminal Court, which requires that the conduct take place in the context of a manifest pattern of similar conduct. The Appeals Chamber decided that the Trial Chamber's reliance on the definition of genocide given in the International Criminal Court's Elements of Crimes was "inapposite" because the requirement that the prohibited conduct be part of a

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[573] *Prosecutor v. Milan Milutinović* et al., Case No. IT-05-87-T, Decision on Ojdanić motion to prohibit witness proofing, 12 December 2006, Trial Chamber, para. 7.

[574] *Ibid*., para. 12.

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

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

[577] *Prosecutor v. Dario Kordić and Čerkez*, Case No. IT-95-14/2, Judgment, Trial Chamber, 26 February 2001, para. 197, referring to *Kupreškić*, Trial Judgment (see footnote 514 above). paras. 578-581. The *Kupreškić* Trial Chamber relied on the following in reaching this conclusion: Control Council Law No. 10, national legislation, particularly in France and Canada; the case law of the International Military Tribunal, particularly the *Einsatzgruppen* case (*Trials of War Criminals before the Nuernberg Military Tribunals*, vol. IV. p. 49) and the *Justice* case (*Trials of War Criminals before the Nuernberg Military Tribunals*, vol. III. p. 974): various international treaties (the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 [(New York, 26 November 1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73], and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 [(New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243]); and the *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), paras. 140-141.

widespread or systematic attack "does not appear in the Genocide Convention and was not mandated by customary international law".[578]

345. In *Kupreškić*, the Trial Chamber also referred to national court decisions when interpreting the degree of organization needed to carry out crimes against humanity and noted the "need for crimes against humanity to have been at least tolerated by a State, Government or entity is also stressed in national and international case-law."[579] It was stressed that "[t]he available case-law seems to indicate that in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit within such a policy."[580]

(f) Decisions of national and international courts and tribunals that refer to "principles", without ascribing any particular legal value to such principles

Observation 158

The International Criminal Tribunal for the Former Yugoslavia has held that "general principles" may crystallise through their elaboration in a series of decisions of national or international courts, without ascribing any particular legal value to such principles.

346. The Trial Chamber in the *Kupreškić* case stated that:

> [t]he Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter … By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence.[581]

Observation 159

The International Criminal Tribunal for the Former Yugoslavia has referred to the principles of international criminal responsibility developed by the Nuremberg and Tokyo trials, as subsequently reflected in national court decisions.

347. In its decision in the *Karadžić* case, the Trial Chamber referred to the development of principles of international criminal responsibility of individuals in the Tokyo and Nürnberg trials, which were then reflected in national court decisions, including in relation to individuals in an official capacity:

> [t]he punishment for the crimes allegedly committed by such individuals is also based on the general principles of international humanitarian law, and derives in particular from the precedents laid down by Nuremberg and Tokyo; furthermore, the principle of individual criminal responsibility of persons in positions of authority has been reaffirmed in a number of decisions taken by

[578] *Krstić*, Appeals Chamber (see footnote 153 above), para. 224.
[579] *Kupreškić*, Trial Judgment (see footnote 514 above), paras. 552 et seq. Reference was made to France, *Barbie*, Confirmation of Conviction, 3 June 1988, Court of Cassation (Criminal Chamber), *International Law Reports*, vol. 100, p. 330; *Touvier*, Court of Appeal of Paris, First Chamber of Accusation, 13 April 1992, and Court of Cassation (Criminal Chamber), 27 November 1992, *International Law Reports*, vol. 100 (1995), p. 337, at p. 351; and Canada, *R v. Finta*, Judgment, 24 March 1994, Supreme Court, [1994] 1 S.C.R. 701, at 733.
[580] *Kupreškić*, Trial Judgment (see footnote 514 above), para. 555.
[581] *Ibid*., para. 537.

national courts, and adopted in various national and international legal instruments.

The Trial Chamber determined that it followed from this principle that the official capacity of an individual, whether as military commander, leader or government official, did not exempt him from criminal responsibility.[582]

7. Decisions of national and international courts and tribunals in relation to procedural matters

Observation 160

The International Criminal Tribunal for the Former Yugoslavia has referred to the decisions of national and international courts in relation to numerous procedural questions arising before it.

348. In the *Delić* case, for example, the Appeals Chamber held that, while there was no jurisprudence in the Tribunal which could be relevant to address the finality of the trial judgment following the death of an appellant prior to the issuance of the appeal judgment, it found it "instructive to provide a brief overview of the relevant provisions and legal precedents in other jurisdictions".[583] The Appeals Chamber reviewed decisions of national courts in Azerbaijan, Canada, France, Germany, New Zealand, Sweden and the United Kingdom, and also the European Court of Human Rights. The Appeals Chamber concluded from this review that there was no "general principle that is consistently followed in the majority of jurisdictions as to the finality of the trial judgement" and that it could not identify "any prevalent approach, let alone identify any rules of customary international law". In the absence of such rule, the Appeals Chamber considered that it would not be compatible with the essence of the appellate proceedings before the International Criminal Tribunal for the Former Yugoslavia to vacate the trial judgment, which should be considered final.[584]

349. In the *Kordić and Čerkez* case, the Appeals Chamber referred to decisions of national and international courts when considering whether out of court statements by witnesses were admissible:

> The Prosecution notes that the prior out-of-court statement of this witness was admitted in the *Blaskić* case at the request of the accused. In that case, the Trial Chamber considered "the need for the proper administration of justice and the requirement of a fair trial" and the exceptions to the principle of oral testimony and cross-examination recognized "both in the national legal systems and precedents established by international jurisdictions, including those exceptions relating to the admission of statements of deceased witnesses."[585]

350. In the *Milosevic* case, the Appeals Chamber referred to the decisions of national courts of various jurisdictions and noted that there had been restrictions to the right of defendants to represent themselves in sexual assault trials in order to protect vulnerable witnesses from trauma. The Appeals Chamber noted that, while it had not addressed the question before, "existing precedent from contemporary war crimes

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[582] *Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case No. IT-95-5-D, Decision in the Matter of Proposal for a Formal Request for Deferral to the Competence of the Tribunal Addressed to the Republic of Bosnia and Herzegovina in Respect of Radovan Karadžić, Ratko Mladić and Mićo Stanišić, *Radovan Karadžić and Ratko Mladić*, 16 May 1995, Trial Chamber, *Judicial Reports 1994–1995*, p. 851, at paras. 23-24.

[583] *Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, Decision on the Outcome of the Proceedings, 29 June 2010, Appeals Chamber, para. 10.

[584] *Ibid.*, paras. 11-15.

[585] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, Appeals Chamber, para. 14.

tribunals is unanimous in concluding that the right to self-representation 'is a qualified and not an absolute right.'"[586]

351. The Appeals Chamber in *Blaškić* referred to its own judgment in the *Kupreškić* case, concerning the standard for determining whether a Trial Chamber's findings were reasonable. The Appeals Chamber must leave primarily to the Trial Chamber the task of hearing, assessing and weighing the evidence presented at trial, and "[o]nly where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber".[587]

352. In the *Gotovina* case, the Appeals Chamber noted that the parties had made "extensive references to national case-law" and found it "instructive to have a brief overview of underlying principles with respect to a counsel's duty of loyalty to a former client in national jurisdictions".[588]

(g) Decisions of international and national courts in relation to sentencing matters

Observation 161

The International Criminal Tribunal for the Former Yugoslavia has referred to the sentencing practices of other international and national criminal tribunals.

353. In the *Krstić* case, the Appeals Chamber held that:

> [r]egarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the *Vasljević* case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. This principle has also been recognized in the [International Criminal Tribunal for Rwanda] and in many national jurisdictions.[589]

(h) Outputs of human rights treaty bodies

Observation 162

The International Criminal Tribunal for the Former Yugoslavia has referred on several occasions to the interpretation of international human rights treaties by the Human Rights Committee and the Committee against Torture, among other materials, to support its decisions.

354. As discussed above, in determining that the establishment of the Tribunal satisfied the requirement under international human rights instruments that tribunals be "established by law" contained in article 14, paragraph 1, of the International Covenant on Civil and Political Rights,[590] the Tribunal's Appeals Chamber supported

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[586] *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, Appeals Chamber, para. 12.

[587] *Blaškić*, Appeal Judgment (see footnote 514 above), para. 17, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Zoran Kupreskic el al.*, Case No. IT-95-16-A, Judgment, 23 October 2001, Appeals Chamber, *Judicial Reports 2000*, p. 1963, para. 30.

[588] *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. It-06-90-AR73.2, Decision on Ivan Čermak's Interlocutory Appeal against Trial Chamber's decision on conflict of interest of attorneys Čedo Prodanović and Jadranka Sloković, 29 June 2007, Appeals Chamber, paras. 44-47.

[589] *Krstić* Appeal Judgment (see footnote 153 above), para. 268.

[590] *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), para. 46.

this determination by referring to,[591] among other things, a decision and a general comment of the Human Rights Committee.[592]

355. In the *Furundžija* case, the Trial Chamber referred to its previous *Delalić* judgment to note that:

> the definition of torture contained in the 1984 Torture Convention is broader than, and includes, that laid down in the 1975 Declaration of the United Nations General Assembly and in the 1985 Inter-American Convention, and has hence concluded that that definition "reflects a consensus which the Trial Chamber considers to be representative of customary international law".[593]

The *Furundžija* Trial Chamber agreed with that conclusion and supported its decision by noting that the same or a similar definition had been applied by the Human Rights Committee and the European Commission of Human Rights. The Trial Chamber also referred to a general comment of the Human Rights Committee in this regard.[594]

356. The *Furundžija* Trial Chamber further referred to "international case law, the reports of the United Nations Human Rights Committee and the United Nations Committee Against Torture, those of the Special Rapporteur and the public statements of the European Committee for the Prevention of Torture" to "evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law".[595]

357. In the *Krstić* case, the Trial Chamber of the Tribunal interpreted provisions of the Convention on the Prevention and Punishment of the Crime of Genocide in accordance with the rules set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties, including as a supplementary means of interpretation, the preparatory work and the circumstances which gave rise to the Convention, international case law on the crime of genocide (in particular, that developed by the International Criminal Tribunal for Rwanda), the International Law Commission's report on the draft Code of Crimes against Peace and Security of Mankind, and "the work of other international committees, especially the reports of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the … Commission on Human Rights".[596]

(i) References to writings

Observation 163

The International Criminal Tribunal for the Former Yugoslavia has referred to writings on far fewer occasions than it has to decisions of courts and tribunals.

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[591] *Ibid*., paras. 43-45.

[592] *Cariboni v. Uruguay* (see footnote 534 above); and Human Rights Committee, general comment No. 16.

[593] *Furundžija*, Trial Judgment (see footnote 517 above), para. 160.

[594] *Ibid*. The European Commission of Human Rights case referred to is the *Greek Case*, in which "the Commission held that torture has a purpose, such as the obtaining of information or confessions or the infliction of punishment and it is generally an aggravated form of inhuman treatment (*Greek Case*, 1969 Y.B. Fur. Cony, on H.R. 12, p. 186)". Further, the Tribunal noted, "[t]he Human Rights Comittee, in its General Comment on Art. 7 of the ICCPR, indicated that the distinction between prohibited forms of mistreatment depends on the kind, purpose and severity of the particular treatment. (*Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRAGEMI\Rev, I at 30 (1994)."

[595] *Furundžija*, Trial Judgment (see footnote 517 above), para. 163.

[596] *Krstić*, Trial Judgment (see footnote 232 above), para. 541.

Observation 164

The International Criminal Tribunal for the Former Yugoslavia has not ascribed any particular weight to writings and has referred to them in conjunction with other materials to support its decisions or reasoning.

358. In *Denali*, the Tribunal referred to *Oppenheim's International Law* when interpreting the expression "general principles of law" in the Tribunal's rules of procedure and evidence, assimilating it to the terms of article 38 of the International Court of Justice Statute. The Tribunal stated that:

> [t]he expression 'general principles of law' in Sub-rule 89(B) is similar to the expression in Article 38(1)(c) of the Statute of the International Court of Justice, without the last four words, 'recognized by civilized nations', which make no substantive difference. Article 38(1)(c) of the … Statute [of the International Court of Justice] has been construed to mean rules accepted in the domestic laws of all civilized States. (See *Guggenheim, 94 Hague Recueil (1958, II), 78*). Oppenheim has also expressed the view that "The intention is to authorise the Court to apply the general principles of municipal jurisprudence, in particular of private law in so far as they are applicable to relations of States." (See *Oppenheim - International Law: A Treatise, Volume I, 8th ed. 1955, 29*)[597]

359. In the *Tadić* case, in connection with the meaning of "belligerent occupation", in addition to referring to the ICRC Commentary to Geneva Convention IV, the Commission's draft Code of Crimes against the Peace and Security of Mankind and national military manuals, the Trial Chamber referred to a work by Georg Schwarzenberger to support the position that belligerent occupation applies to invaded territory, but not in areas where fighting still continues and effective control has not been established, and ceases whenever the Occupying Power loses effective control of the territory.[598] In the same case, the Trial Chamber referred to a work by Antonio Cassese, along with the *Nicaragua* case of the International Court of Justice, the Charter of the International Military Tribunal and the 1907 Hague Conventions, to support its conclusion regarding the customary law nature of common article 3 to the 1949 Geneva Conventions.[599]

360. In the *Čelebići* case, in the context of nationality, the succession of States and its impact on the nature of the armed conflicts in the former Yugoslavia, the Trial Chamber referred to the ICRC Commentary to Geneva Convention IV, the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws,[600] the Commission's articles on nationality in relation to the succession of States[601] and the *Nottebohm* case of the International Court of Justice, and observed in this context that "a considerable amount of literature" had been written. The

[597] *Prosecutor v. Zejnil Delalić et al*., Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, 28 May 1997, Trial Chamber, para. 8.

[598] *Tadić*, Opinion and Judgment, 7 May 1997, Trial Chamber (see footnote 514 above), paras. 580-581, referring to Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals*, (London, Stevens and Sons, 1968), vol. II, pp. 174 and 176.

[599] *Ibid*., para. 618, referring to Antonio Cassese, *Violence and Law in the Modern Age*, transl. S.J.K. Greenleaves (Princeton, Princeton University Press, 1988), p. 109.

[600] Convention on Certain Questions Relating to the Conflict of Nationality Laws (The Hague, 12 April 1930), League of Nations, *Treaty Series*, vol. 179, No. 4137, p. 89.

[601] The draft articles and the commentaries thereto are reproduced in *Yearbook … 1999*, vol. II (Part Two), paras. 47-48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

particular works referred to were *Oppenheim's International Law* and Ian Brownlie's *Principles of Public International Law*.[602]

361. One of the few writers referred to by the Tribunal was Cherif Bassiouni, cited in the *Krstić* case along with decisions of the International Criminal Tribunal for Rwanda, the Commission's draft Code of Crimes against the Peace and Security of Mankind and the Report of the Preparatory Commission for the International Criminal Court, in connection with sentencing.[603]

(j) References to the work of ICRC

Observation 165

The International Criminal Tribunal for the Former Yugoslavia referred to the ICRC Commentaries to the Geneva Conventions to determine the purpose and scope of common article 3.

362. In the *Čelebići* case, the Tribunal's Appeals Chamber referred to the purpose of common article 3 of the Geneva Conventions, as set out in the ICRC Commentary:

> the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself''. These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.[604]

The Appeals Chamber noted that the principles codified in common article 3 "were considered as reflecting the principles applicable to the Conventions in their entirety and as constituting substantially similar core norms applicable to both types of conflict is clearly supported by the ICRC Commentary".[605] The Appeals Chamber concluded that "[i]t is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character."[606]

363. In the *Tadić* case, the Appeals Chamber stated that humanitarian law holds accountable not only those having formal positions of authority, but also those who wield *de facto* power and those who exercise control over perpetrators of serious violations of international humanitarian law. Referring to the ICRC Commentary to article 29 of Geneva Convention IV, the Appeals Chamber determined that "what is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators".[607]

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[602] *Delalić*, Trial Judgment (see footnote 517 above), paras. 247-248 and para. 258, referring to Jennings and Watts, *Oppenheim's International Law*, 9th ed. (London, Longman, 1992), vol. I, pp. 852, 853 and 857; and Ian Brownlie, *Principles of Public International Law*, 4th ed. (Oxford, Oxford University Press, 1990).

[603] *Krstić*, Trial Judgment (see footnote 232 above), para. 498, referring to M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd rev. ed. (The Hague, Kluwer Law International, 1999), p. 295.

[604] *Delalić ("Čelebići case*"), Appeal Judgment (see footnote 539 above), para. 143.

[605] *Ibid*., para. 145, citing the ICRC Commentary to Geneva Convention IV, Jean Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, (International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994), p. 14.

[606] *Delalić ("Čelebići case*"), Appeal Judgment (see footnote 539 above), para. 150.

[607] *Tadić*, Appeal Judgment (see footnote 538 above), para. 96, citing ICRC Commentary to article 29 of Geneva Convention IV, Pictet (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, p. 212.

(k) References to the work of the International Law Commission

Observation 166

The International Criminal Tribunal for the Former Yugoslavia referred to the work of the International Law Commission on a number of occasions, primarily in its earlier judgments, in some cases to support its decisions regarding the application of rules of customary international law, and in other cases, as guidance.

364. In the *Tadić* Appeal Judgment, the Tribunal appears to have relied on several of the draft articles on State responsibility as adopted by the Commission on first reading as statements of customary international law.

365. Referring to draft article 8 of the draft articles as adopted on first reading, the Appeals Chamber stated that "if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State".[608] Further, the Appeals Chamber distinguished between the actions of individuals and those of organized and hierarchically structured groups, regarding the attributability of actions of the latter as analogous to that for organs of the State:

> [u]nder the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission, a State is internationally accountable for ultra vires acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest.[609]

The Appeals Chamber added that:

> "[u]nder the relevant rules on State responsibility as laid down in Article 7 of the International Law Commission Draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, Länder, provinces, member States of Federal States, etc.) even if under the national Constitution these organs enjoy broad independence or complete autonomy.[610]

366. The Appeals Chamber appears to have taken a similar approach to the customary status of the Commission's draft articles adopted on first reading in the Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II in *Blaškić,* when deciding that the Trial Chamber should determine "on the basis of Article 11 of the International Law Commission's Draft Articles on State Responsibility" whether or not to make a judicial finding of a failure of Croatia to comply with article 29 of the Statute of the Tribunal concerning the obligation to cooperate, and ask the President of the Tribunal to forward it to the Security Council.[611]

367. In the *Blaškić* case, the Trial Chamber by contrast referred to the work of the International Law Commission in order to inform or guide its approach to crimes against humanity: "[t]he particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment etc.) are less crucial to the definition than the

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[608] *Tadić*, Appeal Judgment (see footnote 538 above), para. 117, citing the draft articles on State responsibility, *Yearbook ... 1980*, vol. II (Part Two), para. 34, and also *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490/Add.1–7 (first report on State responsibility, by Mr. James Crawford, Special Rapporteur), pp. 39-43.

[609] *Ibid*., para. 121.

[610] *Ibid*., footnote 140.

[611] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, Appeals Chamber, para. 51.

factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part."[612] This was also the case in respect of the meaning of the term "systematic", which the Commission had stated means "pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts".[613] In the same case, the Trial Chamber stated that it was "guided" by the work of the Commission when considering the meaning of the term "murder" in relation to crimes against humanity, which the Commission had stated "is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation".[614]

368. The work of the International Law Commission was similarly drawn on, among other things, by the Tribunal for guidance in the *Erdemović* sentencing judgment, where the Commission's commentary to the draft statute for an International Criminal Court was taken into account when considering the gravity of crimes against humanity in the context of determining the appropriate penalties associated with them. In deciding that crimes against humanity "are recognised as very grave crimes which shock the collective conscience", the Trial Chamber referred to the charges against the accused at the Nürnberg trial, the Secretary-General's report that proposed the establishment of the International Criminal Tribunal for the Former Yugoslavia, and the Commission's statement that "the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or in part".[615]

(l) References to resolutions of international organizations

Observation 167

The International Criminal Tribunal for the Former Yugoslavia has referred to resolutions of the Security Council as providing the legal framework within which the Tribunal operates and as guiding its interpretative approaches.

Observation 168

The International Criminal Tribunal for the Former Yugoslavia has referred to resolutions of the General Assembly of the United Nations as evidence of the formation of rules of customary international law and to support its determination of the existence of such rules.

369. In the *Tadić* case, the Appeals Chamber referred to Security Council resolution 827 (1993), adopted under Chapter VII of the Charter of the United Nations, when confirming its binding nature and setting out the Chamber's interpretative approach to the underlying report of the Secretary-General:

> It should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority.

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[612] *Blaškić*, Trial Judgment (see footnote 551 above), para. 198, citing para. (14) of the commentary to draft article 20 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), p. 40.

[613] *Blaškić*, Trial Judgment (see footnote 551 above), para. 203, footnote 380, citing para. (3) of the commentary to draft article 18 of the draft code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 47.

[614] *Blaškić*, Trial Judgment (see footnote 551 above), para. 217, footnote 417, citing para. (7) of the commentary to draft article 18 of the draft code of crimes against the peace and security of mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 48.

[615] *Prosecutor v. Dražen Erdemović* ("Piliča"), Case No. IT-96-22, Sentencing Judgment, 29 November 1996, Trial Chamber, *Judicial Reports 1996*, p. 1573, at paras. 26-27, citing para. (14) of the commentary to draft article 20 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), p. 40.

> The Report as a whole was 'approved' by the Security Council (see the first operative paragraph of Security Council resolution 827 (1993)), while the Statute was 'adopted' (see operative paragraph 2). By 'approving' the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute.[616]

370. In the *Furundžija* case, the Appeals Chamber appeared to apply the interpretative rules of the Vienna Convention on the Law of Treaties to the interpretation of the Tribunal's Statute, stating that:

> [i]f there is a relevant rule of customary international law, due account must be taken of it, for more than likely, it will control the interpretation and application of the particular provision [of the Statute]. Article 31(3)(c) of the Vienna Convention on the Law of Treaties provides that:
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> > 3. There shall be taken into account, together with the context:
> >
> > ...
> >
> > (c) any relevant rules of international law applicable in the relations between the parties.
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> …
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> Therefore, the relevant rule of international law need not have been in force at the time of the conclusion of the treaty being interpreted; it need only be in force at the time of the interpretation of the treaty.[617]

371. The Appeals Chamber added that:

> [i]f there is no relevant rule of customary international law, the relevant provision in the Statute or the Rules will be interpreted in accordance with the other elements of Article 31 of the Vienna Convention, that is, good faith, textuality, contextuality (note that the Vienna Convention treats relevant rules of international law in connection with the context) and teleology.[618]

Further:

> [i]n interpreting the Statute and Rules due account must be taken of the influence of context and purpose on the ordinary meaning to be given to a particular provision. Contextual interpretation calls for account to be taken of the international character of the Tribunal, in contradistinction to national courts from whose jurisdictions many of the provisions in the Statute and Rules are drawn. However, contextual interpretation highlighting this difference should not be taken too far, at any rate, not so far as to nullify fundamental rights which an accused has under customary international law. Teleological interpretation calls for account to be taken of the fundamental purpose of the Statute, to ensure fair and expeditious trials of persons charged with violations of international humanitarian law so as to contribute to the restoration and maintenance of peace in the former Yugoslavia.[619]

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[616] *Tadić*, Appeal Judgment (see footnote 538 above), para. 295.
[617] *Prosecutor v. Anto Furundžija*, Judgment, 21 July 2000, Appeals Chamber, paras. 275–276.
[618] *Ibid.*, para. 277.
[619] *Ibid.*, para. 280.

372. Further:

> in seeking to ascertain whether there is a relevant rule of customary international law, the Tribunal, being a court, albeit an international one, would no doubt be influenced by the decisions of other courts and tribunals. Decisions of national courts are, of course, not binding on the Tribunal. However, it is accepted that such decisions may, if they are sufficiently uniform, provide evidence of international custom. It is perfectly proper, therefore, to examine national decisions on a particular question in order to ascertain the existence of international custom. The Tribunal should not be shy to embark on this exercise, which need not involve an examination of decisions from every country. A global search, in the sense of an examination of the practice of every state, has never been a requirement in seeking to ascertain international custom, because what one is looking for is a sufficiently widespread practice of states accompanied by *opinio juris*.[620]

373. Furthermore, in the *Tadić* case, the Appeals Chamber stressed the importance of "the principle of individual criminal responsibility" and referred in this respect to the various Security Council resolutions that had decided that persons committing serious violations of international humanitarian law in the former Yugoslavia were individually responsible for such violations.[621]

374. In the *Čelebići* case, the Appeals Chamber, referring to the *Tadić* Decision on Jurisdiction, noted that "[t]he Appeals Chamber also found that General Assembly resolutions corroborated the existence of certain rules of war concerning the protection of civilians and property applicable in both internal and international armed conflicts."[622]

375. It is important to highlight that some resolutions of the General Assembly set out the text of international conventions, adopted by the General Assembly, that will be subsequently opened for signature by States. In the *Tadić* case, the Appeals Chamber referred to the fact that the notion of "common plan" had been "upheld" in the International Convention for the Suppression of Terrorist Bombings, adopted by consensus by the United Nations General Assembly in resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998.[623] The Appeals Chamber Stated that "[a]lthough the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States".[624] The Appeals Chamber therefore seems to have relied on this consensus resolution as demonstrating the *opinion juris* of the States Members of the United Nations.

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[620] *Ibid.*, para. 281.

[621] *Tadić*, Appeal Judgment (see footnote 538 above), para. 186, citing S/25704, para. 53.

[622] *Delalić ("Čelebići case")*, Appeal Judgment (see footnote 539 above), para. 141, referring to *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), paras. 110-112, referring to General Assembly Resolutions 2444 (XXIII) (1968) and 2675 (XXV) (1970).

[623] International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256.

[624] *Tadić*, Appeal Judgment (see footnote 538 above), para. 221. See also Report of the Sixth Committee on measures to eliminate international terrorism (A/52/653) and the procès-verbale of the 72nd meeting of the General Assembly at its fifty-second session (A/52/PV.72).

2. International Criminal Tribunal for Rwanda

(a) Introduction and applicable law

376. The law applicable by the International Criminal Tribunal for Rwanda is set out in the Statute of the Tribunal as adopted by the Security Council under Chapter VII of the Charter of the United Nations.[625] Article 1 of the Statute provides that the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994. The relevant offences are set out in articles 2 to 4 of the Statute.[626]

377. In the *Barayagwiza* case, the Appeals Chamber described the Secretary-General's report (which had been requested by the Security Council at the time of establishment of the International Criminal Tribunal for Rwanda) as establishing the sources of law applicable, including the articles of the Statute, the Rules of the Tribunal and international human rights treaties.[627] It stated that:

> The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.[628]

(b) No express references to subsidiary means

Observation 169

The International Criminal Tribunal for Rwanda made no express references to subsidiary means nor Article 38, paragraph 1 (*d*), in any of its decisions.

378. As the International Criminal Tribunal for Rwanda did not make any express references to subsidiary means nor to Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice in its decisions, the Secretariat should not be understood as taking a view on whether or to what extent the examples presented in the present section may constitute a use of judicial decisions and other materials as subsidiary means for the determination of rules of international law.

(c) Interpretation of the Statute and the applicable offences

Observation 170

The International Criminal Tribunal for Rwanda referred to decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Court of Justice when it determined that its Statute is to be interpreted in accordance with the rules for interpretation of treaties set out in

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[625] Adopted by Security Council resolution 955 (1994) of 8 November 1994, amended by Security Council resolutions 1165 (1998) of 30 April 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002 and 1431 (2002) of 14 August 2002.

[626] *Ibid.*

[627] *Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR, Decision on Appeal against Provisional Arrest and Detention, 3 November 1999, Appeals Chamber, para. 40, referring to the Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994) (S/1995/134), paras. 11-12.

[628] *Ibid.,* para. 40.

article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which reflects customary international law.

379. In the *Nyiramasuhuko* case, the Appeals Chamber referred to International Criminal Tribunal for the Former Yugoslavia decisions and an International Court of Justice decision when it recalled that, while the Statute of the International Criminal Tribunal for Rwanda:

> "is legally a very different instrument from an international treaty", it is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, within the meaning of article 31(1) of the Vienna Convention on the Law of Treaties of 1969, which reflects customary international law.[629]

Observation 171

The International Criminal Tribunal for Rwanda referred to decisions of national and international courts and tribunals, including its own previous decisions and decisions of the International Criminal Tribunal for the Former Yugoslavia when determining the scope of the crimes set out in its Statute.

380. In *Akayesu*, the Trial Chamber referred to "national and international law and jurisprudence" to conclude that:[630]

> it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did.

381. In the *Akayesu* case, the Trial Chamber referred to the evolution of the concept of crimes against humanity, by refence to the decisions of national courts in the *Eichmann*, *Barbie*, *Touvier* and *Papon* cases.[631] The Trial Chamber also noted that the definition of crimes against humanity from the *Barbie* case "was later affirmed by the [International Criminal Tribunal for the Former Yugoslavia] in its *Vukovar* Rule 61 Decision of 3 April 1996".[632]

382. The Trial Chamber in the *Bagosora* case cited various decisions of the International Criminal Tribunal for the Former Yugoslavia to indicate that the "*mens rea* of extermination requires that the accused intend to kill persons on a massive

[629] *Prosecutor v. Nyiramasuhuko* et al. *(Butare)*, Case No. ICTR-98-42-A, Judgment, 14 February 2015, Appeals Chamber, para. 2137, referring to *Tadić*, Judgment, Appeals Chamber (see footnote 538 above), para. 282; *Aleksovski*, Appeal Judgment (see footnote 519 above), para. 98; and *Competence of the General Assembly regarding admission to the United Nations* (see footnote 70 above).

[630] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, Trial Chamber, *Reports of Orders, Decisions and Judgements 1998*, p. 44, at para. 468, also para. 465, referring to the French Court of Cassation.

[631] *Ibid*., para. 567. See also paras. 568-574.

[632] *Ibid*., para. 575, citing *Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (see footnote 528 above), para. 29.

scale or to subject a large number of people to conditions of living that would lead to their deaths in a widespread or systematic manner".[633]

383. In the same judgment, the Trial Chamber also referred to decisions of the International Criminal Tribunal for the Former Yugoslavia while interpreting the scope of the crime of inhumane acts as "a residual clause for serious acts which are not otherwise enumerated in Article 3" adding that such conduct "must be similar in gravity to the acts envisaged in Article 3 and must cause mental or physical suffering or injury or constitute a serious attack on human dignity".[634]

384. The Appeals Chamber in the *Gacumbitsi* case adopted and sought to further elucidate the definition of the crime of rape in the appeal judgment in the *Kunarac* case by the International Criminal Tribunal for the Former Yugoslavia.[635]

386. For example, in the *Nyiramasuhuko* case, the Appeals Chamber of the International Criminal Tribunal for Rwanda was analysing article 3 (h) of its Statute which granted it jurisdiction over persecution as a crime against humanity and referred to the definition of such crime as developed in its own decisions.[636]

Observation 172

The International Criminal Tribunal for Rwanda relied on its own settled "jurisprudence" to interpret its Statute in relation to the definition of persecution as a crime against humanity.

386. The Appeals Chamber noted that the definition of persecution as a crime against humanity was "well settled" in the jurisprudence of the Tribunal. As reiterated by the Appeals Chamber in the *Nyiramasuhuko* case:

> "the crime of persecution consists of an act or omission which discriminates in fact and which denies or infringes upon fundamental rights laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds [in the Statute], specifically race, religion or politics (the *mens rea*)." Thus, in the *Nahimana et al.* case, the Appeals Chamber specified the *mens rea* requirement for persecution as a crime against humanity and, contrary to the Trial Chamber's

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[633] *Prosecutor v. Théoneste Bagosora* et al., Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008, Trial Chamber, para. 2191, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007, Appeals Chamber, para. 476; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006, Appeals Chamber, paras. 259-260; International Criminal Tribunal for Rwanda, *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment, 7 July 2006, Appeals Chamber, para. 86; *Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment, 13 December 2004, Appeals Chamber, para. 522.

[634] *Ibid*., para. 2218, citing *Galić*, Appeal Judgment (see footnote 541 above), para. 155; *Kordić and Čerkez*, Appeal Judgment (see footnote 540 above), para. 117; and International Criminal Tribunal for Rwanda, *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, Trial Chamber, para. 232.

[635] *Gacumbitsi* (see footnote 633 above), para. 151, citing *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23&IT-96-23/1-A, Judgment, 12 June 2002, Appeals Chamber, para. 127.

[636] *Nyiramasuhuko* (see footnote 629 above), para. 2138, referring to *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, 28 November 2007, Appeals Chamber, para. 985. See also, e.g., International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-30/1-A, *Prosecutor v. Miroslav Kvočka* et al., Judgment, 28 February 2005, Appeals Chamber, para. 320; *Kordić and Čerkez*, Appeal Judgment (see footnote 540 above), para. 101; *Blaškić*, Appeal Judgment (see footnote 514 above), para. 131; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment, 17 September 2003, Appeals Chamber, para. 185.

holding, did not extend it to include "ethnicity" as an additional discriminatory ground".[637]

Observation 173

The International Criminal Tribunal for Rwanda referred to a decision of the International Criminal Tribunal for the Former Yugoslavia in order to adopt the same rationale and decision.

387. In the *Gacumbitsi* case, the Appeals Chamber referred to the approach of the International Criminal Tribunal for Rwanda in earlier cases concerning joint criminal enterprise, and a subsequent decision of the International Criminal Tribunal for the Former Yugoslavia Appeals Chamber in the *Kvočka* case. It decided to "adopt[] the holding and rationale of the [International Criminal Tribunal for the Former Yugoslavia] Appeals Chamber in *Kvo[č]ka*".[638]

(d) Examples related to the jurisdiction or competence of the International Criminal Tribunal for Rwanda

Observation 174

The International Criminal Tribunal for Rwanda relied on decisions of the International Court of Justice and International Criminal Tribunal for the Former Yugoslavia to determine the lawfulness of its own establishment by the Security Council.

388. The International Criminal Tribunal for Rwanda, faced with a challenge to the lawfulness of its establishment in the *Kanyabashi* case,[639] referred to decisions of the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia[640] in determining that it had competence to determine the lawfulness of its own establishment by the Security Council (*compétence de la compétence*), which was an inherent authority of all judicial bodies, that the Security Council had implied power to establish a judicial subsidiary organ even though it possessed no judicial or prosecutorial powers of its own,[641] and that the establishment of the International Criminal Tribunal for Rwanda satisfied the requirement under international human rights instruments that tribunals be "established by law".[642]

Observation 175

The International Criminal Tribunal for Rwanda relied on its own "jurisprudence" and that of the International Criminal Tribunal for the Former Yugoslavia, and also provisions of the International Covenant on Civil and Political Rights, to determine that it had no authority in its Statute or Rules of Procedure to award compensation to an acquitted person.

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[637] *Nyiramasuhuko* (see footnote 629 above), para. 2138.
[638] *Gacumbitsi* (see footnote 633 above), paras. 162–163, citing *Kvočka* (see footnote 636 above), paras. 43-54.
[639] *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997.
[640] *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), para. 18-22, citing the *Nottebohm Case (Preliminary Objection) (Liechtenstein v. Guatemala)* (see footnote above), p. 119; and *Effect of awards of compensation* (see footnote 530 above), p. 56.
[641] *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), para. 16, citing the *Effect of awards of compensation* (see footnote 530 above), pp. 60-61.
[642] *Ibid*., para. 45.

Observation 176

The absence of a Security Council resolution to amend the Statute of the International Criminal Tribunal for Rwanda to authorize the payment of compensation, when requested by the President of Tribunal, underlined that the Tribunal did not have such authority, either express or implied.

389. In the *Rwamakuba* case, the Appeals Chamber referred to the "jurisprudence" of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia when determining that it lacked authority to compensate the defendant for having been prosecuted and acquitted. The Presidents of the two Tribunals had requested the Security Council to amend the Statutes to provide for such authority but these efforts were unsuccessful, which underscored "the inability of the Tribunal to provide such a remedy in either its express or implied powers".[643] The Appeals Chamber noted that the International Covenant on Civil and Political Rights referred to a right of compensation only where an individual already convicted by a final decision has been exonerated by newly discovered facts.[644]

390. The Appeals Chamber referred to the contrasting International Criminal Tribunal for the Former Yugoslavia decision in the *Stanković* case. In that case, the authority of the International Criminal Tribunal for the Former Yugoslavia to refer cases to national jurisdictions under Rule 11 *bis* was challenged. The Appeals Chamber determined that the Security Council resolution endorsing the International Criminal Tribunal for the Former Yugoslavia completion strategy, which had proposed referrals to national jurisdictions, reflected that the Tribunal was authorized under its Statute to make such referrals.[645]

(e) The formation or identification of rules of customary international law

Observation 177

The International Criminal Tribunal for Rwanda referred to decisions of the International Criminal Tribunal for the Former Yugoslavia and other judicial decisions following the Second World War to determine rules of customary international criminal law.

391. In the *Rwamakuba* case, the International Criminal Tribunal for Rwanda referred to decisions of the International Criminal Tribunal for the Former Yugoslavia and judicial decisions following the Second World War, including of the International Military Tribunal and tribunals operating under Allied Control Council Law No. 10, to determine that customary international law permitted a conviction for a crime against humanity through participation in a joint criminal enterprise and criminalized

[643] International Criminal Tribunal for Rwanda, *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, para. 10. For the requests of the two Presidents, see letter dated 28 September 2000 from the Secretary General addressed to the President of the Security Council (S/2000/925) (annexing letter from President Pillay of the Tribunal); letter dated 26 September 2000 from the Secretary-General addressed to the President of the Security Council (S/2000/904) (annexing letter from President Jorda of the International Criminal Tribunal for the Former Yugoslavia); letter dated 18 March 2002 from the Secretary-General addressed to the President of the Security Council (S/2002/304) (annexing letter from President Jorda of the International Criminal Tribunal for the Former Yugoslavia).

[644] *Rwamakuba* (see previous footnote).

[645] *Ibid*., citing International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Radovan Stanković*, Case No. IT-96-23/2-AR11bis.1, Decision on Rule 11bis Referral, 1 September 2005, Appeals Chamber, paras. 14-17.

intentional participation in a common plan to commit genocide prior to 1992. In doing so, the Appeals Chamber stated that:[646]

> In concluding that customary international law permitted a conviction for, *inter alia*, a crime against humanity through participation in a joint criminal enterprise, the *Tadić* Appeals Judgement held that the recognition of that mode of liability in prosecutions for crimes against humanity and war crimes following World War II constituted evidence of these components.

392. The Appeals Chamber also relied on the text and drafting history of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.[647]

Observation 178

The International Criminal Tribunal for Rwanda referred to decisions of the International Criminal Tribunal for the Former Yugoslavia and international human rights instruments when determining that the right to a fair trial formed part of customary international law.

393. In the *Kayishema and Ruzindana* case, the Appeals Chamber referred to decisions of the International Criminal Tribunal for the Former Yugoslavia, the Geneva Conventions of 1949, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights when determining that the principle of the right to a fair trial forms part of customary international law. The content of this right was also reflected in the Statute of the International Criminal Tribunal for Rwanda and its Rules of Procedure.[648]

Observation 179

On various occasions, the Tribunal referred to the decisions of the Nürnberg and Tokyo tribunals and national court decisions when considering the development of customary international law and its codification in treaties.

394. In *Musema*, the Trial Chamber referred to the decisions of the Nürnberg and Tokyo tribunals concerning "[t]he principle enunciating the responsibility of command derives from the principle of individual criminal responsibility … [which] was subsequently codified in Article 86 of the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 1949."[649]

395. In the *Nahimana* case, the Trial Chamber referred to the decisions of the Nürnberg tribunal and the European Court of Human Rights, and noted that "hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination".[650]

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[646] *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, Appeals Chamber, para. 14, referring to *Tadić*, Judgment, Appeals Chamber (see footnote 538 above), paras. 195-220; and *Furundžija*, Trial Judgment (see footnote 517 above), paras. 195, 211 and 217.

[647] *Ibid*., para. 14.

[648] *Prosecutor v. Clément Kayishema and Obed Ruzindawa*, Case No. ICTR-95-1-A, Judgment, 1 June 2001, para. 51, referring to *Delalić ("Čelebići case*"), Appeal Judgment (see footnote 539 above), paras. 138 and 139, and *Tadić*, Appeal Judgment (see footnote 538 above), para. 44 et seq.

[649] *Musema* (see footnote 634 above), paras. 128 and 132.

[650] International Criminal Tribunal for Rwanda, *Prosecutor v. Ferdinand Nahimana* et al., Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, Trial Chamber, para. 1076.

(f) Examples concerning "principles"

Observation 180

The International Criminal Tribunal for Rwanda referred to "international jurisprudence" when determining that a number of "principles" have emerged in relation to incitement to discrimination and violence, without ascribing any particular legal value to such principles.

396. In *Nahinamara*, the Trial Chamber held that:

> A number of central principles emerge from the international jurisprudence on incitement to discrimination and violence that serve as a useful guide to the factors to be considered in defining elements of "direct and public incitement to genocide" as applied to mass media.
>
> …
>
> The Chamber considers international law, which has been well developed in the areas of freedom from discrimination and freedom of expression, to be the point of reference for its consideration of these issues, noting that domestic law varies widely while international law codifies evolving universal standards.[651]

Observation 181

The International Criminal Tribunal for Rwanda has referred to its own judgments to determine that the principle of individual criminal responsibility is established.

397. In the *Musema* case, the Trial Chamber referred to the principle of individual criminal responsibility, "as [being] articulated notably in the *Akayesu* and *Rutaganda* Judgements, … sufficiently established and … applicable in the instant case".[652]

Observation 182

On occasion, the International Criminal Tribunal for Rwanda referred to the decisions of other courts and tribunals in support of the existence of certain rules of international law.

398. The Tribunal in *Zigiranyirazo* established that the physical presence of an accused before a court is "one of the most basic and common precepts of a fair criminal trial". The Tribunal had to consider whether the right to be present at trial also encompassed appearing via video-link. In order to determine whether this principle encompassed appearing via video-link, the Tribunal assessed its own legal framework and practice as well as that of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Court and the Special Court for Sierra Leone. The Tribunal confirmed that the right to be present at trial implied physical presence, having considered "other international, regional, and national systems". This included decisions of the Human Rights Committee, the European Court of Human Rights, as well as decisions of domestic courts of Canada, the United States, and England and Wales. The Tribunal also referenced a writing.[653]

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[651] *Ibid*., paras. 1000 and 1010.

[652] *Musema* (see footnote 634 above), paras. 113-115.

[653] *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-01-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, Appeals Chamber, paras. 11-13. The Tribunal referred to Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford, Oxford University Press, 2005).

(g) Examples concerning procedural matters

Observation 183

The International Criminal Tribunal for Rwanda relied on its own previous decisions when determining procedural and evidentiary matters.

399. For example, in the *Ntakirutimana* case, the Trial Chamber noted that:

> When confronted with evidential questions not otherwise provided for by the Rules, the Chamber applied rules of evidence which in its view best favoured a fair determination of the matter before it and which were consonant with the spirit of the Statute and the general principles of law, as authorised by Rule 89(B). The Chamber has taken account of the case law of the Tribunal which has established general principles concerning the assessment of evidence. For example, the *Akayesu* Judgement contains important statements on, inter alia, the probative value of evidence; the use of witness statements; the impact of trauma on the testimony of witnesses; problems of interpretation from Kinyarwanda into French and English; and cultural factors affecting the evidence of witnesses. Subsequent case law of the Tribunal has developed principles relating to evidentiary matters, the most recent authority being the Judgement in the case of *Prosecutor v. Ignace Bagilishema*.[654]

Observation 184

The International Criminal Tribunal for Rwanda relied on its own previous decisions as having developed "general principles" concerning the assessment of evidence.

400. The Trial Chamber in *Prosecutor v. Ignace Bagilishema* held that its prior decisions had:

> established general principles concerning the assessment of evidence. The *Akayesu* Judgement contained important statements on, *inter alia*, the probative value of evidence; witness statements; the impact of trauma on the testimony of witnesses; interpretation from Kinyarwanda into French and English; and cultural factors affecting the evidence of witnesses".[655]

Subsequent jurisprudence of the Tribunal has developed these principles relating to evidentiary matters, the most recent authority being the *Musema* judgment.[656], [657]

401. The Trial Chamber in *Bagosora* cited its own decisions and decisions of the International Criminal Tribunal for the Former Yugoslavia when analysing the elements of persecution as a crime against humanity and noted that "[t]he required discriminatory intent can be inferred from circumstantial evidence, such as the nature of the attack and the circumstances surrounding it".[658]

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[654] *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Case No. ICTR-96-10 and ICTR-96-17-T, Judgment and Sentence, 21 February 2003, Trial Chamber, para. 32.

[655] *Bagilishema*, Trial Judgment (see footnote 153 above), para. 22, referring to *Akayesu* (see footnote 630 above) paras. 130-156.

[656] *Kayishema and Ruzindana*, Trial Judgment (see footnote 153 above), paras. 65-80; *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999, *Reports of Orders, Decisions and Judgements, 1999*, p. 1704, at paras. 15-23; and *Musema* (see footnote 634 above), paras. 31-105.

[657] *Bagilishema*, Trial Judgment (see footnote 153 above), para. 22.

[658] *Bagosora*, Trial Judgment and Sentence (see footnote 633 above), para. 2208, citing *Nahimana*, Appeal Judgment (see footnote 636 above), para. 986; *Blaškić* Appeal Judgment (see footnote 514 above), para. 164; *Krnojelac*, Appeal Judgment (see footnote 636 above), para. 184.

(h) Approach of the International Criminal Tribunal for Rwanda to precedent and consistency

Observation 185

The International Criminal Tribunal for Rwanda determined that the Appeals Chamber should follow its previous decisions but is free to depart from them for cogent reasons in the interests of justice.

402. In the *Semanza* case, the Tribunal's Appeals Chamber stated that it:

> adopts the findings of [the International Criminal Tribunal for the Former Yugoslavia] Appeals Chamber in the *Aleksovski* case and recalls that in the interests of legal certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.[659]

403. The Tribunal has also referred to "settled jurisprudence"[660] and "established jurisprudence"[661] when applying rules of international law.

(i) Examples of reliance on national court decisions

Observation 186

The International Criminal Tribunal for Rwanda referred to decisions of national courts when noting that the "concept of crimes against humanity" had undergone a gradual evolution following the Nürnberg and Tokyo trials.

404. In the *Akayesu* case, the Trial Chamber referred to the *Eichmann, Barbie, Touvier and Papon* cases before national courts when determining that "following the Nuremberg and Tokyo trials, the concept of crimes against humanity underwent a gradual evolution".[662]

Observation 187

The International Criminal Tribunal for Rwanda has referred to national court decisions to exclude, in the context of conviction for international crimes, the principle applicable in some national jurisdictions that persons convicted and imprisoned for life may nevertheless be considered for release.

405. The Appeals Chamber in the *Kamuhanda* case referred to the decisions of national courts to exclude the application of the possibility of release of a person tried for international crimes and noted that "whatever its merits in the context of domestic legal systems, where it may apply 'in principle', this view is inapplicable in a case such as this one which involves extraordinarily egregious crimes."[663]

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[659] *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-23-A, Decision, 31 May 2000, Appeals Chamber, para. 92.

[660] See *Nyiramasuhuko* (footnote 629 above), para. 2138, and *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-A, Judgment, 28 September 2011, Appeals Chamber, para. 170.

[661] *Jean-Baptiste Gatete v. Prosecutor*, Case No. ICTR-00-61-A, Judgment, 9 October 2012, Appeals Chamber, para. 265; *Ephrem Setako v. Prosecutor*, Case No. ICTR-04-81-A, Judgment, 28 September 2011, Appeals Chamber, para. 200; and *Ntakirutimana* (see footnote 633 above), para. 468.

[662] *Akayesu* (see footnote 630 above), para. 567.

[663] *Jean de Dieu Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, Judgment, 19 September 2005, Appeals Chamber, para. 357.

(j) Examples of references to writings

Observation 188

The International Criminal Tribunal for Rwanda referred to writings when interpreting the forms of participation in crimes.

406. The Trial Chamber in the *Akayesu* case referred to writings to note that "complicity is viewed as a form of criminal participation by all criminal law systems, notably, under the Anglo-Saxon system (or Common Law) and the Roman-Continental system (or Civil Law)".[664]

(k) Examples of references to the work of the International Law Commission

Observation 189

The International Criminal Tribunal for Rwanda referred to the work of the International Law Commission when determining the scope of the crime of incitement to commit genocide.

407. The Appeals Chamber in *Nzabonimana* referred to the Trial Chamber in *Akayesu*, which had used a report of the Commission in 1996, which defined public incitement as "the call for criminal action to a number of individuals in a public place or to members of the general public at large" by such means as the mass media, for example, radio or television.[665]

408. The Trial Chamber in *Bikindi*, when considering the elements needed to prove that a speech could be a public and direct incitement to commit genocide, cited, among other materials, its previous decisions and the draft Code of Crimes against the Peace and Security of Mankind. [666]

Observation 190

The International Criminal Tribunal for Rwanda referred to the work of the International Law Commission when considering complicity in the most serious violations of international humanitarian law as a crime under customary international law.

409. The Trial Chamber in the *Akayesu* case referred to Principle VII of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal prepared by the Commission to indicate that "participation by complicity in the most Nuremberg Principles serious violations of international humanitarian law was considered a crime as early as Nuremberg".[667]

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[664] *Akayesu* (see footnote 630 above), para. 527.

[665] International Criminal Tribunal for Rwanda, *Callixte Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-A, Judgment, 29 September 2014, Appeals Chamber, para. 126, citing para. (16) of the commentary to draft art. 2, para. 3 (*f*) of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ...1996*, vol. II (Part Two), para. 50, at p. 22.

[666] *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Judgment, 2 December 2008, Trial Chamber, para. 387, footnote 867, citing *Nahimana*, Appeal Judgment (see footnote 636 above), para. 692, which in turn affirms *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003, Trial Chamber, para. 852, and *Akayesu* (see footnote 630 above), para. 557, and also refers to para. (16) of the commentary to draft art. 2, para. 3 (*f*) of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ...1996*, vol. II (Part Two), para. 50, at p. 22.

[667] *Akayesu* (see footnote 630 above), para. 526.

(l) Examples of references to resolutions of international organizations

410. In the *Kayishema and Ruzindana* case, the Trial Chamber referred to the definition of the crime of genocide from the International Military Tribunal and its prohibition as recognized by the General Assembly:

> The concept of genocide appeared first in the International Military Tribunal (Nuremberg) Judgment of 30 September and 1 October 1946, referring to the destruction of groups. The prohibition of genocide then was recognised by the General Assembly of the United Nations as a principle of international law. Resolution 260(A)(III) of 9 December 1948, adopting the Draft Genocide Convention, crystallised into international law the prohibition of that crime.[668]

(m) Examples of references to treaty bodies

Observation 191

On occasion, the International Criminal Tribunal for Rwanda referred to general comments of the Human Rights Committee and the European Court of Human Rights when considering the procedural requirements for detention.

411. For example, in the *Kajelijeli* case, the Appeals Chamber recalled that:

> The Human Rights Committee has interpreted Article 9 [of the International Covenant on Civil and Political Rights] to mean that any delay in being brought before a Judge should not exceed a few days. The Human Rights Committee decided that under this article, four-days' delay is too long, let alone lapses of 11 days, 22 days, or ten weeks. Article 5(3) of the [European Convention on Human Rights] also requires that the suspect be brought promptly before a Judge or officer able to exercise judicial power upon arrest. The European Court of Human Rights has specified that two days' delay under this article is permissible; however, four days and six hours constitute a violation even in complex cases, let alone one week or longer.[669]

Observation 192

The International Criminal Tribunal for Rwanda referred to decisions of the Human Rights Committee on issues relating to rights of the accused.

412. For example, in *Nahimana*, the Appeals Chamber agreed with the Human Rights Committee that the right to have adequate time for the preparation of a defence "cannot be assessed in the abstract and that it depends on the circumstances of the case".[670]

413. Similarly, in *Kambanda*, the Appeals Chamber agreed with the Human Rights Committee that, subject to special circumstances, a party to a proceeding would not

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[668] *Kayishema and Ruzindana*, Trial Judgment (see footnote 153 above), para. 88.

[669] *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, 23 May 2005, Appeals Chamber, para. 230, referring to Human Rights Committee: general comment No. 8 (1982) on the right to liberty and security of persons, *Official Records of the General Assembly, Thirty-seventh Session*, Supplement No. 40 (A/37/40), annex V, para. 2; *Freemantle v. Jamaica* (CCPR/C/68/D/625/1995), para. 7.4; *Lobban v. Jamaica* (CCPR/C/80/D/797/1998), para. 8.3; *Casafranca v. Peru* (CCPR/C/78/D/981/2001), para. 7.2; *Jones v. Jamaica* (A/53/40, vol. II, annex XI, sect. G), para. 9.3; and European Court of Human Rights: *Graužinis v. Lithuania*, No. 37975/97, 10 October 2000, para. 25; *Brogan and Others v. the United Kingdom*, paras. 6,62; *Talat Tepe v. Turkey*, No. 31247/96, 21 December 2004, paras. 64-70; *Öcalan v. Turkey*, No. 46221/99, para. 106.

[670] *Nahimana*, Appeal Judgment (see footnote 636 above), para. 220.

be allowed to raise issues on appeal that had not previously been raised by counsel in the course of the trial.[671]

414. The Tribunal cited, *inter alia*, outputs of the Human Rights Committee and the Committee against Torture when it held that the punishment of solitary confinement may violate "international standards if not applied as an exceptional measure which is necessary, proportionate, restricted in time and includes minimum safeguards".[672]

415. The Appeals Chamber also cited the Human Rights Committee among other sources when it determined that the right to be present at trial implies physical presence.[673]

416. In *Kambanda*, when determining whether the accused had a right to choose his counsel, the Appeals Chamber referred to the reasoning of Trial Chamber I in the *Ntakirutimana* case and concluded that an interpretation of the International Criminal Tribunal for Rwanda Statute and Rules "read in conjunction with relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel".[674]

3. International Criminal Court

417. The Rome Statute contains an applicable law provision in article 21, which includes the possibility for the Court to apply principles and rules as interpreted in its own previous decisions:

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

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[671] *Jean Kambanda v. Prosecutor*, Case No. ICTR-97-23-A, Judgment, 19 October 2000, Appeals Chamber, para. 27.

[672] *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Decision on the Prosecution's Appeal against Decision on Referral under Rule 11bis, 30 October 2008, Appeals Chamber, para. 15.

[673] *Zigiranyirazo* (see footnote 653 above), paras. 11-13. See also *Nahimana*, Appeal Judgment (see footnote 636 above), paras. 107–108, where the Appeals Chamber held that the right of the accused to be tried in his presence does not preclude the beneficiary of that right from refusing to exercise it, citing the Human Rights Committee.

[674] *Kambanda* (see footnote 671 above), para. 33.

(a) Express reference to subsidiary means under Article 38 of the Statute of the International Court of Justice

Observation 193

The International Criminal Court has not referred expressly to subsidiary means nor to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice in any of its decisions.

418. As the International Criminal Court has not made any express reference to subsidiary means nor to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice in any of its decisions, the Secretariat should not be understood as taking a view on whether or to what extent the examples presented in the present section may constitute a use of decisions of courts and tribunals and other materials as subsidiary means for the determination of rules of international law.

(b) Examples concerning the applicable law

Observation 194

In a number of decisions, the International Criminal Court has set out its approach to the applicable law provisions contained in article 21 of its Statute.

419. In a decision on the *Situation in Kenya*, Pre Trial Chamber II recalled that: "the purpose of article 21 of the Statute is to regulate the sources of law the Court (*sic*) and establishes a hierarchy within those sources of law".[675] Thus, while the Statute is the "first source of law", "[r]ecourse to the subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute is only possible when, as established by the Appeals Chamber, there is a lacuna in the Statute or the Rules."[676]

420. In the *Lubanga* case, the Trial Chamber indicated that "whilst relevant jurisprudence from the ad hoc tribunals may assist the Chamber in its interpretation of the Statute, the Chamber is bound, in the first place, to apply the Statute, the Elements of Crimes, and the Rules of Procedure and Evidence, pursuant to Article 21(l)(a) of the Statute."[677]

421. In a decision in the *Kony* case, on a procedural point concerning the redaction of certain parts of arrest warrants, Pre-Trial Chamber II stated that "[a]s to the relevance of the case law of the ad hoc tribunals, the matter must be assessed against the provisions governing the law applicable before the Court". It added that:

> the rules and practice of other jurisdictions, whether national or international, are not as such "applicable law" before the Court beyond the scope of article 21 of the Statute. More specifically, the law and practice of the *ad hoc* tribunals, which the Prosecutor refers to, cannot *per se* form a sufficient basis for importing into the court's procedural framework remedies other than those enshrined in the Statute.[678]

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

[676] *Ibid*.

[677] *Situation in the Democratic Republic of the Congo in the case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the defence request on the defence request for the admission of 422 documents, 8 March 2011, Trial Chamber I, para. 54.

[678] *Situation in Uganda* [*Kony* et al.], Case No. ICC-02/04-01/05, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes in the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification, 28 October 2005, Pre-Trial Chamber, para. 19.

422. In the *Katanga* case, the Trial Chamber elaborated on the application of article 21 of the Rome Statute, explaining that it "establishes a hierarchy of the sources of applicable law and that, in all its decisions, it must 'in the first place' apply the relevant provisions of the Statute". The Trial Chamber further noted that:

> In light of the established hierarchy, the Chamber shall therefore apply the subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where it identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules.
>
> …
>
> Lastly, in accordance with article 21(2) of the Statute, the Chamber may also apply the principles and rules of laws as defined in previous decisions of the pre-trial chambers and trial chambers of the Court, and the judgments of the Appeals Chamber.[679]

423. In other decisions, the International Criminal Court has emphasized that recourse to such "subsidiary sources" takes place only when there is a lacuna. In the *Situation in the Republic of Kenya*, the Pre-Trial Chamber indicated that article 53 of the Statute:

> regulates in detail the Pre-Trial Chamber's competence to review the Prosecutor's exercise of her powers with respect to investigation and prosecution, as well as the boundaries of the exercise of any such competence. Therefore, the Chamber does not consider that there exists a lacuna in this respect which would need to be filled by reference to subsidiary sources of law referred to in article 21(1)(b) and (c) of the Statute.[680]

424. In the decision on the request for an arrest warrant in the *Al Bashir* case, Pre-Trial Chamber I referred to the situations where the Court could refer to subsidiary sources in the absence of a rule in the International Criminal Court Statute, interpreted in accordance with the rules in the Vienna Convention on the Law of Treaties:[681]

> Third, the consistent case law of the Chamber on the applicable law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (l)(b) and (l)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such *lacuna* cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of Treaties and article 21(3) of the Statute.

Observation 195

On occasion, the International Criminal Court has referred to the interaction between rules and principles of international law as identified by international courts and tribunals and the applicable law provisions of the Rome Statute.

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[679] *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute, 7 March 2014, Trial Chamber, paras. 39 and 42.

[680] *Situation in the Republic of Kenya* (see footnote 675 above), para. 18.

[681] *Situation in Darfur, Sudan in* Prosecutor v. Omar Hassan Ahmad Al Bashir *("*Omar Al Bashir*")*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, Pre-Trial Chamber I, para. 44, referring to *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04-168, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, Appeals Chamber, paras. 22-24, 32-33 and 39.

425. The Trial Chamber in *Katanga* highlighted that the "interpretation of the terms of article 7 of the Statute and, where necessary, the Elements of Crimes, requires that reference be had to the jurisprudence of the ad hoc tribunals insofar as that jurisprudence identifies a pertinent rule of custom, in accordance with article 31(3)(c) of the Vienna Convention." It further emphasized that "[o]f note in this connection is that the negotiation of the definition of a crime against humanity was premised on the need to codify existing customary law".[682]

426. Pre-Trial Chamber I in the Decision on the Confirmation of Charges against William Samoei Ruto *et al*. emphasized the auxiliary nature of the decisions of international courts and tribunals, unless they are "indicative of a principle or rule of international law".[683]

427. The Pre-Trial Chamber further stressed the primacy of the applicable law, as provided in the Rome Statute noting that:

> even then, applying a customary rule of international law only "where appropriate" limits its application to cases where there is a lacuna in the Statute and the other sources referred to in article 21(1)(a). In other words, the Chamber should not resort to applying article 21(l)(b), unless it has found no answer in paragraph (a).[684]

Observation 196

On occasion, the International Criminal Court has referred to the need to rely on treaty rules, rules of customary international law and general principles of law when the International Criminal Court founding texts do not resolve a matter, and the need to refer to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and other international tribunals for this purpose.

428. In *Katanga*, for example, the International Criminal Court stated:

> Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty or customary humanitarian law and the general principles of law. To this end, the Chamber may, for example, be required to refer to the jurisprudence of the *ad hoc* tribunals and other courts on the matter.[685]

Observation 197

In some cases, the International Criminal Court has regarded reliance on decisions of the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and the ICRC Commentary to Geneva Convention IV when interpreting the offences under the Rome Statute as compatible with the applicable law provisions.

429. In the *Lubanga* case, the Pre-Trial Chamber observed that neither the Rome Statute, nor the Elements of crimes defined international armed conflict for the purpose of the definition of war crimes in article 8 of the Statute. The Chamber noted that "pursuant to article 21(1)(b) of the Statute, and with due regard to article 21(3) of the Statute, it is useful to rely on the applicable treaties and the principles and rules

[682] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 1100.
[683] *Situation in the Republic of Kenya in the case of the* Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges against William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 23 January 2012, Pre-Trial Chamber II, para. 289.
[684] *Ibid*.
[685] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 47.

of international law, including the established principles of the international law of armed conflict."[686] Thus, reference was made to common article 2 of the Geneva Conventions, and the Commentary prepared by ICRC.[687] The Chamber further noted that the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia used the same definition of war crimes in the *Tadić* case.[688]

430. The Trial Chamber in the *Lubanga* case, referred to the decisions of the Special Court for Sierra Leone, noting that:

> Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the wording of the provision criminalising the conscription, enlistment and use of children under the age of 15 within the Statute of the [Special Court for Sierra Leone] is identical to Article 8(e)(vii) of the Rome Statute, and they were self-evidently directed at the same objective. The [Special Court for Sierra Leone]'s case law therefore potentially assists in the interpretation of the relevant provisions of the Rome Statute.[689]

Observation 198

The International Criminal Court has clarified the circumstances in which, under the Rome Statute, it may rely on general principles of law and principles and rules of law identified in its own "jurisprudence".

431. When interpreting article 21 of the Rome Statute, the Trial Chamber stated in *Bemba* that:

> Failing the availability of primary sources of law listed in Article 21(1)(a) or subsidiary sources listed in Article 21(1)(b), Article 21(1)(c) empowers the Chamber to apply "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime.[690]

432. In addition, the Trial Chamber found that it could apply "principles and rules of law as outlined in previous decisions of this Court" permitting it "to base its decisions on its previous jurisprudence, or on the jurisprudence of other Chambers of this Court".[691]

(c) Examples related to the jurisdiction or competence of the International Criminal Court

Observation 199

On occasion, the International Criminal Court has referred to decisions of the International Court of Justice in relation to the doctrine of implied or inherent powers, and *compétence de la compétence*.

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[686] *Situation in the Democratic Republic of the Congo in the case of* Prosecutor v. Thomas Lubanga Dyilo, Case No.ICC-01/04-01/06, Decision on the confirmation of charges, 29 January 2007, Pre-Trial Chamber I, para. 205.

[687] *Ibid*., paras. 206- 207, citing International Committee of the Red Cross, *Commentary to the IV Geneva Convention relative to the treatment of prisoners of war*, ICRC, p. 26.

[688] *Ibid*., para. 208, citing *Tadić*, Appeal Judgment (see footnote 538 above), para. 84.

[689] *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, 14 March 2012, Trial Chamber, para. 603.

[690] *Situation in the Central African Republic in the Case of Prosecutor v.* Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, Trial Chamber III, para. 73.

[691] *Ibid.*, para. 74.

433. In the *Kony and Otti* case, the International Criminal Court referred to the doctrine of implied or inherent powers found in the decisions of the International Court of Justice.[692] In the same case, Pre-Trial Chamber II referred to decisions of the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, among other materials, when referring to the principle of "*compétence de la compétence*", which "was also affirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia … in its landmark 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' in the '*Tadić*' case".

Observation 200

The International Criminal Court has referred to decisions of other criminal tribunals when analysing the scope of jurisdictional challenges.

434. In the *Kirimi* case, the Appeals Chamber indicated that it "had regard to the scope of jurisdictional challenges as interpreted by the International Criminal Tribunal for the Former Yugoslavia …, the International Criminal Tribunal for Rwanda… and the Extraordinary Chambers in the Courts of Cambodia". It noted that the International Criminal Tribunal for the Former Yugoslavia jurisprudence had distinguished "between whether a crime or mode of liability existed under customary international law, which falls within the scope of a jurisdictional challenge, from challenges relating to the contours or elements of crimes or modes of liability, which are matters for trial".[693]

435. The Appeals Chamber in *Samoei Ruto* also referred to decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Extraordinary Chambers in the Courts of Cambodia, noting that:

> different statutory provisions that apply to those tribunals, the non-binding nature of their jurisprudence upon this Court and the fact that the Statute sets out in detail the crimes over which this Court has jurisdiction, the Appeals Chamber nevertheless notes that the general approach taken in the [International Criminal Tribunal for the Former Yugoslavia] and [International Criminal Tribunal for Rwanda] jurisprudence has been that factual and evidentiary issues are to be considered at trial, not as part of pre-trial jurisdictional challenges.

The Appeals Chamber again noted that the International Criminal Tribunal for the Former Yugoslavia had distinguished "between whether a crime or mode of liability existed under customary international law, which falls within the scope of a jurisdictional challenge, from challenges relating to the contours or elements of crimes or modes of liability, which are matters for trial".[694] The Appeals Chamber recalled that the Extraordinary Chambers in the Courts of Cambodia had followed a similar approach.[695]

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[692] *Situation in Uganda [Prosecutor v. Joseph Kony and Vincent Otti]*, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application that the Pre-Trial Chamber Disregard as Irrelevant the Submission Filed by the Registry on 5 December 2005, 9 March 2006, Pre-Trial Chamber, paras. 22-23 and 35.

[693] *Situation in the Republic of Kenya in the Case of* Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11-425, Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, Appeals Chamber, para. 37.

[694] *Situation in the Republic of Kenya in the Case of the* Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, Appeals Chamber, para. 31.

[695] *Ibid*., para. 33.

Observation 201

The Pre-Trial Chamber relied on various decisions of national and international tribunals to refer to the recognition of the duty to comply with judicial decisions as applicable to all phases of the proceedings before the International Criminal Court.

436. The Pre-Trial Chamber has relied on various materials, including decisions of national courts and international tribunals, including the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia and the Special Tribunal for Lebanon, to refer to the recognition in various legal systems "that parties to legal proceedings must comply with judicial decisions" and that it "applies to all phases of the proceedings before this Court".[696]

(d) Examples that relate to the interpretation of the Rome Statute and the offences set out therein

Observation 202

The International Criminal Court has referred to decisions of the International Court of Justice and writings in support of principles of interpretation of the Rome Statute.

437. Trial Chamber I, in the Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", referred to an International Court of Justice case when determining that "on the basis of the '*principe de l'effet utile',* the interpretation of article 19(3) of the Statute must avoid rendering it devoid of practical effect."[697] In the *Katanga* case, Trial Chamber II cited writings to indicate that "[t]he principle of effectiveness of a provision" is also part of the general rules of the interpretation of treaties under article 31 of the Vienna Convention on the Law of Treaties that "mandates good faith in interpretation".[698]

Observation 203

The International Criminal Court has referred to the "jurisprudence of the *ad hoc* criminal tribunals" and the ICRC Commentary to Geneva Convention I when interpreting the Rome Statute.

438. In the *Katanga* case, for example, the Trial Chamber referred to "the jurisprudence of the ad hoc tribunals on joint criminal enterprise" as defined by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case, and considered that:

> it may draw on certain criteria from that jurisprudence, particularly so as to best ascertain the meaning of a statutory phrase or expression, such as the phraseology "common purpose", and in so doing, recourse to the systemic method of interpretation may be had. Whereas modes of liability may vary from one international tribunal to another and whereas, in that sense, the Statute of

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[696] *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Case No. ICC-01/13, Decision on the "Application for Judicial Review by the Government of the Union of the Comoros", 15 November 2018, Pre-Trial Chamber I, para. 107.

[697] *Situation in the State of Palestine*, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, Trial Chamber, para. 81, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 71 above), para. 66.

[698] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 46, referring to Jean-Marc Sorel and Valérie Boré Eveno, "Article 31 of 1969 Vienna Convention", in Olivier Corten and Pierre Klein, eds., *The Vienna Conventions on the Law of Treaties* (Oxford, Oxford University Press, 2011), pp. 804–837, at pp. 817-818; Olivier Dörr, "Article 31", in Olivier Dörr and Kirsten Schmalenbach (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I (Berlin, Springer, 2012), pp. 521–570, at p. 540.

> the Court is an innovation whose meaning and coherence must be preserved, nothing precludes reliance in the main on the definition of the expression "common purpose" adopted by the ad hoc tribunals since, moreover, their definition is based on an analysis of customary international law.[699]

439. The Trial Chamber in the *Lubanga* case noted that neither the Rome Statute nor the Geneva Conventions define armed conflict.[700] The Trial Chambers in the *Bemba*, *Katanga*, and *Ntaganda* cases referred to the definition of non-international armed conflict used by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in an appeal against an interlocutory decision in the *Tadić* case.[701] The Trial Chamber, in the judgment in the *Ntaganda* case, noted that such definition used by the International Criminal Tribunal for the Former Yugoslavia "has since been accepted by States as authoritative and has become part of State practice", citing also the ICRC Commentary to Geneva Convention I.[702]

440. The Trial Chamber in the *Lubanga Dyilo* case referred to criteria taken into account by the International Criminal Tribunal for the Former Yugoslavia to determine whether a non-international armed conflict was taking place.[703]

441. In various decisions, the Pre-Trial Chamber referred to decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda to interpret the term "widespread or systematic".[704]

(e) Examples concerning the identification of rules of customary international law and general principles of law

Observation 204

The International Criminal Court has referred to decisions of the International Court of Justice when identifying rules of customary international law.

442. The Trial Chamber in the *Bemba* case indicated that "where relevant and appropriate, the Chamber has found assistance, for instance, in the case law of other

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[699] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 1625, citing *Tadić*, Appeal Judgment (see footnote 538 above), paras. 185-226.

[700] *Dyilo*, Judgment pursuant to Article 74 of the Statute (see footnote 689 above), para. 532.

[701] *Ibid*., para. 533, citing *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above); *Bemba Gombo*, Trial Judgment (see footnote 690 above), para. 128; *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 1173; *Situation on the Democratic Republic of the Congo in the Case of* Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment, 8 July 2019, Trial Chamber, para. 701.

[702] *Ntaganda*, Judgment (see previous footnote), para. 701, citing ICRC, Commentary on Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Cambridge, Cambridge University Press 2016), para. 424.

[703] *Dyilo*, Judgment pursuant to Article 74 of the Statute (see footnote 689 above), para. 538, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Public Judgment with Confidential Annex, 23 February 2011, Trial Chamber, para. 1522, and International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Judgment, 27 September 2007, Trial Chamber, para. 407.

[704] *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, Pre-Trial Chamber, para. 394, citing *Situation in Darfur, Sudan in the Case of Prosecutor v. Ahmad Muhammad Harun (Ahmad Harun*") *and Ali Muhammad Ali Abd-Al-Rahman (*"*Ali Kushayb*")*, Case No. ICC-02/05-01/07-l-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, 27 April 2007, Pre-Trial Chamber, para. 62 (quoted in *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Germain Katanga,* Case No. ICC-01/04-01/07, *Decision on the evidence and information provided by the Prosecution for the issuance of a warrant of arrest for Germain Katanga, 6 July 2007,* para. 33), and *Kordić and Čerkez*, Appeal Judgment (see footnote 540 above), para. 94, and International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, Trial Chamber, paras. 545-546.

international courts and tribunals, in particular the International Court of Justice …, in order to identify such principles and rules [of international law].”[705]

443. Also in the *Bemba* case, the Trial Chamber relied on the decisions of the International Court of Justice to indicate that articles 31 and 32 of the Vienna Convention on the Law of Treaties are part of customary international law.[706]

Observation 205

On occasion, the International Criminal Court has referred to decisions of other international criminal tribunals when identifying a rule of customary international law.

444. In the *Katanga* case, the Trial Chamber considered the definition of crimes against humanity in the International Criminal Court Statute and noted that “general practice accepted as law”, identified by the jurisprudence of the *ad hoc* tribunals, does not require the perpetrators to have quasi-State characteristics. The Trial Chamber noted that the jurisprudence of the *ad hoc* criminal tribunals has elaborated on the definition of crimes against humanity, recalling the decision of the International Criminal Tribunal for the Former Yugoslavia in *Tadić* indicating that “non-State actors are also possible perpetrators of crimes against humanity”. The Trial Chamber concluded that, “[t]he Rome Statute in this regard therefore echoes the rules of custom brought to the fore by the ad hoc tribunals”.[707]

Observation 206

The International Criminal Court has referred to the insufficiency of a practice accepted in only two legal systems as the basis for identifying a general principle of law.

445. In the *Lubanga* case, the Trial Chamber of the International Criminal Court considered the practice of national and international criminal tribunals, noting that although the practice of witness proofing was:

> accepted to an extent in two legal systems, both of which are founded upon common law traditions, *this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists*. The Trial Chamber notes that the prosecution’s submissions with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system.[708]

(f) Examples that concern the approach of the International Criminal Court to precedent and consistency

Observations 207

The International Criminal Court has stated that there is no system of binding precedent at the International Criminal Court, but that it would not depart from its previous decisions absent convincing reasons.

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[705] *Bemba Gombo*, Trial Judgment (see footnote 690 above), para. 71.

[706] *Ibid.,* para. 76, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 117 above), para. 94; *Avena* (see footnote 85 above), para. 83; *Land, Island and Maritime Frontier Dispute* (see footnote 46 above), para. 373; *Arbitral Award of 31 July 1989* (see footnote 202 above), para. 48.

[707] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 1121, citing *Tadić*, Opinion and Judgement, 7 May 1997, Trial Chamber (see footnote 514 above), paras. 654-655.

[708] *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, Trial Chamber I, para. 41 (emphasis added).

It has stated that this approach is intended to ensure predictability of the law, fairness of the adjudicatory process and to foster public reliance on its decisions.

446. The Court's Appeals Chamber has stated that, while it was "not obliged to follow its previous interpretations of principles and rules of law through binding *stare decisis*; rather it is vested with discretion as to whether to do so" and that "absent 'convincing reasons', it will not depart from its previous decisions". This, it continued, was to ensure "predictability of the law and the fairness of adjudication to foster public reliance on its decisions".[709]

Observation 208

The International Criminal Court has stated that it generally treats the decisions of other international courts and tribunals with caution.

447. The Trial Chamber in *Bemba* stressed that the Chambers at the International Criminal Court "generally treated the case law of other international courts and tribunals with caution and underlined that it is not binding on this Court".[710]

Observation 209

On occasion, the International Criminal Court has rejected arguments based on the jurisprudence of the *ad hoc* criminal tribunals by distinguishing the underlying applicable rules.

448. In the Decision on the Confirmation of Charges against William Samoei Ruto et al., the Pre-Trial Chamber rejected a procedural argument presented by the Prosecutor relying on the decisions of other international criminal tribunals, indicating that "as previously held by Pre-Trial Chamber I, that the jurisprudence of the *ad hoc* tribunals concerning mid-trial motions of acquittal cannot guide the Chamber in determining the object and purpose of the confirmation of charges, due to the fundamentally incomparable nature of the two procedural regimes".[711]

449. The Trial Chamber added that, while such witness proofing practice was allowed in other tribunals, such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, it did "not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the International Criminal Court without detailed analysis".[712]

Observation 210

The International Criminal Court has explained that, while relevant, a reparations decision of the International Court of Justice does not preclude the

[709] *Situation in the Republic of Côte d'Ivoire in the Case of* Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Case No. ICC-02/11-01/15 OA 6, Reasons for the "Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)'", 31 July 2015, Appeals Chamber para. 14.

[710] *Bemba Gombo*, Trial Judgment (see footnote 690 above), para. 72.

[711] *Situation in the Republic of Kenya in the Case of the* Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 58, also referring to *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, Pre-Trial Chamber I, para. 45.

[712] Dyilo, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (see footnote 708 above), para. 44.

International Criminal Court taking its own approach in the context of individual criminal responsibility.

450. In the *Ntaganda* case, the Appeals Chamber took note of the judgment of the International Court of Justice in *Armed Activities on the Territory of the Congo* on reparations, but clarified that, while that case concerned the approach of the International Court of Justice to reparations in relation to crimes committed in the same country as the *Ntaganda* case, "the present judgment, rendered in the context of criminal proceedings against an individual, is necessarily based upon the specific statutory regime and jurisprudence that applies to this Court".[713]

Observation 211

On occasion, the International Criminal Court has rejected the approach taken in decisions of other international criminal tribunals and writings concerning the distinction between international and non-international armed conflict.

451. For example, the Trial Chamber in the *Lubanga* case indicated that:[714]

> some academics, practitioners, and a line of jurisprudence from the *ad hoc* tribunals have questioned the usefulness of the distinction between international and non-international armed conflicts, particularly in light of their changing nature. In the view of the Chamber, for the purposes of the present trial the international/non-international distinction is not only an established part of the international law of armed conflict, but more importantly it is enshrined in the relevant statutory provisions of the Rome Statute framework, which under Article 21 must be applied. The Chamber does not have the power to reformulate the Court's statutory framework.

Observation 212

On occasion, the Appeals Chamber of the International Criminal Court has reversed decisions which have referred to the practice and decisions of other tribunals, emphasizing the primacy of the Rome Statute as the applicable law.

452. The Appeals Chamber in *Ruto* reversed a finding of the Trial Chamber indicating that the International Criminal Court had the power to subpoena witnesses, which had relied on the decisions of the European Court of Human Rights,[715] decisions of the International Court of Justice and writings referring to the principle of implied powers of international tribunals.[716] The Appeals Chamber rejected this approach and instead referred to the primacy of the rules of the Rome Statute, pursuant to article 21.[717]

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[713] *Situation in the Democratic Republic of Congo in the Case of* Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06 A4-A5, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, Appeals Chamber, footnote 298.

[714] *Dyilo*, Judgment pursuant to Article 74 of the Statute (see footnote 689 above), para. 539.

[715] *Situation in the Republic of Kenya in the Case of* Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, Trial Chamber, para. 84, citing *Djokaba Lambi Longa v. the Netherlands*, No 33917/12, *Reports of Judgments and Decisions 2012*, para 72.

[716] *Ibid*., paras. 78-79 and 81-82 citing, *inter alia*, *Nuclear Tests (New Zealand v France)* (see footnote 104 above), para. 23.

[717] *Situation in the Republic of Kenya in the Case of* Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09.01/11, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 9 October 2014, Appeals Chamber, para. 105.

453. The Appeals Chamber in *Bemba* reversed a decision of the Trial Chamber which had considered that it had power to suspend a sentence of imprisonment as part of its "power to impose and determine the sentence", referring to the practice of national and international jurisdictions, citing, among others, decisions of the International Criminal Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone.[718]

454. The Appeals Chamber considered, *inter alia*, that the Trial Chamber "erred in law in finding that it had the inherent power to impose a suspended sentence, and therefore acted *ultra vires* in ordering the conditional suspension" of two of the persons convicted.[719] The Appeals Chamber emphasized that:[720]

> *the practices of other international tribunals do not constitute a source of law under article 21 of the Statute*. They cannot therefore provide a legal basis for suspension of sentences at this Court. In any case, the Appeals Chamber also emphasises that contrary to other international courts and tribunals, this Court's functions are regulated by a comprehensive legal framework in which its powers have been deliberately spelt out by the drafters to a great degree of detail, thus leaving little room to the invocation of "inherent powers" in the proceedings before it.

Observation 213

On occasion, the International Criminal Court has taken into consideration the decisions of other international criminal tribunals in sentencing.

455. In the judgment in *Al Mahdi*, the Trial Chamber considered that the admission of guilt as a mitigating circumstance "is well-established in the case law of other international tribunals", referring to decisions of the International Criminal Tribunal for the Former Yugoslavia.[721] However, the Trial Chamber rejected the arguments presented by the Defence based on sentences in cases from the International Criminal Tribunal for the Former Yugoslavia since "[t]hese sentences were based on vastly different circumstances, including the applicable modes of liability and sources of law".[722] Further, the "jurisprudence of the [International Criminal Tribunal for the Former Yugoslavia] is of limited guidance given that, in contrast to the Statute, its

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[718] *Situation in the Central African Republic in the Case of* Prosecutor v. Jean-Pierre Bemba Gombo *et al*., Case No. ICC-01/05-01/13, Decision on Sentence pursuant to Article 76 of the Statute, 22 March 2017, Trial Chamber, para. 41, referring to suspensions of sentences in International Tribunal for the Former Yugoslavia, *Prosecutor v. Slobodan Milosevic*, Contempt Proceedings against Kosta Bulatović, Case No. IT-02-54, Decision on Contempt of the Tribunal, 13 May 2005, Trial Chamber, paras. 18-19; International Tribunal for the Former Yugoslavia, *Prosecutor v. Jelena Rašić*, Case No. IT-98-32/1-R77.2-A, Judgment, 16 November 2012, Appeals Chamber, para. 17; Special Court for Sierra Leone, *Independent Counsel v. Hassan Papa Bangura* et al, Case No. SCSL-2011-02-T, Sentencing Judgement in Contempt Proceedings, 11 October 2012, Trial Chamber, para. 92 and p. 33.

[719] *Situation in the Central African Republic in the Case of* Prosecutor v. Jean-Pierre Bemba Gombo *et al*., Case No. ICC-01/05-01/13, Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Decision on Sentence pursuant to Article 76 of the Statute", 8 March 2018, Appeals Chamber, para. 80.

[720] *Ibid*., para. 79 (emphasis added).

[721] *Situation in the Republic of Mali in the Case of* Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment and sentence, 27 September 2016, Trial Chamber, para. 100, footnote 166, citing *idem*, Prosecution Sentencing Observations, paras. 51-52, and Defence Sentencing Observations, paras. 180-184 and stating: "the fact that an admission of guilt constitutes a mitigating circumstance is well-established in the case law of other international tribunals: see, for example, [International Criminal Tribunal for the Former Yugoslavia], Trial Chamber I, *Prosecutor v. Miodrag Jokić*, Sentencing Judgement, 18 March 2004, IT-01/42/1-S, para. 96 …; International Criminal Tribunal for the Former Yugoslavia], Trial Chamber I, *The Prosecutor v. Milan Babić,* Sentencing Judgement, 29 June 2004, IT-03-72-S, paras. 73-75, 88-89".

[722] *Ibid*., para. 107.

applicable law does not govern ‘attacks’ against cultural objects but rather punishes their ‘destruction or wilful damage’. The legal contexts thus differ.”[723]

456. In the sentencing judgment in the *Ongwen* case, the Trial Chamber indicated “in line with international criminal tribunal jurisprudence” “poor health is mitigating only in exceptional cases”. The health of the convicted person was not an automatic consideration when determining the sentence.[724]

Observation 214

On occasion, the International Criminal Court has referred to the reasoning in decisions of other international criminal tribunals to support its own findings.

457. The Appeals Chamber in the *Ntaganda* case referred to decisions of other criminal tribunals including the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia concerning “direct” and “indirect” victims when deciding an appeal against the reparations order regarding whether children born of rape could be considered victims.[725]

Observation 215

The International Criminal Court has referred extensively to guidelines and principles adopted within the United Nations and to decisions of regional human rights courts when establishing principles relating to reparations for victims of international crimes.

458. Article 75 of the Rome Statute requires the Court to establish principles relating to reparations for victims. On this basis, the Court may determine the scope and extent of any damage, loss and injury to victims. Further, in accordance with article 21, paragraph 3, the law is to be interpreted in a manner consistent with “internationally recognized human rights without any adverse distinction”.

459. In the *Lubanga* case, Trial Chamber I issued a reparations order, noting that, in addition to guidelines and principles adopted in the context of the United Nations concerning reparation for victims, the Chamber also took into account “the jurisprudence of the regional human rights courts and the national and international mechanisms and practices that have been developed in this field”.[726]

460. In a later reparations order in the *Lubanga* case, the Trial Chamber referred to various decisions of the Inter-American Court of Human Rights and the European

[723] *Ibid*., para. 16.

[724] *Situation in Uganda in the Case of* Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Sentence, 6 May 2021, Trial Chamber, para. 103, referring to *Šainović* (see footnote 549 above), para. 1827; *Galić*, Appeal Judgment (see footnote 541 above), para. 436; *Blaškić*, Appeal Judgment (see footnote 514 above), para. 696.

[725] *Situation on the Democratic Republic of the Congo in the Case of* Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”, 12 September 2022, Appeals Chamber, para. 651.

[726] *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, Trial Chamber, para. 186.

Court of Human Rights when setting out examples of the practice of such courts when providing compensation for various forms of harm suffered.[727]

(g) Examples concerning procedural matters

Observation 216

The International Criminal Court has referred to decisions of the *ad hoc* tribunals and regional human rights courts when considering standards of proof and international human rights standards of fair trial.

461. In the *Al Bashir* case, Pre-Trial Chamber I referred in the context of allegations of genocide to the decisions of regional human rights courts, noting that a proof by inference would be met "only if the materials provided by the Prosecution in support of the Prosecution Application show that the only reasonable conclusion to be drawn therefrom is the existence of reasonable grounds to believe in the existence" of a *dolus specialis* to destroy in whole or in part the specific group.[728] Pre- Trial Chamber I considered that such proof had not been submitted in that case and that such conclusion was:

> fully consistent with the case law of the [International Criminal Tribunal for the Former Yugoslavia] and [the International Criminal Tribunal for Rwanda] on the matter" and constituted "the only interpretation consistent with the "reasonable suspicion" standard provided for in article 5(1)(c) of the European Convention on Human Rights and the interpretation of the Inter-American Court of Human Rights in respect of the fundamental right of any person to liberty under article 7 of the American Convention on Human Rights.[729]

Observation 217

On occasion, the International Criminal Court has referred to the practice of other international criminal tribunals as guidance when deciding procedural matters.

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[727] *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Order for Reparations (amended), 5 March 2015, Appeals Chamber, para. 40, citing the jurisprudence of the Inter-American Court of Human Rights (e.g., *Garrido and Baigorria v. Argentina*, Judgment (Reparations and Costs), 27 August 1998, Series C, No. 39, para. 49; *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations), 19 November 2004, Series C, No. 116, paras. 80-89 and 117; *"Juvenile Reeducation Institute" v. Paraguay*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 2 September 2004, Series C, No. 112, para. 295; *El Amparo v. Venezuela*, Judgment (Reparations and Costs), 14 September 1996, Series C, No. 28, paras. 28-30; *Loayza Tamayo v. Peru*, Judgment (Reparations and Costs), 27 November 1998, Series C, No. 42, paras. 147-148; *Cantoral-Benavides v. Peru*, Judgment (Reparations and Costs), 3 December 2001, Series C, No. 88, para. 80) and the European Court of Human Rights (e.g., *Selmouni v. France* [Grand Chamber], No. 25803/94, ECHR 1999-V, paras. 92, 98, 105; *Aksoy v. Turkey*, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, para. 113; *Ayder and Others v. Turkey*, No. 23656/94, 8 January 2004, paras. 141-152; *Campbell and Cosans v. the United Kingdom* (Article 50), 22 March 1983, Series A, No. 60, para. 26; *T.P. and K.M. v. the United Kingdom* [Grand Chamber], No. 25644/94, 29 April 1999, para. 115; *Thlimmenos v. Greece* [Grand Chamber], No. 34369/97, ECHR 2000-IV, para. 70); and International Criminal Court, *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on Applications for Participation in the Proceedings, 2 April 2008, Pre-Trial Chamber, p. 11, and *Situation in the Central African Republic in the Case of Prosecutor v.* Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Fourth Decision on Victims' Participation, Pre-Trial Chamber, paras. 51 and 70-73.

[728] *Situation in Darfur, Sudan*, Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, para. 158.

[729] *Ibid*., para. 160.

462. In the *Kony case*, Pre-Trial Chamber II considered whether Mr. Kony qualified as a person who could not be found within the meaning of article 61, paragraph 2 (b), of the Rome Statute. It considered that the practice of the International Criminal Tribunal for the Former Yugoslavia and the Special Tribunal for Lebanon, "which each allowed for certain proceedings to be held in the absence of the *accused* assuming that 'all reasonable steps' were taken to apprehend the person and give notice of the charges, may provide some useful guidance".[730]

(h) Example relating to the legal value or weight to be given to decisions of other courts or tribunals

Observation 218

The Appeals Chamber of the International Criminal Court has indicated that it would give less weight to the sentencing practice of other tribunals "as opposed to that of a Trial Chamber of the Court".

463. The Appeals Chamber noted in the appeal against the sentencing decision in the *Lubanga* case that:

> the value of other sentencing practices is even lower when the reference is to the sentencing practices of another tribunal, as opposed to that of a Trial Chamber of the Court. This is because, even though there are similarities in the sentencing provisions of the Court and those of other international criminal courts and tribunals, the Court has to apply, in the first place, its own Statute and legal instruments.

The Appeals Chamber concluded that the Prosecutor did not identify an error in the approach of the Trial Chamber to the sentence of Mr. Lubanga and rejected the appeal.[731]

(i) Examples of references to domestic court decisions

Observation 219

The International Criminal Court has stated that it is not bound by the decisions of national courts on evidentiary matters.[732]

Observation 220

The International Criminal Court has stated that, while general principles of law derived from national court decisions can be applied in a subsidiary manner, national law is not part of the applicable law under the Rome Statute.

464. In the *Bemba* case, the Appeals Chamber stated that**:**

> while, the Court, in accordance with article 21 (1) (c) of the Statute, can apply (exclusively as a subsidiary source of law) "general principles derived by the Court from national laws of legal systems of the world", no particular national law constitutes part of the applicable law under article 21 of the Statute.[733]

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[730] *Situation in Uganda in the Case of* Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05, Decision on the Prosecution's request to hold a confirmation of charges hearing in the Kony case in the suspect's absence, 23 November 2023, Pre-Trial Chamber, para. 56.

[731] *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", 1 December 2014, Appeals Chamber, para. 77.

[732] *Dyilo*, Decision on Confirmation of Charges (see footnote 686 above), para. 69.

[733] *Situation in the Central African Republic in the Case of* Prosecutor v. Jean-Pierre Bemba Gombo *et al*., Case No. ICC-01/05-01/13, Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, Appeals Chamber, para. 291.

465. The Appeals Chamber, "recalling that the Court can only apply the sources of law enumerated in article 21 of the Statute, … [saw] no merit in Mr Kilolo's attempt to import certain domestic principles providing for a 'crime-raud exception' to privilege".[734]

(j) Examples of references to writings

Observation 221

The International Criminal Court has on some occasions referred to writings when interpreting the elements of the offences contained in its Statute.

466. For example, the Pre-Trial Chamber in *Katanga* referred to the elements of pillage as a war crime, relying on writings.[735] In the same case, the Pre-Trial Chamber cited a chapter of a book to explain the elements of the war crime of sexual slavery under article 8, paragraph 2 (b) (xxii) 2, of the Elements of Crime.[736]

467. The Trial Chamber in *Lubanga* referred to a dictionary and writings when indicating that while enlisting in a military body could be voluntary, "conscripting" was defined as "to enlist compulsorily", which required "the added element of compulsion".[737]

468. In the judgment in *Ntaganda*, the Trial Chamber relied on writings when indicating that, for the purpose of the war crime of displacement of civilian population, "the issuance of an order within the political or military chain of command is sufficient and the order does not need to be made to the civilian population for the crime to be established".[738]

Observation 222

On occasion, the International Criminal Court has referred to writings when addressing the degree of participation necessary in the perpetration of a crime to result in criminal responsibility.

469. The Trial Chamber in the *Lubanga* case, for example, referred to writings to indicate that the determination as to whether "the particular contribution of the accused results in liability as a co-perpetrator is to be based on an analysis of the

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[734] *Ibid*., para. 434.

[735] *Katanga and Chui*, Decision on the confirmation of charges (see footnote 704 above), para. 332, citing: Hans-Peter Gasser, "Protection of the civilian population", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1999), pp. 209–291, at p. 220; Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge, Cambridge University Press, 2003), pp. 251 and 485-486; Michael Bothe, "The law of neutrality", in Fleck, *The Handbook of Humanitarian Law in Armed Conflict*, pp. 485-516; Hans Boddens Hosang, "Article 8(2)(b)(xiv) - Depriving the nationals of the hostile power of rights or actions", in Roy S. Lee (ed.), *The International Criminal Court. Elements of the Crimes and Rules of Procedure and Evidence* (New York, Transnational Publishers, 2001), pp. 172-174.

[736] *Ibid*., para. 343, citing Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (see previous footnote), p. 328.

[737] *Dyilo*, Judgment pursuant to Article 74 of the Statute (see footnote 689 above), para. 608, citing *Oxford Dictionary*, 5th ed. (2002), p. 831, and also Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (see footnote 735 above), p. 377, and Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes* (Munich, C.H. Beck, 2008), p. 472, at marginal note 231.

[738] *Ntaganda*, Judgment (see footnote 701 above), para. 1081, referring to Ryszard Piotrowicz, "Displacement and displaced persons" in Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2017), pp. 337–353; and Jan Willms, "Without order, anything goes? The prohibition of forced displacement in non-international armed conflict", *International Review of the Red Cross*, vol. 91 (2009), p. 562.

common plan and the role that was assigned to, or was assumed by the co-perpetrator, according to the division of task".[739]

(k) Examples of references to the work of the International Law Commission

Observation 223

On occasion, the International Criminal Court has referred to the work of the Commission as the *travaux préparatoires* of the Rome Statute in relation to procedural matters.

470. The Appeals Chamber in the *Situation in the Democratic Republic of the Congo* noted that "current article 17 (1) (d) of the Statute was contained as article 35 (c) in the draft Statute for an International Criminal Court prepared by the International Law Commission in 1994", where the Commission "pointed out that '[t]he grounds for holding a case inadmissible are, in summary, that the crime in question ... *is not of sufficient gravity to justify further action by the Court*'".[740]

471. The Trial Chamber in the *Al Mahdi* case applied article 65 of the Rome Statute for the first time, which deals with a situation where the accused makes an admission of guilt. The Trial Chamber referred to the draft statute for an International Criminal Court prepared by the Commission and other materials from the drafting process of such provision to interpret and apply the provisions concerning admission of guilt by the accused.[741]

Observation 224

The International Criminal Court has referred to the work of the International Law Commission on the draft statute for an International Criminal Court in the interpretation of the offences covered by its Statute.

472. Trial Chamber II in the *Katanga* case cited the commentaries to the draft statute for an International Criminal Court prepared by the Commission in 1994 when interpreting the systematic nature of an attack for the purposes of a crime against humanity, and recalled "that it is not so much the policy as it is the widespread or systematic nature of the attack − … its 'hallmark'".[742]

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[739] *Dyilo*, Judgment pursuant to Article 74 of the Statute (see footnote 689 above), para. 1000, citing Thomas Weigend, "Intent, mistake of law, and co-perpetration in the Lubanga Decision on Confirmation of Charges", *Journal of International Criminal Justice*, vol. 6 (2008), p. 480; *Stratenwerth/Kuhlen Allgemeiner Teil I, Die Straftat* (2011), 13/83; Gerhard Werle, "Individual criminal responsibility in article 25 ICC Statute", *Journal of International Criminal Justice*, vol. 5 (2007), p. 962; Gerhard Werle, *Principles of International Criminal Law*, 2nd ed. (The Hague, T.M.C. Asser, 2009), paras. 466–468 and 472; Roger S. Clark, "Drafting a general part to a penal code: some thoughts inspired by the negotiations on the Rome Statute of the International Criminal Court and by the Court's first substantive law discussion in the *Lubanga Dyilo* confirmation proceedings", *Criminal Law Forum* (2008), p. 545 et seq; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford, Oxford University Press, 2010), p. 429; Kai Ambos, *La parte general del derecho penal internacional* (Montevideo, Konrad-Adenauer, 2005), p. 189.

[740] International Criminal Court, *Situation in the Democratic Republic of the Congo*, Case No. ICC-01/04, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, Appeals Chamber, para. 81, citing para. (2) of the commentary to draft article 35 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), p. 52.

[741] *Al Mahdi* (see footnote 721 above), para. 22, citing draft article 38 of the draft statute for an international criminal court and para. (4) of the commentary thereto, *Yearbook ... 1994*, vol. II (Part Two), pp. 54 and 55.

[742] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 1111, citing para. (14) of the commentary to draft article 20 of the draft statute for an international criminal court, *Yearbook ... 1994*, vol. II (Part Two), p. 40.

Observation 225

On occasion, the International Criminal Court has drawn guidance from the work of the Commission and the decisions of the International Court of Justice, to interpret unilateral acts.

473. In *Gbagbo*, the Appeals Chamber rejected a challenge to the jurisdiction of the International Criminal Court presented by the accused, which challenge argued that a declaration filed by Côte d'Ivoire accepting the jurisdiction of the International Criminal Court should be read restrictively. The Appeals Chamber referred to the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations [743] and mentioned that the text and commentary drew on the jurisprudence of the International Court of Justice, which "does not restrictively interpret declarations which confer jurisdiction on the [International Court of Justice] pursuant to [that Court's] Statute".[744] The Appeals Chamber rejected the appeal and referred to Principle 7 of the Guiding Principles, indicating that "a restrictive interpretation is, in any event, only necessary if there is doubt as to the declaration's interpretation", and that the declaration made by Côte d'Ivoire did not create such a doubt and did not limit the jurisdiction of the Court by excluding crimes that predated the Rome Statute.[745]

(l) Examples of references to collective works of expert bodies

Observation 226

On occasion, the International Criminal Court has referred to the work of ICRC and writings when interpreting the elements of the crimes contained in its Statute.

474. In the *Lubanga* case, the Trial Chamber referred to the ICRC Commentary to Additional Protocol II to the Geneva Conventions when interpreting the scope of the crime of child recruitment.[746]

475. In the *Katanga* case, the Trial Chamber cited the ICRC Commentary to Additional Protocol II to the Geneva Conventions, and writings to interpret the loss of protection by persons otherwise protected by the prohibition of war crimes,

[743] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations and the commentaries thereto can be found in *Yearbook ... 2006*, vol. II (Part Two), paras. 176–177. See also General Assembly resolution 61/34, para. 3.

[744] *Situation in the Republic of Côte d'Ivoire in the Case of* Prosecutor v. Laurent Koudou Gbagbo, Case No. ICC-02/11-01/11, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings, 12 December 2012, Appeals Chamber, paras. 88–89, referring to Christian Tomuschat, "Article 36", in Andreas Zimmermann *et al*. (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford, Oxford University Press, 2006), paras. 33 and 65; see also *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment of 26 May 1961: I.C.J. Reports 1961*, p. 17, at pp. 17-22, and *Fisheries Jurisdiction (Spain v. Canada)* (see footnote 68 above), para. 44.

[745] *Gbagbo*, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings (see previous footnote), para. 89.

[746] *Dyilo*, Judgment pursuant to Article 74 of the Statute (see footnote 689 above), para. 605, referring to ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), p. 1377 at marginal note 4544, and also p. 1379 at marginal note 4555.

determining that it was "only through direct – and not active – participation in hostilities and for the duration of that participation".[747]

476. In the *Katanga* case, the Trial Chamber, when interpreting the elements of war crimes contained in article 8 of its Statute, also cited the work of ICRC in the identification of customary international humanitarian law, referring to the moment when civilians lose their protection.[748]

Observation 227

On occasion, the International Criminal Court has referred to the ICRC Commentary for the purpose of the interpretation of Additional Protocol II[749] to the Geneva Conventions.

477. The Trial Chamber in the *Lubanga* case considered the prohibition contained in Additional Protocol II to the 1949 Geneva Conventions concerning the recruitment and use of children under the age of 15 years in hostilities, including the intention of the drafters of the Protocol, as referred to in the ICRC Commentary on the Additional Protocols to the Geneva Conventions.[750]

Observation 228

On occasion, the International Criminal Court has referred to the work of ICRC in support of the determination of the scope of rules of customary international law.

478. For example, in the *Ntaganda* judgment, the Trial Chamber held that the limitation of attacks to military objectives contained in article 52, paragraph 2, of Additional Protocol I to the Geneva Conventions "through customary international law, has also become applicable to non-international armed conflicts", relying on the ICRC study *Customary International Humanitarian Law*.[751] In the same decision the Trial Chamber also referred to the same study in relation to other customary law rules such as the enhanced protection owed to medical facilities, found to be applicable also in the case of non-international armed conflict.[752]

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[747] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 790, citing Additional Protocol II, art. 13, para. 3; Yves Sandoz *et al*. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, ICRC, 1986), p. 1453; *Kordić and Čerkez*, Appeal Judgment (see footnote 540 above), para. 50; Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, ICRC, 2009), pp. 53-60.

[748] *Katanga*, Judgment pursuant to Article 74 of the Statute (see footnote 679 above), para. 893, citing Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Volume I: *Rules* (Cambridge, Cambridge University Press, 2005), rule 10.

[749] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3.

[750] *Dyilo*, Judgment pursuant to Article 74 of the Statute (see footnote 689 above), para. 604, footnote 1769, referring to ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987), p. 1380.

[751] *Ntaganda*, Judgment (see footnote 701 above), para. 1146, footnote 3156, referring to Rule 8 in Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law*, Volume I: *Rules* (footnote 748 above), p. 29, and the underlying State practice referred to in that study.

[752] *Ibid*., referring to article 13, paragraph 1, of Additional Protocol I, article 11, paragraph 2, of Additional Protocol II, "found to be a norm of customary international law applicable in both international and non-international armed conflicts", and Rule 28 of the Henckaerts and Doswald-Beck (eds.), *Customary International Humanitarian Law*, Volume I: *Rules* (see footnote 748 above), p. 91, and the underlying State practice referred to in that study.

(m) Examples of references to resolutions of international organizations

Observation 229

The International Criminal Court has referred to various instruments contained in resolutions of the General Assembly concerning reparation for victims.

479. In the *Lubanga* case, the Appeals Chamber established principles for the reparations of victims, relying on the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, noting that "principles should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers".[753]

480. In the reparations order in the *Al Mahdi* case, the Trial Chamber recalled that the International Criminal Court has relied on the Basic Principles of Justice for Victims of Crime and Abuse of Power and the Basic Principles on Reparations for Victims to fulfil its article 75, paragraph 1, requirement to establish principles relating to reparations,[754] as indicated by the Appeals Chamber in the *Lubanga* case.[755] Such principles for reparations, drawing on the Basic Principles, were relied on by Trial Chamber II in the *Katanga* reparations order.[756]

Observations 230

On occasion, the International Criminal Court has referred to resolutions of the Security Council as part of its analysis of the existence of a rule of customary international law.

481. The Pre-Trial Chamber in *Al Bashir* considered various materials in support of the existence of a rule of customary international law pursuant to which immunity of State officials could not preclude prosecution by the Court.[757] Among the materials considered, the Pre-Trial Chamber took into account resolutions of the Security Council to assess the conduct of States, noting that:

> Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve

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[753] *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the appeals against "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with Amended order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, documents ICC-01/04-01/06-3129, para. 55, and ICC-01/04-01/06-3129-AnxA, para. 5.

[754] *Situation in the Republic of Mali in the Case of* Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Reparations Order, 17 August 2017, Trial Chamber, para. 24, citing General Assembly resolution 40/34 of 29 November 1985 (Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power), and General Assembly resolution 60/147 of 21 March 2006 (Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law).

[755] See footnote 753 above.

[756] *Katanga*, Order for Reparations Order (see footnote 0 above), paras. 29-30.

[757] *Situation in Darfur, Sudan, in the Case of* Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, 12 December 2011, Pre-Trial Chamber, paras. 22-43.

prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.[758]

482. The Pre-Trial Chamber concluded that "the international community's commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass"[759] and "that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes".[760]

4. Special Court for Sierra Leone

483. The law applicable by the Special Court for Sierra Leone is set out in the Agreement between the United Nations and the Government of Sierra Leone that established the Special Court for Sierra Leone, together with its annexed Statute.[761] Article 19, paragraph 1, of the Statute of the Special Court for Sierra Leone states that, in the context of sentencing, the Trial Chamber "shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone". Article 20, paragraph 3, of Statute provides that the judges in the Appeals Chamber "shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone."

(a) Express reference to subsidiary means under Article 38 of the Statute of the International Court of Justice

Observation 231

The Special Court for Sierra Leone has not made express reference in any of its decisions to subsidiary means for the determination of rules of international law nor to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

484. As the Special Court for Sierra Leone has not made any express references to subsidiary means nor to Article 38, paragraph 1 (d), in any of its decisions, the Secretariat should not be understood as taking a view on whether or to what extent the examples presented in the present section may constitute a use of judicial decisions and other materials as subsidiary means for the determination of rules of international law.

(b) Examples concerning challenges to the jurisdiction and competence of the Special Court for Sierra Leone

Observation 232

The Special Court for Sierra Leone referred to decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice when determining that the Special Court had been "established by law".

485. The Appeals Chamber in the *Kallon* case referred to decisions of the International Criminal Tribunal for the Former Yugoslavia (*Tadić*), the International

[758] *Ibid*., para. 40, citing Security Council resolution 1593 (2005) of 31 March 2005, and Security Council resolution 1970 (2011) of 26 June 2011.
[759] *Ibid*., para. 42.
[760] *Ibid*., para. 43.
[761] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with annexed Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, p. 137.

Criminal Tribunal for Rwanda (*Kanyabashi*) and the International Court of Justice (*Effects of awards of compensation*) when determining that the requirement that the Special Court for Sierra Leone had been "established by law" meant that its establishment:

> must accord with the rule of law. This means that it must be established according to proper international criteria; it must have the mechanisms and facilities to dispense even-handed justice, providing at the same time all the guarantees of fairness and it must be in tune with international human rights instruments.
>
> … A perusal of the Statute of the Special Court and the Rules bears witness that the various criteria mentioned have been observed and that the Special Court has been established according to the rule of law. [762]

Observation 233

The Special Court for Sierra Leone referred to a decision of the United States Military Tribunal at Nuremberg and a decision of a national court when determining that an amnesty granted by national authorities did not bar prosecution before an international or foreign criminal court.

486. The Appeals Chamber in the *Kallon and Kamara* case referred to the decision in *In re List et al.* and to the *Eichmann* case when determining that the crimes set out in articles 2 to 4 of its Statute were international crimes, which could be prosecuted under the principle of universality.[763] Amnesties granted by Sierra Leone, therefore, could not cover crimes under international law, as they were subject to universal jurisdiction and by reason of the fact that "the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*".[764] The grant of an amnesty for international crimes therefore was not only in breach of international law, "but is in breach of an obligation of a State towards the international community as a whole".[765] The Appeals Chamber found that there was no customary rule prohibiting national amnesty laws, but a development towards an exclusion of such laws in international law.[766]

Observation 234

The Special Court for Sierra Leone referred to the judgment of the International Military Tribunal, an International Court of Justice decision and principles formulated by the International Law Commission when determining that Heads of State did not enjoy immunity from prosecution before international criminal courts and tribunals.

487. In the *Taylor* case, the Appeals Chamber referred variously to the Charter and judgment of the International Military Tribunal, the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,

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[762] *Prosecutor v. Morris Kallon, Sam Hinga Norman and Brima Bazzy Kamara*, Cases Nos. SCSL-2004-15-AR72(E), SCSL-2004-14-AR72(E) and SCSL-2004-16-AR72(E), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, Appeals Chamber, paras. 54-56.

[763] *Prosecutor v. Morris Kallon and Brima Buzzy Kamara*, Cases Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, Appeals Chamber, paras. 68 and 70, referring to *In re List* et al., United States Military Tribunal at Nuremberg, Judgment, 29 July 1948, in *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. VIII, p. 1242, and *Attorney-General (Israel) v. Adolf Eichmann*, Judgment, 29 May 1962, Supreme Court, *International Law Reports*, vol. 36, p. 5, at p. 12.

[764] *Ibid.,* para. 71.

[765] *Ibid.,* para. 73.

[766] *Ibid.,* para. 82.

formulated by the International Law Commission, and a of the International Court of Justice (the *Arrest Warrant* case) when determining that a Head of State did not enjoy immunity from prosecution before the Special Court for Sierra Leone: "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court".[767]

(c) Example referring to interpretation of the Statute of the Special Court for Sierra Leone

Observation 235

The Special Court for Sierra Leone referred to a decision of the International Court of Justice when stating that it interprets the Agreement establishing the Special Court and its annexed Statute in accordance with articles 31 to 33 of the Vienna Convention on the Law of Treaties.

488. The Appeals Chamber of the Special Court for Sierra Leone referred to a decision of the International Court of Justice when stating that it looks first to the constitutive documents of the Court, its Agreement and Statute, and interprets them in accordance with articles 31 to 33 of the Vienna Convention on the Law of Treaties, which may be considered as reflecting a codification of customary international law.[768]

(d) Examples that relate to customary international law

Observation 236

The Special Court for Sierra Leone has referred to the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind as being non-binding, but constituting evidence of customary international law.

489. The Special Court's Appeals Chamber referred to the draft Code as non-binding, but constituting evidence of customary international law, or as shedding light on customary rules in the process of formation, or at the least as indicative of the legal views of eminently qualified publicists representing the major legal systems of the world. The Appeals Chamber also referred to the Commission's commentaries to the 1996 draft Code and the Commission's object under its statute to promote the progressive development of international law and its codification.[769] The reference to the draft Code as indicative of the legal views of eminently qualified publicists representing the major legal systems of the world may be a non-express reference by the Court's Appeals Chamber to the Commission's draft Code as constituting subsidiary means under Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

Observation 237

The Special Court for Sierra Leone has referred to post-Second World War judicial decisions and "subsequent case law" as demonstrating that under customary international law, an accused's knowing participation in crimes amounts to a culpable *mens rea* for individual criminal responsibility.

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[767] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-2003-01-1, Decision on immunity from jurisdiction, 31 May 2004, Appeals Chamber, para. 52.

[768] *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A, Judgment, 26 September 2013, Appeals Chamber, para. 350 and footnote 1085, citing *Arbitral Award of 31 July 1989* (see footnote 202 above), para. 48, for authority that articles 31 and 32 of the Vienna Convention on the Law of Treaties are considered a codification of existing customary international law.

[769] *Ibid*., para. 428.

490. On this basis, the Special Court's Appeals Chamber determined that such knowledge is a culpable *mens rea* under customary international law for aiding and abetting the commission of a crime.[770]

Observation 238

On occasion, the Special Court for Sierra Leone referred to a decision of the International Court of Justice to indicate that the defence of necessity as a ground to preclude wrongfulness was a rule of customary international law.

491. In *Fofana and Kondewa,* a Trial Chamber of the Special Court referred to the judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros* case as "clearly express[ing] the view that the defence of necessity was in fact recognised by customary international law and it was a ground available to States in order to evade international responsibility for wrongful acts".[771]

(e) Examples that state the court's approach to precedent and consistency

Observation 239

The Appeals Chamber of the Special Court for Sierra Leone has stated that, in applying the Statute of the Special Court for Sierra Leone and customary international law, it is guided by decisions of the Appeals Chambers of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, and also of the Appeals Chamber of the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon "and other sources of authority".[772]

492. In stating the above, the Special Court's Appeals Chamber stated also that it is the final arbiter of the law for the Special Court, the decisions of other courts being only persuasive and having no binding authority: "The Special Court for Sierra Leone Appeals Chamber recognises and respects that the [International Criminal Tribunal for the Former Yugoslavia] Appeals Chamber is the final arbiter of the law for that court".[773]

493. In the *Norman* case, the Appeals Chamber indicated that:

> The Statute requires the Appeals Chamber to look to the jurisprudence of the [International Criminal Tribunal for the Former Yugoslavia] and [International Criminal Tribunal for Rwanda] Appeals Chambers for guidance, but does not require the Appeals Chamber of the Special Court to follow this jurisprudence. This body of case law is persuasive, but it is not directly applicable or binding. While there is value in developing a coherent approach across international criminal tribunals on both substantive and procedural questions, it must be emphasised that the Special Court is a hybrid court. Useful guidance may be gleaned from the experience of the other international criminal tribunals, but this Special Court is not bound by their decisions. This Appeals Chamber will, however, follow relevant jurisprudence where it is appropriate to do so.[774]

[770] *Taylor*, Appeal Judgment (see footnote 768 above), para. 483.
[771] *Prosecutor v. Moinina Fofana and Allieu Kondewa,* Case No. SCSL-04-14-T, Judgment, 2 August 2007, Trial Chamber, para. 84.
[772] *Taylor*, Appeal Judgment (see footnote 768 above), para. 472.
[773] *Ibid*.
[774] *Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Decision on interlocutory appeals against Trial Chamber decision refusing to subpoena the President of Sierra Leone, 11 September 2006, Appeals Chamber, para. 13.

Observation 240

The Special Court for Sierra Leone departed from a finding in a decision of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia when it considered it not to be persuasive authority and where another decision of the Special Court for Sierra Leone had also rejected that finding.

494. The Appeals Chamber of the Special Court did not consider as persuasive authority the International Criminal Tribunal for the Former Yugoslavia "*Brđanin* Trial judgment's holding that planning is distinguished from other forms of criminal participation by a requirement of 'specificity'". Further, in *Brima*, the Special Court's Trial Chamber had rejected that holding as an overly narrow construction of the responsibility for planning, and held that the requirement of a substantial contribution or effect was sufficient to establish the culpable link between the accused and the crimes.[775]

(f) Examples where judicial decisions have been referred to when determining questions of international criminal law or procedure

Observation 241

The Special Court for Sierra Leone has referred frequently to decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda when considering questions of international criminal law and procedure.

495. The Special Court's Appeals Chamber referred, for example, to the *Perišić* appeal judgment and the *Tadić* appeal judgment when considering the elements necessary for aiding and abetting the commission of a crime, and the differences between aiding and abetting and joint criminal enterprise.[776] A further example concerns the Appeals Chamber's reliance on decisions of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia summarized in its judgment in *Blaškić*, regarding the *mens rea* necessary for superior responsibility.[777] Decisions of the International Criminal Tribunal for Rwanda were referred to by the Special Court's Appeals Chamber, for example, when considering the prosecution practice of alleging multiple crimes from the same underlying conduct and the impermissibility of cumulative convictions except where not based on the same underlying conduct.[778]

Observation 242

The Special Court for Sierra Leone referred to its own previous decisions when concluding that, in upholding an accused's fair trial rights, the trier of fact must

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[775] *Taylor*, Appeal Judgment (see footnote 768 above), para. 492, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004, Trial Chamber, and Special Court for Sierra Leone, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Judgment, Trial Chamber, 20 June 2007, Trial Chamber, para. 768.

[776] *Taylor*, Appeal Judgment (see footnote 768 above), para. 478, citing *Tadić*, Judgment, Appeals Chamber (see footnote 538 above), paras. 185-229; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Judgment, Appeals Chamber, 28 February 2013, paras. 26-27, and International Criminal Tribunal for the Former Yugoslavia, *Mile Mrkšić and Veselin Sljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009, Appeals Chamber, para. 32.

[777] *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Judgment, 26 October 2009, Appeals Chamber, para. 70, citing *Blaškić*, Appeal Judgment (see footnote 514 above), para. 219.

[778] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-A, Judgment, 22 February 2008, Appeals Chamber, para. 212, citing *Kayishema and Ruzindana*, Trial Judgment (see footnote 153 above), para. 627; and *Akayesu* (see footnote 630 above), para. 468.

determine whether the prosecution has proved an accused's guilt beyond a reasonable doubt.[779]

496. The Appeals Chamber relied further on the Special Court's own previous decisions in determining that, if the trier of fact concludes that an accused's guilt has been so proved, it must determine an appropriate sentence in light of the totality of the convicted person's culpable conduct.[780]

(g) Examples of reliance on domestic court decisions

Observation 243

In application of the applicable law provisions in the context of sentencing, the Special Court for Sierra Leone has held that the Trial Chamber must take into account certain factors in determining an appropriate sentence, including the general practice of the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.[781]

(h) Examples of references to writings

Observation 244

The Special Court for Sierra Leone referred only occasionally to writings in support of its reasoning.

497. For example, the Appeals Chamber referred to an international law textbook, for example, to support part of its reasoning when finding that Charles Taylor had standing to submit an application asserting his immunity from the jurisdiction of the Court as a Head of State even though he had not submitted to incarceration by the Court nor made an initial appearance before it.[782]

5. Extraordinary Chambers in the Courts of Cambodia

498. The applicable law provisions in accordance with which the Extraordinary Chambers in the Courts of Cambodia are to exercise their jurisdiction are contained in the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Extraordinary Chambers in the Courts of Cambodia Agreement).[783] The Agreement sets out the crimes over which the Extraordinary Chambers have jurisdiction, and the personal and temporal scope of its jurisdiction: "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law,

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[779] *Taylor*, Appeal Judgment (see footnote 768 above), para. 591, citing *Sesay*, Appeal Judgment (see footnote 777 above), para. 1229; Special Court for Sierra Leone, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Judgment, 28 May 2008, Appeals Chamber, para. 546.

[780] *Taylor*, Appeal Judgment (see footnote 768 above), para. 591.

[781] *Ibid*., para. 650.

[782] *Taylor*, Decision on Immunity from Jurisdiction (see footnote 767 above), paras. 15-16, 27 and 32, referring to Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge, Cambridge University Press, 2003), p. 623.

[783] Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117. The Extraordinary Chambers in the Courts of Cambodia was established by the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, 10 August 2001, which is Cambodian national legislation. This was subsequently amended by the Law to Amend the 2001 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, 27 October 2004. Both pieces of Cambodian national legislation are available on the website of the Extraordinary Chambers at www.eccc.gov.kh/en/document/legal/law-on-eccc.

international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979".[784]

499. Articles 12, paragraph 2, and 13 of the Extraordinary Chambers in the Courts of Cambodia Agreement expressly incorporate articles 14 and 15 of the International Covenant on Civil and Political Rights concerning fair trial into the Extraordinary Chambers in the Courts of Cambodia Agreement and state that "the Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law".

500. Article 12, paragraph 1, of the Extraordinary Chambers in the Courts of Cambodia Agreement concerning procedure before the Chambers states that:

> The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

Observation 245

The Extraordinary Chambers in the Courts of Cambodia have interpreted the applicable law provision in article 12, paragraph 1, of the Extraordinary Chambers in the Courts of Cambodia Agreement as including seeking guidance on procedural matters from judicial decisions of comparable international criminal tribunals.

501. The Chambers, referring to article 12, paragraph 1, stated that: "[t]he [Chambers are] therefore authorised by the UN-RGC Agreement and [Extraordinary Chambers in the Courts of Cambodia] Law to seek guidance under this system in procedural rules established at the international level, including their interpretation by relevant international judicial bodies".[785] In other words, the Supreme Court Chamber interpreted article 12, paragraph 1, of the Extraordinary Chambers in the Courts of Cambodia Agreement to refer not only to procedural rules adopted by comparable international criminal tribunals, but also to decisions of such tribunals interpreting those rules.

502. The Supreme Court Chamber, referring to the Appeal Judgment in the first case of the Extraordinary Chambers, reiterated that "the Supreme Court Chamber is authorised under Article 12 of the [Extraordinary Chambers in the Courts of Cambodia] Agreement to seek guidance in the rules applicable at the international level" and "to derive its standard for the review of factual findings of the Trial Chamber from the approaches of the [International Criminal Tribunal for the Former Yugoslavia] and the [International Criminal Tribunal for Rwanda]".[786] In the same case, the Supreme Court Chamber relied on the equivalent provisions in the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda,[787] as well as

[784] Extraordinary Chambers in the Courts of Cambodia Agreement, art. 1.

[785] *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007-ECCC/SC, Judgment, 3 February 2012, Appeals Chamber, para. 13.

[786] *Prosecutor v. Khieu Samphân and Nuon Chea*, Case No 002/19-09-2007-ECCC/SC, Judgement, 23 November 2016, Appeals Chamber, para. 94.

[787] *Ibid*., para. 26, citing Rule 115(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia and Rule 115(B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

decisions by these two tribunals[788] and a judgment of the Appeals Chamber of the International Criminal Court.[789]

(a) Express reference to subsidiary means or to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice

Observation 246

The Extraordinary Chambers in the Courts of Cambodia have not made express reference in any of their decisions to subsidiary means for the determination of rules of international law nor to Article 38, paragraph 1 (d), of the Statute of the International Court of Justice.

503. As the Extraordinary Chambers have not made any express references to subsidiary means nor to Article 38, paragraph 1 (d), in any of its decisions, the Secretariat should not be understood as taking a view on whether or to what extent the examples presented in the present section may constitute a use of judicial decisions and other materials as subsidiary means for the determination of rules of international law.

(b) Reference to the interpretation of the Extraordinary Chambers in the Courts of Cambodia Agreement

Observation 247

The Extraordinary Chambers in the Courts of Cambodia have determined that their approach to interpreting provisions of the Extraordinary Chambers in the Courts of Cambodia Agreement is through the application of articles 31 and 32 of the Vienna Convention on the Law of Treaties, and also seeking guidance from "international jurisprudence" on comparable provisions in other jurisdictions.

504. The Supreme Court Chamber in Case 001 stated that the term "senior leaders of Democratic Kampuchea and those who were most responsible" in article 1 of the Extraordinary Chambers in the Courts of Cambodia Agreement:

> "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Extraordinary Chambers in the Courts of Cambodia Agreement] in their context and in the light of its object and purpose." When the interpretation according to Article 31 "leads to a result which is manifestly absurd or unreasonable," Article 32 of the Vienna Convention permits "[recourse [...] to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to [...] determine the meaning." The Supreme Court Chamber may also seek guidance in international jurisprudence on comparable provisions in other jurisdictions. The Supreme Court Chamber therefore must evaluate the term

[788] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 27, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Popović* et al., Case No. IT-05-88-A, Decision on Vujadin Popović's motion for admission of additional evidence on appeal pursuant to rule 115, 20 October 2011, Appeals Chamber, paras. 8-9, and *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on Momčilo Krajišnik's motion to present additional evidence and to call witnesses pursuant to rule 115, and to reconsider decision not to call former counsel, 6 November 2008, Appeals Chamber, para. 7; and International Criminal Tribunal for Rwanda, *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, para. 6.

[789] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 28, citing International Criminal Court, *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, Appeals Chamber, para. 59.

> "senior leaders of Democratic Kampuchea and those who were most responsible" using these canons of interpretation.[790]

505. The Supreme Court Chamber went on to rely on a decision of the Appeals Chamber of the Special Court for Sierra Leone to support its conclusion that the term "most responsible" in article 1 of the Extraordinary Chambers in the Courts of Cambodia Agreement is not a jurisdictional requirement, but constitutes investigatorial and prosecutorial policy which guides the co-investigating judges and co-prosecutors in exercising their independent discretion in investigating and prosecuting the most serious offenders falling within the jurisdiction of the Extraordinary Chambers.[791]

(c) Reference to the sources of international law and the relations between them

Observation 248

The Extraordinary Chambers in the Courts of Cambodia have referred to the applicable law as encompassing not only the Extraordinary Chambers in the Courts of Cambodia Agreement but also the sources of international law set out in Article 38, paragraph 1, of the Statute of the International Court of Justice and have stated that complex questions arising regarding the emergence of rules of international criminal law from these sources and the relations among the sources have to a large extent been addressed in decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

506. The Supreme Court Chamber stated in Case 001 that the applicable law was not limited to the Extraordinary Chambers in the Courts of Cambodia Agreement but encompassed "international conventions, customary international law and general principles of law recognised by the community of nations applicable at the relevant time".[792] In doing so, it referenced Article 38 of the Statute of the International Court of Justice but did not expressly mention subsidiary means for the determination of rules of international law nor Article 38, paragraph 1 (d).[793] It stated that complex questions that arise regarding the emergence of international criminal law rules from these sources and the relations among them have been, to a large extent, addressed in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.[794]

Observation 249

The Extraordinary Chambers in the Courts of Cambodia have relied on International Criminal Tribunal for the Former Yugoslavia decisions to support their position regarding the interplay between treaty law and customary international law in the formation and the determination of rules of international criminal law.

507. The Extraordinary Chambers in the Courts of Cambodia has relied on International Criminal Tribunal for the Former Yugoslavia decisions to support the view that treaty law and customary international law often mutually support and supplement each other in the context of determining whether criminal offences existed at the time of the Extraordinary Chambers' temporal jurisdiction: "[t]reaty law may serve as evidence of customary international law either by declaring the *opinio*

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[790] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 59.
[791] *Ibid*., paras. 73–74, citing *Brima*, Appeal Judgment (see footnote 778 above), para. 282.
[792] *Ibid*., para. 92.
[793] *Ibid.,* para. 92, footnote. 169.
[794] *Ibid.,* para. 92.

juris of States Parties, or articulating the applicable customary international law that had already crystallised by the time of the treaty's adoption".[795] On this basis, for example, the Supreme Court Chamber determined that conclusions reached by post-Second World War tribunals coupled with the definition of slavery found in the Slavery Convention[796] evidenced the state of customary international law concerning enslavement as a crime against humanity at that time.[797]

(d) References to the formation or identification of rules of customary international law

Observation 250

The Extraordinary Chambers in the Courts of Cambodia have relied on decisions of national and regional courts to support its determination that the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal reflected the state of customary international law with respect to crimes against humanity in 1946.

508. The Supreme Court Chamber relied on decisions of national and regional courts when deciding that, with respect to crimes against humanity, the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal accurately reflected the state of customary international law as it existed in 1946. The Principles were not adopted by the General Assembly and, accordingly, the Supreme Court Chamber considered that it could determine whether they were an accurate reflection of the general principles of international law found in the Charter and Judgment of the International Military Tribunal as of 1946.[798]

Observation 251

The Extraordinary Chambers in the Courts of Cambodia have frequently relied on decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda to support their approach to evaluating the emergence of rules of customary international criminal law and the existence of such rules at the time of the Extraordinary Chambers' temporal jurisdiction.

509. The Extraordinary Chambers have acknowledged that heavy reliance has been placed by its Trial Chamber on decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda when determining the existence of crimes or modes of liability and interpreting the law relating to them. The Supreme Court Chamber emphasized that those decisions were non-binding and were not primary sources of international law for the Extraordinary Chambers. The Extraordinary Chambers benefit "from the reasoning of the [International Criminal Tribunal for the Former Yugoslavia] and the [International Criminal Tribunal for Rwanda] in their articulation and development of international criminal law, in light of the protective function of the principle of legality", but the Chambers of the Extraordinary Chambers "are under an obligation to determine that

[795] *Ibid.,* para. 94, citing *Tadić*, Judgment, Appeals Chamber (see footnote 538 above), para. 98; and *Galić*, Appeal Judgment (see footnote 634 above), para. 85.

[796] Slavery Convention (Geneva, 25 September 1926), League of Nations, *Treaty Series*, vol. LX, No. 1414, p. 253.

[797] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 132.

[798] *Ibid*., para. 112, citing *Eichmann* (see footnote 763 above) pp. 277-278; *Touvier* (see footnote 579 above); *Barbie* (see footnote 527 above), p. 139; European Court of Human Rights, *Kolk and Kislyiy v. Estonia* (decision), Nos. 23052/04 and 24018/04, ECHR 2006-I, p. 3; Bosnia and Herzegovina, *Prosecutor v. Ivica Vrdoljak,* Court of Bosnia and Herzegovina, Section I for War Crimes X-KR-08488, 10 July 2008, p. 12; European Court of Human Rights, *Korbely v. Hungary* [Grand Chamber], No. 9174/02, ECHR 2008, para. 81.

the holdings on elements of crimes or modes of liability" in those decisions "were applicable during the temporal jurisdiction" of the Extraordinary Chambers. The Supreme Court Chamber stressed that "careful, reasoned review" of those decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda was "necessary for ensuring the legitimacy of the [Extraordinary Chambers in the Courts of Cambodia] and its decisions".[799]

510. The Extraordinary Chambers have relied on decisions of the International Criminal Tribunal for the Former Yugoslavia to support the view that, in evaluating the emergence of a rule of customary international law "concerning conduct that offends the laws of humanity or the dictates of public conscience", the traditional requirement of "extensive and virtually uniform" State practice may be less stringent than in other contexts, and "the requirement of *opinio juris* may take pre-eminence over the *usus* element of custom". In the field of individual criminal responsibility under international law, it had to be borne in mind that prosecution requires "not only the existence of an established legal norm proscribing the conduct" in question as criminal, but also "a plethora of complex factors that render the prosecution possible", including "the identification of the accused, the availability of evidence and political will" to prosecute. Taking all of these inherent difficulties into account, a paucity of prosecutions could not be found "to disprove automatically the existence of State practice in this regard under international law".[800]

Observation 252

In establishing that crimes against humanity existed as crimes in 1975, the Extraordinary Chambers in the Courts of Cambodia relied on the judgment of the International Military Tribunal, decisions in cases before the Nürnberg Military Tribunals under Control Council Law No. 10 in the occupied areas of Germany, and judicial decisions in a number of national cases.

511. In determining that crimes against humanity existed as crimes in 1975, the Supreme Court Chamber relied on the fact that crimes against humanity had been prosecuted before the International Military Tribunal,[801] in cases before the Nürnberg Military Tribunals under Control Council Law No. 10 in the occupied areas of

[799] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 97.

[800] *Ibid.,* para. 93, citing *Tadić*, Decision on the defence motion for interlocutory appeal on jurisdiction (see footnote 352 above), paras. 98-99; and *Kordić and Čerkez*, Appeal Judgment (see footnote 540 above), para. 44.

[801] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 103, citing *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, vol. I, pp. 173-174 and 253-255.

Germany,[802] and in a number of national prosecutions in respect of conduct that occurred prior to 1975.[803]

512. Furthermore, in determining that "other inhumane acts" was accepted as a residual category of crimes against humanity under customary international law in 1975, the Supreme Court Chamber relied on the relevant provisions of the Charter of the International Military Tribunal, the Charter of the International Military Tribunal for the Far East, the Control Council Law No. 10 and the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, as well as jurisprudence deriving from post-Second World War cases, to draw the conclusion that "it has been established that 'other inhumane acts' constituted an established component of international criminal law at the time" of the alleged criminal conduct.[804]

Observation 253

The Extraordinary Chambers in the Courts of Cambodia have relied on judicial decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Military Tribunal to support its interpretation of the mental element of extermination as a crime against humanity.

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[802] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 103, referring to Control Council Law No. 10, art. II (1) (c); and *ibid*., para. 139, citing cases under Control Council Law No. 10 reaching convictions for enslavement, torture and persecution as crimes against humanity: *U.S. v. Pohl* et al., Judgment, 3 November 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, October 1946 – April 1949*, vol. V (United States Government Printing Office, 1949-1953), p. 970; *U.S. v. Milch*, reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. II, p. 791 and pp. 779-785, 789-790; U*.S. v. Flick* et al., reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. VI, pp. 1195-1196; *U.S. v. Krauch* et al., reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. VIII, ("*I.G. Farben* Case"), pp. 1172-1173; *U.S. v. Krupp* et al., reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. IX, pp. 1396-1409; and *U.S. v. von Weizsaecker* et al., reprinted in *Trials of War Criminals before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. XIV, ("*Ministries* Case"), pp. 794-800.

[803] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 103, citing *Poland v. Greiser,* Case No. 74, Judgment, 7 July 1946, *Law Reports of Trials of War Criminals: Selected and Prepared by the United Nations War Crimes Commission* (United Nations War Crimes Commission, 1949), vol. XIII, pp. 104-106; *Eichmann* (see footnote 763 above), pp. 277-342; France, *Barbie*, Confirmation of Conviction (see footnote 579 above), *International Law Reports*, vol. 100, p. 330; *Kupreškić*, Trial Judgment (see footnote 514 above), para. 602, citing Croatia, *Artuković*, Doc. No. K-1/84-61, 14 May 1986, Zagreb District Court, pp. 23 and 26.

[804] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 576, citing Charter of the International Military Tribunal, art. 6 (c); Charter of the International Military Tribunal for the Far East, art. 5 (c); Control Council Law No. 10, art. II, para. 1 (c); Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle VI (c); *Ministries* Case (see footnote 802 above), pp. 467-468 (the Accused were indicted for a range of crimes, "including murder, extermination, enslavement, imprisonment, killing of hostages, torture, persecutions on political, racial, and religious grounds, and other inhumane and criminal acts"); *U.S. v. Brandt* et al., Judgment, 19 August 1946, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, vol. II ("*Medical* Case"), p. 198 (accused found guilty for taking a consenting part in "atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed"); *Gerbsch* Case, Judgment, 28 April 1948, Special Court, Netherlands, in *Law Reports of Trials of War Criminals* (London, His Majesty's Stationery Office, 1949), vol. XIII, p. 134 ("[a]cts of ill-treatment are covered by the terms 'other inhumane acts'"); *Zuehlke* Case, Judgment, 3 August 1948, Special Court, Netherlands, in *Law Reports of Trials of War Criminals* (London, His Majesty's Stationery Office, 1949), vol. XIV, p. 145 (illegal detention "fell under the notion of 'other inhumane acts committed against any civilian population'").

513. The Supreme Court Chamber has referred to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Military Tribunal[805] to explain and support its views on the mental element of the crime against humanity of extermination and concluded that, different from murder, the *mens rea* of the crime of extermination does not include the notion of *dolus eventualis*, instead, "direct intent to kill on a large scale must be established".[806]

Observation 254

The Extraordinary Chambers in the Courts of Cambodia have relied on post-Second World War judicial decisions and decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Special Tribunal for Lebanon to determine the existence and scope of criminal liability in relation to joint criminal enterprise.

514. The Supreme Court Chamber has relied on a variety of judicial decisions, including a decision of the Extraordinary Chambers' Pre-Trial Chamber, post-Second World War cases, and decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the Special Tribunal for Lebanon, to determine the existence and scope of criminal liability in relation to joint criminal enterprise.[807] While conceding that "the jurisprudence is not always clear in this regard"[808] and "may not always have used consistent terminology", it concluded that "it is sufficient to establish that the accused were held criminally liable for crimes committed in the course of the implementation of a common purpose to which they had made some kind of contribution beyond being a bystander", and "criminal liability for making a contribution to the implementation of a common criminal purpose arose only with respect to crimes actually encompassed by the common purpose". In so far as such crimes merely "resulted from" the implementation of the common purpose, the Trial Chamber had erred in "importing a notion of criminal liability that did not exist either

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[805] *Khieu Samphân and Nuon Chea* (see footnote 786 above), paras. 517 and 520, citing International Criminal Tribunal for the Former Yugoslavia, *Karadžić*, Case No. IT-65-5/18-T, Judgment, 24 March 2016, para. 483, and *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Judgment, 4 December 2012, Appeals Chamber, para. 536; *Stakić*, Appeal Judgment (see footnote 633 above), para. 259; International Criminal Tribunal for Rwanda, *Prosecutor v. Athanase Seromba*, Case No. ICTR-01-66-A, Judgment, 12 March 2008, Appeals Chamber, para. 189; International Military Tribunal Judgment, in *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, pp. 247-255; *Semanza*, Trial Judgment (see footnote 153 above), para. 340.

[806] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 522.

[807] *Ibid*., para. 773, citing *Ieng Thirith, Ieng Sary and Khieu Samphân*, Case No. 002/19-09-2007-ECCC/OICJ (PTC38), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise, 20 May 2010, Pre-Trial Chamber, para. 53 et seq.; *Tadić*, Appeal Judgment (see footnote 538 above), para. 185 et seq.; *Brđanin*, Appeal Judgment (see footnote 633 above), para. 393 et seq.; *Rwamakuba*, Decision on Interlocutory Appeal (see footnote 646 above), para. 9 et seq.; *Brima*, Appeal Judgment (see footnote 778 above), para. 75 et seq; Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, No. STL-11-01/I/AC/R176bis, 16 February 2011, Appeals Chamber, para. 237 et seq. See also *ibid*., paras. 780-787, citing *Almelo* Case, British Military Court, The Netherlands in *Law Reports of Trials of War Criminals* (London, His Majesty's Stationery Office, 1947), vol. I, pp. 35-36 and 43; *Schonfeld* Case, British Military Court, Germany, in *Law Reports of Trials of War Criminals* (London, His Majesty's Stationery Office, 1949), vol. XI, pp. 66-67; *Einsatz-gruppen* Case (see footnote 577 above), pp. 411-412; *U.S. v. Greifelt* et al., Judgment, 10 March 1948, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10*, vols. IV-V, ("RuSHA Case"), p. 103; *Justice* Case (see footnote 577 above), p. 985.

[808] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 776.

under customary international law … or as a general principle of law" at the time of the alleged offences. [809]

(e) Examples of references to principles

Observation 255

The Extraordinary Chambers in the Courts of Cambodia has relied on its own prior decisions when considering the principle of legality (*nullum crimen sine lege*) in international criminal law.

515. The Supreme Court Chamber has endorsed the position taken by the Extraordinary Chambers in previous cases regarding the foreseeability requirement of the principle of legality, such that an accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision". The foreseeability of the criminal consequences of the alleged acts could be demonstrated by the existence of an applicable treaty or customary international law during the relevant period. [810]

Observation 256

The Extraordinary Chambers in the Courts of Cambodia have frequently relied on judicial decisions of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda as a source of guidance when examining the principle of legality (*nullum crimen sine lege*) in international criminal law.

516. The Extraordinary Chambers have relied on decisions of the International Criminal Tribunal for the Former Yugoslavia to determine that the principle of legality applies equally to criminal offences, as well as to forms of responsibility that are charged against an individual accused. The offences and modes of liability charged before the Extraordinary Chambers must have existed either under national law or international law at the time of the alleged criminal conduct occurring between 17 April 1975 and 6 January 1979. [811] Further, once it is established that a charged offence or mode of liability existed as a matter of national or international law at the time of the alleged criminal conduct, the principle of legality does not prohibit the Extraordinary Chambers from interpreting and clarifying the law or from relying on those decisions that do so in other cases. [812] This principle, however, does prevent a Chamber "from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification". [813]

517. Decisions of the International Criminal Tribunal for the Former Yugoslavia have further been relied on when deciding that fairness and due process concerns underlying the principle of legality require that charged offences or modes of responsibility were "sufficiently foreseeable and that the law providing for such liability [was] sufficiently accessible [to the accused] at the relevant time". [814] The

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[809] *Ibid*., para. 810.

[810] *Duch*, Appeal Judgment (footnote 785 above), para. 160, citing *Prosecutor v. Nuon Chea* et al., Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, Pre-Trial Chamber, para. 106, quoting *Ieng Thirith, Ieng Sary and Khieu Samphân*, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (see footnote 807 above), para. 45.

[811] *Duch*, Appeal Judgment (footnote 785 above), para. 91, citing *Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction (see footnote 525 above), paras. 34-44.

[812] *Ibid*., para. 95, citing *Aleksovski*, Appeal Judgment (see footnote 519 above), paras. 126-127.

[813] *Ibid*., para. 95, citing *Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction (see footnote 525 above), para. 38.

[814] *Ibid*., para. 96, citing *Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction (see footnote 525 above), paras. 21 and 37; and *Blagojević and Jokić*, Trial Judgment (see footnote 704 above), para. 695, footnote 2145.

Extraordinary Chambers have also relied on decisions of the International Criminal Tribunal for the Former Yugoslavia in support of the position that "[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation […], it may in fact play a role [...] insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts".[815]

518. Similarly, the Supreme Court Chamber has referred to the wording of decisions of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda concerning "severe mental or physical suffering" or "serious bodily or mental harm",[816] to support its conclusion that the notion of "other inhumane acts" is "sufficiently clear and precise to be consistent with the tenets of accessibility and foreseeability deriving from the principle of legality", "if interpreted and applied in a way so as to restrain the scope of this residual category".[817] Based on an analysis of wording used by the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, as well as the definition provided for in the Rome Statute,[818] the Supreme Court further specified the three particular elements of the crime of inhumane acts,[819] and highlighted that the limitations set by the elements on "other inhumane" acts "enjoy broad support within the corpus of modern international criminal law, and that they adequately circumscribe 'other inhumane acts'".

Observation 257

The Extraordinary Chambers in the Courts of Cambodia have referred to writings to explain the functions of the principle of legality and to support the Extraordinary Chambers' finding that the principle is of particular importance in international criminal law.

519. The Supreme Court Chamber has referred to writings on international criminal law when explaining the purpose of the principle of legality as a means of protecting individual rights in three functional respects: ensuring that individuals who wish to avoid criminal liability may do so by receiving notice of which acts lawmakers deem to be criminal; protecting the individual as a procedural matter against arbitrary exercise of political or judicial power by preventing legislative targeting or conviction of specific persons without stating legal rules in advance; and providing an analogue

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[815] *Ibid*., para. 96, citing *Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction (see footnote 525 above), para. 42.

[816] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 579, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004, Appeals Chamber, para. 165; *Kordić and Čerkez*, Appeal Judgment (see footnote 540 above), para. 117; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgment, 12 December 2007, Trial Chamber, para. 934; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment and Opinion, 5 December 2003, Trial Chamber, para. 152; *Blagojević and Jokić*, Trial Judgment (see footnote 704 above), para. 626; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002, Trial Chamber, para. 130; *Kajelijeli*, Trial Judgment (see footnote 666 above), paras. 932-933 ("serious injury to the mental or physical health"); *Kayishema and Ruzindana*, Trial Judgment (see footnote 153 above), para. 151. See also *Stakić*, Appeal Judgment (see footnote 633 above), para. 366 (the Appeals Chamber found that the crime of "other inhumane acts requires proof of an act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity").

[817] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 578.

[818] *Ibid*., para. 579, citing the Rome Statute, art. 7, para. 1 (k), which defines "other inhumane acts" as "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

[819] *Ibid*., para. 580. The three elements are that: (i) there was an act or omission of similar seriousness to the other acts enumerated as crimes against humanity; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed intentionally.

to the protection afforded by the separation of powers in national courts applying national laws. The Supreme Court found that the restraining function of the principle of legality was of particular importance in international criminal law as it prevented international or hybrid tribunals and courts from unilaterally exceeding their jurisdiction by providing clear limitations on what is criminal.[820]

(f) Examples concerning procedural matters

520. The Extraordinary Chambers have relied on decisions of the International Criminal Tribunal for the Former Yugoslavia to determine that applications asserting that the Extraordinary Chambers lack jurisdiction to try the case must be made in the initial hearing,[821] and to support the standard of review required by the Supreme Court Chamber when determining whether an error of law has been made by the Trial Chamber.[822] They have also relied on decisions of the International Criminal Tribunal for the Former Yugoslavia in support of the position that the Supreme Court Chamber may hear appeals in circumstances where the legal issue in question would not invalidate the trial judgment but is of "general significance" to the Extraordinary Chambers' "jurisprudence".[823] The Extraordinary Chambers have relied on decisions of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda in support of the finding that errors of fact in a trial judgment may only overturn that judgment where they occasion a miscarriage of justice.[824] A further example concerns the Supreme Court Chamber's decision that it has inherent power to satisfy itself *ex proprio motu*, in the interests of justice, that the Trial Chamber had jurisdiction to try the accused, and therefore to review the Trial Chamber's conclusions on jurisdiction.[825]

521. The Extraordinary Chambers have also relied on the decisions of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda, as well as the International Criminal Court, to support their approach to the review of discretionary decisions or decisions of a procedural nature by the Trial Chamber, i.e. it would intervene in the Trial Chamber's exercise of discretion only if it is tainted by a "discernible error […] which resulted in prejudice to the appellant".[826] The Supreme Court Chamber further referred to decisions of the

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[820] *Duch*, Appeal Judgment (footnote 785 above), para. 90, referring to Bassiouni, *Crimes against Humanity in International Criminal Law*, pp. 127-130; and Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge, Cambridge University Press, 2009), p. 26.

[821] *Ibid*., para. 28, citing *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Decision on Nebojša Pavković's Motion for a Dismissal of the Indictment Against Him on Grounds that the United Nations Security Council Illegally Established the International Criminal Tribunal for the Former Yugoslavia, 21 February 2008, Trial Chamber, para. 15.

[822] *Ibid.,* para. 14, citing *Krnojelac*, Appeal Judgment (see footnote 636 above), para. 10.

[823] *Ibid.,* para. 15, citing *Galić*, Appeal Judgment (see footnote 541 above), para. 6.

[824] *Ibid.,* para. 18, citing *Furundžija*, Appeal Judgment (see footnote 617 above), para. 37, and International Criminal Tribunal for Rwanda, *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A, Judgment, 3 July 2002, Appeals Chamber, para. 14.

[825] *Ibid.,* para. 37, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgment, 19 May 2010, Appeals Chamber, para. 19.

[826] *Khieu Samphân and Nuon Chea* (see footnote 786 above)*,* paras. 97-98, citing *Situation in Uganda in the Case of* Prosecutor v. Joseph Kony *et al.*, Case No. ICC-02/04-01/05, Judgment on the appeal of the Defence against the "Decision on admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, Appeals Chamber, paras. 79-80; *Krajišnik* (see footnote 788 above), para. 81; *Kupreškić*, Appeal Judgment (see footnote 587 above), paras 30-32; *Setako* (see footnote 661 above), para. 19; International Criminal Tribunal for Rwanda, *Siméon Nchamihigo v. Prosecutor*, Case No. ICTR-01-63-A, Judgment, 18 March 2010, Appeals Chamber, para. 18; *Šainović* (see footnote 549 above), para. 29; International Criminal Tribunal for Rwanda, *Grégoire Ndahimana v. Prosecutor*, Case No. ICTR-01-68-A, Judgment 16 Deccember 2013, Appeals Chamber, para. 14.

International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda to support its views on the evaluation of hearsay evidence by the Trial Chamber and drew the conclusion that "a trial chamber has broad discretion to consider and rely on hearsay evidence, though this must be done with caution".[827]

522. The Supreme Court Chamber also found decisions of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda persuasive to support its approach to assessing evidence and concluded that "a holistic evaluation and weighing of all the evidence taken together in relation to the fact[s]"is required, rather than a "piecemeal approach", and:

> not each and every fact in the Trial Judgement must be proved beyond reasonable doubt, but all facts underlying the elements of the crime or the form of responsibility alleged as well as all those which are indispensable for entering a conviction, especially facts forming the elements of the crime or the form of responsibility alleged against the accused[828]

Another example concerns the Supreme Court Chamber's reference to decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda to support its application of the its own Internal Rules to the assessment of the Trial Chamber's reliance on expert testimony to reach factual conclusions, including the admission of expert evidence and the weight given to it.[829]

Observation 258

The Extraordinary Chambers in the Courts of Cambodia have relied on its own prior judicial decisions as a source of guidance on procedural issues.

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[827] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 302, citing International Criminal Tribunal for Rwanda, *Emmanuel Rukundo v. Prosecutor*, Case No. ICTR-2001-70-A, Judgment, 20 October 2010, Appeals Chamber, para. 188; International Criminal Tribunal for Rwanda, *Emmanuel Ndindabahizi v. Prosecutor*, Case No. ICTR-01-71-A, Judgment, 16 January 2007, Appeals Chamber, para. 115; *Gacumbitsi* (see footnote 633 above), para. 115; International Criminal Tribunal for Rwanda, *Georges Anderson Nderubumwe Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, 26 May 2003, Appeals Chamber, paras. 34, 207 and 311; International Criminal Tribunal for Rwanda, *Tharcisse Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Judgment, 29 August 2008, Appeals Chamber, paras. 70 and 81; International Criminal Tribunal for Rwanda, *François Karera v. Prosecutor*, Case No. ICTR-01-74-A, Judgment, 2 February 2009, Appeals Chamber, paras. 39 and 178; *Kordić and Čerkez*, Appeal Judgment (see footnote 540 above), para. 281; *Gatete* (see footnote 661 above), para. 99; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgment, 27 January 2014, Appeals Chamber, para. 397.

[828] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 418, citing International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgment, 16 October 2007, Appeals Chamber, para. 129, referring to International Criminal Tribunal for Rwanda, *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanisimwe*, Case No. ICTR-99-46-A, Judgment, 7 July 2006, Appeals Chamber, para. 174; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgment, 9 May 2007, Appeals Chamber, para. 226; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment, 12 November 2009, Appeals Chamber, para. 20.

[829] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 328, citing International Criminal Tribunal for Rwanda, *Tharcisse Renzaho v. Prosecutor*, Case No. ICTR-97-31-A, Judgment, 1 April 2011, Appeals Chamber, paras. 287-288; *Nahimana*, Appeal Judgment (see footnote 636 above), paras. 198, 212 and 508-509; *Semanza*, Trial Judgment (see footnote 153 above), para. 303; International Criminal Tribunal for Rwanda, *Aloys Simba v. Prosecutor*, Case No. ICTR-01-76-A, Judgment, 27 November 2007, Appeals Chamber, para. 174; *Milošević*, Appeal Judgment (see previous footnote), para. 117; International Criminal Tribunal for Rwanda, *Théoneste Bagosora and Anatole Nsengiyumva*, Case No. ICTR-98-41-A, Judgment, 14 December 2011, Appeals Chamber, paras. 225 and 226, footnote 503; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Admission of Expert Report of Robert Donia, 15 February 2007, Trial Chamber, para. 11.

523. The Supreme Court Chamber used the principles set out in its own previous judicial decision (Decision on Civil Party Standing)[830] in Case 001 as the basis to draw its conclusion on the requirement for a party exercising the right to respond and reply to other parties' submissions – the party's rights and interests are directly affected by the submissions in question.[831] It also relied on its previous appeal judgment in Case 001 (*Duch* Appeal Judgment) when deciding the methodology to review alleged errors of law and the standard to determine a reversal or revision of a judicial decision and concluded that the amendment of a decision of the Trial Chamber will happen only if an error of law is identified as "invalidating the judgment or decision".[832] When determining the standard and scope as to the review of alleged errors of fact of the Trial Chamber, the Supreme Court Chamber again relied on its appeal judgment in Case 001 to draw the conclusion that the "standard of reasonableness" shall apply to the review of an impugned finding of fact[833] and its role shall be "mainly verifying whether the burden of proving the elements of the charges was met, rather than in repeating the hearing and substituting the trial findings with its own ones".[834]

Observation 259

The Extraordinary Chambers in the Courts of Cambodia have referred to decisions of the International Criminal Court to illustrate the difference between the procedural rules for victim participation at the Extraordinary Chambers compared to those at the International Criminal Court.

524. The Supreme Court Chamber has noted that, apart from the Extraordinary Chambers, the International Criminal Court and the Special Tribunal for Lebanon are the only other criminal tribunals of international character that allow participation by victims, and of those two, only the International Criminal Court has jurisdiction to grant reparations to victims. The Supreme Court Chamber has referred to decisions of the International Criminal Court to demonstrate the difference in approach at the Extraordinary Chambers, where the acceptance of a civil party application automatically entails the full range of participation rights available to civil parties. By contrast, at the International Criminal Court, victims do not have the status of a party to the proceedings but have a *sui generis* standing that does not automatically confer all the rights of participation. The right of audience and other participatory rights are selectively accorded by the Court upon the demonstration of a specific interest.[835]

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[830] *Prosecutor v. Khieu Samphân and Nuon Chea*, Case No. 002/01, Decision on Civil Party Lead Co Lawyers' Requests relating to the Appeals in Case 002/01, 26 December 2014, Supreme Court Chamber, paras. 14 et 17.

[831] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 81.

[832] *Ibid*., paras. 85-87. In case 001, the Supreme Court Chamber drew its conclusion on this question with reference to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, see *Duch* Appeal Judgment (footnote 785 above), para. 14.

[833] *Ibid*., paras. 88-89.

[834] *Ibid*., para. 94. In case 001, the Supreme Court Chamber relied on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda to decide on these questions.

[835] *Duch*, Appeal Judgment (footnote 785 above) paras. 477-479, citing *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, paras. 3 and 99; and *Katanga and Chui*, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, Appeals Chamber, para. 39; and *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on victims' participation, 18 January 2008, Trial Chamber I, para. 96.

(g) Examples concerning the approach of the Extraordinary Chambers in the Courts of Cambodia to precedent and consistency

Observation 260

The Extraordinary Chambers in the Courts of Cambodia have referred to decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court when determining that there is no formal doctrine of *stare decisis* or binding precedent in civil law systems such as that of Cambodia.[836]

525. The Supreme Court Chamber considered, nevertheless, that adhering to precedent allows for a uniform application of the law, promotes legal certainty, and ensures an accused's right to equality before the law. As a result, the Supreme Court Chamber has stated further that it consistently relies on and refers to its prior findings on rules of law and legal principles and that "international jurisprudence demonstrates a similar general adherence to precedent in pursuit of legal clarity and uniformity of the law".[837]

Observation 261

The Extraordinary Chambers in the Courts of Cambodia has stated that the Judgment of the International Military Tribunal does not constitute binding precedent for the Extraordinary Chambers but that, coupled with the Charter of the International Military Tribunal and General Assembly resolution 95 (I), it provided strong evidence of existing and newly emerging principles of international criminal law in 1946.

526. The Supreme Court Chamber relied on the Judgment of the International Military Tribunal when considering whether crimes against humanity existed under international law in 1975. In doing so, it stated that the Judgment of the International Military Tribunal does not constitute binding precedent for the Extraordinary Chambers, but that coupled with the Charter of the International Military Tribunal and General Assembly resolution 95 (I) of 11 December 1946, it provided strong evidence of existing and newly emerging principles of international criminal law at that time. Resolution 95 (I), adopted unanimously by the General Assembly, had affirmed the principles of international law recognized by the Charter and Judgment of the International Military Tribunal without endorsing any particular articulation or interpretation of such principles. Resolution 95 (I) was followed by resolution 177 (II) of 21 November 1947, in which the Assembly requested the newly established International Law Commission to formulate these principles and to prepare a draft Code of Offences against the Peace and Security of Mankind.[838]

(h) References to decisions of regional human rights courts

Observation 262

The Extraordinary Chambers have referred to the decisions of regional human rights courts when considering the requirement for judicial decisions to be sufficiently reasoned as an important element of a fair trial.

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[836] *Prosecutor v. Khieu Samphân*, Case No. 002/2 19-09-2007/SC, Appeal Judgment, 23 December 2022, Appeals Chamber, para. 47, citing *Kupreškić*, Trial Judgment (see footnote 514 above), para. 540.

[837] *Ibid*., para. 47, citing *Aleksovski*, Appeal Judgment (see footnote 519 above), paras. 93-95; and *Gbagbo*, Reasons for the "Decision on the 'Request for the recognition …'" (see footnote 707 above), para. 14.

[838] *Duch*, Appeal Judgment (footnote 785 above), para. 110.

527. The Supreme Court Chamber has referred to judicial decisions of the European Court of Human Rights,[839] along with the decisions of the Appeals Chambers of the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia, [840] to support its view that judicial decisions must be sufficiently reasoned, which it regarded as an important element of a fair trial. While acknowledging that "the reasoning required to ensure fairness of the proceedings will always depend on the specific circumstances of the case", it concluded that "[o]f most importance is that it is comprehensible how the chamber evaluated the evidence and reached its factual and legal conclusions".[841]

Observation 263

The Extraordinary Chambers in the Courts of Cambodia have referred to the decisions of the Permanent Court of International Justice, the International Court of Justice, and regional human rights courts as persuasive authority with regard to the content of the right to reparations for harm suffered.

528. The Extraordinary Chambers have referred to the judgment of the Permanent Court of International Justice in the *Chorzów Factory* case, referring to the principle of full reparation.[842] The Extraordinary Chambers also referred to the Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall*, which held that this principle applies also between States and individuals.[843]

529. The Supreme Court Chamber has referred to decisions of regional human rights courts as persuasive authority when assessing the content of the rights of victims to remedies, including victims of mass crimes. The Supreme Court Chamber drew a distinction between the jurisdiction of these regional human rights courts, which are focused on the breach of the duty on the part of the respondent State to uphold human rights, and criminal trials, which differ in terms of policy, technical legal framework and rules of interpretation.[844] The Supreme Court Chamber accordingly determined that forms of reparations owed by States differ from reparations that can be awarded against convicted persons. For those reasons, the Supreme Court Chamber decided to consider with caution the civil party appellants' references to decisions of international non-criminal courts. It decided to establish on a case-by-case basis the

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[839] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 203, citing European Court of Human Rights, *Hadjianastassiou v. Greece* Judgment, 16 December 1992, para. 33; *Taxquet v. Belgium* [Grand Chamber], No. 926/05, ECHR 2010, para. 91; *Boldea v. Romania*, No. 19997/02, 15 February 2007, para. 30 (French only, not available in English).

[840] *Khieu Samphân and Nuon Chea* (see footnote 786 above), paras. 204-206, citing International Criminal Court, *Situation in the Democratic Republic of the Congo in the Case of* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", para. 20; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Judgment on Sentencing Appeal, 8 March 2006, Appeals Chamber, para. 96; *Furundžija*, Appeal Judgment (see footnote 617 above), paras. 68-69; *Kunarac* (see footnote 635 above), para. 41; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Milan Milutinović* et al., Case No. IT-05-87, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojsa Pavkovic's Provisional Release, 1 November 2005, Appeals Chamber, para. 11; and *Kupreškić*, Appeal Judgment (see footnote 587 above), para. 32 (the Supreme Court Chamber cited this passage of the judgement with approval in the *Duch* Appeal Judgment (see footnote 785 above), para. 17).

[841] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 207.

[842] *Duch*, Appeal Judgment (footnote 785 above), para. 645, citing *Factory at Chorzów (Merits)* (see footnote 28 above), paras. 73 and 125.

[843] *Ibid.*, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (see footnote 117 above), paras. 152-153.

[844] *Ibid*., para. 652, citing *Velásquez Rodríguez* (see footnote 402 above), para. 134.

potential of such jurisprudence to be persuasive guidance. The Supreme Court Chamber expressed similar concerns regarding procedures used by administrative bodies, such as claims commissions created for the purpose of deciding reparations.[845]

530. The Extraordinary Chambers have made frequent reference to the decisions of regional human rights courts in the context of victims but has noted that both the Inter-American Court and the European Court of Human Rights have autonomous approaches to evidence that are not bound by national rules and depend on the nature of the violation and the issues in dispute between the parties. Such decisions focus on the violation of rights by States. The standard of proof is affected by the fact that the States parties to human rights treaties have a duty to cooperate with the Convention institutions in arriving at the truth.[846]

(i) Examples of references to decisions of national courts

Observation 264

The Extraordinary Chambers in the Courts of Cambodia have relied on decisions of national courts to support its interpretation of the Extraordinary Chambers in the Courts of Cambodia Agreement regarding its temporal jurisdiction.

531. The Supreme Court Chamber has relied on the jurisprudence of the United States and of England and Wales, in the absence of international decisions, to support its interpretation of the Extraordinary Chambers' temporal jurisdiction.[847] It concluded that, although the crimes that form the subject of the charges must fall within the period from 17 April 1975 to 6 January 1977, "the conduct giving rise to individual criminal liability based on participation in a joint criminal enterprise may have occurred before, provided it formed part of extended contributions to the implementation of a common purpose which continued after 16 April 1975", and such conduct would still fall within the temporal jurisdiction of the Extraordinary Chambers.[848]

(j) Examples of references to the outputs of human rights treaty bodies

Observation 265

The Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia has occasionally referred to general comments of the Human Rights Committee.

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[845] *Ibid*., para. 652.

[846] *Ibid*., para. 516, citing Inter-American Court of Human Rights: *Contreras et al. v. El Salvador*, Judgment (Merits, Reparations and Costs), 31 August 2011, para. 181; *Vera Vera v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 19 May 2011, para. 109; *Abrill Alosilla et al. v. Peru*, Judgment (Merits, Reparations and Costs), 4 March 2011, paras. 89-90; *Cabrera Garcia and Montiel Flores v. Mexico*, Judgment (Preliminary Objection, Merits, Reparations and Legal Costs), 26 November 2010, paras. 211-212; *Usón Ramírez v. Venezuela*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 20 November 2009, paras. 206-208; and *Acevedo Buendía et al. v. Peru ("Discharged and Retired Employees of the Comptroller")*, Judgment (Preliminary Objection, Merits, Reparations and Costs), 1 July 2009, paras. 111-114; and European Court of Human Rights, *Ireland v. the United Kingdom*, 18 January 1978, Series A No. 25, paras. 148, 161.

[847] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 216, citing *R. v. Becerra* (Court of Appeals, United Kingdom); *R. v. O'Flaherty* (Court of Appeals, United Kingdom) at para. 64, citing *R. v. Mitchell and King* (Court of Appeal Criminal Division, Scotland); *DPP v. Doot* (House of Lords, United Kingdom); *R. v. Governor of Brixton Prison* (House of Lords, United Kingdom); *R. v. Anderson* (William Ronald); *U.S. v. Kissel* (Supreme Court, United States); *Fiswick v. U.S.* (Supreme Court, United States); *U.S. v. Scarpa* (Court of Appeals, United States); *U.S. v. Maloney* (Court of Appeals, United States), citing *U.S. v. Elwell* (Court of Appeals, United States); *U.S. v. Seher* (Court of Appeals, United States); *U.S. v. Rouphael* (District Court, United States); *Smith v. U.S.* (Supreme Court, United States).

[848] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 221.

532. The Supreme Court Chamber has referred to a general comment of the Human Rights Committee in the context of the right of a person convicted to appeal against the trial judgement on the basis of an alleged error of law or fact that may invalidate the judgment or constitute a miscarriage of justice, including the Trial Chamber's decision on personal jurisdiction.[849] It has also referred to a general comment of the Human Rights Committee in respect of the individual's right to an effective remedy for conduct infringing his or her human rights.[850]

(k) Examples of references to writings

Observation 266

The Extraordinary Chambers in the Courts of Cambodia have referred to a decision of the Special Court for Sierra Leone and writings in general to support its views on the structural challenges that judges, both national and international, face and how those challenges relate to fairness of the proceedings.

533. The Supreme Court Chamber referred to a judicial decision of the Special Court for Sierra Leone and writings to support its view that there are challenges persisting and applying to both international and national judges, such as limited tenure, funding heavily dependent on interested States and pressure on mandate completion.[851] However, the Supreme Court Chamber concluded that "structural issues that may affect fairness must be related to concrete proceedings in order to assess whether they are likely to bring about a real and reasonable apprehension of bias",[852] and the broad structural challenges that judicial systems face do not naturally lead to the violation of the right to be tried before an impartial and independent tribunal. In that sense, the Supreme Court Chamber confirmed that there was no real apprehension of bias on the part of the Trial Chamber.[853]

Observation 267

The Extraordinary Chambers in the Courts of Cambodia have made occasional references to law dictionaries in support of its determination of the definition of certain terms.

534. The Supreme Court Chamber has, when evaluating the term "senior leaders of Democratic Kampuchea and those who were most responsible", referred occasionally to *Black's Law Dictionary* when determining the definition of certain terms. These terms include "justiciable" in the context of the justiciability before the Trial Chamber of the question whether an individual was a Khmer Rouge official[854] and "political question" in the same context.[855]

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[849] *Duch*, Appeal Judgment (footnote 785 above), para. 37, referring to 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*, vol. I (A/62/40 (Vol. I)), annex VI, paras. 45-51.

[850] *Ibid*., para. 647, referring to Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 15.

[851] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 126, citing Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion based on Lack of Jurisdiction (Judicial Independence), 13 March 2004, Appeals Chamber, paras 37-38.

[852] *Ibid*.

[853] *Ibid*.

[854] *Duch*, Appeal Judgment (footnote 785 above), para. 61, citing *Black's Law Dictionary*, 9th ed. (Thomson Reuters, 2009), p. 944.

[855] *Ibid*., para. 61, citing *Black's Law Dictionary*, p. 1277.

Observation 268

The Extraordinary Chambers in the Courts of Cambodia have referred to writings when underlining the importance that the Chambers determine for themselves that the crimes and modes of liability charged existed during the period of its temporal jurisdiction (1975-1979) and also, to a limited extent, to support its assessment of whether such crimes and modes of liability did so exist at that time.

535. The Supreme Court Chamber has referred to writings related to decisions of the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda to underline the importance that the Extraordinary Chambers determine that its findings on elements of crimes and modes of liability were applicable during the temporal jurisdiction of the Extraordinary Chambers:

> the enduring jurisprudential legacy of the [*ad hoc*] Tribunals will largely depend on their ability to base their decisions upon a body of pre-existing rules, and not upon the theoretical eagerness of their drafters. The two Tribunals could become historically and legally anecdotal if they seemed to shelter intellectual complacency or judicial activism.[856]

536. The Supreme Court Chamber has referred to writings to support the view that the antecedents to crimes against humanity date back to the writings of Hugo Grotius.[857] Writings were further relied on when assessing the impact of the Judgment of the International Military Tribunal on the development of international law concerning crimes against humanity.[858] The Supreme Court Chamber referred to writings in only a few limited examples to support its assessment of whether such crimes did so exist in 1975.[859] As set out in previous observations, that assessment was primarily conducted on the basis of judicial decisions, as supported by contemporaneous treaties.

Observation 269

The Extraordinary Chambers have referred to writings when reviewing the history of the negotiation of the Extraordinary Chambers in the Courts of Cambodia Agreement in the context of interpretation of its terms.

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[856] *Ibid*., para. 97, footnote 184, quoting Guénaël Mettraux, "Crimes against humanity in the jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", *Harvard International Law Journal*, vol. 43 (2002), p. 239, and also Gallant, *The Principle of Legality in International and Comparative Criminal Law*, p. 24.

[857] *Duch*, Appeal Judgment (footnote 785 above), para. 101, citing Hugo Grotius, *De Jure Belli ac Pacis*, Francis W. Kelsey transl. (Oxford, Oxford University Press, 1925), Book II, chap. 20, XL(1) [first published 1625] and chap. 25, VIII(2); and Emerich de Vattel, *Le Droit des Gens ; ou, Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains* (Philadelphia, 1883), Book II, chap. 4, p. 298. Note that the latter is one of very few French language writings cited by the Extraordinary Chambers despite French being one of its official languages.

[858] *Duch*, Appeal Judgment (footnote 785 above), para. 110, referring to Hans Kelsen, "Will the judgment in the Nuremberg Trial constitute a precedent in international law?", *International Law Quarterly*, vol. 1, pp. 153–171; Bassiouni, *Crimes against Humanity in International Criminal Law*, p. 348; Egon Schwelb, "Crimes against humanity", *British Yearbook of International Law*, vol. 23 (1946), pp. 178-226; and Otto Kranzbuhler, "Nuremberg eighteen years afterwards", *DePaul Law Review*, vol. 14 (1964-1965), pp. 333-347.

[859] See, for example, *Duch*, Appeal Judgment (footnote 785 above), para. 175, referring to Neil Boister and Robert Cryer (eds.), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford, Oxford University Press, 2008), pp. 535-539, 604, 612; and Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press, 2011), p. 381.

537. The Supreme Court Chamber referred to writings when stating that a first step in interpreting the scope of the term "senior leaders of Democratic Kampuchea and those who were most responsible" in the Extraordinary Chambers in the Courts of Cambodia Agreement was to review the history of the negotiations relating to the intended targets for criminal prosecution before the Extraordinary Chambers.[860] Similarly, when interpreting article 9 new of the Law on the Establishment of the Extraordinary Chambers, the Supreme Court Chamber referred to writings[861] to illustrate its legislative history.[862]

(l) Examples of references to the work of the International Law Commission

Observation 270

The Extraordinary Chambers in the Courts of Cambodia have referred to the work of the International Law Commission when assessing the development of the definition of crimes against humanity since 1946.

In doing so, the Extraordinary Chambers in the Courts of Cambodia took into account that the International Law Commission has a mandate both to codify and to progressively develop international law, and that the Commission did not clearly distinguish when it was working under which element of its mandate.

538. The Supreme Court has referred to the various drafts by the Commission from 1954 to 1996 of a draft code of international offences pursuant to the General Assembly's request in 1947 in resolution 177 (II). None of these drafts had been endorsed by the General Assembly, but the Supreme Court Chamber considered that they may reflect State practice and *opinio juris* with respect to the definition of crimes against humanity as it developed over the years, given that one of the mandates of the Commission was to provide a "more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine" as it did with the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[863]

539. On the other hand, the Supreme Court Chamber recalled that the Commission was also tasked with "the promotion of the progressive development of international law and its codification".[864] Consequently, the draft codes of international offences produced by the Commission between 1954 and 1996 reflected fluctuation between those two elements of its mandate. The Chamber therefore concluded that it needed to assess the Commission's draft codes in light of the evidence of State *opinio juris* and practice at the time in order to be able to determine when the drafts reflect

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[860] *Duch*, Appeal Judgment (footnote 785 above), paras. 46 and 56, quoting David Scheffer, "The negotiating history of the ECCC's personal jurisdiction", 22 May 2011, pp. 4-5, and also Sean Morrison, "Extraordinary language in the Courts of Cambodia: the limiting language and personal jurisdiction of the Cambodian Tribunal", *Capital University Law Review*, vol. 37 (2008-2009), pp. 583–630, p. 627. See generally David Scheffer, "The Extraordinary Chambers in the Courts of Cambodia" in M. Cherif Bassiouni (ed.), *International Criminal Law*, 3rd ed. (Leiden, Koninklijke Brill NV, 2008), pp. 219-255. Professor David Scheffer was the former United States Ambassador at Large for War Crimes Issues (1997-2001) and was one of those involved in negotiation of the Extraordinary Chambers in the Courts of Cambodia Agreement.

[861] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 93, citing Scheffer, "The Extraordinary Chambers in the Courts of Cambodia", p. 247.

[862] *Ibid*., paras. 93-94; Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 9 (new), para. 2.

[863] *Duch*, Appeal Judgment (footnote 785 above), para. 114, footnote 216, citing art. 15 of the Statute of the International Law Commission, adopted by the General Assembly in its resolution 174 (II) of 21 November 1947, as amended by resolutions 485 (V) of 12 December 1950, 984 (X) of 3 December 1955, 985 (X) of 3 December 1955 and 36/39 of 18 November 1981.

[864] *Ibid*., para. 115, citing art. 1 of Statute of the International Law Commission.

customary international law and when they constitute progressive development of the law.[865]

Observation 271

The Supreme Court Chamber has relied on a series of post-1945 international instruments, the work of the International Law Commission, a decision of the European Court of Human Rights, as well as national legislation, to draw the conclusion that the nexus requirement to a war crime or crime against peace in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal was not part of the definition of crimes against humanity by 1975.

540. The Supreme Court Chamber has relied on post-1945 international instruments,[866] the work of the Commission,[867] and a decision of the European Court of Human Rights,[868] as well as national legislation[869] and the decisions of national courts,[870] to examine whether the nexus to a war crime or crime against peace was a legal element of crimes against humanity by 1975. While acknowledging that "the [International Military Tribunal] applied the nexus requirement seemingly as part of the definition of crimes against humanity" [871] and "[t]he jurisprudence on the nexus requirement in relation to Control Council Law No. 10 was inconsistent",[872] the Supreme Court Chamber highlighted the "gradual exclusion" of the nexus requirement from the definition of crimes against humanity in customary international law after the Second World War[873] and concluded that "[t]he nexus requirement to a war crime or crime against peace in the Nuremberg Principles was not part of the definition of crimes against humanity by 1975".[874]

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[865] *Ibid*., paras. 114-116.

[866] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 716, citing Resolution on Crimes Against Humanity, adopted by the eighth Conference for the Unification of Penal Law (Brussels, 10-11 July 1947); Convention on the Prevention and Punishment of the Crime of Genocide, art. I (genocide being a notion that derived from the notion of crimes against humanity); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. 1 (broadening the category of acts constituting crimes against humanity to include the Charter of the International Military Tribunal definition with its nexus requirement, but also apartheid and genocide, which do not have the requirement, while also confirming that crimes against humanity may be committed "in time of war or in time of peace"); International Convention on the Suppression and Punishment of the Crime of Apartheid, arts. I-II.

[867] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 717, citing 1954 draft Code of Offences Against the Peace and Security of Mankind, art. 2, para. 11. The Commission had voted to delete the nexus requirement from the definition), see *Yearbook ....1954*, vol. I, 267th meeting, paras. 40-62.

[868] *Ibid.*, para. 718, citing *Korbely v. Hungary* (see footnote 798 above), para. 82.

[869] *Ibid.*, para. 719, citing Israeli Act on Bringing the Nazis and their Collaborators to Justice, Section 1(b) (not available in English); Hungarian Law-Decree No. 1 of 1971 (promulgating the broader definition of crimes against humanity found in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity); International Crimes Act (Bangladesh), section 3 (2)(a).

[870] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 719, citing Israel, *Attorney General v. Eichmann*, Judgment, District Court of Jerusalem; *Barbie* (see footnote 527 above); *R. v. Finta* (see footnote 579 above), p. 813; *Arancibia Clavel* Case (Supreme Court, Argentina), pp. 18, 23 and 33-34 (Spanish; not available in English).

[871] *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 713.

[872] *Ibid*., para. 715.

[873] The Supreme Court Chamber also referred to the statutes and jurisprudence of international, hybrid and internationalised tribunals established from 1993, as well as the negotiation history of the Rome Statute to further explain and justify its views on the exclusion of the nexus requirement from the definition of crimes against humanity. See *Khieu Samphân and Nuon Chea* (see footnote 786 above), para. 720.

[874] *Ibid*., para. 721.

(m) Examples of references to collective works of expert bodies

Observation 272

In the context of determining the definition of torture under customary international law as of 1975, the Supreme Court Chamber referred to the ICRC Commentary to Geneva Convention IV.

541. In addition to the various references to the work of the ICRC mentioned earlier in the present section, the Supreme Court Chamber referred to the ICRC Commentary to articles 32 and 147 of the Geneva Convention IV when considering the definition of torture under customary international law at that time, and whether in particular an attack on physical integrity was a necessary component of the definition, and whether the purpose of obtaining information or a confession was necessary.[875] The Chamber concluded that the ICRC Commentary supported the definition of torture under the 1975 Declaration on Torture.[876]

(n) Examples of references to resolutions of international organizations

Observation 273

The Extraordinary Chambers in the Courts of Cambodia have referred to General Assembly resolutions when reviewing the history of the negotiation of the Extraordinary Chambers in the Courts of Cambodia Agreement in the context of interpretation of its terms, and when determining the definition of torture as at 1975.

542. The Supreme Court Chamber referred to General Assembly resolution 52/135 of 12 December 1997 in the course of reviewing the history of the negotiation of the Extraordinary Chambers in the Courts of Cambodia Agreement as a first step to interpreting the scope of the term "senior leaders of Democratic Kampuchea and those who were most responsible". The resolution endorsed the position that the most serious human rights violations that had been committed in Cambodia in recent history had been committed by the Khmer Rouge. As a result of the historical review, the Supreme Court Chamber found that, at a minimum, the term "senior leaders of Democratic Kampuchea and those who were most responsible" reflected the intention of the United Nations and the Royal Government of Cambodia to focus finite resources on the criminal prosecution of certain surviving officials of the Khmer Rouge.[877]

543. The Supreme Court Chamber referred to a further General Assembly resolution when examining the definition of torture under customary international law as of 1975. The Chamber considered that the definition of torture in the 1975 Declaration on Torture, which was adopted by States Members of the United Nations as a non-binding General Assembly resolution "without a vote" (unanimously), was arguably evidence that this definition was widely accepted by the international community.[878]

Observation 274

The Extraordinary Chambers in the Courts of Cambodia have referred to publications of a non-governmental organization when considering the *travaux préparatoires* of the establishment of the Extraordinary Chambers.

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[875] *Duch*, Appeal Judgment (footnote 785 above), para. 199, referring to Jean Pictet (ed.), *Commentary on Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958), pp. 223 and 598.

[876] *Ibid.*, paras. 199-201; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly resolution 3452 (XXX) of 9 December 1975.

[877] *Duch*, Appeal Judgment (footnote 785 above), paras. 46-47 and 52.

[878] *Ibid*., para. 204.

544. The Supreme Court Chamber has referred to publications by the Open Society Justice Initiative when reviewing the history of the establishment of the Extraordinary Chambers, and in particular, the meaning of the terms "senior leaders" and "most responsible" in the context of whether they are jurisdictional requirements or matters of investigatorial and prosecutorial discretion. Such discretion, potentially allowing a large number of Khmer Rouge officials to be charged, was the preferred option in public discussion surrounding the creation of the Extraordinary Chambers. The Open Society publications were referred to in particular in the context of such public discussion.[879]

6. Special Tribunal for Lebanon

(a) Introduction and applicable law

545. Under article 1 of the Statute of the Special Tribunal for Lebanon, the Tribunal has jurisdiction "over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons".[880] Under article 2, the applicable law consists of:

> The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy.

Under article 21, paragraph 4, in cases not otherwise provided for in the Rules of Procedure and Evidence, the Tribunal shall apply rules of evidence that "are consonant with the spirit of the Statute and the general principles of law". Under article 24, paragraph 1, the Trial Chamber shall "as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon".

546. The Special Tribunal for Lebanon thus has jurisdiction to try cases under the national law of Lebanon, which has affected the decisions and other materials to which it has referred in its judgments and decisions.

(b) Express references to subsidiary means

Observation 275

The Special Tribunal for Lebanon has not referred expressly to subsidiary means for the determination of rules of law in any of its cases.

547. As the Special Tribunal for Lebanon has not made any express references to subsidiary means nor to Article 38, paragraph 1 (d), in any of its decisions, the Secretariat should not be understood as taking a view on whether or to what extent the examples presented in the present section may constitute a use of judicial decisions and other materials as subsidiary means for the determination of rules of international law.

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[879] *Ibid*., para. 79, referring to Open Society Justice Initiative, *Justice Initiatives: The Extraordinary Chambers* (2006) and particularly Kelly Dawn Askin, "Prosecuting senior leaders of Khmer Rouge crimes", in *Justice Initiatives: The Extraordinary Chambers*, p. 76.

[880] Security Council resolution 1757 (2007), with annexed draft Agreement and draft Statute. The Special Tribunal for Lebanon also has jurisdiction over certain connected cases, with the consent of the Security Council.

(c) Interpretation of the Statute of the Special Tribunal for Lebanon and the applicable offences

Observation 276

The Special Tribunal for Lebanon has determined that its Statute does not suggest that the decisions of international criminal courts or of other States should be looked at to determine the meaning of Lebanese criminal law concepts.

Observation 277

As regards protections for the defendant, the Special Tribunal for Lebanon has determined that it must apply the principles of international human rights law, even though article 2 of its Statute otherwise designates Lebanese law as the applicable law.[881]

548. The Special Tribunal for Lebanon Trial Chamber has emphasized that nothing in the wording of its Statute suggests that a chamber:

> should look to international criminal law case law to determine the meaning of any of the ordinary criminal law concepts already recognised in Lebanese law, of 'committed, participated as accomplice, organized or directed others to commit the crime'. Doing so may be necessary if a mode of liability that does not appear to form part of Lebanese law, such as that relating to a superior-subordinate relationship referred to in Article 3 (2) [of the Statute of the Tribunal] were charged. But it has not been. And if the Statute were indeed imposing a novel mode of liability for crimes committed in Lebanon in 2004 and 2005 that did not form part of Lebanese law at the time, the issue of legality would probably arise.[882]

549. Further, the Trial Chamber added that, "whether … a customary international law definition of the crime of terrorism existed is irrelevant to the Special Tribunal's function in relation to the 'prosecution and punishment of acts of terrorism' as specified in the Lebanese Criminal Code".[883] It followed that "attempting—by recourse to the laws of other nations and State practice—to divine a definition of an international crime of terrorism, and then potentially apply it to something as basic as the criminal law of a sovereign State, cannot be relevant to the Special Tribunal's function to try the crimes specified in Article 2".[884] The Trial Chamber emphasized that it would not:

> look beyond the code itself and any Lebanese judicial decisions defining the crimes, although these decisions neither bind other Lebanese courts nor the Special Tribunal. Where ordinary methods of interpretation, including recourse to Lebanese case law, fail to resolve any ambiguities in the code, the Trial Chamber will interpret the relevant provisions strictly, in favour of the Accused—and in accordance with the principles of international human rights law—and thus avoid any expansive definition of substantive criminal law provisions.[885]

550. In considering the right to private and family life of defendants and their right to a fair trial, the Special Tribunal for Lebanon referred to decisions of the European Court of Human Rights and the Inter-American Court of Human Rights. The Tribunal

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[881] *Prosecutor v. Salim Jamil Ayyash* et al., Case No. STL-11-01/T/TC, Judgment, 18 August 2020, Trial Chamber, para. 6010.
[882] *Ibid*., para. 6014.
[883] *Ibid*., para. 6016.
[884] *Ibid*., para. 6017.
[885] *Ibid*., para. 6018.

stated that although the European Court "does not bind Lebanon or this Tribunal, it is of assistance in assessing the highest standards of international human rights on this point".[886]

(d) Jurisdiction and competence

Observation 278

In determining the lawfulness of its own establishment, the Special Tribunal for Lebanon referred to decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice.

551. In deciding that the Special Tribunal for Lebanon had competence to determine the lawfulness of its own establishment (*compétence de la compétence*) and that it had been lawfully so established by the Security Council through resolution 1757 (2007) and not by the Council bringing into effect a draft treaty between the United Nations and Lebanon that had not been ratified by Lebanon, the Tribunal's Appeals Chamber referred to the equivalent challenges and decisions that had been made in cases before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the decisions of the International Court of Justice that had been referred to in those decisions.[887]

(e) Approach of the Special Tribunal for Lebanon to precedent and consistency

Observation 279

The Special Tribunal for Lebanon stated that there is no system of binding precedent (*stare decisis*) applicable to the Tribunal.

552. In the *Ayyash* case, after recounting the fact that there are legal systems "featuring a formal doctrine of binding precedent—either common law, or depending upon the higher court's position in the judicial hierarchy, some civil law jurisdictions", the Trial Chamber confirmed that, as the Special Tribunal for Lebanon chambers "must put themselves in the place of a national court [of Lebanon], they do so in relation to a national legal system with no formal doctrine of binding precedent".[888]

553. The Appeals Chamber in the *Merhi and Oneissi* case stated that "Lebanese jurisprudence can be used as guidance for the Trial Chamber on how to interpret Lebanese provisions, but it cannot be used to substitute the Trial Chamber's own interpretation or application of the law to the facts before it".[889]

Observation 280

The Special Tribunal for Lebanon has referred to the decisions of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone in sentencing, as the decisions of Lebanese courts do not address crimes comparable to those before the Special Tribunal for Lebanon.

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[886] *Akhbar Beirut S.A.L. and Ibrahim Mohamed Ali Al Amin*, Case No. STL-14-06, Judgment, 15 July 2016, Contempt Judge, paras. 158–159.

[887] *Prosecutor v. Salim Jamil Ayyash* et al., Case No. STL-11-01/PT/TAC/AR90.1, Decision on the Defence Appeal against the Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", 24 October 2012, Appeals Chamber, paras. 14-16.

[888] *Ayyash* (see footnote 881 above), paras. 6007-6008.

[889] *Prosecutor v. Hassan Habib Merhi and Hussein Hassan Oneissi*, Case No. STL-11-01A-2/AC, Appeal Judgment, 10 March 2022, Appeals Chamber, para. 602.

554. In the *Ayyash* sentencing judgment, the Trial Chamber reviewed a number of sentencing decisions by the Lebanese courts, finding them relevant, but concluding that it had "been unable to find any Lebanese decisions relating to crimes comparable to those committed by Mr Ayyash in the attack on Mr Hariri's life". It therefore looked to sentencing practice of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.[890]

(f) Examples referring to procedural matters

Observation 281

The Special Tribunal for Lebanon has referred to the decisions of international courts and national courts other than those of Lebanon primarily in relation to procedural matters.

555. A judge of the Appeals Chamber referred, for example, to decisions of the International Criminal Court Appeals Chamber and the Supreme Court of the United Kingdom when stating that: "High authority holds that 'error of law' exists where there are 'mandatory factors which a trial chamber must take into account […] and failure to consider any of [such] factors may amount to a legal error', and also where the judgment must be reversed because it 'was premised on an erroneous interpretation of the law'".[891] The Appeals Chamber further referred to decisions of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda when deciding that "[i]nternational jurisprudence is uniform in requiring the same beyond reasonable doubt standard in relation to both direct and circumstantial evidence". This was "a well-established principle of international criminal law".[892]

556. The Appeals Chamber and the Trial Chamber appeared to take differing views on the relevance of international law to the interpretation of the elements of the crime of terrorism. The Trial Chamber referred to the Appeals Chamber's conclusion that "every element of the crime of terrorism under Article 314 [of the Lebanese Criminal Code] should be interpreted in light of international law, although it acknowledged that this approach must be subject to the principle of legality".[893] The Trial Chamber took the view that "such recourse to international law was and is unnecessary".[894]

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[890] *Prosecutor v. Salim Jamil Ayyash*, Case No. STL-11-01/S/TC, Sentencing Judgment, 11 December 2020, Trial Chamber, para. 231.

[891] *Merhi and Hussein Hassan Oneissi* (see footnote 889 above), Separate Opinion of Judge Baragwanath, para. 13, referring to International Criminal Court, *Situation on the Democratic Republic of the Congo in the Case of* Prosecutor v. Bosco Ntaganda, Case No. ICC-01/04-02/06, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', 30 March 2021, para. 26, describing the effect of Rule 145 (1) of the Rules of the International Criminal Court; and *Situation in Darfur, Sudan, in the Case of* Prosecutor v. Banda and Jerbo, Case No. ICC-02/05-03/09, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, Appeals Chamber, para. 29.

[892] *Merhi and Hussein Hassan Oneissi* (see footnote 889 above), paras. 48-49, referring to *Blagojević and Jokić*, Appeal Judgment (see footnote 828 above), para. 226, *Stakić*, Appeal Judgment (see footnote 633 above), para. 219; International Criminal Tribunal for the Former Yugoslavia, *Prosecutir v. Milan Martić*, Case No. IT-95-11-A, Judgment, 8 October 2008, Appeals Chamber, para. 55; and *Rutaganda*, Appeal Judgment (see footnote 827 above), para. 488.

[893] *Ayyash*, Trial Judgment (see footnote 881 above), para. 6166, referring to Interlocutory Decision on the Applicable Law, 16 February 2011 (see footnote 807 above).

[894] *Ayyash*, Trial Judgment (see footnote 881 above), para. 6167.

(g) References to the Human Rights Committee

Observation 282

The Special Tribunal for Lebanon has referred to the outputs of the Human Rights Committee and to international human rights instruments and the "decisions and comments of their courts and committees".

557. The Special Tribunal for Lebanon has referred to outputs of the Human Rights Committee and its interpretation of the International Covenant on Civil and Political Rights, noting that the relevant principles and their interpretation "are found in international human rights instruments and the decisions and comments of their courts and committees".[895]

(h) References to writings

Observation 283

The Special Tribunal for Lebanon has made references to writings on only a few occasions.

558. The Tribunal has made references to writings on rare occasions, sometimes referring generically to academic writing on Lebanese law to support its positions, for example in the *Ayyash* case: "The Sabra Defence submits that to be liable, every person accused of co-perpetrating conspiracy must 'personally meet all the objective and subjective elements of the offence'. Although it cited no legal authority for this view, some Lebanese law textbooks, at least, endorse this position".[896] In the same case, in relation to conspiracy, the Trial Chamber stated that, in the absence of decisions of the Lebanese courts, it "also examined in detail several academic texts that analyse this crime under Lebanese law".[897]

(i) References to resolutions of international organizations

Observations 284

The Special Tribunal for Lebanon referred to relevant resolutions of the Security Council, particularly resolution 1757 (2007), which established the legal framework within which it operated.

The Special Tribunal for Lebanon referred to a General Assembly resolution relevant to the right to a remedy and reparation for gross violations of international human rights law.

559. A judge in the Trial Chamber referred to Security Council resolution 1757 (2007) as the Special Tribunal's establishing instrument, which the Council had adopted under Chapter VII of the Charter of the United Nations, and which accordingly required Lebanon to "comply with the Special Tribunal's requests for assistance, irrespective of which of its four independent organs they emanate from". Cooperation with requests of the defence for assistance were "an essential feature of equality of arms between the prosecution and defence, as part of the right to a fair trial mandated under international human rights".[898]

560. The Trial Chamber also referred to General Assembly resolution 60/147 entitled "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law", which provided for "a right to 'adequate, effective

[895] *Ibid*., para. 5918.
[896] *Ibid*., para. 6037.
[897] *Ibid*., para. 6216.
[898] *Ibid*., Separate Opinion of Judge David Re, para. 128.

and prompt reparation for harm suffered' by victims of serious human rights violations. Reparation should be proportional to the gravity of the violations and the harm suffered".[899]

III. Decisions of other bodies

A. Commissions

561. The present section includes some observations based on the awards of claims commissions, compensation commissions and boundary commissions that are found in the United Nations *Reports of International Arbitral Awards*. Some of the cases predate the Statutes of the Permanent Court of International Justice and the International Court of Justice and are framed within a narrow context of applicable law, focused on the compensation for damages. In such cases, the respective observation indicates that is so.

1. Express reference to subsidiary means under Article 38 of the Statute of the International Court of Justice

562. In some decisions of claims commissions, there are express references to "subsidiary means" as part of the applicable law of the German-American Claims Commission in 1923. For example, in administrative decision No. II of the United States and German Claims Commission it was held that the commission will be controlled by Treaty of Berlin:

> that, where no Treaty provision applicable, Commission may apply conventions binding upon United States and Germany, international custom, common rules of municipal law, general principles of law, and, as subsidiary means for determination of law, judicial decisions and teachings of most highly qualified publicists; provided that Commission will not be bound by any particular code or rule of law, but shall be guided by justice, equity and good faith.[900]

563. In the Eritrea-Ethiopia Claims Commission, it was also noted that the applicable law provision found in article 19 of that Commission's Rules of Procedure is modelled on Article 38, paragraph, of the Statute of the International Court of Justice.[901]

2. Examples of uses of writings and decisions to identify the existence of rules of customary international law

Observation 285

On occasion, claims commissions referred to scholarly writings identifying rules as part of customary international law.

564. For example, the Mexican-American Claims Commission in *E. R. Kelley (U.S.A.) v. United Mexican States* relied on a writing by Oppenheim, to indicate "that 'there is now a customary rule of International Law in existence prohibiting the confiscation of private enemy property and the annulment of enemy debts on the territory of a belligerent.' *International Law*, 3rd ed., vol. 2, p. 158".[902]

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[899] *Ibid*., para. 941.

[900] Mixed Claims Commission (United States and Germany) (1 November 1923–30 October 1939), Administrative Decision No. II, 1 November 1923, UNRIAA, vol. VII, pp. 1–391, at p. 23.

[901] Eritrea–Ethiopia Claims Commission, *Partial Award: Prisoners of War – Ethiopia's Claim 4*, Partial Award, 1 July 2003, UNRIAA, vol. XXVI, pp. 73–114, at pp. 83-84, para. 22.

[902] United States/Mexico, General Claims Commission, *E. R. Kelley (U.S.A.) v. United Mexican States*, 8 October 1930, UNRIAA, vol. IV (Sales No. 1951.V.1), pp. 608–615, at p. 613.

Observation 286

The Eritrea-Ethiopia Claims Commission referred to various decisions of international courts and tribunals and writings in support of the customary status of the Geneva Conventions and the Hague Convention of 1907.

565. In various decisions, the Eritrea-Ethiopia Claims Commission indicated that "there are important modern authorities for the proposition that the Geneva Conventions of 1949 have largely become expressions of customary international law" referring to decisions of the International Court of Justice and scholarly writings.[903]

566. The Eritrea-Ethiopia Claims Commission also made "the same holdings with respect to the customary status of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 and its annexed Regulations ('Hague Regulations') as those it has made with respect to the Geneva Conventions of 1949."[904]

3. Examples concerning consistency with prior decisions

Observation 287

In cases predating to the Statute of the Permanent Court of International Justice, awards recognized the value of consistency with prior decisions.

567. For example, in the *Corvaïa case*, the umpire was assessing whether it had jurisdiction over claims of French origin, which were then owned by Italian citizens. It considered that "[t]he umpire does not, however, find himself free. A long course of arbitral decisions has emphasized the fact that the claim must be both Italian in origin and Italian in ownership before it can be recognized by an Italian Commission",[905] citing Moore's compilation of arbitral awards.

4. Examples of references to judicial decisions or writings to determine the existence and scope of a rule of international law

Observation 288

Prior to the Statute of the Permanent Court of International Justice, awards referred to rules of international law concerning the attribution of State responsibility found or applied in other awards and writings.

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[903] Eritrea–Ethiopia Claims Commission, *Partial Award: Prisoners of War – Eritrea's Claim 17*, Award, 1 July 2003, UNRIAA, vol. XXVI, pp. 23–72, at p. 40, para. 40 referring to, e.g., *Legality of the Threat or Use of Nuclear Weapons* (see footnote 80 above), para. 79; S/25704, para. 35; Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, Oxford University Press, 1995), p. 24; and Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press, 1989), p. 45.

[904] Eritrea–Ethiopia Claims Commission, *Partial Award: Central Front – Eritrea's Claims 2, 4, 6, 7, 8 & 22*, Award, 28 April 2004, UNRIAA, vol. XXVI, pp. 115–153, at pp. 127-128, para. 22, citing *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, vol. I, pp. 253–254; *United States v. Von Leeb* ("*High Command*" Case), *Trials of War Criminals Before the Nuernberg Military Tribunal Under Control Council Law No. 10*, vol. XI, pp. 1–756, at p. 462; S/25704, para. 35; see also Lassa Oppenheim, *International Law: A Treatise*, vol. II, *Disputes, War and Neutrality* (Hersch Lauterpacht, ed., 7th ed. Longmans, 1952) pp. 234–236; Jonathan I. Charney, "International agreements and the development of customary international law", *Washington Law Review*, vol. 61 (1986), pp. 971–996.

[905] *Corvaïa Case*, Award, 1903, UNRIAA, vol. X, pp. 609–635, at p. 635, citing John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. II (Washington, Government Printing Office, 1898), pp. 1353, 2254, 2753 and 2757.

568. In the *H. G. Venable v. United Mexican States* case, the Claims Commission referred to multiple arbitral awards "it appears to be a well-established principle of international law that a denial of justice may be predicated on the failure of the authorities of a government to give effect to the decisions of its courts".[906]

569. In *George W. Cook (U.S.A.) v. United Mexican States*, the Mexican-American Claims Commission stated "that it is generally recognized that confiscation of the property of an alien is violative of international law, just as it is generally forbidden by domestic law around the world". The Claims Commission added that "a well recognized rule of international law requires that an absorbing state shall respect and safeguard rights of persons and of property in ceded or in conquered territory".[907]

570. In *Sambiaggio* case, the Italian-Venezuelan Commission considered the decisions of various claims commissions, to conclude that a government cannot be held responsible for the acts of a revolutionary movement. It referred, for example, to a case before the Mexican-American Claims Commission for damages caused by the Confederate forced during the American civil war, as contained in Moore's *Digest*.[908]

571. The British-Venezuelan Commission in the *Aroa Mines Case* referred to the *Sambiaggio* case, and other decisions of various claims commissions noting that "[t]he precedents form an unbroken line, so far as the umpire has been favored with a chance to study them, supporting the usual non-responsibility of governments for the acts of unsuccessful rebels. It was so held by the eminent Sir Edward Thornton in all cases which he decided as umpire in the United States-Mexican Commission. (Moore, vol. 3. pp. 2977-2980.)".[909]

572. Similar references to the rule of attribution in the *Sambiaggio* case were made by other claims commissions.[910]

Observation 289

On occasion, awards by claims commissions relied on writings and awards in relation to the determination of the adequate compensation for losses.

573. In *Henry James Bethune (Great Britain) v. United States (Lord Nelson case)*, it was held that "[i]n international law, and according to a generally recognized principle, in case of wrongful possession and use, the amount of indemnity awarded

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[906] United States/Mexico, General Claims Commission, *H. G. Venable (U.S.A.) v. United Mexican States*, 8 July 1927, UNRIAA, vol. IV, pp. 219–261, at pp. 245–246.

[907] United States/Mexico, General Claims Commission, *George W. Cook (U.S.A.) v. United Mexican States*, 30 April 1929, UNRIAA, vol. IV, pp. 506–516, at p. 509.

[908] Italian-Venezuelan Commission, *Sambiaggio Case*, Award, 1903, UNRIAA, vol. X, pp. 499–525, at p. 513, referring to John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. III (Washington, Government Printing Office, 1898), pp. 2886-2892.

[909] British-Venezuelan Commission, *Aroa Mines Case*, Award, 1903, UNRIAA, vol. IX, pp. 402–445, at p. 440.

[910] Italian-Venezuelan Commission, *De Caro Case*, Award, 1903, UNRIAA, vol. X, pp. 635–644, at p. 642. See also Mixed Claims Commission (France-Venezuela), *Acquatella, Bianchi* et al. *Case*, Award, 1903-1905, UNRIAA, vol. X, pp. 1–8, at p. 6; British-Venezuelan Commission, *Puerto Cabello and Valencia Railway Case*, Award, 1903, UNRIAA, vol. IX, pp. 510–533, at p. 513; *Aroa Mines Case* (see previous footnote), p. 402; Great Britain/United States, *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v. Great Britain*, Award, 18 December 1920, UNRIAA, vol. VI, pp. 42–44, at p. 44; United States/Mexico, General Claims Commission, *G. L. Solis (U.S.A.) v. United Mexican States*, 3 October 1928, UNRIAA, vol. IV, pp. 358–364, at p. 361, referring to *Home Frontier and Foreign Missionary Society*, p. 42.

must represent both the value of the property taken and the value of its use", relying on scholarly writings.[911]

574. In *Walter H. Faulkner (U.S.A.) v. United Mexican States*, the American-Mexican Claims Commission referred to its decision in the case of *L.F.H. Neer*,[912] where it held that international standards should be applied for the determination of compensation. The decision also referred to the amount calculated as a compensation per diem in the *Topaze* case,[913] and the commission noted that it was:

> willing to follow these precedents, but realizing how much the value of money has changed feels bound to increase them fifty per centum. Cases of allowing damages for illegal imprisonment are most similar to the present one, and in such cases tribunals often allowed a gross sum without interest. The Commission is prepared to follow this precedent too.[914]

575. The Eritrea-Ethiopia Claims Commission referred to the *Corfu Channel* case[915] to indicate that "where injury is non-material and hence not compensable by restitution or compensation, the appropriate form of reparation for a State's wrongful act is satisfaction".[916] The Commission also considered the decisions of various claims commission when analysing the causality of claims in order for them to be compensable and noted that it did not "believe that a State's international responsibility in a case such as this extends to all of the losses and disruptions accompanying an international conflict. A breach of the *jus ad bellum* by a State does not create liability for all that comes after. Instead, there must be a sufficient causal connection."[917]

Observation 290

On occasion, claims commissions referred to compilations of decisions and writings in the determination of the law applicable to takings of property by the State during an epidemic.

576. In the *Bischoff* case, the German-Venezuelan Commission was addressing a claim for compensation based on the taking of a carriage belonging to the claimant during a smallpox epidemic. The Commission held that "[i]t seems to be well settled by the authorities that in the case of an original wrongful taking of personal property the owner is not bound to receive the property in an injured condition".[918] However, it noted that "in a number of cases before arbitration commissions involving the taking and detention of property, where the original taking was lawful, that the defendant

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[911] Great Britain/United States, *Henry James Bethune (Great Britain) v. United States (Lord Nelson case)*, Award, 1 May 1914, UNRIAA, vol. VI, pp. 32–35, at p. 34, citing T. Rutherforth, *Institutes of Natural Law* (Cambridge, 1854), vol. 1, chap. XVII, sec. V; John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, vol. VI (Washington, Government Printing Office, 1906), p. 1029; United States, Indian Choctaw's case. Law of Claims against Governments, Report No. 134, 43rd Congress, 2nd session, House of Representatives, Washington, 1875, p. 220, et seq.

[912] United States/Mexico, General Claims Commission, *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, 15 October 1926, UNRIAA, vol. IV, pp. 60-66.

[913] *Topaze Case (interlocutory)*, 1903, UNRIAA, vol. V, pp. 387-389.

[914] United States/Mexico, General Claims Commission, *Walter H. Faulkner (U.S.A.) v. United Mexican States*, 2 November 1926, UNRIAA, vol. IV, pp. 67–74, at p. 71.

[915] *Corfu Channel case* (see footnote 69 above), p. 35. See also *Difference between New Zealand and France concerning the interpretation or application of two agreements* (see footnote 464 above), para. 122.

[916] Eritrea–Ethiopia Claims Commission, *Final Award, Eritrea's Damages Claims*, Decision, 17 August 2009 (see footnote 156 above), para. 269.

[917] *Ibid*., p. 722, para. 289.

[918] German-Venezuelan Commission, *Bischoff Case*, Award, 1903, UNRIAA, vol. X, pp. 420–421, at p. 420, citing *American and English Encyclopedia of Law*, 2nd ed., vol. VIII, p. 692, and cases cited.

government is liable for damages for the detention of the property for an unreasonable length of time and injuries to the same during that period. (Moore, Vol. 4, pp. 3235 and 3265.)".[919]

Observation 291

The Eritrea-Ethiopia Boundary Commission referred to the evidentiary value of maps by reference to the decisions of the International Court of Justice.

577. The Eritrea-Ethiopia Boundary Commission referred to the evidentiary value of maps noted that "it is not the maps "in themselves alone" (to use the language of the Chamber of the International Court of Justice in the *Frontier Dispute* case) which produce legally significant effects, but rather the maps in association with other circumstances."[920]

578. That Commission further indicated that "in considering the general significance of map evidence, if that evidence is uncertain and inconsistent, its value will be reduced in relation to the endorsement of a conclusion arrived at by other means, as also its support for any alteration of a result reached on the basis of textual interpretation", referring to the International Court of Justice judgment in *Kasikili/Sedudu*.[921]

Observation 292

On occasion, conciliation commissions predating the Vienna Convention on the Law of Treaties referred to the principles of interpretation as found in writings.

579. In the *Aroa Mines Case*, the British-Venezuelan Commission, referred to the principles of interpretation of treaties as found in writings and cited multiple excerpts from various authors, including the following:

> When the language of a treaty, taken in the ordinary meaning of the words, yields a plain and reasonable sense, it must be taken as intended to be read in that sense, subject to the qualifications that any words which may have a customary meaning in treaties differing from their common signification must be understood to have that meaning, and that a sense can not be adopted which leads to an absurdity or to incompatibility of the contract with an accepted fundamental principle of law. (Hall, *Int. Law.*, 350.)[922]

580. For example, the Anglo-Italian Conciliation Commission in the *Cases of Dual Nationality* relied on writings to indicate the principles of interpretation of treaties, noting that:[923]

> The provisions of at treaty must be interpreted in such a way that they may conform as much as possible with the rules established by international law rather than derogate from these rulings. And let us say once for all that the arbitrator cannot substitute the legislator (V. par. ex., Carabier, "*l'arbitrage international*", *Recueil des Cours de La Haye*, 1950, vol. I, p. 265 *et suiv*.; Briefly, "Règles du Droit de la Paix", *ibid*., 1936, vol. IV, p. 137).

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[919] *Ibid*.

[920] Eritrea-Ethiopia Boundary Commission, *Decision regarding delimitation of the border between Eritrea and Ethiopia*, 13 April 2002, UNRIAA, vol. XXV, pp. 83–195, at p. 114, para. 3.22, referring to *Frontier Dispute* (see footnote 105 above), para. 56.

[921] *Ibid*., p. 115, para. 3.25, referring to *Kasikili/Sedudu Island* (see footnote 213 above), para. 87.

[922] *Aroa Mines Case* (see footnote 909 above), p. 411.

[923] Anglo-Italian Conciliation Commission, *Cases of Dual Nationality — Decision No. 22*, Award, 8 May 1954, UNRIAA, vol. XIV, PP. 27–36, at p. 35.

581. The Italian-United States Conciliation Commission in the *Armstrong Cork Company Case* also relied on the rules of interpretation as elaborated in writings:

> As has been stated by Professor Hyde, in his noteworthy study on the interpretation of treaties *[International Law, Chiefly as Interpreted and Applied by the United States,* 1945, vol. II, p. 4470) "… one must reject as unhelpful and unscientific procedure the endeavor to test the significance of the words employed in a treaty by reference to their so-called 'natural meaning' …". This could not, at best, be treated other than as a presumption *juris tantum* which can be rebutted.[924]

5. Examples of reliance on domestic court decisions

Observation 293

On occasion, claims and reparations commissions referred to domestic court decisions in relation to certain aspects covered by domestic law, for example, nationality, or the ownership of certain assets including a company.

582. For example, in the *Deutsche Amerkanische Petroleum Gesellschaft Oil Tankers Award*, the tribunal referred to multiple decisions of courts in the United Kingdom, France and the United States, noting that:

> the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets, other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and, after its winding up, a proportional share of the assets.[925]

583. In some cases, like *Lily Costello* et al*. (U.S.A. v. United Mexican States),* the Mexican-American Claims commission referred to the decisions of national courts in relation to the rebuttal of a presumption of continued nationality, addressed the issue of the nationality of claims and referred to cases concerning claims of the estate of deceased dual nationals.[926]

6. Examples of use of writings

Observation 294

In some awards rendered by claims commissions prior to the Statute of the Permanent Court of International Justice, references was made to certain rules of international law as contained in the writings of publicists.

584. For example, the umpire in the *Bembelista* case was analysing a claim concerning damage caused near an area where a military attack took place, and took into account the Manual of the Institute of International Law,[927] analysed several writings, including Vattel,[928] and concluded that the umpire "has made careful

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[924] Italian-United States Conciliation Commission, *Armstrong Cork Company Case — Decision No. 18*, Award, 22 October 1953, UNRIAA, vol. XIV, pp. 159–173, at p. 165.

[925] *The Deutsche Amerkanische Petroleum Gesellschaft Oil Tankers (USA, Reparation Commission),* Award, 5 August 1926, UNRIAA, vol. II, pp. 777–795, at p. 787.

[926] See United States/Mexico, General Claims Commission, *Lily J. Costello, Maria Eugenia Costello and Ana Maria Costello (U.S.A.) v. United Mexican States*, Award, 30 April 1929, UNRIAA, vol. IV, pp. 496–506, at pp. 501-503.

[927] Netherlands-Venezuelan Commission, *Bembelista Case*, Award, 1903, UNRIAA, vol. X, pp. 717–720, at p. 718.

[928] *Ibid*., p. 719 referring to De Vattel, *Le Droit des Gens ; ou, Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et des Souverains* (Washington, Carnegie Institution of Washington, 1916), Book III, chap. XV, sect. 232, p. 197.

examination of nearly all of the international law text-books, and finds the principles herein laid down to receive their unqualified sanction".[929]

585. Another example can be found in the *Poggioli* case, where the award mentions the work of various publicists and noted that "there has been in fact a denial of justice by the administrative authorities of the State; that the considerations herein narrated come within the language of Calvo, who finds responsibility 'in case of complicity or of manifest denial of justice,'".[930]

7. Examples of references to the work of the International Law Commission

Observation 295

The United Nations Compensation Commission referred to the work of the International Law Commission in relation to State responsibility.

586. The Panel of Commissioners of the United Nations Compensation Commission found that the damage resulting from the use or diversion of the resources of Kuwait to cover the costs incurred to repair the loss and damage directly caused by the Iraqi invasion of Kuwait fell "squarely within the types of loss contemplated by articles 31 and 35 of the [International Law Commission] articles and the principles established in the [*Factory at*] *Chórzow* case, and so are compensable".[931]

587. Another example can be found in a 1999 report of the United Nations Compensation Commission which referred to the "accepted principles of international law", and noted that "[t]he Draft Articles on State Responsibility by the International Law Commission, for example, provide in relevant part that 'compensation covers any economically assessable damage sustained … and, where appropriate, loss of profits'".[932]

Observation 296

The Eritrea-Ethiopia Claims Commission has referred to the articles on State responsibility prepared by the Commission.

588. For example, in the final award on compensation the Eritrea-Ethiopia Claims Commission considered that the principle of full reparation contained in the *Factory at Chórzow* case indicated that the purpose of compensation to be paid by a responsible State should "seek to wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed", as reflected in article 31 of the articles on State responsibility.[933]

8. Examples of references to collective works of expert bodies Observation

Observation 297

On occasion, claims commissions referred to the work of private institutions.

589. The French-Italian Commission in *Différend interprétation et application des dispositions de l'Article 78, par. 7, du Traité de Paix au territoire éthiopien* referred

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[929] *Ibid*., p. 719.

[930] Italian-Venezuelan Commission, *Poggioli Case*, Award, 1903, UNRIAA, vol. X, pp. 669–692, at p. 689.

[931] Report and recommendations made by the Panel of Commissioners concerning Part Three of the third instalment of "F3" claims (S/AC.26/2003/15), para. 220.

[932] Report and recommendations made by the Panel of Commissioners concerning the second instalment of "E2" claims (S/AC.26/1999/6), para. 77.

[933] Eritrea–Ethiopia Claims Commission, *Final Award, Eritrea's Damages Claims*, Decision, 17 August 2009 (see footnote 156 above), para. 24, quoting *Factory at Chorzów (Merits)* (see footnote 28 above), p. 47.

to the rules of the interpretation of treaties contained in the work of the Institute of International Law, indicating that it was a universally recognized principle of interpretation that the provisions of a treaty must be interpreted in their context.[934]

590. In the *Fubini* case, the Italian-United States Conciliation Commission noted that:

> [t]he rules on the art of interpreting international treaties require that the interpreter rely, first of all, on the text that must be applied, in giving the terms employed by the contracting States their natural meaning. In that direction is the Resolution of the Institut de droit international of April 19, 1956, Grenade session (*Annuaire*, vol. 46, p. 365) … In its jurisprudence, the Permanent Court of International Justice rendered the same opinion and refused to give any consideration to the provisions that were not to be found in the text … The jurisprudence of the present International Court of Justice is in no way different.[935]

591. In the *H. G. Venable v. United Mexican States* case, the Commission referred to Ralston's publications on the Venezuelan Arbitrations of 1903, the rules on bankruptcy law adopted by the Institute of International Law in 1902 and the draft convention on bankruptcy law "inserted in the final protocol of the Hague Conference on Private International Law of October-November, 1925", where a syndic or bankruptcy trustee acted as a representative of the estate and was not considered a representative of the government.[936]

592. In *James H. McMahan (U.S.A.) v. United Mexican States*, the Mexican-American Claims Commission was discussing the boundary dividing Mexico and the United States in the Rio Grande. It indicated that up to such point, both States may exercise full territorial rights, referring to scholarly writings, treaties concluded after the Congress of Vienna in 1815 and the regulations adopted by the Institute of International Law in 1887 concerning the navigation of international rivers separating two or more States to indicate that such instruments recognized the right of riparian States to exercise police powers in the river.[937]

Observation 298

On occasion, the Eritrea-Ethiopia Claims Commission referred to the work of the ICRC concerning the customary status of certain rules of international humanitarian law.

593. The Eritrea-Ethiopia Claims Commission referred on occasion on the work of the ICRC concerning customary international humanitarian law, however, it indicated that it:

> note[d] with appreciation the new, exhaustive study of customary law by the ICRC, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005). That

[934] French-Italian Conciliation Commission, *Différend interprétation et application des dispositions de l'Article 78, par. 7, du Traité de Paix au territoire éthiopien — Décisions nos 176 et 201*, Awards, 1 July 1954 and 16 March 1956, UNRIAA, vol. XIII, pp. 626–661, at p. 643, citing Hersch Lauterpacht, *De l'interprétation des traités, nouveau projet définitif de résolutions à l'issue du débat de Sienne au sein de l'Institut de Droit International*, p. 1, art. 1, para. 2.

[935] Italian-United States Conciliation Commission, *Fubini Case — Decision No. 201*, Award, 12 December 1959, UNRIAA, vol. XIV, pp. 420–434, at p. 425.

[936] *H. G. Venable* (see footnote 906 above), p. 228.

[937] Mexico/United States, General Claims Commission, *James H. McMahan (U.S.A.) v. United Mexican States*, Award, 30 April 1929, UNRIAA, vol. IV, pp. 486–496, at p. 490, referring to L. Oppenheim, *International Law*, vol. 1, 3rd ed. (London, Longmans, 1920), pp. 314-322; Paul Fauchille, *Traité de droit international public*, vol. 1, Part 2, 8th ed. (Paris, Rousseau, 1925) pp. 453 et seq.; John Bassett Moore. *A Digest of International Law*, vol. 1 (Washington, Government Printing Office, 1906), pp. 616. et. seq.; J. de Louter, *Le droit international public positif*, vol. 1 (Oxford, Oxford University Press, 1920), p. 445, also, p. 490.

study concludes that a broader prohibition than the one stated in Article 54(2) has become customary law. The Commission need not, and does not, endorse the study's broader conclusion.[938]

9. Examples of references to other expert bodies

Observation 299

On occasion, claim commissions relied on the bases for discussion of the Conference of the Codification of International Law in support of certain rules.

594. The Mexican-American Claims Commission in *Mexican Union Railway (Ltd.) (Great Britain) v. United Mexican States* referred to the *Bases for Discussion of the 1930 Conference for the Codification of International Law*, and the response of the British Government in support of the rule requiring the exhaustion of local remedies.[939]

595. In *Minnie Stevens Eschauzier (Great Britain) v. United Mexican States*, the British-Mexican Claims Commission referred to various materials in support of the rule of continuous nationality of the claimant to qualify for compensation. The commission noted that "the most recent developments of international law seem inclined to attach great value to the conditions existing at the time of the award", and after citing the *Bases of Discussion for the Conference for the Codification of International Law*, it concluded that "[i]n the light of such weighty documents on the subject, the Commission do not feel at liberty to ignore the fact that the claimant no longer possesses the British nationality", and rejected the claim.[940]

B. United Nations human rights treaty bodies

1. Introduction and applicable law

596. The United Nations human rights treaty bodies are committees of independent experts that monitor the implementation by States parties of their obligations under their respective international human rights treaties.[941] None of the treaties have a specific provision on the law applicable by the respective treaty body.

597. The commentary to the draft conclusions on the present topic as provisionally adopted by the Commission during its seventy-fourth session includes the outputs of treaty bodies in individual complaints procedures within the meaning of "decisions".[942]

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[938] Eritrea-Ethiopia Claims Commission, *Partial Award: Western Front, Aerial Bombardment and Related Claims – Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26*, Award, 19 December 2005, UNRIAA, vol. XXVI, pp. 291–349, at p. 330, para. 105, footnote 23.

[939] Great Britain/Mexico, *Mexican Union Railway (Ltd.) (Great Britain) v. United Mexican States*, Award, February 1930, UNRIAA, vol. V, pp. 115–129, at p. 122, para. 13.

[940] Great Britain/Mexico, *Minnie Stevens Eschauzier (Great Britain) v. United Mexican States*, Award, 24 June 1931, UNRIAA, vol. V, pp. 207–212, at pp. 210–211.

[941] *Ayyash*, Trial Judgment (see footnote 881 above), para. 941.

[941] See para. 4 above.

[942] Para. (6) of the commentary to draft conclusion 2 on subsidiary means for the determination of rules of international law, *Official Records of the General Assembly, Seventy-eighth Session, Supplement No. 10* (A/78/10), p. 82 ("The term "decisions", understood in a broad sense, includes those taken under individual complaints procedures of State-created treaty bodies, such as the Human Rights Committee. Thus, instead of the term 'judicial decisions', which is found in Article 38, paragraph 1 (d), of the Statute, the Commission, consistent with its prior work, selected the broader term 'decisions', the merit of which is to encompass decisions issued by a wider range of bodies.").

2. Approach of the treaty bodies to precedent and consistency

Observation 300

The United Nations human rights treaty bodies have consistently referred to their own decisions, either directly in the text of a decision or in a footnote, when determining the scope and content of provisions of their respective treaties.

598. For example, in *Judge v. Canada*, the Human Rights Committee recalled "its previous jurisprudence in *Kindler v. Canada*, that it does not consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts per se to a violation of article 6 of the Covenant".[943]

599. Similarly, in *Atasoy and Sarkut v. Turkey*, the Human Rights Committee relied on its own previous case to reinforce its conclusion on the content of a specific right:

> The Committee recalls that in its decision of inadmissibility regarding communication No. 185/1984, *L.T.K. v. Finland*, it had indeed regarded this phrase as reinforcing a conclusion that article 18 did not specifically confer a right to conscientious objection. Since that time, however, the Committee has confirmed that the oblique use of this phrase in a different context "neither recognizes nor excludes a right of conscientious objection," and so does not contradict the necessary consequences of the Covenant's guarantee of the right to freedom of thought, conscience and religion.[944]

600. The Human Rights Committee also referred on several occasions to its own findings while examining the admissibility of communications lodged with it: for example, it relied on its previous decisions in order to determine what may constitute "an abuse of the right of submission",[945] it also referred to its own previous decision to determine the meaning of article 5, paragraph 2 (a), of the Optional Protocol to the Covenant.[946]

601. In *M.D.C.P. v. Spain*, the Committee on the Elimination of Racial Discrimination, when considering the merits of the communication, observed that:

> In its examination of individual communications, the Committee has also ruled on facts similar to those in the present case, related to the same context in the same State party, finding violations of articles 2 (b), (c), (d) and (f), 3, 5 and 12 of the Convention.[947]

602. In the *Tirunavukarasu v. the Kingdom of the Netherlands*, the Committee against Torture referred, in a footnote, to its previous decisions to support the established legal test in *non-refoulement* cases: [948]

> Although the risk [of torture in the country of return] does not have to be shown to be "highly probable", the burden of proof generally falls on the complainant,

[943] *Judge v. Canada* (A/58/10, vol. II, annex V, sect. G), para. 10.2.

[944] *Atasoy and Sarkut v. Turkey* (A/67/10, vol. II, annex IX, sect. U), para. 10.3. In this same paragraph the Committee also referred to the jurisprudence of the European Court of Human Rights.

[945] See, for example, *Murne* et al. *v. Sweden* (CCPR/C/137/D/2813/2016), para. 9.2, and *F.A.H.* et al. *v. Colombia* (CCPR/C/119/D/2121/2011), para. 8.3.

[946] See *Murne et al. v. Sweden* (see previous footnote), para. 9.3. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (New York, 15 December 1989), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171.

[947] *M.D.C.P. v. Spain* (CEDAW/C/84/D/154/2020), para. 7.9, citing *N.A.E. v. Spain* (CEDAW/C/82/D/149/2019), para. 15.5, and *S.F.M. v. Spain* (CEDAW/C/75/D/138/2018), paras. 7.5 and 7.6.

[948] *Tirunavukarasu v. the Kingdom of the Netherlands* (CAT/C/76/D/991/2020), para. 10.4, citing *A.R. v. The Netherlands* (A/59/44, vol. II, annex V, sect. G), para. 7.3; and *Dadar v. Canada* (A/61/44, annex VIII, sect. A), para. 8.4.

who must present an arguable case establishing that he or she is at personal, foreseeable and real risk.

Observation 301

The treaty bodies frequently refer to their own general comments or recommendations.

603. For example, in the *Gabriel Osío Zamora v. the Bolivarian Republic of Venezuela* case, the Human Rights Committee quoted several legal positions contained in its general comment No. 32 (2007).[949] In the *Ali and Ali v. Norway* case, the Human Rights Committee relied on the joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017), while examining the question of legality of the placement of children in immigration detention.[950]

604. In *Mohamed Ben Djazia and Naouel Bellili v. Spain*, the Committee on Economic, Social and Cultural Rights on several occasions referred to the legal positions contained in its general comments while considering the merits of the case.[951]

605. In *A. v. Denmark*, the Committee on the Elimination of Discrimination against Women, *inter alia*, referred to the general comment No. 2 of the Committee against Torture when considering whether sexual gender-based violence could be tantamount to torture.[952]

606. The Committee against Torture frequently recalled the established legal positions related to *non-refoulement* cases, as had been expressed in its own general comments.[953]

Observation 302

The Human Rights Committee has recognized the importance of ensuring both consistency and coherence of its decisions, while allowing for departure from this in exceptional situations.

607. In the *Judge v. Canada* case the Human Rights Committee observed that:

> While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required … in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised … The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present–day conditions.[954]

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[949] *Gabriel Osío Zamora v. the Bolivarian Republic of Venezuela* (CCPR/C/121/D/2203/2012), paras. 8.5, 9.3 and 9.4.

[950] *Ali and Ali v. Norway* (CCPR/C/135/D/2926/2017), para. 10.7. The Committee also made references to its own general comment No. 35 in para. 10.3 and to the jurisprudence of the European Court of Human Rights in para. 10.7.

[951] *Ben Djazia and Bellili v. Spain* (E/C.12/61/D/5/2015), paras. 13.1, 13.3–13.4, 14.2, 15.2–15.3 and 17.6.

[952] *A. v. Denmark* (CEDAW/C/62/D/53/2013), para. 8.5.

[953] See, for example, *T.M. v. Sweden* (CAT/C/68/D/860/2018), paras. 12.4 and 12.13; *Abichou v. Germany* (CAT/C/50/D/430/2010), para. 11.3 and 11.5; and *E.C.B. v. Switzerland* (A/66/44, annex XII, sect. A), para. 10.4.

[954] *Judge v. Canada* (see footnote 921 above), para. 10.3.

Observation 303

The Human Rights Committee has referred to the rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties.

608. In the *Judge v. Canada* case the Human Rights Committee observed that:

> In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[955]

Observation 304

The human rights treaty bodies have regularly referred to decisions of regional human rights judicial bodies.

609. The Committee on Economic, Social and Cultural Rights referred, in the footnote, to the jurisprudence of the European Court of Human Rights to supports its interpretation of the "clear disadvantage" criterion:[956]

> In exercising its discretionary power [not to consider a communication that fails to meet a minimal level of severity], the Committee should take into account, among other factors, its jurisprudence on the various rights under the Covenant and whether the alleged victim was at a clear disadvantage on the basis of the circumstances of the case, especially the nature of the rights allegedly violated, the seriousness of the alleged violations and/or the possible effects of the violation on the alleged victim's personal situation.

610. In the *Chiara Sacchi et al. v. Argentina* case, the Committee on the Rights of the Child, while interpreting article 2 of the Convention on the Rights of the Child, referred in a footnote to the interpretation of the Inter-American Court of Human Rights to reinforce of a textual similar provision of Inter-American Convention on Human Rights:[957]

> the Committee finds that the appropriate test for jurisdiction in the present case is that adopted by the Inter-American Court of Human Rights in its Advisory Opinion on the environment and human rights … The Committee considers that, while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction.

611. The Human Rights Committee has occasionally referred to legal positions in the decisions of the Inter-American Court of Human Rights[958] and the European Court of Human Rights[959] to support its own interpretation of the Covenant.

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[955] *Ibid*., para. 10.4

[956] *Ben Djazia and Bellili v. Spain* (see footnote 951 above), para. 11.5, citing European Court of Human Rights, *Gagliano Giorgi v. Italy*, No. 23563/07, ECHR 2012, paras. 54–56; and *Giusti v. Italy*, No. 13175/03, 18 October 2011, para. 34.

[957] *Sacchi* et al. *v. Argentina* (CRC/C/88/D/104/2019), para. 10.7, citing Inter-American Court of Human Rights, Advisory Opinion OC-23/17, *Medio Ambiente y Derechos Humanos* [The environment and human rights], 15 November 2017, Series A, No. 23, para. 136, also paras. 175–180 on the precautionary principle ("It is also worth noting the textual similarity between article 1 of the Inter-American Convention on Human Rights and article 2 of the Convention on the Rights of the Child, in respect of jurisdiction").

[958] See, for example, *Gabriel Osío Zamora v. the Bolivarian Republic of Venezuela* (footnote 949 above), para. 9.3.

[959] See, for example, *A.P. v. Kazakhstan* (CCPR/C/133/D/2726/2016), para. 10.5, where the Committee referred to "a similar approach"; also *Sheriffdeen v. Sri Lanka* (CCPR/C/133/D/2978/2017), para. 6.2.

612. While addressing the issue of exhaustion of domestic remedies in *S.F.M. v. Spain*, the Committee on the Elimination of Discrimination against Women referred to decisions of the European Court of Human Rights to the effect that "the authors of an individual communication are not obliged to exhaust all available remedies but must give the State party the opportunity, through a relevant chosen mechanism, to remedy the matter within its jurisdiction".[960] In the *A. v. Denmark* case, the Committee on the Elimination of Discrimination against Women referred to the case law of the European Court of Human Rights and the Inter-American Commission on Human Rights to support its position that gender-based violence and abuse could be classified as torture.[961]

Observation 305

On occasion, the treaty bodies have referred to the work of the International Law Commission.

613. The Committee on Economic, Social and Cultural Rights referred to the Commission's commentaries to the articles on State responsibility when examining admissibility *ratione temporis* of the communication. The Committee observed as follows:

> The Committee recalls that the Optional Protocol entered into force for the State party on 5 May 2013 and that, in accordance with article 3 (2) (b) of the Optional Protocol, the Committee must declare a communication inadmissible when the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the State party concerned unless those facts continued after that date. As noted by the International Law Commission:
>
> > An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution … The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.[962]
>
> By the same token, the Committee considers that a fact that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time.

614. In *Chiara Sacchi* et al. *v. Argentina*, the Committee on the Rights of the Child referred to a case of the Inter-American Court of Human Rights whereby the Court referred to the legal position of the International Law Commission. It reads as follows:[963]

> in line with the position of the Inter-American Court of Human Rights, that not every negative impact in cases of transboundary damage gives rise to the

[960] *S.F.M. v. Spain* (see footnote 947 above), para. 6.3.
[961] *A. v. Denmark* (see footnote 952 above), para. 8.5.
[962] *Merino Sierra and Merino Sierra v. Spain* (E/C.12/59/D/4/2014), para. 6.7, citing para. (6) of the commentary to article 14 (Extension in time of the breach of an international obligation) of the articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 60.
[963] *Sacchi* et al. *v. Argentina* (see footnote 957 above), para. 10.12.

> responsibility of the State in whose territory the activities causing transboundary harm took place, that the possible grounds for jurisdiction must be justified based on the particular circumstances of the specific case, and that the harm needs to be "significant". In this regard, the Committee notes that the Inter-American Court of Human Rights observed that, in the articles on prevention of transboundary harm from hazardous activities, the International Law Commission referred only to those activities that may involve significant transboundary harm and that "significant" harm should be understood as something more than "detectable" but need not be at the level of "serious" or "substantial".

615. In its views in the case of *Sarma v. Sri Lanka*, which concerned the abduction of the son of the author of the communication by an officer of the Sri Lankan Army, the Human Rights Committee noted that "it is irrelevant in the present case that the officer to whom the disappearance is attributed acted *ultra vires* or that superior officers were unaware of the actions taken by that officer",[964] the Human Rights Committee referred in a footnote to article 7 of the articles on State responsibility and concluded that the State was responsible for the disappearance.

Observations 306

On occasion, the Committee on Economic, Social and Cultural Rights has referred to article 14 of the articles on State responsibility when considering the admissibility of communications.

616. For example, in the case of *Merino Sierra and Merino Sierra v. Spain*, the Committee on Economic, Social and Cultural Rights indicated that a communication would be inadmissible when the facts that are subject to such document occurred prior to entrance onto force of the Optional Protocol, unless those facts continued after that date, and referred to the commentary to article 14 of the articles on State responsibility concerning the extension in time of the breach of an international organization.[965] In that case, the Committee on Economic, Social and Cultural Rights considered "that a fact that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time".[966] In that case, it concluded that "[t]he information contained in the communication does not point to the occurrence of any events that have continued subsequent to the entry into force of the Optional Protocol that could, in themselves, be considered to constitute a violation of the Covenant", and decided that it was precluded *ratione temporis* from examining the communication, and that the communication was inadmissible under article 3, paragraph 2 (b), of the Optional Protocol to the Committee on Economic, Social and Cultural Rights.[967]

617. The Committee on Economic, Social and Cultural Rights has also referred to article 14 in a similar analysis in the consideration of the admissibility of the communication in *S.C. and G.P. v. Italy*, where it considered that:[968]

> [W]hen the facts constituting a violation of the Covenant occurred before the entry into force of the Optional Protocol for the State party concerned, the mere

[964] *Sarma v. Sri Lanka* (A/58/40, vol. II, annex V, sect. V), 3 July 2003, para. 9.2, footnote 13.

[965] *Merino Sierra and Merino Sierra v. Spain* (see footnote 962 above), paras. 6.1–6.7, citing para. (6) of the commentary to art. 14 (Extension in time of the breach of an international obligation) of the articles on responsibility of States for internationally wrongful acts, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, para. 77, at p. 60.

[966] *Ibid*., para. 6.7.

[967] *Ibid*.

[968] *S.C. and G.P. v. Italy* (E/C.12/65/D22/2017), para. 6.5, also referring to *Merino Sierra and Merino Sierra v. Spain* (see footnote 962 above) and the commentary to article 14 of the articles on State responsibility, and also *Alarcón Flores* et al. *v. Ecuador* (E/C.12/62/D/14/2016), para. 9.7.

fact that their consequences or effects have not been extinguished, after the entry into force, is not sufficient grounds for declaring a communication admissible *ratione temporis*.

Observation 307

The Human Rights Committee has referred to decisions of the International Court of Justice.

618. In *Christian Nekvedavičius v. Lithuania*, the Human Rights Committee noted the following:[969]

> The Committee notes in this regard the author's arguments that international law deems decisions taken by the authorities of an illegal occupation to be null and void … and recalls the advisory opinion of the International Court of Justice in the *Namibia* case in which the Court noted that the invalidity of legal acts passed by an illegal regime "cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory". The Committee recalls that the advisory opinion had been understood by the European Court of Human Rights as covering other private law relationships as well. … Bearing also in mind that the Covenant does not protect the right to property per se, the Committee is not persuaded by the author's claims regarding the absolute duty of the State party under international law in general, and the Covenant in particular, to regard the 1948 decision regarding the private property title over his father's houses as null and void.

Observation 308

In absence of a definition of "enforced disappearance" in the International Covenant on Civil and Political Rights, the Human Rights Committee has referred to the definitions contained in the Rome Statute, the Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance.[970]

619. In several instances, the Human Rights Committee referred to definitions contained in all three instruments mentioned above in the observation when considering the question as to whether and under what circumstances a forced disappearance could amount to denying the victim recognition as a person before the law.[971] On some occasions, the Human Rights Committee relied on the definition of "enforced disappearance" contained in the Rome Statute alone.[972]

Observation 309

When considering whether the principle of *non-refoulement* applied to persons exposed to risks other than torture, the Committee against Torture has referred to several international instruments, decisions of regional human rights courts and other relevant materials.

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[969] *Nekvedavičius v. Lithuania* (CCPR/C/121/D/2802/2016), para. 6.8, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (see footnote 71 above), para. 125, and European Court of Human Rights, *Cyprus v. Turkey* [Grand Chamber], No. 25781/94, ECHR 2001-IV.

[970] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

[971] *Grioua v. Algeria* (A/62/10, vol. II, annex VII, sect. Y), para. 7.8; *Kimouche v. Algeria* (*ibid*., sect. Z), para. 7.8; *Cifuentes Elgueta v. Chile* (A/64/40, vol. II, annex VIII, sect. J), para. 8.4.

[972] *Yurich v. Chile* (A/61/10, vol. II, annex VI, sect. H), para. 6.3; *Boucherf v. Algeria* (A/61/10, vol. II, annex VI), para. 9.2; *Bousroual v. Algeria* (A/64/10, vol. II, annex IX, sect. I), para. 9.2.

620. In *Adam Harun v. Switzerland*, the Committee against Torture observed that:[973]

> the preamble to the Convention proclaims that any act of torture or inhuman or degrading treatment or punishment is an offence to human dignity. Accordingly, cruel, inhuman and degrading treatment is addressed in the preamble in connection with article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights. These explicit references enabled the Committee, in its general comment No. 2 (2007) on the implementation of article 2 by States parties, to make it clear that obligations under the Convention, including with regard to article 3, extend to both torture and other acts of cruel, inhuman or degrading treatment or punishment, and that, as previously stated by the Committee, article 16 of the Convention is non-derogable. The Committee notes that this interpretation is corroborated by the majority of international conventions which, even though they may draw a terminological distinction between the two concepts, confirm the absolute nature of their prohibition in each case. The Committee notes that the same approach is adopted in the 1949 Geneva Conventions and the first Additional Protocol of 1977. The same applies to the Rome Statute of the International Criminal Court (in the definition of both crimes against humanity and war crimes) and to the Statute of the International Criminal Tribunal for the Former Yugoslavia. The 1951 Convention relating to the Status of Refugees goes even further, since article 33, entitled "Prohibition of expulsion or return ('*refoulement*')" seeks to prevent any threat to life, thus encompassing both concepts. The Committee further notes that the Convention does not detract from the State party's obligations under other human rights instruments to which it is a party, including the European Convention on Human Rights, to which the respondent State is a party, which includes no exception and also links the two concepts in the interpretation of article 3. The Committee emphasizes in this context that the European Court of Human Rights systematically highlights the mandatory nature of the principle of *non-refoulement* and hence of the prohibition of the transfer of an applicant to a State where he is at risk of being subjected to torture and ill-treatment. It is clear from all these rules that international law now extends the principle of *non-refoulement* to persons exposed to risks other than torture.

Observation 310

On occasion, the Committee on Economic, Social and Cultural Rights has referred to decisions of domestic courts.

621. The Committee on Economic, Social and Cultural Rights made references, *inter alia*, to judgments of the Constitutional Court of South Africa and of the Supreme Court of India to reinforce its position on the importance of procedural guarantees in forced eviction cases.[974]

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[973] *Harun v. Switzerland* (CAT/C/65/D/758/2016), para. 8.6, citing general comment No. 2, in particular paras. 1, 3, 6, 15 and 25; Office of the United Nations High Commissioner for Refugees, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol", para. 19; European Court of Human Rights, *Saadi v. Italy* [Grand Chamber], No. 37201/06, ECHR 2008, and *Ramzy v. the Netherlands* (striking out), No. 25424/05, 20 July 2010; and the interpretation by the Human Rights Committee of article 7 of the International Covenant on Civil and Political Rights in its general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement": in *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A).

[974] *Ben Djazia and Bellili v. Spain* (see footnote 951 above), para. 13.14.