SECTION 2. JUDICIAL DECISIONS AND PUBLICISTS

A. JUDICIAL DECISIONS

1. International Court of Justice

Article 38 of the I.C.J. Statute in its paragraph 1(d) directs the Court to apply judicial decisions as "subsidiary means for the determination of rules of law." It is expressly made subject to Article 59 which states that

"the decision of the Court has no binding force except between the parties and in respect of that particular case." Hence the principle of *stare decisis* is not meant to apply to decisions of the International Court. That qualification and the relegation of judicial decisions generally to a "subsidiary" status reflect the reluctance of states to accord courts—and the International Court in particular—a law-making role. The Court's decisions are supposed to be declaratory of the law laid down by the states in conventions and customary rules. In addition, the stated objection to *stare decisis* reflects a perception of international disputes as especially individual, each distinguished by particular features and circumstances.

Despite these qualifications, I.C.J. decisions are, on the whole, regarded by international lawyers as highly persuasive authority of existing international law. The very fact that state practices are often divergent or unclear adds to the authority of the Court. Its decisions often produce a degree of certainty where previously confusion and obscurity existed. A much-quoted dictum of Justice Cardozo reflects the attraction of judicial authority, especially to lawyers in the common law tradition:

> International law or the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests to its jural quality.

New Jersey v. Delaware, 291 U.S. 361 (1934).

A decision of the International Court is generally accepted as the "imprimatur of jural quality" when the Court speaks with one voice or with the support of most judges. Not infrequently, the separate opinions of dissenting judges or other individual opinions contain cogent reasoning that influences subsequent doctrine more than the decision of the majority. Judgments and advisory opinions by a significantly divided court have diminished authority. This is especially true when the issues are perceived as highly political and the judges seem to reflect the positions of the states from which they come. Notable examples are the 1966 decision of the Court in the *South West Africa Cases* and the 1984 decision on jurisdiction and admissibility in the case brought by Nicaragua against the United States. The fact that the key paragraph in the 1996 advisory opinion on *Nuclear Weapons* (excerpted in Chapter 2) was decided by the president's tie-breaking vote left many commentators convinced that the judgment had done little to clarify a contested area of the law and would have little real-world impact.

Judgments and advisory opinions are not always compelling to states. Governments respond in various ways to decisions they consider unfounded or unwise. For example, after the *Lotus Case* (*supra*), many governments adopted a treaty provision which reversed the Court's ruling. See p. 78 note 7. Individual states have also reacted to unfavorable decisions by altering or withdrawing their consent to jurisdiction, as the United States did after the *Nicaragua* case (see Chapter 9). After the *Nuclear Weapons* advisory opinion, U.S. officials noted that some aspects of the opinion

confirmed U.S. position and that no change in U.S. nuclear policies could be expected. See references in note 9 on p. 90.

Notwithstanding these reactions, the Court's pronouncements, especially in non-political matters, are a primary source for international lawyers. Every judgment or advisory opinion is closely examined, dissected, quoted and pondered for its implications. They are generally lengthy and learned analyses of relevant principles and practices and particular cases include opinions often amounting to more than 200–300 pages. After nine decades the case-law and associated opinions of the two "World Courts" constitute a substantial *corpus juris* relevant to many questions of international relations.

A complex problem concerns the role of the Court in "developing" international law and reaching decisions that go beyond declarations of existing law. It is clear that states, by and large, do not expect or wish the Court to "create" new law. Yet as Brierly observed, "the act of the Court is a creative act in spite of our conspiracy to represent it as something else." The Basis of Obligation in International Law 98 (Waldock ed. 1958). Both states and judges are aware "of the discretionary elements in the art of judging: the selection of 'relevant' facts, the need to give specific meaning to broad undefined concepts, the subtle process of generalizing from past cases, the uses of analogy and metaphor, the inevitable choices between competing rules and principles." Schachter, International Law in Theory and Practice 41 (1991). These discretionary elements are more evident in international law than in most areas of domestic law. The fragmentary character of much international law and the generality of its concepts and principles leave ample room for "creative" judicial application. On the other hand, the judges are well aware of the dangers of appearing to be "legislating" and of their precarious consensual jurisdiction (see Chapter 9). One way to meet the problem is to place emphasis on the particular facts of the case to avoid the appearance of creating new law. But there is also a pull in the opposite direction. The Court needs to show that its decisions are principled and in accord with the agreed basic concepts of international law. This requirement leads to reliance on broad doctrinal concepts and precepts taken from treatises and prior case-law. When applied to new situations, the abstractions of basic doctrine create new law. Though many governments hesitate to accept or recognize this, international lawyers acknowledge the formative role of the Court while recognizing the political necessity for the Court to appear solely as an organ for declaring and clarifying the existing law.

NOTES

1. *Composition of I.C.J.* The 15 judges of the International Court are elected for nine-year terms by majority votes of political bodies, namely the Security Council and the General Assembly of the United Nations. (Statute of the Court, Articles 3–18). They are required to have the qualifications required in their respective countries for appointment to the highest judicial office or to be "jurisconsults of recognized competence in international law." (Id. art. 2.) They are supposed to represent the "main forms of civilization and of the principal legal systems of the world." (Id. art. 9.) This requirement is considered to be met by a geographical and political distribution of seats among the main regions of the world. Many of the judges have been well known legal scholars. In recent years, most have had prior service in their national governments, as legal advisors to the foreign office or as representatives to international bodies.

2. *Representative Qualities of International Judges.* Does the fact that the judges are elected by political bodies and are considered likely to reflect the views of their own governments impugn or reduce "the jural quality" of their decisions? Is it legally justifiable to minimize a judicial decision as a source of law because many of the judges have taken the same position as their own governments? How can parties to cases before the Court seek to reduce the effect of ideological or national bias, assuming they wish to do so? See Suh, Voting Behaviors of National Judges in International Courts, 63 A.J.I.L. 224 (1969); Rosenne, The Composition of the Court, in The Future of the International Court of Justice 377 (Gross ed. 1976); Weiss, Judicial Independence and Impartiality: A Preliminary Inquiry, in The International Court of Justice at a Crossroads 123–54 (Damrosch ed. 1987); Schachter, *supra*, at 69–73 (1991).

2. Decisions of Other International Tribunals

International decisions also embrace the numerous judgments of arbitral tribunals established by international agreement for individual disputes or for categories of disputes. Though they are not in a strict sense judicial bodies, they are generally required to decide in accordance with law and their decisions are considered an appropriate subsidiary means of determining international law. Governments and tribunals refer to such decisions as persuasive evidence of law. The International Court only occasionally identifies specific arbitral awards as precedents but it has also referred generally to the jurisprudence and consistent practice of arbitral tribunals. Governments do not hesitate to cite international arbitral decisions in support of their legal positions. Such decisions may be distinguished on the basis of the agreements establishing the tribunal or other special circumstances but in many cases they have been accepted as declaratory of existing international law.

Decisions of arbitral tribunals are published in the U.N.'s Reports of International Arbitral Awards (U.N. Rep. Int'l Arb. Awards), International Law Reports (Lauterpacht ed.), and International Legal Materials (published by the American Society of International Law). The Iran–U.S. Claims Tribunal, with now almost three decades of jurisprudence, has many volumes of published decisions. For further discussion of arbitration as a means of dispute settlement see Chapter 9.

Two European courts—the European Court of Justice (located in Luxembourg, with competence over questions arising within the framework of the European Communities/European Union) and the European

Court of Human Rights (an organ of the Council of Europe, located in Strasbourg) also hand down many decisions that express or interpret principles and rules of international law. The Inter–American Court of Human Rights has a growing body of case law. The decisions of these regional courts are relevant not only to their specialized subject-matter (e.g., economic integration or human rights), but also to more general problems of international law, such as the law of treaties or of state responsibility.

The 1990s and 2000s have witnessed the creation of new international tribunals of specialized subject-matter jurisdiction, with growing potential to contribute to general international law. These include the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the International Tribunal for the Law of the Sea, and the dispute settlement body of the World Trade Organization, as well as the permanent International Criminal Court established in 2002. These will be dealt with in subsequent chapters, both as regards the substantive law that they apply (e.g., Chapters 16–17) and as regards general considerations of international judicial jurisdiction (Chapter 9). For present purposes it is sufficient to draw attention to two main themes relevant to the problem of sources: (1) whether these new tribunals can be expected to apply a methodology of sources similar to that indicated in Article 38 of the Statute of the I.C.J., and (2) whether their decisions will be treated by the I.C.J. and other law-applying bodies as "subsidiary means" under Article 38(1)(d) of the I.C.J. Statute, comparably to the I.C.J.'s own judgments. Commentators evaluating the early years of operation of such tribunals have ventured an affirmative answer to the first question, and have likewise predicted the inevitable influence of such tribunals on other courts, including the I.C.J. See, e.g., Charney, Is International Law Threatened by Multiple International Tribunals? in 271 Rec. des Cours 101, 189–236 (1998); Charney, The Impact on the International Legal System of the Growth of International Courts and Tribunals, 31 N.Y.U. J. Int'l L. & Politics 697 (1999) and related symposium articles; Palmeter & Mavroidis, The WTO Legal System: Sources of Law, 92 A.J.I.L. 398 (1998) (finding that W.T.O. dispute settlement practice on sources is similar to that of I.C.J. Statute Art. 38, and discerning other parallels, e.g. in tendency to refer to prior rulings of the dispute settlement body as authoritative even though not formally binding); Mavroidis, No Outsourcing of Law? WTO Law as Practiced by WTO Courts, 102 A.J.I.L. 422 (2007).

The I.C.J. is not in a hierarchical relationship with such tribunals. Though I.C.J. judgments continue to have great influence, other bodies have felt free to differ with the I.C.J. when presented with similar (albeit not identical) questions. The result can be a productive dialogue. For example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia explicitly disagreed with an aspect of the I.C.J.'s *Nicaragua* judgment, finding its reasoning "unconvincing." *Tadić, Case No. IT–94–1–AR72*, Appeal from Judgment of Conviction, para. 115ff. (July 15, 1999). When the I.C.J. later returned to related questions in the

Bosnian *Genocide* case, 2007 I.C.J. No. 91 at paras. 402–07, it explained in some detail the basis for the disagreement between the two tribunals and its reasons for adhering to its own "settled jurisprudence" in resolving the questions before it. It also relied significantly on the I.C.T.Y.'s findings of fact in cases involving individual criminal responsibility for genocide.

Other international organs perform some functions analogous to those of courts, but by virtue of their restricted competence, their authority as potential "sources" or "subsidiary means" is uncertain or disputed. As an example, the U.N. Human Rights Committee (the implementing body for the International Covenant on Civil and Political Rights) has aroused controversy for its pronouncements concerning reservations to human rights treaties; in the view of some governments, the Committee exceeded its competence in purporting to opine on the legal effects of such reservations and thus those governments contend that the Committee's opinion (expressed in the form of a "general comment") lacks authority. This controversy is addressed in Chapter 3 on the law of treaties and Chapter 13 on human rights. It is mentioned here as an illustration of the widening domain of bodies applying rules of international law, whose output might arguably (though contestedly) contribute to the sources of international law. For more on problems of interaction among international courts and tribunals, see the I.L.C.'s Fragmentation Study (Chapter 1).

3. Precedents in International Tribunals

The fact that Article 59 of the I.C.J. Statute excludes *stare decisis* has not meant that the Court's case-law ignores precedent. The Court cites its earlier decisions and often incorporates their reasoning by reference, thereby creating a consistent jurisprudence. When the Court seems to depart from precedent, it generally distinguishes the cases and explains the reasons for the different views. See cases cited in 3 Rosenne, The Law and Practice of the International Court, 1920–2005, at 1552–58 (4th ed. 2006); Shahabuddeen, Precedent in the World Court (1996).

Most other international tribunals likewise appear be following their own precedents even though their constitutive instruments do not provide for them to do so, and also to be paying attention to what the I.C.J. and other tribunals are doing. For detailed examination of the role of prior decisions in the dispute settlement organs of the world trade system, see Mavroidis, No Outsourcing of Law? WTO Law as Practiced by WTO Courts, 102 A.J.I.L. 422 (2007); see also Bhala, The Myth About Stare Decisis and International Trade Law, 14 Am. U. Int'l L. Rev. 845 (1999); Bhala, The Precedent Setters: De Facto Stare Decisis in WTO Adjudication, 9 Fla. State U. J. Transnat'l. L. & Pol. 1 (1999); Bhala, The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication, 33 Geo. Wash. Int'l L. Rev. 873 (2001). In the context of international criminal law, a former president of the I.C.T.Y. has written that "one can discern perhaps the outlines of an informal *stare decisis* principle, as courts and governments rely on precedent rather than repeatedly engage in detailed

analysis of the customary status of the same principles." Meron, Revival of Customary Humanitarian Law, 99 A.J.I.L. 817, 819–20 (2005).

NOTE

The U.S. Supreme Court's View of I.C.J. Jurisprudence. In *Sanchez–Llamas v. Oregon*, 548 U.S. 331 (2006), the U.S. Supreme Court declined to follow the interpretation of an international treaty rendered by the I.C.J. in a case brought by Mexico against the United States, *Avena and Other Mexican Nationals*, 2004 I.C.J. 12. The Supreme Court stated that "[n]othing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts." With reference to Article 59 of the I.C.J. Statute, the Court said: "Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent *even as to the ICJ itself*; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts." 548 U.S. 331, 355 (emphasis in original). While an interpretation by an international court may be entitled to "respectful consideration," the Supreme Court felt free to reach a different conclusion on the matter before it. See also *Medellin v. Texas*, 128 S.Ct. 1346 (2008), discussed further in Chapter 9.

4. Decisions of Municipal Courts

The opinions in *Paquete Habana* and the *Lotus Case* (Chapter 2, pp. 61, 68) cite municipal court decisions as evidence of customary law. Such municipal decisions are indicative of state practice and *opinio juris* of the state in question. However, inasmuch as national courts in many countries also apply principles and rules of international law, their decisions may be treated as a subsidiary source independently of their relation to state practice. While the authority of a national court would as a rule be less than that of an international court or arbitral body, particular decisions of the higher national courts may be the only case-law on a subject or the reasoning and learning in the decisions may be particularly persuasive. Decisions of the U.S. Supreme Court and other high courts have been relied on by arbitral bodies and have been cited by states in support of their claims. In some areas of law such as state responsibility and sovereign immunity, national court decisions have had a prominent role. See Chapters 8 and 12; see also Nollkaemper, Internationally Wrongful Acts in Domestic Courts, 101 A.J.I.L. 760 (2007).

The International Criminal Tribunal for the Former Yugoslavia (I.C.T.Y.) has referred extensively to municipal decisions, especially those applying the international laws of war. For examples, see Meron, Revival of Customary Humanitarian Law, 99 A.J.I.L. 817, 824, 826 (2005). Some judges of the I.C.T.Y. have asserted that relatively greater attention should be given to the rulings of national authorities that were sitting in the capacity of an international tribunal and applying international law (e.g., the Allied military tribunals in occupied Germany after World War II) than to national courts that were merely applying local law. See the joint separate opinion of Judges McDonald and Vohrah in *Erdemović, Case*

No. IT–96–22–A, Judgment on Appeal, paras. 42ff (Oct. 7, 1997). In the *Nuclear Weapons* advisory opinion, a Japanese court decision was noted in some of the separate and dissenting opinions as a relevant subsidiary source under Article 38(1)(d). See, e.g., 1996 I.C.J., 375, 397 (Dissenting Opinion of Judge Shahabuddeen, citing *Shimoda v. State* (Tokyo Dist. Ct. 1963)).