
McGill Journal of Dispute Resolution



Revue de règlement des différends de McGill

Volume 5 (2018-2019), Number 8

Article

**Today's Notion of International
Case Law: From a Subsidiary Source
to a Binding Authority**

Yunus Emre Acikgonul

Contents

I.	INTRODUCTION	188
II.	CASE LAW AS SOURCE OF INTERNATIONAL LAW	189
	A. Binding Authority	191
	B. Persuasive Authority	192
	C. Jurisprudence Constante	192
III.	PRACTICE OF FOLLOWING PRECEDENT	193
	A. General Duty to Consider	193
	B. Duty to Follow Well-Established Precedent	195
	C. Primary Source for International Lawyers	197
IV.	ICJ AND DEVELOPMENT OF INTERNATIONAL LAW	198
	A. ICJ's Influence Varies in Each Field	199
	B. Courts' Involvement in Creation of Law	201
V.	CASE LAW AND OTHER PRIMARY SOURCES	203
	A. Treaty Law	204
	a. <i>Anglo-Norwegian Fisheries Case</i>	204
	b. <i>Reparations Case</i>	204
	c. <i>North Sea Continental Shelf Cases</i>	205
	d. <i>Gabčíkovo-Nagymaros</i>	205
	e. <i>Reservations to Genocide Convention Case</i>	205
	B. Customary Law	206
	C. Reversal of Judicial Decisions	206
	a. <i>The Lotus Case</i>	207
	b. <i>The Icelandic Fisheries Case</i>	207
	c. <i>Corfu Channel Case</i>	207
	d. <i>North Sea Continental Shelf Cases</i>	208
VI.	PRACTICE IN OTHER TRIBUNALS	208
	A. Investment Arbitration	208
	B. Commercial Arbitration	211
	C. WTO Dispute Settlement Body	212
VII.	CONCLUSION	213

Today's Notion of International Case Law: From a Subsidiary Source to a Binding Authority

Yunus Emre Acikgonul*

Case law is described as a subsidiary source of international law by the Statute of the ICJ. However, a 'formalist approach to precedent' and the 'practice of the courts' do not necessarily overlap. The practice of courts and tribunals demonstrate that previous judgments have an immense effect on future decisions. In particular, when there is a settled and consistent jurisprudence, the authority of precedent is generally considered more than a simple persuasion, and could amount to a binding force. However, case law does not have a uniform role in every field of international law. The role of precedent has evolved in its own way in each settlement system. Each system of arbitration and court represents a unique institutional context, the specifics of which influence how precedent evolves and affects future disputes. Another relevant question is whether courts have a lawmaking power. The plain reading of Article 38 and 59 of the Statute of ICJ suggests that states are reluctant to accord courts and tribunals a law-making role. However, practice demonstrates that international courts and arbitral tribunals effectively shift normative expectations and play an integral part in the making of international law. Today, the role of case law has already gone beyond the declaration of existing laws.

...

La jurisprudence est considérée comme une source subsidiaire de droit international par le Statut de la CIJ. Cependant, il n'existe pas nécessairement un chevauchement entre 'une approche formaliste au précédent' et 'la pratique des tribunaux'. La pratique des cours et des tribunaux démontre que les jugements antérieurs ont un impact important sur les décisions futures. En particulier, lorsque la jurisprudence est constante et cohérente, le précédent est généralement plus que persuasif et pourrait détenir un pouvoir contraignant. Toutefois, la jurisprudence n'a pas un rôle uniforme dans tous les domaines du droit international. Le rôle du précédent a évolué de sa propre façon dans chaque système de règlement de différends. Chaque système de règlement de différends représente un contexte institutionnel unique, dont les particularités influencent la manière dont les précédents évoluent et affectent les futurs litiges. Une autre question pertinente qui se pose est à savoir si les tribunaux ont un pouvoir législatif. Le sens ordinaire des articles 38 et 59 du Statut de la CIJ suggère que les États hésitent à conférer aux cours et tribunaux un rôle législatif. Cependant, la pratique démontre que les tribunaux internationaux et les tribunaux d'arbitrage modifient de façon efficace les attentes normatives et jouent un rôle essentiel dans l'établissement du droit international. Aujourd'hui, le rôle de la jurisprudence a déjà dépassé la déclaration des lois existantes.

I. INTRODUCTION

The principles of general international law derive from the resolutions of international organizations, treaties and other declarations that contain normative rules. However, international law still lacks a sufficient level of authoritative rules. There is no single body able to create laws internationally binding upon everyone. Yet, there is a problem of discovering where the law is to be found. Naturally, there is a need for an authority to clarify whether a particular proposition amounts to a legal rule. This perplexity is reinforced by the anarchic nature of world affairs and the clash of competing sovereignties in the international legal order.¹ Due to these ongoing complexities, the International Court of Justice (ICJ) judgments and arbitral awards generally assume considerable importance in determining and developing the international law.²

Case law is described as a subsidiary source of international law by the *Statute of the International Court of Justice* (“*ICJ Statute*”).³ Unlike the states with common law traditions, prior decisions only have *inter-partes* effect and do not bind other courts and arbitral tribunals in international law. This norm is formulated in the *ICJ Statute* at Article 38, which states that “the decision of the Court has no binding force except between the parties and in respect of that particular case”.⁴ Although this is the valid doctrine, the practice of courts and tribunals demonstrates that previous judgments have an immense effect on future decisions.

Scholarly writings are divided with regards to the role of case law in international law. Several approaches can be identified in the literature as to the authority of precedent. It is almost unanimously accepted that precedents may be used as persuasive authority by other courts in subsequent disputes.⁵ Some have even argued that precedent can have an even stronger influence

* Yunus Emre Acikgonul has specialized on the public international law with a focus on the law of the sea. Mr. Acikgonul published a number of articles and a book on public international law.

He served in Foreign Service as a Legal Counsellor and holds two LLM degrees. Mr. Acikgonul is pursuing a doctorate program at the United Nations University for Peace.

1 Malcolm N Shaw, *International Law*, 5th ed, (Cambridge: Cambridge University Press, 2003) at 66.

2 Jonathan I Charney, “Progress in International Maritime Boundary Delimitation Law” (1994) 88 *AJIL* 227 at 227.

3 United Nations, *Statute of the International Court of Justice*, 18 April 1946, art 38 [*ICJ Statute*]

4 *Ibid* at art 59.

5 Judge Sir Christopher Greenwood, “Sources of International Law: An Introduction” (United Nations Audiovisual Library Lecture Series, delivered in 2008) online: *United Nations* <<http://webtv.un.org/watch/judge-greenwood-icj-on-the-sources-of-international-law/2622924798001/?term=&lan=english>>.

over other courts in certain circumstances.⁶ Other writers have stated that there is no such rule of precedent in international law. This paper, however, argues that case law does not have a uniform role in international law. Generalization of the authority of precedent will ignore the particulars of each judicial settlement system. In fact, each arbitration and court system represents a unique institutional context, the specifics of which will influence how precedent evolves and affects future disputes.

Generally speaking, international courts⁷ tend to give serious consideration to previous judicial opinions. Unlike courts, *ad hoc* arbitrators place relatively less weight on precedent.⁸ Therefore, a thorough and accurate analysis of the role of case law in international law requires addressing the practice of each system individually. With this understanding, earlier sections will focus on the practice of the ICJ while the final section will offer a brief overview on other international courts and arbitral tribunals.

Similarly, the role of case law does not have the same weight in all fields of law. For example, jurisprudence has a decisive role in shaping the developing fields of international law. It is not a coincidence that, in the absence of clear guidance in treaty law, rules of international law in developing areas substantially evolved from customary law and have been developed by international courts and arbitral tribunals.⁹ To the contrary, judicial decisions are less significant in highly institutionalized areas of law. This study aims to identify these areas of law in a systematic way.

In the fourth section, the role of case law will be discussed in relation to primary sources of international law. When judicial decisions prove the existence of primary rules in customary law, judicial decisions can gain the status of legally binding rules of general application. Similarly, the consistent decisions of courts and tribunals can also contribute to the development of the treaty law. By referring to landmark cases, this chapter will explain how case law influences customary international law and treaty law.

Before delving into these issues, the paper will first present the basic arguments on the status of case law as a source of international law. In the second and third chapters, the paper will aim to find answers to two critical questions. First, whether international courts and arbitral tribunals are involved in the 'creation of law' and, second, what degree of authority precedent has over the courts and arbitrators in the determination of future

6 Gary Born, *International Arbitration: Law and Practice* (Alphen aan den Rijn, NL: Kluwer Law International, 2012), at 367; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (New York: The New Press, 2013); Marc Jacob, "Precedents: Lawmaking Through International Adjudication" (2011) 12 Ger Law J 1005 at 1031.

7 Arbitration and judicial settlement are two available legal methods of the resolution of international disputes. See *ICJ Statute, supra* note 3 at art 33.

8 W Mark C Weidemaier, "Toward a Theory of Precedent in Arbitration" (2009) 51:5 Wm & Mary L Rev 1895 at 1904–6.

9 Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge: Cambridge University Press, 2015), at 13, 187, 192 and 213.

cases.

II. CASE LAW AS SOURCE OF INTERNATIONAL LAW

Article 38 of the *ICJ Statute* is widely recognised as the most authoritative pronouncement as to the sources of public international law. The statute defines ‘treaties’, ‘customary law’ and the ‘general principles of law’ as primary sources of law, and ‘case law’ and ‘doctrine’ as subsidiary sources of law.

This classification leads to a debate in academia regarding the meaning of subsidiary sources and their value as a source of law. It is generally accepted that subsidiary sources of international law are mainly designed to ‘clarify’, ‘determine’ and ‘declare’ the existence of primary rules of law, to ‘substantiate’ the rules of customary law, to ‘interpret’ the treaties and to ‘confirm’ the applicability of general principles of law. However, it is also acknowledged that judicial decisions have a further role in the development of international law than what was originally envisaged in the *ICJ Statute*. As noted by Professor Malcolm Shaw, although judicial decisions, in the words of article 38, are to be utilised as a subsidiary means for the determination of rules of law rather than as an actual source of law, they can be of immense importance.¹⁰

In this context, two main positions have emerged in academia regarding the role of case law. The proponents of a first position categorically reject the doctrine of *stare decisis*, and contend that a decision of the court produces binding effect upon the parties only insofar that, they argue, an extension of the effect of a decision on later cases would go beyond the statutory limits.¹¹ This argument is also supported by formal declarations of law, particularly Article 59 of the *ICJ Statute*, which provides that “the decision of the Court has no binding force except between the parties and in respect of that particular case”,¹² thus excluding any binding force of earlier decisions. This group also proposes that under Article 38 of the *ICJ Statute*, courts have no power to create law, but only to furnish and apply the existing law in a given case.¹³

The proponents of the second position, to the contrary, contend that courts and arbitrators consistently refer to prior decisions and even feel compelled to comply with the precedent when settling a dispute,¹⁴ even though there is no doctrine of precedent in international law, as it is known in the common law. The second group further notes that case law in international law has gone beyond the limits drawn in Article 38 of the

¹⁰ Shaw, *supra* note 1 at 104.

¹¹ Karl Doehring, “The Participation of International and National Courts in the Law-Creating Process” (1991-1992) 17 SAYBIL 1 at 5.

¹² *ICJ Statute*, *supra* note 3 at art 59.

¹³ Doehring, *supra* note 11 at 4.

¹⁴ Jacob, *supra* note 6.

ICJ Statute.¹⁵ Courts and arbitrators have already shaped the international legal order by actively contributing to the creation of law in many fields. Proponents of this position have mainly relied on the actual role and practice of international courts and arbitral tribunals.

Both positions receive criticism and support in academia to some extent. However, in order to determine the actual status of precedent, a number of fundamental questions need to be addressed as a first step. For example, without a doctrine of *stare decisis*, why are prior rulings entitled to any weight at all? How much weight should they receive in future cases? If any weight should be given, what are the tendencies and practices of each judicial institution? Even before delving into the answers to these questions, a number of approaches regarding the degrees of precedent developed in national law systems will be introduced to set the stage for further discussions.

A. *Binding Authority*

Giving a binding authority to prior judicial decisions is the strongest form of precedent in national systems. This form of precedent imposes an obligation on lower courts to follow the prior decisions of higher courts.¹⁶ A similar approach is in force in common law appellate court systems, where the doctrine of *stare decisis* demands other courts follow earlier decisions unless there are 'compelling reasons' and in rare circumstances.¹⁷ The United States Supreme Court explained the rationale behind this approach by referring to the principles of consistency, integrity and predictability, with the following statement:

Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right ... It is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.¹⁸

It is generally out of the question that earlier court decisions do not have a 'formally binding' authority over future courts in international law. However, international courts in certain subjects have highlighted

¹⁵ Shaw, *supra* note 1 at 104.

¹⁶ Irene M Ten Cate, "The Costs of Consistency: Precedent in Investment Treaty Arbitration" (2013) 51 *Colum J Transnat'l L* 418 at 439.

¹⁷ Fabien Gélinas, "Dispute Resolution as Institutionalization in International Trade and Information Technology" (2005) 74 *Fordham L Rev* 489 at 496–97 [Gélinas, "Institutionalization"].

¹⁸ *State Oil Co v Khan*, 522 US 3 (1997) at 20.

the need to follow previous judicial decisions for the sake of certainty and predictability.¹⁹ Particularly when case law exhibits a striking unanimity of approach to the same question with a reasoned result or if a particular decision has won widespread respect over time, some propose an ‘effectively binding’ precedent for other international courts and tribunals.²⁰

B. *Persuasive Authority*

Although it is clear that no formal rule of precedent exists in international law, the need for certainty and predictability requires that prior decisions be recognized with a level of respect.²¹ The fact that there is no *stare decisis* doctrine in international law does not mean that prior decisions have no precedential value. Advocates of this approach propose that the majority of adjudicators treat precedent as a ‘persuasive authority’. The same argument is developed for the practice of the ICJ, which is not bound by its prior decisions, but treats them as a highly persuasive authority.²²

This approach suggests that adjudicators need to follow non-binding decisions only if they are persuaded by the strength of their reasoning. It is, however, optional in the sense that it neither constrains the decision-making freedom of adjudicators nor automatically binds future courts.²³ Perhaps, this doctrine has attached itself to the idea that good reasons are and should be persuasive, in the ordinary sense of the word, irrespective of the formal status of the documents.²⁴

C. *Jurisprudence Constante*

Another proposed approach to precedent in public international law is based on the doctrine of *jurisprudence constante* under French law. *Jurisprudence constante* is an appealing analogy,²⁵ since it is generally considered weaker than persuasive authority in that any precedential force only takes effect when there is a repeated citation of an earlier decision. Under this doctrine, when a consistent line of cases exists, courts and

19 *Prosecutor v Zlatko Aleksovski*, IT-95-14/1-A, Judgement on Appeal (24 March 2000) at para 97 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) [*Aleksovski*].

20 Robertson, *supra* note 6; Born, *supra* note 6.

21 Francisco Blavi, “The Role of Arbitral Precedent in International Commercial Arbitration: Present and Future Developments” (2015) 6 *Resolv J Altern Disp Resol* 1 at 10.

22 D Brian King & Rahim Moloo, “International Arbitrators as Lawmakers” (2014) 46:3 *NYUJ Int L & Pol* 875 at 884.

23 Ten Cate, *supra* note 16 at 442.

24 Gélinas, “Institutionalization”, *supra* note 17 at 494.

25 Andrea K Bjorklund, “Investment Treaty Arbitral Decisions as Jurisprudence Constante” (2008) in Colin B Picker, Isabella D Bunn and Douglas W Arner, eds, *International Economic Law the State and Future of the Discipline* (Portland, OR: Hart Publishing, 2008) at 272.

tribunals should follow them, unless there are 'compelling reasons' to justify departure.²⁶ In that sense, when there is repeated and consistent case law, *jurisprudence constante* attaches a *stare decisis* effect to lines of cases, which becomes, over time, stronger than the doctrine of 'persuasive authority'.

The idea behind *jurisprudence constante* is that since the decision is repeated constantly (*constante*), it acquires "a certain natural authority" and has a strong influence over following awards.²⁷ Therefore, the doctrine does not place too much power in the hands of any single adjudicator, since it attaches precedential value only to consistently used lines of cases.²⁸ The accretion of these consistent decisions ultimately will develop a *jurisprudence constante* - a 'persisting jurisprudence' that secures unification and stability of judicial activity, harmonization and the development of law.²⁹

III. PRACTICE OF FOLLOWING PRECEDENT

The status of precedent in international law has long elicited long discussion. As the foregoing section suggests, there are different views in legal scholarship regarding the precedential force of prior decisions in international law. Courts and tribunals themselves have also contributed to this academic debate in their decisions. A brief overview of case law on the matter will further shed light on the discussion.

A. General Duty to Consider

While international courts are not obliged to follow previous decisions, they almost always take previous decisions into account³⁰. In practice, courts and arbitral tribunals will closely examine previous decisions and will carefully distinguish those cases applicable or similar to the problem being studied. As Professor Shaw has noted, "the Court has striven to follow its previous judgments and insert a measure of certainty within the process".³¹ This idea has been confirmed by the arbitral tribunal in

²⁶ Ten Cate, *supra* note 16 at 444.

²⁷ Vaughan Lowe QC & Antonios Tzanakopoulos, "The Development of the Law of the Sea by the International Court of Justice" in Christian J Tams and James Sloan, eds, *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 177 at 186.

²⁸ Bjorklund, *supra* note 25 at 272–73.

²⁹ M Troper and C Grzegorzczuk, "Precedent in France," in D Neil MacCormick & Robert S Summers, eds, *Interpreting Precedents* (Farnham, UK: Ashgate/Dartmouth Publishing, 1997) 103 at 137.

³⁰ Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (New York: Routledge, 2002), at 51, referring to V Roben, *Le Precedent dans la jurisprudence de la Cour internationale* at 382–407.

³¹ Shaw, *supra* note 1 at 104.

Dow Chemical v Saint-Gobain Case, where the tribunal noted:

Decisions of these tribunals progressively create case law which should be taken into account because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successfully elaborated, should respond.³²

Similarly, the Appellate Body of Dispute Settlement Body (DSB) of the World Trade Organization (WTO) stated that Panel and Appellate Body reports “are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute”.³³

In *Saipem v Bangladesh*, the ICSID Tribunal took a similar position noting that:

The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals ... It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to ... meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.³⁴

In the light of above-mentioned decisions, the observation that there is no international rule of *stare decisis* should not be given exaggerated effect.³⁵ Adjudicators still have the duty of taking prior decisions into account where there is relevance or similarity with the case being resolved. Arbitrator Gabrielle Kaufmann-Kohler contributed the origins of this duty with the following words: “[I]t may be debatable whether arbitrators have a legal obligation to follow precedents - probably not - but it seems well settled that they have a moral obligation to follow precedents so as to foster a normative environment that is predictable.”³⁶ This duty mainly serves the requirements of consistency and predictability. It can be argued that the ‘duty to take

32 *ICC Award No 4131*, (1984) YCA, at 131 et seq (also published in: Clunet 1983, at 899 et seq) at 136.

33 *Japan-Taxes on Alcoholic Beverages Case* (1996), WTO Doc WT/DS8/AB/R (Appellate Body Report) at 14 [*Japan-Alcoholic Beverages*].

34 *Saipem S.p.A v The People’s Republic of Bangladesh* (2007), ICSID Case No ARB/05/7 (Arbitrator : Philip Otton) [*Saipem*].

35 Jan Paulsson, “The Role of Precedent in Investment Arbitration” in Katia Yannaca-Small, ed, *Arbitration Under International Investment Agreements : Guide to Key Issues*, 1st ed (New York: Oxford University Press, 2010) at 700.

36 Gabrielle Kaufmann-Kohler, “Arbitral Precedent Dream, Necessity or Excuse?” (2007) 23:3 *Arb Intl* 357 at 374.

jurisprudence into account' essentially amounts to persuasive authority.³⁷

B. *Duty to Follow Well-Established Precedent*

International courts and arbitral tribunals emphasized that the role of case law naturally increases when there is a well-established precedent. The ICJ, with reference to an earlier decision indicated in the *Genocide Convention Case*, stated that “while those (prior) 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.”³⁸ The ICSID Tribunal in *Saipem v Bangladesh* noted that “subject to compelling contrary grounds, it [the Tribunal] has a duty to adopt solutions established in a series of consistent cases.”³⁹

Several other examples follow. In *Cameroon v Nigeria*, the ICJ implied that Article 59 of the *ICJ Statute* is going too far⁴⁰ and that precedent should have a force in international law. The Court stated that while “there can be no question of holding [a State] to decisions reached by the Court in previous cases... the real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases”⁴¹

In *Prosecutor v Aleksowski*, the Appeals Chamber of the International Criminal Tribunal for Yugoslavia underlined that “(in) the interests of 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”.⁴²

In *Nicaragua v Colombia*, the ICJ underlined the three-staged delimitation method developed by case law and decided that the Court should not depart from established and consistent precedent unless there are compelling reasons.⁴³

A similar reasoning was made in the *Occidental v Ecuador* investment arbitration case, where ICSID Tribunal stated that “in summary, it may be seen that compound interest is the norm in recent expropriation

³⁷ Fabien Gélinas, “Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalization” in Mark Gehring & Marie-Claire Cordonier Segger, eds, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) at 582–3 [Gélinas, “Creeping Institutionalization”].

³⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Preliminary Objections, [2008] ICJ Rep 412 at para 53 [*Genocide Convention Case*].

³⁹ *Saipem*, *supra* note 34.

⁴⁰ Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014) at 120.

⁴¹ *Land and Maritime Boundary (Cameroon v Nigeria; Equatorial Guinea intervening)*, [1998] ICJ Rep 275 at para 28 [*Cameroon v Nigeria*].

⁴² *Aleksowski*, *supra* note 19 at para 107.

⁴³ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, [2012] ICJ Rep 624 at para 190 [*Nicaragua v Colombia*].

cases under ICSID. The Tribunal sees no reason to depart from the norm and from the basis pleaded by both parties.”⁴⁴

The dissenting arbitrator in *Burlington v Ecuador* summarized the Tribunal’s tendency in a coherent way, in her dissenting opinion, with the following:

“... the Tribunal considers that it is not bound by previous decisions. Nevertheless, the majority considers that it must pay due regard to earlier decisions of international courts and tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases...”⁴⁵

The Appellate Body of the WTO went a step further and suggested that a failure to take into account previous reports of the Panel or depart from consistent precedent might amount to a violation of the obligation to conduct an objective assessment of the matter before it,⁴⁶ by noting that:

We are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel’s approach has serious implications for the proper functioning of the WTO dispute settlement system.⁴⁷

The foregoing case law suggests that Article 59 has not meant that international courts and arbitral tribunals can ignore precedent.⁴⁸ To the contrary, they feel obliged to take into consideration prior decisions, and follow the settled jurisprudence unless there are very particular reasons not to do so.

The Advocate General of the European Court of Justice shed light on the tendencies of international adjudicators, contending that “[i]t is none the less obvious that the Court should, as a matter of practice, follow its

44 *Occidental Petroleum Corp, Occidental Exploration and Production Co v Republic of Ecuador*, Award (2012), ARB/06/11 at para 834–40 (International Centre for Settlement of Investment Disputes) (Arbitrators: Brigitte Stern & David A.R. Williams) [*Occidental v Ecuador*].

45 *Burlington Resources Inc v Republic of Ecuador, Decision on Liability* (2012), Decision on Liability, ICSID No ARB/08/05 at para 187 (International Centre for Settlement of Investment Disputes) (Arbitrators: Gabrielle Kaufmann-Kohler, Brigitte Stern, Francisco Orrego Vicuña) [*Burlington v Ecuador*].

46 Armin Von Bogdandy & Ingo Venzke, “Beyond dispute: International judicial institutions as lawmakers” in Armin von Bogdandy & Ingo Venzke, eds, *International Judicial Lawmaking* (Heidelberg, DE: Springer Publishing, 2012) 3 at 19, referring to *United States: Final Anti-Dumping Measures on Stainless Steel from Mexico* (held on 12 February 2008), WTO Doc WT/DS344/AB/R, at para 162 [*United States-Stainless Steel (Mexico)*].

47 *United States-Stainless Steel (Mexico)*, *supra* note 46.

48 Lori F Damrosch et al, *International Law: Cases and Materials*, 4th ed (St. Paul, MN: West Publishing Co, 2001) at 135.

previous case-law except where there are strong reasons for not so doing.”⁴⁹ Where there is a corpus of consistent decisions, international adjudicators have little choice but to follow past awards.⁵⁰ Even when courts seem to depart from established precedent, they generally feel obliged to explain the compelling reasons for their different conclusion.⁵¹ This practice is nothing less than giving a de facto *stare decisis* effect to case law where there is a well-established precedent. In other words, precedent gains effectively binding force over future courts in these circumstances by way of practice, even though it is not recognized by the formal declarations of international law.

C. *Primary Source for International Lawyers*

To complement the foregoing arguments, it would be necessary to discuss briefly how the disputing parties, scholars and international lawyers treat case law. As explained above, courts regularly use precedents in their legal reasoning. “In many judgments, precedents act as arguments in support of decisions that in terms of authority are hardly inferior to provisions spelled out in an international treaty”. Disputing parties are of course well aware of this and treat earlier judicial decisions as if they form part of the sources of international law.⁵² Particularly, the ICJ’s pronouncements are a primary source for international lawyers. Therefore, every judgment is closely examined and pondered for its implications by the parties.⁵³ If parties invoke similar facts from prior cases, courts and tribunals cannot ignore the previous decisions without running the risk of seeming arbitrary.⁵⁴

States also tend to rely on judicial decisions when they make legal arguments. The *Bay of Bengal* case is an outstanding example of this tendency. In this case, Bangladesh partially relied on the argument of the “most natural prolongation” in the initial proceedings of the case. Following a decision of a different tribunal in another dispute that had arrived at a result going against Bangladesh’s aforementioned argument, Bangladesh abandoned its argument while its case was pending. Similarly, scholars also look instinctively to case law to determine the most important trends in legal

49 *Merck v Primecrown, Ltd, Opinion of Advocate General Fennelly*, [1996] Joined Cases C-267/95 & C-268/95 (ECR I-6288) at para 142.

50 Weidemaier, *supra* note 8 at 1900.

51 Damrosch et al, *supra* note 48 at 136.

52 Von Bogdandy & Venzke, *supra* note 46 at 991.

53 Damrosch et al, *supra* note 48 at 135.

54 Paulsson, *supra* note 35 at 700.

thinking in international law.⁵⁵

IV. ICJ AND DEVELOPMENT OF INTERNATIONAL LAW

The preceding chapters demonstrate that judicial decisions, particularly ICJ pronouncements, are generally considered to be authoritative precedents of the law.⁵⁶ However, an understanding of the notion of case law requires further discussion: What is the broader contribution of ICJ pronouncements to the development of international law?

The ICJ's influence on international law is not limited to their precedential value for other courts. Even when the Court operates within the established system of sources, it can naturally contribute to the development of international law through the interpretation of treaties and the identification of custom.⁵⁷ When its decisions confirm the existence of a rule of customary international law, they are bound to influence the conduct and the perception not only of the parties but also that of other states.⁵⁸ Similarly, when called upon to apply a treaty, the Court can be influential by advancing a particular interpretation that often will be relied on outside the scope of the particular dispute.⁵⁹

It is clear that the jurisprudence of the ICJ is of substantial importance to the development of international law.⁶⁰ Professor Gowlland-Debbas stated that "one can hardly today deny the impact of its judgments and advisory opinions and the role they have played in the development and consolidation of international law".⁶¹ Similarly, a former judge of the PCIJ echoed this orthodoxy in the following terms: "[I]nternational tribunals applying the law which regulates the conduct of States can play an important role in world affairs. More than this, the judgments of such tribunals tend to become important sources for the development of international law."⁶²

The ICJ's contribution to international law can take a variety of forms. Clarification and substantiation of the primary sources of international

55 Edward Gordon, "Thoughts About A Case Law Approach To Customary International Law" (1982) 76 Proceedings of the Annual Meeting (American Society of International Law) 258 at 259.

56 See Christian J Tams, "The ICJ as a 'Law-Formative Agency': Summary and Synthesis" in Christian J. Tams & James Sloan, eds, *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 378 at 378.

57 *Ibid* at 385.

58 Lowe & Tzanakopoulos, *supra* note 27 at 178.

59 Tams, *supra* note 56 at 385.

60 John P Grant, *International Law Essentials* (Edinburgh: Edinburgh University Press, 2010) at 21.

61 Vera Gowlland-Debbas, "The Role of the International Court of Justice in the Development of the Contemporary Law of Treaties" in Christian J. Tams & James Sloan, eds, *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 25 at 26.

62 Manley Ottmer Hudson, *International Tribunals: Past and Future* (Washington : Carnegie Endowment for International Peace and Brookings Institution, 1944), at 110, no 16.

law is one major role that the ICJ has played in the international realm. In many decisions to date, case law has 'identified' and 'substantiated' rules of customary law not found in codification. Sir Hersch Lauterpacht suggests that the ICJ "made a tangible contribution to the development and clarification of the rules and principles of international law".⁶³ Many ICJ decisions 'recognized' legal developments and thereby 'ratified' them. Since its foundation, the Court's jurisprudence has left its mark on many contemporary international law issues at some point, and only a few areas are completely sealed off from its influence.⁶⁴ One may argue that the development of rules of international law perhaps is the essential function of the International Court,⁶⁵ despite the limited role envisaged in the statutory provisions.

A. *ICJ's Influence Varies in Each Field*

Even though the ICJ's contribution to international law has been significant in certain fields, other areas have experienced less influence by the Court. Therefore, a simplistic approach generalizing the Court's impact on international law will not bring accurate results.

There are many decisive factors determining the Court's contribution to a field. Traditionally, the Court has been more influential in areas open to judicial development and with little competition by other agencies of legal development.⁶⁶ Therefore, the jurisprudence of international courts and arbitral tribunals has been of critical importance particularly in developing fields of international law, where it has been provided with an opportunity to regularly pronounce on relevant rules of law. Similarly, ICJ's contribution has remained relatively limited in highly institutionalized or regularized areas of law. In these fields, the Court's main function has been limited to the application and interpretation of relevant rules to the particular case submitted to it.

In their book, "The Development of International Law by the International Court of Justice", Tams and Sloan have systematically analyzed which areas of international law are more or less receptive to judicial development. They made two observations that restrain the developmental impact of judicial decisions generally. "Firstly, where the law spells out virtually every detail, courts called upon to apply it can do no more than fine-tune. Secondly, where the law is highly diversified, courts with few cases are hardly ever able to exercise significant influence." They

63 Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958), at 4, 5.

64 Tams, *supra* note 56 at 379.

65 Charles de Visscher, *Theory and Reality in Public International Law*, translated by PE Corbett (Princeton: Princeton University Press, 1968) at 390.

66 Tams, *supra* note 56 at 395.

gave the example of ‘human rights law’, which is not only found in numerous treaties, but also heavily institutionalized. The ‘law of the sea’, ‘international humanitarian law’ and ‘international environmental law’ are other examples given by the authors to the fields with a vast number of specific provisions and institutions. Therefore, the Court’s contribution has typically been much more targeted in these broad areas of international law.⁶⁷

Despite the relatively insignificant role of the ICJ, other courts and tribunals sometimes play important roles in the development of areas of international law that are heavily institutionalized. While the ICJ’s role has been relatively limited in international criminal law, for example, decisions of contemporary international war crimes tribunals have contributed significantly to the development of international criminal law.⁶⁸ Similarly, European, Inter-American and African human rights courts not only helped the development of international human rights law, but also had direct effects on the domestic laws of the member states.⁶⁹

The ‘law of territory’, ‘state responsibility’, ‘immunities’, ‘succession’, ‘maritime delimitation’ and ‘diplomatic protection’ are counterexamples where the ICJ’s contribution has been relatively significant. These fields of law lack organized processes and monitoring bodies, and, as such, international practice dominates the fields. In these areas, there are simply no competing agencies of legal development and the international community looks to the ICJ for guidance on the law.⁷⁰ The International Tribunal for the Law of the Sea (ITLOS) confirmed the significant role of judicial bodies in the development of maritime delimitation law stating that the decisions of international courts and tribunals are of particular importance in determining the content of the law applicable to maritime boundary delimitation.⁷¹

However, it would be excessive to claim that the Court’s influence covers every aspect of these less institutionalized fields. One should keep in mind that the impact of the ICJ on the evolution of international law largely depends upon how many cases are brought before it⁷². In fact, the number of cases resolved by the ICJ since its foundation still remains relatively small. Similarly, the Court’s significant contributions typically concern specific areas on which it has had the opportunity to pronounce its opinion. It would

67 *Ibid* at 393–4.

68 Justice Bankole Thompson, *Universal Jurisdiction: The Sierra Leone Profile* (The Hague : Asser Press, 2015) at 9.

69 For the particular influence of Inter-American Court of Human Rights Court on domestic systems see Von Bogdandy & Venzke, *supra* note 46 at 1001.

70 Tams, *supra* note 56 at 393–9.

71 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (2012), ITLOS Rep 4 at para 184 (International Tribunal for the Law of the Sea) [*Bangladesh/Myanmar*].

72 Alan Boyle & Christine Chinkin, *The Making of International Law* (Oxford : Oxford University Press, 2007) at 269.

be safe to argue that the ICJ's contribution in these areas has been restricted to specific aspects that the Court was asked to decide on.⁷³

B. Courts' Involvement in Creation of Law

Another controversial topic on the notion of case law in international law is whether courts and tribunals have lawmaking power. The plain reading of Article 38 and 59 of the *ICJ Statute* suggests that states are reluctant to accord courts and tribunals a law-making role. In other words, states do not expect or wish the courts to create new law. Therefore, judicial decisions are supposed to be a declaration of the law laid down by the states in treaty law and customary law, rather than the creation of it.⁷⁴ The ICJ stated on numerous occasions that "the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it."⁷⁵ In *Nuclear Weapons Opinion*, the ICJ reiterated the settled doctrine in the following statement:

It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons.⁷⁶

However, legal scholarship has been divided on whether international courts and arbitral tribunals can create law or not. On the one hand, some writers defend orthodoxy by arguing that international courts can only ascertain, declare and apply the rules that were already existed in primary sources of international law. Contrary to common law systems, international courts do not have the function of creating law, nor does their jurisprudence form a source of international law.⁷⁷

On the other hand, many eminent scholars reject the strict categorization of the sources of international law stipulated in Article 38 of the *ICJ Statute*, and insist that courts do have an implicit legislative role.⁷⁸ Kelsen found it impossible to maintain a categorical distinction between the creation of law and the application of law.⁷⁹ Others argued that exclusively

⁷³ Tams, *supra* note 56 at 392–3.

⁷⁴ Damrosch et al, *supra* note 48 at 134, 136.

⁷⁵ *South West Africa (Liberia v South Africa; Ethiopia v South Africa)*, [1966] ICJ Rep 6 at para 89 [*South-West Africa*]; *Fisheries Jurisdiction (UK v Iceland)*, Merits, [1974] ICJ Rep 3, at para 40 [*UK v Ireland*]; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para18 [*Nuclear Weapons Opinion*].

⁷⁶ *Nuclear Weapons Opinion*, *supra* note 75 at para 18.

⁷⁷ Doehring, *supra* note 11 at 7, 10.

⁷⁸ Thirlway, *supra* note 40 at 118.

⁷⁹ Hans Kelsen, *Law and peace in international relations* (Cambridge : Harvard University Press, 1942) at 163 ; Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (Aalen : Scientia Verlag, 1934), at 82, 83.

focusing on lawmaking by way of formal sources will turn a blind eye to the critical role of judicial decisions.⁸⁰ Judge Shahabuddeen confirmed this phenomenon, noting that “[i]t does not accord with reality to suggest that the Court may develop the law only in the limited sense of bringing out the true meaning of existing law in relation to particular facts”.⁸¹

In fact, international courts have been tasked to develop the international law and their decisions prove to be a key element in shaping the legal developments.⁸² However, the dividing line between development and creation of law is unclear, if there is one. And if courts can contribute to the development of law, are they not ultimately contributing to the creation of new law?⁸³ When the innovations introduced by the decisions of international courts win general acceptance, there is a strong probability that others will follow such decisions in later cases. It follows, then, that it is not appropriate to confine the role of judicial decisions to ‘subsidiary’ means of determining the law.⁸⁴ When the adjudicatory practice of international courts has an influence over others, it should be qualified as an exercise of public authority that demands a higher level of recognition than as having a ‘subsidiary’ character.⁸⁵

In reality, judgments of international courts and tribunals may sometimes amount to the implicit creation of law.⁸⁶ Particularly when there are discretionary and creative elements involved in the application of the law, courts naturally make the law.⁸⁷ Judge Lauterpacht brought a perspective to

80 Von Bogdandy & Venzke, *supra* note 46 at 998.

81 Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 2007) at 68.

82 Von Bogdandy & Venzke, *supra* note 46 at 998.

83 Shahabuddeen, *supra* note 81 at 68.

84 Malanczuk, *supra* note 30 at 51.

85 Von Bogdandy & Venzke, *supra* note 46 at 992.

86 Shaw, *supra* note 1 at 67.

87 Robert B Brandom, “Some Pragmatist Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms” (1999) 7:2 *European J Philosophy* 164 at 180.

this question in this famously quoted passage:

It is not [the courts'] function deliberately to change the law so as to make it conform with their own views of justice and expediency. This does not mean that they do not in fact shape or even alter the law. But they do it without admitting it; they do it while guided at the same time by existing law; they do it while remembering that stability and certainty are no less of the essence of the law than justice; they do it, in a word, with caution. The same considerations apply to the administration of international justice.⁸⁸

The *ICJ Statute* and other conventions do not allow judges and arbitrators to conclude that they cannot reach a decision because they have not found an applicable law.⁸⁹ Thus, judicial creativity and the development of international law are a natural part of their duties. It is undeniable that international courts and arbitral tribunals effectively shift normative expectations and play an integral part in the making of international law. The role of jurisprudence has already gone beyond the declaration of existing laws.⁹⁰ Therefore, the fundamental question is not whether judicial precedents form part of law-making, but what the limits might be to this activity.⁹¹ The following chapter will shed light on how case law influences the international legal order by way of contributing to the codification of international law.

V. CASE LAW AND OTHER PRIMARY SOURCES

Article 38 of the *ICJ Statute* requires judicial decisions to determine and apply the sources of international law. The formal reading of this article suggests that international courts and arbitral tribunals are expected to clarify the primary sources of law, including the identification of customary rules of international law, interpretation of treaties and application of general principles of law.

However, the practice of international adjudication illustrates that the role of courts is not always confined to the limits envisaged in the *ICJ Statute*. As discussed in preceding sections, courts and tribunals not only determine the primary rules of law, but also contribute to the development of international law. Their broader role could sometimes help to codify or alter the primary sources of international law. An analysis of case law would

88 Lauterpacht, *supra* note 63 at 75.

89 Paulsson, *supra* note 33 at 716.

90 Damrosch et al, *supra* note 48 at 136.

91 Jacob, *supra* note 6 at 1031.

reveal how international courts, particularly the ICJ, could have an immense impact on treaty law and customary law.

A. *Treaty Law*

The ICJ is often called upon by the parties to advance a particular interpretation of a treaty clause. Although the interpretation mainly aims to address the specific issue before the court, it is generally relied on outside the scope of the particular dispute. The *Admission to Membership, Namibia, Congo v Uganda, Wall*, and *Genocide Convention* cases are prominent examples of such role.⁹² Moreover, in certain instances, the ICJ's interpretation can lead to the alteration or creation of a specific treaty rule, as illustrated below.

a. *Anglo-Norwegian Fisheries Case*

One of the most well-known examples of Court's impact on treaty law occurred in the *Anglo-Norwegian Fisheries* case. The Court's decision for the first time established the right of states to draw straight baselines to measure territorial sea.⁹³ The judgment received a high level of acceptance from the international community and was eventually incorporated into international conventions.⁹⁴ The terminology created by the Court, such as 'deeply indented coast' and 'fringe of islands' was copied to the particular provision of *UNCLOS*.⁹⁵

b. *Reparations Case*

Another outstanding instance includes the Advisory Opinion in *Reparations Case*. The ICJ recognized the legal personality of the United Nations to bring an international claim in respect of its agents wrongfully injured by states.⁹⁶ Within a short space of time thereafter, it was widely accepted that the same applies to almost any group of international

⁹² Doebling, *supra* note 11 at 385–6.

⁹³ *Anglo-Norwegian Fisheries (UK v Norway)*, [1951] ICJ Rep 116 at 129–30 [*Anglo-Norwegian Fisheries Case*].

⁹⁴ *Geneva Convention on the Territorial Sea and Contiguous Zone*, 29 April 1958, 516 UNTS 205 at art 5 (entered into force 10 September 1964); *United Nations Conventions on the Law of the Sea*, 10 December 1982, 1833 UNTS 397 at art 7 (entered into force 16 November 1994) [*UNCLOS*].

⁹⁵ *UNCLOS*, *supra* note 94 at 7.

⁹⁶ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep at 174–85 [*Reparations Case*].

organization.⁹⁷ Perhaps more importantly, this decision set the foundations of the treaty-making capacity of international organizations and led to the development of many treaties between international organizations and their member states.⁹⁸

c. *North Sea Continental Shelf Cases*

In the *North Sea Continental Shelf Cases*, the ICJ laid down the basic principles of the law of maritime boundary delimitation. While rejecting the customary character of the 'equidistance method', the Court underlined that delimitation should be centered on 'equitable principles'.⁹⁹ This landmark decision was not only rehashed by other courts, but also incorporated into the *UNCLOS Convention*, which states that delimitation of continental shelf should aim "to achieve an equitable solution".¹⁰⁰

d. *Gabčíkovo-Nagymaros*

In the *Gabčíkovo-Nagymaros* case between Hungary and Slovakia, the ICJ rendered a decision on an environmental dispute for the first time since its foundation. Although the main question at stake was whether Hungary breached its treaty obligations, the decision marked a breakthrough for international environmental law. The ICJ considered that Czechoslovakia deprived "Hungary of its right to an equitable and reasonable share of the natural resources of the Danube".¹⁰¹ Later on, this specific terminology was codified in the 1997 *United Nations Convention on Non-Navigational Uses of International Watercourses* as "equitable and reasonable utilization".¹⁰²

e. *Reservations to Genocide Convention Case*

The *Reservations to the Genocide Convention* Advisory Opinion of ICJ was a landmark decision in shaping the concept of reservations in international treaty law. The Court proposed that "a State (...) can be regarded as being a party to the Convention if the reservation is compatible

97 Sir Franklin Berman, "The International Court of Justice as an 'Agent' of Legal Development?" in Christian J Tams and James Sloan, eds, *The Development of International Law by the International Court of Justice* (Oxford: Oxford University Press, 2013) 7 at 18.

98 Pierre d'Argent, "Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)" in Rüdiger Wolfrum, ed, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012) at 880, para 10.

99 *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3 at para 85 [*North Sea Continental Shelf Cases*].

100 *UNCLOS*, *supra* note 94 at arts 74, 83.

101 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at para 85 [*Gabčíkovo-Nagymaros*].

102 *United Nations Convention on the Law of Non-Navigational Uses of International Watercourses*, 21 May 1997, 36:3 ILM 700 (entered into force 27 August 2014).

with the object and purpose of the Convention (...)”¹⁰³ Not much later, this innovation has been codified in the 1969 *Vienna Convention on the Law of Treaties* as “incompatible with the object and purpose of the treaty”.¹⁰⁴

B. Customary Law

The relationship between case law and customary law exists in two ways. On the one hand, a decision of the ICJ can be strongly influential and could lead states to follow it, thus eventually becoming a rule of customary international law. If a number of national systems adopt such an established decision, that specific rule can gain a primary status, either as a rule of ‘customary law’ or ‘general principle of law’ recognised by civilised nations.¹⁰⁵

On the other hand, in many decisions to date, case law has identified and substantiated rules of customary law that are codified, but are necessary to resolve disputes between the parties.¹⁰⁶ The Court very often has been able to recognize that a particular rule had acquired the status of customary international law by determining the existence of necessary elements, namely ‘state practice’ and ‘*opinio juris*’. The ‘law of the immunities’, ‘law of responsibility’, ‘law of treaty succession’ and ‘law of title to territory’ are some prominent examples where the ICJ contributed to the development of customary international law.¹⁰⁷

C. Reversal of Judicial Decisions

The ICJ’s influence on the development of international law has not always gone in a positive direction. In rare cases, the judgment of the Court has been criticized and not followed by states later on. There are cases where the international community has even reversed the decision of the Court through international treaties where they found the decision unfounded or

103 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 29.

104 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 at art 19(c) (entered into force 27 January 1980).

105 Doehring, *supra* note 11 at 8.

106 J Ashley Roach, “Today’s Customary International Law of the Sea” (2014) 45:3 *Ocean Dev Int Law* 239 at 252.

107 Tams, *supra* note 56 at 385, 387. See the following relevant cases: *Frontier Dispute (Burkina Faso v Mali)*, [1986] ICJ Rep 554 [*Burkina Faso v Mali*]; *Arrest Warrant of 11 April 2000 (DRC v Belgium)*, [2002] ICJ Rep 3 [*DRC v Belgium*]; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, [2012] ICJ Rep 99 [*Germany v Italy*]; *Mavrommatis Palestine Concessions, Judgment No 2 (Greece v UK)* (1924), PCIJ (Ser A) No 2 at 12 [*Mavrommatis Palestine Concessions*]; *United States Diplomatic and Consular Staff in Tehran (USA v Iran)* [*United States Diplomatic and Consular Staff in Tehran*], [1980] ICJ Rep 3; *LaGrand (Germany v USA)*, [2001] ICJ Rep 466 [*Libya v Chad*]; *Gabčíkovo-Nagymaros, supra* note 101; *Territorial Dispute (Libya v Chad)*, [1994] ICJ Rep 6.

inappropriate. Some examples follow.

a. *The Lotus Case*

The *Lotus* case stands as a landmark decision where the international community reacted to the decision of the Permanent Court of International Justice. The Court decided that there is no customary rule of international law restricting the jurisdiction of a port state over collisions on the high seas.¹⁰⁸ This decision was strongly criticized and later abandoned in *UNCLOS*.¹⁰⁹ Today, Article 97 of *UNCLOS* stipulates that in the event of a collision on the high seas, no penal proceedings may be instituted against a person by a port state.¹¹⁰

b. *The Icelandic Fisheries Case*

The *Icelandic Fisheries Jurisdiction* case is another instance where the ICJ pointed out the existence of a customary rule of international law which was never fully adopted by the international community in the later years. The ICJ declared that a 12-mile fisheries zone is a rule of customary international law, and that coastal states dependent on coastal fisheries have a right of preferential access to fisheries under customary law.¹¹¹ However, the decision drew criticism on account of the lack of evidence. No states seemed to rely on it, and it eventually disappeared under the impetus of the development of the Exclusive Economic Zone (EEZ) during the Third Law of the Sea Conference.¹¹²

c. *Corfu Channel Case*

One of the key issues at stake in the *Corfu Channel* case was the definition of 'innocent passage'. In this case, the ICJ diverged from the position adopted in the 1930 Hague Conference. The Court instead treated the 'manner' as the decisive factor determining the innocence of the passage.¹¹³ However, the international community reverted the Court's decision, re-adopted the Hague Conference definition and codified in *Law of the Sea Conventions*. Under *UNCLOS*, the 'activities' during the passage is the critical element in determining the nature of the passage, instead of

108 *SS Lotus Case (France v Turkey)*, Merits (1927), PCIJ (Ser A) No 9 at para 27 [*Lotus*].

109 Shaw, *supra* note 1 at 104.

110 *UNCLOS*, *supra* note 94 at art 97.

111 *Fisheries Jurisdiction (UK v Iceland) (Germany v Iceland)*, Merits, [1974] CJ Rep 175 at para 52–8 [*Icelandic Fisheries Jurisdiction*].

112 Lowe & Tzanakopoulos, *supra* note 27 at 191.

113 *The Corfu Channel Case*, Judgment of 9 April 1949, [1949] ICJ Rep 4 at para 28–32 [*Corfu Channel*].

'manner'.¹¹⁴

d. *North Sea Continental Shelf Cases*

Another decision where the Court's finding has been gradually abandoned by future practice was the *North Sea Continental Shelf* cases. The ICJ decided that the delimitation of continental shelf should be based on the 'natural prolongation' of each state's land territory under the sea.¹¹⁵ Again, the emergence of EEZ in customary law led the courts to abandon this criterion.¹¹⁶

VI. PRACTICE IN OTHER TRIBUNALS

The foregoing chapters aimed to give an in-depth understanding of the notion of case law in international law with a focus on the ICJ. However, an increased number of international tribunals and proliferations of the arbitration practice have changed the nature of international legal order. Particularly, "[i]nternational arbitral law has produced a body of precedent" which has "made a distinct contribution to international law".¹¹⁷ The legal status of arbitral tribunals as a source of law is in theory equal to other types of case law, including the ICJ.¹¹⁸ Therefore, a thorough and accurate analysis of the notion of jurisprudence in international law requires the examination of the concept of precedent in other panels and arbitral tribunals.

It is clear that each system of judicial settlement represents a unique institutional context, the particulars of which influence how the doctrine of precedent evolves in each system. For the purpose of this study, the evaluation of the status of precedent in other tribunals will progress through a focus on three different systems of dispute resolution: (1) international investment arbitration, (2) international commercial arbitration, and (3) the Dispute Settlement Body of the World Trade Organization.

A. *Investment Arbitration*

As in other areas of public international law, the sole duty of an investment arbitrator is to resolve the dispute in the particular case,

¹¹⁴ UNCLOS, *supra* note 94 at art 19(2).

¹¹⁵ *North Sea Cases*, *supra* note 99 at para 101.

¹¹⁶ *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgement of 3 June 1985*, [1985] ICJ Rep 13 at paras 39, 40 [*Libya v Malta*]; *Bangladesh/Myanmar*, *supra* note 71 at para 361. See also Helga Guðmundsdóttir, *The Unnatural life Cycle of Natural Prolongation in the Delimitation of the Continental Shelf* (Reykjavik: Magister Juris Diss, University of Iceland, 2015) [unpublished].

¹¹⁷ Lauterpacht, *supra* note 63 at 17–8.

¹¹⁸ Paulsson, *supra* note 35 at 704.

rather than to create a 'common law' for future arbitrators and investors.¹¹⁹ Therefore, there is no doctrine of *stare decisis* in investment arbitration.¹²⁰ Arbitral awards "shall be binding on the parties"¹²¹, and have no binding force on those who are not parties, or even on the same parties when future disputes arise.

Even though the ICSID system was not "consciously designed to create a body of investment law precedent", ICSID tribunals frequently refer to previous decisions.¹²² It is common practice for arbitrators in investment treaty arbitrations to cite decisions issued in earlier cases. Empirical studies confirm that the practice to follow precedent is relatively higher in investment arbitration than in other areas of international arbitration. In fact, Jeffrey Commission has found that 78 percent of the ICSID awards rendered between 1990 and 2006 cited at least one other case.¹²³ Another recent study by Rishap Gupta and Katrina Limond, reviewing 664 decisions, involved a total of 5,516 citations.¹²⁴ These numbers are ever growing and arbitral tribunals in investment arbitration cases are increasingly referring to previous decisions.¹²⁵

There are a number of factors that contribute to the importance of precedent and consistency in jurisprudence in investment arbitration. The institutionalized nature of the ICSID system, nomination of decision makers by the ICSID Secretariat, publicity of awards and the increasing number of reasoned decisions effectively create a strong jurisprudence system that guides future arbitrators.

Although investment arbitrators are not formally bound by the precedent, it is evident that arbitrators are often influenced and inspired by previous awards. There is an informal, but powerful, system of precedent that constrains arbitrators to account for prior published awards and to stabilize international investment law.¹²⁶ In fact, tribunals themselves clearly state that they rely on earlier decisions in order to sustain their authority

119 *Ibid* at 707.

120 *El Paso Energy International Company v The Argentine Republic* (2011), RB/03/15 (International Centre for Settlement of Investment Disputes) (Arbitrators: Lucius Caflisch, Brigitte Stern, Piero Bernardini) [*El Paso v Argentina*].

121 *International Centre for Settlement of Investment Disputes Convention*, 18 March 1965, ICSID/15 at art 53 (entered into force 14 October 1966) [*ICSID Convention*].

122 Weidemaier, *supra* note 8 at 1908.

123 Jeffrey P Commission, "Precedent in Investment Treaty Arbitration - A Citation Analysis of a Developing Jurisprudence" (2007) 24 *J Intl Arb* 129 at 149–50.

124 Rishap Gupta and Katrina Limond, "Who is the Most Influential Arbitrator in the World" (14 January 2016) 11:1 *Global Arbitration Rev* at 18.

125 Blavi, *supra* note 21 at 7.

126 Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration" (2006) 30 *Fordham Intl LJ* 1014 at 1016.

when their decision would appear controversial.¹²⁷ The tribunal in *El Paso v Argentina Case* articulated this position with the following terms:

It is nonetheless a reasonable assumption that international arbitral tribunals, including those set up within the ICSID, will generally take into account the precedents set by other international tribunals. The present Tribunal will follow that same approach...¹²⁸

The ICSID Tribunal in *Saipem v Bangladesh* noted that the tribunal is expected to “pay due consideration to earlier decisions of international tribunals” and “meet the legitimate expectations of the community of States and investors towards certainty of the rule of law”.¹²⁹

Moreover, if there is a consistent line of decisions, investment arbitrators even feel compelled to follow prior decisions when resolving a dispute. *Occidental v Ecuador* is a good illustration of how precedent works in investment arbitration when there is a well-established precedent.¹³⁰ The tribunal based its decision solely on ‘settled precedent’ and stated that “[i]n summary, it may be seen that compound interest is the norm in recent expropriation cases under ICSID. The Tribunal sees no reason to depart from the norm and from the basis pleaded by both parties.”¹³¹

Similarly, in *Burlington v Ecuador*, the majority of the tribunal held the position that while the Tribunal is not bound by previous decisions, it should follow solutions established in a series of consistent cases subject to compelling contrary grounds.¹³²

In light of the foregoing, it is safe to argue that consistent prior decisions have a strong authority over future disputes in investment arbitration. Giving consideration to a settled decision would not be a sufficient justification for an arbitrator to depart from an established precedent. The tribunal is expected to prove that there are ‘compelling reasons’ to abandon a consistent precedent that already meets the legitimate expectations of the

127 *Occidental v Ecuador*, *supra* note 44; *El Paso v Argentina Case*, *supra* note 120; *Pan American Energy LLC v Argentine Republic* (2006), ARB/04/8 (International Centre for Settlement of Investment Disputes) (Arbitrators: Lucius Cafilisch, Brigitte Stern & Albert Jan van den Berg) [*Pan American Energy v Argentina*].

128 *Pan American Energy v Argentina*, *supra* note 127 at para 39.

129 *Saipem*, *supra* note 34 at para 67.

130 Florian Grisel, “Precedent in Investment Arbitration: The Case of Compound Interest” (2014) 2 *Peking U Transnatl Rev* 217 at 226.

131 *Occidental v Ecuador*, *supra* note 44 at paras 834–40.

132 *Burlington v Ecuador*, *supra* note 45 at para 187.

parties and the needs of the rule of law.

B. Commercial Arbitration

Although arbitral tribunals in investment disputes are increasingly referring to prior decisions, it is difficult to say that a similar trend currently exists in commercial arbitration.¹³³ Available evidence suggests that international commercial arbitration features a much less robust system of arbitral precedent than investment arbitration. A recent survey found that only 15 percent of the International Chamber of Commerce (ICC) awards cited previous arbitral decisions.¹³⁴ Another survey by Kaufmann-Kohler found that 6 out of 100 awards on sale of goods engaged with past awards.¹³⁵

If orthodoxy needs to be repeated, there is no formal and binding precedent in international commercial arbitration. Commercial arbitrators generally have broad discretion over the application of relevant judicial precedents. Their powers are based on party autonomy and they have no duty to national law.¹³⁶ Therefore, the impact of commercial arbitral decision on the deliberations of future tribunals is seen as relatively limited.

A system of arbitral precedent may require the use of reasoned and publicly accessible awards.¹³⁷ Therefore, if there is any, the system of precedent in commercial arbitration is very weak. Most of the awards are not publicly available. Arbitration proceedings and sessions are conducted confidentially.¹³⁸ These factors naturally deprive commercial arbitration of any organizational system of jurisprudence. Future arbitrators cannot fully contain the urge of the *homo ratio juris* to rely on previous decisions and to seek coherence.¹³⁹

However, foregoing arguments do not necessarily mean that prior awards will be completely ignored in commercial arbitration. To the contrary, previous decisions can be useful for future arbitrators and potentially contribute to the principles of certainty and predictability. “And for the arbitrators, prior rulings can justify awards to the rest of the world and enhance the prospect that similar cases will be treated similarly”.¹⁴⁰ Even

133 Frank Spoorenberg & Jorge E Viñuales, “Conflicting Decisions in International Arbitration” (2009) 8:1 L Practice Intl Courts Trib 91 at 109.

134 Kaufmann-Kohler, *supra* note 36 at 362.

135 *Ibid.*

136 Julian D M Lew, “Sulamerica and Arsanovia: English Law Governing Arbitration Agreements” in Georges Affaki & Horacio Alberto Grigera Naon, eds, *Jurisdictional Choices in Times of Trouble* (Paris: International Chamber of Commerce, 2015) 136 at 140.

137 Weidemaier, *supra* note 8 at 1927.

138 Richard M Alderman, “Consumer Arbitration: The Destruction of the Common Law” (2003) 2:1 J American Arbitration at 11.

139 Gélinas, “Creeping Institutionalization, *supra* note 37 at 584.

140 William W Park, “The Predictability Paradox: Arbitrators and Applicable Law” in Fabio Bortolotti & Pierre Mayer, eds, *Application of Substantive Law by International Arbitrators* (Paris: ICC Publications, 2014) 60 at 64.

ad hoc tribunals will naturally tend to look into jurisprudence of standing courts and other *ad hoc* tribunals.¹⁴¹

It is important to highlight that precedent in commercial arbitration can only be, at the highest, a persuasive authority for other tribunals. In other words, when arbitral tribunals cite precedent, this is only because the arbitrators might believe that such interpretation is persuasive, not necessarily mandatory.¹⁴² Still, in order for international commercial awards to become persuasive precedents, the substance of the decision must display some degree of homogeneity and accessibility.¹⁴³ For example, this is the case of sports arbitrations, internet domain disputes, or construction cases, in which the awards are usually published and subsequently often followed by other arbitral tribunals.¹⁴⁴

On final analysis, commercial arbitrators are expected to act on a case by case basis and retain their discretion to decide disputes as they see fit. Unlike courts, they have no duty or obligation to existing case law. They are not 'bound by the precedent', nor do they have to 'give a serious consideration' to previous awards. Commercial arbitrators do what they want with previous decisions and thus there is no clear practice in this field.¹⁴⁵ Perhaps, the only moral duty they have, at the minimum, is to take the settled jurisprudence into account in order not to fail to fulfill the requirements of legal certainty and predictability.

C. *WTO Dispute Settlement Body*

The Dispute Settlement Body of the World Trade Organization, which deals with disputes between member states, has generated its own practices and unique adjudication system in international realm. Therefore, precedential force of prior reports over other panels displays a *sui generis* character.

On the one hand, there is no such thing as a doctrine of *stare decisis* in the DSB system, as in other areas of international law.¹⁴⁶ "[T]he reports of panels and the Appellate Body are not binding precedents for other disputes between the same parties on other matters or different parties on the same matter."¹⁴⁷ Similarly, the *Dispute Settlement Understanding* provides that

141 Lowe & Tzanakopoulos, *supra* note 27 at paras 186, 187.

142 Audley Sheppard, "Res judicata and Estoppel" in Bernardo M Cremades & Julian DM Lew, eds, *Parallel State and Arbitral Procedures in International Arbitration* (Paris: ICC Publications, 2005) 219 at 222.

143 Commission, *supra* note 123 at 135.

144 Born, *supra* note 6 at 1124.

145 Kaufmann-Kohler, *supra* note 36 at 362.

146 Gélinas, "Institutionalization", *supra* note 17 at 492.

147 WTO, *A Handbook on the WTO Dispute Settlement System* (Cambridge : Cambridge University Press, 2004) at 90–1.

Panels are prohibited from changing existing agreements.

On the other hand, under the *Dispute Settlement Understanding*, Panels are also expected to provide 'security' and 'predictability' to the multilateral trading system.¹⁴⁸ A relevant question naturally arises out of this statement as to whether providing 'security and predictability' suggests a certain type of 'precedent' in the WTO dispute settlement system.

The Appellate Body commented on the scope of this duty in *Japan - Alcoholic Beverages*. It noted that Panel and Appellate Body reports "are often considered by subsequent Panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".¹⁴⁹ With this statement, the Appellate Body highlights that Panels are under the 'duty to give consideration' to prior decisions that have similar facts and patterns to meet the expectation of members.¹⁵⁰

In *United States - Final Anti-Dumping Measures*, the Appellate Body went a step further. It suggested that a failure to take into account previous reports of the Panel or depart from consistent precedent might amount to a violation of the obligation to conduct an objective assessment of the matter before it.¹⁵¹ This finding proposes that consistency and predictability are core elements in the WTO dispute settlement system. If there is a consistent line of precedent, it acquires a certain level of authority over following awards, perhaps more than a persuasive one. In these circumstances, the Appellate Body or a Panel cannot depart from settled reports without 'compelling reasons' justifying the departure.

VII. CONCLUSION

The debate on the notion of international case law has been stuck too often in the question of whether jurisprudence has a precedential '*authority*' over future cases. This paper proposes that the role of case law is more than a plain 'persuasive evidence of law' and may amount to an 'effectively binding force' under certain conditions.

At the same time, the study acknowledges that there is no standard answer to this question. Foregoing chapters have demonstrated that the role of precedent has evolved in its own way in each settlement system. While ICJ decisions often generate considerable commentary and worldwide respect due to the Court's prestige and authority, the same cannot be held for the ITLOS. Thanks to their institutionalized settlement mechanisms, ICSID and the WTO DSB have developed a stronger precedential system

¹⁴⁸ WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the WTO Agreement, art 3(2) [*Dispute Settlement Understanding*].

¹⁴⁹ *Japan-Alcoholic Beverages*, *supra* note 33 at 14.

¹⁵⁰ Gélinas, "Institutionalization", *supra* note 17 at 497.

¹⁵¹ Von Bogdandy & Venzke, *supra* note 46, referring to *United States-Stainless Steel (Mexico)*, *supra* note 46 at para 162.

than commercial arbitration. While ICSID tribunals tend to give serious consideration to previous cases, *ad hoc* arbitral tribunals do not feel obliged to consider past decisions.

The study further revealed that a 'formalist approach to precedent' and the 'practice of the courts' do not necessarily overlap. In spite of Articles 38 and 59 of the *ICJ Statute*, judicial decisions have proven to be of immense importance as a source of law. Case law may become a very strong source of law when certain conditions are satisfied. These criteria include reasoning and publicity of award, consistency of decision, eminence of arbitrators, institutionalization of the settlement body, number of tribunal members, unanimity of award, sophistication of the dispute, and competence of the tribunal.

Among others, the existence of a well-established jurisprudence is perhaps the strongest factor in giving precedent some form of authority. When there is a settled and consistent jurisprudence, the authority of precedent is generally considered more than as simply persuasive. In the practices of ICSID, ITLOS, the WTO, and the ICJ, consistent past decisions can have a binding force over future decisions, even though it is not stipulated by formal declarations of law. In these circumstances, courts and tribunals tend to bind themselves with a 'moral' obligation, which this paper calls a judicial *opinio juris*, to follow past decisions with consistent patterns. At the minimum, they are under a burden to prove the existence of compelling reasons to justify their departure from a settled precedent.

Even in the absence of a well-established jurisprudence, courts and tribunals are aware of the importance of the pursuit of consistency and meeting the legitimate expectations of the community. Therefore, they tend to pay due consideration to previous decisions even if there is no consistent line of cases.

The second argument that the paper proposes is that ICJ and other international courts actively '*influence*' to the development of international law. When tasked to resolve a dispute where there are no clear rules and principles of international law, courts implicitly create law. However, a brief survey of seminal cases demonstrates that only a handful of cases have substantially altered or created new rules in international law. Although landmark cases are limited in numbers, they have had important influence on highly controversial matters, by way of bringing definitive rules to the specific disputes. Still, the vast majority of rulings and awards have the function of 'deciding' individual disputes rather than 'making' the law.

The paper contends that the role of case law will continue to shape international law in two ways in the future. In terms of being a precedential '*authority*' for other courts and tribunals, the role of jurisprudence will continue to increase, particularly due to growing tendencies towards institutionalization and the publicity of awards in the international legal order. With regards to the *influence* of case law in the general development

of international law, the ICJ and other courts should be expected to have a diminished role in the future. As international law continues to develop alongside new institutions, organizations and treaties, the ICJ and other courts will be given less opportunity to render seminal cases to fill the gaps and divergences.