IDENTIFICATION OF CUSTOMARY INTERNATIONAL LAW

[Agenda item 6]

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The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law

Memorandum by the Secretariat

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CONTENTS

Multilateral instruments cited in the present document

	Source
Hague Convention (IV) Respecting the Laws and Customs of War on Land (The Hague, 18 October 1907)	J. B. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907*, New York, Oxford University Press, 1915.
Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London, 8 August 1945)	United Nations, *Treaty Series*, vol. 82, No. 251, p. 279.
Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948)	*Ibid*., vol. 78, No. 1021, p. 277.

	Source
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	*Ibid.*, vol. 75, Nos. 970–973, pp. 31 *et seq.*
Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977)	*Ibid.*, vol. 1125, No. 17512, p. 3.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Ibid.*, vol. 1833, No. 31363, p. 3.
Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994)	*Ibid.*, vols. 1867–1869, No. 31874.
Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2)	*Ibid.*, vol. 1869, p. 401.

Introduction

1. At its sixty-third session, in 2011, the International Law Commission decided to include the topic "Formation and evidence of customary international law" in its long-term programme of work[1] and, at its sixty-fourth session, in 2012, the Commission included the topic in its current programme of work.[2] At its sixty-fifth session, in 2013, the Commission decided to change the title of the topic to "Identification of customary international law".[3] At the sixty-seventh session of the Commission, in 2015, the Chair of the Drafting Committee presented the report of the Drafting Committee on "Identification of customary international law", containing draft conclusions 1 to 16 [15], provisionally adopted by the Drafting Committee at the sixty-sixth and sixty-seventh sessions of the Commission.[4] The Commission took note of those draft conclusions.[5]

2. At its sixty-seventh session, in 2015, the Commission further requested the Secretariat to prepare a memorandum concerning the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law.[6] The present memorandum has been prepared in fulfilment of that request.

3. The scope of the memorandum is limited to the case law of "international courts and tribunals of a universal character". The term "universal character" is not to be understood as relating to universal membership of the constitutive instruments of the judicial organs considered, but to the fact that they are open to universal membership, and that the judicial organ in question therefore potentially exercises its jurisdiction *ratione materiae* at the global level.[7] The International Criminal Court has been considered here on this basis. Regional courts and tribunals, by contrast, have not. Similarly, hybrid criminal courts established by negotiation between the United Nations and a single affected State have not been included. The International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have been included in view of their establishment as subsidiary organs in decisions of the Security Council—decisions which, in accordance with Article 25 of the Charter of the United Nations, all Member States have agreed to accept and carry out. On this basis, they are regarded as "universal" for the purpose of the present memorandum, regardless of their competence *ratione temporis*, *ratione loci* or *ratione personae*. Furthermore, arbitral awards have not been systematically analysed in the present memorandum by virtue of the *ad hoc* character of arbitral tribunals. For the same reason, reports issued by panels and decisions rendered by arbitrators under the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization (WTO) have not been included in this analysis.

4. The term "national courts" is used here interchangeably with the terms "domestic courts" and "internal courts" to encompass all judicial organs exercising their functions within the domestic legal order, regardless of their position in the legal system. The present memorandum addresses exclusively the role of decisions of national courts for the purpose of the identification of rules of customary international law. Such judicial decisions may be referred to by international courts and tribunals in other contexts, or for other purposes, which are outside the scope of the present memorandum. As stated by the Permanent Court of International Justice, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[8] Thus, a domestic judicial decision may be

[1] *Yearbook … 2011*, vol. II (Part Two), p. 175, paras. 365–367. In its resolution 66/98 of 9 December 2011, the General Assembly took note of the inclusion of the topic in the Commission's long-term programme of work.

[2] *Yearbook … 2012*, vol. II (Part Two), p. 85, para. 268.

[3] *Yearbook … 2013*, vol. II (Part Two), p. 65, para. 65.

[4] The statement of the Chair of the Drafting Committee is available from the website of the Commission, at: http://legal.un.org/ilc.

[5] *Yearbook … 2015*, vol. II (Part Two), pp. 27–28, para. 60.

[6] *Ibid.*, p. 28, para. 61.

[7] In the commentary to draft article 1 of the draft articles on the representation of States in their relations with international organizations, the Commission indicated that "[t]he question whether an international organization is of universal character depends not only on the actual character of its membership but also on the potential scope of its membership and responsibilities". Para. (4), *Yearbook … 1971*, vol. II (Part One), document A/8410/Rev.1, chap. II, sect. D, at p. 285.

[8] *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment, 25 May 1926, *P.C.I.J. Reports 1926, Series A*, No. 7, p. 19.

considered in order to enlighten the facts underlying the dispute adjudicated upon,[9] or indeed as one of the alleged internationally wrongful acts that constitute the object of the dispute.[10] Decisions of national courts could also be at issue in a procedural context, such as when taken on the admissibility of claims based on the exercise of diplomatic protection, which requires the exhaustion of local remedies.[11] Furthermore, domestic judicial decisions may be relevant as State practice in the application of a treaty under article 31, paragraph 3 (*b*), of the Vienna Convention on the Law of Treaties,[12] or they could be employed as evidence of how a State construes its own treaty obligations.[13] A domestic judicial decision might also be relevant for the purpose of the identification of general principles of law.[14] Finally, decisions of national courts may be referred to in order to illustrate well-established principles of law or procedure, without any direct implication as to their value in international law as such.[15]

5. The present memorandum only addresses explicit references to decisions of national courts in the decisions of international courts and tribunals applying or referring to customary international law. In the course of their deliberation process, international courts and tribunals may well consider the decisions of national courts and then either disregard them or borrow from their line of reasoning without making any reference thereto in the final text of the judgment. This use of domestic judicial decisions is, however, inherently unquantifiable. Furthermore, even when explicit, such references, as well as their purpose, need to be assessed with caution by taking into account the context of the decision and its line of reasoning. It is therefore necessary to consider them together with the other evidence referred to by international courts and tribunals on the same occasion, such as legislation, treaty provisions or academic writings.

6. The present memorandum first reviews the *travaux préparatoires* of Article 38, paragraph 1, of the Statute of the International Court of Justice (chap. I below). It then proceeds with the analysis of relevant decisions of the Permanent Court of International Justice (chap. II below); the International Court of Justice (chap. III below); the International Tribunal for the Law of the Sea (chap. IV below); the Appellate Body established under article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the World Trade Organization (WTO Appellate Body) (chap. V below); the International Tribunal for the Former Yugoslavia (chap. VI below); the International Criminal Tribunal for Rwanda (chap. VII below); and the International Criminal Court (chap. VIII below). For each of these chapters, the most relevant findings are discussed in the form of observations and accompanying explanatory notes. Some general observations arising from the whole analysis are included in the final section (chap. IX below).

[9] See e.g. *Interhandel Case*, Judgment of March 21st, 1959, *I.C.J. Reports 1959*, p. 6, at p. 27; *Elettronica Sicula S.p.A. (ELSI)*, Judgment, *I.C.J. Reports 1989*, p. 15; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, *I.C.J. Reports 1999*, p. 62; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, *I.C.J. Reports 1999*, p. 1045, at p. 1066, para. 33; *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466; *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004*, p. 12, at p. 61, para. 127; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015*, pp. 3, 87 and 105, at paras. 238, 333 and 343.

[10] See, e.g., *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Provisional Measure, Order of 17 June 2003, *I.C.J. Reports 2003*, p. 102; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, *I.C.J. Reports 2012*, p. 99, at pp. 113–116, paras. 27–36, and at pp. 145–146, para. 109.

[11] See art. 14 of the articles on diplomatic protection, General Assembly resolution 62/67 of 6 December 2007, annex. The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook … 2006*, vol. II (Part Two), paras. 49–50. See also, most recently, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, *I.C.J. Reports 2007*, p. 582.

[12] See also the commentary to draft conclusion 6 provisionally adopted by the Commission on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". *Yearbook … 2014*, vol. II (Part Two), pp. 108 *et seq.*, para. 76.

[13] *Prosecutor v. Radislav Krstić*, Judgment, Case No. IT-98-33-A, Appeals Chamber, International Tribunal for the Former Yugoslavia, 19 April 2004, para. 141; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136, at pp. 176–177, para. 100.

[14] See, e.g., *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, *I.C.J. Reports 2003*, p. 161, at pp. 354–358 (Separate Opinion by Judge Simma).

[15] See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, Separate Opinion by Judge Lachs, at p. 171; *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, Separate Opinion by Judge Shahabuddeen, at p. 205, and, Separate Opinion by Judge Weeramantry, at p. 220.

Chapter I

Article 38, paragraph 1, of the Statute of the International Court of Justice

7. The present chapter provides an overview of the role of the decisions of national courts in the determination of customary international law as envisaged in Article 38, paragraph 1, of the Statute of the International Court of Justice. This provision, which has come to be regarded as an authoritative enumeration of the sources of international law, reads:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> *a.* international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> *b.* international custom, as evidence of a general practice accepted as law;
>
> *c.* the general principles of law recognized by civilized nations;
>
> *d.* subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Observation 1

Decisions of national courts may constitute forms of evidence of State practice or acceptance as law (*opinio juris*) for the purpose of determining the existence and content of a rule of customary international law under Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice.

8. National courts are organs of States and as such their decisions are relevant for the determination of a general practice that is accepted as law (*opinio juris*). From the point of view of international law, all national courts and tribunals are State organs, so that any judicial decision may in principle be relevant for the purpose of the identification of customary rules. It is common for international courts and tribunals to refer generally to the decisions of national courts. For example, in the *Nottebohm* case, the International Court of Justice referred to the practice of "[t]he courts of third States … confronted with a similar situation" when identifying which customary international law rules applied to the opposability to third States of the acquisition of nationality by naturalization in the context of diplomatic protection.[16] Furthermore, in the *Jurisdictional Immunities* case, the International Court of Justice referred to decisions of national courts in its assessment of both State practice and acceptance as law (*opinio juris*).[17] Similarly, in the *Tadić* case, the Appeals Chamber of the International Tribunal for the Former Yugoslavia made a general reference to "national case-law" as evidence of the formation of customary international law.[18]

Observation 2

Under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, judicial decisions constitute subsidiary means for the determination of customary international law.

Observation 3

The Statute of the International Court of Justice contains no definition of the term "judicial decisions", nor does it clarify whether the term encompasses decisions by both national and international courts and tribunals.

9. Under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice, "judicial decisions" constitute one of the "subsidiary means for the determination of rules of law". The rules in question are those deriving from the sources listed under paragraphs (*a*) to (*c*), including international custom.

10. Except for the addition of the phrase "whose function is to decide in accordance with international law such disputes as are submitted to it", the text of Article 38 of the Statute of the International Court of Justice is identical to the corresponding provision in the Statute of its predecessor, the Permanent Court of International Justice. The draft scheme of the Statute was developed by an Advisory Committee of Jurists, appointed in 1920 by the Council of the League of Nations to submit a report on the establishment of the future Permanent Court of International Justice. While, during the first phase of discussions, some draft proposals explicitly referred only to international decisions, no such express limitation was included in the final text, for reasons which are unknown.

11. Indeed, several proposals made by members of the 1920 Advisory Committee of Jurists were explicitly limited to international judicial decisions or to the decisions of the future Court itself, and the initial proposal made by Baron Edouard Descamps, Chair of the Advisory Committee of Jurists, referred explicitly to "international jurisprudence as a means for the application and development of law".[19] Mr. Descamps also referred to international jurisprudence in his statement on the rules of law to be applied by the Court.[20] In the discussion that followed, several members of the Committee expressed reservations regarding the inclusion of judicial decisions and doctrine in Article 38.[21] As regards the ensuing debate, the *procès-verbaux* indicates merely that a "discussion followed between M. de Lapradelle, the President and Lord Phillimore, as a result of which point 4 was worded as follows: 'The authority of judicial decisions and the doctrines of the best qualified writers of the various nations'".[22]

12. The subsequent discussion in the Council of the League of Nations provides little by way of clarification. A statement by the relevant subcommittee appointed by the Third Committee of the First Assembly of the League, in response to a proposal by Argentina, noted that the reference to judicial decisions in Article 38 was intended to facilitate the Court's contribution, via its jurisprudence, to the development of international law.[23] No record, however, exists of any discussion of the role of national courts.

13. It can be noted that, between the end of the nineteenth century and the adoption of the Statute of the International Court of Justice in 1945, arbitral tribunals at times referred to decisions of national courts as

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[16] *Nottebohm Case (Second Phase)*, Judgment of April 6th, 1955: *I.C.J. Reports 1955*, p. 4, at p. 22 (see generally pp. 21–23).

[17] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), at p. 123, para. 55 (reference to State practice) and at p. 135, para. 77 (reference to *opinio juris*).

[18] *Prosecutor v. Duško Tadić,* Judgment, Case No. IT-94-1-A, Appeals Chamber, International Tribunal for the Former Yugoslavia, 15 July 1999, *Judicial Reports 1999*, para. 292.

[19] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee: June 16th–July 24th, 1920, with Annexes* (The Hague, Van Langenhuysen Frères, 1920), 13th meeting, annex 3 thereto, p. 306.

[20] *Ibid.*, 14th meeting, annex 1 thereto, p. 322 ("Not to allow the judge to make use of existing international jurisprudence as a means of defining the law of nations is, in my opinion, to deprive him of one of his most valuable resources.").

[21] For example, *ibid.*, 15th meeting, p. 334 (Mr. Ricci-Busatti stating that it was "inadmissible to put them on the same level as positive rules of law"), and annex 4 thereto, p. 351 (containing a proposed amendment appending the "subsidiary means" to the article as follows: "The Court shall take into consideration the judicial decisions rendered by it in analogous cases, and the opinions of the best qualified writers of the various countries, as means for the application and development of law.").

[22] *Ibid.*, 15th meeting, p. 337.

[23] League of Nations, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court*, 1921, p. 211. Available from www.icj-cij.org/en/pcij-other-documents.

subsidiary means for the determination of rules of customary international law.[24]

14. When the Statute of the International Court of Justice was adopted, the view was expressed in the Advisory Committee of Jurists in charge of the preparation of the draft Statute that "it would be difficult to make a better draft in the time at disposal of the Committee", and, since "the Court had operated very well under Article 38", "time should not be spent in redrafting it".[25] The article was the object of a very limited discussion beyond the addition, upon the proposal of Chile, of the words "whose function is to decide in accordance with international law such disputes as are submitted to it".[26]

[24] Examples of the use of decisions of national courts as subsidiary means for the determination of customary international law by arbitral tribunals include: *Disagreements between the United States and the United Kingdom, relating to the Treaty extending the right of fishing, signed at Washington, 5 June 1854*, Decisions of 8 April 1858, UNRIAA, vol. XXVIII (United Nations publication, Sales No. E.06.V.9), pp. 73–106, at pp. 87–88; *Aroa Mines* case, Mixed Claims Commission United Kingdom–Venezuela, Decision, 1903, UNRIAA vol. IX (United Nations publication, Sales No. 1959.V.5), pp. 402–445, at pp. 413 and 436; *Kummerow, Otto Redler and Co., Fulda, Fischbach*, and *Friedericy* cases, Mixed Claims Commission Germany–Venezuela, 1903, UNRIAA, vol. X (United Nations publication, Sales No. 60.V.4), pp. 369–402, at p. 397; *American Electric and Manufacturing Company* case (damages to property), Mixed Claims Commission United States–Venezuela, 1903, UNRIAA, vol. IX, pp. 145–147, at p. 146; *Jarvis* case, Mixed Claims Commission United States–Venezuela, UNRIAA, vol. IX, pp. 208–213, at pp. 212–213; *E. R. Kelley (U.S.A. v. United Mexican States)*, General Claims Commission United Mexican States–United States of America, 1930, UNRIAA, vol. IV (United Nations publication, Sales No. 1951.V.1), pp. 608–615, at pp. 612–613; *The Diverted Cargoes* case, Greece–United Kingdom of Great Britain and Northern Ireland, Award of 10 June 1955, UNRIAA, vol. XII (United Nations publication, Sales No. 63.V.3), pp. 53–81, at p. 79. A particularly notable example is the *Trail Smelter* case between the United States and Canada, in which the arbitral tribunal had to deal with a relatively unprecedented question under international law, and explicitly discussed the relevance of domestic judicial decisions of federal States as a potentially fruitful subsidiary means in the identification of customary international law in the absence of international decisions on the matter (*Trail Smelter case (United States/Canada)*, Award of 15 April 1938 and 11 March 1941, UNRIAA vol. III (United Nations publication, Sales No. 1949.V.2), pp. 1905–1982, at pp. 1963–1964).

[25] United Nations Conference on International Organization, Summary of seventh meeting of the United Nations Committee of Jurists, document G/30, 13 April 1945, in *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIV, p. 162, at pp. 170–171.

[26] United Nations Conference on International Organization, Summary report of nineteenth meeting of Committee IV/1, document 828, 7 June 1945, in *ibid.*, vol. XIII, p. 279, at pp. 284–285. Furthermore, Colombia requested that a statement be annexed to the records of the meeting highlighting its understanding that the sources of law referred to in Article 38 should be consulted "in consecutive order", *ibid.*, annex A, p. 287. See also United Nations Conference on International Organization, Summary report of fifth meeting of Committee IV/1, document 843, 11 May 1945, *ibid.*, p. 162, at p. 164.

Chapter II

Permanent Court of International Justice

Observation 4

The case law of the Permanent Court of International Justice contains few references to decisions of national courts for the purposes of determining customary international law.

15. References to decisions of national courts present in the case law of the Permanent Court of International Justice are limited to the Court's early contentious cases (*Series A*). None appear in *Series B* or *Series A/B*. Given that the Court dealt primarily with treaty law, recourse to customary international law was seldom deemed necessary. This ought to be taken into account when interpreting the elements presented in the present chapter, because the lack of references may reflect more on the infrequency with which the Court had recourse to customary international law than on the role of domestic court decisions in the process of its identification.

16. The case in which the decisions of domestic courts figure most prominently is that of the *S.S. Lotus*.[27] An argument of one of the Parties was that a customary rule had developed according to which criminal proceedings in collision cases came exclusively within the jurisdiction of the State whose flag was flown.[28] In evaluating this claim, the Permanent Court of International Justice referred to several decisions of domestic courts invoked by the Parties, but eventually dismissed their relevance on account of their inconsistency. It is unclear whether the decisions referred to were considered as subsidiary means, in addition to forms of evidence of State practice and *opinio juris* in the identification of custom. It may be noted that the Court employed the language of the two-element approach by examining the "conduct" of the States concerned, and whether their "conception of that law", was being "generally accepted".[29] Nevertheless, the Court's reference to international judicial decisions concurrently with those of domestic courts may suggest that it also considered these cases as subsidiary means.[30] Thus, the question of whether domestic judicial decisions can constitute subsidiary means for the determination of rules of international law in addition to forms of evidence of elements of customary rules was left open. The Court adopted a cautious approach on the issue, by merely concluding that "as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law".[31] The Court did so "[w]ithout pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law".[32]

[27] *Case of the S.S. "Lotus" (France v. Turkey)*, Judgment No. 9, 7 September 1927, *P.C.I.J. Reports 1928, Series A*, No. 10, at pp. 18–19.

[28] *Ibid.*, pp. 28–30.

[29] *Ibid.*, p. 29.

[30] *Ibid.*, p. 28 ("So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited.").

[31] *Ibid.*, p. 29.

[32] *Ibid.*, p. 28.

17. Decisions of domestic courts were referred to more often in separate and dissenting opinions by individual judges of the Permanent Court of International Justice, both as forms of evidence of State practice or *opinio juris*, and as subsidiary means. For example, Judge Altamira's dissenting opinion in the *S.S. Lotus* case employed domestic judicial decisions as State practice.[33] Other judges referred to domestic decisions as subsidiary means in the determination of custom, for instance Judges Weiss and Finlay in the *S.S. Lotus* case[34] and Judge Moore in the *S.S. Lotus* and *Mavrommatis Palestine Concessions* cases.[35] These examples suggest that the Court may have considered those domestic decisions during the deliberation process.

[33] *Ibid.*, Dissenting Opinion of Judge Altamira, at pp. 96–99.

[34] *Ibid.*, Disssenting Opinion of Judge Weiss, at p. 47, and Dissenting Opinion of Lord Finlay, at pp. 53–55 and p. 57 (note in particular, at pp. 53–54: "The case seems to me clear on principle, but there is also authority which points to the same conclusion. In the *Franconia* case (*R. v. Keyn*, 1877, 2 Ex. Div. 63), it was argued for the Crown that there was jurisdiction in the English Courts to try a charge of manslaughter on the very ground which we are now considering … The decision of course proceeded upon the view which the English Court took of the international law on the point, but it was international law they had to apply. The decision is not binding upon this Court but it must be regarded as of great weight and cannot be brushed aside as turning merely on a point of English municipal law.").

[35] *Ibid.*, Dissenting Opinion of Judge Moore, at pp. 68–69, at pp. 71–83, and at pp. 85–89 (note in particular, at p. 74: "international tribunals, whether permanent or temporary, sitting in judgment between independent States, are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries"); *Mavrommatis Palestine Concessions*, Judgment, 30 August 1924, *P.C.I.J. Series A*, No. 2, Dissenting Opinion of Judge Moore, at p. 57.

Chapter III

International Court of Justice

18. Of all 667 orders, judgments and advisory opinions issued by the International Court of Justice from 31 July 1947 to 31 December 2015, 64 either explicitly discussed or applied customary international law.[36] It is apparent from such a record that the Court has considered and applied customary international law increasingly over

[36] *Corfu Channel case*, Judgment of April, 9th, 1949, *I.C.J. Reports 1949*, p. 4, at p. 22 and p. 28; *Colombian-Peruvian asylum case*, Judgment of November 20th, 1950, *I.C.J. Reports 1950*, p. 266, at p. 274 and pp. 276–278; *Reservations to the Convention on Genocide*, Advisory Opinion, *I.C.J. Reports 1951*, p. 15, at pp. 23–24; *Fisheries Case*, Judgment of December 18th, 1951, *I.C.J. Reports 1951*, p. 116, at p. 131 and p. 139; *Nottebohm case (Preliminary Objection)*, Judgment of November 18th, 1953, *I.C.J. Reports 1953*, p. 111, at pp. 119–120; *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment of June 15th, 1954, *I.C.J. Reports 1954*, p. 19, at p. 32; *Nottebohm Case (second phase)* (see footnote 16 above), at pp. 21–22; *Interhandel Case* (see footnote 9 above), at p. 27; *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960, *I.C.J. Reports 1960*, p. 6, at p. 39 and pp. 43–44; *North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, at pp. 28–46, paras. 37–82; *Barcelona Traction, Light and Power Company*, Limited Judgment, *I.C.J. Reports 1970*, p. 3, at p. 46, paras. 87–88; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, at p. 31, paras. 52–53, at pp. 46–48, paras. 94 and 96–97; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 175, at pp. 191–198, paras. 41–60; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 3, at pp. 22–29, paras. 49–68; *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, p. 12, at pp. 31–35, paras. 54–65; *United States Diplomatic and Consular Staff in Tehran*, Judgment, *I.C.J. Reports 1980*, p. 3, at p. 24, para. 45, at pp. 30–31, para. 62, and at p. 40, para. 86; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, *I.C.J. Reports 1982*, p. 18, at pp. 45–49, paras. 42–48; *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, *I.C.J. Reports 1984*, p. 246, at pp. 288–295, paras. 79–96, and at pp. 297–300, paras. 106–114; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 13, at pp. 29–34, paras. 26–34, at pp. 38–40, paras. 45–48, and at pp. 55–56, para. 77; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see footnote 15 above), at p. 27, para. 34, at pp. 92–115, paras. 172–220, at p. 126, paras. 245–247, and at p. 133, paras. 263–265; *Frontier Dispute*, Judgment, *I.C.J. Reports 1986*, p. 554, at pp. 564–568, paras. 19–30; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, *I.C.J. Reports 1988*, p. 12, at pp. 34–35, para. 57; *Elettronica Sicula S.p.A. (ELSI)* (see footnote 9 above), at pp. 42–43, paras. 50–51, and at pp. 66–67, paras. 110–111; *Arbitral Award of 31 July 1989*, Judgment, *I.C.J. Reports 1991*, p. 53, at pp. 68–70, paras. 46–48; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening)*, Judgment, *I.C.J. Reports 1992*, p. 351, at pp. 386–390, paras. 41–46; *Maritime Delimitation in the Area* (see footnote 15 above), at pp. 58–59, paras. 46–48, and at pp. 62–63, paras. 55–56; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 6, at pp. 21–22, para. 41; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment, *I.C.J. Reports 1994*, p. 112, at pp. 125–126, para. 40; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 1995*, p. 6, at p. 18, para. 33; *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 90, at p. 102, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 240, para. 26, at p. 245, paras. 41–42, at p. 247, para. 52, and at pp. 253–263, paras. 64–97; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, *I.C.J. Reports 1996*, p. 803, at p. 812, para. 23; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, at pp. 38–39, para. 46, at pp. 40–41, para. 51, at pp. 64–65, para. 104, at pp. 66–67, paras. 109–110, at pp. 71–72, para. 123, and at p. 81, para. 152; *Difference Relating to Immunity from Legal Process* (see footnote 9 above), at pp. 87–88, para. 62; *Kasikili/Sedudu Island (Botswana/Namibia)* (see footnote 9 above), at p. 1059, para. 18; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40, at p. 91, para. 167, at pp. 93–94, paras. 174–176, at p. 97, para. 185, at pp. 100–101, para. 201, at pp. 101–102, para. 205, and at p. 111, para. 229; *LaGrand (Germany v. United States of America)* (see footnote 9 above), at pp. 501–502, paras. 99–101; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3, at pp. 20–25, paras. 51–59; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 303, at pp. 429–430, paras. 263–264; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 625, at pp. 645–646, para. 37; *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above), at pp. 110–111, para. 36; *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment* (see footnote 14 above), at pp. 182–183, paras. 41–43, at pp. 186–187, para. 51, at pp. 196–197, para. 74, and at p. 198, para. 76; *Avena and Other Mexican Nationals (Mexico v. United States of America)* (see footnote 9 above), at p. 48, para. 83, and at p. 59, paras. 119–120; *Legal Consequences of the Construction of a Wall* (see footnote 13 above), at p. 167, para. 78, at pp. 171–172, paras. 86–89, at p. 174, para. 94, at p. 182,

time. This is to be contrasted with the relatively rare discussion of customary international law by its predecessor.

Observation 5

In the identification of customary international law, the International Court of Justice occasionally referred to decisions of national courts as forms of evidence of State practice or, less frequently, of acceptance as law (*opinio juris*).

Observation 6

When the International Court of Justice referred to decisions of national courts as evidence of State practice or acceptance as law (*opinio juris*), such reference was often made in conjunction with other forms of evidence of customary international law such as legislative acts or treaty provisions.

19. References to domestic judicial decisions can be found in 13 of the 64 decisions in which the International Court of Justice discussed or applied customary international law.[37] In 10 of these decisions, such references are not made in connection with the identification of customary international law.[38] In three cases, decisions of national courts are considered as forms of evidence of State practice or acceptance as law (*opinio juris*).[39]

20. Reference to decisions of national courts as forms of acceptance as law (*opinio juris*) was first made by the International Court of Justice in the *Nottebohm* case, without reference to specific decisions and in the context of considering practice and *opinio juris* as a whole. In that case, which dealt with the requirements for the exercise of diplomatic protection, the Court had to identify which customary international law rules applied to the opposability to third States of the acquisition of nationality by naturalization. In so doing, the Court considered the practice of "the courts of third States" and deemed this and other forms of State practice (such as domestic laws) as "manifest[ing] the view of these States".[40] A similar reference was also made, more recently, in the case concerning *Jurisdictional Immunities of the State*, where the Court referred to "the jurisprudence of a number of national courts" to establish the existence of *opinio juris*.[41]

21. Two cases referred to decisions of national courts in the assessment of State practice. In the *Arrest Warrant* case, when discussing the existence of an exception to immunity in case of war crimes or crimes against humanity,

para. 117, at pp. 194–195, para. 140, at pp. 197–198, paras. 150–152, and at p. 199, paras. 156–157; *Frontier Dispute (Benin/Niger)*, Judgment, *I.C.J. Reports 2005*, p. 90, at pp. 108–110, paras. 23–27, and at pp. 120–121, paras. 45–47; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 168, at pp. 226–227, paras. 162–164, at pp. 229–230, para. 172, at p. 242, paras. 213–214, at pp. 243–244, para. 217, at p. 244, para. 219, at pp. 251–252, para. 244, at p. 256, para. 257, at p. 257, para. 259, and at pp. 275–276, paras. 329 and 333; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment, *I.C.J. Reports 2006*, p. 6, at p. 27, para. 46, at pp. 31–33, paras. 64–70, at p. 35, para. 78, and at pp. 51–52, para. 125; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at pp. 202–206, paras. 385–395, and at pp. 207–211, paras. 398–407, and at pp. 216–217, paras. 419–420, and at pp. 232–234, paras. 459–462; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, *Judgment* (see footnote 11 above), at pp. 599–600, paras. 39 and 42, at p. 606, para. 64, and at pp. 614–616, paras. 86–94; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 659, at pp. 706–707, paras. 151–154; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, *I.C.J. Reports 2008*, p. 177, at p. 219, para. 112, at pp. 231–232, para. 153, and at p. 238, para. 174; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 213, at p. 237, para. 47, and at pp. 265–266, paras. 140–144; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010*, p. 14, at p. 46, paras. 64–65, at pp. 55–56, para. 101, at p. 60, para. 121, at p. 67, para. 145, and at pp. 82–83, para. 204; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J. Reports 2010*, p. 403, at pp. 436–439, paras. 79–84; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, *I.C.J. Reports 2011*, p. 70, at pp. 125–126, paras. 131 and 133; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), at p. 120, para. 50, at pp. 122–135, paras. 54–79, at pp. 136–142, paras. 83–97, at pp. 146–148, paras. 113–118, and at p. 153, para. 137; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, *I.C.J. Reports 2012*, p. 324, at p. 331, para. 13; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 422, at pp. 444–445, para. 54, at p. 456, para. 97, at p. 457, para. 99, at p. 460, para. 113, and at p. 461, para. 121; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012*, p. 624, at p. 645, para. 37, at p. 666, paras. 114–118, at pp. 673–674, paras. 137–139, at p. 690, para. 177, at pp. 692–693, para. 182, and at p. 707, para. 227; *Frontier Dispute (Burkina Faso/Niger)*, Judgment, *I.C.J. Reports 2013*, p. 44, at pp. 73–74, paras. 62–63; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, *I.C.J. Reports 2013*, p. 398, at pp. 403–404, para. 19; *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports 2014*, p. 3, at p. 28, para. 57, at pp. 45–47, paras. 112–117, and at p. 65, para. 179; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (see footnote 9 above)/, pp. 46–47, 49–50, 52–53, 56, 61, 64, paras. 87–88, 95, 98, 104–105, 115, 128–129, and 138; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, p. 665, at p. 705, para. 101, at pp. 706–708, paras. 104 and 106, at pp.711–712, para. 118, at p. 720, para. 153, at pp. 721–722, para. 157, at p. 724, para. 168, and at p. 726, para. 174.

[37] *Fisheries Case* (see previous footnote),p. 134; *Nottebohm Case (Second Phase)* (see footnote 16 above), p. 22; *Interhandel Case* (see footnote 9 above), p. 18; *Elettronica Sicula S.p.A. (ELSI)* (see footnote 9 above); *Difference Relating to Immunity from Legal Process* (see footnote 9 above); *Kasikili/Sedudu Island (Botswana/Namibia)* (see footnote 9 above), p. 1066, para. 33; *LaGrand (Germany v. United States of America)* (see footnote 9 above), p. 476, paras. 18–19; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 23–24, paras. 56–58; *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above); *Avena and Other Mexican Nationals (Mexico v. United States of America)* (see footnote 9 above), p. 61, para. 127; *Legal Consequences of the Construction of a Wall* (see footnote 13 above), pp. 176–177, para. 100; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see previous footnote), p. 425, para. 55; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening* (see footnote 10 above), pp. 122–148, paras. 55–120.

[38] See para. 4 above.

[39] *Nottebohm Case (second phase)* (see footnote 16 above), p. 22; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 23–24, paras. 56–58; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), p. 123, para. 55, p. 127, para. 64, pp. 131–135, paras. 71–77, and p. 148, para. 118.

[40] *Nottebohm Case (second phase)* (see footnote 16 above), p. 22.

[41] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), p. 135, para. 77.

the International Court of Justice recalled the parties' arguments based on the decisions of courts in the United Kingdom and France, and then stated:

> The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[42]

It is noteworthy that, in this context, the Court highlighted the decisions of "national higher courts" as State practice.

22. In the *Jurisdictional Immunities* case, the International Court of Justice had to determine whether certain exceptions to State immunity had emerged as customary international law. In so doing, the Court first noted that judgments of national courts would be relevant to its task:

> In the present context, State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention.[43]

It then went on to mention several national judicial decisions as State practice in relation to the so-called "territorial tort exception",[44] the immunity for acts of armed forces,[45] and the alleged exception to immunity in the case of grave breaches of the law of armed conflict.[46]

Observation 7

In the case law of the International Court of Justice, decisions of national courts have constituted particularly relevant forms of evidence of rules of customary international law in subject areas which are closely linked with domestic law provisions, or which require implementation by national courts.

23. In all three judgments by the International Court of Justice in which decisions of national courts were relied upon as State practice, such decisions were especially relevant to the identification of customary international law by reason of the subject matter of the customary rule being identified: issues of nationality are primarily the domain of domestic law, and the immunity of States and their officials before national courts is a rule of international law which, by definition, finds application before such courts. This point was illustrated by Judge Keith in his separate opinion in the *Jurisdictional Immunities* case:

> I do of course appreciate that it is unusual in the practice of this Court and its predecessor to draw on the decisions of national courts. But, as appears from the Judgment in this case, the Court, for good reason, does give such decisions a major role. In this area of law it is such decisions, along with the reaction, or not, of the foreign State involved, which provide many instances of State practice.[47]

Observation 8

The International Court of Justice has never explicitly excluded the possibility that decisions of national courts may constitute "judicial decisions" under Article 38, paragraph 1 (d), of its Statute.

Observation 9

The International Court of Justice has never explicitly referred to decisions of national courts as subsidiary means for the determination of customary international law under Article 38, paragraph 1 (d), of its Statute.

24. The International Court of Justice has never pronounced in the abstract on whether the reference to judicial decisions in Article 38, paragraph 1 (*d*), of its Statute excluded decisions by domestic courts. In its Advisory Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, the Court buttressed its finding of that there is a "fundamental principle of international law that international law prevails over domestic law" by relying on "judicial decision[s]" as subsidiary means, but then referred only to an international arbitration award and a decision of its predecessor, and not to decisions of national courts.[48] In the absence of a clear statement by the Court as to why it did not refer to any domestic court decisions to draw such a conclusion, it is difficult to infer that such choice implied a general exclusion of decisions of national courts from the realm of Article 38, paragraph 1 (*d*), of its Statute, especially in the light of the use of domestic court references by individual judges.

25. In none of the 64 decisions in which the International Court of Justice discussed or applied customary international law did the Court explicitly rely upon decisions of national courts as subsidiary means for the identification of customary international law under Article 38, paragraph 1 (*d*), of its Statute. This needs to be assessed against the background of the rarity of references by the Court to any subsidiary means other than its own previous decisions, those of its predecessor, or arbitral decisions.[49]

26. It is to be noted, however, that in the *Jurisdictional Immunities* case, the International Court of Justice appeared to have referred in one passage to decisions

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[42] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 23–24, paras. 56–58.

[43] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), p. 123, para. 55.

[44] *Ibid.*, p. 127, para. 64.

[45] *Ibid.*, pp. 131–135, paras. 72–77.

[46] *Ibid.*, pp. 136–138, paras. 83–88.

[47] *Ibid.*, p. 162, para. 4 (Separate Opinion of Judge Keith).

[48] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* (see footnote 36 above), pp. 34–35, para. 57.

[49] See in particular, *Land, Island and Maritime Frontier Dispute* (footnote 36 above), pp. 593–594, para. 394; *Legal Consequences of the Construction of a Wall* (see footnote 13 above), p. 179, para. 109; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 36 above), *inter alia* at p. 92, para. 119, pp. 121–122, para. 188, p. 126, para. 198; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, p. 12, at p. 69, para. 176, and and p. 93, para. 263; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010*, p. 639, at pp. 663–664, para. 66; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment (see footnote 36 above), p. 331, para. 13.

of national courts as subsidiary means of identification of customary law, together with other subsidiary means such as judgments of the European Court of Human Rights. When discussing whether the *jus cogens* nature of humanitarian law rules would preclude rules on State immunity from applying, the Court held that no conflict between *jus cogens* and State immunity existed because procedural rules on immunity did not bear upon the question of the legality of the conduct, nor did such *jus cogens* status confer jurisdiction to a court where it did not exist.[50] It then confirmed its own interpretation by reference to certain domestic decisions, as well as decisions of the European Court of Human Rights.[51] However, it is unclear whether the Court employed those decisions as subsidiary means or as State practice. The subsequent reference to State practice in the form of legislation, as well as the observation that the courts in Italy were the only ones to follow a certain interpretation, may suggest that these cases, too, were being employed by the Court as forms of State practice in the determination of customary international law, and not as subsidiary means.

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

Observation 10

Individual opinions of judges of the International Court of Justice have occasionally referred to decisions of national courts, both as State practice and as subsidiary means in the determination of customary international law.

28. Individual opinions of judges made reference to decisions of national courts in 20 of the 64 decisions in which the International Court of Justice discussed or applied customary international law.[52] While some of these references fall beyond the remit of the present memorandum,[53] others were used as evidence of State practice or as subsidiary means in the identification of customary international law.

29. Examples of the use of decisions of national courts as evidence of State practice may be found in the individual opinions attached to the *Arrest Warrant* and *Jurisdictional Immunities* judgments, where judges employed decisions of national courts as State practice in the same manner as the International Court of Justice.[54] But in

[50] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), pp. 140–141, paras. 92–95.

[51] *Ibid.*, pp. 141–142, para. 96: "In addition, this argument about the effect of *jus cogens* displacing the law of State immunity has been rejected by the national courts of the United Kingdom (*Jones v. Saudi Arabia*, House of Lords, [2007] 1 AC 270; ILR, vol. 129, p. 629), Canada (*Bouzari v. Islamic Republic of Iran*, Court of Appeal of Ontario, *DLR*, 4th Series, Vol. 243, p. 406; ILR, vol. 128, p. 586), Poland (*Natoniewski*, Supreme Court, *Polish Yearbook of International Law*, Vol. XXX, 2010, p. 299), Slovenia (case No. Up-13/99, Constitutional Court of Slovenia), New Zealand (*Fang v. Jiang*, High Court, [2007] *NZAR*, p. 420; ILR, vol. 141, p. 702) and Greece (*Margellos*, Special Supreme Court, ILR, vol. 129, p. 525), as well as by the European Court of Human Rights in *Al-Adsani v. United Kingdom* and *Kalogeropoulou and Others v. Greece and Germany* (which are discussed in paragraph 90 above), in each case after careful consideration. The Court does not consider the judgment of the French Cour de cassation of 9 March 2011 in *La Réunion aérienne v. Libyan Arab Jamahiriya* (case No. 09-14743, 9 March 2011, *Bull. civ.*, March 2011, No. 49, p. 49) as supporting a different conclusion. The Cour de cassation in that case stated only that, even if a *jus cogens* norm could constitute a legitimate restriction on State immunity, such a restriction could not be justified on the facts of that case. It follows, therefore, that the judgments of the Italian courts which are the subject of the present proceedings are the only decisions of national courts to have accepted the reasoning on which this part of Italy's second argument is based. Moreover, none of the national legislation on State immunity considered in paragraphs 70–71 above, has limited immunity in cases where violations of *jus cogens* are alleged".

[52] *Fisheries Case* (see footnote 36 above), pp. 160–161 (Dissenting Opinion of Sir Arnold McNair); *North Sea Continental Shelf* (see footnote 36 above), p. 107 (Separate Opinion of Judge Fouad Ammoun); *United States Diplomatic and Consular Staff in Tehran* (see footnote 36 above), p. 63 (Dissenting Opinion of Judge Tarazi); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 36 above), p. 175, para. 31 (Dissenting Opinion of Judge Oda); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (see footnote 15 above), p. 171 (Separate Opinion of Judge Lachs); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement* (see footnote 36 above), p. 60 (Separate Opinion of Judge Shahabuddeen); *Maritime Delimitation in the Area between Greenland and Jan Mayen* (see footnote 15 above), p. 205 (Separate Opinion of Judge Shahabuddeen) and p. 220 (Separate Opinion of Judge Weeramantry); *East Timor (Portugal v. Australia)* (see footnote 36 above), pp. 211–212 (Dissenting Opinion of Judge Weeramantry); *Legality of the Threat or Use of Nuclear Weapons* (see footnote 36 above), p. 292 (Separate Opinion of Judge Guillaume), pp. 400–402 (Dissenting Opinion of Judge Shahabuddeen), and pp. 439 and 486 (Dissenting Opinion of Judge Weeramantry); *Difference Relating to Immunity from Legal Process* (see footnote 9 above), p. 94 (Separate Opinion of Vice-President Weeramantry); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 40–42 (Separate Opinion of President Guillaume), pp. 69–70 and pp. 88–89 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), p. 125 (Separate Opinion of Judge *ad hoc* Bula-Bula), and pp. 140, 144, 155–156, 161, 165–166, 171–172 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert); *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above), at p. 123 (Dissenting Opinion by Judge *ad hoc* De Cara); *Oil Platforms (Islamic Republic of Iran v. United States of America)* (see footnote 14 above), pp. 354–358 (Separate Opinion of Judge Simma); *Avena and Other Mexican Nationals (Mexico v. United States of America)* (see footnote 9 above), p. 110 (Separate Opinion of Judge *ad hoc* Sepúlveda); *Legal Consequences of the Construction of a Wall* (see footnote 13 above), p. 229 (Separate Opinion of Judge Kooijmans) and p. 236 (Separate Opinion of Judge Al-Khasawneh); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (see footnote 36 above), p. 89 (Separate Opinion of Judge *ad hoc* Dugard); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 36 above), p. 391 (Dissenting Opinion of Judge *ad hoc* Mahiou); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (see footnote 36 above), p. 293 (Declaration of Judge *ad hoc* Guillaume); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see footnote 36 above), p. 474 (Dissenting Opinion of Judge Koroma) and pp. 623–624 (Separate Opinion of Judge Yusuf); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), pp. 162–164 and 171 (Separate Opinion of Judge Keith), pp. 215 and 234 (Dissenting Opinion of Judge Cançado Trindade), p. 304 (Dissenting Opinion of Judge Yusuf), and pp. 313–321 (Dissenting Opinion of Judge *ad hoc* Gaja).

[53] See paragraph 4 above.

[54] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (see footnote 36 above), pp. 40–42 (Separate Opinion of President Guillaume), pp. 69–70 and pp. 88–89 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal), p. 125 (Separate Opinion of Judge *ad hoc* Bula-Bula), and pp. 140, 144, 155–156, 161, 165–166, 171–172 (Dissenting Opinion of Judge *ad hoc* Van den Wyngaert); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 10 above), pp. 162–164, at p. 171 (Separate Opinion of Judge Keith), pp. 215 and 234 (Dissenting Opinion of Judge Cançado Trindade), p. 304 (Dissenting Opinion of Judge Yusuf), and pp. 313–321 (Dissenting Opinion of Judge *ad hoc* Gaja).

some cases, individual judges employed cases of national courts to illustrate State practice even when the Court itself did not explicitly do so. For instance, Judge Oda in his dissenting opinion in the *Continental Shelf* case referred to a domestic arbitration to explain the practice of the United Kingdom,[55] and Vice-President Weeramantry in the advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* referred to the jurisprudence of domestic courts as State practice concerning immunity.[56] These examples may suggest that the Court itself, while not explicitly relying upon these domestic cases, might have still considered them during the deliberation process.

30. Individual judges have also made direct reference to decisions of national courts as subsidiary means in the identification of rules of law, including customary international law.[57] An explicit reference to domestic judicial decisions as being relevant for the determination of customary international law under Article 38, paragraph 1 *(d)*, of the Statute of the International Court of Justice is made in Judge Shahabuddeen's dissent in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, whereby he stated that a decision by a Tokyo District Court had to be considered as the only available relevant precedent, which "[t]hough not of course binding … ranks as a judicial decision under Article 38, paragraph 1 (*d*), of the Statute of the Court; it qualifies for consideration".[58] Furthermore, despite the absence of any reference to the judgment of the Tokyo District Court decision in the Court's advisory opinion, both Judge Guillaume and Judge Weeramantry also referred to it in their individual opinions.[59]

[55] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (see footnote 36 above), p. 175, para. 31 (Dissenting Opinion of Judge Oda).

[56] *Difference Relating to Immunity from Legal Process* (see footnote 9 above), p. 94 (Separate Opinion of Vice-President Weeramantry).

[57] See, for instance, *Fisheries Case* (see footnote 36 above), pp. 160–161 (Dissenting Opinion of Sir Arnold McNair); *North Sea Continental Shelf* (see footnote 36 above), p. 107 (Separate Opinion of Judge Fouad Ammoun); and *United States Diplomatic and Consular Staff in Tehran* (see footnote 36 above), p. 63 (Dissenting Opinion of Judge Tarazi).

[58] In his view, departure from the conclusions reached therein had to be explained by the Court. *Legality of the Threat or Use of Nuclear Weapons* (see footnote 36 above), pp. 400–401 (Dissenting Opinion of Judge Shahabuddeen); *Certain Criminal Proceedings in France (Republic of the Congo v. France)* (see footnote 10 above), p. 123 (Dissenting Opinion of Judge *ad hoc* De Cara); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)* (see footnote 36 above), p. 89 (Separate Opinion of Judge *ad hoc* Dugard); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (see footnote 36 above), p. 474 (Dissenting Opinion of Judge Koroma) and pp. 623–624 (Separate Opinion of Judge Yusuf).

[59] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, at p. 292 (Separate Opinion of Judge Guillaume) and p. 439 (Dissenting Opinion of Judge Weeramantry).

Chapter IV

International Tribunal for the Law of the Sea

Observation 11

The International Tribunal for the Law of the Sea has not referred to decisions of national courts in the context of the identification of customary international law.

31. Of all the 80 orders, judgments and advisory opinions issued by the International Tribunal for the Law of the Sea from 13 November 1997 to 31 December 2015, four made reference to customary international law.[60]

32. The International Tribunal for the Law of the Sea explicitly considered Article 38 of the Statute of the International Court of Justice, to which article 74, paragraph 1, and article 83, paragraph 1 of the United Nations Convention on the Law of the Sea refer, when identifying the customary international law of maritime delimitation in the *Bay of Bengal* case. On that occasion, the Tribunal considered that Article 38, paragraph 1 (*d*), referred to decisions of international courts and tribunals, without any mention of national courts.[61] However, the specific purpose of the statement was to justify the reliance of the Tribunal on an arbitral award, without indicating a general position on the relevance of decisions of national courts.[62]

33. Overall, no references were found to decisions of national courts in the identification of customary international law.

Observation 12

Individual opinions of judges of the International Tribunal for the Law of the Sea have at times referred

[60] *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, *ITLOS Reports 2001*, p. 95, at p. 110, para. 81; *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, *ITLOS Reports 2003*, p. 10, at p. 25, para. 92; *"Tomimaru" (Japan v. Russian Federation)*, Prompt Release, Judgment, *ITLOS Reports 2005–2007*, p. 74, at p. 94, para. 63; *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, at p. 28, para. 57, at p. 47, para. 135, at p. 50, para. 145, at pp. 50–51, paras. 147–148, at p. 56, para. 169, at p. 58, para. 178, at pp. 59–60, paras. 182–183, at p. 62, para. 194, at pp. 65–66, paras. 209–211, at p. 75, and at p. 77.

[61] *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, p. 4, at pp. 55–56, paras. 183–184: "Decisions of international courts and tribunals, referred to in Article 38 of the Statute of the [International Court of Justice], are also of particular importance in determining the content of the law applicable to maritime delimitation under articles 74 and 83 of the Convention. In this regard, the Tribunal concurs with the statement in the Arbitral Award of 11 April 2006 that: 'In a matter that has so significantly evolved over the last 60 years, customary law also has a particular role that, together with judicial and arbitral decisions, helps to shape the considerations that apply to any process of delimitation' (*Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, RIAA, Vol. XXVII, p. 147, at pp. 210–211, para. 223)."

[62] *Ibid.*, pp. 55–56, paras. 183–184.

to decisions of national courts as subsidiary means for the identification of rules of international law.

34. References to decisions of national courts can be found in separate and dissenting opinions of judges of the International Tribunal for the Law of the Sea, in the context of the identification of customary international law and procedural rules concerning evidence. In order to determine "general international law" on the status of a warship that had been authorized by the coastal State to enter territorial waters, Judge Rao made reference, in his separate opinion in the *ARA Libertad* case, to the *Schooner Exchange* judgment by the United States Supreme Court as a subsidiary means for the determination of rules of law, together with an academic writing "to the same effect".[63] Other references to decisions of national courts were made by judges in the context of the identification of procedural rules concerning evidence.[64] Such references indicate that, for those judges at least, decisions of national courts were relevant as subsidiary means for the identification of the three main categories of sources of international law listed under Article 38, paragraph 1 (*a*) to (*c*).

[63] *"ARA Libertad" (Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, *ITLOS Reports 2012*, p. 332, Separate Opinion of Judge Chandrasekhara Rao, at pp. 360–361, paras. 10–11.

[64] See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (footnote 61 above), Dissenting Opinion of Judge Lucky, p. 256; *M/V "Virginia G" (Panama/Guinea-Bissau)*, Judgment, *ITLOS Reports 2014*, p. 4, Separate Opinion of Judge Lucky, at p. 189–190, para. 53, and Dissenting Opinion of Judge *ad hoc* Sérvulo Correia, at pp. 382–385, para. 20.

Chapter V

World Trade Organization Appellate Body

Observation 13

The World Trade Organization Appellate Body has not referred to decisions of national courts in the identification of customary international law.

35. Of the 139 WTO Appellate Body reports issued from 29 April 1996 to 31 December 2015, 42 mentioned or applied customary international law.[65] The vast majority of those references concerned the application of "customary rules of interpretation of public international law", which the Appellate Body deemed to have been codified in the Vienna Convention on the Law of Treaties.[66] Others concerned good faith as a "principle of general international law",[67] or issues of State responsibility.[68] In none was reference made to decisions of national courts as State practice, evidence of acceptance as law (*opinio juris*), or as a subsidiary means in the identification of customary international law.

[65] As indicated above in paragraph 3, World Trade Organization panel reports and arbitrators' reports have not been considered for the purpose of the present memorandum, since the panels and arbitrators are not standing bodies like the Appellate Body, but *ad hoc* mechanisms established upon request of a complaining party.

[66] See WTO, Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline (US—Gasoline)*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, at p. 17; Appellate Body Report, *Japan—Taxes on Alcoholic Beverages (Japan—Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97, at pp. 10–11; Appellate Body Report, *United States—Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (US—Carbon Steel)*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779, at para. 61; Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US—Softwood Lumber IV)*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571, at para. 59; Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology (US—Continued Zeroing)*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291, at para. 267.

[67] Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations" (US—FSC)*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619, at p. 56, para. 166; Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (US—Hot-Rolled Steel)*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697, at p. 38, para. 101; Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute (US—Continued Suspension)*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507, at para. 278.

[68] Appellate Body Report, *United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (US—Cotton Yarn)*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027, at para. 120; Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US—Line Pipe)*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403, at para. 259; Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties On Certain Products From China (US—Anti-Dumping and Countervailing Duties (China))*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869, at para. 309.

Chapter VI

International Tribunal for the Former Yugoslavia

36. Article 1 of the Statute of the International Tribunal for the Former Yugoslavia provides that the Tribunal has the power to "prosecute persons responsible for serious violations of international humanitarian law".[69] In his report regarding the establishment of the Tribunal, which was later fully endorsed by the Security Council, the

[69] On 3 May 1993, the Secretary-General presented a report to the Security Council pursuant to paragraph 2 of Security Council resolution 808 (1993) regarding the establishment of an international tribunal "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), document S/24704). On 25 May 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted resolution 827 (1993), establishing the International Tribunal for the Former Yugoslavia on the basis of that report.

Secretary-General indicated that the Tribunal would only be applying existing international humanitarian law rules which were beyond any doubt part of customary international law, so that the *nullum crimen sine lege* principle would be respected and no question would arise concerning the adherence of some but not all States to specific international humanitarian law conventions.[70] In the *Vasiljević* case, the Trial Chamber confirmed that the Statute of the International Tribunal for the Former Yugoslavia[71] was not intended to create new criminal offences and that the "Tribunal only has jurisdiction over any listed crime if it was recognised as such by customary international law at the time the crime is alleged to have been committed".[72] Customary international law is thus a significant source of law for the Tribunal. Out of 81 judgments delivered by the Tribunal until 1 December 2015, 49 referred to decisions of national courts in the context of the identification of customary international law.[73]

Observation 14

In the identification of customary international law, the International Tribunal for the Former Yugoslavia occasionally referred to decisions of national courts as forms of evidence of the two constitutive elements of customary international law, although it only sometimes qualified any given decision as being either State practice or evidence of acceptance as law (*opinio juris*) specifically.

37. The International Tribunal for the Former Yugoslavia has explicitly endorsed the two-element approach to the identification of customary international law, and has occasionally used decisions of national courts as pertinent forms of evidence of each element. In the *Hadžihasanović and Kubura* case, the Trial Chamber emphasized that to prove the existence of a customary rule, the two constituent elements of the custom must be established, namely, the existence of sufficiently consistent practices (material element), and the conviction of States that they are bound by this uncodified practice, as they are by a rule of positive law (mental element).[74]

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[70] *Ibid.*, paras. 29 and 33. The report emphasized that "[w]hile there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law"; it went on to indicate that the treaties which could without doubt be deemed to reflect customary international humanitarian law were the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Charter annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis; the Convention on the Prevention and Punishment of the Crime of Genocide; and the Geneva Conventions for the protection of war victims.

[71] Statute of the International Tribunal for the Former Yugoslavia, Security Council resolution 827 (1993), 25 May 1993, annex, art. 5 (see S/25704, annex).

[72] *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Judgment, Trial Chamber II, 29 November 2002, para. 198. See also *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment, Trial Chamber, 7 May 1997, *Judicial Reports 1997*, vol. I, p. 2, at para. 654; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgment, Appeals Chamber, 29 July 2004, para. 141.

[73] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see previous footnote); *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, Trial Chamber, 16 November 1998, *Judicial Reports 1998*, vol. II, p. 951; *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgment, Trial Chamber, 10 December 1998, *Judicial Reports 1998*, vol. I, p. 467; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, Trial Chamber, 25 June 1999, *Judicial Reports 1999*, p. 512; *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above); *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-T, Judgment, Trial Chamber, 14 December 1999, *Judicial Reports 1999*, p. 399; *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgment, Trial Chamber, 14 January 2000, *Judicial Reports 2000*, vol. II, p. 1399; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, Trial Chamber, 3 March 2000, *Judicial Reports 2000*, vol. I, p. 556; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgment, Appeals Chamber, 20 February 2001; *Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković*, Case No. IT-96-23-T and IT-96-23/1-T, Judgment, Trial Chamber, 22 February 2001; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, Trial Chamber, 26 February 2001; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgment, Trial Chamber, 2 August 2001; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgment, Trial Chamber II, 15 March 2002; *Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-A, Judgment, Appeals Chamber, 12 June 2002; *Vasiljević* (see previous footnote); *Prosecutor v. Mladen Naletilić aka "TUTA" and Vinko Martinović, aka "ŠTELA"*, Case No. IT-98-34-T, Judgment, Trial Chamber, 31 March 2003; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgment, Trial Chamber II, 31 July 2003; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgment, Appeals Chamber, 17 September 2003; *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgment, Trial Chamber II, 17 October 2003; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T,Judgment and Opinion, Trial Chamber I, 5 December 2003; *Krstić*, Judgment, Case No. IT-98-33-A (see footnote 13 above); *Blaškić*, Case No. IT-95-14-A (see previous footnote); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14-/2-A, Judgment, Appeals Chamber, 17 December 2004; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, Trial Chamber I, Section A, 17 January 2005; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgment, Trial Chamber II, 31 January 2005; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, Judgment, Trial Chamber I, Section A, 16 November 2005; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-T, Judgment, Trial Chamber, 15 March 2006; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgment, Appeals Chamber, 22 March 2006; *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgment, Trial Chamber II, 30 June 2006; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgment, Trial Chamber I, 27 September 2006; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, Appeals Chamber, 30 November 2006; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgment, Appeals Chamber, 3 April 2007; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Judgment, Appeals Chamber, 16 October 2007; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment, Trial Chamber II, 10 July 2008; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgment, Appeals Chamber, 17 July 2008; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-T, Judgment, Trial Chamber I, 15 September 2008; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgment, Appeals Chamber, 8 October 2008; *Prosecutor v. Milan Milutinović* et al., Case No. IT-05-87-T, Judgment, Trial Chamber, 26 February 2009; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgment, Appeals Chamber, 19 May 2010; *Prosecutor v. Vujadin Popović* et al., Case No. IT-05-88-T, Judgment, Trial Chamber II, 10 June 2010; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Judgment, Trial Chamber II, 23 February 2011; *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment,Trial Chamber I, 15 April 2011; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Judgment, Trial Chamber I, 6 September 2011; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Judgment, Trial Chamber II, 12 December 2012; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-A, Judgment, Appeals Chamber, 28 February 2013; *Prosecutor v. Nikola Šainović* et al. (former *Milutinović* et al.), Case No. IT-05-87-A, Judgment, Appeals Chamber, 23 January 2014; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-A, Judgment, Appeals Chamber, 27 January 2014. The present memorandum only deals with judgments pronounced by the Trial and Appeals Chambers of the International Tribunal for the Former Yugoslavia on the merits of the case. It does not cover judgments delivered in cases where plea agreements had been entered, judgments of contempt cases, and sentencing decisions.

[74] *Hadžihasanović and Kubura* (footnote 73 above), paras. 255–257, at para. 254. Attention should be drawn to the fact that the Trial Chamber first turned to the 2005 International Committee of the Red Cross study on customary international law (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, *Rules*, Cambridge, Cambridge University Press, 2005). As

It added that, considering States' judicial practice, "State practice seems to be more than divided, and would even tend to suggest that they have no obligation to prosecute war crimes solely on the basis of international humanitarian law".[75] The Trial Chamber further proceeded with an examination of a series of decisions of national courts.[76] In relation to *opinio juris*, the Trial Chamber concluded that

> it can be inferred from the absence of sufficiently consistent practice that a majority of States do not consider themselves bound under international law to prosecute and try grave breaches of international humanitarian law solely on the basis of international criminal law.[77]

38. On certain occasions, the Chambers of the International Tribunal for the Former Yugoslavia have explicitly qualified decisions of national courts as State practice.[78] In other cases, however, the Chambers did not qualify such decisions as State practice or *opinio juris*. In the *Tadić* case, for instance, a Trial Chamber clarified that decisions of national courts, together with national legislation, treaty provisions and the Charter of the International Military Tribunal, established "the basis in customary international law for both individual responsibility and of participation in the various ways provided by article 7 of the Statute".[79] In some cases, the Chambers have relied directly on national legislation and decisions of national courts to reach a finding on the existence or content of customary rules.[80]

Observation 15

When the International Tribunal for the Former Yugoslavia referred to decisions of national courts as evidence of the two constitutive elements of customary international law, such reference was often made in conjunction with other forms of evidence such as legislative acts or treaty provisions.

39. References to decisions of national courts were often complemented by other forms of evidence, such as legislative acts or treaty provisions, in order to demonstrate the existence of a customary rule or to establish when the process of formation of a customary rule was completed.[81] For example, in the *Halilović* case, a Trial Chamber analysed the historical context of the nature of command responsibility as a form of individual criminal responsibility, stating that it "emerged in the post World War II era in national war crimes legislation, as well as in some post World War II case law".[82] The Trial Chamber first surveyed national legislation[83] and subsequently resorted to decisions of national courts,[84] thereby noting that "the post World War II case law was not uniform in its determination as to the nature of the responsibility arising from the concept of command responsibility".[85] The Trial Chamber concluded that the concept of command responsibility was only "codified" with the adoption of Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).[86]

Observation 16

In the case law of the International Tribunal for the Former Yugoslavia, decisions of national courts have constituted particularly relevant forms of evidence of customary rules of international criminal law, a subject area that has partly developed from domestic legislation and decisions of national courts.

40. It appears from the case law of the International Tribunal for the Former Yugoslavia that customary rules pertaining to international criminal law have often emerged from the State practice and acceptance as law (*opinio juris*) embodied in decisions of national courts. The Appeals Chamber judgment in the *Tadić* case is an illustration of such a marked reliance on national courts in this area of the law.[87] The Appeals Chamber stated that, given the absence in the Statute of the International Tribunal for the Former Yugoslavia of the objective and subjective elements of collective criminality, it was necessary to turn to customary international law to identify those elements and that "[c]ustomary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation".[88] In particular, the Chamber relied on decisions of national courts as evidence of State practice when it held that "[i]n the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation". This led the Appeals Chamber to conclude that

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this study was silent on the matter, the Chamber decided to look into State practice and *opinio juris*.

[75] *Hadžihasanović and Kubura* (footnote 73 above), para. 255.

[76] *Ibid.*, paras. 256–257.

[77] *Ibid.*, para. 258.

[78] See, for example: *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (footnote 72 above), paras. 665–669; *Tadić*, Case No. IT-94-1-A, Judgment (footnote 18 above), para. 94; *Jelisić* (footnote 73 above), para. 61; *Halilović*, Case No. IT-01-48-T, Judgment, Trial Chamber I, Section A (footnote 73 above), paras. 82–83 (when the Chamber first looked into the "post World War II jurisprudence", in the context of prevention of commission of crimes by commanders, to then turn to the codification of command responsibility and the existence of a preventive duty, the International Committee of the Red Cross commentary to Additional Protocol I, and the International Tribunal for the Former Yugoslavia's own jurisprudence) and para. 91; *Hadžihasanović and Kubura* (footnote 73 above), para. 255; *Milutinović* (footnote 73 above), para. 197, footnote 356; *Šainović* (footnote 73 above), paras. 1622–1646.

[79] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see footnote 72 above), para. 669 (see also paras. 665–669).

[80] See *Kunarac*, Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber (see footnote 73 above), paras. 130–131 (when discussing the definition of the crime of rape); *Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber (see footnote 73 above), para. 66, footnote 73 (after analysing national legislation and case law, the Chamber held that "[f]urther evidence of the unsettled nature of State *opinio juris* and practice … is evidenced by the controversial negotiations as late as 1999 by State delegates to the Working Group on the Elements of Crimes for the Rome Statute."); *Halilović*, Case No. IT-01-48-T, Trial Chamber I, Section A (footnote 73 above), paras. 43–47.

[81] See, for instance, *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above), para. 290; *Blaškić*, Case No. IT-95-14-T, Trial Chamber (footnote 73 above), paras. 316–332; *Galić*, Case No. IT-98-29-A, Appeals Chamber (footnote 73 above), paras. 92–97; and *Šainović* (footnote 73 above), paras. 1626–1646.

[82] *Halilović*, Case No. IT-01-48-T, Trial Chamber I, Section A (footnote 73 above), para. 42.

[83] *Ibid.*, para. 43.

[84] *Ibid.*, paras. 44–47.

[85] *Ibid.*, para. 48.

[86] *Ibid.*, paras. 49–54.

[87] *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above), paras. 194–226.

[88] *Ibid.*, para. 194.

the consistency and cogency of the case law and the treaties referred to … as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.[89]

Observation 17

The International Tribunal for the Former Yugoslavia has indicated in general terms that decisions of national courts are relevant as subsidiary means for the identification of rules of law in the meaning of Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

Observation 18

The International Tribunal for the Former Yugoslavia has frequently relied on decisions of national courts as a particularly relevant subsidiary means for the determination of the existence or content of rules of international criminal law.

Observation 19

The International Tribunal for the Former Yugoslavia has emphasized the primacy of international judicial decisions over decisions of national courts as subsidiary means for the identification of rules of law. Chambers have gradually reduced recourse to decisions of national courts over time, as more decisions of other international criminal courts and tribunals became available.

41. The International Tribunal for the Former Yugoslavia has affirmed that it would have recourse to "judicial decisions" as subsidiary means for the determination of rules of law under Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.[90] It also held that decisions of national courts could be used for this purpose, but emphasized the primary importance of international judicial decisions. In *Kupreškić* et al., the Trial Chamber held that judicial decisions

> should only be used as "subsidiary means for the determination of rules of law" (to use the expression in Article 38 (1) (*d*) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law) … [since] … judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes … [and] … the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law… [I]nternational criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgments, as the latter are at least based on the same *corpus* of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.[91]

42. In its case law, decisions of national courts have frequently been relied upon by the International Tribunal for the Former Yugoslavia as subsidiary means to determine a rule of law. For example, in the *Tadić* case,[92] the Trial Chamber had recourse to decisions of national courts on a number of issues,[93] and employed them as subsidiary means for the definition of "civilian population" and of "crimes against humanity".[94] As to "civilian population", the Trial Chamber expressly referred to national case law as being "instructive" because the relevant court applied "national legislation" which "defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter", and it was thus relevant for a contemporary analysis of customary international law.[95] When discussing the definition of crimes against humanity, the Trial Chamber stated that, as

> the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences.[96]

The Trial Chamber proceeded to analyse a previous decision of the Tribunal, a report of the Commission and one decision of the United States Court of Appeals for the Second Circuit to reach its conclusion on the matter.[97] Similarly, in cases subsequent to *Tadić*, the Chambers often relied on the authority of decisions of national courts in conjunction with other subsidiary means.[98] A

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[89] *Ibid.*, paras. 225–226.

[90] "[R]ecourse would be had to the various sources of international law as listed in Article 38 of the Statute of the [International Court of Justice], namely international conventions, custom, and general principles of law, as well as other subsidiary sources such as judicial decisions and the writings of jurists. Conversely, it is clear that the Tribunal is not mandated to apply the provisions of the national law of any particular legal system." *Delalić*, Case No. IT-96-21-T (see footnote 73 above), para. 414. See also *Furundžija*, Case No. IT-95-17/1-T, Trial Chamber (footnote 73 above), para. 196, where the Chamber stated that the pronouncements of the British military courts for the trials of war criminals were "less helpful in establishing rules of international law" as the law applied was domestic.

[91] *Kupreškić* (see footnote 73 above), paras. 540–542.

[92] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see footnote 72 above).

[93] *Ibid.*, paras. 638–643, 650–655, 657–658, 669, 678–687, 694 and 696.

[94] *Ibid*. The Trial Chamber started by clarifying that neither the Statute of the International Tribunal for the Former Yugoslavia, nor the Secretary-General's report on the International Tribunal for the Former Yugoslavia, provides guidance on the definition of "civilian" (para. 637). As a consequence, the Chamber made use of treaty provisions, decisions of national courts, United Nations documents, and a decision from a Trial Chamber of the Tribunal in another case, to reach a finding on the meaning of "civilian" (paras. 638–643).

[95] *Ibid.*, para. 642. The national case law in question refers to the *Barbie* case by the Criminal Chamber of the French Court of Cassation: France, *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, Cour de Cassation, *Barbie Case*, ILR, vol. 100 (1988), p. 330.

[96] *Tadić*, Case No. IT-94-1-T, Opinion and Judgment (see footnote 72 above), para. 654.

[97] *Ibid.*, paras. 654–655.

[98] See, for example: *Tadić*, Judgment, Case No. IT-94-1-A (see footnote 18 above), paras. 255–270; *Hadžihasanović and Kubura* (footnote 73 above), para. 188, footnote 318; *Orić* (footnote 73 above), para. 304, footnotes 860–861, and para. 588, footnotes 1579–1581; *Jelisić* (footnote 73 above), para. 68; *Blaškić*, Case No. IT-95-14-T, Trial Chamber (footnote 73 above), paras. 221, 223–224, 229–230; *Kunarac et al.*, Case No. IT-96-23 and IT-96-23/1-A, Appeals Chamber (see footnote 73 above), para. 123; *Krnojelac*, Case No. IT-97-25-A, Appeals

clear example of this can be found in the *Kunarac* case.[99] The Trial Chamber discussed the definition of "enslavement" by looking into "various sources that deal with the same or similar subject matter, including international humanitarian law and human rights law", as enslavement is not defined in the Statute of the International Tribunal for the Former Yugoslavia.[100] The Trial Chamber resorted to treaty provisions,[101] international, regional and national case law,[102] and reports of the Commission.[103]

43. In the specific context of international criminal law, a particular type of domestic judicial decision was especially relevant. As the first international criminal tribunal established since the Nuremberg and Tokyo international military tribunals, the International Tribunal for the Former Yugoslavia had few decisions of international criminal courts to rely on in deciding the first cases that it had to adjudicate. An important judicial source of information, bearing considerable authority for the Tribunal, were decisions emanating from courts established in Germany under Control Council Law No. 10, dealing with cases involving crimes committed during the Second World War. Although handed down by domestic courts, those decisions were taken in application of international law, and in particular customary international law. In the *Furundžija* case, for instance, the Trial Chamber indicated the criteria for the appreciation of the relevance of decisions of domestic courts in the following terms:

> For a correct appraisal of this case law, it is important to bear in mind, with each of the cases to be examined, the forum in which the case was heard, as well as the law applied, as these factors determine its authoritative value. In addition, one should constantly be mindful of the need for great caution in using national case law for the purpose of determining whether customary rules of international criminal law have evolved in a particular matter.[104]

Therefore, various Chambers of the International Tribunal for the Former Yugoslavia have frequently referred, in general, to "the jurisprudence from World War II trials" or to "the post-World War II jurisprudence" as authority for the purpose of establishing the existence, and especially the precise content, of customary rules of international criminal law.[105] They constituted, at the time, the only authoritative judicial pronouncements pertaining to the application of international humanitarian law in the context of a criminal trial. With the development of its own jurisprudence, the Tribunal has increasingly relied more on its own case law, or that of the International Criminal Tribunal for Rwanda, and correspondingly references to decisions of national courts, as subsidiary means, have become less frequent.

Chamber (footnote 73 above), para. 96; *Stakić*, Case No. IT-97-24-A, Appeals Chamber (footnote 73 above), paras. 290–300, 315; *Simić* (footnote 73 above), para. 102, footnote 186; *Blagojević and Jokić* (footnote 73 above), para. 624, footnote 2027, paras. 646, 664; *Strugar*, Case No. IT-01-42-T, Trial Chamber II (footnote 73 above), paras. 363–364; *Halilović*, Case No. IT-01-48-T, Trial Chamber I, Section A (footnote 73 above), para. 60, footnote 143, and para. 63, footnote 149; *Brđanin* (footnote 73 above), paras. 393–404, and 410; *Delić* (footnote 73 above), paras. 73–74; *Popović* (footnote 73 above), para. 807, footnote 2911; *Đorđević* Trial Chamber II (footnote 73 above), para. 1771; and *Perišić*, Appeals Chamber (footnote 73 above), para. 44, footnote 115.

[99] *Kunarac*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber (see footnote 73 above). See also *Krnojelac*, Case No. IT-97-25-T, Trial Chamber II (footnote 73 above), para. 58, footnote 197 (the Chamber listed "authorities" supporting its finding regarding customary international law, which in its turn included the Charter of the International Military Tribunal, international and national case law, and Commission documents), and para. 474, footnote 1429.

[100] *Kunarac*, Case No. IT-96-23-T and IT-96-23/1-T, Trial Chamber (see footnote 73 above), para. 518.

[101] *Ibid*., paras. 519–522, 528–533 and 536.

[102] *Ibid*., paras. 523–527 and 534–535.

[103] *Ibid*., para. 537.

[104] *Furundžija*, Case No. IT-95-17/1-T, Trial Chamber (footnote 73 above), para. 194.

[105] See, for instance: *Kvočka* (footnote 73 above), para. 186; *Hadžihasanović and Kubura* (footnote 73 above), paras. 255–261; *Brđanin* (footnote 73 above), para. 415.

Chapter VII

International Criminal Tribunal for Rwanda

Observation 20

In the identification of customary international law, the International Criminal Tribunal for Rwanda has rarely referred to decisions of national courts as forms of evidence of State practice or of acceptance as law (*opinio juris*).

Observation 21

In the identification of customary international law, the International Criminal Tribunal for Rwanda referred to decisions of national courts as subsidiary means for the determination of rules of law, albeit less frequently than it referred to its own case law and that of the International Tribunal for the Former Yugoslavia.

44. Article 1 of the Statute of the International Criminal Tribunal for Rwanda[106] provided that the tribunal would "have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda or Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994". As to the applicable law, the Tribunal had a slightly expanded jurisdiction compared to the International Tribunal for the Former Yugoslavia. The Security Council, which established the Tribunal not on the basis of a draft statute prepared by the Secretary-General, but through negotiation among Council members, "included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime".[107] Nevertheless, in the *Akayesu* case, a Trial Chamber clarified:

[106] Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955 (1994), 8 November 1994, annex, art. 3.

[107] Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), document S/1995/134, 13 February 1995, para. 12.

> Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the [International Tribunal for the Former Yugoslavia], by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibility of the perpetrator of the crime, the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the [International Tribunal for the Former Yugoslavia], during which the … Secretary-General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are *beyond any doubt part* of customary law.[108]

Of a total of 85 judgments issued by the International Criminal Tribunal for Rwanda and analysed for the purposes of this memorandum, 12 referred to decisions of national courts in the context of the identification of customary international law.[109]

45. The International Criminal Tribunal for Rwanda case law at times employed decisions of national courts for the interpretation and clarification of modes of individual criminal responsibility,[110] of elements of crimes,[111] and of the scope and meaning of crimes.[112] For instance, several references to decisions of national courts were made by the Trial Chamber in the *Akayesu* case, which was the first trial judgment it delivered.[113] In that case, on a few occasions, the Chamber resorted solely to decisions of national courts to reach its finding,[114] while on others it relied on international instruments, international jurisprudence and national laws, in addition to decisions of national courts.[115]

46. The cases subsequent to *Akayesu* turned to decisions of national courts sparingly. For example, decisions of national courts were employed as evidence of State practice in the *Bogosora and Nsengiyumva* case.[116] In the *Bagilishema* case, both the Trial and the Appeals Chambers used decisions of national courts as subsidiary means for the determination of rules of law.[117]

47. The use of decisions of national courts as subsidiary means was slightly more frequent in the case law of the International Criminal Tribunal for Rwanda. In some cases, the Chambers analysed decisions of national courts in conjunction with different forms of evidence to either make a finding or reach a conclusion on the interpretation, scope and meaning of a certain provision. In *Musema*, within the context of superior responsibility, the Trial Chamber took into consideration the jurisprudence of the International Tribunal for the Former Yugoslavia and of the Nürnberg and Tokyo tribunals, writings of jurists, and decisions of national courts.[118] In *Nzabonimana*, the Chamber used decisions of national courts, jurisprudence of the International Criminal Tribunal for Rwanda, a report of the Commission, and writings of jurists when discussing the meaning of "public incitement" in relation to genocide.[119] On other occasions, the Chambers resorted solely to decisions of national courts together with jurisprudence of the International Tribunal for the Former

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[108] *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, Trial Chamber I, 2 September 1998, *Reports of Orders, Decisions and Judgements 1998*, vol. I, para. 605.

[109] *Akayesu* (see previous footnote); *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment, Trial Chamber I, 27 January 2000, *Reports of Orders, Decisions and Judgements 2000*, vol. II; *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment, Trial Chamber I, 7 June 2001, available from https://unictr.irmct.org/en/cases/ictr-95-1a; *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-A, Judgment, Appeals Chamber, 3 July 2002, available from https://unictr.irmct.org/en/cases/ictr-95-1a; *Prosecutor v. Ferdinand Nahimana, John-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence, Trial Chamber I, 3 December 2003, available from https://unictr.irmct.org/en/cases/ictr-99-52; *Prosecutor v. Sylvestre Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, Appeals Chamber 7 July 2006, *Reports of Orders, Decisions and Judgements 2006*, vol. I, p. 983; *Prosecutor v. Ferdinand Nahimana, John-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, Judgment, Appeals Chamber, 28 November 2007, available from https://unictr.irmct.org/en/cases/ictr-99-52; *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgment, Appeals Chamber, 12 March 2008, available from https://unictr.irmct.org/en/cases/ictr-01-66; *Prosecutor v. Simon Bikindi*, Case No. ICTR-01-72-T, Judgment, Trial Chamber III, 2 December 2008, available from https://unictr.irmct.org/en/cases/ictr-01-72; *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-T, Judgment and Sentence, Trial Chamber I, 5 July 2010, available from https://unictr.irmct.org/en/cases/ictr-97-36a; *Prosecutor v. Théoneste Bagosora and Anatole Nsengiyumva*, Case No. ICTR-98-41-A, Judgment, Appeals Chamber, 14 December 2011, available from https://unictr.irmct.org/en/cases/ictr-98-41; and *Callixte Nzabonimana v. Prosecutor*, Case No. ICTR-98-44D-A, Judgment, Appeals Chamber, 29 September 2014, available from https://unictr.irmct.org/en/cases/ictr-98-44d. The present memorandum only covers judgments pronounced by the International Criminal Tribunal for Rwanda Trial and Appeals Chambers on the merits of the case before 31 December 2015. It does not cover judgments delivered in cases where plea agreements had been entered, judgments of contempt cases, and sentencing decisions. Additionally, the memorandum is restricted exclusively to the use of national decisions by the Trial Chambers and Appeals Chambers on matters of customary international law. The use of national decisions for the purposes of general principles of law and procedural questions does not fall within its scope.

[110] *Akayesu* (see footnote 108 above), paras. 556 and 633; *Musema*, paras. 142 and 270–274; *Bagilishema*, Trial Chamber I (see previous footnote), para. 37, footnote 32, para. 44, and para. 50, footnote 55; *Bagilishema*, Appeals Chamber (see previous footnote), para. 35, footnote 50; *Nahimana*, Trial Chamber I (see previous footnote), para. 1045; *Munyakazi* (see previous footnote), para. 430, footnote 866.

[111] *Akayesu* (see footnote 108 above), paras. 502–504, 534, 539–548 and 584, footnote 153; *Bagilishema*, Trial Chamber I (see footnote 109 above), para. 34, footnote 30; *Nahimana*, Appeals Chamber (see footnote 109 above), para. 896, footnote 2027, and para. 898, footnotes 2030–2031; *Gacumbitsi* (see footnote 109 above), para. 60, footnote 145; *Seromba* (see footnote 109 above), para. 161, footnote 389.

[112] *Akayesu* (see footnote 108 above), paras. 567–576; *Nahimana*, Appeals Chamber (see footnote 109 above), para. 692, footnote 1657; *Nzabonimana* (see footnote 109 above), para. 125, footnote 372.

[113] *Akayesu* (see footnote 108 above), paras. 502–504, 534, 539–548, 556, 567–576 and 584, footnote 153, and para. 633.

[114] *Ibid.*, paras. 502–504, and para. 584.

[115] *Ibid.*, paras. 525–548, 549–562, 563–577 and 630–634.

[116] *Bagosora and Nsengiyumva* (see footnote 109 above), para. 729, footnote 1680. When discussing the issue of the criminalization of acts degrading the dignity of the corpse or interfering with a corpse, the Chamber stated that "any review of customary international law regarding this issue would need to take into account the large number of jurisdictions that criminalise degrading the dignity of or interfering with corpses". The Chamber proceeded to quote a number of pieces of national legislation and, finally, added that "in several trials following the Second World War, accused were convicted on charges of mutilating dead bodies".

[117] *Bagilishema*, Trial Chamber I (see footnote 109 above), para. 34, footnote 30, para. 37, footnote 32, para. 44, para. 50, footnote 55, paras. 142–143, para. 1012, footnote 1188; *Bagilishema*, Appeals Chamber (see footnote 109 above), para. 35, footnote 50.

[118] *Musema* (see footnote 109 above), paras. 127–148. See also paragraphs 264–275, where the Chamber discussed the class of perpetrators of crimes belonging to the armed forces and resorted to the jurisprudence of the International Criminal Tribunal for Rwanda, the Tokyo and Nuremberg tribunals, and decisions of national courts.

[119] *Nzabonimana* (see footnote 109 above), paras. 125–127.

Yugoslavia to reach a finding,[120] or only to decisions of national courts to interpret a provision.[121]

[120] *Bagilishema*, Trial Chamber I (see footnote 109 above), paras. 34 and 44–46.

[121] *Akayesu* (see footnote 108 above), paras. 502–504.

Chapter VIII

International Criminal Court

Observation 22

In the identification of customary international law, the International Criminal Court has referred both to decisions of international courts and tribunals, and to decisions of national courts as subsidiary means for the determination of rules of law.

48. As only one judgment in the case law of the International Criminal Court was deemed relevant for the purposes of this memorandum,[122] it would be premature to draw general observations from it. Instead, some general remarks may be made regarding the judgment in question, which was delivered by the Appeals Chamber in the *Lubanga* case.[123] On this occasion, national decisions were used by the Appeals Chamber when discussing the standard of foreseeability of events in relation to the common plan necessary for co-perpetration.[124] While national decisions were cited in footnotes supporting the Chamber's assertion that the standard of foreseeability was a virtual certainty, no explanation of their role was given by the Chamber. In addition to decisions of national courts, the Chamber used the case law of the International Criminal Court and other subsidiary means for the determination of rules of law, such as the case law of the International Tribunal for the Former Yugoslavia and writings of jurists on the subject.[125] It may accordingly be inferred that the Chamber used national decisions in this case as subsidiary means for the determination of rules of law.

[122] The memorandum only deals with judgments pronounced by the International Criminal Court Trial Chambers and Appeals Chamber on the merits of the case. It does not cover sentencing decisions and decisions on the confirmation of the charges before trial. Consequently, a total of five judgments were analysed, out of which one was deemed relevant and four were deemed not relevant for the purposes of the study. The relevant jurisprudence comprises judgments pronounced by the Chambers of the International Criminal Court up to 31 December 2015.

[123] *Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 A5, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014.

[124] *Ibid*., para. 447, footnotes 827–828.

[125] *Ibid*., paras. 445–449.

Chapter IX

General observations

Observation 23

In the identification of customary international law, decisions of national courts may be referred to for two distinct purposes: as forms of evidence of the constitutive elements of rules of customary international law, or as subsidiary means for the determination of such rules.

49. Decisions of national courts have two general functions in the determination of customary international law. First, they constitute an important form of evidence, among others, that a certain practice of a State exists or that it is accepted as law (*opinio juris*) under Article 38, paragraph 1 (*b*), of the Statute of the International Court of Justice; indeed, since national courts are State organs, their decisions may at times directly constitute State practice or be an expression of acceptance as law (*opinio juris*). Second, decisions of national courts may be among the "judicial decisions" referred to as subsidiary means for the determination of rules of law, including customary international law, in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice.

50. This dual nature of decisions of national courts is reflected in the decisions of international courts and tribunals analysed above. While international courts and tribunals have primarily referred to decisions of national courts as State practice or evidence of acceptance as law (*opinio juris*) of specific States in order to establish that customary international law has emerged, some courts and tribunals, most notably international criminal tribunals, have also referred to them as subsidiary means to confirm the existence of a rule that has already been deemed to have emerged.

Observation 24

Decisions of national courts are regularly referred to by international courts and tribunals in the assessment of the two constitutive elements of rules of customary international law, particularly with reference to those areas of international law that are more closely linked with domestic law.

51. Decisions of national courts constitute a form of evidence, among others, for the determination of the existence of a general practice that it is accepted as law (*opinio juris*). International courts and tribunals have employed decisions of national courts in this context by referring to them in conjunction with other elements, such as domestic law or administrative practice, in order to

assess the practice of a specific State, and in conjunction with other elements, such as positions taken by Governments, in order to assess the existence of acceptance as law (*opinio juris*) of those States. When considering decisions of national courts for such purposes, international courts and tribunals have relied particularly on decisions of the highest national courts whenever available. Such decisions often bear a particular significance with respect to legislation since international courts and tribunals generally do not engage in an interpretation of domestic legislation, but rely on the interpretation given by the courts responsible for the application of that law.

52. When referring to decisions of national courts as evidence of State practice or acceptance as law (*opinio juris*), international courts and tribunals have often engaged in a quantitative analysis of relevant decisions, and on the variety of States from which they emanate, rather than the details of the line of argument of each. In this regard, the decisions considered are often those that have been relied upon by the parties appearing before the deciding international court or tribunal. Furthermore, in evaluating the balance of available decisions, international courts and tribunals generally conduct an overall assessment, so that general inconsistency between jurisdictions may lead to the conclusion that a certain rule does not exist or has not yet fully emerged.

53. Decisions of national courts have been especially relied upon as State practice or acceptance as law (*opinio juris*) when establishing the existence of customary international law pertaining to certain domains of international law—such as immunity from jurisdiction, criminal law and diplomatic protection—because of the special relevance of national judicial practice to those specific domains.

Observation 25

Findings on rules of customary international law made by national courts have been referred to by international courts and tribunals as subsidiary means for the determination of the existence or content of such rules.

54. In the application of customary international law, decisions of national courts may also serve as a subsidiary means to confirm the finding on the existence or scope of a given rule of customary international law by an international court or tribunal without proceeding to an assessment *de novo* of overall State practice or acceptance as law (*opinio juris*). In this regard, it is to be noted that some international courts and tribunals, as well as judges of the International Court of Justice in their individual opinions, have construed the term "judicial decisions" in Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice as encompassing decisions of national courts. In addition, no instance was found in which international courts or tribunals excluded the possibility that decisions of national courts may have such a subsidiary function under Article 38, paragraph 1 (*d*), of the Statute.

55. It follows that decisions of national courts may be considered "subsidiary means for the determination of rules of law", including rules of customary international law. However, it is not clear that all subsidiary means mentioned in Article 38, paragraph 1 (*d*), of the Statute have equal authority. In the case law analysed in the present memorandum, decisions of national courts were referred to less often and approached with more caution than decisions emanating from international courts and tribunals. Furthermore, subsidiary reliance on decisions of national courts occurred mostly with reference to questions that had not been the object of developed case law at the international level, where no international judicial decisions existed, or with reference to subject areas where domestic judicial practice was especially relevant. This was especially true in the early case law of the International Tribunal for the Former Yugoslavia: as international case law developed over time, reliance on decisions of national courts diminished.

56. When decisions of national courts are relied upon by international courts and tribunals as subsidiary means, it is the decision itself that is considered by the deciding court or tribunal, rather than the position of the national court within the domestic legal system. Thus, a decision of a district court dealing with issues of international law similar to those under consideration by the deciding court or tribunal is not necessarily less relevant as a subsidiary means under Article 38, paragraph 1 (*d*), of the Statute of the Court than a decision of a higher court from a different legal system. The authority of a statement made in a decision of a national court as a subsidiary means for the determination of a rule of law resides essentially in the quality of the reasoning and its relevance to international law.