

Beyond Dispute: International Judicial Institutions as Lawmakers

Precedents: Lawmaking Through International Adjudication

By Marc Jacob*

A. Introduction

This paper deals with the role of judicial decisions in international adjudication. It is impossible to fail to notice the abundance of prior cases invoked in decisions of international tribunals and that, in order to find out what the law actually is, reference to previous cases is all but inevitable in practice. In some areas of international law, judicial or arbitral decisions have even been said to be the centre of progressive development. Nevertheless, there is an undeniable and deeply-rooted professional trepidation in many parts of the world regarding this enduring phenomenon.¹ Even absent a fully articulated theory of adjudication or legal reasoning, the very idea of “judicial lawmaking” tends to arouse instinctive suspicion, especially when coupled with a denial of any restraining force of prior cases. Be that as it may, observations to the extent that judicial decisions are not veritable sources of international law or only binding between the parties in a particular dispute are only the beginning, and far from the end, of the present inquiry.² Several interrelated and intricate questions need to be disentangled and dealt with in order to get a better grasp on what is commonly, and often rather unhelpfully, lumped together loosely under the vague label of “judicial precedent.” The paper is hence partly descriptive and partly revisionary. I do not however intend to rehash general criticisms or defences of precedent. Instead, I aim to present precedent as a general and omnipresent jurisprudential concept that enables and constrains judicial decision-making even in seemingly ordinary cases and to then showcase the specificities of one particular legal system in this respect, namely public international law. Hopefully this provides some of the methodological groundwork for other questions central to the present project, not least concerning the legitimacy of judicial lawmaking.

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¹ ARNOLD DUNCAN MCNAIR, *THE INTERNATIONAL COURT OF JUSTICE* 9 (1949).

² See, e.g., Statute of the International Court of Justice (ICJ Statute), 26 June 1945, *UNTS*, vol. 33, 993, Arts 38(1)(d) & 59.

B. What Are Precedents?

I. Perspectives on Precedents

Since any inquiry is inevitably hostage to perspective,³ it is perhaps appropriate at the outset to draw attention to three broad ways of approaching precedent. Firstly, it is possible to speak of *rules of precedent*. Not only do these differ from the material content of precedents (i.e. the *norms in precedents*, which are often collectively referred to as case law), but they are also by themselves silent as to a larger *theory of precedent*. This triangle roughly corresponds to legal method, substantive law, and legal theory, respectively.

The so-called *rules of precedent* are those guidelines stipulating how precedent operates in practice in a given legal system. These are often methodological instructions that differ in nature and quality from actual law concerning precedents, which tends to be derived from (quasi-)constitutional considerations. Their misapplication, therefore, does not necessarily result in an incorrect judgment where no pertinent substantive norms are contravened.⁴ These rules are occasionally also referred to as a particular doctrine of precedent, particularly in systems where such rules are fairly detailed, as in the phrase “[t]he peculiar feature of the English doctrine of precedent is its strongly coercive nature.”⁵ It is here that one encounters a first confusion that is still surprisingly common. Terminology aside, a rule of precedent can of course also be a negative stipulation, such as “tribunals in investment arbitration are not bound by previous decisions of other tribunals.”⁶ Yet this simple rule on the lack of knockout authority of judicial pronouncements is not infrequently treated as synonymous with a complete absence of rules of precedent rather than a pronouncement on a particular facet thereof, for instance when a tribunal claims that “[t]here is so far no rule of precedent in general international law; nor is there any within the specific ICSID system”⁷ Such shorthand can be misleading. All legal systems have rules of precedent, even if these are implicit, terse, or prohibitive. To hold otherwise is to confuse a rule with its contents. They merely come in various flavours and guises and can either be fairly elaborate, as is traditionally the case in common law jurisdictions, or in a more rudimentary stage of articulation, as in the case of public international law. Nor does recognition of precedential effect necessarily commit one to a

³ See FRIEDRICH WILHELM NIETZSCHE, ZUR GENEALOGIE DER MORAL III 12 (1887).

⁴ It is however conceivable that underlying rules or principles could indirectly be violated, thereby triggering some form of legal consequence.

⁵ RUPERT CROSS & JAMES W. HARRIS, PRECEDENT IN ENGLISH LAW 3 (1991).

⁶ RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 36 (2008).

⁷ *AES Corp. v. Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312, para. 23.

specific theory of law. As will be developed further below, many rules of precedent are in fact postulates of language or logic.

A *theory of precedent* on the other hand generally makes no claim to accurately proscribe or even represent the precise workings of prior judicial decisions in the everyday legal practice of a specific legal system. Rather, it takes a step back and examines the very essence and potential of judicial pronouncements. Such a theory provides a framework for understanding precedent and is therefore among other things likely to inquire more deeply into whether and how precedents work in general, the concept of legal norms, different judicial ideologies regarding precedents, the proper role of the judge (usually folded into a discussion of the separation of powers), the various advantages and disadvantages of assorted precedent models, and possible approaches to the extrapolation, interpretation, and application of precedents. The two main points advanced in this respect here are that there is little point to strenuous refutations that judges make law and that, almost as a corollary of the first point, precedents have both a creative and a constricting function, simultaneously enabling and fettering judicial decision-making.

II. Nature of Precedents: Sources & Arguments

Precedents are situations—in a legal context, usually decided cases—in which an issue at hand has already been decided elsewhere. Since they provide patterns on which future conduct can be based, precedents have been likened to “the usable past.”⁸ In an important sense, therefore, a precedent is also a form of argument or justification employed in the context of decision-making.⁹ Its logical structure is straightforward but belies the many layers of complexity bedeviling the subject: Every time situation A arises, the answer should be B *because* A was previously resolved in manner B. The italicised conjunction betrays the core of precedent: decisional consistency based on historical lineage. One cannot blow both hot and cold, the argument goes. Stripped down to this bare skeletal frame, it quickly becomes apparent that precedent is not exclusive to the legal domain, as any exasperated parent can testify when a child demands treatment akin to that previously afforded to an elder sibling.¹⁰ If this is the case, it gives rise to the hypothesis that precedent plays a role in every legal system, albeit perhaps of varying significance.¹¹ Exactly what role it plays in international law is the topic of this paper.

⁸ NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* ch. 1 (2008).

⁹ See Frederick Schauer, *Precedent*, 39 *STANFORD LAW REVIEW* 571 (1987) (noting the logical semblance between argumentation and justification).

¹⁰ *Id.*, 572.

¹¹ Cf. Neil MacCormick & Robert Summers, *Further General Reflections and Conclusions*, in: *INTERPRETING PRECEDENTS*, 531-532 (Neil MacCormick & Robert Summers eds, 1997).

It is a basic premise of all law that certain actions have to satisfy certain criteria; in other words, they must be justified. This also applies to international law, which after all claims to bind states. It is a normative endeavour, ultimately drawing on non-legal considerations. The law does not however admit all possible justificatory arguments. A higher dice roll for instance is not considered acceptable. Since the delineation of these considerations is ultimately so theoretical and contested—in short, messy—a matter defying readily apprehensible usability, formal sources of law habitually serve as common points of reference or agencies to govern conduct.¹² These sources can be seen as translations of what is materially right, or they can be considered the unique origin of law themselves.¹³ But whatever their exact jurisprudential breed may be, sources continue to exert a centripetal pull on the legal mind.

Accordingly, it might appear natural to ask whether precedents are legal sources in the sense that treaties or custom are in international law or parliamentary legislation is in domestic legal systems, i.e. formal sources of law. This is certainly an instinctive reaction amongst many lawyers, especially those of a more positivistic jurisprudential bent. The question inherently only allows for an affirmative or a negative answer. And, using the staple methodology of international law, even a cursory glance at Article 38 of the ICJ Statute will yield an undemanding “no.” Decided cases, we are told, are at best a source of law (albeit a secondary one) only for the very parties to a particular case and evidence of the state of law elsewhere.¹⁴ It is said the ICJ merely applies the law; it does not make it.¹⁵ Unfortunately, however, this denial is as undemanding as it is limited in explanatory power. What follows is hence not necessarily a refutation of the internal logic of this orthodoxy, but rather of the significance of the perspective it adopts.

III. A Tale of Two Theories

This presents a good opportunity to introduce two paradigms or archetypes (less kindly, one might say caricatures or stereotypes) frequently encountered in attempting to demarcate where adjudication ends and judicial legislation begins.

¹² See Martti Koskenniemi, *Methodology of International Law*, in: THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, margin numbers 7, 24 (Rüdiger Wolfrum ed., 2007), available at: <http://www.mpepil.com>.

¹³ See GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE 6 (1932) (for the former view); HANS Kelsen, REINE RECHTSLEHRE 64 (1934) (on the latter position).

¹⁴ See ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT: THEORIE UND PRAXIS para. 618 (1984). Although even this is strongly contested, cf. Allan Pellet, *Article 38*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE - A COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), 784 (insisting, as the mainstream does, that the ICJ's jurisprudence is not a real source of law but merely a documentary “source” in the sense of a resource or investigatory tool).

¹⁵ See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19-20 (2008).

On the one hand, there is what might loosely be called the common law approach, which is well-known for unashamedly priding itself on its judicial creativity and hardnosed pragmatism. Addressing the Society of Public Law Teachers in Edinburgh in 1971, Lord Reid of Drem, at the time senior Lord of Appeal in Ordinary of the House of Lords, dryly noted that it was a “fairy tale” that the law was locked away conveniently in a mythical Aladdin’s cave and that on a judge’s appointment there descended on him knowledge of the magic words “Open Sesame!”¹⁶ This frank confession is typical of a legal culture that is traditionally devoid of any reverence for the supremacy and conclusiveness of the *lex scripta* as an expression of a coherent legal regime. Solutions are traditionally tailor-made as and when the need arises, more or less haphazardly without any grand overarching plan or logic.¹⁷ Slapdash though it may be, this mode of evolution is often hailed as a great virtue promoting efficiency, effectiveness, and contextual sensitivity.¹⁸ Necessarily, a great deal of faith is placed in the legal elite. Not surprisingly, the declaratory theory, according to which courts more or less mechanically pronounce existing law, is nowadays rarely met with much enthusiasm in such traditions besides being used strategically to convey images of judicial passivity.¹⁹ Yet despite the critical potential inherent in such outspoken acknowledgment, powerful challenges have been issued on the one hand by those suspicious of the semantic openness of cases and wary of placing too much power into the hands of the privileged few, and on the other hand by those rejecting a rose-tinted view of adjudication that is blind to the virtues of the democratic process.²⁰

In any event, one might claim that such a bold account may be true for common law jurisdictions, but has little to no applicability to code-based systems, where the decisional brunt is said to be born by legislatures and judgments are not considered “proper” sources of law. Such is indeed the premise of the declaratory theory, which arguably predominates on the European continent. Its motto is Justinian’s famous aphorism “*non exemplis sed legibus iudicandum est*” (“justice must be administered not on the basis of precedents but based on [statutory] law”); its credo is the divide between law (courts) and politics (legislatures); its patron saint is Charles-Louis de Secondat baron de la Brède et de Montesquieu; and its intent and effect is to play down the role of the judiciary. Woe betide who commits the heresy of judicial usurpation in the face of legislative or

¹⁶ Subsequently published as Lord Reid, *The Judge as Law Maker*, 12 JOURNAL OF THE SOCIETY OF PUBLIC LAW TEACHERS 22 (1972).

¹⁷ See, e.g., ALLAN C. HUTCHINSON, EVOLUTION AND THE COMMON LAW 98 (2005) (“messy, episodic, and self-correcting”).

¹⁸ See Robert Howse, *Moving the WTO Forward - One Case at a Time*, 42 CORNELL INTERNATIONAL LAW JOURNAL 223, 230 (2009) (albeit professing to “common law prejudice”).

¹⁹ See, e.g., EDWARD W. THOMAS, THE JUDICIAL PROCESS 3 (2005).

²⁰ Examples of the former include the Realists and the Critical Legal Studies movement. On resuscitating liberal democratic ideals, see, e.g., JEREMY WALDRON, THE DIGNITY OF LEGISLATION 2 (1999).

constitutional superiority! Traditional German doctrine, for instance, hence holds that judges do not make law unless exceptionally required to fill unintended gaps in the legal order.²¹ Accordingly, it is possible to differentiate neatly between the judicial activities of interpretation, (legitimate) legal development beyond the meaning of statutory wording that is still compatible with its spirit or purpose, and (illegitimate) legal development that is compatible with neither wording nor purpose of a statute. Once again, pointed criticism is not in short supply.²²

Whether the two positions sketched above are commendable in their aspirations or accurate descriptions is an issue on which nothing shall be said here. The former is best left to the deep waters of political philosophy. As to the latter, various commentators, in particular private lawyers and comparatists, have expressed serious doubts regarding such simplified macroscopic schisms.²³ Nor shall an attempt be made to pigeonhole public international law into one of these positions. And almost to add insult to injury, the obsession with sources of law is in itself no stranger to stinging critique.²⁴ The point here is to draw attention to two narratives that—consciously or subconsciously—dominate much of the debate on precedent. This is unfortunate since they tend to obfuscate the phenomenon more than assist in elucidating it. While the narratives help to understand where particular contributions are coming from (literally), endless haggling over whether judges “make law” or judgments are sources properly so-called, whatever that may be, suffers in the context of precedents from twin defects: theoretical short-sightedness and long-sightedness.

IV. Theory Myopia: Failing to Account for the Richness of International Legal Argument

Attending to the first charge, waxing over classifications of decided cases as formal sources of law or not is to a large extent a red herring. Adopting such a perspective to the exclusion of all others (deliberately) fails to see the larger picture. At the risk of sounding trite, it is suggested here that no matter what their exact jurisprudential providence may be, prior cases are crucial to adjudication, including dispute settlement in public international law. While it may be true that this point is more easily made—perhaps even

²¹ See, e.g., BERND RÜTHERS, RECHTSTHEORIE: BEGRIFF, GELTUNG UND ANWENDUNG DES RECHTS 160-162, 505-567 (2008) (with further references). The idea of gaps in the law is of course itself an enduring controversy.

²² See, e.g., Marion Eckertz-Höfer, “Vom guten Richter” - Ethos, Unabhängigkeit, Professionalität, 62 DIE ÖFFENTLICHE VERWALTUNG 729, 733 (2009) (“It is a platitude, that ... even in their everyday dealings ... judges make law. Judicial decision-making is hardly ever simple cognition of the law, but also regularly law-production.”); JOSEF ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG 174-177 (1970).

²³ See, e.g., PATRICK S. ATIYAH, PRAGMATISM AND THEORY IN ENGLISH LAW 2-3 (1987).

²⁴ See, e.g., only KELSEN (note 13), 78; Gerald Gray Fitzmaurice, *Some Problems Regarding the Formal Sources of Law*, in: SYMBOLAE VERZIJL: PRÉSENTÉES AU PROF. J. H. W. VERZIJL, À L'OCCASION DE SON LXX-IÈME ANNIVERSAIRE, 174 (Frederik Mari van Asbeck ed., 1958).

inevitable—if judicial decisions were considered formal sources of law, the opposite is neither mandated as a postulate of logic nor from practical observation. That is not to deny that it is possible to come up with a view of law in which precedent “plays no role beyond the practical,” which is an implicit relegation of institutionalized dispute settlement processes and its considerable effects to a side show of “real law,” whatever that might then be. Besides largely tilting at windmills, such a quest for methodological purity and its harsh separation between law and its cognition requires considerable argumentative support of its own and begs questions as to its utility, especially in the wider context of the present project.

To be sure, formal sources are undeniably an important aspect of law. And of course international *law* remains a normative affair; but it is not simply an affair of norms laid down in positive sources. Formal sources are not the only game in town when it comes to arguing and thus deciding cases; analogies, hypotheticals, consequentialist considerations, historical points, different kinds of logical or linguistic arguments, and the use of dictionaries, maps, graphs, or statistics, to name but a few, are all widespread modes of *legal* argument. Reasoning in law is a complex process consisting of many steps, usually ranging from the initial classification of matters to various stages of identification and interpretation to some form of syllogistic conclusion.²⁵ Precedent can play a part in nearly all of these. Even if it often appears in the guise of a previously expounded rule or principle, i.e. as a major (legal) premise, it is not limited to the extraction of norms. Each of these steps is argumentative and possibly subject to various unspoken meta-rules (e.g. that a speaker ought not to contradict herself and give reasons for a statement). Nor is purportedly self-sufficient deduction immune to the shortcomings of a purely logical method.²⁶ In summary, just as it is inaccurate to claim that the law admits any and all types of arguments, it would be an equally gross oversimplification to maintain that adjudication is exclusively concerned with shoehorning arguments into formal sources.

Quite to the contrary, in most sophisticated matters before higher courts, the formal sources of law regulating the disputed issue are themselves rarely as such focal. Instead, controversies arise over making correct use of these sources or reconciling apparently conflicting sources, given that there is no single universally accepted method of approaching these tasks. Law as an argumentative or justificatory practice is not purely (or even, mainly) concerned with the classification of sources of law. It is far richer than that. Formal sources are usually only the first step in a lengthy chain of reasoning.

²⁵ See, e.g., Joxerramon Bengoetxea, Neil MacCormick & Leonor M. Soriano, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, in: THE EUROPEAN COURT OF JUSTICE (Gráinne De Búrca & Joseph H. H. Weiler eds, 2001).

²⁶ Cf. Aleksander Peczenik, *Jumps and Logic in the Law*, 4 ARTIFICIAL INTELLIGENCE AND LAW 297 (1996).

The objection that without the “formal source” badge a prior case is only of diminished value because a litigant cannot base her claim squarely and solely on it is unconvincing for at least two reasons. First, it ignores the semantic openness of all sources, which viewed in pre-interpretive isolation are often equally unhelpful.²⁷ If the other side is competent, it will in almost all reasonably involving disputes be possible to craft a similarly solid opposing legal position using the same sources. Second, it forgets that all cases relied on invariably refer to a multiplicity of other sources, hence at the very least serving as a form of shorthand or summary thereof. They are proxies, the reasoning of which a litigant can appropriate (and possibly spin) no matter what. It need hardly be mentioned here that saying an argument is permissible is of course not saying it is a good argument.

Doubting the exclusivity of formal sources in this context is by no means tantamount to abandoning the project of positive law. Nor does it entail an abrogation of the judicial obligation to resolve the dispute before the court. Quite to the contrary, it is submitted that this can better be accommodated if judicial decision-making does not shut its eyes to such valuable legal artefacts. Indeed, to an outsider it would seem quite baffling that a legal system that deigns two of the slipperiest hodgepodes ever to be called formal sources of law respectable bases for legal propositions (viz. custom and general principles) would turn up its nose at clearly enunciated statements relating to the law coming from its own court. Hardened by years of training and practice, the legal professional hastily dismisses such naivety without much effort as a misunderstanding of ascertainability and validity. Yet the impression remains that the more one lingers on such distinctions, the more one forgets the actual task at hand—resolving disputes, not “science for the sake of science”²⁸—and submits to the socio-political Rorschach test that precedent so frequently is.²⁹

After all, it is beyond doubt that previous cases can be illustrative of legal reasoning³⁰ or a material source of law by clarifying previously uncertain legal questions and thus affecting the position and planning of potential litigants.³¹ Moreover, as one very experienced judge observed, reference to prior cases is further attractive to courts for a host of

²⁷ Certainly the doyens of modern positivism conceded the existence of a form of judicial discretion either on account of the open linguistic texture of law or because of the flexibility of the posited legal standards and the rapidness of social change, see HERBERT L. A. HART, *THE CONCEPT OF LAW* 124-128 (1961) and Kelsen (note 13), 97-99.

²⁸ *Nationality Decrees Issued in Tunis and Morocco*, PCIJ 1923, Series C, No. 2, 58 (Prof. de Lapradelle’s speech).

²⁹ More on this *infra* section E.

³⁰ See SHABTAI ROSENNE, 3 *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005* 1553 (2006) (recognizing the value of a precedent without any need for “difficult theories of judicial legislation”); Stephen M. Schwebel, *The Contribution of the International Court of Justice to the Development of International Law*, in: *INTERNATIONAL LAW AND THE HAGUE’S 750TH ANNIVERSARY*, 407 (Wybo P. Heere ed., 1999).

³¹ See VERDROSS & SIMMA (note 14), para. 619.

practical or even downright banal reasons.³² There are undeniable intangible advantages to not having to do something for the first time. For one, precedents can save time and work. Especially if a judge is working in a foreign language, as most judges in international courts are, a well-crafted phrase or expression can be a welcome building block for one's own judgment. Moreover, it is often easier to convince a colleague of one's position when a decided case is invoked. Furthermore, there is some psychological comfort in turning to past decisions, since it suggests that any blame one might attract ultimately ought to be laid at another doorstep. In particular these last two points hint at the seemingly inescapable undercurrent to any discussion of precedents, but with an interesting twist: Utilizing past cases gives the impression that the judge is applying rather than making law.³³

Nothing in this paper seeks to detract from the fact that a degree of variance regarding the treatment of precedent remains on account of historical, constitutional, and philosophical reasons. Much of this plays out in how cases are appreciated and discussed in practice and in the concomitant precedent-handling techniques, i.e. the particular doctrines of precedent. In very general terms, formalist orthodoxy tends to start with those abstract pronouncements deigned formal sources but then inevitably draws on cases in order to specify and resolve matters, whereas the less formalistic approach is quite content to scour the larger repository of legal artefacts without attempting to minutely trace the legal spark from its democratic cradle to its courtroom grave in that direction only.³⁴ But in its argumentative propensity, precedent is a point of convergence.

Perhaps it bears repeating. It is of course possible to find ways to insist on an anemic distinction between precedents as "mere" illustrations and precedents as "proper" sources and to draw up demarcations between adjudication and legislation. This can be done either through simplistic description ("adjudication is what judges do, legislation is what parliaments do") or more or less complex normative theories of adjudication.³⁵ But for present intents and purposes, such attempts miss the point: Formalist accounts and their insistence on binary validity are poorly suited to an adequate exposition of the variable nature and effect of precedent.³⁶

³² KONRAD SCHIEMANN, VOM RICHTER DES COMMON LAW ZUM RICHTER DES EUROPÄISCHEN RECHTS 8-9 (2005).

³³ ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 10 (2004) ("precedent camouflages lawmaking, while enabling it").

³⁴ Cf. Reiner Schulze & Ulrike Seif, *Einführung*, in: RICHTERRECHT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT, 8-9 (Reiner Schulze & Ulrike Seif eds, 2003).

³⁵ See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 26, 37 (1997).

³⁶ See Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD JOURNAL OF LEGAL STUDIES 215, 243 (1987).

V. Theory Hyperopia: Failing to Account for the Pervasiveness of Precedential Effect

The second charge is that, even if one does not completely ignore the significance of judicial decisions, the fixation with formal sources focuses the debate unduly on one particularly majestic type of discussion, namely the perennial issue of the legitimacy of judicial creativity. This commonly pits judges boldly reshaping the legal landscape through intrepid pronouncements against democratic decision-making and thus involves large-scale socio-political theorizing and ambitious considerations and ideological battles pertaining to institutional balance.

Such concerns regarding judges crudely supplanting their own designs at the cost of others are certainly deserving of scholarly attention, but by no means do they exhaust the issue of precedent. Saying a court does not possess purely legislative competences is not the same as arguing its decisions lack novel aspects.³⁷ In rashly eliding the two, a removed perspective tends not to focus on the legal development close at hand that is engendered by the everyday practice of the courts. As will be argued shortly, the other side of the coin is that precedents commit the future not only in spectacular big-bang pronouncements *de novo* arousing democratic ire and charges of “activism,” but also through quiet, everyday judicial activity that is not suspected of outright “judicial legislation.” This continuous and inevitable ossification of a legal system through sets of cases creating an ever-denser thicket of precedent furnishes a broad basis for determining later cases. While occasionally subtle or humdrum to the point of being imperceptible, this is the more common form of judicial legal development. On to the systemic function of precedent then.

C. System-Building Through Adjudication

I. Can Precedents Constrain?

One of the reasons why formalist theories so readily discount the system-building³⁸ quality of decided cases is because they categorically rule out any normative force, either expressly or implicitly, and thereby conclude precedents have no authority at all beyond the immediate disputes. This is what Article 59 of the ICJ Statute for instance ostensibly does by brusquely dealing with the matter in a negative fashion: Decisions of the ICJ are said to lack binding force at large. Inversely, only the parties to a case are bound by that

³⁷ Cf. Robert Y. Jennings, *The Role of the International Court of Justice*, 68 THE BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 43 (1997).

³⁸ This is an admittedly minimalistic conception of a system focusing mainly on the fact of interdependence of individual decisions without necessarily imputing a deeper meaning or underlying logic to these connections. Legal system is further used interchangeably with legal order. Cf. *infra* sections C.III. and C.V.

particular decision.³⁹ Such clear denials of the constraining force of previous cases *extra partes* are rarely encountered elsewhere, but where they are not exclaimed as plainly as in Article 59 they are often implicit in statements to the extent that decided cases are not properly called law or read into other norms or principles such as judicial independence or fidelity to the entire legal system. As a consequence of such disavowals, it is then surmised that judicial decisions do not have “real” authority but, at best, only “practical” or “persuasive” authority in the sense of alluding to underlying justifications or providing good reasons for believing a decision to be correct in law.

It is submitted here that a simple binary “on-or-off” or “black-or-white” understanding of precedents’ authority is not very helpful when considering the import of prior cases. Bindingness is not *sine qua non* for system-building. Precedents in international law constrain in much quieter fashion than the formalist insistence purports. This does not even require committing to theories of judicially evolved normativity. Nor need this inevitably offend democratic sensitivities. Between the fanciful extremes of completely bound and totally free judicial decision-making, there exists ample space for reason-based adjudication that does not violate basic tenets of legality.⁴⁰ Precedents, it is averred here, always have a latent potential to constrain later decision-makers and hence harbour a generative potential by channelling developments accordingly. They do so on account of imposing argumentative burdens and enabling communication between the different actors of the legal process, regardless of any statement to the contrary. At the same time as being a potential shackle, a precedent can also act as a springboard for a statement of law, given the familiar propensity of some courts to bury legal propositions to be used another day, for instance whenever an abstract principle is established but its application is denied or irrelevant—and hence remains unchallenged—in the former proceedings.⁴¹ Precedents can thus lead to path-dependency by organising complex environments and creating argumentative frameworks, be it directly or more obliquely. This provides a measure of determinacy that can be drawn upon in the course of “judicial governance.”⁴²

³⁹ See Rudolf Bernhardt, *Article 59*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE - A COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), 1232, 1244. While Lauterpacht disagreed that Art. 59 deals with precedent in general, the preponderance of literature suggests this was indeed intended by the committee of jurists responsible for the ICJ Statute. See HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 8 (1958). Cf. MAX SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL: ETUDE SUR LA JURISPRUDENCE DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE 161 (1946); MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942 207 (1943); Maarten Bos, *The Interpretation of International Judicial Decisions*, 33 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 11, 46 (1981).

⁴⁰ See, e.g., JERZY WRÓBLEWSKI, THE JUDICIAL APPLICATION OF LAW 270, 273 (1992); RAIMO SILTALA, A THEORY OF PRECEDENT: FROM ANALYTICAL POSITIVISM TO A POST-ANALYTICAL PHILOSOPHY OF LAW 76-105 (2000).

⁴¹ For a rather unabashed attempt, see, e.g., *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Separate Opinion of Judge Cançado Trindade, 20 April 2010, paras 3-5.

⁴² STONE SWEET (note 33), 4.

In an important sense, prior cases stabilise expectations regarding the law, but there is often more to them than meets the eye. As a consequence thereof, all courts—including the ICJ—are to an extent system-builders, be it purposely or accidentally. Several related points need to be addressed in what follows in order to make these assertions good.

To begin with, a crude binary understanding of a case's normativity ("binding or not") belies the complexity of the reasoning processes accompanying the practical application of precedents. The stereotypes such an account conjures up are not borne out in reality. That English judges constantly follow pertinent precedents slavishly is as inaccurate as the cliché that the German judge always makes up his mind afresh in every new case. Shades of grey also exist when it comes to systems espousing "binding" precedent; American judges for instance are said to be less strict than their English counterparts.⁴³ Leaving aside the issue of personal ideology, it is imperative to bear in mind that precedents are a malleable legal artefact, perhaps even more so than treaties or statutes, due to their loquacity, factual specificities, uncertain relevance, and the constant process of reformulating and remoulding them.⁴⁴ Moreover, a precedent-based rule can usually be outweighed or defeated, and the degree or weight of its authority depends on a plethora of factors, such as the hierarchical rank of the court, whether the prior decision was made by a full bench or not, the reputation of that court, the precedent's age, the soundness of the reasoning employed, the presence or absence of dissent, its reception by the larger epistemic community, changes in social and legal reality, and more.⁴⁵ It seems fair to say, and many very senior common law judges have indeed reinforced this view, that a multitude of legal positions can be wriggled out of precedents if only one is willing to argue accordingly, no matter whether *stare decisis* is officially endorsed or not. Recall the cautionary words of Llewellyn: "I know of no phase of our law so misunderstood as our system of precedent."⁴⁶ In many respects, the so-called strict doctrine of precedent is perhaps more rhetoric than reality. That is of course not to deny that constraints are imposed by precedents, but simply that these constraints are subject to reasoning processes and can be used creatively.

On the other hand, portraying those systems with an outright or implicit disavowal of any binding force of precedents (e.g. public international law) as eternal adjudicatory blank

⁴³ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 4 (1982); PATRICK S. ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 116-117 (1987).

⁴⁴ Cf. JOSEPH RAZ, *THE AUTHORITY OF LAW* 195 (1979).

⁴⁵ See Aleksander Peczenik, *The Binding Force of Precedent*, in: *INTERPRETING PRECEDENTS*, 475-478 (Neil MacCormick & Robert Summers eds, 1997).

⁴⁶ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 62 (1960). Note in this respect also Allen's important but often overlooked insistence that throughout history judges have frequently made it clear that there is no magic in the mere citation of precedents: CARLETON KEMP ALLEN, *LAW IN THE MAKING* 212-213 (1958).

slates is equally unconvincing. True, it is sometimes assumed that on account of statements such as Article 59 the very same issue could theoretically later be decided totally differently.⁴⁷ But there are so many caveats to this brazen statement that one should seriously consider whether this supposed Litmus test still in fact serves a useful purpose.

First, there is of course the Court's glaring practice of extensively quoting its own pronouncements and its marked hesitation to deviate from its own prior decisions.⁴⁸ Many of the reasons for this behavior have already been alluded to above.⁴⁹ But these practical observations, accurate though they may be, shall not be relied upon here in order to avoid inferring an abstract proposition from a fact.

The second point relates directly to the attributes of the international system. For one, its complex organization, high degree of specialization and lack of effective all-purpose legislature serves to offset the paradigmatic primacy of state consent that potentially dampens judicial innovation in international law.⁵⁰ Furthermore, as will be elaborated upon in due course, precedent is a particular species of analogy. As such it is a rather modest argumentative device relying on fairly specific comparisons, building bridges and linking solutions one by one. It is thus arguably better suited to international dispute settlement, which, per definition, comprises a wide range of worldviews and legal traditions, than totalising top-down modes of argumentation, such as an all-pervasive theory like law and economics or strict deductivism based on an all-encompassing code.⁵¹

Third, saying that a decision has no binding force beyond a dispute is not equal to saying judicial decisions cannot bear on a later case at all. As Judge Jessup once put it in the *Barcelona Traction* case when discussing Article 59, "the influence of the Court's decisions is wider than their binding force."⁵² Indeed, even in legal systems dominated by a codification culture there are various reasons militating against a court reaching a different result on a similar matter. Among these are equality, fairness, unity, stability, continuity, legal certainty, and the protection of legitimate expectations. These might even find expression in various norms of a legal system. Whether or not this is the case for public

⁴⁷ Bernhardt (note 39), 1244 (but immediately observing that reality differs from this rarefied suggestion).

⁴⁸ See, e.g., *id.*; MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 29-31 (1996).

⁴⁹ See *supra* section B.IV.

⁵⁰ See WOLFGANG GASTON FRIEDMANN, LAW IN A CHANGING SOCIETY 84-85 (1972).

⁵¹ That is of course not to say that precedent argumentation is normatively or ideologically abstemious. See, *in particular, infra* section D.IV.

⁵² *Barcelona Traction, Light and Power Company, Limited*, Judgment of 5 February 1970, Separate Opinion of Judge Jessup, ICJ Reports 1970, 163, para. 9.

international law is an interesting question in its own right, but beyond the scope and intent of this paper. Then there is also the matter of reputation. All self-respecting judges have an interest in eschewing seemingly erratic behaviour and avoiding the impression their respective legal systems violate the basic idea of treating like cases alike. It is thus suggested here that, regardless of normative statements to this effect, such second-order considerations provide good reasons (if not necessarily a legal entitlement) why, if question A was previously resolved in manner B, this should again be the case when A arises.⁵³ Nothing compels dismissing an argument merely because it is not “binding,” especially where it includes judicial discussion on the values of law and the weighing and formulation of principles of law, all of which are elements of legal discourse. The flip side is that opposing B demands a justificatory effort. To be sure, once precedent fixes a construction, it is still open to discussion (perhaps on what is ultimately an appeal to rationality, flexibility, or justice); after all, this is not about *stare decisis et non quieta movere*. But answer B merits serious consideration and might be too convincing to be shaken.

II. *The Return of the Formalist*

Rejecting the view of precedents as burdens implicitly relies on what might be called a theory of illegitimate authority. Two variants are conceivable: one relating to formal sources (Article 38), the other to an express exclusion of bindingness (Article 59). It is argued here that neither can convincingly rule out precedential effect. The sources variant has already been dealt with above. I now turn to an assessment of the latter from an internal public international law perspective.

Does Article 59 of the Statute free future judges and litigants of all constraints of past decisions? The argument would go along the lines that not only does public international law lack a commitment to precedent, but it actually contains an explicit stipulation to the contrary.⁵⁴ How exactly is said provision to be understood?

Statements on the purpose of Article 59 tend to amount to what the ICJ's predecessor said in 1926 in *In re German Interest in Polish Upper Silesia (Merits)*: “The object of [Article 59 of the Statute] is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes.”⁵⁵ Viewed in this minimalistic light, what the PCIJ said is that each particular case must be decided individually and that the reasoning and obligations of one case cannot be blindly

⁵³ See, e.g., MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 79 (2008).

⁵⁴ Provisions to similar effect might be said to be Art. 20(3) of the German Basic Law or Art. 5 of the French Civil Code. These of course have their own systemic implications.

⁵⁵ PCIJ 1926, Series A., No. 7, 19.

transplanted to another situation without justification. More recently, the ICJ considered the core of Article 59 to be “the positive statement that the parties are bound by the decision of the Court in respect of a particular case,” thereby situating Article 59 within the distinctive context of *res judicata*.⁵⁶ This is again perfectly compatible with the suggestion that prior decisions create argumentative (as opposed to formalistic legal) burdens in similar situations. Understanding precedents accordingly by no means amounts to an automatic abandonment of sovereignty or a circumvention of the consent principle, issues that are obviously close to the heart of the international legal system. Without wanting to labor the point, there is a fundamental difference between something being binding (assuming for a moment this is a helpful concept) and something imposing a burden; the latter makes no attempt to conclusively regulate a matter to the exclusion of all countervailing arguments. Moreover, Article 59 does not explain why the Court should in fact deviate from a previously espoused line of reasoning, all other things being equal. It would further be plainly mistaken to read this provision as an entitlement to decide cases wrongly, a suggestion that jars with the ICJ’s function to decide submitted disputes “in accordance with international law” (Article 38). Finally, it would be practically impossible to come up with a workable rule to effectively keep precedents out of pleadings, given that the use of generalised hypotheticals in argumentation cannot be barred.

The remaining possibility is to interpret Article 59 as condoning the practice of ignoring arguments, even if they are on point. Again, this fails to convince. For one, this would turn a concise negative statement into a dissimilar positive entitlement. Deliberately shutting one’s mind to a reasonable legal argument is once again difficult to reconcile with the discharge of the Court’s function to decide in accordance with international law and the general idea of voluntary international adjudication. Moreover, although prior cases can impose significant constraints, the process of arguing by precedent is, as shall be shown below, elastic enough to accommodate various concerns. Nor should the Court feel compelled to maintain an air of infallibility. It is not the blunt correction of a mistake that harms the project of international law, but rather the embarrassment occasioned by shoddy and selective reasoning under the guise of a theory of illegitimate authority. In conclusion, deliberately ignoring relevant prior decisions is so arbitrary and artificial a suggestion as to verge on farce.

One is thus left with the impression that Article 59 is, strictly speaking, a superfluous restatement of the obvious, designed to assuage those afraid of the spectre called *stare decisis*. Rather than regulating precedential effect, it is an expression of the latent distrust of international adjudication harboured by many states. As Waldock observed, there was an understandable trepidation to give “a wholly new and untried tribunal explicit authority

⁵⁶ *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Judgment of 26 February 2007, ICJ Reports 2007, 44, para. 115. On the relation between *res judicata* and precedent, see *infra* section C.IV.

to lay down binding law upon all States.”⁵⁷ But that anxiety is to a large degree based on an extreme form of precedent that is practically nonexistent.

III. Instances of System-Building

One of the suggestions incidentally advanced in this paper is that even more so than to the talismanic landmark judgments of international adjudicatory bodies (the so-called “leading cases”), the shaping of international law is owed to the cumulative effect of the often unnoticed tweaking and tinkering constantly carried out regarding issues that do not usually arouse the hotter convictions of men and women. This is not only a matter of the stakes in a particular case or the degree to which a court or tribunal is exposed to the larger public, but rather a more or less unconscious reshaping in the course of the judicial routine of resolving disputes rather than making grand legal pronouncements *in abstracto*. At the most basic level, the fodder for argumentation obviously increases with the number and length of decided cases, given that this presents ever more lattices for future litigants to latch on to. Social scientists tell us that international adjudication thereby creates an empirically measurable web of case law.⁵⁸ Reference to prior cases has in some legal environments indeed become the most common argumentative device of international judicial institutions and a veritable mainstay of “judicial discourse,” the ECJ being an example. It is in this respect worth bearing in mind that even the ostensibly minor and obscure cases and the semi-automatic process of adjudication in itself can often result in evolutionary developments, even where this was not intended or appreciated. The mechanics of this case law method will be discussed in more detail shortly; only a few preliminary points will be addressed here.

For one, it is not unheard of for an international judicial institution to adjust its legal assessment of an issue over time. The ICJ for instance revisited the question of the Federal Republic of Yugoslavia’s (FRY, later Serbia and Montenegro) access to the Court for the period between 1992 and 2000, a question among other things depending on the FRY being party to the ICJ Statute and hence hinging on its status as a member of the UN. In the course of the *Genocide* litigation, the Court opined that the *sui generis* FRY could appear before the ICJ during the period in question.⁵⁹ Shortly thereafter, however, the Court

⁵⁷ Humphrey Meredith Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 91 (1962). The advisory committee was beset by some fairly quixotic views on precedent, with some drafts assuming the Court’s decisions might have the authority of rules of international law, see SHAHABUDDIN (note 48), 49-52.

⁵⁸ See, e.g., Margaret McCown, *Precedent and Judicial Decision Making: The Judge Made Law of the European Court of Justice*, American Political Science Association Annual Conference, 29 August - 1 September 2001, Panel 27-3: Law, Politics, and Power: Contrasting Comparative Perspectives (quantifying *inter alia* the proportion of cases citing precedent, precedent life-span, date, cluster density, as well as form and legal domain of cases).

⁵⁹ *Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina), Judgment of 3 February 2003, ICJ Reports 2003, 30, paras 69-

changed its view in the *Legality of Use of Force* cases and held that the FRY was not at the relevant time a member of the UN and that consequently the Court was not open to it.⁶⁰ Yet when the merits stage of the *Genocide* saga subsequently came for consideration, the ICJ once again reverted to its earlier position that the FRY (now Serbia and Montenegro) had the capacity to appear before the Court and affirmed its jurisdiction under the mantle of *res judicata*.⁶¹

Regardless of what the correct answer may be on the substance of this matter, such a sequence of decisions illustrates that adjudication is often a continuous process of rethinking and remoulding a legal system step by step.⁶² Importantly, the apparent absence of consistency or overarching rationality does not compel the conclusion that judicial decisions lack intra-systemic impact. Not only do these cases show that the ICJ and especially individual dissenting judges certainly do engage the Court's jurisprudence (be it convincingly or not), but to treat a *volte-face* as proof for the lack of systemic development rides roughshod over the rationale of individual decisions while at the same time imposing a rather ambitious definition of what constitutes a "proper" legal system that focuses on logical coherence to the detriment of actual interrelation.⁶³

A perhaps more subtle but equally characteristic example of a court's creative activity is when it quietly recolours, adds, or omits a particular word or expression. Lauterpacht draws our attention to such a situation.⁶⁴ In *Electricity Company of Sofia and Bulgaria (Interim Measures of Protection)*, the PCIJ silently dropped the reference to the irreparability of possible damage as a criterion for the indication of interim measures.⁶⁵ This had been a feature of the PCIJ's jurisprudence on interim measures to date, which were arguably limited to cases where an infraction could not be made good simply by

71. The Court had previously skirted the issue: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 8 April 1993, ICJ Reports 1993, 14, paras 17-18.

⁶⁰ *Legality of Use of Force* (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment of 15 December 2004, ICJ Reports 2004, 279, para. 91 (the main argument being that the 2000 admission of the FRY to the UN revealed retroactively that it had not been a member).

⁶¹ *Case concerning Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, ICJ Reports 2007, 51, para. 135.

⁶² Cf. HANS Kelsen, *LAW AND PEACE IN INTERNATIONAL RELATIONS* 161-163 (1997).

⁶³ This may certainly be a tendency within the so-called Continental, and in particular German, legal tradition. Cf. *supra* section B.III.

⁶⁴ LAUTERPACHT (note 39), 252-253.

⁶⁵ PCIJ 1939, Series A/B, No. 79, 199 (focusing solely on the prevention of acts likely to prejudice rights resulting from the impending judgment).

payment of an indemnity or by compensation or restitution.⁶⁶ Instead of contrasting these cases and stating the obvious (“there is no binding doctrine of precedent in international law”), it is once again suggested that the more perceptive analysis is that case sequences are a constant process of redirection and recalibration of the law, even in apparently standard cases that do not seem to present knotty legal conundrums.

In a similar vein, it bears noting that precedent is a Janus-faced concept. As the “usable past,” it is backward-looking. This is perhaps the more traditional way of looking at the concept. But, paraphrasing Schauer, today is not only yesterday’s tomorrow, it is also tomorrow’s yesterday. If precedents have the potential to constrain, as claimed in this paper, present decisions will be the precedents of the future. Judges aware of this will craft their judgments accordingly by using more guarded language or couching their judgments in explicit reservations so to not open the floodgates of any unwanted future developments. At other times, they might sow seeds to bloom later. Assuming that is true and perplexing though it may at first seem, this means that precedent constrains even where there is no prior decision. Whether or not this results in sub-optimal decisions is a question that cannot be fully pursued here, but this feature additionally helps to explain the reluctance of many systems to acknowledge the existence of precedent.

IV. Related Systemic Tools: Analogy, Experience & Res Judicata

There are various ways to prejudice subsequent judicial decision-making. For one, precedent bears a close relation to analogy. Both are forms of argumentation typically revolving around the idea of treating like alike and producing systemic consistency. Analogical reasoning is the imputation of one characteristic in a situation where another characteristic is shared for the purpose of informing judgment.⁶⁷ Just like precedent, it is frequently employed outside the law.⁶⁸ But the notion of precedent is narrower. Whereas both analogy and precedent require the compared cases to be relevantly similar, precedent tends to demand a more exacting degree of fidelity. A situation might thus be analogous without being a precedent, but not vice versa, such as when there is no appeal to replicability or whenever the facts are similar but the operation of an opposed rationale precludes precedential effect. Precedents on the other hand are paradigm examples of analogous reasoning.⁶⁹ This potentially translates into an analogy being less compelling

⁶⁶ *Denunciation of the Treaty of 1865 between Belgium and China*, PCIJ 1927, Series A, No. 8, 7.

⁶⁷ See LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 29 (2005).

⁶⁸ See Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARVARD LAW REVIEW* 741, 743 (1993).

⁶⁹ See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 *HARVARD LAW REVIEW* 923, 934 (1996).

than a precedent. The upshot is that analogical argumentation is by and large more readily accepted even in those legal systems ostensibly disavowing any operation of precedent.⁷⁰

Although similar to the extent that both draw on previous occurrences, precedent must also be differentiated from reasoning by experience. Experience is observational knowledge about the world.⁷¹ As such, it revolves around being conscious of things. Should the apple one day travel skywards after leaving my hand, my experience of gravity has proven inadequate and will be revised. Precedent, to the contrary, does not make any directly extrapolative claims, but rather it appeals to consistency. It is not primarily concerned with the validity of its supporting reasons. Hence, a “bad precedent” is typically still considered a precedent.

Furthermore, precedent ought not to be confused with the concept of *res judicata*, a more circumscribed device whereby the final judgment of a competent court may not be disputed in later legal proceedings. This only applies to the disputed decision and the involved parties, including any successors following lapse of an appeal period. While it can also be broadly said to deal with legal stability, *res judicata* is specifically concerned with the closure of concrete legal quarrels and with assuring a litigant the benefit of an obtained judgment.⁷²

V. *Interim Conclusion*

Let us take stock for a moment. Precedents in international law are best thought of not as normative obligations but as argumentative burdens on the party seeking a different result from that reached in a pertinent previous decision. Arguments from precedent are independent from the status of precedent as a formal source of law or any express denial of bindingness.

If a comparable prior case exists and is referred to, a later decision-maker has less argumentative flexibility. One cannot, for instance, claim the previous solution impossible or so outlandish that no one would ever think of it. Indeed, as we know from Bracton’s practice book, “I have never heard of such a thing!” was part of the judicial dialectic in England as early as 1237, centuries before the strict doctrine of binding precedent

⁷⁰ Although its application is then often tempered by the demand for the existence of an unintended regulatory gap, itself a perennial debate beyond the remit of this paper.

⁷¹ Cf. ALVIN I. GOLDMAN, *EPISTEMOLOGY AND COGNITION* 301 (1986).

⁷² See *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, 44, para. 116.

developed there.⁷³ The use of precedent as an argument is not tied to a particular set of rules of precedent. Rather, it provides a good reason or justification why the subsequent decision should be as argued, all other things being equal. It can certainly be defeated by various means. But it is a real constraint all the same, in that it clutters previously unencumbered argumentative freedom. Cases unavoidably add layer upon layer of judicial gloss to the understanding of law, which eventually becomes thick and encrusted and thus increasingly hard to break out of. Of course it is not outright impossible to resist such argumentative burdens, but it at least demands some effort. Such a fluid understanding unavoidably destabilises the distinction between utilisation and production of norms, traditionally assumed impenetrable but never fully convincing in international law, and enhances the dynamic nature and multiplicity of actors relevant to the legal process.⁷⁴

The argumentative burden is similar, but not identical to a presumption. The latter can apply without the aid of proof and introduces a default position that trumps automatically in the absence of a rebuttal. An argumentative burden is less ambitious. Unlike a presumption, it does not claim decisional exclusivity on an isolated issue. Metaphorically speaking, it adds one further weight in an attempt to tip the scales, whereas the presumption is the string tying one side of the scales down and demanding to be cut loose by whoever wants to resist it.

A parting thought on precedents and the coherence and integrity of the international legal system: A precedent is only one small stone in a larger mosaic, which in the end does not necessarily have to amount to a coherent picture, let alone one that is pleasing to behold. An acknowledgement of precedents as constraining and thereby system-building devices does not commit one to a particular view of the legal system as a whole.

D. The Operation of Precedent

1. Establishing Precedential Effect

Having claimed that precedents create argumentative burdens and hence can constrain decision-making, it is time to look at how exactly this operates in practice. The thrust of the argument that will be presented in what follows is that classificatory exercises and rules of language and logic can both constrain and empower decision-makers and thus affect the legal order just like substantive rules might.

⁷³ This in fact did not reach its final definitive form until the beginning of the 19th century, with the *locus classicus* usually claimed to be Baron Parke's exposition in *Mirehouse v. Rennell*, 1 Cl & F 527, 546. On this and Bracton, see ALLEN (note 46), 184-186, 227-228.

⁷⁴ Cf. Karl-Heinz Ladeur & Ino Augsberg, *Auslegungsparadoxien: Zur Theorie und Praxis Juristischer Interpretation*, 36 RECHTSTHEORIE 143, 164 (2005).

The starting point is that there is in law no other way to argue and justify than through words. The more fully a point is argued, the more likely it will be successful.⁷⁵ In the words of Schwarzenberger, “[i]t is probably not accidental that the least convincing statements on international law made by the International Court of Justice excel by a remarkable economy of argument.”⁷⁶ The ECJ in particular is accused of similar sins on account of its French-inspired magisterial and bureaucratic style and its traditionally terse syllogistic reasoning, which makes leaps in logic and hidden premises all the more likely and can shield a court from critique. Since there is rarely an express formulation to rely on, a precedent provides ample interpretive leeway. Precedents are hence constantly subject to dynamic re-formulation and re-characterization. They are never set in stone. Indeed, one cannot overstate the role of the subsequent court or other interpreters looking at a prior decision.

The various tools and techniques available that will be described below clearly evince the argumentative nature of law. The consequent ambiguity and cacophony rules out any “dictation by precedent,”⁷⁷ as feared by the drafters of Article 59. Such a thing is impossible without fundamentally upsetting the present system. But the channelling force of precedent in the hands of a skilled judge, advocate or commentator is very real.

II. *Relevant Similarity*

The lynchpin of precedent is relevant similarity. While of course no two situations will ever be identical, what matters is that they are the same *as far as relevant*.⁷⁸ Since this involves comparison, a quest for a generalisable abstraction or overarching category follows after the first intuition or mere perception of relevant likeness.⁷⁹ This search for an organizing theory is inevitably an inroad for all sorts of (“non-legal”) considerations.

Be that as it may, identifying the relevant part of a precedent which serves as a basis for the abstract argument is an elusive endeavour.⁸⁰ There is no set formula for doing so. If

⁷⁵ Naturally there comes a point where nothing useful can be added. Moreover, this does not doubt the general wisdom that succinctness rather than prolixity is the key to good legal drafting and pleading.

⁷⁶ GEORG SCHWARZENBERGER, 1 *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* § I 32 (1957).

⁷⁷ LLEWELLYN (note 46), 76.

⁷⁸ Some commentators like to point to “sameness”, others to “similarity” as the linking factors between two cases. The position adopted here is that the situations need to be the same only as concerns the relevant matters, which is casually expressed by saying the cases are similar or comparable.

⁷⁹ These expressions are preferable to the term *ratio decidendi*, which invokes many uncalled for assumptions.

⁸⁰ See Geoffrey Marshall, *What is Binding in a Precedent*, in: *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY*, 503 (Neil MacCormick & Robert Summers eds, 1997).

one were to ask ten lawyers what is precisely mandated by a (“strictly binding”) case, one might very well receive ten different answers. Many approaches are on offer, varying in degree of formality from the utterly mechanistic⁸¹ via the moderately principled⁸² to the completely discretionary.⁸³ Public international law theory, being largely in denial as it is, provides no assistance on the matter. Nor do common law systems offer an agreed upon method. In line with the general claim that precedents are best understood as arguments and only inadequately captured by rigid theories of validity, it is suggested that this uncertainty is however far from fatal; rather, it is itself part of the wider argumentative context of precedential and legal reasoning. Nothing ought to be dismissed outright on account of an artificial test soaked with various unspoken normative premises. In this spirit of eclectic methodological pluralism, one might turn to expressions used in prior cases, specific facts, teleological aspects, underlying principles, tendencies and developments reacted to over a series of cases, and so on; the point of all of which is to find an abstraction that explains the first case and convincingly covers the present case. This involves creating and testing principles of low to medium abstraction, with one foot planted in the concrete context. In actual practice, this tends to be an “incompletely theorised” exercise, i.e. the actual basis for one’s reasoning is unknown or not laid open clearly.⁸⁴ In any event, perhaps concerns are overblown, given that common law systems appear to have managed fine as is. But it is already here that exacting methodology gives way to a more mercurial notion of convincingsness, highlighting the importance of *arguing* a point and thus enhancing the role of the international judiciary. The optimist might call this the dialectic of precedent; for the cynic, this is the precedent game.

III. Rules of Precedent as Rules of Language

It is in this context that language plays a particularly interesting role, which at times appears underappreciated.⁸⁵ Since the particular wording used in a previous case is one of the most promising origins of a generalisable abstraction, the looser the language used in the prior case is, the more situations will fall under the umbrella of an accordingly constructed category. Obvious though it may sound, whether or not future scenarios can be said to come under the precedent is not exclusively a matter over which the legal system wields control, but to a great extent also up to the relevant rules of language, given

⁸¹ See, e.g., EUGENE WAMBAUGH, *THE STUDY OF CASES* 8 (1894); Arthur Goodheart, *Determining the Ratio Decidendi of a Case*, in: *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW*, 4-25 (Arthur Goodheart ed., 1931).

⁸² See, e.g., KATJA LANGENBUCHER, *DIE ENTWICKLUNG UND AUSLEGUNG VON RICHTERRECHT* 77-93 (1996).

⁸³ See, e.g., Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 *MODERN LAW REVIEW* 5, 20 (1937).

⁸⁴ Sunstein (note 68), 745-746. Llewellyn’s golf metaphor pertains: “Onto the green, with luck, your science takes you. But when it comes to putting you will work by art and hunch.” See KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 42-43 (1930).

⁸⁵ But see Schauer (note 9), 587, 579.

that they largely determine the ambit of the categories. While language is notoriously hazy,⁸⁶ semantic constraints can at times be close to inevitable. Attempting without more to argue Alsations are not affected by rules relating to “dogs” is certainly an uphill battle. Arguably one should not only focus on the craft of the judge, but also on what the person interpreting the precedent brings to the table. But the basic point seems sound: The size of the overarching categories is legally relevant, yet primarily a matter of language. Indeed, this close connection between law and language explains the conventional reticence of many judges to say more than what is necessary. If this is correct, three points are worthy of note.

Firstly, the precedential effect of cases is wider than commonly assumed, lying silently in forgotten cases only waiting to be tapped into by inventive litigants. Public international law is thus not only shaped by the will of the states, but can also be manipulated decisively by creative use of the French and English language. Secondly, the size of the extracted categories influences the degree of constraint, i.e. the strength of a precedent. The bigger it is, the harder it becomes to avoid its burden. This is yet another string to the bow of those arguing that normative talk about the “weight” of a precedent or its “bindingness” as if this were some kind of metaphysical measurement largely misses the point. A prior case is not a precedent at all if it is dissimilar in relevant matters. Specific objections can thus be phrased as a lack of similarity. Concerns that through a recognition of precedent the ICJ could, for instance, not champion diplomatic immunity in a case where an embassy was stormed without granting an official who was suspected of gross human rights violations unwarranted privileges in another situation are unfounded if this can be denied on the basis of a relevant dissimilarity. Thirdly, if language can impose its own constraints, then multilingualism and looser social and cultural ties weaken these constraints on account of diluting linguistic precision and reducing the common conceptual repository. This perhaps offers an explanation why precedent thrives in the fertile soil of highly homogenous legal systems (e.g. Victorian England) and habitually has a looser hold on heterogeneous orders (e.g. public international law).

IV. Resisting Precedential Effect

Assuming two cases are relevantly similar, what then? Having repeatedly dismissed the notion of strict bindingness and argued for a conception of precedents as important arguments, it should not be a revelation that once a case has been identified as a precedent, the particular stage of legal reasoning is far from over. Different techniques can then be employed to absorb an argumentative burden. After all, precedent not only entails constraint but also creativity and potential for legalisation. These techniques tend

⁸⁶ See, e.g., Martin Morlok, *Neue Erkenntnisse und Entwicklungen aus Sprach- und Rechtswissenschaftlicher Sicht*, in: *PRÄJUDIZ UND SPRACHE*, 33-34 (Bernhard Ehrenzeller, Peter Gomez, Markus Kotzur, Daniel Thürer & Klaus A. Vallender eds, 2008).

to be more rigidly defined and applied in systems that purport to give special authority to precedents and possess a hierarchical judicial branch. Consequently, they are not very developed in public international law, but, nevertheless, they are still influential in the international realm.

1. *Distinguishing*

Perhaps the most obvious attempt to resist the argumentative burden is to claim it does not actually bear on the present situation. This has already been alluded to above. Distinguishing is a dual process of reverse analogy whereby the precedent is not impugned as such but rather declared to be inapplicable. By pointing out relevant differences, the reach of the precedent is retrospectively shaped. Examples of the ICJ and the PCIJ employing this technique are legion and include the *Lotus*, *Mosul* and *Barcelona Traction* cases.⁸⁷ More recently, the ICJ in a maritime dispute between Nicaragua and Honduras considered that special factors mandated the construction of a bisector line instead of the traditionally preferred equidistance line, while at the same time explicitly reaffirming its prior jurisprudence on Article 15 of UNCLOS.⁸⁸

The first point to be aware of here is that the very fact that the Court and its predecessor bother to distinguish cases underlines the notion of precedents imposing an argumentative burden. Why else would they care to do so in a system where cases are not “binding”? This fits well with Allen’s observation that “the fascinating game of distinguishing” was popular in English courtrooms long before any acceptance of *stare decisis* or any suggestion that cases are formally considered law.⁸⁹

Secondly, just as in the quest for relevant similarity, dissimilarity must be germane. Any case can in the end be distinguished on account of minor factual specificities. But that is not the point. Again, there is no magic formula for eliminating the accidental and non-representative.⁹⁰ The process of distinguishing thereby also contributes indirectly to judicial system-building. If a dissimilarity is not considered significant enough despite

⁸⁷ *Lotus*, Judgment of 7 September 1927, PCIJ 1927, Series A, No. 10, 26 (distinguishing the *Costa Rica Packet* arbitration); Preliminary Objections, Judgment of 24 July 1964, ICJ Reports 1964, 28-30 (distinguishing *Aerial Incident of 27 July 1955*). See also William Eric Beckett, *Les Questions d'Intérêt Général au Point de Vue Juridique dans la Jurisprudence de la Cour Permanente de Justice internationale*, 39 RECUEIL DES COURS 135, 138 (1932); SHAHABUDEEN (note 48), 111 (referring in particular to the many instances in which *Monetary Gold* was distinguished).

⁸⁸ *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports 2007, 740-746, paras 268-287.

⁸⁹ ALLEN (note 46), 187.

⁹⁰ See CHAIM PERELMAN, *LOGIQUE JURIDIQUE, NOUVELLE RHÉTORIQUE* 129 (1976).

existing, the reach of the prior decision is implicitly extended to the degree of its application in the present case.

Thirdly, there are on closer inspection two principal ways in which a precedent can be distinguished: Either the previous case does not truly stand for what is contended, or the present situation differs in significant factual or legal respects. The former focuses on the prior case and restricts its rationale, which might prompt one to call this process retrospective *obitering*. An example hereof is the *Namibia* opinion, in which the ICJ narrowed the reasoning of the *Status of Eastern Carelia* opinion to turning on membership of the League of Nations and appearance before the PCIJ.⁹¹ The latter is perhaps the more typical method of distinguishing. It centres on the present situation and points to different circumstances warranting a lessening of the argumentative burden, which again is an act of fleshing out the bare bones of the international legal system.⁹²

2. Departing

But even when a prior case is relevantly similar (i.e. applicable), there is ample opportunity to avoid its gravitational effect. A more direct technique of challenging the argumentative burden is to decline to accept its intrinsic logic. This process of invalidation is commonly called overruling, especially in hierarchical judicial systems with more elaborate precedent rules, or departing.⁹³ There are various reasons for refusing to pay heed to the force of a precedential argument. The most obvious—namely the existence of provisions giving effect to a grander political commitment to individual justice, flanked by the jurisprudential faith in a logically coherent and complete system of law as expressed by the *lex scripta*—has already been referred to above. But beyond this all-or-nothing argument, a precedent might be considered flawed from the start or outdated.

Turning to the ICJ, although it is often said it has the power to do so, the Court is loath to expressly depart from cases.⁹⁴ It usually “explains away” changes in the law via distinctions, which accords with its dislike for generalisations. The rift between the *Legality of Use of Force* and *Genocide* jurisprudence might serve as a recent example hereof.⁹⁵ To a certain degree, this works. The same result can usually be achieved either

⁹¹ See Advisory Opinion of 21 June 1971, ICJ Reports 1971, 23, paras 30-31 and Advisory Opinion of 23 July 1923, PCIJ 1923, Series B, No. 5, 27.

⁹² See, e.g., *Lotus* (note 87), 26 and *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Reports 2002, 89, para. 88 (expressing puzzlement at the Court’s reliance on *Factory at Chorzów*).

⁹³ Although distinguishing could also be seen as a form of departure. Perhaps it is hence best to adopt Llewellyn’s more prosaic phrase of “killing the precedent”.

⁹⁴ See, e.g., *Namibia*, ICJ Reports 1971, 18, para. 9.

⁹⁵ Admission of the FRY to the UN was used as a device to avoid a universal position on its “access” to the ICJ.

through an exception (i.e. disapplication) or through an argument applying but being outweighed. But there is nevertheless a qualitative difference: Only in the first situation is the argument left largely intact. Defeating it through logical or other arguments on the other hand modifies its material content more fundamentally, quite possibly to the point of completely eradicating what worth it may have had. This is of course in itself a process of reshaping the international legal system through adjudication.

In any event, this apparent lack of disharmony should not fool anyone into believing international law was free of contradictory positions or devoid of any evolutionary momentum. While there is perhaps no clear example of the Court expressly disapproving one of its prior decisions, both ICJ and PCIJ have arguably departed from precedents *sub silentio* at times.⁹⁶ The lack of situations in which the ICJ openly invalidates its precedents is probably also largely due to the fact that there are simply not that many decisions by the Court. Indeed, the paucity of decided cases partly explains why international courts tend to have a rather carefree approach as to how to handle precedential arguments.⁹⁷

Briefly sketching some methodological preliminaries in this respect, departing is a two-stage process. First, arguing for the invalidation of such an argumentative burden essentially involves a claim that it is mistaken, for example because it does not fit with the broader picture (i.e. jars with other rules or principles) or because the conflict at hand is of a fundamentally different nature. In short, there is a sounder argument as to what international law requires. But even if that can be accomplished, the precedential effect is not yet absorbed. Even in legal systems in which it is permissible to make light of the first step, there are then second-order considerations that have to be dealt with. The second stage is thus ascertaining whether there are any other reasons why the argument should nevertheless hold sway, for instance, where there is detrimental reliance deserving of protection or another exceptional reason why consistency should be preferred in this instance.

⁹⁶ See, e.g., the *Electricity Company of Sofia and Bulgaria* Case, the jurisprudence on recourse to the *travaux préparatoires* (shifting from impermissible if a treaty is clear to an apparently freely available aid to interpretation), and the role of equity in the law of maritime delineation in *Tunisia/Libya*. On the latter, see PROSPER WEIL, *THE LAW OF MARITIME DELIMITATION: REFLECTIONS* 172-173 (trans. By Maureen MacGlashan, 1989).

⁹⁷ But note that the obverse is not true, as evinced by the ECJ and European Court of Human Rights.

E. Epilogue: Of Mystics and Ostriches

Owing to training, tradition, temperament, experience, and jurisprudential and political outlook, two habitually recurring general takes on precedent as a whole—one might say, states of mind—can be identified.

First, there are the mystics, who grandiloquently peddle maudlin views of the authority, unity, and purity of judge-made law and extol the virtues of the “piety of precedent.”⁹⁸ They dream of a space free of the unavoidably ruinous vicissitudes of politics and regale in Lord Mansfield’s theme of the law “working itself pure.”⁹⁹ Such is the reverence for the judiciary and the impeccability and consistency of their methods and motivations that precedents are frequently applied blindly without critical reflection. The playfulness and flexibility of language is substituted with an unquestionable deference to judicial pronouncements, which are elevated to articles of faith. For the mystics, international adjudication is salvation.

Then there are those who stick their head in the sand and pretend judicial decisions play no role beyond mere education, as if anyone could get by perfectly without them if only he or she had a proper technical grasp of the “real” legal sources. Dismissing cases as crutches and precedent as an illness befalling only common lawyers and their jerry-built legal systems or hopeless utopians, these ostriches stubbornly refuse to take the power and precariousness of language to its logical conclusion and all too readily dismiss the notion of law as an argumentative practice. They deliberately shut their intellectual toolboxes, be it because of a frustration born out of the self-inflicted difficulty to account for these phenomena or due to a principled revulsion at the thought of social science material intruding the wholesomeness of law as a self-sufficient discipline.

Hopefully this paper has at least averted to some of the pitfalls of both romantic mysticism and the blithely ignorant approach to precedents. International judges are of course neither philosopher kings nor simply *bouche de la loi*. The real question is not so much whether or not they make law, but to what extent there are limits to this activity. I have attempted to sharpen a perception of precedent as a very real phenomenon that plays out even in the absence of grand legal and socio-political theorising, as an argument that simultaneously constrains and allows for creativity, and as a device for shaping a legal system. As concerns the prospects of an entirely rational system of precedents in international law, muted expectations appear warranted. But if nothing else, the critical

⁹⁸ Chided, *e.g.*, by THOMAS (note 19), 139-153 (referring to an aphorism by R. W. Emerson: “A foolish consistency is the hobgoblin of little minds”).

⁹⁹ See ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72-73, 108-109 (1996) (stating that one of the “dirty little secrets” of jurisprudence is its discomfort with democracy and fear of popular action).

potential of this acknowledgement merits the effort; only by seeing the precedential web can one even attempt to deal with it.