

UNIVERSITY OF CAMBRIDGE
RESEARCH CENTRE FOR INTERNATIONAL LAW

HERSCH LAUTERPACHT MEMORIAL LECTURES

PRECEDENT
IN THE WORLD COURT

MOHAMED SHAHABUDDEEN

Honorary Bencher of the Middle Temple
Associate Member of the Institute of International Law
Judge of the International Court of Justice

LIBRARY / BIBLIOTHÈQUE
DEPT. OF EXTERNAL AFFAIRS /
MINISTÈRE DES AFFAIRES EXTERIEURES
125 SUSSEX
OTTAWA K1A 0G2

GROTIUS PUBLICATIONS
 **CAMBRIDGE**
UNIVERSITY PRESS

The idea that precedents operate only as inputs in the evolution of customary international law enjoys respect.¹² In support of that view, reference is sometimes made to a suggested discrepancy between the treatment of decisions of the Court under Article 38, paragraph 1 (*d*), of the Statute, and the treatment of its decisions under Article 24 of the Statute of the International Law Commission. The latter reads:

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

The Report of the International Law Commission covering its second session, 5 January to 25 July 1950, commented as follows:

Article 24 of the Statute of the Commission seems to depart from the classification in Article 38 of the Statute of the Court, by including judicial decisions on questions of international law among the evidences of customary international law. The departure may be defended logically, however, for such decisions, particularly those by international courts, may formulate and apply principles and rules of customary international law. Moreover, the practice of a State may be indicated by the decisions of its national courts.¹³

The Statute of the Court is part of the Charter. The Statute of the International Law Commission is not; it was established by the General Assembly, a body coordinate in legal status with the Court. Thus, the provisions of the Statute of the Commission cannot amend those of the Statute of the Court. The Report of the Commission proceeds on the basis that there is a difference in meaning as between the two provisions. If there is a difference, the meaning of Article 38, paragraph 1 (*d*), of the Statute of the Court remains unaffected by the different meaning of Article 24 of the Statute of the Commission.

The development of customary international law depends on State practice. It is difficult to regard a decision of the Court as being in itself an expression of State practice. A case, it is true, is

¹² See, for example, in more recent times, Paul Guggenheim, *Traité de Droit international public* (Geneva, 1967), I, p. 112, para. 4; and Barberis, 'La Jurisprudencia', p. 652.

¹³ *YBILC* 1950, II, p. 368, para. 30.