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## Research Article

# THE THEORY AND PRACTICE OF PRECEDENT IN INTERNATIONAL ADJUDICATION: A VIEW FROM UKRAINE

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**Summary:** 1. Introduction. – 2. A Modern Approach of the Nature and Classification of Precedents of International Adjudicative Bodies. – 3. Horizontal Interaction of Institutions of International Adjudication as a Type of Precedent. – 4. Concluding Remarks.

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## CONFLICTS OF INTEREST

The author declares no conflict of interest of relevance to this topic.

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The author declares that she was not involved in any state bodies, courts, or any other organisations' activities related to the views and case-law discussed.

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# THE THEORY AND PRACTICE OF PRECEDENT IN INTERNATIONAL ADJUDICATION: A VIEW FROM UKRAINE

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**A**bstract This article argues that legal pragmatism and realism are the methodological basis for considering the law-making function of international courts. Classical scientific approaches, the representatives of which view courts only as applicators of the law, do not allow research into the nature and role of international adjudicative bodies. Since there are several positions on the nature, content, and legal force of the precedent decisions of international adjudicative bodies (the are both diametrically opposed and, to some extent, similar), the author takes a position that considers the characteristics of modern international relations. The author proposes to classify international judicial precedents by considering the construction of judicial institutions and the legal force of decisions because these criteria reflect the nature and significance of such decisions. The classification divides precedents into vertical and horizontal (persuasive). The author argues that vertical precedent set by a particular body of international justice can be absolute, i.e., a structurally lower judicial body can, under no circumstances and exceptions, make a decision without taking into account the legal conclusions made by the higher judicial body. Vertical international judicial precedent may also be relative, i.e., in certain circumstances, a higher judicial body may make a different decision in a similar case, which suggests no obligation to be bound by its own previous decisions. Analysis of the decisions of many international courts has led to the conclusion that international courts create judicial precedents of persuasive content. In particular, the author uses decisions of the European Court of Human Rights (ECtHR) that contain citations of the Court's own legal positions and the International Court of Justice's legal positions. It is proved that the so-called horizontal precedent is a persuasive precedent, the content of the legal provisions of which is based on the authority of the cited international court's decisions. Thus, international judicial precedent not only exists but must be recognised legally because only the formal enshrinement of the legal force of such decisions will lead to the recognition of judicial precedent as a formal source of international law.

**Keywords:** *judicial law-making, international adjudicative bodies, international judicial precedent, source of international law, vertical precedent, persuasive precedent, case-law*

## 1 INTRODUCTION

At the turn of the 20th-21st centuries, international relations were characterised by significant changes compared to previous periods of recent history. Before this, strong states often reached beyond their obligations, violating fundamental human rights and freedoms, despite legal mechanisms built after World War II. In this regard, Jack L. Goldsmith and Eric A. Posner noted that international law 'is indeed a phenomenon, but

scholars exceed its significance and possibilities, and modern multilateral international treaties do not affect the behaviour of states'.<sup>1</sup>

The modern theory and practice of international law require qualitatively new or non-classical (neoclassical) approaches to basic concepts, categories, and processes, one of which is the law-making process and, in particular, the judicial law-making activities of international justice bodies. The defining characteristics of non-classical epistemology are relativism, plurality, nonlinearity, and alternativeness, which allow researchers to analyse complex dialectical relationships between necessary, rigidly determined legal events and processes on the one hand and atypical, nonlinear events on the other.

This approach intensifies the study by lawyers of problems that were previously on the periphery of legal research. In particular, the non-classical theory of international law offers answers to the problem of determining the legal force of decisions of international courts. Postmodern legal theory allows us to consider how legal systems, international law, etc. contain, among other elements, contain relevant sources: legal relations that have legal consequences and case-law, the results of which lead to the creation of new legal norms.<sup>2</sup>

Pragmatic jurisprudence tends to pursue legal understanding, which is critical of formalism and dogmatism, recognising the importance of practical activities, judicial activities, and so on. Representatives of legal pragmatism believe that judges create the law.<sup>3</sup> Experts are increasingly insisting that in recent decades, there has been a need for new methodological approaches that would make it possible to consider the activities of courts not only as applicators of the law but also as lawmakers.<sup>4</sup>

The definition of a 'source of international law', as well as the identification of specific types and structural series belonging to this category, remain debatable.<sup>5</sup> Likewise, in jurisprudence, the

1 JL Goldsmith, EA Posner, *The Limits of International Law* (1st ed Oxford University Press 2006) 225.

2 For more on this, see: T Murphy, 'Postmodernism: Legal theory, legal education and the future' (2000) 7 (3) *International Journal of the Legal Profession* 357-379. DOI: 10.1080/096959500750143188; J Penner, E Melissaris, 'Postmodern Legal Theory' in *McCoubrey & White's Textbook on Jurisprudence* (5th Oxford University Press 2014) DOI: 10.1093/he/9780199584345.003.0015; SM Feldman, 'The Return of the Self, or Whatever Happened to Postmodern Jurisprudence' (2017) 9 (2) *Washington University Jurisprudence Review* 267-294.

3 R Dworkin, *Justice in Robes* (Harvard University Press 2006); R Dworkin, *Taking Right Seriously* (Bloomsbury Academic 2013); CC Langdell, *A summary of the law of contracts* (2d ed Boston: Little, Brown and Company 2012) <[http://www.greenbag.org/v22n4/v22n4\\_from\\_the\\_bag\\_langdell.pdf](http://www.greenbag.org/v22n4/v22n4_from_the_bag_langdell.pdf)> accessed 5 May 2021; OW Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457 <<http://moglen.law.columbia.edu/LCS/palaw.pdf>> accessed 5 March 2021

4 G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 (1) *Journal of International Dispute Settlement* 5-23. DOI: 10.1093/jnlids/idq025; E Linaki, 'Judicial Decisions. What kind of Sources of International Law' (2013) 2 *Lex-warrior* 13-17; NA Guralenko, 'Judicial precedent in a system of legislative sources: Philosophical and legal aspects' (PhD (Law) thesis abstract, Lviv State University of Internal Affairs 2009) 13.

5 S Prylutsky, 'Judicial policy: Legal nature, place and role in the political system of the state' (2008) 1 *Sudova apelyatsiya* 26-33; SV Shevchuk *Judicial lawmaking: World experience and prospects in Ukraine* (Referat 2007); V Yamkovyy 'Introduction of judicial precedent as a necessary element of harmonization of Ukrainian legislation with European legal systems' (2009) 2 *Comparative Legal Research* 25-30; J Komárek 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 *The American Journal of Comparative Law* 148-161; H Gao, 'Dictum on Dicta: Obiter Dicta in WTO Disputes' (2018) 17 (3) *World Trade Review* 509-533; N Ridi 'The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 (2) *Journal of International Dispute Settlement* 200-247. doi.org/10.1093/jnlids/idz007; N Ridi 'Doing things with international precedents: The use and authority of previous decisions in international adjudication' (PhD (Law) thesis, King's College London 2019) <<https://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.822281>> accessed 5 March 2021; N Ridi "'Mirages of an Intellectual Dreamland"? Ratio, Obiter and the Textualization of International Precedent' (2019) 10 (3) *Journal of International Dispute Settlement* 361-395. doi.org/10.1093/jnlids/idz005.

provisions on the direction of judicial precedent remain uncertain. The question is whether a judicial precedent is binding in similar cases in general or only in subsequent similar cases. By combining scientific achievements on problematic issues, we offer a systematic version of the analysis of the modern theory on the nature and types of international court precedent.

## 2 A MODERN APPROACH TO THE NATURE AND CLASSIFICATION OF PRECEDENTS OF INTERNATIONAL ADJUDICATIVE BODIES

Current trends in the development and strengthening of judicial law-making are markedly different from the concept of *lex non scripta*, according to which court decisions were characterised as 'unwritten laws' or 'unwritten principles'. At the beginning of the 21st century, few people doubt that continental judicial precedent is more universal than judicial precedents created by courts of common law.<sup>6</sup>

The doctrine of *stare decisis* does not and cannot be applied to the administration of justice by international courts. It is well known among scholars that international law, as aphoristically formulated by Lord Alfred Denning, 'does not know *stare decisis*', and 'the role of judgments in such cases is similar to the role of judgments under the doctrine of jurisprudence constant'.<sup>7</sup>

As stated in the opinion of the Consultative Council of European Judges:

precedents or established case law which establish clear, consistent and reliable rules [that] reinforce the close link between the unity and consistency of case law and the right of everyone to a fair trial, whether precedent is considered a source of law, or whether precedent is binding, references to previous judgments are an effective tool for courts in both the common and the continental law.<sup>8</sup>

There is a common type of precedent in the countries of civil law and common law, the so-called 'persuasive precedent'. Certain court decisions, which in themselves do not set a precedent, when given the authority of the court that adopted them, significantly affect the practice of other courts, although it is not binding on them. Convincing precedent can also be set by a foreign court decision and influence the practice of a national court, which is especially common in common law countries. It is difficult to overestimate the role of convincing precedent in the application of international treaties by international and national courts.

The content of judicial precedent is the basis for overcoming legal uncertainty in the process of dispute settlement. The basis for resolving such legal uncertainty is called various things in the legal literature: in Anglo-American countries, it is '*ratio decidendi*', and in Ukraine,<sup>9</sup>

6 J Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011); BB Jia, 'Judicial decisions as a source of international law and the defence of duress in murder or other cases arising from armed conflict' in W Tiewa, S Yee (eds) *International Law in the Post-Cold War World: Essays in memory of Li Haopei* (Taylor & Francis Group 2001) 99-119; A Boyle, C Chinkin, *The Making of International Law* (Oxford University Press 2007).

7 A Markel, 'American, English and Japanese warranty law compared: Should the U.S. reconsider her article 95 declaration to the CISG?' (2009) 21 Pace Int'l L. Rev 196 <<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1037&context=pilr>> accessed 4 March 2021.

8 'The role of courts with respect to the uniform application of the law' Opinion no 20 [2017] CCJE 4 2.3. <<https://rm.coe.int/opinion-ccje-en-20/16809ccaa5>> accessed 4 March 2021.

9 NV Stetsyk, 'Judicial lawmaking: General theoretical characteristics' (2010) 3 (8) Journal of the Academy of Advocacy of Ukraine; YM Romanyuk 'Judicial lawmaking in the context of justice reform: Problem statement' (2016) 10 Law of Ukraine 9-19; N Bobechko, A Voinarovych, V Fihurskyi, 'Newly Discovered and Exceptional Circumstances in Criminal Procedure of Some European States' 2021 2 (10) Access to Justice in Eastern Europe 44-66. DOI: 10.33327/AJEE-18-4.2-a000059; T Didych 'Judicial Law-making and Its Regulation in Independent Ukraine: Its History and Development' 2021 3 (11) Access to Justice in Eastern Europe 82-100. DOI: 10.33327/AJEE-18-4.3-a000071.

'legal position', 'legal opinion', or 'legal argumentation' (similar to the terminology used in civil law systems). The content of legal positions as examples of solving complex court cases can be different depending on the nature of the problem to be solved in a complex court case. If a legal gap is overcome in a legal position, it can be normative-legal.

Given the classic theory of judicial law-making by W. Blackstone, who wrote that, 'depending on the nature of the use of case law, there are declarative and creative precedents',<sup>10</sup> these definitions are used quite often. Declarative court precedents are divided into confirmatory and interpretive. Confirmatory court precedents confirm the existence of legal norms. Interpretive precedents explain the meaning of a current legal norm. According to the normative element's content, there are creative precedents and precedents of interpretation. Creative precedents are precedents that create a new rule of law or change or repeal an existing one. Creative precedents are divided into those that supplement the law and those that abolish the law.

This classification reflects the structure and content of case-law of the Anglo-American legal system. We have already noted that the founding treaties of the EU do not bind the previous judgments of the European Court of Justice (hereinafter – CJEU) to the EU, but the CJEU case-law is evolving according to the principle of precedent.<sup>11</sup> O. Moskalenko argues that despite the significant similarity of the CJEU case-law to the common law system case-law, this court has a number of unique features:

- a) its use of principles and procedures of continental law;
- b) the presence of two stages of formation of the decision on the case (inductive and deductive);
- c) formulation (interpretation) by the Court of the principles of law; d) orientation in decision-making for political purposes;
- e) the unwillingness of the Court itself to recognise its decisions as precedents.<sup>12</sup>

In this regard, T. Komarova notes that 'in the hierarchy of competition law sources, decisions of the CJEU are not lower than primary law, because acts of interpretation of the CJEU are, in fact, an integral part of it (the judgements of the CJEU are one of the sources of the EU *acquis communautaire*)'.<sup>13</sup>

L. Alexander and E. Sherwin state that 'in quoting and borrowing process, relevant international bodies decisions are gradually becoming precedent-setting'.<sup>14</sup> Judicial precedents are understood by authors as:

decisions which, due to the persuasiveness of their arguments, are perceived by the international legal community (first of all, by judges) as an authoritative statement of law. Precedent decisions, given the citation and borrowing of their conclusions, are not binding on future disputes, but they contribute to progress in the regulation of international relations. Precedent judgements form interdependent groups, which makes it possible to distinguish system-forming and consolidating court precedents. System-forming decisions include those that the international judicial community

10 W Blackstone, *Commentaries on the Laws of England* (Clarendon Press 1765, Good Press 2019) 73.

11 See I Boyko, 'The case law of the European Court of Justice and the problem of preventing pollution of the marine environment' (2018) 2 (10) *Lex Portus* 32.

12 OM Moskalenko, 'Sources of European Union law (international legal analysis)' (PhD (Law) thesis abstract, Legislation Institute of the Verkhovna Rada of Ukraine 2006) 11.

13 TV Komarova, *The Court of Justice of the European Union: The development of the judicial system and the practice of interpreting EU law* (Pravo 2018) 336.

14 LA Alexander, E Sherwin, 'Judges as Rulemakers' (2004) 15 *University of San Diego Public Law and Legal Theory Research Paper Series 1*. <[https://digital.sandiego.edu/lwps\\_public/art15/](https://digital.sandiego.edu/lwps_public/art15/)> accessed 5 March 2021.

considers to be the most authoritative and cited (or borrowed) in most disputes on similar issues. Consolidating judgments are decisions that justify their own conclusions by the provisions set out in the system-forming decisions.<sup>15</sup>

S. Markin classifies judicial precedents into unconditionally binding and conditionally binding. The author bases this division on the degree of influence of the precedent on the further activity of the courts: a decision, which the courts must abide by in any case, is unconditionally binding; a decision is considered conditionally binding if the courts may in some cases deviate and ignore it, i.e., reject the precedent. According to the author, rejection requires the following grounds: that the court decision is contrary to applicable law or is unreasonable.<sup>16</sup>

The horizontal binding nature of international judicial precedent is always relative, as the legal positions of previous judgments are cited and borrowed only in view of the authority of international judicial institutions.

Scholars consider binding judgments of the European Court of Justice (hereinafter – ECJ),<sup>17</sup> which were adopted as a result of a preliminary rulings procedure, as the ECJ clarifies EU law norms at the request of a national court and creates new rules that become mandatory. Judgments rendered in the framework of the preliminary norming procedure often formulate and generalise the concepts, approaches, and practice of the Court in resolving specific cases. The basic principles that determine the interaction of a special, independent legal system of the EU with the national legal systems of the member states and with international law are formulated. These decisions interpret, clarify, and develop the provisions of the founding treaties and adjust the powers of the institutions of the EU and the states. For example, the principles of the rule of law and the direct effect of EU law, the priority of human rights and freedoms, and the non-contractual liability of the Union and its states for infringements and many other provisions were first defined in preliminary acts.

International adjudicative bodies have internal structural subdivisions and, within them, the effect of vertical judicial precedent can be traced. In particular, there are Grand Chambers within the ECtHR and the ECJ, whose decisions in complex court cases are binding on other vertically-related bodies. The International Criminal Tribunals for the former Yugoslavia (hereinafter – ICTY) and Rwanda have binding chambers of appeal. E.g., in the decision on the case of Zlatko Aleksovski, the ICTY Appeals Chamber substantiates the possibility of applying the principle of *stare decisis* to ICTY decisions: '<...> the interpretation of the Statute <...> In particular, it should have the right to withdraw from them for compelling reasons in the interests of justice'.<sup>18</sup>

Deviation from the position set out in the previous decision is likely when such a decision was 'made through negligence' (*per incuriam*), i.e., the court decision was incorrect because the judge or judges did not have all the necessary information about the permissible rules of law. The Appeals Chamber clarified that what should be followed in previous decisions is the principle of *ratio decidendi*. There is no obligation to comply with previous decisions on cases, the circumstances of which may be different from this case.<sup>19</sup>

15 Ibid (n 14) 13.

16 SV Markin, 'Judicial precedent as a source of private international law' (PhD (Law) thesis abstract, Volgograd Academy of Internal Affairs 2005) 19.

17 TV Komarova (n 13); LA Heffernan, 'Discretionary Jurisdiction for the European Court of Justice?' (1999) 34 Irish Jurist 148-169; P Craig, C Harlow (eds), *Lawmaking in the European Union* (Kluwer Law International 1998).

18 Prosecutor v Zlatko Aleksovski, case no IT-95-14/1-AR77, Appeals Chamber, 24 March 2000, 39 <<https://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>> accessed 4 March 2021.

19 Ibid.

The Appellate Body of the World Trade Organization (hereinafter – WTO AB) functions as the appeal institution towards decisions of the Dispute Settlement Body. An interesting example is the report of the WTO AB regarding the implementation by Mexico the Dispute Settlement Body's decision on the case of dolphin protection.<sup>20</sup> The dispute, initiated by Mexico in 2008, was based on measures taken by the US to protect dolphins, which traditionally swim near shoals of tuna and very often die when caught in fishing nets during fishing. The US government has demanded that its fishermen change the technology of tuna fishing to reduce dolphin mortality and imposed a ban on the import of tuna products from countries that had not taken such measures. Following consideration by the WTO Dispute Settlement, the ban was replaced by the introduction of a special 'dolphin-safe' label for tuna products, setting out the conditions under which tuna products sold on the US market could be labelled.<sup>21</sup>

However, this decision was challenged by Mexico with a request to declare the requirements for the labelling of tuna products unsatisfactory. In particular, Mexico requested the WTO AB to review the facts and conclusions of the expert group, which included representatives of Australia, Brazil, Canada, China, Ecuador, the EU, Guatemala, India, Japan, Korea, New Zealand, and Norway as third parties for the interpretation and application the Agreement on Technical Barriers to Trade (under Art. 2.1).<sup>22</sup> The WTO AB found no mistakes in the experts' assessment of the risks to dolphins arising from the use of different fishing methods in different parts of the ocean.<sup>23</sup> The WTO AB's decision of 14 December 2018 was that 'the interpretation of the eligibility criteria, certification requirements and calibration tracking and verification requirements for risks to dolphins arising from the use of different fishing methods in different areas of the ocean, provided by a group of experts, must be executed'.<sup>24</sup>

Under para. 6 of Art.17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2), the WTO AB did not have the competence to review the facts of the case.<sup>25</sup> This should be understood as WTO members appealing to the Appellate Body with a report from a group of experts. Under para. 13 of Art. 17 of the Agreement 'the Appellate Body may uphold, change or revoke the legal considerations and conclusions of the group of experts'.<sup>26</sup>

Given the suggestions of scholars on the classification of judicial precedents, we propose to divide the judicial precedents of international judicial bodies into mandatory (or vertical) and persuasive (or horizontal). For example, mandatory precedents include judgments of the ECJ adopted as a result of preliminary rulings procedure, as the Court, in clarifying norms of EU law upon request, creates new rules that become binding. The case-law of the

20 United States – Measures concerning the importation, marketing and sale of tuna products recourse to article 21.5 of the DSU by Mexico. Report of the Appellate Body (WT/DS381/AB/RW 20 November 2015) <[https://www.wto.org/english/tratop\\_e/dispu\\_e/381abr\\_w\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/381abr_w_e.pdf)> accessed 4 March 2021.

21 US–TUNAII(MEXICO)1(DS381)<[https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds381sum\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds381sum_e.pdf)> accessed 4 March 2021.

22 Ibid.

23 Ibid.

24 United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products. Report of the Appellate Body (WT/DS381/AB/RW/USA; WT/DS381/AB/RW2 14 December 2018) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/381ABRWUSA.pdf&Open=True>> accessed 4 March 2021.

25 Understanding on Rules and Procedures Governing the Settlement of Disputes (The Uruguay Round agreements. Annex 2 Dispute Settlement Understanding) <[https://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm#17](https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#17)> accessed 4 March 2021.

26 Ibid.

Grand Chambers of the ECtHR, the ECJ, and the criminal tribunals Appeal Chambers is binding on other vertically related bodies.<sup>27</sup>

Vertical precedent set by a particular body of international justice can be absolute, i.e., a structurally lower judicial body can, under no circumstances and exceptions, make a court decision without taking into account the legal conclusions made by the higher judicial body. Vertical international judicial precedent may also be relative, i.e., in certain circumstances, a higher judicial body may take a different decision in a similar case, which suggests there is no obligation for it to be bound by its own previous decisions.

Persuasive or horizontal judicial precedents are becoming quite common, as international adjudicative bodies actively refer to their own and other decisions, as well as borrow the legal positions of case-law decisions of other bodies of international justice.

### 3 HORIZONTAL INTERACTION OF INSTITUTIONS OF INTERNATIONAL ADJUDICATION AS A TYPE OF PRECEDENT

Scholars and judges of international courts (in particular, V. Butkevich, J. Guillaume, O. Kiyivets, J. Martinez, C. Romano, N. Khronovski, M. Shahabuddeen, S. Shevchuk, and M. Jacob) note that the decisions of international courts are increasingly based on the courts' own previously adopted decisions or other international courts decisions.<sup>28</sup> For example, Stanislav Shevchuk writes that 'such inter-judicial interaction, although not formally defined, is inherent in modern international jurisprudence ...'<sup>29</sup> Mohamed Shahabuddeen emphasises that 'the International Court of Justice actually carries out law-making in the sense of development, adaptation, modification of norms, filling of gaps, interpretation of norms.'<sup>30</sup>

Such activity is manifested in references to previous decisions of that court or those of other courts. The horizontal effect of precedent in their activities is recognised by the international judicial institutions — some of them even enshrine it in their statutes. In particular, under para. 2 of Art. 21 of the ICC Statute, 'The Court may apply principles and rules of law as interpreted in its previous decisions.'<sup>31</sup>

International courts have similar jurisdiction on some issues. As Jenny Martinez points out, 'their jurisdiction is intertwined <...> therefore, when making decisions, courts refer to

27 Armin von Bogdandy, Ingo Venzke, Jean d'Aspremont, Marjan Ajevski, Hugh Thirlway, and Karl Doebling write about international courts as lawmakers in R Wolfrum, I Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013) panel IV 159-327.

28 For more on this, see: VG Butkevich (ed) *International law. Fundamentals of theory: a textbook* (Lybid 2002); O Kiyivets 'Methodology of international law in the context of the study of sources of international law: Some general reflections on the eternal' (2012) 1-2 *Ukrayins'kyi chasopys mizhnarodnoho prava* 42-46; N Khronovski 'Forming a single European standard of human rights: The accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' (2013) 1 *Yevropeys'ke pravo* 14-27 <<http://real.mtak.hu/16584/1/>> accessed 6 March 2021; M Jacob, 'Precedents: Law-making Through International Adjudication' (2011) 12 (5) *German Law Journal* 1005-1032 <<https://doi.org/10.1017/S207183220001720X>>; C Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal of International Law and Policy* 709-751 <<https://biblioteca.cejamerica.org/handle/2015/1268>> accessed 6 March 2021.

29 SV Shevchuk, *Judicial lawmaking: World experience and prospects in Ukraine* (Referat 2007) 473.

30 M Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 1996) 90.

31 Rome Statute of the International Criminal Court (of 17 July 1998, entered into force 1 July 2002) <<https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>> accessed 5 March 2021.

decisions made by other courts <...><sup>32</sup> Gilbert Guillaume<sup>33</sup> has a similar opinion noting that 'the expansion of international judicial and arbitration bodies already affects the functioning of international law.'<sup>34</sup>

This idea was developed by Sir Michael Wood, who emphasises:

Although there is no hierarchy of international courts and tribunals, International Court of Justice decisions are often seen as authoritative precedents for other courts and tribunals <...><sup>35</sup>

Examples would be *Jones et al. v the United Kingdom*,<sup>36</sup> M/V "SAIGA" (No. 2),<sup>37</sup> and Japan – Taxes on Alcoholic Beverages.<sup>38</sup>

Examples that we believe are evidence of horizontal precedent are states' applications to the ICJ for the delimitation of maritime zones, which are quite numerous and constitute the most effective legal way of resolving disputes over the maritime boundary delimitation. The delimitation of the disputed areas is based on the principles of equidistance and justice, which are established in international jurisprudence on these issues. The horizontal precedent in this area begins with the judgment on the case *Germany v. Denmark and the Netherlands* (1969),<sup>36</sup> which proposed a new method of delimiting the exclusive economic zone and the continental shelf based on justice.

The Court referred to this principle in decisions on the cases of delimitation of the continental shelf between Tunisia and Libya (1982),<sup>37</sup> maritime delimitation between Canada and the US (1984),<sup>38</sup> delimitation of the continental shelf between Libya and Malta (1985),<sup>39</sup> on the territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (2007),<sup>40</sup> and the Black Sea delimitation (2009).<sup>41</sup> We have already emphasised that international relations and international law have needed new tools and mechanisms for more than 70 years.

Horizontal precedents can be considered one of the newest tools in the process of international law-making. In particular, the international legal concept of jurisdiction is gradually being formed as a norm-definition due to decisions of international judicial bodies, starting with the decision on the case *Nicaragua v. United States of America*,<sup>42</sup> which states that

32 J Martinez, 'Towards an International Judicial System' (2003) 56 Stan L Rev 441.

33 Gilbert Guillaume is former president of the International Court of Justice <<https://www.iaiparis.com/profile/gilbert.guillaume>> accessed 5 March 2021.

34 G Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order' Speech to the Sixth Committee of the General Assembly of the United Nations (27 October 2000) <<http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident&score;GuillaumeSixthCommittee20001027.htm>> accessed 5 March 2021.

35 'Report of the 17th session (30 April -1 June and 2 July-10 August 2018)' General Assembly Official Records, Seventy-third Session, Supplement no 10 (Yearbook of the International Law Commission 2018) <<https://undocs.org/en/A/73/10>> accessed 5 March 2021.

36 North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3.

37 Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment of 24 February 1982, ICJ Reports 1982, 18.

38 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment of 12 October 1984, ICJ Reports 1984, 246.

39 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985, ICJ Reports 1985, 13.

40 Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment of 8 October 2007, ICJ Reports 2007, 659.

41 Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment of 3 February 2009, ICJ Reports 2009, 61.

42 Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14.

even if USA participation in financing, organizing, training, supplying and equipping contras, choosing their military or paramilitary targets, planning all their operations dominated or was decisive, this is not enough to accuse the USA of helping contras during their operations in Nicaragua, as it does not prove that the USA ruled or forced the contras to commit illegal acts. In order to bring the United States to justice, it is necessary to prove that this state exercised effective control over the military and paramilitary operations in which such violations were committed.<sup>43</sup>

The Court examined the extent of US control over the contras to determine whether the US was responsible for their actions (killings, abductions of civilians, etc.).<sup>44</sup>

The ICJ has found that the presence of 'effective control' in the Court's view can be confirmed either by the direct order to commit unlawful acts or by the coercion to commit them. That is, the Court linked the notion of jurisdiction to the notion of territory and to the notion of effective control. Thus, the judgment on the case *Nicaragua v. United States* gave the notion of 'jurisdiction in international law' an extraterritorial character. The ECtHR, referring to the decision of the ICJ, expanded the meaning of 'jurisdiction' in Order of 23 March 1995. The Court stated that

a Party may be held liable if, as a result of a military operation, whether lawful or unlawful, it exercises effective control outside its national territory. The obligation to ensure the observance of rights and freedoms in this territory derives from the fact of such control, regardless of whether it is carried out directly, through the armed forces, or through a subordinate local administration.<sup>45</sup>

Subsequently, this legal position was borrowed and cited in decisions on cases: *Bankovic and others v. NATO countries*,<sup>46</sup> *Ilaşcu and others v. Moldova and Russia and others*, and *Al-Skeini and others v. the United Kingdom*.<sup>47</sup> In particular, in the judgment on the Ilaşcu case of 8 July 2004, the Court noted that the concept of 'exercise of jurisdiction' was key to determining the state's responsibility for certain actions. Jurisdiction is understood as the territorial legal capacity of the state, which is usually exercised throughout the state. But there may be exceptions. The presumption may be limited, as the Court ruled, 'when a state is unable to exercise its power in certain parts of its territory, as a result of military occupation by the armed forces of another state that actually control the occupied territory'.<sup>48</sup> The Court emphasises the primacy of the territorial principle in the application of the ECHR but recognises that the notion of 'jurisdiction' is not necessarily limited to the state territory. In exceptional circumstances, the actions of states were carried out outside the territory, as a result of which they can be regarded

43 Ibid, para 113.

44 Ibid, para 115.

45 *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995, para 62) <<https://hudoc.echr.coe.int/eng#%7B%22docname%22:%22Loizidou%20v%20Turkey%22,%22itemid%22:%222001-57920%22%7D>> accessed 6 March 2021.

46 *Bankovic and others v Beldium and others* App no 52207/99 (ECtHR, 12 December 2001) <<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%22Bankovic%20and%20others%20v%20Belgium%20and%20others%22,%22itemid%22:%222001-22099%22%7D>> accessed 6 March 2021.

47 *Ilaşcu and others v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) <<https://hudoc.echr.coe.int/eng#%7B%22docname%22:%22Ila%C5%9Fcu%20and%20others%20v%20Moldova%20and%20Russia%22,%22itemid%22:%222001-61886%22%7D>> accessed 6 March 2021; *Al-Skeini and others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%222001-105606%22%7D>> accessed 6 March 2021.

48 *Ilaşcu and others v Moldova and Russia* (n 50) para 311.

as the exercise of their jurisdiction. In such cases, the state may be held internationally liable for failure to protect human rights and freedoms in the territory.<sup>49</sup>

International judicial institutions' established practice contains many references both to their own decisions and to the decisions of other international judicial bodies. The ECtHR actively refers to decisions of the ICJ and even borrows legal positions made by the Permanent Court of International Justice.

For example, in the decision on case *Lawless v. Ireland*, which was the first to interpret international human rights law against the state, the Court referred to a number of precedents from the case-law of the PCIJ and the ICJ. In particular, it was noted that 'the Commission [European Commission of Human Rights] referred to various precedents obtained from the advisory opinion procedure.<sup>50</sup> The ICJ, in turn, took into applications of individuals received through international organisations who applied for advisory opinions, although Statute of Court provides that 'only States may be represented in court'.<sup>51</sup>

The judgment on the case *Cabral v. the Netherlands*, which holds that there was a violation of paras. 1, 3 (d) of Art. 6 of the ECHR,<sup>52</sup> was adopted by considering previous decisions of the ECtHR itself: para. 32 states that the Court applies the principles already formulated in the decisions on cases *Paić v. Croatia*,<sup>53</sup> *Seton v. the United Kingdom*,<sup>54</sup> and *Bátěk and Others v. the Czech Republic*.<sup>55</sup>

The Inter-American Court of Human Rights (hereinafter – CorteIDH) also considers the ECtHR's case-law as an influential factor in settlement disputes. Thus, in the decision on the case of *The Last Temptation of Christ (Olmedo-Bustos et al. v. Chile)*, the CorteIDH was guided by the established practice of the ECtHR in the field of freedom of expression.<sup>56</sup> The CorteIDH has established its own practice for resolving cases concerning the rights of indigenous peoples of Latin America,<sup>57</sup> and here, the practice of the ECtHR has also been borrowed as a model. In particular, in 2013-2014, the court heard the case *The indigenous peoples of Kuna de Madungandi and Amber de Bayano v. Republic of Panama*.<sup>58</sup> In the judgment of 14 October 2014, the Court referred

49 Ibid, paras 310-321.

50 *Lawless v Ireland* App no 332/57 (Report of the European Commission of Human Rights, adopted on 19 December 1959) <<https://70.coe.int/pdf/lawless-v.-ireland.pdf>> accessed 6 March 2021.

51 *Cruz Varas and others v Sweden* App no 15576/89 (ECtHR 20 March 1991) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-57674%22%5D%7D>> accessed 6 March 2021; *Papamichalopoulos and others v Greece* App no 14556/89 (ECtHR 24 June 1993) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-57836%22%5D%7D>> accessed 6 March 2021; *Loizidou v Turkey* App no 15318/89 (ECtHR 18 December 1996) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-58007%22%5D%7D>> accessed 6 March 2021.

52 *Cabral v the Netherlands* App no 37617/10 (ECtHR 28 November 2018) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-185308%22%5D%7D>> accessed 6 March 2021.

53 *Paić v Croatia* App no 47082/12 (ECtHR 29 June 2016, paras 29-31) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-161752%22%5D%7D>> accessed 6 March 2021.

54 *Seton v the United Kingdom* App no 55287/10 (ECtHR 12 September 2016, paras 57-59) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-161738%22%5D%7D>> accessed 6 March 2021.

55 *Bátěk and others v the Czech Republic* App no 54146/09 (ECtHR 12 April 2017, paras 37-39) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-170057%22%5D%7D>> accessed 6 March 2021.

56 Case of 'Last Temptation of Christ' (Olmedo-Bustos et al) v Chile (CorteIDH, 5 February 2001) <[http://corteidh.or.cr/docs/casos/articulos/seriec\\_73\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_73_ing.pdf)> accessed 6 March 2021.

57 A Fodella, 'Indigenous Peoples, the Environment, and International Jurisprudence' in N Boschiero, T Scovazzi, C Pitea, C Ragni (eds) *International Courts and the Development of International Law* (TMC Asser Press 2013) 349-364 <[https://doi.org/10.1007/978-90-6704-894-1\\_28](https://doi.org/10.1007/978-90-6704-894-1_28)> accessed 5 May 2021

58 Caso de los pueblos indígenas Kuna de Madungandi y Embera de Bayano y sus miembros v. Panama (CorteIDH, 14 de octubre de 2014) <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_284\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_284_esp.pdf)> accessed 6 March 2021.

numerically to and used the ECtHR's case-law. In particular, in paras. 36, 40-46, and 77, the CorteIDH cites the ECtHR's decision.<sup>59</sup>

## 4 CONCLUDING REMARKS

This article has shown that international adjudicative bodies, in applying the law, quite successfully develop international law, creating new rules. Therefore, international case-law is a precedent practice. The study of the law-making function of international courts should be conducted through new approaches, namely pragmatism and realism, as classical theories no longer provide sufficient scientific tools.

The concepts belonging to the category of 'source (form) of international law', in our opinion, include: 'international treaty', 'international custom', 'judicial precedent', 'decisions and resolutions of international organisations', and 'acts of international conferences'. The analysis of specific forms must be carried out using a method of comparison between them.

A case-law decision contains two legal prescriptions: precedent and individual. The precedent prescription is accepted under conditions of normative and legal uncertainty (a gap, too abstract, ambiguous instructions, collisions, etc.) and is obligatory both for the parties in the case and for parties in similar cases.

Among the features of the case-law decisions of international judicial bodies are the conditionality of case-law with treaties and customary international law and courts' right to change and cancel its precedents.

Since there are several positions on the nature, content, and legal force of decisions of international judicial institutions of precedent (they are both diametrically opposed and, to some extent, similar), we consider it necessary to formulate our own position, which takes into account the characteristics of modern international relations. The judicial precedent of international judicial arbitration institutions is a decision that contains legal position(s) that either clarify the content of the current rule or formulate a new rule. Such decisions are taken into account by the court that made them or by other judicial-arbitration bodies when considering a similar case; they are binding for the dispute parties, as well as politically binding on third countries.

59 *Loizidou v Turkey* App no 15318/89, paras 40-51 (ECtHR, 18 December 1996) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-58007%22%5D%7D>> accessed 5 May 2021; *Posti and Rahko v Finland* App no 27824/95, para 39 (ECtHR 2002-VII, 24 September 2002) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-60644%22%5D%7D>> accessed 5 May 2021; *Ananyev and others v Russia* App no 42525/07 and 60800/08, para 75 (ECtHR, 10 January 2012) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-108465%22%5D%7D>> accessed 5 May 2021; *HadzhiGeorgeviev v Bulgaria* App no 41064/05, para 56 (ECtHR, 16 July 2013) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-122363%22%5D%7D>> accessed 5 May 2021; *Almeida Garrett, Mascarenhas Falcão and others v Portugal* App no 29813/96 and 30229/96, para 43 (ECtHR, 11 January 2000) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-58417%22%5D%7D>> accessed 5 May 2021; *Blečić v Croatia*, GC App no 59532/00, para 86 (ECtHR, 8 March 2006) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-72688%22%5D%7D>> accessed 5 May 2021; *Malhous v The Czech Republic*, GC App no 33071/96 (ECtHR, 13 December 2000) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222002-5837%22%5D%7D>> accessed 5 May 2021; *Ostojić v Croatia* App no 16837/02 (ECtHR, 26 September 2009) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-22693%22%5D%7D>> accessed 5 May 2021; *Papamichalopoulos and others v Greece* App no 14556/89 (ECtHR, 24 June 1993) <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%222001-57836%22%5D%7D>> accessed 5 May 2021; *Hutten-Czapka v Poland* App no 35014/97 [GC], paras 152-153 (ECtHR, 19 June 2006) <<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22Poland%22%5D%7D%22itemid%22:%5B%222001-75882%22%5D%7D%7D>> accessed 5 May 2021.

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