Annex

Subsidiary means for the determination of rules of international law
by Charles C. Jalloh

I. Introduction

1. The International Court of Justice ("ICJ"/"the Court"), whose function is to decide in accordance with international law such disputes as are submitted to it by States, is required to apply Article 38 (1) of the Statute of the International Court of Justice. Though formally only directed to the ICJ judges, the provision is widely considered one of the most, if not the most, authoritative statement of the sources of international law. Article 38(1) provides, in relevant part, that the Court in resolving disputes submitted to it shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, *judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*.[1] [Emphasis added].

2. Unsurprisingly, given the centrality of sources to the international legal system, the International Law Commission ("the Commission") has devoted significant time to studying the sources identified in Article 38 (1) of the ICJ Statute, namely international conventions, and more recently, international custom as well as general principles of law. Indeed, arguably forming the Commission's most important contribution to date has been its work on the law of treaties which culminated into the 1969 Vienna Convention on the Law of Treaties[2] but also continued afterwards.[3] The Commission's initial work on the law of treaties has subsequently given risen to increasingly more specialized Commission studies on the same subject. These include on the question of treaties concluded between States and international organizations or between two or more international

[1] Statute of the International Court of Justice art. 38 ¶ 1, U.N. Charter, Annex I, at 21-30 (1945).

[2] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on the Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3; and Vienna Convention on the Law of Treaties Concluded Between States and International Organizations, or between International Organization, Mar. 21, 1986, 1155 U.N.T.S 331.

[3] *See generally* Int'l Law Comm'n, *About the Commission*, available at https://legal.un.org/ilc/ (last accessed July 27, 2021)(The Commission's related works *include*: the law of treaties (1949–1966); reservations to multilateral conventions (1951); succession of States in respect of treaties (1968–1974); treaties concluded between States and international organizations (1970–1982); reservations to treaties (1993–2011); effects of armed conflicts on treaties (2004–2011); unilateral acts of States (1996–2006); subsequent agreements and subsequent practice in relation to the interpretation of treaties, previously treaties over time (2008–2018); provisional application of treaties (2012–2021); *Jus cogens*, now Peremptory Norms of General International Law (*Jus Cogens*)(2015–present)).

organizations,[4] reservations to treaties,[5] the effects of armed conflict on treaties,[6] unilateral acts of States,[7] subsequent agreements and subsequent practice in relation to the interpretation of treaties,[8] provisional application of treaties,[9] and peremptory norms of general international law (*jus cogens*).[10]

3. With regard to Article 38, paragraph 1(b) of the ICJ Statute, which refers to international custom as evidence of a general practice accepted as law, the Commission took the topic "Formation and evidence of customary international law" into the programme of work at its sixty-fourth session (2012) though the title was later amended to "Identification of customary international law" during the sixty-fifth session (2013).[11] At its seventieth session (2018), the Commission adopted a set of draft conclusions on the identification of customary international law, on second reading, with commentaries and forwarded them with a final recommendation pursuant to article 23 of the Statute of the Commission.[12] The General Assembly, at its seventy-third session (2018), welcomed the completion of the work on the topic and took note of the draft conclusions on the identification of customary international law which were annexed to its resolution.[13] It commended them to States and encouraged their wider dissemination.

4. Continuing with its efforts to clarify the foundational sources of international law, during its seventieth session (2018), the Commission decided to add the topic "General principles of law" to its current programme of work and appointed a special rapporteur.[14] General principles of law have given rise to several questions in practice, and of course, are also a source of law in Article 38(1)(c)[15] of the ICJ Statute. During its seventy-first session (2019), the Special Rapporteur on the topic of general principles of law presented his first report to the Commission, and in 2020, the second report.[16] Due to the COVID-19 global pandemic, however, the session was exceptionally postponed by a year. The debate on the latter report could therefore only take place during the seventy-second session in 2021.[17]

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4 Int'l Law Comm'n, Rep. on the Work of its Thirty-fourth Session, U.N. Doc. A/37/10 at 12–63 (1982).

5 Int'l Law Comm'n, Rep. on the Work of its Sixty-third Session, U.N. Doc. A/66/10 at 23 (2011).

6 *Id.* at 106.

7 Int'l Law Comm'n, Rep. on the Work of its Fifty-eighth Session, U.N. Doc. A/61/10 at 159–167 (2006).

8 Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 11 (2018).

9 *Id.* at 201.

10 Int'l Law Comm'n, Rep. on the Work of its Seventy-first Session, U.N. Doc. A/74/10 at 141 (2019).

11 Int'l Law Comm'n, *Provisional summary record of the 3132nd meeting*, U.N. Doc. A/CN.4/SR.3132 at 22 (May 22, 2012).

12 Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 119 (2018).

13 *See* G.A. Res. 73/203 1, ¶ ¶ 4 (Dec. 20, 2018).

14 Int'l Law Comm'n, *Provisional summary record of the 3433rd meeting*, U.N. Doc. A/CN.4/SR.3433 at 3 (July 19, 2018).

15 Statute of the International Court of Justice art. 38 ¶ 1(c), U.N. Charter, Annex I, at 21-30 (1945).

16 Marcelo Vázquez-Bermúdez (Special Rapporteur for general principles of law), *First report on general principles of law*, U.N. Doc. A/CN.4/732 (Apr. 5, 2019); Marcelo Vázquez-Bermúdez (Special Rapporteur for general principles of law), *Second report on general principles of law*, U.N. Doc. A/CN.4/741 (Apr. 9, 2020); *See also* U.N. Secretariat, General principles of law, Memorandum by the Secretariat, Int'l Law Comm'n, U.N. Doc. A/CN.4/742, (May 12, 2020).

17 *See* Int'l Law Comm'n, *Daily Bulletin Seventy-second Session (2021)*, available at https://legal.un.org/ilc/sessions/72/bulletin.shtml (last accessed July 30, 2021) (The plenary debate on the topic general principles of law began with the special rapporteur's introduction on July 12, 2021 during the Commission's 3,536th meeting, and concluded with a referral to the drafting committee on July 21, 2021 during the Commission's 3,546th meeting.)

5. The Commission's focus on the elucidation of the sources of international law appears to have been well received by States and the international legal community. To date, it has completed studies aimed at clarifying treaties and customary law. It is also well on track with its study of the sometimes neglected and sometimes misunderstood source of general principles of law. At this stage, the Commission has undertaken systematic consideration of the first three sub-paragraphs of Article 38, paragraph 1. But one last sub-paragraph of Article 38 (1) concerning "subsidiary means" for determining rules of international law remains largely unaddressed.

6. The subject matter has, of course, come up in the Commission's work over the years. These include during the plenary debate of the first report on General principles of law during the seventy-first session exposing the lack of clarity regarding subsidiary means. However, the topic has not been separately examined for its potential value, even if by its own express terms, it is merely a "subsidiary means for the determination of rules of law." In any case, there are aspects of these subsidiary means and their interaction and relationship to the sources that are uncertain, confusing, and arguably even unsettled. Consequently, in order not to leave a gap in the clarity, predictability and uniformity of international law, it is proposed that the Commission consider completing its systematic study of Article 38(1) by also examining the subsidiary means for the determination of rules of international law listed in sub-paragraph (d), that is to say, *judicial decisions* and *the teachings of the most highly qualified publicists of the various nations*.

7. "Judicial decisions" as well as "the teachings of the most highly qualified publicists of the various nations" have played a vital role in the development of international law. This is particularly evident in, but not limited to, the formative years of international law. The weight of judicial decisions and scholarly works vary, depending on the tribunal and relevant field of international law. The Commission, given its previous as well as more recent work on sources of international law and its specific mandate as a general international law expert body, seems particularly well placed to provide clarification on several aspects of the subsidiary means for the determination of rules of law. This would include the nature, scope and functions of subsidiary means *vis-à-vis* the sources of international law.

8. As with other recent sources-related topics, and without prejudice to a different outcome that may emerge from the needs of this study, the outcome on the topic could be a set of draft conclusions accompanied with commentaries. The preference for draft conclusions will thus parallel the approach of the Commission on the topics "Identification of customary international law"[18] and "General principles of law."[19] There is, as of yet, no single definition of "draft conclusions" in the practice of the Commission. In the meaning used here, it is proposed that the outcome of the study on the topic would represent the outcome of a process of reasoned deliberation and a restatement of the rules and practices found in relation to subsidiary means in determination of the rules of international law. Thus, the content of such draft conclusions, in line with the statute and settled practice of the Commission, could be presumed to reflect both the codification and progressive development of international law.

[18] *See* Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 119-122 (2018).

[19] *See* Int'l Law Comm'n, Rep. on the Work of its Seventy-first Session, U.N. Doc. A/74/10 at 329 (2019).

II. The topic fulfils the Commission's criteria for new topics

9. The topic meets the criteria for selection of new topics set by the Commission in 1996 and again reiterated in 1998.[20] The requirements are that the topic should: (a) reflect the needs of States in respect of the progressive development of international law and its codification; (b) be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and (c) be concrete and feasible for progressive development and codification.[21] Though not applicable in this instance, since this would be a classic general international law topic, the Commission also agreed not to restrict itself to traditional topics but to also consider those that reflect new developments in international law and pressing concerns of the international community.[22]

10. The Commission's topic selection criteria mentioned immediately above are fulfilled in the present case. The topic is important for States by promoting a more comprehensive understanding of *judicial decisions* and *the teachings of the most highly qualified publicists of the various nations* and the underlying practical and theoretical approaches to them by different courts and tribunals at the national and international levels. A legion of international and national jurisprudence and an extensive body of scholarly literature refers to judicial decisions and teachings of publicists, though not always expressly as subsidiary means, in the process of determining the applicable rules of international law.[23] Studying the approaches and diverging views on the use of subsidiary means in Article 38(1)(d) could thus provide an authoritative methodological guide and would likely aid the determinations of the weight to attach to them in the process of determining the existence of the rules of international law in paragraphs 1(a) to 1(c) of Article 38 of the ICJ Statute.

11. The topic is also sufficiently advanced in terms of State practice to permit codification and progressive development. This is because there is a voluminous body of national and international judicial decisions. There has also been a dramatic increase in the number of international courts and tribunals over the past half century, as well as ample academic writings and other scholarly literature referring to subsidiary means of determining the rules of law.

12. The topic is also both concrete and feasible given the particular focus on Article 38(1)(d), and taken together with previous works of the Commission, offers it an opportunity to complete its contribution on the clarification of the role of subsidiary means in the identification of the sources of international law. The work may thus serve as a useful complement to the ongoing work on Article 38(1)(c), regarding general principles of law, and depending on when it is taken up by the Commission, could allow potential synergies between it and Article 38(1)(d) to be further explored.

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[20] [1997] 2 Y.B. Int'l L. Comm'n 1, at 71–71 ¶ 238, U.N. Doc. A/CN.4/SER.A/1997/Add.1; [1998] 2 Y.B. Int'l L. Comm'n 1, at 110 553, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (1998).

[21] *Id.*; *See also* Int'l Law Comm'n, Rep. on the work of its Fifty-second Session, U.N. Doc. A/55/10 at 131 ¶ 728 (2000).

[22] [1998] 2 Y.B. Int'l L. Comm'n 1, at 110 ¶ 553, U.N. Doc. A/CN.4/SER.A/1998/Add.1 (1998)("The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.").

[23] *See* Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 Int'l & Comp. L. Q.1 (2017); *See also* Sondre T. Helmersen, *Scholarly Judicial Dialogue in International Law*, 16 L. & Pract. of Int'l Cts. & Trib. 464 (2017). For a thoughtful new monograph on teachings, see Sondre T. Helmersen, The Application of Teachings by the International Court of Justice (Cambridge Univ. Press, 2021).

III. Brief overview of Article 38(1) and doubts about subsidiary means

13. The place of judicial decisions and the writings of the most highly qualified publicists of the various nations in Article 38(1) remains the subject of debate among writers. There seems to be even a divergence of scholarly views on whether Article 38(1) establishes one or two lists. Some view the judicial decisions referred to in sub-paragraph (d) as a source of law much like the other sources of law listed in sub-paragraphs (a) to (c) of the article, and describe the language of Article 38 "… as essential in principle and see no great difficulty in seeing a subsidiary means for the determination of rules of law as being a source of the law, not merely by analogy but directly…."[24] The second, and perhaps more prominent approach, asserts that the article establishes two lists. Sub-paragraphs (a) to (c) provide the "formal sources from which legally valid rules of international law may emerge,"[25] while sub-paragraph (d) is said to provide alternative or additional means by which the existing "rules of law may be determined."[26] In other words, the subsidiary means are seen as solely a vehicle for the determination or ascertainment of the existence or content of the sources rather than themselves being sources as such. The opportunity to study this matter might enable the Commission to clarify the existing legal situation based on practice and to offer guidance on the status and use of subsidiary means across different areas of international law.

14. Furthermore, within the discussion of the wide category of "judicial decisions," there are questions concerning the status of decisions of *national* courts and tribunals in contrast to the decisions of *international* courts and tribunals.[27] While judicial decisions cannot in and of themselves be sources of law, the findings of judicial bodies when interpreting and applying treaties, custom and general principles of law determining rules of international law can identify binding legal obligations for States, international organizations and other bodies.

15. As regards the relationship of subsidiary means to the different sources of international law, judicial decisions seem to play different roles, sometimes clarifying general treaty rules or purposively interpreting them to apply to new situations that might not have been previously contemplated.[28] In this regard, the ICJ, as the principal judicial organ of the United Nations, has through its judgments made substantial contributions to

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[24] Robert Y. Jennings, *International Lawyers and the Progressive Development of International Law*, *in* Theory of International Law at the Threshold of the 21st Century, 413-24 (J. Makarczyk ed., 1996).

[25] Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 Eur. J. Int'l L. 649, 652 (2013); O. J. Lissitzyn, *Reviewed Work: International Law. Vol. 1 (3rd ed.): International Law as Applied by International Courts and Tribunals by Georg Schwarzenberger*, 53 Am. J. Int'l. L. 197 (1959).

[26] *Id.* at 653 (citing Schwarzenberger).

[27] *See* Sienho Yee, *Article 37 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases*, 7 J. Int. Disp. Settlement 472 (2016).

[28] *See* Int'l Ct. of Justice, Handbook of the International Court of Justice, at 98-100, U.N. Sales No. 1055 (2016), available at https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf (last accessed July 27, 2021)(Indeed, as far back as 1949, the ICJ recognized such a "new situation" in relation to the UN Charter in its *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949)("The Court is here faced with a new situation. The questions to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law.")(Since then, in many decisions, the ICJ has expressly recognized the evolution of international law. It has stressed the importance of such evolution to the determination of the law applicable to the case in question.).

the development of various fields of international law, inter alia, on the law governing the use of force, law of the sea, maritime boundary delimitation, State responsibility, law of treaties, consular relations, asylum, international environmental law, decolonization, self-determination, etc. The Court, in turn, often applies the substantive rules elucidated in its prior decisions. In the process of doing so, by fiat of its judicial decisions explicating rules of international law, it also makes contributions to the consolidation if not the development of international law.[29]

16. Regarding customary international law, as explained in the Memorandum prepared by the Secretariat of the Commission in the topic "Identification of customary international law," "decisions of national courts have two general functions in the determination of customary international law."[30] One function they serve is as evidence of State practice. Another is as an aid to the determination of rules of law. This duality was recognized in the Commission's final conclusions on identification of customary international law.[31] Accordingly, building on that prior work and the ongoing work on general principles of law, it might be beneficial for the analysis under this topic to consider the role that judicial decisions of both national and international courts play in the interpretation and application of international law rules articulated in treaties, custom and general principles of law as envisioned by Article 38.

17. Article 38 of the ICJ Statute did not, of course, develop in a vacuum. Writing in 1908, Oppenheim provided an insight into the state of affairs prior to the drafting of Article 38:

> Apart from the International Prize Court agreed upon by the Second Hague Peace Conference but not yet established, there are no international courts in existence which can define these customary rules and apply them authoritatively to cases which themselves become precedents binding upon inferior courts. The writers on international law, and in especial the authors of treatises, have in a sense to take the place of the judges and have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognised usage has now ripened into a custom, and the like . . . . It is for this reason that textbooks of international law have so much more importance for the application of law than text-books of other branches of the law.[32]

18. Current Article 38(1)(d) is based on the Permanent Court of International Justice (PCIJ) Statute. The 1920 Advisory Committee of Jurists, specifically President Descamps, proposed a text which read: international jurisprudence as a means for the application and

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[29] *See* Int'l Ct. of Justice, Handbook of the International Court of Justice, at 77, U.N. Sales No. 1055 (2016), available at https://www.icj-cij.org/files/publications/handbook-of-the-court-en.pdf (last accessed July 27, 2021)(Concluding that "A judgment of the Court does not simply decide a particular dispute, but inevitably also contributes to the development of international law. Fully aware of this, the Court takes account of these two objectives in preparing and drafting its judgments.").

[30] U.N. Secretariat, Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law, Memorandum by the Secretariat, Int'l Law Comm'n, U.N. Doc. A/CN.4/691 (Feb. 9, 2016).

[31] *See, for instance*, Int'l Law Comm'n, Rep. on the Work of its Seventieth session, U.N. Doc. A/73/10 at 120-21 (2018)(Conclusions 6, 10, 13 and 14)(Encompassing, in some of these instances, both judicial decisions of national courts and the teachings of publicists).

[32] Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 Eur. J. Int'l L. 649, 659 (2013); *See also* L F. L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 Am. J. Int'l L. 313 (1908).

development of law.[33] This faced some opposition. In subsequent debates, President Descamps stated that "[d]octrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should only serve as elucidation."[34] The initial Descamps proposal was not adopted. During subsequent discussions, Mr. Root and Mr. Phillimore submitted an alternative draft.[35] "Faced with continued opposition, Descamps [] suggested . . . the following wording: '[t]he Court shall take into consideration judicial decisions and the teachings of the most highly qualified publicists of the various nations as a subsidiary means for the determination of rules of law'."[36] Descamps himself also proposed adding "as subsidiary means for the determination of rules of law." This language was adopted without change.[37] Thus, as part of the proposed study, it is expected that a close review of the drafting history of the provision could prove useful to clarifying the intended role and current place of subsidiary means in the determination of rules of international law.

IV. Judicial decisions

19. The first paragraph of Article 38 of the ICJ Statute makes clear that "judicial decisions" are "subsidiary means for the determination of rules of law."[38] That said, as one commentator has argued, "[t]his formula underestimates the role of decisions of international courts in the norm creating process. Convincingly elaborated judgments often have a most important influence on the norm-generating process, even if in theory courts apply existing law and do not create new law."[39] In principle, of course, decisions of the ICJ carry no binding force, except between the parties, and even then, only in respect of that particular case (Article 59, ICJ Statute).[40] Thus, although there is no *stare decisis* before the Court similar to that found in Common Law legal systems, with a hierarchy of judicial precedents from higher courts being binding on lower courts, the ICJ does in practice rely on its own prior decisions. This enhances predictability and consistency in the application of international law. It also serves to advance legal security for States and international organizations. The Court departs from prior decisions only for serious reasons, and where it does so, it often provides the rationale for doing so.

20. At times, it can be challenging to determine how narrowly or broadly Article 38(1) is to be interpreted. The Court also naturally relies on the work of its predecessor, the PCIJ. The parties pleading before it do so as well. The parties and any interveners often also refer extensively to both judicial decisions and teachings or scholarly works. In the result, perhaps unsurprisingly, the Court also usually refers to the decisions of other international and national courts and tribunals. It has only, in a relatively small number of cases, cited the works of individual scholars in its main judgments though the work of expert bodies such as the Commission seem prominent when it is deciding cases or rendering advisory opinions.

21. The ICJ now increasingly refers to judicial decisions from other courts in a pattern that could only be expected to increase as international law becomes more specialized.

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[33] *Id.* at 651.

[34] *Id.* at 652.

[35] Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 Eur. J. Int'l L. 649, 652 (2013).

[36] *Id.*

[37] *Id*.

[38] Statute of the International Court of Justice art. 38 ¶ 1(d), U.N. Charter, Annex I, at 21–30 (1945).

[39] Rudolf Bernhardt, *Custom and Treaty in the Law of the Sea*, in Recueil Des Cours: Collected Courses of the Hague Acad. of Int'l L. (Vol. 205), 247–330 (1987).

[40] Statute of the International Court of Justice art. 59, U.N. Charter, Annex I, at 21–30 (1945).

For example, it has cited the International Tribunal for the Law of the Sea,[41] the Central American Court of Justice,[42] the Court of Justice of the European Communities[43] (now Court of Justice of the European Union), some arbitral awards,[44] and to regional human rights bodies, such as the Inter-American Court of Human Rights,[45] the European Court of Human Rights,[46] and the African Commission on Human and Peoples' Rights.[47] In relation to the latter, in its 2010 *Diallo* judgment,[48] the ICJ referred to the African Commission on Human and Peoples' Rights interpretation of article 12(4) of the African Charter on Human and People's Rights. The Court stated:

> [w]hen the court is called upon […] to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question.[49]

22. Furthermore, the ICJ has frequently referred to the work of specialized tribunals, including the International Criminal Tribunal for the former Yugoslavia[50] (ICTY) and the International Criminal Tribunal for Rwanda[51] (ICTR) on issues of international criminal and international humanitarian law. In some cases, as those cited in the preceding paragraph, it has given a measure of deference to rulings of specialized courts. Similarly, given that every field of international law is part of a wider international legal system, for their part, those tribunals also often refer to the ICJ for authoritative guidance on the status of international law on key issues alongside the sources mentioned in Article 38.

23. The practice of specialized and national courts in following the rulings of the ICJ on matters of general international law could also be interesting to examine as part of

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[41] *See* Territorial and Maritime Dispute (*Nicar. v. Col.*), Judgment, 2012 I.C.J. Rep. 624, 666 ¶ 114 (Nov. 19).

[42] *See* Land, Island and Maritime Frontier Dispute (*El Sal. v. Hond.*: Nicar. intervening), Judgment, 1992 I.C.J. Rep. 351, 599 ¶ 401 (Sept. 11)(Referring to the judgment in *El Sal. v. Nicar.* AJIL 674 (CACJ 1917)).

[43] *See* Application of the Interim Accord of 13 September 1995 (*The former Yugoslav Rep. of Maced. v. Greece*), Judgment, 2011 I.C.J. Rep. 644, 678-79 ¶ 109 (Dec. 5).

[44] *See* Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicar. v. Hond.*), Judgment, 2007 I.C.J. Rep. 659, 701 ¶ 133 (Oct. 8)(Referring to the award rendered on Mar. 24, 1922 by the Swiss Federal Council in Frontier Dispute between Colombia and Venezuela, I R.I.A.A. 223 (1922))(In the same case and just one paragraph later, the Court also referred to the award rendered on Jan. 23, 1933 by the Special Boundary Tribunal in Honduras Borders (*Guat. v. Hond.*), II RIAA 1325 (1949)).

[45] *See* Case Concerning Ahmadou Sadio Diallo (*Rep. of Guinea v. Dem. Rep. Congo*), Compensation, 2012 ICJ Rep. 324, 331 ¶ 13 (June 19).

[46] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. Rep. 43, 92 ¶ 119 (Feb. 26); Case Concerning Ahmadou Sadio Diallo (*Rep. of Guinea v. Dem. Rep. Congo*), Compensation, 2012 I.C.J. Rep. 324, 331 ¶ 13 (June 19); Jurisdictional Immunities of the State (*Ger. v. It.*: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, 132 ¶ 72 (Feb. 3).

[47] *See* Ahmadou Sadio Diallo (*Rep. of Guinea v. Dem. Rep. Congo*), Merits, Judgment, 2010 I.C.J. Rep. 639, 663-64 ¶ 66-67 (Nov. 30).

[48] *Id.* at 664 ¶ 67.

[49] *Id.*; *See also* Mads Andenas and Johann R. Leiss, *The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute*, 77 Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 907–972 (2017) for a thorough discussion of article 38 and the ICJ approach to judicial decisions.

[50] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. and Montenegro*), Judgment, 2007 I.C.J. Rep. 43, 130 ¶ 212 (Feb. 26).

[51] *Id.* at 126 ¶ 198.

what is often referred to as judicial dialogue between different courts and tribunals.[52] For example, the ICTY has referred to such subsidiary means as envisioned by Article 38(1)(d) of the ICJ Statute. To illustrate, in Kupreškić et al., the ICTY Trial Chamber stated that "[b]eing international in nature . . ., the Tribunal [could not] but rely upon the well-established sources of international law and, within this framework, upon judicial decisions."[53] Regarding the value that should be given to such decisions, the Trial Chamber held the view that they "should only be used as a 'subsidiary means for the determination of rules of law'".[54] The Tribunal further clarified that "judicial precedent is not a distinct source of law in international criminal adjudication."[55] Relatedly, Article 20(3) of the Statute of the Special Court for Sierra Leone (SCSL) specifies that "[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the [ICTY and ICTR]."[56] However, the SCSL underscored that this provision does not imply that the decisions of those international tribunals constitute direct sources or are binding on the SCSL.[57]

24. A similar position can be seen at the International Criminal Court (ICC) whose body of applicable law in Article 21[58] of the Rome Statute mirrors, to a great extent, the sources listed in Article 38 of the ICJ Statute. In addition to applying its own statute as well as applicable treaties and other principles and rules of international law as well as general principles derived from the national laws of legal systems of the world, including the laws of States that would normally exercise jurisdiction over the various crimes within its jurisdiction, the ICC may apply principles and rules of law as interpreted in its previous decisions.

25. While the question of the place of judicial decisions, including those from other courts and tribunals would depend on the relevant constitutive statutes or instruments of those tribunals and even their jurisprudence, a wide variety of practice can be found in the use of judicial decisions to ascertain the applicable rules of law to apply in a given case as subsidiary means for the determination of the law. This begs the question: what is a "judicial decision"? Moreover, the phrase "judicial decisions" in Article 38(1) of the

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[52] See, for example, scholarly analysis of judicial dialogue in the field of human rights law in *Special Issue: Judicial Dialogue in Human Rights*, edited by Elżbieta Karska and Karol Karski, 21 Int'l Com. L. Rev. 5 (2019).

[53] Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 Eur. J. Int'l L. 649, 653 (2013); *See also* L. F. L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 Am. J. Int'l L. 313 (1908).

[54] *Id.*

[55] Aldo Z. Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 Eur. J. Int'l L. 649, 653 (2013).

[56] Statute of the Special Court for Sierra Leone art. 20 ¶ 3, Jan. 16, 2002, 2178 U.N.T.S. 145.

[57] *See Prosecutor v. Issa Hassan Sesay et. al*., Case No. SCSL-04-15-T, Trial Court Judgment, at 295 (Mar. 2, 2009); For commentary on the jurisprudential contributions to international criminal law by the Special Court for Sierra Leone, *see* Charles C. Jalloh, The Legal Legacy of the Special Court for Sierra Leone (Cambridge Univ. Press, 2020); Charles C. Jalloh (ed.), The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law (Cambridge Univ. Press, 2014); Symposium, *The Legal Legacy of the Special Court for Sierra Leone*, 15 FIU L. Rev. 1 (2021); Charles C. Jalloh, *The Continued Relevance of the Contributions of the Sierra Leone Tribunal to International Criminal Law*, 15 FIU L. Rev. 1, 1-13 (2021); Charles C. Jalloh, *Closing Reflections on the Contributions on the SCSL's Legal Legacy*, 15 FIU L. Rev. 1, 91-95 (2021).

[58] For excellent commentary, see Margaret M. deGuzman, "Article 21", in O. Triffterer and K. Ambos, eds., Rome Statute of the International Criminal Court: A Commentary (3rd ed., Munich and Oxford, C. H. Beck, Hart, Nomos, 2016) 932–948.

ICJ Statute was not qualified by the words "international" or "national", and for that matter, "regional". This appears to suggest that a more comprehensive understanding of "judicial" and "decisions" may be required.

26. Questions also persist regarding the relevance and weight of decisions of national courts, as opposed to international courts, as well as those of regional judicial courts and quasi-judicial tribunals in the determination of the rules of *international* law in the context of sources. Legitimate questions can also be asked whether, in the context of determining specific rules, the works of specialized ad hoc panels or arbitrators established by one or two disputing parties ought to carry the same weight as decisions of judicial bodies established by international or regional courts created by States especially those of a universal or quasi universal character. This is particularly so in areas such as international investment law or where the decision of such arbitral bodies departs from existing rules of international law.

27. In some instances, concerns have also arisen that different international courts and tribunals might concurrently address the same dispute, or might reach conflicting conclusions with respect to the same international rule, leading to questions as to their respective institutional competences and their hierarchical relations *inter se*.[59] While those concerns and questions may be of some importance, they fall outside the scope of the present topic.

28. Against this wider backdrop, it should be possible to determine a methodology that can assist in ascertaining the value and weight to be given to judicial decisions as subsidiary means for determination of the applicable rules of international law. This could enable the Commission to set out a consistent approach that could be useful to States, international organizations, courts and tribunals, as well as legal scholars and practitioners of international law.

V. The teachings of the most highly qualified publicists

29. The second prong of Article 38, paragraph 1(d), of the ICJ Statute affirms that "the teachings of the most highly qualified publicists of the various nations" are also "subsidiary means for the determination of rules of law." True, as a historical matter, the work of the most well-known scholars was of greater importance in the clarification of the applicable rules of international law.[60] This stature appears to have somewhat diminished, no doubt in part, because States have increasingly regulated matters using international conventions, and where such may not exist or prove to be insufficient, may themselves resort to customary international law and general principles of law although the process of determining the existence and content of the applicable rules from those sources also usually benefit from consulting scholarly works. Courts and tribunals, independently of "the teachings" of "the most highly qualified publicists," can also access with electronic means the extensive body of State practice through digests and other credible sources compiling such information. This appears to thereby limit the need for reliance on the work of "publicists."

[59] Concerns about fragmentation and regime conflicts have also led to debates about the unity, coherence and legitimacy of international law. *See, in this regard,* [2006] 2 Y.B. Int'l L. Comm'n 1, at 177-84, U.N. Doc. A/CN.4/SER.A/2006/Add.1; Rep. of the Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion Of International Law*, U.N. Doc. A/CN.4.L.682 at 13–14 ¶ 13 (Apr. 13, 2006).

[60] *See* Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 Int'l & Comp. L. Q.1 (2017); *See also* Sondre T. Helmersen, *Scholarly Judicial Dialogue in International Law*, 16 L. & Pract. of Int'l Cts. & Trib. 464 (2017).

30. Different courts and legal systems at the national and international levels take different approaches to the teachings of publicists or doctrine in the context of determination of rules of law whether national or international in nature. Whereas the teachings of publicists are only somewhat present in the judgements of the ICJ, with a relatively small number of main judgments referring to them, scholarly works are quite prominent in the separate opinions of individual judges as well as in the rulings and judgments of numerous other international courts and tribunals. They are also common in decisions of regional and other international tribunals. These include, out of many possible examples, the African Court of Human and Peoples' Rights, the European Court of Human Rights, the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights as well as the International Criminal Tribunals including the International Criminal Court as well as others such as the World Trade Organization. Some courts and tribunals at the municipal and international levels even frequently receive, or invite, the views of scholars acting as *amicus curiae* on specific legal issues.

31. If the works of individual scholars or publicists carry some weight, at least as an aid to interpretation, it appears that those originating from groups of scholars and certain expert bodies could be seen as even more authoritative. A threshold question would be whether the collective works of experts can be seen as forming part of the teachings of publicists. Furthermore, and if so, a distinction might also need to be drawn between the outcomes of the work of purely *private* expert bodies and those expert bodies created by States or international organizations. The pronouncements of groups of international lawyers, engaged in scientifically assessing the status of the law such as codification or progressive development, could certainly prove useful and influential. They could thus fall within the category of "teachings." Examples of such expert groups would include both ad hoc and permanent groups such as the Harvard Research in International Law (1929–1932), the *Institut de Droit International* and the International Law Association. All these private bodies, at different times in history, have made useful contributions to the clarification and advancement of certain areas of international law.

32. State created bodies, for example those established by and tasked with specific roles under a treaty such as the Human Rights Committee, the Committee against Torture and the International Committee of the Red Cross may carry, depending on the issue, some authority in the determinations of the applicable rules of international law. At least in so far as it concerns interpretations of legal areas within their areas of competence. Similarly, the works of legal or regional codification bodies such as that of the Asian-African Legal Consultative Organization, the African Union Commission on International Law, the Council of Europe Committee of Legal Advisers of Public International Law, the Inter-American Juridical Committee, being linked to States or State created organizations, albeit at the regional level, may also hold a similar place. The Commission's prior work has acknowledged this in the context of, for example, the draft conclusions addressing the pronouncement of expert bodies in the topic subsequent agreements and subsequent practice in relation to the interpretation of treaties.[61] A further examination in relation to Article 38(1) would therefore seem to be warranted.

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[61] Int'l Law Comm'n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10 at 113 ¶ 18 (2018)("An agreement of all the parties to a treaty, or even only a large part of them, regarding the interpretation that is articulated in a pronouncement is often only conceivable if the absence of objections could be taken as agreement by State parties that have remained silent. Draft conclusion 10, paragraph 2, provides, as a general rule: 'Silence on the part of one or more parties can constitute acceptance of the subsequent practice when the circumstances call for some reaction.' Paragraph 3, second sentence, does not purport to recognize an exception to this general rule, but rather intends to specify and apply this rule to the typical cases of pronouncements of expert bodies."); *See also* Georg Nolte (Special Rapporteur for subsequent practice in relation to

33. In a similar vein, consideration *could* be given to the work of the Commission in the discharge of its unique General Assembly mandate to assist States with the promotion of the progressive development of international law and its codification under Article 13 of the Charter of the United Nations. Indeed, the Commission and its special rapporteurs and members, not only refer extensively to judicial decisions, they also routinely refer to the "teachings" of scholars. This includes in their reports and commentaries to adopted articles, principles and guidelines, as well as during plenary debates and drafting committees. The Commission, under its Statute, may even enjoy closer relations with such authorities as it can also formally consult with "scientific institutions and individual experts" (Article 16). It is furthermore expressly required to present its draft articles to the General Assembly accompanied by "adequate presentations of precedents, and other relevant data, including treaties, *judicial decisions* and *doctrine*." (Article 20(a)).

34. With regard to codification, as it evaluates State practice, the Commission could request from governments "laws, decrees, *judicial decisions*…" (Article 19(2)). Similarly, in identifying the ways and means of making the evidence of customary international law more readily available, the Commission is to have due regard to collections and publications of "documents concerning State practice and the *decisions of national and international courts* on questions of international law" (Article 24). These statutory provisions appear to demonstrate the relevance of those decisions, not just for judicial bodies, but also for international legal expert bodies that assist with the codification and progressive development of international law. That said, the Commission has, quite understandably, refrained from claiming a special status or authority for its own work even though some courts and some academics tend to ascribe a measure of authority to it.

35. In the end, though pervasive in national and international courts and the work of experts and the Commission at least as aids to interpretation of the law, the works of individual legal experts, groups of legal experts and other learned bodies has attracted more limited attention as subsidiary means for the determination of rules of international law. Nonetheless, as stated by the United States Supreme Court in the *Paquete Habana* Case, "such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[62] The quality, objectivity and thoroughness of the work is therefore vital to its authoritativeness. Questions of how to assess the influence of scholars and their works through empirical and or other approaches could be of interest.

36. Interestingly, since the *Paquete Habana* decision in 1900, there does not appear to have been many attempts to systematize the category of "judicial decisions" and the "teachings of the most highly qualified publicists." Ultimately, perhaps due to the nature of the topic, it remains inconsistent how judicial decisions and the teachings of the most highly qualified publicists of the various nations are methodologically assessed and weight assigned to them in the determination of the applicable rules of law. Questions may also exist, in a multicultural and pluralistic world, how the language of international law is used to ensure the construction of understandings of international law by publicists can be truly representative of a universal system of international law.

VI. Scope of the topic and potential issues to be addressed

37. Taking the foregoing into account, it is proposed that the Commission study could cover some underlying issues regarding Article 38(1)(d), to determine how "subsidiary

treaty interpretation), *Fourth report on subsequent agreements and subsequent practice in relation to treaty interpretation*, U.N. Doc. A/CN.4/694 (Mar. 7, 2016).

[62] *The Paquete Habana*, 175 U.S. 677, 20 S. Ct. 290 (1900), 686–700.

means" have been used by States, by international courts and tribunals, and by international organizations as well as by private and governmental expert bodies and scholars in the process of determining the applicable rules of (international) law.

38. Without excluding other questions, or aspects which may arise in the course of the topic, it can be suggested that the Commission could in the main analyze the following topics:

(i) Description of the topic, aims, methodology.

(ii) The nature and scope of subsidiary means for determination of rules of law:

(a) The origins of subsidiary means, including drafting history during the establishment of the Permanent Court of International Justice, and the functional role played in different areas of international law such as international human rights law, international criminal law, international economic law, etc.;

(b) Scope and terminology regarding "subsidiary means", including the meaning of "subsidiary", "means", "judicial" "decisions", "determination", "rules of law", "teachings", "most highly qualified", "publicists", and "various nations";

(c) The status and use of subsidiary means by States, in particular in international adjudication, as well as eventually in judicial decisions and in the writings of publicists, as evidence of international law;

(d) The functions and relationship between the subsidiary means for the determination of rules of law, including in national and international courts and differences in that regard, if any, between various legal systems;

(iii) The relationship of subsidiary means with the sources of international law: i.e. treaties, custom and general principles of law;

(iv) The various methods of ascertaining the weight and value assigned to judicial decisions and the weight of teachings of the publicists of the various nations as subsidiary means for determining the rules of law and the difference between the weight assigned to the works of individual scholars versus groups of scholars and official or other expert bodies including as between various legal systems;

(v) Bibliography containing multilingual list of works on subsidiary means under Article 38(1)(d) collected in the course of the study and invited from States;

(vi) Potential outcomes of the study (conclusions); and

(vii) Any other/miscellaneous issues.

VII. Proposed method of work on the topic

39. The method of work on the topic will rely on both primary and secondary materials and literature on the topic. Primarily, the work will be guided by the extensive State practice, treaties, other international instruments, judicial decisions from relevant national, regional and international courts as well as national laws, decrees and other documents. Scholarly works, including those of individual experts and those of expert bodies and relevant international organizations will also be taken into account. This is particularly so given the nature of the present topic and the letter and spirit of Article 38(1)(d).

VIII. Conclusion

40. Overall, it appears that judicial decisions and the teachings of the most highly qualified publicists are a form of evidence of international law and are routinely referred to by international and national courts and tribunals. By their express terms, they are only "subsidiary means" for the "determination" of the rules of law. Nonetheless, in the face of confusion and divergent judicial approaches in national and international courts and tribunals, there appears to be room for greater clarity regarding which judicial decisions and teachings are included and their potential legal and other effects in the system of modern international law. Against that backdrop, a comprehensive study of Article 38(1)(d) could help complement the Commission's primary work on the identification of rules of international law and recent topics it has undertaken in this significant area of general international law. In so doing, the Commission could significantly contribute to the codification and progressive development of international law in relation to the classical topic of sources of international law.

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