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Sir Franklin Berman

Authority in International Law

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Authority in International Law

Sir Franklin Berman¹

Thomas Franck Lecture at Humboldt-Universität zu Berlin, 25 June 2018

Abstract:

The author discusses the question of authority when determining the content of an international legal rule. Taking Article 38(1)(d) of the ICJ Statute as a point of departure, he determines through meticulous analysis what ranks as judicial decisions as well as teachings within the meaning of the norm. The author then proceeds to a number of factors to determine authoritativeness: objectivity, knowledgeability, depth of analysis, and the presence or otherwise of reasoning and, in particular, the persuasiveness of an opinion. In the case of judicial pronouncements, the author points out that the paradox between Article 59 and Article 38(1)(d) of the ICJ Statute is only an apparent one. While judgments of the Court are binding only between the parties, it is merely the underlying reasoning that can be taken into account in the context of Article 38(1)(d) if considered persuasive. Without central authority, authoritativeness in international law must always be earned which is also the reason for the lack of an hierarchical order between as well as within judicial pronouncements and learned writings though the former are usually more likely to fulfil the criteria of authoritativeness. In both cases, however, previously acquired reputation of a court or even an individual judge as well as of a learned writer can create a presumption of authoritativeness. On a more general level, the author concludes with a call for a more careful differentiation between the determination of law and its application. Putting the issue discussed into perspective, the author argues that situations of law determination arise, contrary to common understanding, in fact far less often than situations of law application.

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It is a privilege for me to give this lecture in Berlin, a city which has meant much to my family and me over the years. I pay tribute to the initiative of those who conceived and carried forward this imaginative research project on the future of the international rule of law. I am honoured also to be delivering a lecture carrying the name of Tom Franck, whom I counted as a friend, and greatly respected as a legal thinker.

My title – *Authority in International Law* – does not speak for itself, so it would be best for me to begin with some explanation of what I have in mind.

Some years ago, that revered British international lawyer, Sir Robert Jennings, now sadly deceased, published the text of a lecture under the incomparable title, *What is international law, and how do we tell it when we see it?* My aim is more modest than Sir Robert's. I want us to assume the existence of international law. And to assume further that we know that there is a rule (or rules) of international law that apply to a specific question before us. My question is then, granted those assumptions, how do we determine what the content of that rule (or those rules) is? It is, in other words, not a first-order question like Sir Robert's, but a consequential question of the second order.

But the fact that it this is a second-order question does not make it any the less important. A vast amount of the literature, not only in the field of international law itself, but also in the fields of politics and international relations, is devoted to the question how, in the special and obviously very distinctive circumstances of the international system, law gets created in the first place. The contrast is drawn with the ordered and regulated modes of law-creation within national constitutional and legal systems, usually by action of the legislature, though sometimes of the executive. That enquiry into how law gets made is an essential core component of the Rule of Law. How can one, in any rationally defensible sense, talk about the Rule of Law without there being definite criteria for determining the coming-into-being or the existence of "law" in the first place? My other revered countryman, Lord Bingham, formulated Eight Principles to describe what the Rule of Law means, and the very first of them was "The law must be accessible, clear & predictable". Though he did, with cautious shrewdness, add the qualification "so far as possible", and he added also, along with the requirements of clarity and predictability, the further characteristic of intelligibility.

It follows from this, that those of us who are concerned with international law, with its future, and with the role that it can or should play, should be just as concerned about the processes by which the content of any individual rule of international law is authoritatively determined in its application to a particular set of circumstances, as we are by the methods and means by which the law is created.

By this roundabout route then, I have finally arrived at what I mean, in the title of this lecture, by "authority". We cannot, after all, justifiably talk about the cardinal importance of the law applying impartially and equally to everyone, or of the imperative requirement that disputes over competing claims of right or obligation being settled by law, unless we presuppose the availability of the authoritative establishment of what that "law" is, for the particular case. And that is the nature of the "authority" that I have in mind.

Before I launch into that theme, though, I ought to register one important distinction at the outset. This is the distinction between two processes: the process by which a specific rule of international

law comes into being, comes into existence (in other words, the first-order question, the question of law-creation), and the process by which the meaning and content of that rule is ascertained for its particular application (the second-order question with which I am concerned this evening).

When the International Law Commission of the United Nations set about, under the guidance of my distinguished successor, Sir Michael Wood, to study the topic *Identification of Customary International Law*, Sir Michael put the project in terms of the "formation and evidence" of rules of customary international law.² In his Second Report, he states the objective as being "to offer practical guidance to those, in whatever capacity, called upon to identify rules of customary international law, in particular those who are not necessarily specialists in the general field of public international law." The draft Conclusions adopted by the Commission in 2016, and submitted to the General Assembly, put the Commission's concern as the way in which the "existence and content" of rules of customary international law are to be determined. But in truth the Conclusions that follow, and the Commission's Commentaries on them,³ focus almost exclusively on the question of identifying whether a customary rule has come into existence, and hardly at all on the ascertainment of the content of an already established rule, i.e. our second-order question for this evening. This is not intended as a criticism, merely a recognition of some of the analytical intricacies of our important and demanding discipline.⁴

With that by way of introduction, let me home in on the question of authority. A good place to begin is with what we can treat as our foundational text, Article 38 of the Statute of the International Court of Justice. Although this provision is, in terms, no more than a direction to a specific court as to what law it is to apply, case by case, to individual disputes that come before it, it rapidly mutated, by general acceptance, into the core foundational text on the sources of international law. This marches in parallel with the clear signal given by the drafters of the new ICJ Statute, when they added to the old version of Article 38 the lapidary statement at the head of its first paragraph, that the function of the Court is "to decide in accordance with international law" such disputes as are submitted to it. And, to one's slight surprise, despite the many and varied problems residing in the way in which the provision was drafted in both its old and new versions, the terms of the Article have been very much more commented on in the literature than in the actual judgments of the ICJ itself. We have simply become habituated to the idea that international law consists of treaties and custom, supplemented where necessary by little touch of general principles of law, and have devoted the main part of our attention to working out the relationship between them – itself not an easy task – without too much regard to what implications might lie in the particular way in which Article 38 was phrased.

To say that the sources of international law are treaties and custom, supplemented by general principles, inevitably leaves at large the question of discerning the substantive content of the applicable law falling within those categories. But it also seems to mark the transition between the first three and the fourth sub-paragraphs of Article 38(1).

² First report of the Special Rapporteur, Sir Michael Wood (65th session of the ILC (2013)); see now the final version of the ILC Study, Yearbook of the International Law Commission, 2018, vol. II, Part Two.

³ UN Document A/71/10 (2016).

⁴ An earlier, influential study by the International Law Association focussed expressly on the "formation" of customary (general) international law (ILA 2000).

Sub-paragraphs (a)-(c) clearly specify sources of law, two of them primary, one supplementary. Sub-paragraph (d), however, does something different. It reads as follows (although still under the general rubric of what the Court "shall apply"):

subject to the provisions of Article 59, 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.

Almost every word in this mysterious text calls for exegesis, but let us begin by asking what the negotiators might have had in their minds first in 1920 and later in 1945, when putting the provision together and then re-enacting it substantially unchanged for the transition from the Permanent Court of International Justice (PCIJ) to the present ICJ.

We might start with the fact that there had been some argument, when the PCIJ was being designed, over whether its Statute should include any listing of sources at all. Such precedent as there was with the Central American Court of Justice and the International Prize Court, neither of which had flourished, was thin and uninformative. On one side, it was argued that, in the absence of a codification of international law, it would be better to leave to the judges themselves the determination of the applicable law. Others took the view that, the institution of international jurisdiction still being in its infancy, States could not be expected to commit themselves to its exercise without some precision over the law that would be applied to regulate their disputes. One may well feel that the second approach was more practically realistic than the first. But those who favoured it tended also to want the enumeration of sources to stick to positive law, in other words treaty and custom, and nothing more.

The viewpoint that eventually won the day was close to that of Baron Descamps, the President of the Advisory Committee of Jurists, who had launched the discussion by proposing a four-point listing essentially similar to what emerged as the final text of Article 38.⁵ The positivists gave way to the argument that, precisely because there had been no general codification, it might be fatal to the whole project of a permanent judicial institution, and to the development of international law itself, if the way was left open to the Court to pronounce a non liquet on the ground that there was no applicable rule of positive law. Drafting amendments aside, the only substantial change made to the resulting text was the suppression of the hierarchy which Descamps had proposed in the order of application of the various sources listed; that was however done not by the experts themselves, but only at the level of the final debates within the League of Nations on the adoption of the Statute.

A quarter of a century later, the prevailing mood at the San Francisco Conference on the UN Charter can be summed up by the lapidary remark in the report of the Inter-Allied Committee:

The law to be applied by the Court is set out in Article 38 of the Statute, and, although the wording of this provision is open to certain criticisms, it has worked well in practice and its retention is recommended.

⁵ Though, surprisingly, the reference to expert literature in the fourth point was not in Descamps' original text, but came from a proposal by Root and Phillimore, the two leading common lawyers in the Advisory Committee, to include "the opinions of writers".

In reality, to say it "worked well" could have been written in less absolute terms as "it had worked well enough", that is to say that, despite its faults, the provision had given rise to no insuperable difficulty; though, as we shall see, the reason for that could equally have been found in the very small degree of attention that had actually been paid to Article 38 by the PCIJ in its judicial activity overall.

In the event, then, the only addition made to the article at San Francisco was, as we have seen, the introductory phrase describing the ICJ's function as "to decide, in accordance with international law, such disputes as are submitted to it."

The general tenor of this two-stage debate gives us very little to go on in trying to discover what the drafters and negotiators had in their mind as the substantive content of Article 38(1)(d) other than that it was there – like the previous sub-paragraph on general principles of law – as a means to forestall, when it came to individual cases, the argument that there could be no judicial decision on the dispute because there was no – or not sufficient – definite law available to resolve it. At least it is clear, though, that the provision was seen as a method or means to identify what the substantive law was, but not of creating it.

That would seem to fit in accurately with the terms of Article 38(1)(d) itself. The Article does not, even while directing the ICJ to "apply" these dual streams of judicial decision and "teachings", posit them as sources of law. It describes them instead as to be applied "as subsidiary means for the determination of rules of law;" in the French text "comme moyen auxiliaire de détermination des règles de droit". Professor Pellet calls it a way to "elucidate" what the rules to be applied by the Court were. Citing in turn Manley Hudson, he takes the view that the French version dispels much of the difficulty in the text, because "auxiliaire" shows that it has in mind the confirmation of rules found to exist, but I am not so sure. What interests me less than the qualifying adjective is the noun it qualifies: "moyen", in the singular. To my mind, it is that which sends a clear signal that what is being prescribed is a technique, and moreover a technique for determination (not "confirmation") but not, by the same token, a process for law-creation.

That said, we have, as indicated, a dual stream: one channel is judicial decisions ("les décisions judiciaires" in the French), the other the "teachings" of the "most highly qualified publicists" ("la doctrine des publicistes les plus qualifiés"). And that leads us back immediately to the question of authority which I sought to isolate as I began: who are the judges on whose decisions this status is being conferred, and why? Who are the publicists whose views are being thus recognized, and why?

Before we get down to examining these questions more closely, two further linguistic particularities are worth noting. As before, this is not just for the pleasure of juggling with languages, great though that the pleasure is, but as a means of extracting the real flavour and substance of the legal text in front of us – in accordance with the best precepts of interpretation in international law.

The first is that this is one of those seemingly paradoxical cases in which the French text uses a definite article ("les décisions judiciaire(s)"), whereas the English does not ("judicial decisions"). Whenever that happens – and whether it is the French that has the definite article or the English – it is a sure indication of a subtlety of meaning which can easily be overlooked but should not be. Here it must be telling us that we are not looking for individual judicial decisions, nor for selected

or even numerically cumulated judicial decisions, but for some more general essence of judicial decision-making.

The second linguistic point relates to the "most highly qualified publicists", and it is that, this time, we have a noun appearing in the singular in the French text ("la doctrine") which seems more significantly indicative than the plural "teachings" which we find in the English language version. Once again, as the French text more clearly shows, this must be a signifier for something not disaggregated (as "teachings" in the plural might seem to imply), but rather a cumulated overall sense of the authoritative opinion on a particular subject.

If, then, we are to begin our search for which judges it is that the Statute wishes to recognize in this paragraph, we must go back to the rationale implicit in it, namely that the purpose is to elicit the overall sense of judicial decisions on a given subject. The reason for doing that is for the additional help it may offer in determining the content of a rule of international law which nevertheless has its legal basis in the main sources listed earlier, namely the twin pillars of treaty and custom, supplemented if necessary by general principles of law.

If you approach the matter in that way, two conclusions flow at once.

One is that this auxiliary or supplementary technique is not limited to customary international law, but can apply equally well to law arising from treaty. For example, a decision by one or more competent courts on whether a treaty has been validly ratified by sufficient parties to bring it into force despite the reservations formulated by some of them, or on whether it covers particular sets of circumstances, or whether it is breached by particular kinds of conduct in circumstances of a certain kind, or even whether its provisions stand in conflict with what might be considered a rule of jus cogens, a decision of that kind might very well be illuminating and influential in a subsequent authoritative determination of a comparable question. And this would be so whether the subsequent determination falls to be made by an international tribunal in a dispute validly before it, or even by an international organ for the purposes of carrying out its statutory functions, or by the competent organs of a State or group of States in order to formulate their position on the point in question and decide on that basis on their future conduct.

The second conclusion is that the particular status of the individual court in question does not matter all that much in and of itself. It might matter if the question had been whether that particular court's decision had determined an issue with such legal force that its decision ought to be given respect, or indeed that the earlier was required in law to be followed by a later court. But if, by contrast, what we are looking for is some sort of coincident trend, or overall body of decision-making by courts – what Pellet, in a crisp phrase, calls "jurisprudence, not particular decisions" – then the question naturally presents itself in a different way.

It is not, in other words, an issue of the effect on future cases of a particular court decision in a particular case, such as, for example, as the decisions of domestic courts that have given rise to a number of proceedings before the ICJ in recent years: like the judgments of the US courts in *La Grand* and *Avena*, about consular access in death penalty cases; of the Malaysian courts in *Cumaraswamy*, about the immunities of a UN special rapporteur; of the Italian courts in *Jurisdictional Immunities*, where State immunity was in question, or the series of recent cases about the exercise of Belgian or French criminal jurisdiction. In those cases, the issue itself was whether the exercise of the local jurisdictional power was internationally lawful, or whether it

engaged the international responsibility of the parent State. By definition, the local courts were either being reproached for having ignored a rule of international law or for having considered it but deciding it wrongly, with the result that their judgments, far from carrying nascent international authority, were themselves the very point of dispute.

Our question is therefore a different one. And, as I see it, it is not so much a question as to any innate authority residing in prior decisions, as one of their weight. There are various factors that enter into this weighing-up which I shall come to a little later. Before doing so, however, it might be of interest to look more closely into how the ICJ itself has handled the question of the authority of prior decisions – by which I mean, of course, its own decisions as well as those of its predecessor, the PCIJ, the decisions of other international tribunals, and, as appropriate, those of national courts.

Here we immediately encounter a paradox. Article 59 of the Statute lays down in express terms that a decision of the ICJ itself "has no binding force, except between the Parties and in respect of that particular case," and Article 38 makes an explicit cross-reference to that rule. And, if the "no-binding precedent" rule attaches itself to the ICJ's own judgments, it should in principle apply with even greater force to judicial decisions emanating from other courts and tribunals. Yet Article 38(1)(d) lays down in equally express terms that "judicial decisions" are a subsidiary means for the determination of rules of law, although it makes this "subject to" Article 59. Furthermore – and here comes the real paradox – the "judicial decisions" to which the ICJ has in fact paid the greatest and most regular attention over the years are indeed its own judgments, and those of the PCIJ (to which the Article 59 rule had also applied).

On digging a little deeper, though, the paradox can be seen to be apparent only.

There are wholly understandable judicial politics which might have led the new World Court consciously to decide to privilege its own prior decisions as a means of reinforcing its status and authority,⁶ but there are also, I think, reasons of substance. The one most commonly cited is the principle of consent on which the jurisdiction of international courts is founded, but (for reasons I cannot go into now) I think this is a red herring. More significant is the fact that, like any other court, the ICJ – at least when dealing with contentious cases – is responding to the actual case put before it by the parties, it is not pronouncing on some newly-minted construct put together by the Court itself. The maxim *jura novit curia* does not mean that an international court has discretionary freedom to base its decision on whatever legal analysis it chooses, whether or not that has been debated before it between the parties. That constraint can be seen to operate particularly strongly in arbitration, and an arbitral award could indeed find itself being formally challenged if the tribunal were to do so. But it applies before standing courts as well. And – quite naturally – parties arguing before the ICJ are very prone to cite back to its own previous judgments.

Nor, I think, is it simply the question of where to draw the line – where to draw the line, and how to draw the line. To be sure, the problem of drawing the line is very likely to have presented itself to the mind of jurists as subtle and worldly-wise as those elected to membership of the World Court.

⁶ Shahabuddeen, *Precedent in the World Court* (CUP 1996): "Obviously, and rightly, the court regards its own authority and that of its predecessor, as supreme in the field of international adjudication." (at p. 11). Though, in their earlier years, both PCIJ and ICJ cited arbitral authority more freely than later (cf. Pellet, 'Article 38' in *The Statute of the International Court of Justice, A Commentary* (2nd ed., OUP 2012) at para. 317).

A signal that the Court, in the exercise of its own functions, was attributing significant authority to the judicial decisions of other bodies would inevitably have encouraged States – or, latterly, their external counsel – to amass and cite more and more of those as well in argument before the Court. And then the question would have been: can we, as a court, fail to engage with this body of material adduced in front of us? But, if we do, how do we justifiably select that material amongst it which we find genuinely instructive, without courting the accusation of favouring some types of court and legal systems over others? Given that unspoken background, it is hardly surprising, once again, that an incipient, and then developing, world tribunal should take the cautious path, at least overtly, even while absorbing, inwardly, the value that could be drawn from other tribunals and their jurisprudence. This is entirely conjectural on my part, but, if it should hold some truth, it brings with it a loss: the loss of strangling at birth the kind of high-level judicial dialogue that has recently developed, in Europe, between the European Court of Human Rights and national courts and (to a lesser, and less satisfying extent) between that Court and the Court of Justice of the European Union.

Most recently, though, and under the impact of a steadily widening spectrum of standing international dispute-settlement arrangements in specialized fields, the position has begun to change. In the first place, there are some areas of rapidly developing international law in which it would be unthinkable for a litigating State, and possibly irresponsible so far as its counsel are concerned, not to cite to the ICJ the reasoned and considered decisions of other bodies in comparable cases. Obvious examples are the International Tribunal for the Law of the Sea (ITLOS) in respect of maritime rights and maritime delimitation; State-to-State arbitration tribunals in respect of environmental protection and also maritime delimitation; the World Trade Organization (WTO) in respect of trade; and no doubt also, judgments of the Ad Hoc War Crimes Tribunals and the International Criminal Court, where and if relevant. While there are also some areas in which the whole development of the law has been driven along by the decisions of national courts, such as, most strikingly, State immunity, and to a lesser extent environmental protection, these national court judgments are better classed as examples of State practice; and that is the way the ILC has treated them in its study on the formation of customary international law.

We have, in other words, reached a stage at which a "class distinction" has established itself, in that we now have a series of bodies, limited in number but authoritative in nature and operation, which have been established by States on the international plane, with the mandate to arrive at reasoned and binding decisions in particular, more or less specialized, fields, by processes of a very similar character to those employed by the ICJ itself. And we seem also to have reached a stage at which, quite naturally, those appearing before the ICJ to argue a case on behalf of a party State invoke the reasoned and binding decisions of those bodies as material to which the Court can, and should, accord weight in arriving at its own reasoned and binding decision. Moreover, as I shall argue in a moment, the practice of the Court has begun to adjust itself to this new situation. If so, then the paradox to which I referred begins to fade.

Before getting to that point, let me start by focusing attention on an important distinction. This is the distinction between what Article 59 refers to as "(t)he decision of the Court" and on the other hand the reasoning leading up to and sustaining that decision. So, when Article 59 limits the binding force of the "decision" to the Parties, and in respect of the particular case, it is saying nothing to limit or affect the precedential weight of the reasoning behind the decision. This is not, I hasten to say, a trick to smuggle in the differentiation which common lawyers make between ratio

decidendi and obiter dictum – and in fact to do so would be the diametric opposite of my present argument. It is rather an appeal to that familiar differentiation in civil law systems between "le dispositif" and "les motifs". This is a point that was made many years ago by Sir Eric Beckett in his Hague Lectures, and the distinction has become well established in the judicial practice of the ICJ. We grappled with it at length, for example, in arguing Cambodia's Application for Interpretation of the 1963 Judgment in the Temple Case. The issue was whether the Court's power of interpretation of an earlier Judgment could permit it to clarify one of the essential findings it had made on the way to the decision in that Judgment; and the Court had no difficulty of principle in placing on one side the supporting reasoning inextricably linked with the determinations in the operative clause, and on the other side the reasoning in the Judgment more generally.

The crux, therefore, when it comes to assessing the authoritative effect of judicial decisions in the "determination of rules of international law", is the difference between the binding verdict on the particular dispute between the parties, and the persuasive effect of the argument and analysis contained in the reasoning leading up to that decision; the first is embodied formally in the operative clauses found in standard form at the end of the Judgment, and on which the judges vote; the second has to be drawn out of a study of the Court's legal reasoning that precedes it. That distinction, I believe, both justifies and explains the ICJ's treatment of its own past Judgments, and also its developing practice in respect of the decisions of other international courts and tribunals.

An example I can offer is the very recent Judgment of the ICJ on compensation, in the Costa Rica-Nicaragua case about activities in the border area between the two States.⁷ The principal issue before the Court was how to assess the impairment or loss of certain environmental goods and services. The applicable legal principles, including the acceptability of monetary compensation in lieu of physical restoration on the ground, the essential nature of compensation as restitution not punishment, and indeed whether compensation could be claimed for environmental damage, were all derived by the Court from first principles, and reinforced with ample citation of its own Judgments going back to the classic statements of the PCIJ in the *Chorzów Factory* case. No reference of any kind was made to other judicial decisions, whether national or international. But, when it came to the application of those principles, including notably the valuation of material damage, the Court relied extensively on the approaches that had been adopted by the UN Compensation Commission and the UN Environmental Programme (UNEP). Both had been cited to it in argument by the parties.

Although not directly explicated as such by the Court, this practice seems to me exactly in line with the distinction I suggested a few moments ago, between the "decision" of the Court, as that should be understood under Article 59 of the Statute, and the line of reasoning supporting it, as well as the different kind of influence to be attributed to each of those. It also seems to me the only way in which we can reconcile what would otherwise be an impossible contradiction between the linked provisions of Articles 38 and 59, with Article 59 laying down that decisions, even those of the ICJ itself, cannot be binding precedents, but Article 38 admitting "judicial decisions" in general as subsidiary means for determining rules of law. It brings us face-to-face, moreover, with another distinction, that between the process of finding the law, that is to say, determining the relevant legal right or obligation, and the process of then applying the law so found to the facts and

⁷ Judgment of 2 February 2018.

circumstances of the particular case. This is a distinction that has preoccupied me a great deal of late, and I therefore intend to come back to it in the final stage of my argument.

This, then, is the heterogeneous collection of reasons serving to explain why the ICJ routinely cites its own past decisions but seldom refers to those of other courts or tribunals. But there is nothing in them which stands in the way (as I hope I have shown) of an appropriate use of the threads spun by courts and tribunals, both international and national, to weave into the process of ascertaining the content of the international law that should determine the resolution of a particular dispute. What matters ultimately is the quality of any prior decision, and in particular the logic and persuasiveness of the analysis and reasoning which went into it; and it is, at the same time, that very logic and persuasiveness that will have influenced, not only the reaction to the decision of the parties and the wider community, but also the reception of the decision by later courts and tribunals, which will in turn help to form a general corpus of common judicial decision as envisaged in Article 38. The process is not at all dissimilar to that taking place in the higher courts of my own country when counsel cite judicial decisions from other jurisdictions that are not binding, but are put to the court as persuasive authority; the court is entirely free to discard them, wholly or in part, or to follow them, at its discretion, and does so, not out of any sense of obligation, but according to whether they provide useful assistance in illuminating a rule or doctrine which is before it. And the criterion is always, alongside relevance, the quality of the analysis and the persuasiveness of the reasoning.

If it seems intuitively obvious that judicial decisions as a class should be given a certain formal status, though subject to the express reservations laid down in Articles 38 and 59, it is not so obvious why Article 38(1)(d) should have included within it a parallel reference to "the teachings of the most highly qualified publicists" with or without adding "of the various nations". At least, it is not so obvious to modern eyes. At the time of the founding of the League of Nations, international law was far more uncertain than it is today. General international conventions were far, far fewer in number; they were also more limited, and often more partial, in the fields they addressed, and dealt with those fields in far less detail. Customary international law was not readily ascertainable, and tended to be seen as concentrations of regulation in areas with intensive State practice, surrounded by large areas of vagueness and obscurity. Talk of there being an international legal system would have been met by the raising of a quizzical eyebrow. In those circumstances, it can well be understood, as I have already pointed out, that a central anxiety was to avoid placing the newly-created permanent judicial institution in a position where it might have to decline to give judgment on a dispute – and might perhaps end up declining with increasing frequency – because it could discover no established law on the basis of which it could decide: in other words, to wave requesting States away with nothing more than a *non liquet*.

It is in this historical context that the inclusion of this secondary source acquires its rationale. The negotiating history of the provision tells us little more, other than that some of the earlier drafts put to the Advisory Committee of Jurists had aimed to give the new World Court an overt law-making power when positive law was wanting. In that context, the appeal to both the published literature and to judicial decisions can be understood as the guidance the new Court was then to follow in exercising that limited legislative power, and thus as setting boundaries on its free scope. But the whole notion of a law-making power was plainly a sizeable step too far, and the idea behind it became instead what we see in Article 38(1)(d). What happened in the process, however, was not just a watering down of the power to be given to the Court, but a change in its nature: no

longer a power to make law, and by definition not another formal source of law. Instead, as the paragraph says in terms, it is now a "means", of a "subsidiary" character, for the "determination" not of law in general but of "rules of law", in other words "rules" that already existed aliunde but whose scope and content had to be captured and isolated in order to apply them to the case in hand.

That much can be taken as read, and is reflected in the standard commentaries. What none of the commentaries delve into, however, is what the actual terms of the provision should be understood to mean: what is a "publicist"? Who are the "most highly qualified" among them, and on what basis, and how are they to be identified? What are their "teachings"? And how should these last be evaluated? Any attempt consciously and directly to apply the provision on its own terms would throw up a whole series of questions of that kind calling for answer.

Yet here we are more or less on our own, as the one thing one can say with certainty about the judicial decision-making of the Court is that it simply does not make a practice of citing published writings, nor has it therefore ever seen the need to put the specific categories of this part of Article 38 into operation. Published writings are from time to time referred to in individual opinions, especially dissenting opinions, but that is more often than not under the hand of those members of the Court who write the most luxuriously and extensively, so tells us nothing of value about the role the cited writings may have played in shaping the final opinion of the Court itself.

By the same token, States in their pleadings, and counsel in oral argument, do make occasional reference to published authors, almost always as a way of bolstering an argument the essential weight of which rests elsewhere. Fitzmaurice has a limpid phrase, which he applies even more to previous case law than to writings, of a precedent being quoted not in virtue of its inherent authority but because of the felicitous way in which it gives expression to a common thought. But there is scant evidence, if any at all, of the litigants in a given case applying their mind, for the benefit of the Court, to the question whether the particular author was qualified to be considered someone falling within the descriptive categories of Article 38(1)(d), or to the question whether that author's opinion is or is not generally shared by other authors of the same degree of eminence.

My own personal experience suggests that the citation of writings by the parties in argument is more frequent and more widespread in arbitration than before the ICJ, and even more in investment arbitration than in inter-state arbitration. But that practice exhibits two puzzling features. The first is its indiscriminate nature. I do not think I have ever once seen an attempt by the party concerned to explain why this particular author (or this particular piece of writing) should be given special credence by the tribunal. Nor, by the same token, any attempt to tell the tribunal to what extent the view expressed by the author represents a commonly held opinion, or is instead the particular viewpoint of this particular writer, perhaps even *contra mundum*. The most that one gets – and then only sometimes – is the throwaway adjective "leading", "highly respected", "authoritative".

The second feature is that this habit of undisciplined citation goes hand-in-hand with and parallel to the troubling institution of the "legal expert opinion", tendered to the tribunal as an annex to the party's written pleadings, in the same way as the party might tender a piece of expert evidence on damages, or on industry practices, or on mining or engineering. I am talking, of course, not about expert advice on, say, the national law of one of the parties on which an international

tribunal may need special help, but on the very international law which the tribunal is required to know and to apply. Whether and how far these expert opinions on the applicable international law are found helpful by investment tribunals is not something on which I, as an active arbitrator, would wish to comment. What troubles me, though, in the context of my theme this evening, is what status and effect these expert opinions are thought to have, in the minds of those who submit them to a tribunal. If it is just an argument on the applicable law, then why is it not put to the tribunal through the mouth of counsel, including possibly by retaining the "expert" as an extra member of the party's legal team? The expert's legal argument would then fall into the forensic process just like any other argument or submission advanced by a party. Or is it thought to have some special, i.e. higher and more authoritative, status, deriving from the method of its production? In which case, what status does it have, and more important, why? We are certainly a very long way removed from the "teachings of the most highly qualified publicists of the various nations".

This is a diversion from my main theme, but I use it as a way of raising the question, what are the "teachings" that Article 38 has in mind? It cannot possibly be that something produced specially for an actual case, and moreover at the instance of one of the parties to that case, ranks as a "teaching" of that kind; a "teaching" must surely be something which already exists in a more general sense before the judicial process begins. The implication must also be that it is something that has been published, so is publicly available to all – where "all" here includes specifically both parties to the dispute and well as the members of the court or tribunal. A final implication must be that the material in question has some real claim to be objective, analytical, and non-partisan.

But do "teachings" ("la doctrine" in French) also mean that what we have to consider under this head essentially – or even exclusively – academic writing? The answer, I suppose, is linked to what we should understand by "publicists". It is a strange word, old-fashioned, not in common use, and no doubt having more of a French origin than an English-language one. But even my very good French dictionary now dismisses the term, half contemptuously, as associated with press spokesmen and public relations! To the extent that an answer can be found, it can only lie in the context, that is in the function the provision was intended to serve, namely to help avoid the unfortunate obstacle of non liquet, but to do so in a principled way that would not encounter the opposition of legal positivists.

Against this background, it is permissible to deduce two propositions. The first is that what the provision has in view is expert opinion, informed, educated expert opinion. It does not have to be scholarly opinion – and certainly not in the meaninglessly loose way "scholarly" is regularly used today, but it does have to show itself as worthy of attention because it is knowledgeable, balanced and convincing. That would, I am sorry to say, rule out a very large proportion of the academic articles I read, even in the leading journals, which, for all the depth of study behind them, come across more as combative advocacy rather than dispassionately rational analysis. The point is, however, the rather broader one that there is no reason why the category of "publicists" has to be limited to those engaged in the full-time pursuit of teaching or research. It can apply just as well to other serious commentators and observers, such as legal practitioners or public servants. The second is that what the provision is searching for is less the authoritative pronouncements of individual great sages, than some sort of reflection of the general state of informed expert opinion; that is, after all, no more than what the provision itself says when it refers to "teachings" in the plural and to "la doctrine". But it is without prejudice, of course, to the possibility that the writings

of one individual may convincingly lay out the state of opinion more widely than merely setting out his or her own individual views.

We are still left, though, with the two characteristics our "publicists" must display; they must be "the most highly qualified" and "of the various nations". I do not, however, propose to devote much attention to these, as they seem evidently to be descriptions rather than prescriptions. It is in any case inevitable that invoking the authority of writers requires that they be persons of recognized standing in their field – or at least it should be, but see my comments on arbitration a short while ago. The main point is, though, that, once you adopt as starting point that what you are looking for is not individual opinion but collective wisdom, any search for graduated rankings of individual eminence becomes otiose. And, as regards "of the various nations", that is plainly no more than a reminder that, with a global court applying international law, the search for authority cannot properly be culturally or regionally confined; but this is a reminder which is probably pointed more at the litigating States and their counsel than at the Court itself. Which is not, however, to say that the reminder does not now look and feel somewhat different, in a world in which international law study and commentary is far more widely dispersed, on a global basis, even though the languages in which litigation is conducted at the World Court (though not in arbitration) remain confined to English and French, which inevitably confers a premium on works published in those languages. It should nevertheless be noted that language is not all, and that the national range of authors publishing in French and English was wide even at the founding moment, and is now far wider still.

A final question is whether there are any exceptions to my thesis that the defining characteristic is not individual academic or similar eminence but depth and breadth of knowledge, objectivity, and logical persuasiveness in putting across views which are not purely individual but broadly accepted. The one exception that does come to mind is the category of commentaries by recognized experts on particular systems or regimes. The most obvious examples are the leading works by Rosenne on the law and practice of the ICJ or, in the arbitration field, Schreuer on the ICSID Convention. But the category is a special one, inasmuch as these are not works on general topics of international law, but rather on the inner operation of particular regimes, and, what is more, special treaty-based regimes at that. Moreover, the category shows quite strong similarities, both in typology and in status, with the commentaries on key legislative codes which are such a feature of legal systems that, like international law do not know a doctrine of formal precedent.

Last of all, I pose myself the question whether it is right to treat that category of "teachings of publicists" as synonymous with writings by single authors. Simply posing the question shows that the answer is no. On the one hand, we have a growing number of commentaries on leading international texts being produced by groups of selected experts, under the editorship of recognized figures; one, which has been of great use to me in preparing this lecture, is the Commentary on the ICJ Statute, in which Professor Zimmermann played a leading part, another, also under the Oxford University Press imprint, the Commentary on the UN Charter with Professor Nolte one of the chief editors. In cases of this kind, the wider the pool from which the contributors have been drawn, and the clearer the signs that the work is a true collaborative enterprise, or at least that there has been a real editorial hand in play in harmonizing the contributions, the easier it will be to say that in fact the work as a whole reflects the literal criteria of Article 38(1)(d).

Mention of these collective studies brings us, last of all, to the one category of joint scientific endeavour in the field to which even the ICJ, and in its wake the generality of arbitral tribunals, pays overt regard, and indeed cite as a form of authority for the "determination of rules of law".

There are no prizes for guessing that what I have in mind is the work of the International Law Commission. That the work of the ILC qualifies under the terms of Article 38(1)(d) should be clear. It meets all of the criteria I have been suggesting ought to go into giving realistic meaning to the idea behind this provision in the Statute. Most particularly, the sequential process followed by the ILC puts it at the highest end of the spectrum of truly collective endeavour, with two further reinforcing factors: that the work of the ILC is tested out as it proceeds against the comments and reactions of governments, which can then be considered and taken into account in forming the final product; and that the reasoning behind the Commission's proposals is exposed by the Commission in its reports and its commentaries on draft articles. More significant than the organic connection of the ILC to the UN as an organization is, I think, that the election of its members by the UN General Assembly, together with the provisions in the ILC's own Statute for geographical representation, can be seen as a mechanism – at least if it operates rationally, which has not always been the case – towards meeting the requirements of "most highly qualified" and "of the various nations". And finally, whatever might be said about the attitude of the Court itself towards the published writings, one can be absolutely certain that, at the level of the ILC, the literature will have been meticulously and exhaustively examined. In other words, whoever is absorbing or reflecting the work of the ILC will be getting the published literature, so to speak, pre-digested.

Against this combined background, a ready justification can be found for the privileging of the ILC's proposals and recommendations in the practice of the ICJ. If there has been a problem, it is not this, but rather the somewhat indiscriminate approach the Court has taken towards the ILC's working product, without on occasion sufficient attention to whether the particular item cited is the final product, or indeed to whether it should be regarded as the ILC's considered reflection of the *lex lata*, as opposed to a proposal *de lege ferenda*, which marks in turn that boundary between law-making and the determination of established law which underlies the whole structure of Article 38 of the ICJ Statute.

Is there scope for the extension of favoured treatment to other forms of collective scientific endeavour in the field of international law, notably the resolutions of the *Institut de droit international* or the reports of the International Law Association? Perhaps; they display some of the same features, including, in the case of the *Institut*, a process of election that favours qualifications and eminence, and an increasing measure of global representation. But for the time being the influence of their work, though real, remains subliminal, and operates more as signposts to the way the expert wind is blowing than as actual authority to sustain propositions of law.

I have at this point to acknowledge that I began by posing the very general question of where we look for authority to determine the content of a rule of international law, but have devoted almost all of my discussion to the processes of international courts and tribunals, and in particular the ICJ. The truth is, however, that similar processes of law-discovery are taking place all the time in other contexts, including by States and their officials to inform their actions and their foreign policy, by national armed forces and their personnel, by national courts as a necessary part of deciding cases under their domestic jurisdiction, and indeed by finance, commerce and industry in order to shape the conduct of their ordinary business. I have no wish to brush aside this dense web of law-discovery. Far from it; it constitutes a bigger part of the active engine of international law than the episodic emergence of action by international courts. But time precludes my giving it more than a cursory mention.

In principle, the same approach ought to be followed in each of these scenarios; the issue is, after all the same, how to ascertain, accurately and reliably, the content of a given rule of international law, and there should be no room for variation in the outcome of the search according to who is doing the searching. In practice, though, it is virtually inevitable that the context will have some effect. But, in a well ordered system, the effect will be more a product of circumstance than of technique. The dividing line I draw lies between the reflectively deliberative process of courts or tribunals, whether international or national, and the result-oriented processes of States or business enterprises. On the one hand, a court will have had the benefit, which must never be underestimated, of having the issues thrashed out before it by contesting parties, who are themselves free to draw on whatever materials seem to them useful in supporting their argument, so that the court, once again, is the recipient of a pre-digested product. On the other hand, the court will in addition have had the benefit, which must also not be underestimated, of being able to see how the rule of law it is examining will look in its application to a defined set of circumstances. A government, or a business enterprise, will however be doing something different. It will be not so much deciding on the law, but rather deciding on a course of action based on a particular view of the law. And moreover its action will be met by reaction, which in some cases may have the Newtonian property of being equal and opposite; a final outcome lies still in the future. Conversely, where the ICJ may, for the reasons already discussed, have a predisposition against formal judicial precedent, and national courts may be bound into national rules in that respect, a government or private enterprise, looking to find the applicable rule, is bound to be more heavily influenced by judicial precedent than by any other source of authority, just by virtue of the properties of judicial decision I have mentioned. And users in this category may equally benefit not just from having prior judicial decisions at their fingertips, but from being able to see how, in the intervening period, particular decisions like judgments of the ICJ have been received in international and learned opinion for the quality (or otherwise) of their reasoning, and the practical applicability and good sense of their pronouncements.

Which leads me to a final, and somewhat trite, observation, looking once again at the question of the authority of judicial precedent, that not all judgments, even those of the ICJ, are equal; some are more equal than others. In other words, one must accept that, for all their weighty authority in general and in particular, even judicial decisions, simply by virtue of their essential character as reasoned conclusions deriving from open analysis and argument, are out there for comment and examination, and have to earn their ranking in the marketplace of ideas. In relation to the ICJ, one can see this particularly strongly in the case of Advisory Opinions. But it is no less strong in respect of judgments in contentious cases, not for their binding effect on the parties in respect of the particular dispute, which is absolute, but for their precedential effect on the law more generally, which is the subject of this lecture.

That brings me to the end of my journey for this evening, but at the finishing point I owe you some conclusions. In essence, they come down to two. Both of them are quite simple, though difficult to express with scientific precision.

The first is that international law, being an inherently fluid legal system not based on legislative prescription or centralized authority, is bound, by that very fact, to be dependent on the state of opinion in a way that would be hard to imagine for other legal systems. But, by that same token, it is very difficult to see how opinion, whatever its source, could claim the rank of binding legal authority. That would be, quite paradoxically, to substitute disputation for the missing legislation.

It leads, however, to consequences, one of which is that there is no difference, in this context, between the essential nature of judicial pronouncement and learned writing; both of them are forms of opinion, distinguished only by their origin and by their generating process – and, of course, by the fact that a judicial decision may be binding and obligatory for the specific dispute. In that light, Articles 38 and 59 of the ICJ Statute have it right. In both cases, what marks out one opinion from another on the scale of authoritativeness is a collection of factors, including objectivity, knowledgeability, depth of analysis, and the presence or otherwise of reasoning and, in particular, its persuasiveness. Within that framework, judicial decision earns for itself a certain priority deriving from the nature and fairness of the judicial process, and the requirement that decisions and conclusions must be openly reasoned. But the priority can be sacrificed if the judicial outcome is found wanting in any of those authority criteria. Conversely, in the case of learned writers, whether academic or not, acquired reputation can, if properly earned, serve to create a presumption of its own that the written product is inherently likely to fulfil the authority criteria. But that in turn applies to the judicial realm as well, where there is no doubt whatever that, whether we admit it or not, we rank the authority attributed to judicial pronouncement according to the perceived standing of the judicial organ, and very often that of the individual judges as well. And, to make the circle close in on itself, that assessment of standing is in turn derived from the fulfilment of the authority criteria: of fairmindedness, objectivity, knowledgeability, persuasiveness of reasoning, etc.⁸

My second, and final, conclusion is the one I promised earlier, and relates to the distinction between the determination of law and its application. That there is a difference between them is obvious, or ought to be more obvious than it often seems to be. It is signalled in plain sight in the standard jurisdictional clause contained in treaty after treaty, which opens a compulsory dispute settlement procedure to disputes concerning "the interpretation or application of the present treaty", or "the interpretation of this treaty or the application of its provisions". Yet most writing, and most commentary, and indeed all too often the expressed view of governments, treats everything that international courts and tribunals do, apart from finding the facts, as being determinations of law. In my view, once you leave aside fact-finding (which international tribunals are slowly learning how to do), the overwhelming majority of what these tribunals do is not deciding what the law is; it is the application of already known propositions of law to the particular facts.

Common lawyers are often in the habit of saying that at least 80% of a case is fact, and only the remaining 20% law; some put it even higher. On the strength of my own personal experience as international judge and arbitrator, I would say that, in a typical international case, maybe about 70% is fact, a bare 5% or so is law, and the remaining 25% – which is usually the critical portion of the case – is the application of that 5% of law to the particular circumstances, i.e. to those of the findings of fact that are held to be relevant and important to the settlement of the specific dispute.

For illustrative examples, let me go to the field of investment arbitration, which is freshest in my mind; though I should immediately disclaim that nothing I am about to say should be taken as a comment on any case I have joined in deciding in the past, or is still under decision at present. One example is the principle requiring "fair and equitable treatment" of foreign investment. In truth,

⁸ To the same effect, see Pellet (fn. 6 above) at para. 311: "Central to the question is the persuasiveness of the legal reasoning."

everybody knows, more or less, what "fair and equitable treatment" is; the arguments, and they are many and vigorous, at the individual and at the general policy level, are not really about the substantive content of the principle, but about whether what has been found to have happened in the specific case crosses the permissible boundary or not. Or take the case of "creeping expropriation". There is no dispute over the fact that, under international law, even though there has been no formal deprivation of ownership, there comes a point at which interference with foreign property will be regarded as serious enough to have an equivalent effect and will therefore be treated as expropriation. The argument is not about that, but about whether what has been found to have happened in the specific case lies beyond that point, or not. In other words, what a tribunal looking at this sort of issue has to decide is not "what is the law on fair and equitable treatment or creeping expropriation?" but the more mundane – though equally challenging – of where the line should be drawn along the rich continuum of particular instances. And it will come to that question after having looked deeply with minute attention into the actual facts of a very specific case. These acts of judgement are intensely fact-specific, but it is precisely that function which the disputing parties have consented to remit to the arbitrament of an independent tribunal.

Why do I end on that note? It is not because the issue is an obsession of mine, though I sometimes feel, in my frustration, that I am tending in that direction. It is instead to put into perspective the issue I have chosen to discuss this evening. I have spoken about "authority" in the context laid out by Article 38 of the ICJ Statute, that is, where and how we look when subsidiary means are needed to determine already existing rules of law. I have suggested that that situation is in fact far less frequent than is often thought. I have argued, in an attempt to keep matters in proportion, that the overwhelming part of what international courts and tribunals, States and governments, and international organizations do is not law-determination, but the application of law to particular sets of circumstances. I have suggested also that, when the need for law-determination does occur, sources with appropriate authority are readily there to be found, that they stand in no hierarchical relationship to one another, nor do they need to, and that intuitively rational criteria exist to enable the choice to be made as to which ones deserve to be treated with greater authority in the particular case.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

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