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# *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*

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## **Abstract**

*This article offers an interpretation of Article 38(1)(d) of the ICJ Statute based on the formal pronouncements of international criminal courts and tribunals, distilled from their judgments. It considers that the qualification 'subsidiary' is meant neither to distinguish the means from the primary sources nor to denote 'of lesser importance'. It further examines the verification process envisaged in 'the determination of rules of law', as well as the more direct impact of judicial decisions vis-à-vis the teachings of publicists.*

## **1 Introduction**

Shahabuddeen observes that, although in the past Article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute)<sup>1</sup> may not have presented any special difficulty of interpretation, that view is not generally shared today.<sup>2</sup> Various viewpoints have been put forward on the proper role of judicial decisions (and, to a lesser extent, teachings of the most highly qualified publicists) in the context of debates on sources of international law.<sup>3</sup> This article offers an interpretation of Article 38(1)(d)

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<sup>1</sup> UN, Statute of the International Court of Justice, 18 Apr. 1946. Para. 2 of Art. 38 will not be examined in this article.

<sup>2</sup> M. Shahabuddeen, *Precedent in the World Court* (1996), at 7.

<sup>3</sup> These include Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in M. Koskenniemi, *Sources of International Law* (2000); Jennings, 'The Judiciary, International and

of the ICJ Statute based on the formal pronouncements of the international criminal courts and tribunals.<sup>4</sup>

The article explores the meaning of the phrase ‘as subsidiary means for the determination of rules of law’ in Article 38(1)(d) of the ICJ Statute and takes the view that ‘determination’ comprises: (1) a verification of the *existence* and *state* of rules of law; and (2) a verification of the *proper interpretation* of rules of law (the ‘verification process’). It holds that the qualification ‘subsidiary’ is not intended merely to denote that judicial decisions cannot be accorded the status of sources;<sup>5</sup> rather, this term serves to qualify the means in relation to the court or tribunal undertaking the determination. It proceeds to consider which judicial decisions are properly envisaged in Article 38(1)(d) of the ICJ Statute, considering the case of judicial decisions connected to law-creating processes and judicial decisions connected to national law. Finally, although this sub-paragraph treats judicial decisions and teachings of publicists as it were in the same breath,<sup>6</sup> the article takes the view that an approach which fails to take account of the more direct impact of judicial decisions should be avoided.<sup>7</sup>

## 2 The Enduring Significance of Article 38(1) of the ICJ Statute

The principle of legality, enshrined in Article 15 of the International Covenant on Civil and Political Rights (ICCPR),<sup>8</sup> to a large extent necessitates the formal approach adopted by the international criminal courts and tribunals with respect to sources of international law.<sup>9</sup> These sources are authoritatively listed in Article 38(1) of the

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National, and the Development of International Law’, 45 *ICLQ* (1996) 1; Oppenheim, ‘The Science of International Law: Its Task and Method’, in M.D. Evans and P. Capps, *International Law* (2009) (originally published in 2 *AJIL* (1908)); Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (3rd edn, 1957); and Shahabuddeen, *supra* note 2.

<sup>4</sup> The jurisprudence of the following international criminal courts and tribunals has been considered: the International Criminal Tribunal for the Former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR); the Special Court for Sierra Leone (SCSL); the Extraordinary Chambers in the Courts of Cambodia (ECCC); and the International Criminal Court (ICC).

<sup>5</sup> G.J.H. Van Hoof, *Rethinking the Sources of International Law* (1983), at 170.

<sup>6</sup> Jennings, *supra* note 3, at 6.

<sup>7</sup> Fitzmaurice, *supra* note 3, at 168.

<sup>8</sup> UN GA, International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, available at: [www.unhcr.org/refworld/docid/3ae6b3aa0.html](http://www.unhcr.org/refworld/docid/3ae6b3aa0.html) (accessed 12 Sept. 2012).

<sup>9</sup> See, *inter alia*, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, at 34; Art. 33 new of the ECCC Law, 27 Oct. 2004, ref. NS/RKM/1004/006; and Art. 22 of the Rome Statute of the ICC, 17 July 1998, ref. A/CONE.183/9. With respect to the affirmation of this principle in the jurisprudence see, *inter alia*, *United States v. Wilhelm List et al.* (‘Hostage case’), US Military Tribunal Nuremberg, judgment of 19 Feb. 1948, in 10 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law, Vol. XI/2, at 1240; *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Pasic, Vladimir Santic, also known as ‘Vlado’*, Judgment, IT-95-16-T, ICTY Trial Chamber, 14 Jan. 2000, at 540 (‘*Kupreskic et al.* Trial Judgment’); and *Prosecutor v. Mitar Vasiljevic*, Judgment, Case: IT-98-32-T, ICTY Trial Chamber, 29 Nov. 2002, at 202.

ICJ Statute.<sup>10</sup> Although, in principle, Article 38(1) of the ICJ Statute professes only to provide a direction to the ICJ, authorizing it to consider various materials when deciding disputes submitted to it,<sup>11</sup> this Article has come to constitute the foundation stone for any credible discussion on sources of international law,<sup>12</sup> and an inquiry into this subject inescapably has to begin with it.<sup>13</sup> The *ad hoc* Tribunals have regularly had recourse to Article 38(1) of the ICJ Statute in this manner.<sup>14</sup> Moreover, where newer international criminal courts and tribunals have incorporated their own provisions on applicable law, their lists have broadly followed the approach to sources enshrined in Article 38(1) of the ICJ Statute.<sup>15</sup>

In view of the above, although this Article has been criticized, *inter alia*, for being under-inclusive or for including aspects which are not genuine sources,<sup>16</sup> it would be a mistake to underestimate the enduring significance of Article 38(1) of the ICJ Statute.<sup>17</sup> The next section briefly considers the drafting of the precursor to Article 38(1)(d) of the ICJ Statute before examining the individual elements of this article, starting from the meaning of the phrase ‘as subsidiary means for the determination of rules of law’.

### 3 Some Considerations Concerning Article 38(1)(d) of the ICJ Statute

When the precursor to Article 38(1)(d) of the ICJ Statute was being drafted by the 1920 Advisory Committee of Jurists, President Descamps proposed a text which read:

4. international jurisprudence as a means for the application and development of law.<sup>18</sup>

This phrase is not entirely free from ambiguity, because it simultaneously uses the words ‘application’ and ‘development’. The former entails a reference to already

<sup>10</sup> See P. Malanczuk (ed.) *Akehurst's Modern Introduction to International Law* (7th edn, 1997), at 1.

<sup>11</sup> Fitzmaurice, *supra* note 3, at 173. See also *Prosecutor v. Dusho Tadic a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 Oct. 1995, at 43.

<sup>12</sup> R. McCorquodale and M. Dixon, *Cases and Materials on International Law* (4th edn, 2003), at 19.

<sup>13</sup> Jennings, ‘What is International Law and How Do We Tell It When We See It?’, in Koskeniemi, *supra* note 3, at 60.

<sup>14</sup> See, for instance, *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as 'Pavo', Hazim Delic, Esad Landzo also known as 'Zenga'*, Judgment, IT-96-21-T, ICTY Trial Chamber, 16 Nov. 1998, at 414 (‘Čelebići Trial Judgment’); and *Kupreskic et al.* Trial Judgment, *supra* note 9, at 540; and *Prosecutor v. Dragen Erdemovic*, Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, ICTY Appeals Chamber, 7 Oct. 1997, at 40 (‘Erdemovic Appeals Judgment’).

<sup>15</sup> For instance, with respect to Art. 21 of the Rome Statute of the ICC, Cryer maintains that this Art. does little more than restate the traditional formal position of judicial decisions in international law: see Cryer, ‘Neither Here Nor There? The Status of International Criminal Jurisprudence in the International and UK Legal Orders’, in K.H. Kaikobad and M. Bohlander, *International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick* (2009), at 191. See also, *inter alia*, Rule 72bis of the SCSL Rules of Procedure, 12 Apr. 2002 (available from the SCSL website).

<sup>16</sup> Malanczuk, *supra* note 10, at 36. See also Koskeniemi, *supra* note 3, at xi.

<sup>17</sup> M.M.A. Dixon, *Textbook on International Law* (6th edn, 2007), at 24.

<sup>18</sup> Shahabuddeen, *supra* note 2, at 52.

existing law, while the latter implies at least some element of newness and suggests that judicial decisions could, in a sense, be a source of law.<sup>19</sup> A subsequent text introduced reference to the ‘opinions of writers’, but otherwise did not resolve this ambiguity.

However, the records of the debate on judicial decisions within the Advisory Committee very clearly show that its members did not consider such decisions as a source of international law in the proper sense of that term.<sup>20</sup> In answer to a question by Ricci-Busatti, President Descamps stated unequivocally 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.’<sup>21</sup>

While this statement by Descamps left no room for doubt as to his opinion, it did not completely satisfy Ricci-Busatti. Faced with continued opposition, Descamps finally suggested, as a compromise, 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’.

The final text of this sub-paragraph, therefore, not only removed all mention of judicial decisions as a means for the development of the law; there was also explicit agreement amongst the drafters that judicial decisions were not, in any sense, envisaged as primary sources of law. Finally, and also of note, while President Descamps’ initial text referred to ‘international’ jurisprudence, the final sub-paragraph did not qualify the type of judicial decisions intended and, in particular, did not distinguish between ‘international’ and ‘national’ decisions.

### ***A The Distinction Between Law-Creating Processes and Law-Determining Agencies in Article 38(1) of the ICJ Statute***

A review of the literature indicates considerable divergence over the proper interpretation of Article 38(1) of the ICJ Statute. One view is that that Article, in effect, lays down one, global list of sources of international law. From this perspective, the judicial decisions referred to in sub-paragraph (d) may constitute as much a source of law as any of the other sources listed in sub-paragraphs (a) to (c) of Article 38(1). Jennings, for instance, asserts that, ‘I see 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’.<sup>22</sup>

Another view, however, is that Article 38(1) of the ICJ Statute establishes two *distinct* lists. From this perspective, the first list (sub-paragraphs (a) to (c)) lays down exhaustively the formal sources from which legally valid rules of international law may emerge. The second list (sub-paragraph (d)) lays down some of the means by

<sup>19</sup> Van Hoof, *supra* note 5, at 169.

<sup>20</sup> *Ibid.*, at 169.

<sup>21</sup> PCIJ, *Procès Verbaux of the Proceedings of the Committee* (1920), Advisory Committee of Jurists, 16 June–24 July 1920, at 336. See also Van Hoof, *supra* note 5, at 170.

<sup>22</sup> Jennings, *supra* note 3, at 3–4. See also Shahabuddeen, ‘Judicial Creativity and Joint Criminal Enterprise’, in S. Darcy and J. Powderly, *Judicial Creativity at the International Criminal Tribunals* (2010), at 186.

which such rules of law may be determined. One of the main proponents of this view, Schwarzenberger, states:

This paragraph deals with two different issues. Sub-paragraphs (a)–(c) are concerned with the pedigree of the rules of international law. In sub-paragraph (d), some of the means for the determination of alleged rules of international law are enumerated.<sup>23</sup>

This approach, which is supported by a consideration of the drafting history,<sup>24</sup> also closely reflects the formal approach to Article 38(1)(d) of the ICJ Statute consistently adopted by the international criminal courts and tribunals in their judgments. For instance, in *Kupreskic et al.*, the ICTY Trial Chamber stated:

Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and, within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a ‘subsidiary means for the determination of rules of law’ ... Clearly, judicial precedent is *not a distinct source of law* in international criminal adjudication.<sup>25</sup>

Similarly, although Article 20(3) of the Statute of the Special Court for Sierra Leone (the SCSL Statute) 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 International Tribunals for the former Yugoslavia and for Rwanda’, the SCSL has underscored that this provision should not, in any way, be construed as implying that the judicial decisions of the ICTY and the ICTR may constitute direct sources.<sup>26</sup>

From this perspective, therefore, Article 38(1) of the ICJ Statute gives rise to two *distinct* categories: (1) three named ‘law-creating processes’ which constitute the formal sources of international law; and (2) two named ‘law-determining agencies’ which constitute subsidiary means for the determination of rules of antecedent law.<sup>27</sup>

Turning to the specific wording of Article 38(1)(d) of the ICJ Statute, first, although the phrase ‘rules of law’ in this sub-paragraph does not specify which law is intended – whether national or international – it is clear from the *chapeau* to this Article, which provides that the Court is bound to decide ‘in accordance with international law’, that this phrase refers to ‘rules of international law’.

While the term ‘to determine’ is capable of more than one meaning,<sup>28</sup> Shahabuddeen notes that ‘[t]he argument is strong ... that the reference to “the determination of rules of law” visualised a decision which would merely elucidate the existing law, and not bring new law into being’.<sup>29</sup> Although the author goes on to discuss a different interpretation of the term,<sup>30</sup> a review of the judgments of the international criminal courts

<sup>23</sup> Schwarzenberger, *supra* note 3, at 26–28.

<sup>24</sup> Van Hoof, *supra* note 5, at 169.

<sup>25</sup> *Kupreskic et al.* Trial Judgment, *supra* note 9, at 540, emphasis added.

<sup>26</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Judgment, Case No. SCSL-04-15-T, SCSL Trial Chamber, 2 Mar. 2009, at 295 (‘RUF Trial Judgment’). See also Cryer, *supra* note 15, at 188.

<sup>27</sup> Schwarzenberger, *supra* note 3, at 26–28.

<sup>28</sup> Other meanings of the term ‘to determine’ include ‘to settle’, ‘to ordain’, and ‘to decree’: see Shahabuddeen, *supra* note 2, at 77.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

and tribunals indicates that they have construed this term in the sense of ‘for the verification of’.<sup>31</sup> This is also the meaning Schwarzenberger assigns to that phrase when he considers that ‘[w]hereas, in the case of the law-creating processes, the emphasis lies on the forms by which any particular rule of international law is created, in the case of the law-determining agencies it is on how an alleged rule is to be *verified*’.<sup>32</sup>

The question, then, is how is an alleged rule to be verified? It is submitted that the end, specified in Article 38(1)(d) of the ICJ Statute, of ‘the determination of rules of law’ may be attained by the following means:

1. A verification of the ‘existence’ and ‘state’ of rules of law at the relevant time. (For example, a review of state practice and *opinio juris* to establish whether a particular rule of customary international law was recognized at the time of the offences alleged.)
2. A verification of the ‘proper’<sup>33</sup> (or ‘accurate’)<sup>34</sup> interpretation of rules of law.<sup>35</sup> (For example, in *Stakic*, the ICTY Trial Chamber held that ‘when interpreting the relevant substantive criminal norms’, the Chamber could be guided by judicial decisions.)<sup>36</sup>

The above process (the ‘verification process’) broadly corresponds to what Cassese describes as the ‘wise’ approach, whereby judicial decisions are used ‘in order to establish (i) whether a customary international rule has formed, or (ii) whether a general principle of international law exists, or to determine (iii) whether the interpretation of an international rule adopted by another judge is convincing and, if so, applicable’.<sup>37</sup>

<sup>31</sup> For instance, in his Declaration in the *Furundzija* appeal, Judge Robinson held, ‘[t]he Chamber’s examination of decisions of national courts and international tribunals ... could provide a sufficient foundation for a *determination* as to whether a rule of custom had emerged ...’: *Prosecutor v. Anto Furundzija*, Judgment, Declaration of Judge Patrick Robinson, Case No. IT-95-17/1-A, ICTY Appeals Chamber, 21 July 2000, at 288. The ECCC Trial Chamber in *Duch* held, ‘[t]he principle of legality prevents neither a reliance on unwritten custom nor a *determination* through a process of interpretation and clarification as to the elements of a particular crime’: *Kaing Guek Eav alias Duch*, Judgment, Case File/Dossier No. 001/18-07-2007/ECCC/TC, ECCC Trial Chamber, 26 July 2010, at 290 (*‘Duch Trial Judgment’*). emphasis added. See also *The Prosecutor v. Laurent Semanza*, Judgment, Case No. ICTR-97-20-T, ICTR Trial Chamber, 15 May 2003, at 312 (*‘Semanza Trial Judgment’*).

<sup>32</sup> Schwarzenberger, *supra* note 3, at 26–27, emphasis added.

<sup>33</sup> *The Prosecutor v. André Ntagerura Emmanuel Bagambiki Samuel Imanishimwe*, Judgment, Case No. ICTR-99-46-A, ICTR Appeals Chamber, 7 July 2006, at 127 (*‘Ntagerura et al. Appeals Judgment’*). See also R. Dixon and K.A.A. Khan, *Archbold, International Criminal Courts: Practice, Procedure and Evidence* (3rd edn, 2009), at 154. The principles of interpretation are themselves derived from one or more of the sources of law listed in Art. 38(1)(a) to (c) of the ICJ Statute, such as from the VCLT. See, for instance, *Semanza Trial Judgment*, *supra* note 31, at 336.

<sup>34</sup> See *Čelebići Trial Judgment*, *supra* note 14, at 160. See also *Ntagerura et al. Appeals Judgment*, *supra* note 33, at 127.

<sup>35</sup> Jennings notes that ‘[o]f course we all know that interpretation does, and indeed should, have a creative element in adapting rules to new situations and needs, and therefore also in developing it even to an extent that might be regarded as changing it. Nevertheless, the principle that judges are not empowered to make new law is a basic principle of the process of adjudication. Any modification and development must be seen to be within the parameters of permissible interpretation’: see Jennings, *supra* note 3, at 3.

<sup>36</sup> *Prosecutor v. Milomir Stakic*, Judgment, IT-97-24-T, ICTY Trial Chamber, 31 July 2003, at 414.

<sup>37</sup> Cassese, ‘The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks’, in M. Bergsmo (ed.), *Human Rights and Criminal Justice For the Downtrodden: Essays in Honour of Asbjørn Eide* (2003), at 20, emphasis in original.



However, Article 38(1)(d) of the ICJ Statute specifies not only the end, namely ‘for the determination of rules of law’, but also the status of the two law-determining agencies as ‘subsidiary means’ to this end. Schwarzenberger points out that ‘[i]t follows that *principal* means for the determination of rules of law must exist’.<sup>38</sup> The question is, therefore, which are these principal means?

The verification process described above is generally undertaken by a court or tribunal by way of a first-hand determination of the existence, state, and proper interpretation of the relevant rules of law. For instance, a court or tribunal may verify the state of a rule of customary international law at the relevant time by means of an inductive review of state practice and *opinio juris*. It may also verify the proper construction of a treaty provision by means of direct interpretation. These first-hand means for the determination of rules of law may be characterized as ‘principal means’.

However, the court or tribunal (or other agency) could cast its net wider and supplement these principal means of verification with ‘subsidiary means’, namely judicial decisions from other courts and tribunals (‘external judicial decisions’) and the teachings of publicists, who may have considered the same or similar legal issues, and whose reasoning may therefore inform the court or tribunal’s own analysis. These means would be characterized as ‘subsidiary’ because they would not have issued directly from the court or tribunal itself. Rather, they would have been undertaken, as it were, by ‘third parties’ and, in relation to the court or tribunal, would constitute second-hand (or ‘subsidiary’) means. It should be evident that ‘principal’ and ‘subsidiary’ means for the determination of rules of law are not mutually exclusive. On the contrary, they could supplement each other.

The characterization ‘subsidiary’ in Article 38(1)(d) of the ICJ Statute should not therefore be seen as an assessment of the relative importance of judicial decisions (or teachings of publicists) in the determination of rules of law. It should not be interpreted as meaning that such judicial decisions are of ‘lesser importance’. Indeed, some authors have cautioned that ‘the practical significance of the label “subsidiary means” in Article 38(1)(d) is not to be exaggerated’<sup>39</sup> because ‘the authority and persuasive power of judicial decisions may sometimes give them greater significance than they enjoy formally’.<sup>40</sup>

Similarly, an interpretation which views the qualification ‘subsidiary’ merely ‘to reflect the intention of the drafters of article 38 that judicial decisions cannot be accorded the status of sources in the formal sense of that term, that is in the same sense as treaties, custom and general principles were meant to be sources of international law’,<sup>41</sup> should likewise be avoided. From the perspective that law-creating processes in sub-paragraphs (a) to (c) of Article 38(1) of the ICJ Statute, and law-determining agencies in sub-paragraph (d), constitute *distinct* lists, it would appear misleading to

<sup>38</sup> Schwarzenberger, *supra* note 3, at 26–28, emphasis added.

<sup>39</sup> I. Brownlie, *Principles of Public International Law* (4th edn, 1990), at 19.

<sup>40</sup> L.E.L. Oppenheim, *et al.*, *Oppenheim’s International Law. Vol. 1, (Peace)* (9th edn, ed. Sir Robert Jennings and Sir Arthur Watts, (1992), at 41. See also Nollkaemper, ‘Decisions of National Courts as Sources of International Law: An Analysis of the Practice of the ICTY’, in G. Boas and W. Schabas, *International Criminal Law Developments in the Case Law of the ICTY* (2003), at 290.

<sup>41</sup> Van Hoof, *supra* note 5, at 170.

view the ‘means’ as some kind of ‘subsidiary sources’.<sup>42</sup> While there is no question that law-determining agencies are subordinate to law-creating processes in the sense that the former are necessarily dependant on, and secondary to, the latter,<sup>43</sup> to construe this phrase as merely denoting this apparent fact would appear superfluous.

The designation ‘subsidiary’ in Article 38(1)(d) of the ICJ Statute serves to qualify the means in relation to the court or tribunal undertaking the determination. Where the court or tribunal undertakes the determination of rules of law through first-hand means, such as through judicial interpretation, such means may be characterized as ‘principal’. Where, however, the court or tribunal relies on second-hand means in its verification process, such as external judicial decisions or teachings of publicists, such means may be characterized as ‘subsidiary’ (in French, ‘*moyen auxiliaire*’).

A relevant consideration at this stage is whether it may be possible to envisage other subsidiary means not expressly mentioned in Article 38(1)(d) of the ICJ Statute. This possibility is certainly admitted by Schwarzenberger, who holds that sub-paragraph (d) lists only ‘*some of the means for the determination of the alleged rules of international law*’.<sup>44</sup> The international law landscape has developed significantly since this sub-paragraph was originally drafted in 1920, and today additional instruments may be seen properly to qualify as ‘subsidiary means’ for the determination of rules of law. These may include the work of the International Law Commission<sup>45</sup> and the work of the International Committee of the Red Cross and Red Crescent, such as its study on customary international humanitarian law.<sup>46</sup> Both of these instruments have been used widely as subsidiary means in the practice of international criminal courts and tribunals.<sup>47</sup>

One view, therefore, is that Article 38(1)(d) of the ICJ Statute does not establish an exhaustive list of subsidiary means, and additional means may be considered to fall within the scope of this sub-paragraph. However, the danger with this approach is

<sup>42</sup> See, for instance, Boas *et al.*, who assert that Art. 38(1) of the ICJ Statute ‘refers to three primary sources and one subsidiary source’: G. Boas, J.L.J.D. Bischoff, and N.L. Reid, *Elements of Crimes under International Law* (2008), at 5, emphasis added. Van Hoof notes that judicial decisions cannot really be qualified as ‘subsidiary sources’: Van Hoof, *supra* note 5, at 169. The term ‘source’, instead of ‘means’, has sometimes also been used in the judgments of international criminal courts and tribunals themselves. For instance, in *Brdanin*, the ICTY Appeals chamber held, ‘[t]he post-World War II jurisprudence mentioned above, which has been interpreted as a valid source for the ascertainment of the contours of joint criminal enterprise liability in customary international law’: *Prosecutor v. Radoslav Brdanin*, Judgment, IT-99-36-A, ICTY Appeals Chamber, 3 Apr. 2007, at 415, emphasis added.

<sup>43</sup> Oppenheim, *et al.*, *supra* note 40, at 41.

<sup>44</sup> Schwarzenberger, *supra* note 3, at 26–28, emphasis added.

<sup>45</sup> For more information on the work of the ILC visit: [www.un.org/law/ilc/](http://www.un.org/law/ilc/) (last accessed 2 Oct. 2012).

<sup>46</sup> For more information on the ICRC’s study visit: [www.icrc.org/eng/resources/documents/statement/customary-law-statement-210705.htm](http://www.icrc.org/eng/resources/documents/statement/customary-law-statement-210705.htm) (last accessed: 2 Oct. 2012).

<sup>47</sup> With respect to the work of the ILC see, *inter alia*, *The Prosecutor v. Tihomir Blaskic*, Judgment, IT-95-14-T, ICTY Trial Chamber, 3 Mar. 2000, at 205; and *Kaing Guek Eav alias ‘Duch’*, Appeal Judgment, Case File/Dossier No. 001/18-07-2007-ECCC/SC, ECCC Supreme Court Chamber, 3 Feb. 2012, at 114–115. With respect to the ICRC study on customary international humanitarian law see *Prosecutor v. Stanislav Galić*, Judgment, Separate and Partially Dissenting Opinion of Judge Schomburg, IT-98-29-A, ICTY Appeals Chamber, 30 Nov. 2006, at 19; *Prosecutor v. Milomir Stakic*, Judgment, IT-97-24-A, ICTY Appeals Chamber, 22 Mar. 2006, at 296; and *Duch* Trial Judgment, *supra* note 31, at 541 (n. 1646).



that it seems to dissonate with the approach that the lists in Article 38(1) of the ICJ Statute are exhaustive. A more satisfactory approach is perhaps to view such means as falling within the broad rubric of 'the teachings of the most highly qualified publicists of the various nations'.

The next section will consider which judicial decisions are properly envisaged by Article 38(1)(d) of the ICJ Statute.

### 1. *Judicial Decisions Connected to Law-creating Processes*

Article 38(1)(d) of the ICJ Statute refers to 'judicial decisions' in broad and unqualified terms.<sup>48</sup> While it is generally accepted that this reference covers a broad range of judicial decisions,<sup>49</sup> a review of the literature indicates considerable divergence over which judicial decisions are properly envisaged by this sub-paragraph. For instance, some commentators hold that the reference to 'judicial decisions' in Article 38(1)(d) of the ICJ Statute includes judicial decisions used as evidences of customary international law.<sup>50</sup> This position is, however, not shared by others.<sup>51</sup>

It is well known that judicial decisions, particularly national ones, can play a pivotal function as evidences of customary international law.<sup>52</sup> The Permanent Court of International Justice considered national judicial decisions as 'facts which express the will and constitute the activities of States'.<sup>53</sup> Large parts of customary international law have been developed in accordance with the practice of the judicial decisions of national courts.<sup>54</sup>

As discussed, some authorities have regarded judicial decisions used for this purpose as falling within the scope of Article 38(1)(d) of the ICJ Statute.<sup>55</sup> However, judicial decisions used as evidences of customary international law are more intimately connected with the law-creating processes, and their consideration under Article 38(1)(d) risks muddying the distinction between law-creating processes and law-determining agencies. As such, they are more appropriately considered under Article 38(1)(b), rather than Article 38(1)(d).<sup>56</sup> The same reasoning applies to all judicial decisions used as material sources of rules of international law, such as judicial decisions used in identifying (or negating) general principles of law.

This view is bolstered by the fact that, had judicial decisions as evidence of customary international law been envisaged by Article 38(1)(d) of the ICJ Statute, it would appear illogical that this sub-paragraph expressly names only two types of evidence,

<sup>48</sup> Jennings, *supra* note 3, at 6.

<sup>49</sup> *Ibid.*

<sup>50</sup> Brownlie, *supra* note 39, at 23.

<sup>51</sup> See, for instance, Jia, 'Judicial Decisions as a Source of International Law and the Defence of Duress in Murder or Other Cases Arising from Armed Conflict', in H. Li, S. Yee, and T. Wang (ed.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001), at 83.

<sup>52</sup> Nollkaemper, *supra* note 40, at 281–282.

<sup>53</sup> *German Interests in Polish Upper Silesia (Germany v. Poland)*, 1926 PCIJ (ser. A) No. 7 (25 May), at 52.

<sup>54</sup> Nollkaemper, *supra* note 40, at 281–282.

<sup>55</sup> See *Kupreskic et al.*, Trial Judgment, *supra* note 9, at 540. See also Brownlie, *supra* note 39, at 23.

<sup>56</sup> Jia, *supra* note 51, at 83.

one of which – the teachings of publicists – is of highly incidental value in evidencing the practice and *opinio juris* of states. If judicial decisions as evidence of customary international law were properly envisaged under Article 38(1)(d), why was the list therein not expanded to include other possible types of evidence, such as national legislation, official proclamations, etc.? It is submitted, therefore, that judicial decisions used as material sources of rules of international law should be considered under the respective sub-paragraphs (a) to (c) of Article 38(1) of the ICJ Statute.

## 2. *Judicial Decisions Connected to National Law*

A distinction is sometimes drawn in the literature between judicial decisions of national courts and judicial decisions of international courts. Cassese stresses the fundamental distinction between international courts and tribunals and municipal courts, in that the former are required to apply international law, whereas the latter are primarily required to apply domestic law.<sup>57</sup> Some authors have cautioned that, even when municipal judges may look as if they are applying international law (and may actually believe that they are doing so), in fact all that they are applying is some peculiar rule of their own national law.<sup>58</sup> Moreover, it has been observed that some judicial decisions of national courts present a narrow outlook or rest on a very inadequate use of the international law sources.<sup>59</sup>

Schwarzenberger identifies six specific grounds on which judicial decisions of national courts may be distinguished, including on the basis that national courts normally may not apply international law which runs counter to the national constitution, and that, in many countries, the doctrine of ‘acts of state’ imposes restrictions on the judicial freedom of national courts.<sup>60</sup>

Although it may be useful, for the purposes of Article 38(1)(d) of the ICJ Statute, to distinguish between different categories of judicial decisions,<sup>61</sup> the critical factor is not between judicial decisions of national courts and judicial decisions of international courts, as such, but rather between judicial decisions of courts and tribunals primarily applying national law (‘national judicial decisions’) and those of courts and tribunals primarily applying international law (‘international judicial decisions’). The emphasis, therefore, is not on the ‘type’ of court or tribunal itself, but rather on the ‘type of law’ being applied. This clarification is useful as the judicial decisions of national courts applying international law (such as the post-World War II courts operating by virtue of Control Council Law No. 10<sup>62</sup>), as well as of mixed courts and tribunals applying international law, would be regarded as ‘international judicial decisions’.

<sup>57</sup> Cassese, *supra* note 37, at 19.

<sup>58</sup> Malanczuk, *supra* note 10, at 51.

<sup>59</sup> Brownlie, *supra* note 39, at 23.

<sup>60</sup> Schwarzenberger, ‘The Inductive Approach to International Law’, 60 *Harvard L Rev* (1947) 539, at 554–555.

<sup>61</sup> *Kupreskic et al. Trial Judgment*, *supra* note 9, at 541.

<sup>62</sup> The ICTY Trial Chamber in *Kupreskic et al.* considered these courts as ‘national courts’: see *Kupreskic et al. Trial Judgment*, *supra* note 9, at 541. Judges McDonald and Vohrah note that, ‘[i]n relation to the post-World War Two military tribunals constituted under the London Charter or Control Council Law No. 10, doubt remains as to whether any of these military tribunals were truly “international in character”’: see *Erdemovic Appeals Judgment*, *supra* note 14, at 53.

It may be argued that international judicial decisions, if only because they are based on international law,<sup>63</sup> are more likely to provide assistance in the determination of rules of international law than perhaps national judicial decisions. This point was clearly underscored by the ICTY Trial Chamber in *Kupreskic et al.*, which held that '[t]he value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. on whether or not the Tribunal is an international court proper'.<sup>64</sup>

However, it may not be useful to be too categorical on this point, as both international and national judicial decisions may, depending on the circumstances, lend assistance to the determination of rules of international law.<sup>65</sup>

## **B Distinction Between Judicial Decisions and the Teachings of the Most Highly Qualified Publicists**

Article 38(1)(d) of the ICJ Statute treats judicial decisions and teachings of publicists as it were in the same breath.<sup>66</sup> Some have questioned why, in view of the manifest risk of subjectivism, teachings of publicists have been accorded such an 'inflated position'.<sup>67</sup> Schwarzenberger observes that, to a certain extent, the relatively late development of a steady stream of well-reasoned international judicial decisions may be held responsible for this state of affairs.<sup>68</sup> Writing in 1908, Oppenheim provides an insight into the state of affairs immediately prior to the drafting of the precursor to sub-paragraph (d):

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 treaties, 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 text-books of international law have so much more importance for the application of law than text-books of other branches of the law.<sup>69</sup>

The international law landscape has developed significantly since this period, and Jia asserts that the role of the teachings of publicists 'cannot be the same in our times when international tribunals have assumed considerably greater authority in interpreting international law by reason not only of consistency in their reasoning and balance in their conclusion, but, far more importantly, of their power given by States to pronounce authoritatively upon legal issues'.<sup>70</sup>

<sup>63</sup> See *Kupreskic et al.* Trial Judgment, *supra* note 9, at 542.

<sup>64</sup> *Ibid.*, at 538–541.

<sup>65</sup> *Semanza* Trial Judgment, *supra* note 31, at 336.

<sup>66</sup> Jennings, *supra* note 3, at 6.

<sup>67</sup> Schwarzenberger, *supra* note 60, at 559–562.

<sup>68</sup> *Ibid.*

<sup>69</sup> Oppenheim, *supra* note 3, at 17.

<sup>70</sup> Jia, *supra* note 51, at 78.

Fitzmaurice famously held, '[a] decision is a fact: an opinion, however cogent, remains an opinion'.<sup>71</sup> The author notes that it is not so much that judicial decisions necessarily possess a higher intrinsic value than the teachings of publicists, but that they have 'a *more direct and immediate impact* on the realities of international life'.<sup>72</sup>

Schwarzenberger considers that there is no other element in Article 38(1) of the ICJ Statute which deserves to be treated with as much reserve as the teachings of publicists.<sup>73</sup> Oppenheim cautions that many of the rules ostensibly 'ascertained' by publicists are 'mere fancies'.<sup>74</sup> Moreover, with respect to the reference in Article 38(1)(d) of the ICJ Statute to the teachings of the *most* highly qualified publicists, it has been observed that trying to ascertain who are the *most* highly qualified publicists in the field of international law is problematic in the extreme.<sup>75</sup>

While the teachings of publicists are regularly cited in the judgments of international criminal courts and tribunals, judicial decisions tend to attract greater deference and have a greater bearing than teachings of publicists. For instance, in dismissing a defence submission (relating to participation in a joint criminal enterprise), the SCSL Trial Chamber in *Taylor* noted that he 'has cited *only* a textbook, but no jurisprudence, in support of [his] submission',<sup>76</sup> implying that the submission might have been more persuasive had it been supported by a judicial decision. Moreover, in the table of authorities annexed to some of the judgments of those courts and tribunals, 'judicial decisions' are normally ranked above the 'secondary' teachings of publicists.<sup>77</sup>

This discussion is not meant to downplay the value of teachings of publicists as important and influential subsidiary means for the determination of rules of international law.<sup>78</sup> However, an approach to Article 38(1)(d) of the ICJ Statute which fails to account for the more direct and immediate impact of judicial decisions should be avoided.<sup>79</sup> Fitzmaurice maintains that Article 38(1)(d) of the ICJ Statute 'errs in placing judicial decisions on the same footing as the teachings of the most highly qualified publicists',<sup>80</sup> while Jia notes that it is simply unrealistic to continue to treat judicial decisions and writings of publicists as being of equal authority.<sup>81</sup>

<sup>71</sup> Fitzmaurice, *supra* note 3, at 168.

<sup>72</sup> *Ibid.*, emphasis added.

<sup>73</sup> Schwarzenberger, *supra* note 60, at 559–562.

<sup>74</sup> Oppenheim, *supra* note 3, at 36.

<sup>75</sup> Schwarzenberger, *supra* note 60, at 559–560.

<sup>76</sup> *Prosecutor v. Charles Ghankay Taylor, Judgment*, SCSL-03-01-T, SCSL Trial Chamber, 18 May 2012, at 463 (n. 1093).

<sup>77</sup> See the annexed table of authorities in, *inter alia*, *RUF Trial Judgment*, *supra* note 26. See also *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Judgment*, Case No. SCSL-2004-16-A, SCSL Appeals Chamber, 22 Feb. 2008.

<sup>78</sup> Malanczuk, *supra* note 10, at 51.

<sup>79</sup> Fitzmaurice, *supra* note 3, at 168.

<sup>80</sup> Cited in Jennings, *supra* note 3, at 9.

<sup>81</sup> Jia, *supra* note 51, at 78.

## 4 Concluding Remarks

This article was written as part of research looking into the approach of international criminal courts and tribunals to the use of external judicial decisions. In this respect, it has been observed that '[t]he role of precedent across international courts has not yet been thoroughly studied, since it is only recently that the number of international rulings of most courts has become sizeable'.<sup>82</sup> This research aims to contribute to this body of literature by examining and mapping out the method of use of such external judicial decisions by these courts and tribunals.

As such, the article has laid out an approach to Article 38(1)(d) of the ICJ Statute based on the formal pronouncements of international criminal courts and tribunals, distilled from their judgments. The next stage of the research undertakes a study of the actual practice of international criminal courts and tribunals with regard to their method of use of external judicial decisions, particularly in light of the lack of clear normative guidance concerning such use.

Finally, this article is also meant as a modest response to the resurgence in the literature of a trend towards the deformatization of international law and a movement away 'from formal law-ascertainment and the resort to non-formal indicators to ascertain ... legal rules'.<sup>83</sup> The emphasis here on a formal approach to Article 38(1)(d) of the ICJ Statute may be seen as a reaction to the view, propounded by some, that the process of 'deformatization [of international law] will continue unabated'.<sup>84</sup>

<sup>82</sup> D. Terris, C. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007), at 120.

<sup>83</sup> d'Aspremont, 'The Politics of Deformatization in International Law', 3 *Goettingen J Int'l L* (2011) 503, at 507.

<sup>84</sup> *Ibid.*, at 550.