Submission from the United States to the International Law Commission on "the use of subsidiary means for the determination of rules of international law, in the sense of Article 38, paragraph 1(d), of the Statute of the International Court of Justice"

January 12, 2023

Introduction

The United States welcomes the opportunity to provide this submission in response to the International Law Commission's request for certain information related to "the use of subsidiary means for the determination of rules of international law, in the sense of Article 38, paragraph 1(d), of the Statute of the International Court of Justice."[1] The United States extends its appreciation to the Special Rapporteur for this project, Mr. Charles Jalloh, as well as to the other members of the ILC. The below information is not intended to be exhaustive; the United States welcomes further discussion with and queries from the Commission or Special Rapporteur on subsidiary means for the determination of the rules of international law.

Decisions of national courts, legislation, and any other relevant practice at the domestic level

U.S. courts have often relied upon Article 38(1) as providing the list of sources of international law.[2] They have described the four elements of Article 38(1) as hierarchical, with Article 38(1)(d) providing a subsidiary or secondary means of determining international law. For example, the U.S. Court of Appeals for the Second Circuit, in *Flores v. Southern Peru Copper Corp.*, wrote that:

> Article 38 embodies the understanding of States as to what sources offer competent proof of the content of customary international law. It establishes that the proper *primary* evidence consists only of those "conventions" (that is, treaties) that set forth "*rules* expressly recognized by the contesting states," *id.* at 1(a) (emphasis added), "international custom" insofar as it provides "evidence of a general practice *accepted as law,*" *id.* at 1(b) (emphasis added), and "the general principles of *law* recognized by civilized nations," *id.* at 1(c) (emphasis added). It also establishes that acceptable *secondary* (or "subsidiary") sources summarizing customary international law include "judicial decisions," and the works of "the most highly qualified publicists," as that term would have been understood at the time of the Statute's drafting.[3]

U.S. courts long emphasized the secondary utility of "teaching of the most highly qualified publicists" (ICJ Statute Art. 38(1)(d)) to determine the content of international law. The seminal U.S. Supreme Court decision in *The Paquete Habana*, although decided several decades before the ICJ Statute was written, addressed the subsidiary means that would later be

[1] UN Doc. A/77/10 at 8-9.

[2] *See, e.g. U.S. v. Hasan*, 747 F. Supp. 2d 599, 631-637 (E.D. Va. 2010) (applying each element, in order, of Article 38(1)(d) to the question at hand).

[3] 406 F.3d 65, 83 (2d. Cir. 2003).

listed in Article 38(1)(d).[4] In particular, the Court stated that "the work of *jurists* and *commentators*" can be looked to as "trustworthy evidence of what the law really is" only when there is no applicable treaty or controlling domestic law.[5] Over a century later, in *Sosa v. Alvarez-Machain*, the Court evaluated the "current state of international law" as evidenced first and foremost treaties and "controlling legislative acts or judicial decision," and in their absence "the works of jurists and commentators."[6]

The role of commentary in determining the content of international law was addressed by the U.S. Court of Appeals for the Second Circuit in *United States v. Yousef.*[7] The Court in *Yousef* acknowledged that scholarship continues to develop regarding the sources of international law, but ultimately found that "publicists' writings are not true 'sources' of international law."[8] Such writings can be "useful in explicating or clarifying an established legal principle or body of law" and can constitute "an acceptable additional source to shed light on a particular question of international law only when *recourse must also be had* beyond the opinions, decisions, and acts of states, and only then to a lesser degree than to more authoritative evidence, such as the State's own declarations, law, and instructions to its agents."[9] The court found that the argument that professors of international law by virtue of their academic experience can determine the rules of customary international law was "certainly without merit."[10] "Put simply, and despite protestations to the contrary by some scholars (or 'publicists' or 'jurists'), a statement by the most highly qualified scholars that international law is *x* cannot trump evidence that the treaty practice or customary practices of States is otherwise."[11]

The Second Circuit returned to the value of the authorities listed in Article 38(1)(d) in *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*[12] The Court stated that courts do traditionally rely on "the works of jurists, writing professedly on public law…or by judicial decisions recognizing and enforcing that law"[13] but also cited to its *Yousef* opinion that "scholarly works are not included among the authoritative sources of customary international law."[14]

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[4] 175 U.S. 677 (1900).

[5] *Id.* at 700 (emphasis added).

[6] 542 U.S. 734 (quoting *The Paquete Habana*, 175 U.S. at 700). Note that in this case, the Court did not address the role of *non-controlling* judicial decisions such as those referred to in ICJ Statute Article 38(1)(d).

[7] 327 F.3d 56 (2d Cir. 2003).

[8] *Id.* at 101.

[9] *Id.* (internal quote omitted) (emphasis in original).

[10] *Id.* at 102.

[11] *Id.*, *see also Flores*, 414 F.3d 233, 250 (2d Cir. 2003) (quoting *Yousef* for the proposition that "we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.")

[12] 517 F.3d 104 (2d Cir. 2008).

[13] *Id.* at 116 (internal quote omitted).

[14] *Id.*

In *Doe v. Nestle S.A.,* the U.S. District Court for the Central District of California quoted Section 103, note 1, of the Restatement (Third) of Foreign Relations Law, which the court wrote "helpfully explains the role of scholarly sources as evidence of customary international law."[15] While the Restatement (now in its fourth iteration), is not a U.S. government document nor does it reflect U.S. state practice, U.S. courts have cited its standard on sources of international law. Section 103, note 1, quoted by the *Doe* court, states that scholarly sources:

> …include treatises and other writings of authors of standing; resolutions of scholarly bodies such as the Institute of International Law (Institut de droit international) and the International Law Association; draft texts and reports of the International Law Commission, and systematic scholarly presentations of international law such as this Restatement. Which publicists are "the most highly qualified" is, of course, not susceptible of conclusive proof, and the authority of writings as evidence of international law differs greatly. The views of the International Law Commission have sometimes been considered especially authoritative.

U.S. courts have also occasionally referred to decisions of international courts and tribunals.[16] The Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.*, for example, cited expressly to Article 38(1)(d) and wrote that the "history and conduct" of certain international tribunals was "instructive" for the case at hand.[17] The Court concluded in that case that "modern international tribunals" had demonstrated that the legal assertion made by the plaintiffs had not "ripen[ed] into a universally accepted norm of international law."[18]

We are not aware of legislation regarding the sources of international law in the sense of ICJ Statute Article 38(1)(d).[19]

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[15] 748 F. Supp. 2d 1057, n. 11 (C.D. Ca. 2010).

[16] *See, e.g., Hasan*, 747 F. Supp. 2d at 635-636.

[17] 621 F.3d 111, 133 (2d Cir. 2011).

[18] *Id.* at 137.

[19] While the 2012 Law of Armed Conflict Deskbook for the Judge Advocate General Legal Center is explicitly stated *not* to "espouse an 'official' position of the U.S. Army, Department of Defense, or U.S. Government," it does express "how the Army JAG School teaches its judge advocate students." U.S. ARMY JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., INT'L AND OPERATIONAL L. DEP'T, LAW OF ARMED CONFLICT DESKBOOK ii (2012). The Deskbook cites to Article 38 as a list of sources of international law. *Id.* at 3. It articulates an understanding that the Article 38(1)(d) sources are subordinate to the other three types of sources, asserting that "[j]udicial decisions and the teaching of the most highly qualified publicists can be subsidiary means for the determination of rules of law. These are not really 'sources' of law in that they are 'not ways in which law is made or accepted, but opinion-evidence as to whether some rule has in fact become or been accepted as international law.'" *Id.* at 5. It also refers to Article 38 as articulating a "hierarchy of law," where the international conventions in subparagraph (a) are at the top and provide a "useful starting point for understanding the relative hierarchy within international law." *Id.* at 214.

Statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals

The United States previously explained its view of subsidiary means for the determination of rules of international law in its submission to the ILC, dated January 5, 2018, regarding the draft conclusions on the identification of customary international law. With respect to draft conclusions 13 (decisions of courts and tribunals) and 14 (teachings), the United States endorsed the ILC's view that decisions of courts and tribunals and teachings, "(except where national court decisions may constitute State practice) [] are not themselves sources of international law, but rather are sources that may help elucidate rules of law where they accurately compile and soundly analyze evidence of State practice and opinio juris."[20] Further views on this topic are included the U.S. comments on the draft conclusions on the identification of customary international law.[21]

In its pleadings before international courts and tribunals, the United States often cites to or quotes relevant non-binding decisions of courts and tribunals and the writings of the teachings of the most highly qualified publicists. [22] In *Avena and Other Mexican Nationals*, for example, the United States argued in its Counter-Memorial that the International Court of Justice (ICJ) should consider the principles and reasoning applied in earlier ICJ decisions when deciding new cases.[23] In support of this argument, the U.S. quoted Article 38(1)(d), asserting that "[t]he [ICJ] Statute expressly directs the Court, in considering and deciding cases, to apply 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'…. This surely includes the Court's own decisions."[24] However, the United States relies on such documents as persuasive authority, not as an independent source of law. During recent hearings before the ICJ, the United States urged the Court to interpret a treaty provision "based on [its] text and structure," and to disregard the opposing party's reliance on "hundreds of disparate arbitral decisions rendered some 50 years following the Treaty's conclusion and interpreting vastly different investment agreements concluded decades later."[25]

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[20] Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as Adopted by the Commission in 2016 on First Reading at 18 (available at https://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/icil_usa.pdf&lang=E).

[21] *Id.* at 18.

[22] The United States notes in this regard that its pleadings in investor-state arbitrations, as well as its pleadings in cases before the International Court of Justice and administered by the Permanent Court of Arbitration are, with rare exception, publicly available. *See, e.g., https://www.state.gov/international-claims-and-investment-disputes/*; *see also https://icj-cij.org/*.

[23] *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgement, Counter Memorial of the United States of America at n. 128 (Nov. 2, 2003)

[24] *Id.*

[25] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Verbatim Record, CR 2022/20 (Sept. 23, 2022).