The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute

Mads Andenas[*]/*Johann Ruben Leiss*[**]

[*] Professor at the University of Oslo; Former Chair-Rapporteur, UN Working Group on Arbitrary Detention; Former Director, British Institute of International and Comparative Law, London; Former Director, Centre of European Law, School of Law, King's College, University of London; and undertook work on this article as a Visiting Research Fellow at All Souls College, Oxford in 2016. For more information about the author see <http://www.jus.uio.no/ifp/personer/vit/msandena/>.

[**] MLE, LL.M. (EUI), is Research Fellow at the Faculty of Law, University of Oslo. Email: <j.r.leiss@jus.uio.no>. For more information about the author see <http://www.jus.uio.no/ifp/personer/vit/johannrl/>.

This article builds on a draft working paper published as *M. Andenas* and *J. R. Leiss*, "Article 38(1)(d) ICJ Statute and the Principle of Systemic Institutional Integration (15 November 2016)" University of Oslo Faculty of Law Research Paper No. 2016-20, available at SSRN: <https://ssrncom/abstract=2869655>. We thank *Georg Nolte*, *Geir Ulfstein*, *Eirik Bjorge*, *Matthias Lippold*, *Gentian Zyberi*, *Ludovica Chiussi*, *Astrid Iversen*, *Stian Øby Johansen*, the anonymous reviewer of the ZaöRV and all those who commented or made suggestions on earlier drafts presented at the Max Planck Institute for International, European and Regulatory Procedural Law (Luxembourg), chaired by *Hélène Ruiz Fabri*, the doctoral seminar of *Andreas L. Paulus* (Universität Göttingen) and PluriCourts (Oslo).

Abstract

This article explores the systemic relevance of Art. 38(1)(d) Statute of the International Court of Justice (ICJ Statute). We argue that this provision and its application by the International Court of Justice (ICJ) embody a principle of systemic institutional integration. This is a natural and logical corollary of the principle of substantive legal integration. Partly as a consequence of the lack of political action by states to resolve contradictions and fragmentation at the substantive level within the expanding international legal system, courts have been left with a central role at the institutional level. The ever-increasing number of judicial bodies with a role to play in international law must acknowledge each other by taking account of one another's decisions for international law to be an effective legal system; they must address possible conflicts (including those which cannot be resolved) and, in so doing, contribute to the development of legal custom, general principles and (substitutions for) hierarchies of norms and institutions.

In our view, Art. 38(1)(d) ICJ Statute offers a basic communicative framework for the "production of communitarian semantics" that allows for the development of an international judicial system. Lit. (d) "obliges" international courts and tribunals, as a general rule, to take into account the jurisprudence of other judicial bodies when determining international law under the principal sources (lit. (a)-(c)). This "obligation" is subject to qualification insofar as it is not an "obligation" in the strict sense and it acknowledges the practical limitations of courts and thus provides necessary flexibility. It may not require obedience to other "judicial decisions" but it brings about a shift in the argumentative burden. If a court wants to depart from another court's ruling, it must indicate the grounds on which it does so. It follows that departure from interpretations in other decisions must be based on reasonable grounds. Premised on a similar rationale to that of its substantive counterpart, Art. 38(1)(d) sets out a basic framework for coordinating and harmonizing international adjudication, while at the same time recognizing its heterogeneous and horizontal character.

I. Introduction

The ICJ's use of the "judicial decisions" of other judicial bodies throws light on the systemic relevance of Art. 38(1)(d) of the ICJ Statute.[1] Open reliance on decisions by other judicial bodies is a new departure for the ICJ. It has gone from being a rare exception[2] to a growing practice.[3] When these

[1] Statute of the International Court of Justice (signed 26.6.1945, entered into force 24.10.1945), (1946) UKTS 67, Cmd 7015, (1945) Can TS 7, 3 Bevans 1153. The ICJ Statute is annexed to the Charter of the United Nations (UN Charter), of which it forms an integral part.

[2] The ICJ's Registrar would previously informally advise judges that "the Court does not cite regional courts in their judgments", see *M. Andenas*, International Court of Justice, *Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) Judgment of 30 November 2010, ICLQ 60 (2011), 810, 817 [fn. 26], available as University of Oslo Faculty of Law Research Paper No. 2011-17 at SSRN. *Hugh Thirlway* has referred to "an unwritten rule of drafting that the Court only referred specifically to its own jurisprudence" which existed at the time he entered the service of the court in 1968 (*H. W. A. Thirlway*, The Law and Procedure of the International Court of Justice 1960-1989: Part Two, BYIL 61 (1991), 1, 128 [fn. 471]). *Rosalyn Higgins* wrote, as recently as 2016, that "[t]he ICJ has traditionally been very reluctant to refer to, still less to cite, the opinions and judgments of other courts and bodies" (*R. Higgins*, The United Nations at 70 Years: The Impact Upon International Law, ICLQ 65 [2015], 1, 8). See also *T. Treves*, Cross-fertilization Between Different International Courts and Tribunals: The Mangouras Case, in: H. P. Hestermeyer/D. König/N. Matz-Lück/V. Röben/A. Seibert-Fohr/P.-T. Stoll/S. Vöneky (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, 2012, 1791 et seq., and *A. Cassese*, The International Court of Justice: It is High Time to Restyle the Respected Old Lady, in: A. Cassese (ed.), Realizing Utopia: The Future of International Law, 2012, 248. See, however, the former President of the Court *G. Guillaume*, The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order, Speech of the President of the International Court of Justice to the UN General Assembly (26.10.2000) (available at <http://www.icj-cij.org>, last accessed 1.8.2017), who maintains that the ICJ "keeps careful track of the judgments rendered by other courts and tends increasingly to make reference to them", and the analysis in *J. Crawford/P. Nevill*, Relations Between International Courts and Tribunals: The "Regime Problem", in: M. Young, Regime Interaction in International Law: Facing Fragmentation, 2012, 235.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), ICJ Rep. 2004, 136, is considered the break-through for references to and reliance on different UN treaty bodies and Special Rapporteurs; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment), ICJ Rep. 2007, 43, 130 et seq. for the International Criminal Tribunal for the Former Yugoslavia (ICTY); *Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (Preliminary Objections), ICJ Rep. 2007, 582 for regional human rights courts as the European Court of Human Rights (ECtHR); *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), ICJ Rep. 2012, 99, for judgments by domestic courts as state practice for establishing international customary law. See on the growing practice, e.g. *E. Bjorge*, The International Court of Justice's Methodology of Law Ascertainment and Comparative Law, in: M. Andenas/D. Fairgrieve (eds.), Courts and Comparative Law, 2015. On a similar development

referrals and citations are not part of the facts relied upon by the court,[4] nor a means of establishing the factual background of the case,[5] where referrals are not to constituent elements of customary international law – whether state practice, *opinio juris* or both[6] –, or used to establish general principles,[7]

before the ECtHR, see *H. Ruiz Fabri*, The Use of International Judicial Precedents by the European Court of Human Rights: On the Trail of a Judicial Policy, European Journal of Human Rights 15 (2017), 231.

[4] See, for example, *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. United States of America*) (Judgment), ICJ Rep. 2004, 12, 66 [142]-[143]. See with a view to the use of domestic judicial decisions as "facts", the Memorandum by the Secretariat of the International Law Commission, Identification of Customary International Law, The Role of Decisions of National Courts in the Case Law of International Courts and Tribunals of a Universal Character for the Purpose of the Determination of Customary International Law, UN Doc. A/CN4/691, 3 [4].

[5] See, for example, *Bosnia Genocide* (Judgment) (note 3), 130 et seq. [212]-[223], in which the court extensively relied on decisions of the ICTY and held: "This case does however have an unusual feature. Many of the allegations before this Court have already been the subject of the processes and decisions of the ICTY […] [and] that it should in principle accept as highly persuasive relevant findings of fact made by the Tribunal at trial unless of course they have been upset on appeal."

[6] See, for example, *Jurisdictional Immunities of the State* (note 3), 122 [54], 127 [64], 129 [68], 131 et seq. [71]-[75], 134 [76], 135 [78], 136 [83], 137 [85], 139 [90], 142 [96], 148 [118]. See on the role of decisions of national courts as state practice: Third Report on Identification of Customary International Law by *Michael Wood*, Special Rapporteur, UN Doc. A/CN4/682, 42 [58]; Second Report on Identification of Customary International Law by *Michael Wood*, Special Rapporteur, UN Doc. A/CN4/672, 23 et seq. [41]; *P. M. Moremen*, National Court Decisions As State Practice: A Transnational Judicial Dialogue?, North Carolina Journal of Internatioial Law and Commercial Regulation 32 (2006), 259; *A. Pellet*, Article 38, in: A. Zimmermann/K. Oellers-Frahm/C. Tomuschat/C. J. Tams (eds.), The Statute of the International Court of Justice – A Commentary, 2nd ed. 2012, 816 [217] and 862 [321]; *A. L. Paulus*, The Judge and International Custom, Law and Practice of International Courts and Tribunals 12 (2013), 253. Judicial decisions of domestic courts are considered to constitute state practice under Art. 38(1)(b) ICJ Statute, and relevant subsequent practice under Art. 31(3)(b) Vienna Convention on the Law of Treaties (Vienna Convention on the Law of Treaties [with annex], signed 23.5.1969, entered into force 27.1.1980, 1155 UNTS 331) (VCLT) in the application of treaties (see Memorandum by the Secretariat of the International Law Commission (note 4), 3 [4]), as well as "other subsequent practice" under Art. 32 VCLT (see Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation by *Georg Nolte*, Special Rapporteur, UN Doc. A/CN4/694, 36-37 [69]). Arguably, it is the pronouncements of expert bodies that constitute "other subsequent practice" under Art. 32 VCLT, but are not considered practice under Art. 31(3)(b) (Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 36 et seq. [69]), 26 et seq. [62]-[64]). It is disputed whether the same also applies to other international judicial bodies.

[7] *Case Concerning Oil Platforms* (*Islamic Republic of Iran v. United States of America*) (Judgment) (Separate Opinion *Judge Simma*), ICJ Rep. 2003, 161, 354 et seq. [66]-[74]. See also Memorandum by the Secretariat of the International Law Commission (note 4), 3 et seq. [4].

they are typically used as "subsidiary means" (in the terms of Art. 38(1)(d) ICJ Statute) to determine the rules of law under lit. (a)-(c).[8]

[8] See, for example, *The Corfu Channel Case* (Merits), ICJ Rep. 1949, 4, 18; *Fisheries Case* (*United Kingdom v. Norway*), ICJ Rep. 1951, 116, 131; *Nottebohm Case* (*Liechtenstein v. Guatemala*) (Preliminary Objections), ICJ Rep. 1953, 111, 119; *Nottebohm Case* (*Liechtenstein v. Guatemala*) (Second Phase), ICJ Rep. 1955, 4, 21 et seq.; *Case Concerning the Continental Shelf* (*Tunisia v. Libyan Arab Jamahiriya*), ICJ Rep. 1982, 18, 57 [66]; *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada v. United States of America*) (Judgment), ICJ Rep. 1984, 246, 274 [46], 314 [161], 317 [169]; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*) (Jurisdiction and Admissibility), ICJ Rep. 1984, 392, 431 [88]; *Case Concerning the Continental Shelf* (*Libyan Arab Jamahiriya v. Malta*) (Judgment), ICJ Rep. 1985, 13, 38 [45], 44 et seq. [57]; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion), ICJ Rep. 1988, 12, 34 [57]; *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen* (*Denmark v. Norway*), ICJ Rep. 1993, 38, 58 [46], 60 et seq. [51], 62 [55], 62 et seq.[56], 67 [66]; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Rep. 1996, 226, 258 [80]; *Case Concerning the Gabčíkovo-Nagymaros Project* (*Hungary v. Slovakia*) (Judgment), ICJ Rep. 1997, 7, 55 [83]; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (*Cameroon v. Nigeria; Equatorial Guinea intervening*) (Preliminary Objections), ICJ Rep. 1998, 275, 296 [38]; *Case Concerning Kasikili/Sedudu Island* (*Botswana v. Namibia*) (Judgment), ICJ Rep. 1999, 1045, 1060 [20]; *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (*Qatar v. Bahrain*) (Merits), ICJ Rep. 2001, 40, 75 et seq., 77 [110]-[114]; *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of Congo v. Belgium*) (Judgment), ICJ Rep. 2002, 3, 24 [58]; *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* (*Cameroon v. Nigeria; Equatorial Guinea intervening*), ICJ Rep. 2002, 303, 445 [297], 447 [304]; *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan* (*Indonesia v. Malaysia*), ICJ Rep. 2002, 625, 682 [135]; *Wall Opinion* (note 3), 172 [89], 179 [109], 180 et seq. [112], 192 et seq. [136]; *Bosnia Genocide* (Judgment) (note 3), 115 et seq. [172], 121 et seq. [188], 125 [193]-[195], 126 [198], 126 et seq. [199], 127 [200], 167 [300], 208 et seq. [399]-[407]; *Diallo* (Preliminary Objections) (note 3), 615 [89]; *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia v. Singapore*), ICJ Rep. 2008, 12, 36 [67], 50 [121]; *Maritime Delimitation in the Black Sea* (*Romania v. Ukraine*), ICJ Rep. 2009, 61, 109 et seq. 110 [149], 125 [198]; *Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (Judgment), ICJ Rep. 2010, 639, 663 et seq., [66]-[68], 667 et seq. [75]-[77]; *Application of the Interim Accord of 13 September 1995* (*The former Yugoslav Republic of Macedonia v. Greece*), ICJ Rep. 2011, 644, 678 et seq. [109]; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment), ICJ Rep. 2012, 624, 668 [125], 690 et seq. [178], 691 [179], 697 et seq. [198], 705 [220], 706 [223], 707 [227], 708 et seq. [231], 715 et seq. [240]-[242], 716 et seq. [244]; *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agriculture Development* (Advisory Opinion), ICJ Rep. 2012, 10, 27 [39]; *Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (Compensation), ICJ Rep. 2012, 324, 333 [18], 334 et seq. [24], 337 [33], 339 et seq. [40], 342 [49], 343 et seq. [56]; *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*) (Judgment), ICJ Rep. 2012, 422, 457 [101]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*) (Merits), ICJ Rep. 2015, 3, 65 [142], 66 et seq. [145]-[148], 68 et seq. [154]-[164]; *Certain Ac-*

Art. 38(1)(d)'s systemic relevance must be seen against the backdrop of the expansion of international law. This expansion is characterized by a remarkable multiplication and specialization of international law,[9] in tandem with a "proliferation"[10] – if not "explosion"[11] – of international courts and tribunals, and quasi-judicial bodies.[12] The institutional proliferation of judicial bodies, most of them operating in different legal sub-fields, does not conform to the familiar model of the domestic legal order. Indeed, this proliferation has led to systemic concerns about the consistency and effectiveness of international adjudication.[13] The lack of formal judicial hierarchy and appellate structures is seen as a threat to the unity, coherence and predictability of the international judicial system. It is likely to increase the risk of conflicting judgments and competing claims over jurisdiction. Fears have been expressed that international courts and tribunals lack legitimacy, operating as they do in isolation from each other, free from systemic constraints and uncoupled from systems of checks and balances.

Some argue that the risk of conflicting jurisprudence for the structure of international law should not be exaggerated. For example, the former president of the ICJ, *Schwebel*, highlighted the resilience of international law and claimed that

> "[i]n practice international courts may be expected to demonstrate due respect for the opinions of other international courts. […] But the fabric of international

tivities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*) (Merits) and *Construction of a Road in Costa Rica Along the San Juan River* (*Nicaragua v. Costa Rica*) (Merits), ICJ Rep. 2015, 665, 697 et seq. [71]-[76], 711 et seq. [116]-[119].

9 See on this phenomenon, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, finalized by *Martti Koskenniemi*, UN Doc. A/CN4/L682 (2006).

10 See on the rather negative connotation of this term: *P. M. Dupuy/J. E. Viñuales*, The Challenge of "Proliferation": An Anatomy of the Debate, in: C. P. R. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2014, 136 et seq.

11 *R. P. Alford*, The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance, ASIL Proc. 94 (2000), 160.

12 According to the chart published by the "Project on International Courts and Tribunals" (<http://www.pict-pcti.org>, last accessed 1.8.2017) approximately 125 international judicial institutions exist today. Further, on the proliferation of international courts and tribunals, see the special volume of the N. Y. U. J. Int' l L. & Pol. 31 (1998). On the history of the proliferation of judicial bodies, see *J. I. Charney*, Is International Law Threatened by the Multiplication of International Tribunals?, RdC 271 (1998), 101, 117 et seq.

13 See e.g. *G. Guillaume*, The Future of International Judicial Institutions, ICLQ 44 (1995), 848, 849 and 862.

law and life is, it is believed, resilient enough to sustain such occasional differences as may arise."[14]

Yet, the recent backlash against international courts and tribunals (and domestic courts) has underscored the relative fragility of (international) adjudication.[15] Only if courts consider themselves part of a common endeavor, can they counteract the fragmentation and centrifugal forces that weaken international adjudication.

Under the broader label of "judicial dialogue", referring to the decisions of judicial bodies from other legal subsystems (often referred to as "cross-judging",[16] "cross-citation", "cross-fertilization"[17] or "cross-pollination"[18]) has been proposed as one way of responding to systemic concerns in international adjudication. Art. 38(1)(d) is a positive – and underexplored – codification of the use of other judicial decisions. Art. 38(1) ICJ Statute reads:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[19]

---

[14] Address by the President of the International Court of Justice, *Judge Schwebel*, to the General Assembly of the United Nations (27.10.1998), A/53/PV.44, 4.

[15] See *K. J. Alter/J. T. Gathii/L. R. Helfer*, Backlash against International Courts in West, East and Southern Africa: Causes and Consequences, EJIL 27 (2016), 293. See also the severe attacks by UK media and politicians against the ECtHR. On the backlash against investment arbitration, see: *M. Waibel/A. Kaushal/K.-H. Chung* (eds.), The Backlash Against Investment Arbitration: Perceptions and Reality, 2010.

[16] *R. Teitel/R. Howse*, Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order, N. Y. U. J. Int' l L. & Pol. 41 (2009), 959.

[17] See e.g. *T. Treves* (note 2); *J. D'Aspremont*, Formalism and the Sources of International Law, 2011, 205. See also on this expression *A.-M. Slaughter*, Judicial Globalisation, Va. J. Int'l L. 40 (1999-2000), 1103, 1117 et seq.; *A. von Bogdandy/I. Venzke*, The Spell of Precedents: Lawmaking by International Courts and Tribunals, in: C. P. R. Romano/K. J. Alter/Y. Shany (note 10), 517.

[18] See e.g. *P. M. Moremen* (note 6), 261.

[19] The French text reads:

"*La Cour, dont la mission est de régler conformément au droit international les différends qui lui sont soumis, applique: a. les conventions internationales, soit générales, soit spéciales, établissant des règles expressément reconnues par les Etats en litige; b. la coutume internationale comme preuve d'une pratique générale acceptée comme étant le droit; c. les principes généraux de droit reconnus par les nations civilisées; d. sous réserve de la disposition de l'Article 59,*

We will analyze the reference to "judicial decisions" in lit. (d) in order to determine its systemic importance. We will explore the meaning of the term "subsidiary means" and the (ir)relevance of the concept of precedent between courts that operate in different legal "regimes". References to the court's own jurisprudence will not be dealt with in this contribution. The analysis will address three main questions, based primarily on the ICJ's jurisprudence. What is the relationship between "judicial decisions" as "subsidiary means" and the sources listed in lit. (a)-(c)? The next question explores how the decisions of other judicial bodies should be used: Is there an obligation to consider such decisions? Can they ever have a binding effect? And, more generally, what is their weight? Finally, what is the systemic relevance of Art. 38(1)(d), which follows from our analysis?

Reasoning from structure and reasoning from substance, our contention is that Art. 38(1)(d) ICJ Statute provides a means of institutional integration, as a natural corollary to the principle of systemic integration in its substantive sense.[20] We suggest that Art. 38(1)(d) ICJ Statute provides an *institutional* application of the principle of systemic integration, in much the same way as Art. 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[21] in regard to the substantive law and interpretation of international treaties.[22] We will show that Art. 38(1)(d) ICJ Statute "obliges" international courts and tribunals, as a general rule, to take account of the jurisprudence of other judicial bodies when determining international rules under the principal sources (lit. (a)-(c)). This "obligation" is, however, subject to qualification: "obligation" is not used here in the strict sense to imply

les décisions judiciaires et la doctrine des publicistes les plus qualifiés des différentes nations, comme moyen auxiliaire de détermination des règles de droit."

[20] The substantive dimension of fragmentation concerns the specialization and diversification of international law into multiple "regimes", such as human rights law, criminal law, the law of the sea, or trade law (see *M. Andenas*, Reassertion and Transformation: From Fragmentation to Convergence in International Law, Geo. J. Int' l L. 46 [2015], 685, 692).

[21] Art. 31 VCLT provides a "[g]eneral rule of interpretation", and states in (3)(c) that, when interpreting a treaty, "[t]here shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties".

[22] Systemic integration through interpretation has been put forward as a key element in addressing the substantive fragmentation of international law, most prominently in the ILC Fragmentation Report (note 9). This approach builds on *C. McLachlan*, The Principle of Systemic Integration and Art. 31(3)(c) of the Vienna Convention, ICLQ 54 (2005), 279. See also, *J. Crawford*, Chance, Order, Change: The Course of International Law, RdC 365 (2013), 9. On convergence of methods in treaty interpretation, see *E. Bjorge*, The Convergence of the Methods of Treaty Interpretation: Different Regimes, Different Methods of Interpretation?, in: M. Andenas/E. Bjorge (eds.), A Farewell to Fragmentation, 2015, 498 et seq., and *E. Bjorge*, The Convention as a Living Instrument Rooted in the Past, Looking to the Future, HRLJ 36 (2016), 243.

"wrongfulness" for non-compliance. Furthermore, it acknowledges the practical limitations of courts and therefore provides necessary flexibility. Though obedience to other "judicial decisions" is not required, this "obligation" nevertheless brings about a shift in the argumentative burden. If a court wants to depart from another court's ruling, it must show that it has reasonable grounds for doing so.

While we draw mainly from the case law of the ICJ, we argue that – in the absence of special provisions in the constituent documents of other courts – this "obligation", as reflected in Art. 38(1)(d) ICJ Statute (or its customary, respectively general principle equivalent) applies as a general rule also before other international courts and tribunals.[23]

We argue that this reading of Art. 38(1)(d) provides a tool for addressing systemic concerns about unity, coherence, and legitimacy in determining rules of law. At the same time, it does justice to the heterogeneous structure and pluralist nature of the international judiciary. It may curb judicial autonomy, by restraining courts from pursuing the interests of their respective subsystem while ignoring wider societal interests. Interpreting lit. (d) as embodying a principle of systemic institutional integration may also mitigate some of the concerns raised about informal judicial interaction and cooperation among courts: it provides a more formal framework which explicates judicial dialogue; it allocates judicial authority more openly; and it adds legitimacy to international adjudication. Importantly, this principle does not set aside but complements informal judicial interaction or other judicial techniques that address jurisdictional conflicts.

Our starting point is a formalist approach to international law. While we are fully aware of the many limitations of formal approaches,[24] formalism

[23] A comprehensive survey of the case law of other courts and tribunals would go beyond the scope of this article and is left to further research. A review of the ICJ's case law seems justified as a starting point. As has been pointed out by the First Report on Formation and Evidence of Customary International Law by *Michael Wood*, Special Rapporteur, UN Doc. A/CN4/663, 28 [66], in the context of custom formation: "Notwithstanding the specific contexts in which these other courts and tribunals work, overall there is substantial reliance on the approach and case law of the International Court of Justice, including the constitutive role attributed to the two elements of State practice and *opinio juris*." See also the Second Report on Identification of Customary International Law (note 6), 6 [16] [n 15].

[24] Critiques of formalism abound. One fundamental objection concerns the main formalist proposition of a single final foundational premise, which remains epistemologically arbitrary (see *J. V. H. Holtermann /M. R. Madsen*, European New Legal Realism and International Law: How to Make International Law Intelligible, LJIL 28 [2015], 211, 215). The indeterminacy of the final rule makes formalist approaches "like a harlot […] at the disposal of everyone" (*A. Ross*, On Law and Justice, 1959, 261). Other criticize formalism for overstating the self-contained nature of law and for not taking into account the political implications of practice and social facts (see e.g. *R. Pound*, Mechanical Jurisprudence, Colum. L. Rev. 8

helps to distinguish legal arguments from non-legal arguments. International courts and tribunals derive their authority from formal sources.[25] Art. 38(1) ICJ Statute establishes an authority and a method that distinguishes adjudication from political authority.[26] Formalist approaches in isolation cannot fully explain the nature of international law and international adjudication. They cannot do away with the inevitable elements of choice and construction in the determination of law. Formalism can, however, guide and structure arguments about law. The application of legal techniques not only shapes legal discourse, but most importantly, it makes it distinguishable from political discourse.[27] It limits the first referential point of legal arguments to the formal norm, making it possible to exclude arguments unrelated to the legal discourse.

This paper is an attempt to construct a doctrinal argument concerning the use of judicial decisions under Art. 38(1)(d) ICJ Statute. It aims to explore the potential of a formalized approach to cross-citation and judicial dialogue. We acknowledge that this may be nothing more than a starting point. Yet it may provide us with a better understanding of the inherent systemic relevance of lit. (d) for international adjudication.

This article will be structured as follows: the notion "systemic relevance" will be clarified against the background of the expansion of international law (section II.). The scope and meaning of lit. (d) will then be analyzed, with particular regard to its systemic relevance, in section III. Section IV. will address some possible objections and conclude.

[1908], 605; and *J. L. Goldsmith/E. A. Posner*, The Limits of International Law, 2005, 13). Further, formalism has difficulties explaining the plural nature of public authority and multiplication of actors and stakeholders that are involved in international law making. Postmodern approaches have pointed to the role of the judge as a political actor and the subjectivity of the determination of law (see e.g. *M. Koskenniemi*, From Apology to Utopia: The Structure of International Legal Argument, Re-issued with Epilogue, 2005).

[25] In this respect, we share many views with *J. D'Aspremont's* "neo-formalist" approach (note 17). In our view, however, one can go even further emphasizing the normativity of formalism as a precondition for a sustainable "*feeling* of convergence of law-ascertainment" (*J. D'Aspremont* (note 17), 213 et seq.) by law-applying authorities.

[26] *A. L. Paulus*, International Adjudication, in: S. Besson/J. Tasioulas (eds.), The Philosophy of International Law, 2010.

[27] This is reflected in the way in which the Advisory Committee of Jurists distinguished between "general principles" and "equity" when it explained in 1920 its list of formal sources of law in the Statute of the Permanent Court of International Justice (PCIJ Statute) including the former and not the latter, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (16 June-24 July 1920) with Annexes (Van Langenhuysen Brothers 1920), 322.

II. The Notion of "Systemic Relevance" and the Expansion of International Law

The notion of "systemic relevance" refers here to the relevance of Art. 38(1)(d) ICJ Statute in addressing systemic concerns in international adjudication. These concerns result from the expansion of international law over the last decades. They include issues such as the risk of forum shopping,[28] conflicting judgments, the "loss of an overall perspective on the law",[29] and competing claims over jurisdiction and authority between different judicial bodies.[30]

The expansion of international judicial institutions has not been accompanied by any formal hierarchy of courts and tribunals.[31] Other structural elements, which might have secured coordination and coherence, are also lacking.[32] There is no appellate structure at the international level.[33] Prelim-

[28] *J. Pauwelyn/L. E. Salles*, Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions, Cornell Int'l L. J. 42 (2009), 77; *L. R. Helfer*, Forum Shopping for Human Rights, U. Pa. L. Rev. 148 (1999), 285.

[29] ILC Fragmentation Report (note 9), 11 [8]. See also *C. McLachlan* (note 22), 284, *P.-M. Dupuy*, Competition Among International Tribunals and the Authority of the International Court of Justice, in: U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus/S. von Schorlemer/C. Vedder (eds.), From Bilateralism to Community Interest: Essays in Honour of Bruno Simma, 2011, 862, and *G. Guillaume* (note 13), 849 and 862. *Jennings*, for example, expressed concerns that there is a "tendency of particular tribunals to regard themselves as different, as separate little empires" (*Sir R. Jennings*, The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers, in: L. Boisson de Charzournes (ed.), Implications of the proliferation of International Adjudicatory Bodies for Dispute Resolution: Proceedings of a Forum Co-sponsored by the American Society of International Law and the Graduate Institute of International Studies, 1995, 2 and 6).

[30] *Y. Shany*, No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, EJIL 20 (2009), 73, 87.

[31] See e.g. *C. P. R. Romano*, Can You Hear Me Now? The Case for Extending the International Judicial Network, Chi. J. Int'l L. 10 (2009), 233, 234; *T. Treves*, Conflicts Between the International Tribunals for the Law of the Sea and the International Court of Justice, International Law and Politics 31 (1999), 809; *Sir R. Jennings*, The Judiciary, International and National, and the Development of International Law, ICLQ 45 (1996), 1, 5. Nevertheless, judgments of the ICJ in contentious cases enjoy supremacy according to Art. 103 of the Charter, since they create binding obligations for the parties to the dispute under Art. 94(1) UN Charter, see *A. L. Paulus/J. R. Leiß*, Article 103, in: B. Simma/D.-E. Khan/G. Nolte (eds.), The Charter of the United Nations: A Commentary, Vol. 2, 3rd 2012, 2124 et seq. [39], with further references. Yet as *P.-M. Dupuy* (note 29), 864, has pointed out, the ICJ is "far from being recognized as an international supreme court". In his view, Art. 92 of the Charter attaches "superior hierarchical position in the institutional framework" of the UN to the court, but not so from a "relational point of view" due to Art. 95 UN Charter (*P.-M. Dupuy* (note 29), 864).

[32] *P. M. Dupuy/J. E. Viñuales* (note 10), 143 et seq.

[33] There are, however, exceptions within some sub-fields, see e.g. the appellate structures of international criminal tribunals (such as the ICTY and the ICTR) or the WTO. Even

inary reference procedures in international law cannot be found outside of the European Union (EU) and the European Free Trade Association (EFTA) context.[34] No system which enables one court to request an advisory opinion from another international court, has yet been established.[35]

Despite the increasing number of judicial bodies and the lack of explicit coordination or structure, international and national courts and tribunals do not operate in clinical isolation from each other. Beyond the rare examples of formalized judicial interaction and coordination, such as the procedures under Art. 267 TFEU, judicial bodies do engage in some *modi* of judicial

though in a number of cases the ICJ was asked to review aspects of the legality of decisions made by other judicial bodies, the court did not act as an appellate court. For example, its decision in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against United Nations Educational, Scientific and Cultural Organization* (*U.N.E.S.C.O.*) (Advisory Opinion), ICJ Rep. 1956, 77, reviewed, at the request of the UNESCO executive board, decisions rendered by the Administrative Tribunal of the ILO with regard to the jurisdiction of the tribunal and errors in procedure. The court did not review the decision on the merits which "appear[ed] as serving, in a way, the object of judicial appeal" (Administrative Tribunal of the ILO (note 33), 83, 98). See in this regard also *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (Advisory Opinion), ICJ Rep. 1973, 166, *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal* (Advisory Opinion), ICJ Rep. 1982, 325 and *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal* (Advisory Opinion), ICJ Rep. 1987, 18. See in general on the "supervisory", rather than "appeal" functions of the court, *R. Kolb*, The International Court of Justice, 2013, 863 et seq. See, further, the discussion on the establishment of an appellate mechanism in international investment treaty arbitration: *D. A. Gantz*, An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges, Vand. J. Transnat'l L. 39 (2006), 39; *N. Gal-Or*, The Concept of Appeal in International Dispute Settlement, EJIL 19 (2008), 43. See generally, *F. Baetens*, Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms, Journal of International Dispute Settlement 8 (2017), 432.

[34] Art. 267 of the Consolidated Version of the Treaty on the Functioning of the European Union, OJ C326/47 (2012) (TFEU) and Art. 34 of the Agreement Between the EFTA States on the Establishment of A Surveillance Authority and a Court of Justice, OJ L 344/3 (1994). See on the idea of introducing a preliminary reference procedure between the ICJ and other courts: *G. Guillaume* (note 13), 862. See, however, *P.-M. Dupuy* (note 29), 874 et seq., who considers this idea to have a "tiny link with political realism and diplomacy".

[35] See, however, the optional reference procedure from domestic courts to the ECtHR (see Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, not yet entered into force [2.10.2016], CETS ETS No. 214 [2013]). In the case of the different United Nations administrative tribunals, it is the international organization receiving a ruling against it that can request an advisory opinion from the ICJ. On the idea that other courts should be enabled to request advisory opinions from the ICJ, see *K. Oellers-Frahm*, Multiplication of International Courts and Tribunals and Conflicting Jurisdiction - Problems and Possible Solutions, Max Planck UNYB 5 (2001), 67, 92 et seq. For a sceptical position, see *T. Treves*, Advisory Opinions of the International Court of Justice on Questions Raised by Other International Tribunals, Max Planck UNYB 4 (2000), 215.

cooperation, coordination and dialogue.[36] The four main forms of judicial interaction can be categorized along the following lines.

Within the first category, possible clashes with final institutional authority are solved through interpretation when applying substantive law. The principles of *lex specialis*,[37] *lex posterior*,[38] systemic integration[39] and the presumption of compatibility,[40] for example, avoid conflicting claims of final authority by preventing conflicts in the first place.[41] Judicial principles, which are based on concepts of judicial restraint, fall within the second category. Examples are subsidiarity,[42] *lis pendens*,[43] *res judicata*,[44] and judicial

[36] See *A.-M. Slaughter* (note 17) who detects five categories of judicial interaction: relations between national courts and the ECJ, national courts and the ECtHR, "judicial comity", constitutional cross-fertilization and face-to-face meetings among judges.

[37] See on this principle: *A. Lindroos*, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis, Nord. J. Int'l L. 74 (2005), 27; ILC Fragmentation Report (note 9), 30 et seq. [46]-[222]; *B. Simma/D. Pulkowski*, Of Planets and the Universe: Self-contained Regimes in International Law, EJIL 17 (2006), 483, 485 et seq.

[38] See on this principle: ILC Fragmentation Report (note 9), 115 et seq. [223]-[323].

[39] See on this principle: *C. McLachlan* (note 22); ILC Fragmentation Report (note 9), 206 et seq. [410]-[480]. See further the discussion in the next section.

[40] See on the presumption of compatibility, the ICJ in the *Case Concerning Right of Passage Over Indian Territory* (*Portugal v. India*) (Preliminary Objections), ICJ Rep. 1957, 125 142. See also the ECtHR in *Al-Jedda v. United Kingdom*, App. No. 27021/08 App. No. 27021/08, ECHR Rep. 2011-IV, 305, (ECtHR), 60 [102]; in *Nada v. Switzerland*, App. No. 10593/08, (ECtHR), 48 et seq. [170]-[172], and *Al-Dulimi and Montana Management Inc. v. Switzerland*, App. No. 5809/08, (ECtHR), 66 et seq. [138]-[140]. See further: *C. W. Jenks*, The Conflict of Law-Making Treaties, BYIL 30 (1953), 401, 428 et seq.; *J. Pauwelyn*, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, 2003, 240 et seq.

[41] On these principles in the broader context of the discussion on "normative hierarchy" in international law, see *A. L. Paulus/J. R. Leiß* (note 31), 2116 et seq. [11]-[18].

[42] See e.g. *Y. Shany*, Toward a General Margin of Appreciation in International Law?, EJIL 16 (2005), 907 and *Y. Shany*, All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee, Journal of International Dispute Settlement 8 (2017), 560; *E. Bjorge*, Been There, Done That: The Margin of Appreciation and International Law, Cambridge Journal of International and Comparative Law 1 (2014), 181; *E. Cannizzaro*, Proportionality and Margin of Appreciation in the Whaling Case: Reconciling Antithetical Doctrines?, EJIL 27 (2016) 27; and *M. Andenas/G. Bianco*, International Law and the Margin of Appreciation, 2018.

[43] See on *lis pendens* in international law: *C. McLachlan*, Lis Pendens in International Litigation, RdC 336 (2008), 199. On its prerequisites, see: *Case Concerning Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*) (Merits), PCIJ Ser. A, No. 7, 20.

[44] See on *res judicata*: *A. Reinisch*, The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes, Law and Practice of International Courts and Tribunals 3 (2004), 37. *P.-M. Dupuy* (note 29), 869, observed that this principle has never been applied by the court as such, even though it was mentioned in various decisions.

comity[45] when used in the exercise of judicial restraint. The third category overlaps with the first two and builds on different jurisdictional devices developed in private international law that are referred to as choice of law or conflict of laws.[46] The fourth category is judicial cooperation through informal dialogue – the "invisible court".[47] Here, courts engage in a non-formal communicative process of interaction and exchange.[48]

For many of those who focus on the substantive dimension of the fragmentation of international law, the principle of systemic integration is considered a key element – if not the key element – in addressing systemic concerns in international law. It stipulates as a general rule that one must take into account the broader normative environment when interpreting international rules.[49] Art. 31(3)(c) VCLT, expressing this principle in treaty interpretation, reads: "There shall be taken into account, together with the context […] (c) any relevant rules of international law applicable in the relations between parties.". As the wording makes clear, Art. 31(3)(c) is not restricted to "general international law" but applies to "any relevant rules of international law applicable in the relations between the parties".[50] Another principle, which is relevant in the context of systemic integration, is the presumption of compatibility, which highlights one of its underlying rationales.[51] It presumes that states do not intend to create contradictory norms in interna-

[45] *J. Crawford* (note 22), 221, explains the role of judicial comity in a non-hierarchical system: "Comity represents an exercise of discretion by the court or tribunal that weighs its own jurisdiction against the interests of the parties and the conflicting jurisdiction, actual or anticipated, of other courts or tribunals." See also *A.-M. Slaughter*, Court to Court, AJIL 92 (1998), 708; *A.-M. Slaughter* (note 17), 1112 et seq.; *A. Nollkaemper*, Concerted Adjudication in Case of Shared Responsibility, N. Y. U. J. Int' l L. & Pol. 46 (2014), 809, 845, and *P. M. Dupuy/J. E. Viñuales* (note 10), 146 et seq.

[46] See the analysis in *C. McLachlan*, Foreign Relations Law, 2014.

[47] This expression refers to the image of the "invisible college" that was introduced by *O. Schachter*, The Invisible College of International Lawyers, Nw. U. L. Rev. 72 (1977), 217. The term "invisible court" is also used by *P. Hobbs*, The Invisible Court: The Foreign Intelligence Surveillance Court and Its Depiction on Government Websites, in: A. Wagner/R. K. Sherwin (eds.), Law, Culture and Visual Studies, 2014, referring to the secret US Foreign Intelligence Surveillance Court.

[48] See on different forms of informal interaction: *A.-M. Slaughter*, A Global Community of Courts, Harv. Int'l L.J. 44 (2003), 191, 192 et seq., and *A.-M. Slaughter* (note 17), 1120 et seq.; *C. Baudenbacher*, Judicial Globalization. New Developments or Old Wine in New Bottles?, Texas Journal of International Law 38 (2003), 505, 524 et seq. See on the "*dédoublement fonctionnel*" of judges *G. Scelle*, Le Phénomène du Dédoublement Fonctionnel, in: W. Schätzel/H. J. Schlochauer (eds.), Rechtsfragen der Internationalen Organisation: Festschrift für Hans Wehberg zu seinem 70 Geburtstag, 1956.

[49] See ILC Fragmentation Report (note 9), 208 [413] and 209 [415]; *C. McLachlan* (note 22).

[50] See ILC Fragmentation Report (note 9), 212 [422].

[51] See *A. L. Paulus/J. R. Leiß* (note 31), 2118 [18].

tional law.[52] Both the principle of systemic integration and the presumption of compatibility should ensure that normative "conflicts" are avoided by using all interpretative means available.[53]

One of the main objections to this approach of conflict avoidance through interpretation, which was most prominently proposed by the *Fragmentation Report* of the International Law Commission (ILC), is that it deals almost exclusively with the risks of *substantive* fragmentation of international law without properly addressing its *institutional* aspects.[54] The institutional dimension is almost exclusively discussed in the context of interpretation of clauses that determine jurisdiction and thus the rules of law.[55] Yet it seems impossible to address systemic questions in international law comprehensively without taking into account both "norm-fragmentation" and "authority-fragmentation".[56] Courts and tribunals play a central role in securing systemic demands in international law.[57] Given the intrinsic link between determining international legal norms and the allocation of authority, tools for harmonious interpretation and presumptions of compatibility cannot meet systemic concerns comprehensively if they are not backed up by principles allocating judicial authority and inter-institutional discourses concerning the application and interpretation of international rules.

Applying procedural principles, such as *res judicata* or *lis pendens* in order to avoid jurisdictional conflict has only limited systemic potential insofar as these principles deal with jurisdictional conflicts in the same case (in

---

52 See *Right of Passage* (Preliminary Objections) (note 40), 142. See on this principle *C. W. Jenks* (note 40), 427 et seq.; *J. Pauwelyn* (note 40), 240 et seq.; ILC Fragmentation Report (note 9), 25 [37]. See also the ECtHR in *Al-Jedda* (note 40) 60 [102]; in *Nada* (note 40), 48 et seq. [170]-[172]; and *Al-Dulimi* (note 40), 66 et seq. [138]-[140].

53 See *C. W. Jenks* (note 40), 429; *J. Pauwelyn* (note 40), 240 et seq., and 245 et seq.; *C. J. Borgen*, Resolving Treaty Conflicts, George Washington International Law Review 37 (2005), 573, 639. The jurisprudence of the ECtHR on possible conflicts between obligations arising from UN Security Council resolutions and obligations emanating from the ECHR serves as an illustration of the operationalization and interplay of both principles, see ECtHR in *Al-Jedda* (note 40), 60 et seq. [102]-[109]; in *Nada* (note 40), 48 et seq. [170]-[172]; and *Al-Dulimi* (note 40), 66 et seq. [138]-[149].

54 See the critique by *T. Kleinlein*, Judicial Lawmaking by Judicial Restrain? The Potential of Balancing in International Economic Law, GLJ 12 (2011), 1141 et seq. See also *T. Broude*, Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration, Loyola University Chicago International Law Review 6 (2008), 173, 174 et seq.; *E. Vranes*, Völkerrechtsdogmatik als "Self-contained Discipline"? Eine kritische Analyse des ILC Report on Fragmentation of International Law ZÖR 65 (2010), 87, 115.

55 ILC Fragmentation Report (note 9), 212 et seq. [423], 244 [480].

56 *T. Broude* (note 54), 175.

57 See *T. Kleinlein* (note 54), 1141 et seq.

terms of subject, cause and object) and do not necessarily tackle concerns over systemic coherence in a broader sense.[58]

One of the main critiques of informal judicial dialogue through judicial networks as a "system protective" device is that it stands at odds with the requirements of transparent decision-making. Furthermore, informal judicial networks are potentially instable in times of crisis and peril. They often depend on instable variables, such as the persons involved, their integrity and their situational willingness to engage in inter-judicial communication.[59] It is therefore doubtful whether they can secure sufficient systemic resilience.

Some of the most relevant questions regarding the risks ensuing from fragmentation thus remain unanswered: Are there further "system protective doctrines" which successfully address some of the most pressing systemic concerns at the institutional level of international law? What tools are effective and resilient enough to tackle systemic concerns at the institutional level of international law?

III. Article 38(1)(d) ICJ Statute and Systemic Institutional Integration

In this section, we will explore whether Art. 38(1)(d) ICJ Statute provides a basis for addressing the above-mentioned *institutional* systemic concerns in the context of expanding international law. We argue that – based on its construction and its application by the ICJ –Art. 38(1)(d) embodies a principle of (systemic) *institutional* integration which exists as a natural and logical corollary to the principle of systemic substantive legal integration. Systemic *institutional* integration – as an independent but complementary principle – is based on the same considerations and rationales as its substantive counterpart. All international courts and tribunals are themselves creatures of the wider international system, even though they may operate within specialized regimes. Their existence and overall functioning is based on and governed by general international law; at the very least, their constituent documents derive their validity and function from the framework of general international law.[60] Art. 38(1)(d) sets out a basic framework for coordinat-

[58] See *P.-M. Dupuy* (note 29), 870 et seq., 873.

[59] See *P.-M. Dupuy* (note 29), 864, who points to the culture of judges that might address systemic concerns which is an "extremely subjective element" and therefore "fragile".

[60] See *C. McLachlan* (note 22), 280 on the argument that all "treaties are themselves creatures of international law". See also the ILC Fragmentation Report (note 9), 208 [414] and

ing and harmonizing international adjudication, while at the same time recognizing its heterogeneous and horizontal character. Lit. (d) does not give effect to the concept of precedent (in a formal sense), but shares many of its functions and effects. It obliges courts to take into account other judicial decisions, whilst acknowledging practical limitations on courts. Courts are not bound by virtue of lit. (d) to follow other judicial decisions, but there is a shift in the argumentative burden.

1. An Independent Principle? A General Principle?

There are good reasons to argue that aspects of the principle of systemic *institutional* integration are already vested in its substantive corollary. Normative and institutional integration stand together in a "distinct correlative and functional relationship".[61] *Broude* even goes so far as to claim that Art. 31(3)(c) VCLT is in itself "relatively aggressive in its potential impact on authority".[62] Without the institutional framework, legal harmonization, integration and conflict avoidance are futile. The principle of systemic integration contained in Art. 31(3)(c) VCLT already requires that international courts take into account the decisions of other judicial bodies established on the basis of a treaty. The jurisprudence of courts of specialized "subsystems" must be seen as an integral part of the treaty itself, as they provide authoritative interpretations of the obligations enshrined in the treaty and so define treaty obligations. For example, when a court must take into account obligations under the European Convention of Human Rights (ECHR)[63] as "relevant rules of international law applicable in the relations between the parties", it must inevitably refer to Strasbourg's jurisprudence.[64]

In our view, it is nonetheless necessary to carve out the additional, complementary systemic potential of Art. 38(1)(d) ICJ Statute for the following reasons. Art. 38 is contained in the ICJ Statute which is an integral part of

Study on the Function and Scope of the *Lex Special* Rule and Question of "Self-Contained Regimes", Report of the Study Group of the International Law Commission by *Martti Koskenniemi*, UN Doc ILC(LVI)/SG/FIL/CRD1/Add1 (2004), [160].

61 *T. Broude* (note 54), 174 et seq. and 178.

62 *T. Broude* (note 54), 176.

63 Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4.11.1950, entered into force 3.9.1953), ETS No. 5, 213 UNTS 222, amended by Protocol No. 14, entered into force 1.6.2010, UNTS No. A 2889.

64 See *P.-M. Dupuy* (note 29), 874 and *P. M. Dupuy/J. E. Viñuales* (note 10), 146; *A. von Bogdandy/I. Venzke* (note 17), 504.

the most fundamental legal text of international law, the United Nations (UN) Charter (see Art. 92 UN Charter). Moreover, Art. 38 ICJ deals with the institutional dimension of the process of determining the rules of law or law determination.[65] Lit. (d) finds explicit arrangements for the legal relevance and weight of "judicial decision". Furthermore, we aim to clarify the relationship between "judicial decisions" as "subsidiary means" and the principal sources contained in Art. 38(1)(a)-(c).

Art. 38(1) ICJ Statute is not only applicable before the ICJ but must also be considered a general rule applicable before all judicial bodies determining rules of international law. This includes international judicial bodies, domestic courts constitutionally authorized to apply international law and any other court or institution applying international law as such. The general relevance of Art. 38(1) ICJ Statute is supported by its wording according to which the court "whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply" the sources listed in this provision. This implies that the enumeration, which follows, reflects the content of international law (even if one considers the list not to be exhaustive).[66] The general relevance of Art. 38(1) ICJ Statute is supported by the constant practice of international and domestic courts referring to this provision when determining rules of international law and relying on the ICJ's interpretation.[67] Whether Art. 38(1) sets out a legal method or methodology and whether it should be qualified as a customary norm or a fundamental principle of international law can remain open. Those courts which have a special choice of law or related provisions in their constituent documents,[68] in general do not exclude an application of Art. 38(1) ICJ

[65] See *S. Sur*, International Law, Power, Security and Justice: Essays on International Law and Relations, 2010, 166: "Art. 38 of the ICJ Statute cannot be considered a simple guide, limited solely to a technical role in the court, but rather – despite its imperfections – the enunciations of the modes of law formation." See also *R. Y. Jennings*, The Identification of International Law, in: B. Cheng (ed.), International Law: Teaching and Practice, 1982, 3, 9.

[66] See *W. Weiss*, Allgemeine Rechtsgrundsätze des Völkerrechts, AVR 39 (2001), 394, 395.

[67] See e.g. on the interpretation of Art. 38(1)(b) ICJ Statute, First Report on Formation and Evidence of Customary International Law (note 23), 28 [66]; Second Report on Identification of Customary International Law (note 6), 6 [16] [n 15]. See earlier the Survey of International Law in Relation to the Work of Codification of the International Law Commission: Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission - Memorandum submitted by the Secretary-General, UN Doc. A/CN4/1/Rev1, Extract from the Yearbook of the International Law Commission, 1949, 22.

[68] See e.g. Art. 21 of the Rome-Statute of the International Criminal Court or Art. 3 WTO Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement.

Statute, but constantly rely on this provision.[69] If a court's statute were to explicitly exclude – at least residually – any reliance on general international law, Art. 38(1) ICJ Statute as a general rule would give way to the institutional *lex specialis*.

2. Drafting History and the Absence of Systemic Concerns

As the historical records show, Art. 38(1)(d) ICJ Statute and its almost identical precursor, Art. 38(4) of the Statute of the Permanent Court of International Justice (PCIJ Statute), were not necessarily drafted with systemic concerns in mind, or even with the aim of establishing an international judicial system. Even though the drafting of Art. 38(4) PCIJ Statute in 1920 triggered "fierce"[70] discussion within the Committee of Jurists on the role of judicial decisions, the debate did not deal with the general systemic relationship between different international courts and tribunals. The absence of such a discussion is understandable, given the historical context of the drafting. At the time of the creation of this provision, no other permanent international judicial body existed – besides the Permanent Court of Arbitration as a framework for *ad hoc* arbitration – to put the question of an international judicial system on the agenda.[71] While, probably, it would go too far to argue that Art. 38(1)(d) was drafted for this purpose, it nevertheless does not preclude its character as a principle of systemic institutional integration.

3. "Subsidiary Means"

The ICJ has applied Art. 38(1)(d) ICJ Statute in a number of cases – and implicitly in many more – and has taken account of other courts and tribunals, or the absence of any relevant jurisprudence.[72] It has done so when

[69] See the First Report on Formation and Evidence of Customary International Law (note 23), 12 [29]: "Article 38.1 of the Statute of the International Court of Justice, which is widely regarded as an authoritative statement of sources of international law."

[70] *A. Pellet* (note 6), 853 [304].

[71] States agreed at the Second Hague Peace Conference to establish a permanent prize court, but never created it, see *M. E. O'Connell/L. Vanderzee*, The History of International Adjudication, in: C. P. R. Romano/K. J. Alter/Y. Shany (note 10), 51. The Central American Court of Justice (CACJ) had already been automatically terminated when the PCIJ Statute was drafted.

[72] See the examples in note 8.

determining rules of treaty law,[73] rules of customary international law,[74] and general principles.[75] Yet any clear categorization is difficult due to the fact that the court is rarely explicit about the source from which it has deduced a norm of international law and whether it uses judicial decisions as direct sources, elements of other sources, or as subsidiary means in determining a legal rule.

Among other reasons, this lack of methodological clarity on the part of the ICJ has made the question of the meaning of the term "subsidiary means" and the relationship between judicial decisions and the main sources under Art. 38(1)(a)-(c) to be one of the most contested questions on the interpretation of Art. 38(1)(d) ICJ Statute.

Some members of the 1920 Committee of Jurists considered judicial decisions to be sources of law.[76] Others insisted that doctrine and jurisprudence were of a purely subsidiary nature.[77] The expression "as subsidiary means

[73] See for example: *Wall Opinion* (note 3), 179 [109], 180 et seq. [112], 192 et seq. [136]; *Bosnia Genocide* (Judgment) (note 3),115 et seq. [172], 121 et seq. [188], 123 [190], 125 [193]-[195], 126 [198], 126 et seq. [199], 127 [200], 167 [300], 208 et seq. [399]-[407]; *Diallo* (Judgment) (note 8), 663 et seq. [66]-[68], 667 et seq. [75]-[77]; *Interim Accord* (note 8), 678 et seq. [109], 685 [132]; *Obligation to Prosecute and Extradite* (note 8), 457 [101]; *Croatia Genocide* (Judgment) (note 8), 61 [129], 65 [142], 66 et seq. [145]-[148], 68 et seq. [154]-[164], 70 et seq. [161]; *Jan Mayen* (note 8), 58 [46], 60 et seq. [51], 62 et seq. [56], 67 [66].

[74] See for example: *Fisheries Case* (note 8), 131; *Nottebohm* (Second Phase) (note 8), 21 et seq.; *Gulf of Maine* (note 8), 274 [46], 314 [161], 317 [169]; *Case Concerning the Land, Island and Maritime Frontier Dispute* (*El Salvador v. Honduras; Nicaragua intervening*), ICJ Rep. 1992, 351, 589 et seq., [387-404]; *Nuclear Weapons* (note 8), 258 [80]; *Gabčíkovo-Nagymaros* (Judgment) (note 8), 57 [66]; *Kasikili/Sedudu Island* (Judgment) (note 8), 1060 [20]; *Arrest Warrant* (Judgment) (note 8), 24 [58]; *Boundary Between Cameroon and Nigeria* (note 8), 445 [297], 447 [304]; *Pulau Ligitan* (note 8), 682 [135]; *Wall Opinion* (note 3), 172 [89]; *Diallo* (Preliminary Objections) (note 3), 615 [89]-[90]; *Bosnia Genocide* (Judgment) (note 3), 209 et seq. [402]-[404]; *Pedra Branca* (note 8), 36 [67] and 50 [121]; *Black Sea* (note 8), 109 et seq. [149] and 125 [198]; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 668 [125], 690 et seq. [178], 691 [179], 697 et seq. [198], 705 [220], 706 [223], 707 [227], 708 et seq. [231], 715 et seq. [240]-[242], 716 et seq. [244]; *Jurisdictional Immunities of the State* (note 3), 131 et seq. [72]-[76], 135 [78], 139 [90] and 142 [96]; *Jan Mayen* (note 8), 62 [55]; *Maritime Delimitation* (*Qatar v. Bahrain*) (Merits) (note 8), 75 et seq. [110]-[114], 111 [229].

[75] See for example: *Continental Shelf* (*Libya v. Malta*) (Judgment) (note 8), 44 et seq. [57], 38 [45]; *Boundary Between Cameroon and Nigeria* (Preliminary Objections) (note 8), 296 [38]; *Bosnia Genocide* (Judgment) (note 3), 92 [119]; *Judgment No. 2867* (note 8), 27 [39]; *Diallo* (Compensation) (note 8), 331 [13], 333 [18], 334 et seq. [24], 337 [33], 339 et seq. [40], 342 [49], 343 et seq. [56]; *UN Headquarters Agreement* (note 8), 34 [57]; *Corfu Channel* (Merits) (note 8), 18; *Nicaragua* (Jurisdiction and Admissibility) (note 8), 431 [88]; *Nottebohm* (Preliminary Objection) (note 8), 119 et seq.

[76] On the discussion within the Committee, see *A. Pellet* (note 6), 853 [304].

[77] E.g. *A. Ricci-Busatti* (Procès-Verbaux (note 27), 332 and 308) and *Baron É. Descamps* (Procès-Verbaux (note 27), 332, 334 and 336). See also *Lord W. Phillimore* (Procès-Verbaux

for the determination of rules of law" was eventually added by the committee following a proposal by *Descamps*.[78] Academic debate is also divided between those who argue that the term "subsidiary means" indicates that judicial decisions are no sources of international law[79] and that this formulation stipulates a hierarchical relationship between the main sources under lit. (a)-(c) and judicial decisions, and those who consider judicial decisions to be direct sources of international law.[80]

In our view, Art. 38(1) distinguishes between the sources listed in (a)-(c) and judicial decisions. One way of rationalizing this is to begin with the way in which the term "subsidiary means" refers to two different levels of legal determination: a "principal level" and a "subsidiary level". The two-level approach implied by the term "subsidiary means" evinces the dependency of judicial decisions on other sources.[81] The term "subsidiary means" indicates that judicial decisions are applied subsequently to, and are dependent on, a prior principal determination of legal rules.[82] They cannot stand alone but must refer back to other legal sources. The fact that earlier proposals for Art. 38(1)(d)'s predecessor in the PCIJ Statute, indicating an order among the sources and judicial decisions and placing the latter at the

(note 27), 584) who argued that "judicial decisions state, but do not create, law", and *A. de Lapradelle* (Procès-Verbaux (note 27), 584) who proposed that "it would be useful to specify that the Court must not act as a legislator".

78 *Baron É. Descamps* (Procès-Verbaux (note 27), 605). The Council of the League adopted the Committee's final proposal – then Art. 38 – with a minor modification by adding the formulation "subject to the provisions of Article 57bis".

79 See e.g. *A. Pellet* (note 6), 853 et seq. [304]-[305]. *G. Schwarzenberger*, International Law, Vol. I: International Law as Applied by International Courts and Tribunal, 3rd ed. 1958, 26 et seq., regards subsidiary means as "law determining agencies" by which an alleged rule may be "verified". The Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 27 [64], speaks of "evidence for identifying the different sources". See also *S. Rosenne*, The Law and Practice of the International Court, 1920-2005, Vol. III, 2006, 1551. *M. O. Hudson*, The Permanent Court of International Justice 1920-1942: A Treatise, 1943, 603, points to the – similarly authoritative – French wording and the term "*moyen auxiliaire*". See also *W. Graf Vitzthum*, Begriff, Geschichte und Quellen des Völkerrechts, in: W. Graf Vitzthum (ed.), Völkerrecht, 2nd ed. 2001, 79 [147], who speaks of "bloße[n] Erkenntnisquellen". See, further, *G. J. H. van Hoof*, Rethinking the Sources of International Law, 1983, 173, who regards it as "comprehensible that decisions of the Court are viewed as a source" but rejects their classification as "*de jure* sources of international law".

80 See e.g. *Sir R. Jennings* (note 31), 3 et seq., writing that he has "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". See, however, *Sir R. Jennings/Sir A. Watts*, Oppenheim's International Law, Vol. 1, 9th ed. 1992, 41, who speak of "indirect sources".

81 See *A. Z. Borda*, A Formal Approach to Article 38 (1) (d) of the ICJ Statute From the Perspective of the International International Criminal Courts and Tribunals, EJIL 24 (2013), 649.

82 *A. Z. Borda* (note 81), 656.

end,[83] were dropped, does not rule out the dependency of judicial decisions as subsidiary means on a prior principal determination of legal rules.[84] The absence of a successive or hierarchical order relates to the order in which the court proceeds when determining law and not to the general question of whether judicial decisions are dependent on other sources.

That judicial decisions are applied as subsidiary means "for the determination of rules of law" does not necessarily imply that judicial decisions are sources similar to those in lit. (a)-(c). The term "determination" is open to different interpretations.[85] Understood broadly, it includes the initial finding of a rule and its application.[86] The verb "determine" in isolation may also mean to include an element of creation. Alongside the term "subsidiary means", however, this is probably too broad an interpretation, unlikely to reflect the intention of the drafters.

However, this two-level construction also does not imply that judicial decisions share no features at all with the legal sources listed in (a)-(c). Against the backdrop of the broader discussion on the role of judges between judicial law-finding and judicial law-making, it is difficult to argue that a process of legal determination has no law-creating features.[87] The judicial practice of determining legal rules necessarily requires interpretation. Interpretation as a communicative exercise shapes rules and brings them into law. Judicial decisions resemble the dynamic and procedural relationship between the creation and the finding of law. Conceiving judicial decisions as merely "reflections on", "elucidations of" or "documentations for" existing rules does not sufficiently reflect this dynamic and procedural rela-

[83] See e.g. Procès-Verbaux (note 27), 306.

[84] The Sub-committee of the League Council deleted the words "in the order following" because it considered them "unnecessary", Documents Concerning the Action Taken by the Council of the League of Nations Under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court (not including material collected for, or the Minutes of, the Advisory Committee of Jurists) (Pref. 1921), 211.

[85] See *A. Z. Borda* (note 81), 650; *M. Shahabuddeen*, Precedent in the World Court, 1996, 77.

[86] See *A. Z. Borda* (note 81), 653.

[87] See *Sir R. Jennings/Sir A. Watts* (note 80), 41, who point to the fact that "judicial decision has become a most important factor in the development of international law"; *S. Talmon*, Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion, EJIL 26 (2015), 417, 419, who argues that "determining the law also always means developing and, ultimately, creating the law". See also *A. E. Boyle/C. M. Chinkin*, The Making of International Law, 2007, 268; *J. D'Aspremont* (note 17), 204. See already, *H. Kelsen*, Reine Rechtslehre: Einleitung in die Rechtswissenschaftliche Problematik, 1934, 82 et seq., 91. See further: Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) (Separate Opinion *Judge Alvarez*), ICJ Rep. 1949, 174, 190: "[I]n many cases it is quite impossible to say where the development of law ends and where its creation begins."

tionship. A strict hierarchical categorization of the means enumerated in Art. 38(1) into "law-creating processes" and "law determining agencies", as suggested by *Schwarzenberger*, does not take account of the complex character of judicial decisions.[88]

4. Article 38(1)(d) ICJ Statute and the Concept of Precedent

A question that is closely related to the discussion about the meaning of the term "subsidiary means" is whether the judicial decisions of other courts qualify as precedents – either by virtue of Art. 38(1)(d) or as a source outside of Art. 38.

The concept of precedent refers to the binding effect of judicial decisions for subsequent cases beyond the specific case in which the decision was rendered.[89] It is closely linked to the principle of *stare decisis*. Even though precedent in its most developed formal sense is mostly associated with common law systems, as an abstract (non-formal) jurisprudential principle it may be regarded as common to all legal systems.[90]

Precedent is considered to be of high systemic relevance for legal and judicial systems. *Martinez* considers precedent to be one of the most relevant "system protective doctrines".[91] It is considered a central element in the

---

[88] See *G. Schwarzenberger* (note 79), 26 et seq., who considers "principal" and "subsidiary means" as "law-determining agencies" of different characters, the former having priority over the latter.

[89] See *Sir G. Fitzmaurice*, Some Problems Regarding the Formal Sources of International Law, in: M. Koskenniemi (ed.), Sources of International Law, 2000, 73. The literature on precedent is abundant. A classic UK text is *R. Cross/J. W. Harris*, Precedent in English Law, 4th ed. 1991). For a more recent UK perspective, see *N. Duxbury*, The Nature and Authority of Precedent, 2008. See further *M. J. Gerhard*, The Power of Precedent, 2008. For earlier discussions, see e.g. *C. K. Allen*, Precedent and Logic, L.Q.R. 41 (1925), 329; *Lord Wright*, Precedents, U. Toronto L.J. 4 (1942), 247. On the concept of precedent in international law, see e.g. *M. Shahabuddeen* (note 85). *G. Guillaume*, The Use of Precedent by International Judges and Arbitrators, Journal of International Dispute Settlement 2 (2011), 5; *C. Schreuer/M. Weiniger*, A Doctrine of Precedent?, in: P. Muchlinski/F. Ortino/C. Schreuer (eds.), The Oxford Handbook of International Investment Law, 2008; and Société Française Pour le Droit International, Le Précédent en Droit International (Colloque de Strasbourg), 2015.

[90] *G. I. Hernández*, The International Court of Justice and the Judicial Function, 2014, 167; *A. T. Kronman*, Precedent and Tradition, Yale L.J. 99 (1990), 1029, 1031 et seq. See, however, the explicit preclusions of the concept of precedent in Art. 5 of the French Code Civil.

[91] *J. S. Martinez*, Towards an International Judicial System, Stanford L. Rev. 56 (2003), 429, 448 et seq. *Martinez* describes several categories of "system-protective doctrines". Among these are rules relating to overlapping or concurrent jurisdiction over disputes, rules related to the enforcement of judgments (such as the principle of *res judicata*), rules related to precedent, and rules related to interaction with political branches of government.

process of system formation and system stabilization. From a systemic perspective, precedent has a dual nature. It relies on an existing systemic framework, which situates different courts within the same legal system. At the same time, it establishes system affiliation between different judicial bodies and defines judicial relationships among courts and tribunals. Precedent is not able to construct legal systems in isolation, but it is the concept around which many of the systemic questions crystallize. This systemic feature of precedent even prompts some observers to argue that there are judicial systems – particularly, but not exclusively, common law systems – which are constructed mainly on the basis of precedent. *Stone Sweet*, for example, has shown the important role that precedent played in the "Judicial Construction of Europe".[92] *Justice Stevens* of the U.S. Supreme Court has highlighted the systemic relevance of precedent by stating that *stare decisis*:

> "is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion'."[93]

One form of precedent binds a court to follow its own decisions; another form of precedent binds courts to follow the decisions by higher courts in an appellate system. Lit. (d) does not aim at either binding effect in a formal sense of precedent. This view seems to be the majority position in international doctrine and practice:[94] international courts are bound formally nei-

[92] *A. Stone Sweet*, The Judicial Construction of Europe, 2004, explains how the EU was constructed through the joint effort of the domestic courts of the EU member states and the ECJ by applying the preliminary reference procedure and the concept of precedent.

[93] *Hubbard v. United States*, 514 US (1995), 695, 711. It is well known that there are different views on the doctrine and its application among the justices of the U.S. Supreme Court. At the same time, the doctrine continues to provide a framework for legal reasoning in the judgments.

[94] See, for example, the ICTY in *Prosecutor v. Kupreškić et al.,* Case No. IT-95-16-T, Trial Chamber Judgment (ICTY), 540, stating that: "Clearly, judicial precedent is not a distinct source of law in international criminal adjudication." See further: *Sir G. Fitzmaurice* (note 89), 74; *M. N. Shaw*, International Law, 5th ed. 2003, 103. See with regard to the ICJ: *Sir R. Jennings* (note 31), 6.

ther by their own decisions,[95] nor by the decisions of other judicial bodies as precedents.[96]

For the ICJ, however, this does not follow, as some suggest, from Art. 59 ICJ Statute, to which Art. 38(1)(d) refers. As has been pointed out by *Lauterpacht*, Art. 59 merely refers to intervention and does not address the broader question of precedent.[97]

The first reason why it is necessary to distinguish between precedent and Art. 38(1)(d) is that, contrary to lit. (d), precedent as a strictly formal concept relies on a claim of "content-independent" authority.[98] Under a strict formal concept of precedent, a judge does not follow the decision because it accurately reflects law emanating from another source and is based on persuasive reasoning but because of its "content-independent" normative status. Courts obey precedent not because it "evinces", "reflects" or "elucidates" the law contained in other formal sources but because of the source-status of the precedent and the judge's authority itself.[99] Precedent subordinates "content to form".[100] While Art. 38(1)(d) does not neglect the law-making function inherent to jurisprudential activity, the characterization of judicial decisions as "subsidiary means" excludes claims of "content-independent" authority which decouple the decision's authority from the authority of another source of international law. They must refer to the other sources enumerated under lit. (a)-(c) and are dependent on them.[101]

One may counter that even if one looks at those common law systems which are most commonly associated with the use of precedent, such as the UK or the US, judicial decisions are generally not considered to create law

---

[95] See *Boundary Between Cameroon and Nigeria* (Preliminary Objections), (note 8), 275 [28]. See also, *J. S. Martinez* (note 91), 482. See, however, *G. I. Hernández* (note 90), 156 et seq. See, moreover, *R. Kolb* (note 33), 1162 et seq., who applies the term precedent to the use of the ICJ of its own decisions but also maintains that international courts are not "formally tied by precedent since the *stare decisis* principle is inapplicable in international law".

[96] *J. S. Martinez* (note 91), 484. Some international treaties establish an appellate system, for instance in the European Union. In a hierarchical system, the authority of the judgment of the higher court will invariably be given a weight closer to that of a doctrine of precedent.

[97] See *Sir H. Lauterpacht*, The Development of International Law by the International Court, (reprinted edition 1982), 1958, 8. See on this point also *Sir R. Jennings* (note 31), 6 et seq. See, however, the opposite view in *J. Crawford*, Brownlie's Principles of Public International Law, 8th ed. 2012, 38.

[98] *G. I. Hernández* (note 90), 169 et seq. See on the "content independence" of authority in general: *H. L. A. Hart*, Commands and Authoritative Legal Reasons, in: H. L. A. Hart (ed.), Essays on Bentham: Studies in Jurisprudence and Political Theory, 1982, 243, 261 et seq.; *F. Schauer*, Authority and Authorities, Va. L. Rev. 94 (2008), 1931, 1935.

[99] See *G. I. Hernández* (note 90), 158.

[100] *G. I. Hernández* (note 90), 171.

[101] *H. W. A. Thirlway*, The Sources of International Law, in: M. D. Evans (ed.), International Law, 3rd ed. 2010, 110.

totally independent from other legal sources. In these legal systems, they are, at least to a certain extent, "ancillary" to other formal sources of law.[102] Nevertheless, the fundamental conceptual difference between precedent and Art. 38(1)(d) still stands: precedents develop a normative life of their own, which emancipates them from other sources; the same does not hold true for Art. 38(1)(d). Thus, the difference between independent normative authority attached to judicial decisions by precedent and independent normative authority under Art. 38(1)(d) is not simply one of degree but it is one of kind.

Second, there are wider methodological and conceptual implications to *not* considering other judicial decisions as precedents: this enables courts to challenge the findings of other courts openly, through reasoned argument. Precedent, on the contrary, limits the grounds on which the authority of other judicial decision may be challenged.[103] Distinguishing cases on factual grounds often remains the only possibility.[104]

Third, distinguishing precedent and the use of decisions as "subsidiary means" is also in accordance with and gives expression to the non-hierarchical, heterogeneous character of the international adjudicatory system. From a normative point of view, it provides the necessary flexibility with regard to selecting the judicial decisions to be taken into account.

A fourth argument against considering Art. 38(1)(d) as giving effect to precedent is that the consensual nature of international law precludes states that were not parties to a case and did not explicitly agree to be bound by the outcome from being bound by the judgment.[105] The ICJ's judgment in the *Frontier Dispute* case in which a chamber of the court considered the 1917 judgment by the Central American Court of Justice (CACJ) to constitute "a relevant precedent decision of a competent court" cannot be interpreted as holding a formal concept of precedent to be applicable. The chamber made clear that the 1917 judgment "[o]bviously […] could not be *res judicata* between the Parties in the present case" as Honduras was not a

[102] *G. I. Hernández* (note 90), 180 et seq., 185 ("it is important to note that within the common law systems, judicial decisions have, even when binding, always drawn a distinction between a formal source and evidentiary or optional source of law"). See *J. Austin*, Lectures on Jurisprudence or the Philosophy of Positive Law, Vol. 2, 1911, 655, who considered precedents as evidence of how judges have interpreted the law. See also the *House of Lords* (*UK*), *Practice Statement* (*Judicial Precedent*), (1966) 1 WLR 1234 in which the Law Lords held that the concept of precedent has its limits and does not operate independently from other legal concerns.

[103] *G. I. Hernández* (note 90), 169 et seq.

[104] See on the relevance of distinguishing in the context of precedent, *N. Duxbury* (note 89), 111 et seq. See on the ICJ's practice of distinguishing *R. Kolb* (note 33), 1162 et seq.

[105] *J. S. Martinez* (note 91), 483.

party to the proceedings before the CACJ.[106] It further emphasized that it "must make up its own mind on the status of the waters of the Gulf, taking account of the 1917 decision".[107] When the court affirmed the legal finding of the CACJ,[108] it held that its own opinion on the particular regime in the case at hand "parallels" the findings in the 1917 judgment.[109]

Whether Art. 38(1)(d) also conclusively[110] regulates the use of judicial decisions in the determination of the applicable law, excluding the idea of an independent concept of precedent outside of Art. 38, is a more complicated question. *Reisman* (one of the representatives of the process-oriented New Haven School) has spoken of a "myth" created by international legal doctrine and practice that Art. 38 ICJ Statute conclusively reflects what international law is, ignoring the plethora of legal communications making international law.[111] *Jacob* argues that one should apply a more dynamic and flexible concept of precedent which does not "wax over classifications of decided cases as formal sources of law or not".[112] He contends that the classification of judicial decisions into categories of formal sources and non-formal sources does not do justice to the richness of legal arguments.[113] In his view, formal sources are "usually only the first step in a lengthy chain of reasoning".[114] He writes:

> "[f]ormal sources are not the only game in town when it comes to arguing and thus deciding cases; analogies, hypotheticals, consequentialist considerations, historical points, different kinds of logical or linguistic arguments, and the use of dictionaries, maps, graphs, or statistics, to name but a few, are all widespread modes of legal argument. Reasoning in law is a complex process consisting of many steps, usually ranging from the initial classification of matters to various

106 *Frontier Dispute* (note 74), 600 [402].
107 *Frontier Dispute* (note 74), 601 [403].
108 *Frontier Dispute* (note 74), 599 [401].
109 *Frontier Dispute* (note 74), 601 [404].
110 See *G. I. Hernández* (note 90); 180, who speaks of a closed enumeration. See further *C. J. R. Dugard*, International Law: A South African Perspective, 3rd ed. 2005, 27, observing that "every effort is made to bring new developments in respect of sources of law within the categories" of Art. 38(1)(d) ICJ Statute.
111 *J. W. Reisman*, International Law-Making: A Process of Communication, ASIL Proc. 75 (1981), 101. See also *H. H. Koh*, Transnational Legal Process, Neb. L. Rev. 75 (1996), 181, as another "*Spielart*" of the process-oriented legal school focusing on the various actors that participate in the creation of the law.
112 *M. Jacob*, Precedents: Lawmaking Trough International Adjudication, GLJ 12 (2011), 1006, 1010.
113 *M. Jacob* (note 112), 1010 et seq. *Jacob* considers this classification to be a "red herring", which "fails to see the larger picture".
114 *M. Jacob* (note 112), 1011.

stages of identification and interpretation to some form of syllogistic conclusion."[115]

In his view, "[p]recedent can play a part in nearly all of these".[116] *Paulsson* argues in a similar vein. He maintains that "it is pointless to resist the observation that precedents generate norms of international law". Yet, in his view, the concept of precedent in international law must be distinguished from the traditional concept in common law systems; the influence and effect of international awards and judgments differ. In his words: "while hierarchically undistinguishable, there are awards and awards, some destined to become ever brighter beacons, others to flicker and die near-instant deaths".[117]

It is indisputable that formal sources are not the only issue when it comes to law-making, and the picture is more complex than suggested by Art. 38 ICJ. Yet, one main argument speaks in favor of locating authority for the use of international judicial decisions in lit. (d): it reminds courts of the necessary interdependence of judicial decisions as subsidiary means and of principal sources. The virtue of locating the use of judicial decisions conclusively in Art. 38(1)(d) lies in considerations of transparency and accountability.

The clear conceptual distinction between judicial decisions as subsidiary means under Art. 38(1)(d), on the one hand, and their use as precedent, on the other, should not, however, conceal the numerous overlaps between both concepts – in terms of function, purpose and effect – which are pertinent to the systemic relevance of Art. 38(1)(d). Similar to precedent, cross-references under Art. 38(1)(d) set out, explicate and stabilize the structural relationships between different judicial bodies. The use of judicial decisions from other courts under a formal and reliable framework, even if they are no formal precedents, contributes to stability, predictability, equality and consistency across the jurisprudence of the different courts. In so doing, courts stabilize the normative expectations of other actors in the legal system – one of their main functions.[118] Furthermore, the use of judicial decisions as a subsidiary means and as precedent provide a common communicative and argumentative framework for analogical reasoning in a "path de-

115 *M. Jacob* (note 112), 1011.

116 *M. Jacob* (note 112), 1011.

117 *J. Paulsson*, International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law, in: A. J. van den Berg (ed.), International Arbitration 2006: Back to Basics?, 2007, 881.

118 See *J. Habermas*, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, 1996, 427; *N. Luhmann*, Das Recht der Gesellschaft, 1993, 61; *A. von Bogdandy/I. Venzke* (note 17), 508.

pendent way" among different courts. This argumentative framework encourages reasoning from structure in addition to reasoning from substance.[119] It establishes a structure which induces a redistribution of the argumentative burden based on the allocation of authority among different judicial bodies.[120] Another function of precedent, which is shared by Art. 38(1)(d), is that of making available a technique of justification, which relies on a historical lineage of reasoning that links the judgment's authority to the broader system rather than to the single judge. By relying on other judicial decisions, judges may justify their reasoning vis-à-vis other courts and society at large. This helps judges meet one of the main challenges[121] of their profession: justifying the application or "adaptation" of the law, which is an inherently indeterminate social abstraction, to a concrete case.[122]

5. Is There an Obligation to Use Other Judicial Decisions?

As has been discussed above, Art. 38(1)(d) ICJ Statute does not grant other judicial decisions the status of a formal source of international law similar to those contained in lit. (a)-(c) or the status of a binding precedent in the strict sense.[123] Some would argue therefore that Art. 38(1)(d) does not entail an obligation to take into account other judicial decisions but leaves it to the judges' discretion.[124] This reading is supported by those who interpret the term "subsidiary means" as indicating a hierarchical relationship between the sources under lit. (a)-(c) and judicial decisions. Others draw a parallel between Art. 38(1)(d) ICJ Statute and Art. 32 VCLT and point to the similarity between the formulations "subsidiary" and "supplementary". Art. 32 VCLT, which refers to "supplementary means" of treaty interpretation, is considered to include judicial decisions as materials that interpreters

119 On the "the significant role of reasoning from structure", see *J. S. Martinez* (note 91) 456.

120 On the shift in the argumentative burden in the context of precedent, see *F. Schauer*, Precedent, Stanford L. Rev. 39 (1987), 571, 580 et seq.; *A. von Bogdandy/I. Venzke* (note 17), 507. See also *G. I. Hernández* (note 90), 179.

121 *A. Stone Sweet* (note 92), 9 et seq., even speaks of an "existential crisis".

122 *A. Stone Sweet* (note 92), 9 et seq. and 32.

123 See also *Sir G. Fitzmaurice* (note 89), 72 et seq.

124 See e.g. Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 27 et seq. [65]. See further *A. Pellet* (note 6), 854 [305] who argues that the court is merely "'invited to use" other judicial decisions. See also *R. van Alebeek/A. Nollkaemper*, The Legal Status of Decisions by Human Rights Treaty Bodies in National Law, in: H. Keller/G. Ulfstein (eds.), UN Human Rights Treaty Bodies: Law and Legitimacy, 2012, 410 et seq.

"may (and are encouraged but not required to) take into account".[125] It is argued that Art. 38(1)(d) ICJ Statute and Art. 32 VCLT therefore "differ fundamentally" from Art. 31(3)(b) VCLT, as the latter "imposes an obligation to take subsequent practice into account when interpreting a treaty". Art. 38(1)(d) ICJ Statute and Art. 32 VCLT, in contrast, "merely open a possibility: whether or not recourse is had to these subsidiary or supplementary means of interpretation" and leave it to the discretion of the interpreter.[126]

In our view, however, Art. 38(1)(d) and the principle of systemic institutional integration "oblige" the court to take other judicial decisions into account.[127] "Obligation" is not used here in a strict sense, nor is it understood as necessarily leading to the "wrongfulness" of an approach that does not take other judicial decisions into account. Not only is it controversial whether courts are subjects to international obligations in a strict sense, but international adjudication also lacks appellate structures for enforcing such "obligation" by means of judicial review. In the present context therefore, "obligation" refers to a duty, which courts should obey in order to carry out their judicial function properly.[128] This "obligation" is subject to qualification insofar as it acknowledges the practical limitations of courts and allows them some flexibility.[129]

a) The Wording: "Shall Apply"

Art. 38(1)'s wording supports this conclusion. The formulation – the court's "function is to decide in accordance with international law" – refers to the whole body of public international law as the basis for its decisions.

---

[125] Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 27 et seq. [64]-[65].

[126] *R. van Alebeek/A. Nollkaemper* (note 124), 410 et seq.

[127] See also *Sir G. Fitzmaurice* (note 89), 76 et seq. See further *R. Kolb* (note 33), 1204, who argues that the ICJ must take into account the pronouncements of other tribunals, at least if they belong to the UN system according to, what he calls, the principle of "free and cooperative interaction of jurisprudence". The decisions of the BVerfG in *Görgülü*, BVerfGE 111, 307 [50] and *Zwangsbehandlung* (1 BvL 8/15, order from 26.7.2016, available at <http://www.bundesverfassungsgericht.de>, last accessed 1.8.2017, 31 [90]) seem to suggest that the court considers itself to be bound to take into account decisions of those courts and judicial expert bodies to which Germany has subjected itself under international law.

[128] A term which comes close to our understanding of "obligation" is the German term *Obliegenheit* which maybe translated as "imperfect obligations".

[129] See further Section 7 on the judicial decisions to be taken into account and methodological questions.

As has been explained above, the term "subsidiary means" merely points to the fact that judicial decisions are dependent on and applied subsequently to a prior principal determination of legal rules – they are, however, not to be excluded from the body of international law. Also the wording "shall apply" implies a general "obligation" to make use of the means listed – including judicial decisions – to determine the applicable law, rather than this being at the discretion of the court.[130]

The reference to Art. 32 VCLT is therefore misleading. Even though the decisions of international courts and tribunals can be "subsidiary means" under Art. 38(1)(d) ICJ Statute and "other supplementary means" under Art. 32 VCLT, since the provisions do not stand in a relationship of exclusivity but partly overlap,[131] the formulations "subsidiary" and "supplementary" have different meanings in their respective contexts. Art. 32 uses the formulation "[r]ecourse may be had to supplementary means of interpretation" while Art. 38(1)(d) ICJ Statute uses the wording "shall apply" – the latter phrase implying a general duty. Furthermore, the use of other judicial decisions as "supplementary means" merely serves to "confirm" interpretations that follow from Art. 31 VCLT or help to clarify when the interpretation under Art. 31 VCLT "[l]eaves the meaning ambiguous or obscure" or "[l]eads to a result which is manifestly absurd or unreasonable". Similar constraints do not apply to the use of judicial decisions under Art. 38(1)(d) ICJ Statute. Thus, the relationship between Arts. 31 and 32 VCLT differs from the relationship between Art. 38(1)(d) and (a)-(c) ICJ Statute. The term "subsidiary means" indicates that judicial decisions are dependent on and applied subsequently to a prior principal determination of legal rules. In contrast to their use under Art. 32, they are not merely applied as *ex-post* confirmation of principal interpretations or as tools which apply in the absence of principal means of interpretation.

Moreover, in our view, Art. 32 VCLT and Art. 38(1)(d) ICJ Statute serve different functions. Art. 38(1)(d) ICJ Statute specifically deals with the institutional configuration of different judicial actors in the process of law determination, while Arts. 31 and 32 VCLT address general rules of treaty interpretation without seeking such strong institutional implications.

---

130 See, however, *A. Pellet* (note 6), 854 [305], who argues that the "phrasing of the chapeau of para. 1 is unfortunate" as the court does not "apply"' judicial decisions which it considers mere "documentary sources".

131 See Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 27 [64].

b) The Practice of the Court and Litigants Before the Court

The view that Art. 38(1)(d) "obliges" the court to take other judicial decisions into account is also supported by general practice among international lawyers and judges. This suggests that there is a common feeling of "obligation" to take into account other judicial decisions in international proceedings. *Fitzmaurice* has observed that international judges and lawyers treat judicial decisions as something "which the tribunal cannot ignore" and "which it is bound to take into consideration". Equally, courts "will not usually feel free to ignore a relevant decision and will normally feel obliged to treat it as something that must be accepted, or else – for good reason – rejected, but which must in any event be taken fully into account".[132]

The ICJ's practice was for a long time characterized by a general reluctance to refer to other judicial decisions. In the majority of cases, the court did not explicitly take into account decisions of other courts and tribunals.

However, it seems that the court itself is more and more inclined to accept such a duty now.[133] In its 2010 *Diallo* judgment, interpreting Arts. 9(1) and (2) and 13 of the International Covenant on Civil and Political Rights (ICCPR), the court referred to the decisions and comments of the Human Rights Committee.[134] It made clear that it did so in order

> "to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[135]

The court's reference to the "entitlement" of individuals and States to clarity and consistency can be seen as expressing the court's sense of "obligation" concerning the use of other judicial decisions. This duty was even more clearly stated in the following paragraph of the same judgment, when the court referred to the African Commission on Human and Peoples'

---

132 *Sir G. Fitzmaurice* (note 89), 76.

133 See the references in note 3.

134 *Diallo* (Judgment) (note 8), 663 et seq., [66]-[68], 667 et seq. [75]-[77]. At 663 et seq. [66], the court referred to *Maroufidou v. Sweden,* No. 058/1979, UN Doc. CCPR/C/13/D/52/1979, IHRL 1734 (UNHRC 1981), ILR 62 (1982), 278 (UNHRC) and *Human Rights Committee, CCPR General Comment No. 15: The Position of Aliens under the Covenant*, UN Doc. HRI/GEN/1/Rev1. In *Diallo* (Judgment) (note 8), 668 [77], the court referred to *Human Rights Committee, CCPR General Comment No. 8: Article 9* (*Right to Liberty and Security of Persons*) UN Doc. HRI/GEN/1/Rev1. The court also referred extensively to the Human Rights Committee and other UN bodies in the 2004 *Wall Opinion* (note 3).

135 *Diallo* (Judgment) (note 8), 664 [66].

Rights interpretation of Art. 12(4) of the African Charter on Human and Peoples' Rights (ACHPR). The court stated that,

> "when the Court is called upon […] to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question."[136]

The idea that the court "must take due account" suggests that the court feels obliged to take the Commission's interpretation into account. By holding that taking into account the jurisprudence of other courts provides the "necessary clarity and the essential consistency of international law, as well as legal security", the court underlines the systemic relevance of cross-references and makes clear that it does not consider itself to be operating in an institutional vacuum. This statement can be seen as a confirmation that Art. 38(1)(d) embodies a principle of systemic institutional integration.[137]

c) Systemic Relevance

In addition, systemic arguments speak in favor of interpreting Art. 38(1)(d) ICJ Statute as "obliging" courts to take into account other judicial decisions. Such an interpretation gives weight to this provision's potential as a key "system-protective" device, similar to precedent's systemic relevance. While Art. 38(1)(d) and the concept of precedent must be conceptually distinguished, they nevertheless share many features relevant to their systemic role. Much like to the concept of precedent, an "obligation" to use judicial decisions stabilizes the organizational structure of international adjudication. It is likely to foster predictability and consistency in the jurisprudence of different courts. Further, it establishes a structure, which makes the allocation of authority more transparent and results in a redistribution of the argumentative burden in legal discourse. In so doing, it strengthens the effectiveness of the system by stabilizing the normative expectations and expectations concerning the exercise of authority. From this perspective, Art. 38(1)(d) provides a communicative and argumentative framework for ana-

136 *Diallo* (Judgment) (note 8), 664 [67].

137 See in this context also the separate opinion of *Judge M. Shahabuddeen* in *Semanza v. Prosecutor,* Case No. ICTR-97-20-A, Appeals Chamber Judgment (ICTR), [27]-[29], who referred to a "legal duty" to take into account other courts to secure "coherence in the whole field".

logical reasoning in a "path dependent way" among different courts, which encourages reasoning from structure in addition to reasoning from substance.[138] The process of determining the law not only entails a dialectic relationship between the specific legal rule that is determined in the case at hand and the broader legal system, but also between the institution which determines the rule and the broader institutional system.[139] Authoritative determination and interpretation of legal rules is intrinsically linked to the legal system in which the court is situated. It is the system which provides the framework within which the exercise of legal authority has effect.

Art. 38(1)(d) ICJ Statute, interpreted as embodying a principle which obliges courts to make use of other decisions, thus satisfies some of the main desires of systemic approaches to international law, namely, their striving for unity, coherence and conflict avoidance. It ensures that international courts and tribunals take into account the findings and interpretations of legal rules by other courts in addition to the normative environment (Art. 31(3)(c) VCLT). It acknowledges that the processes of determining the law and of resolving institutional conflict are often indistinguishable.[140]

d) Against Invisible "Juristocracy"

Interpreting Art. 38(1)(d) ICJ Statute as "obliging" courts to make use of other judicial decisions and giving expression to the principle of institutional systemic integration formalizes informal judicial dialogue among courts and tribunals and makes it transparent. Alongside rather formal elements – such as preliminary references –, which establish and stabilize judicial systems, there exists a number of informal forms of judicial coordination and cooperation which are relevant to the systemic nature of the international judiciary and which play a role in the process of law determination.

The "obligation" to use other judicial decisions mitigates some of the concerns expressed in relation to informal means of judicial dialogue. It makes the "invisible court" visible. By formalizing it, inter-judicial dis-

138 On "the significant role of reasoning from structure", see *J. S. Martinez* (note 91), 456.

139 See a similar argument with regard to the "systemic relationships between rules and principles", Study on the Function and Scope of the Lex Specialis Rule and Question of "Self-Contained Regimes", Report of the Study Group of the International Law Commission (note 60), [29] and *C. McLachlan* (note 22), 287 ("The process of interpretation encapsulates a dialectic between the text itself and the legal system from which it draws breath.").

140 See the similar argument with regard to the relationship between interpretation and conflict resolution: ILC Fragmentation Report (note 9), 207 [412].

course becomes more transparent.[141] In so doing, it counters fears that informal judicial cooperation and dialogue merely act as a veil behind which international elites drive politics, uncontrolled, and fears that cooperation amounts to arbitrary practice. It also helps allocate authority. It provides a reliable structure for judges who participate in international adjudication – they can predict and assess the effect of their decisions – and for those concerned (e.g. individuals and litigants) – who can trace back and detect overarching judicial structures.

e) Prevention of the Arbitrary Use of Other Judicial Decisions

Additional support for the "obligation" to use other judicial decisions can be found in the discourse on comparative approaches in domestic law.[142] One major concern with comparative law and the use of "foreign" judgments in municipal law is that it allows for "cherry picking"[143] and strategic appeals to other judicial decisions.[144] This may lead to an arbitrary selection process[145] and may not prevent selection bias by judges.[146]

---

[141] See on the value of transparency through reasoning, *A. Føllesdal*, To Guide and Guard International Judges, N. Y. U. J. Int' l L. & Pol. 46 (2014), 793, 803 et seq.

[142] In this context it is worth drawing on comparative legal discourse, where discussion of the use of foreign judicial decisions has been a longstanding tradition. Until very recently, international law and comparative law have been considered by the vast majority of legal scholars as operating in two fundamentally different academic and practical contexts. Yet, a shift in approach to these disciplines seems to be appearing, focusing on their interrelatedness rather than their distinctiveness. One recent comprehensive discussion of this field of research, often labelled as "comparative international law", was published in the American Journal of International Law in 2015. See, for example: *A. Roberts/P. B. Stephan/P.-H. Verdier/M. Versteeg*, Comparative International Law: Framing the Field, AJIL 109 (2015), 467; *M. Forteau*, Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission, AJIL 109 (2015), 498; *N. Jain*, Comparative International Law at the ICTY: The General Principles Experiment, AJIL 109 (2015), 486; *K. Linos*, How to Select and Develop International Law Case Studies: Lesson From Comparative Law and Comparative Politics, AJIL 109 (2015), 475. See also *B. N. Mamlyuk/U. Mattei*, Comparative International Law, Brook. J. Int'l L. 36 (2011), 385.

[143] See a parallel concern for international law in Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 41 et seq. [108]-[109], who points to concerns of legitimacy if courts choose other decisions on a selective basis which is not representative of the context of Art. 32 VCLT.

[144] See the discussion on the use of foreign law in domestic legal systems: *A. Scalia*, Keynote Address: Foreign Legal Authority in Federal Courts, ASIL Proc. 98 (2004), 305, 309. Debate over the legitimacy of comparative law has been particularly intense form in the United States and is played out in its Supreme Court with comparative and international law on occasion lumped together as "foreign law".

[145] *A. Føllesdal* (note 141), 804 et seq.

An "obligation" to use other judicial decisions may counter the risk of arbitrariness and it may contribute to methodological coherency in the selection of other judicial decisions.[147] It requires that one justifies the selection of judicial decisions. The selection must be based on rational grounds.[148]

One important difference between the use of judicial decisions in international law and in domestic legal systems should be highlighted: To our knowledge, no domestic legal system has a general constitutional provision[149] comparable with Art. 38(1)(d) ICJ Statute or with a similar systemic potential.

f) Balance of Power

One of the main criticisms wielded against international law in general, and international adjudication in particular, is that it is characterized by an underdeveloped constitutional structure of balance of powers. Constitutions generally set out procedural frameworks which couple law and politics and balance the power between different constitutional organs.[150] In domestic systems, the legislative branch can change the law in order to "correct" decisions by the judiciary.[151] At the international level, such legislative power is – in reality – severely restricted due to the viscous nature of international rule creation, whether it is through treaty-making or custom formation.[152] At the domestic level, directly elected representatives often

146 See on this problem also *M. Rosenfeld/A. Sajó*, Introduction, in: M. Rosenfeld/A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, 2012, 13.

147 See on the call for more methodological "coherency" in the use of comparative law by courts: *M. Andenas/D. Fairgrieve*, Courts and Comparative Law: In Search of a Common Language for Open Legal Systems, in: M. Andenas/D. Fairgrieve, Courts (note 3), 20 and as developed in *M. Andenas/D. Fairgrieve*, Intent on Making Mischief: Seven Ways of Using Comparative Law, in: P. G. Monateri (ed.), Methods of Comparative Law, 2012, 17 et seq.

148 On methodological questions and challenges on the selection of judicial decisions, see section III. 7. b).

149 A reference to comparative law in the South African Interim Constitution of 1993 was strengthened in the 1996 South African Constitution, § 39(1) which states: "When interpreting the Bill of Rights, a court, tribunal or forum must: promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and, may consider foreign law."

150 See *A. von Bogdandy/I. Venzke*, In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification, EJIL 23 (2012), 7, 21 et seq.

151 *A. von Bogdandy/I. Venzke* (note 150), 20.

152 See *E. A. Posner/J. C. Yoo*, Judicial Independence in International Tribunals, Cal. L. Rev. 93 (2005), 1, 56.

select judges and thereby ensure democratic legitimation, at least indirectly.[153] This is not so at the international level.[154]

Even though the "obligation" to use other judicial decisions according to a principle of systemic institutional integration cannot fully compensate for the general lack of constitutional elements, it nevertheless enhances checks and balances, at least within the international judiciary. Courts exercise a certain degree of control over each other, as a substitute for checks and balances within domestic systems, by engaging in deliberate processes at the international level.[155]

Furthermore, from the point of view of ardent proponents of regime specialization, such as *Niklas Luhmann*, the use of judicial decisions stemming from other "functional systems" can be regarded as instances of "structural coupling" which provide for "irritation" and reform of the different functional subsystems.[156] While this may not suffice to overcome alleged "normative closure" and self-referentiality, which constitute and characterize social systems, it may nevertheless provoke changes within the different sub-systems of international law.

g) The Unequal Status of Literature and Judicial Decisions

One challenge to our interpretation is that Art. 38(1)(d) ICJ Statute also refers to "teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law". In particular this is the case as we propose a literal interpretation of "shall apply" judicial decisions.[157] Are courts equally obliged to apply "teachings" or legal literature when determining legal rules?

We would argue that judicial decisions and "teachings of the most highly qualified publicists of the various nations" do not share the same status, despite the wording of lit. (d).[158] This distinction may be drawn for the following reasons.

---

153 *A. von Bogdandy/I. Venzke* (note 150), 34.

154 On the election of international judges, see *R. Mackenzi/K. Malleson/P. Martin/P. Sands*, Selecting International Judges: Principles, Process, and Politics, 2010.

155 On this argument as general support in favour of strengthening the international judiciary, see *J. K. Cogan*, Competition and Control in International Adjudication, Va. J. Int'l L. 48 (2008), 411, 438.

156 On structural coupling, see *N. Luhmann*, Die Gesellschaft der Gesellschaft, 1997, 92 et seq, 776 et seq.

157 See above section III. 5. a).

158 See *A. Z. Borda* (note 81), 650; *Sir G. Fitzmaurice* (note 89), 76; *Sir R. Jennings* (note 31), 8 et seq.; *A. Pellet* (note 6), 854 [305]; *G. J. H. van Hoof* (note 79), 177. See also *S. T.*

In contrast to the increasing use of judicial decisions by the ICJ, the court has explicitly referred to doctrinal views in only very few cases.[159] In one case, a chamber of the court cited "the successive editors of *Oppenheim's* International Law, from the first edition of *Oppenheim* himself (1905) to the eighth edition by *Hersch Lauterpacht* (1955)" and "*G. Gidel*, Le droit international de la mer (1934)".[160]

Furthermore, publicists do not exercise public power in the same way as courts and tribunals do, if they exercise public power at all.[161]

Therefore, devising and agreeing on criteria for the selection of literature based on reasonable grounds that meet the requirements of legitimacy would be difficult, if not unfeasible.

Helmersen, The Use of Scholarship by International Courts and Tribunals, (Ph.D. project in progress at the University of Oslo, Faculty of Law, Department of Public Law, on file with the authors) who shows that international courts and tribunals treat judicial decisions as having more impact on the law than scholarship. See further *S. T. Helmersen*, The Use of Scholarship by the WTO Appellate Body, GoJIL 7 (2016), 309. See, however, *H. W. A. Thirlway* (note 101), 110, who argues that the distinction between teachings and judicial decisions is not a sharp one due to the fact that judges are often eminent scholars themselves. See also *Lord W. Phillimore*, Procès-Verbaux (note 27), 333, who even argued that doctrine was "universally recognised as a source of international law". See, however, *A. Ricci-Busatti* Procès-Verbaux (note 27), 332. See, further, *A. de Lapradelle* Procès-Verbaux (note 27), 336, who argued that "jurisprudence was more important than doctrine".

159 *A. Pellet* (note 6), 868 [336].

160 *Frontier Dispute* (note 74), 593 [394]. The PCIJ referred to the "teachings of publicists" (see *The Case of the S.S. "Lotus"* [*France v. Turkey*], PCIJ Ser. A, No. 10, 26) but explicitly left open the question of their legal relevance or weight. Domestic jurisdictions have varied and evolving practices. French and Italian courts do not cite doctrine in their judgments. US and German courts make extensive use of doctrine. On English courts and the restrictive "Dead Authors' Rule" ruling out contemporary writings, *M. Andenas*, Pulling the Language of Parliament to Pieces and Making Nonsense Out of It, in: M. Andenas/N. Järeborg (eds.), Anglo-Swedish Studies in Law, 1999, 220. In individual opinions, judges of the ICJ show no similar restraint. They often refer to handbooks and academic literature.

161 On the exercise of public power by international courts see *A. von Bogdandy/I. Venzke* (note 150). Some argue that bodies such as the ILC, which come close to some legitimate exercise of public power, also fall under the term "publicists". In our view, however, the ILC does not derive its authority from lit. (d).

6. The Legal Relevance and Weight of Other "Judicial Decisions"

a) Do Other Judicial Decisions Have a Binding Effect?

Even though Art. 38(1)(d) entails an "obligation" to take into account other judicial decisions, the court is not obliged to strictly follow these decisions.[162] As has been argued, they do not have the status of principal sources like those mentioned in Art. 38(1)(a)-(c), nor do they have the status of binding precedent. Judicial decisions are dependent on and are applied subsequently to a prior principal determination of legal rules; they have no independent binding normative relevance in the context of Art. 38(1). This means that the court is primarily bound by the rules following from the principal sources under lit. (a)-(c).

In the 2010 *Diallo* judgment, the court made this explicitly clear when referring to the Human Rights Committee. With regard to the legal relevance of the Committee's pronouncements, the court held that, even though its own interpretation "is fully corroborated by the jurisprudence" of the Committee, it "is in no way obliged, in the exercise of its judicial functions to model its own interpretation of the Covenant on that of the Committee".[163] In the judgment, *Land, Island and Maritime Frontier Dispute*, a chamber of the court also pointed out that even though it would take the 1917 judgment into account as "a relevant precedent decision", it did not feel bound to follow the CACJ's findings. It "must make up its own mind […] on the status of the waters of the Gulf" merely "taking such account of the 1917 decision as it appears to the Chamber to merit".[164] Likewise, the formulation which can be found later in the judgment, that the chamber's opinion "parallels" the findings in the CACJ's 1907 judgment, suggests that the ICJ's decision did not follow due to the binding effect of the CACJ judgment.[165] The judgment in the *Bosnia Genocide* case, the first case in which the ICJ openly disagreed with a decision of another court or tribunal,

[162] *Sir G. Fitzmaurice* (note 89), 76 et seq.; *A. Nollkaemper* (note 45), 840. Therefore, courts are only "obliged" to rely on judicial decisions for the determination of customary international law when, for example, these decisions are instances of state practice. Notably, however, the language that the court uses does not differ very much when using judicial decisions directly as instances of state practice. See also the BVerfG in *Görgülü* (note 127), [50] and *Zwangsbehandlung* (note 127), 30 et seq. [90] which does not consider itself to be strictly bound by decisions of other international judicial bodies.

[163] *Diallo* (Judgment) (note 8), 664 [66].

[164] *Frontier Dispute* (note 74), 601 [403].

[165] *Frontier Dispute* (note 74), 601 [404].

is another instance in which the court did not consider itself bound by the decisions of other judicial bodies.[166] The court made clear that it had given "careful consideration to the [International Criminal Tribunal for the Former Yugoslavia (ICTY)] Appeals Chamber's reasoning in support of the foregoing conclusion, but [found] itself unable to subscribe to […] [its] view".[167]

Also the language used by the court, in cases in which it does not comprehensively discuss the legal relevance of judicial decisions but merely cites them, suggests that the court does not consider itself bound to follow judicial decisions as independent sources. In a number of cases the court has referred to other judicial decisions in brackets (using words such as "see",[168] "compare",[169] etc.) in support of its own findings. Another formulation often used by the court is that it has "noted",[170] "observed",[171] "taken into account"[172] or "carefully examined"[173] other judicial decisions. While the language used and the forms of citation vary, in general, the court uses other decisions as argumentative support, employing expressions which indicate that its own findings concur with the findings of other courts.[174]

b) What Is the Weight of Other Judicial Decisions?

If Art. 38(1)(d) ICJ Statute entails an "obligation" to take into account other judicial decisions, but they have no independent binding effect, what is their legal weight? What does it mean for the ICJ to attach "great weight"

166 *Bosnia Genocide* (Judgment) (note 3), 208 et seq. [399]-[407].
167 *Bosnia Genocide* (Judgment) (note 3), 208 [403].
168 See e.g. *Gabčíkovo-Nagymaros* (Judgment) (note 8), 55 [83]; *Pulau Ligitan* (note 8), 682 [135].
169 See e.g. *Kasikili/Sedudu Island* (Judgment) (note 8), 1060 [20].
170 See e.g. *Arrest Warrant* (Judgment) (note 8), 24 [56]-[58]; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 668 [125], 706 [223]; *Bosnia Genocide* (Judgment) (note 3), 167 [300]; *Interim Accord* (note 8), 678 et seq. [109] and 685 [132].
171 See e.g. *Diallo* (Compensation) (note 8), 339 et seq. [40]; *Bosnia Genocide* (Judgment) (note 3), 125 [193]-[195] and 126 et seq. [199].
172 See e.g. *Diallo* (Compensation) (note 8), 331 [13].
173 See e.g. *Diallo* (Preliminary Objections) (note 3), 615 [89].
174 See *Pedra Branca* (note 8), 36 [67] and 50 [121]; *Wall Opinion* (note 3), 192 et seq. [136]; *Black Sea* (note 8), 125 [198]; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 707 [227]; *Bosnia Genocide* (Judgment) (note 3), 126 et seq. [199], 121 et seq. [188] and 123 [190]; *Boundary Between Cameroon and Nigeria* (note 8), 445 [297]; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 690 et seq. [178] and 708 et seq. [231].

to other decisions and to "take due account" of them?[175] Do they serve as mere "persuasive authority"[176] or do they carry greater weight?

Taking the systemic relevance of Art. 38(1)(d) and the ICJ's practice into consideration, it follows that even though other decisions do not represent precedent or independent formal sources, they must be considered more than mere "persuasive authority". The notion of persuasive authority – used mostly in (domestic) comparative legal discourse, but also tentatively applied to the world of international judicial interaction[177] – refers to the authority of foreign decisions which "attracts adherence" rather than "obliging" it.[178] It is "used to justify […] the use of non-binding and non-national sources of law".[179] One of the main features of "persuasive authority" is that reference to and the use of other decisions are left to the judge or court.[180] Therefore, Art. 38(1)(d) and persuasive authority differ from one

[175] *Diallo* (Judgment) (note 8), 664 [66]-[67]. In the following paragraph the court made clear that these findings were also in accordance with the jurisprudence of the ECtHR (*Diallo* [Judgment] (note 8), 664 [68]).[176] See in general on this notion: *H. P. Glenn*, Persuasive Authority, McGill L. J. 32 (1987), 261. He points to the fact that this is a concept which lacks "formal definition" and is "a well-known but imprecise concept" (*H. P. Glenn* (note 176), 264).

[176] See in general on this notion: *H. P. Glenn*, Persuasive Authority, McGill L. J. 32 (1987), 261. He points to the fact that this is a concept which lacks "formal definition" and is "a well-known but imprecise concept" (*H. P. Glenn* (note 176), 264).

[177] See *A.-M. Slaughter*, A New World Order, 2004, 75 et seq.

[178] *H. P. Glenn* (note 176), 263.

[179] *H. P. Glenn* (note 176), 263.

[180] See *T. Kadner Graziano*, Is it Legitimate and Beneficial for Judges to Compare?, in: M. Andenas/D. Fairgrieve, Courts (note 3), 37 et seq., who argues that "foreign legislation and case law can never bind the national judge. The authority of foreign law can only be persuasive authority.". As pointed out by *Judge Albie Sachs* of the South African Constitutional Court, precedent and persuasive authority are conceptually very different: "If I draw on statements by certain United States Supreme Court Justices, I do so not because I treat their decisions as precedents to be applied in our Courts, but because their dicta articulate in an elegant and helpful manner problems which face any modern court dealing with what has loosely been called church/state relations. Thus, though drawn from another legal culture, they express values and dilemmas in a way which I find most helpful in elucidating the meaning of our own constitutional text." (*S v. Lawrence; S v. Negal; S v. Solberg* (CCT38/96, CCT39/96, CCT40/96), ZACC 11 [1997]; 1997 [10] BCLR, 1348; 1997 [4] SA 1176, 94 [141] of the version available at the court's homepage). See also the strong pleas to use foreign judicial decisions as "persuasive authority" by *Lord Bingham* in *Fairchild v. Glenhaven Funeral Services Ltd*, UKHL 22 (2002), (House of Lords), [32], and by *Justice Kennedy* from the US Supreme Court in *Donald P. Roper, Superintendent, Potosi Correctional Center, Petitioner v. Christopher Simmons* (Opinion of the Court by *Justice Kennedy*), (2005) 543 US 551, 24 et seq.

another in one crucial aspect: under Art. 38(1)(d), courts are "bound" to take into account other judicial decisions.[181]

The practice of the court shows that in the great majority of cases the court adheres to the findings of other judicial bodies. It corroborates their findings and uses them as confirmation of its own reasoning.[182] In the rare cases in which the court has not strictly followed the decisions of other courts and tribunals, it has done so not out of simple defiance but by distinguishing – using more or less sophisticated reasoning – the facts in each case. For example, in its judgment in *Land and Maritime Boundary between Cameroon and Nigeria*, the court held that the findings of the arbitral tribunal in the *Guinea-Bissau* case were not comparable as the tribunal had made specific findings in regard to the delimiting line between Guinea and Guinea Bissau which did not apply to the case before it.[183] In the *Bosnia Genocide* case, too, the ICJ refused to follow the jurisprudence of other judicial bodies on which Bosnia had relied claiming that these were "based on their particular facts" without further explanation.[184] In its 2007 *Diallo*

[181] Yet, Art. 38(1)(d) ICJ Statute shares some common features with the concept of "persuasive authority", which distinguishes it from precedent or other formal sources, such as their greater flexibility.

[182] See e.g. *Corfu Channel* (Merits), (note 8), 18; *Nottebohm* (Preliminary Objection) (note 8), 119; *Nottebohm* (Second Phase) (note 8), 21 et seq.; *Continental Shelf* (*Tunisia v. Libya*) (note 8), 57 [66]; *Nicaragua* (Jurisdiction and Admissibility) (note 8), 431 [88]; *Gulf of Maine* (note 8), 274 [46]; *Continental Shelf* (*Libya v. Malta*) (Judgment) (note 8), 44 et seq. [57]; *Judgment No. 333* (note 33), 72 [97]; *UN Headquarters Agreement* (note 8), 34 [57]; *Frontier Dispute* (note 74), 599 [401], 601 [403]-[404]; *Jan Mayen* (note 8), 58 [46], 60 et seq. [51], 62 [55], 67 [66]; *Nuclear Weapons* (note 8), 257 et seq. [79]-[80]; *Gabčíkovo-Nagymaro* (Judgment) (note 8), 55 [83]; *Boundary Between Cameroon and Nigeria* (Preliminary Objections) (note 8), 296 [38]; *Kasikili/Sedudu Island* (Judgment) (note 8), 1060 [20]; *Maritime Delimitation* (*Qatar v. Bahrain*) (Merits) (note 8), 75 et seq. [110]-[114], 77 [117], 83 [139]-[140], 111 [229]; *Arrest Warrant* (Judgment) (note 8), 24 [58]; *Boundary Between Cameroon and Nigeria* (note 8), 446 [299], 447 [304]; *Wall Opinion* (note 3), 90 [15] and [31], 172 [89], 176 et seq. [100], 179 [109], 192 et seq. [136]; *Bosnia Genocide* (Judgment) (note 3), 92 [119], 115 et seq. [172], 121 et seq. [188], 125 [193]-[195], 126 [198], 126 et seq. [199], 127 [200], 167 [300], 208 et seq. [399]-[407]; *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Carribbean Sea* (*Nicaragua v. Honduras*), ICJ Rep. 2007, 659, 701 [133]-[134], 710 [165], 722 et seq. [213], 723 [214], 729 [235], 746 et seq. [288], 755 et seq. [310], 756 [311]; *Pedra Branca* (note 8), 50 [121]; *Black Sea* (note 8), 109 et seq. [149], 125 [198]; *Dispute Regarding Navigational and Related Rights* (*Costa Rica v. Nicaragua*), ICJ Rep. 2009, 213, 229 et seq. [20], 233 [36], 234 [39], 235 [41]; *Diallo* (Judgment) (note 8), 663 et seq. [66]-[68], 667 et seq. [75]-[77]; *Interim Accord* (note 8), 678 et seq. [109], 685 [132]; *Judgment No. 2867* (note 8), 27 [39]; *Obligation to Prosecute and Extradite* (note 8), 457 [101]; *Diallo* (Compensation) (note 8), 331 [13], 333 [18], 334 et seq. [24], 337 [33], 339 et seq. [40], 342 [49], 343 et seq. [56]; *Croatia Genocide* (Judgment) (note 8), 61 [129], 65 [142], 66 et seq. [145]-[148], 68 et seq. [154]-[164], 70 et seq. [161]; *Jan Mayen* (note 8), 58 [46], 60 et seq. [51], 62 et seq. [56], 67 [66].

[183] *Boundary Between Cameroon and Nigeria* (note 8), 445 [297].

[184] *Bosnia Genocide* (Judgment) (note 3), 92 [119].

judgment, the court rebutted the applicability of findings by arbitral tribunals to which Ghana had referred by arguing that these were "special cases" based on "specific" international agreements.[185] In the *Territorial and Maritime Dispute* case, the court made clear that it would not abandon its usual methodology on maritime delimitation since the Court of Arbitration's decision in the *Anglo-French Continental Shelf* case dealt with a geographical situation quite different to the one at hand.[186] In some cases, the court has reviewed other judicial decisions but has come to the conclusion that the relevant legal question has not been addressed in international jurisprudence or by a specific decision. Examples are the decisions in the *Gulf of Maine Area* case,[187] in the *Jan Mayen* case,[188] in the *Arrest Warrant of 11 April 2000* case,[189] and in the case on the *Dispute Regarding Navigational and Related Rights*.[190]

The only instance in which the court, arguably, openly disagreed with the decision of another court or tribunal is the famous passage of the court's judgment in the *Bosnia Genocide* case.[191] When discussing the state of Serbia's responsibility, the court did not follow the ICTY's view in the *Tadić* case.[192] Yet, the ICJ did not merely dismiss the ICTY's findings but seems to have accepted a shift of the argumentative burden as it allowed itself to deviate from the ICTY's finding only after engaging in a lengthy discussion of its reasons for deviating.[193] In its *Tadić* judgment, the ICTY's Appeals Chamber favored the application of an "overall control" test as the decisive criterion for determining whether acts committed by Bosnian Serbs could be attributed to the Federal Republic of Yugoslavia under the law of State responsibility. The ICTY did so over the application of the "effective control" test which was employed by the ICJ in its *Nicaragua* judgment.[194]

---

185 *Diallo* (Preliminary Objections) (note 3), 615 [90].

186 *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 668 [125].

187 *Gulf of Maine* (note 8), 314 [16].

188 *Jan Mayen* (note 8), 58 [46].

189 *Arrest Warrant* (Judgment) (note 8), 24 [58].

190 *Navigational and Related Rights* (note 182), 247 et seq. [82]-[83].

191 *Bosnia Genocide* (Judgment) (note 3), 208 et seq. [399]-[407].

192 *Bosnia Genocide* (Judgment) (note 3), 208 et seq. [399]-[407]. See the *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment.

193 *Bosnia Genocide* (Judgment) (note 3), 208 et seq., [399]-[407].

194 See on the ICTY's "overall control" test: *Tadić – Appeals Chamber Judgment* (ICTY) (note 192), 47 et seq. [115]-[145]. See on the ICJ's "effective control"' test: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*) (Judgment), ICJ Rep. 1986, 14, 64 [115], and *Bosnia Genocide* (Judgment) (note 3), 208 et seq. [399]-[407]. The Appeals Chamber seemed to suggest in *Tadić* that international law does not provide for an integrated judicial system.

Even though the ICJ acknowledged that it "may well be that the [overall control] test is applicable and suitable" insofar as it is employed "to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide", it made clear that it refused the application of the same test to the general law on state responsibility for acts committed by paramilitary units, armed forces which are not among its official organs.[195] The court underlined that it had given "careful consideration to the Appeals Chamber's reasoning in support of the foregoing conclusion, but [found] itself unable to subscribe to […] [its] view".[196] It explained that it

> "observes that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. As stated above, the Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY's trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it.[197]

For the present analysis, it is most interesting that the court extensively discussed the ICTY's reasoning in order to justify refuting its decision,[198] notwithstanding the fact that the Tribunal itself had refused to follow the ICJ's reasoning in *Nicaragua* in the first place.

When one looks at the ICJ's practice from a systemic perspective, the underlying *ratio* becomes clear: the court considers other judicial decisions to be highly relevant in order "to achieve the necessary clarity and the essential consistency of international law, as well as legal security".[199] At the same time the court pays tribute to the heterogeneous horizontal structure of international adjudication. The court finds an "obligation" in Art. 38(1)(d) to take into account other judicial decisions, without being strictly bound by them. Other decisions shift the argumentative burden and allow for devia-

195 *Bosnia Genocide* (Judgment) (note 3), 210 et seq., [404]-[407].
196 *Bosnia Genocide* (Judgment) (note 3), 209 [403].
197 *Bosnia Genocide* (Judgment) (note 3), 209 [403].
198 *Bosnia Genocide* (Judgment) (note 3), 208 et seq., [399]-[407].
199 *Diallo* (Judgment) (note 8), 664 [66].

tion only when it is thoroughly reasoned.[200] This approach of the court gives expression to the principle of systemic integration.

Where courts have established the applicable law in a case by other means (whether treaty, custom or general principles), the use of other judicial decisions under Art. 38(1)(d) has two rationales. It serves as a framework for reflection on the reasonableness of the law determination and the application and interpretation of the norm to a concrete set of facts.

7. The Judicial Decisions to be Taken into Account

a) The Term "Judicial Decisions"

One of the few points on which there seems to be general consensus is the broad interpretation of the term "judicial decisions" in Art. 38(1)(d) ICJ Statute. It is interpreted as including decisions by national, as well as international, judiciaries.[201] Furthermore, it includes a broad variety of judicial

[200] See *Sir G. Fitzmaurice* (note 89), 76 et seq., who comes to a similar conclusion. See also *J. S. Martinez* (note 91), 487, who argues that "as a default rule […] an international court should consider relevant decisions of other international courts, not depart from them unless necessary for the decision in the case at hand, and, when departing, articulate clearly the reasons for doing so" (*Martinez*, however, does not claim that such a rule has already emerged). See further *R. Higgins/P. Erbb/D. Akande/S. Sivakumaran/J. Sloan*, Oppenheim's International Law: United Nations, 2017, Vol. II, 850, with a regard to views of the HRC arguing that "if there is a strong presumption that they are correct, they must be given serious consideration, and there must be a sound, legal reason for disagreeing with them" (footnotes omitted). A comparative look at the German *Bundesverfassungsgericht* offers an interesting – seemingly parallel – perspective in this regard: the BVerfG has ruled in several cases – some of them following the *LaGrand Case* ([*Germany v. United States of America*] [Judgment], ICJ Rep. 2001, 466) and *Case Concerning Avena and Other Mexican Nationals* [Judgment] (note 4)) proceedings before the ICJ – that decisions by European and international courts are to be considered as "normative guidance" (*normative Leitfunktion*) to be respected by domestic courts (see *Görgülü* (note 127)), 317; *Vienna Convention on Consular Relations I*, 2 BvR 2115/01, 2 BvR 2132/01, 2 BvR 348/03, order from 19.9.2006; BVerfGK 9, 174, [43], [54]-[62] [of the online version]; *Vienna Convention on Consular Relations II*, 2 BvR 2485/07, 2 BvR 2513/07, 2 BvR 2548/07, order from 8.7.2010; BVerfGK 17, 390, (the last two orders are available at <http://www.bundesverfassungsgericht.de>, last accessed 1.8.2017). "Respect" in this regard means more than "taking into account": German courts must follow a decision of a court if it would have been binding on Germany if it had been a party to the case (*Berücksichtigungspflicht*). Only if domestic courts give convincing reasons may they deviate from the international decision (see *Security Detention*, BVerfGE 128, 326, 365). On the BVerfG's perspective on international adjudication, see *A. L. Paulus* (note 6), 261.

[201] See Memorandum by the Secretariat of the International Law Commission (note 4); *M. O. Hudson* (note 79), 613; *H. W. A. Thirlway* (note 2), 127 et seq.; *Sir R. Jennings/Sir A. Watts* (note 80), 44; *A. Nollkaemper*, The Role of Domestic Courts in the Case Law of the

bodies to which the ICJ may refer when determining rules of international law. Decisions by permanent international courts and tribunals, as well as awards of arbitration tribunals, all fall under this provision.[202] The formulation "judicial decisions" not only covers judicial bodies in the narrow sense of those delivering binding judgments, but also includes bodies of a quasi-judicial character. This includes, for example, "pronouncements"[203] by expert bodies which share certain judicial features.[204] Which expert bodies qualify as judicial bodies and which of their pronouncements qualify as "judicial decisions" in the sense of lit. (d) must be decided on a case-by-case basis. Various human rights expert bodies, in our view, would fall under Art. 38(1)(d), not only with regard to their "views" or "opinions" rendered in cases concerning individual complaints, but also when making general comments.[205] Even though general comments have a general nature, they

International Court of Justice, Chinese Journal of International Law 5 (2006), 301, 304 et seq.; *W. Graf Vitzthum* (note 79), 79 [147]; *M. N. Shaw* (note 94), 104. See, however, *A. Pellet* (note 6), 862 [321], who argues that domestic decisions are better viewed as elements of customary international law (*opinio juris* and state practice).

202 See *W. Graf Vitzthum* (note 79), 79 [147]. See, however, *J. Paulsson* (note 117), 880, who leaves the question whether international arbitral awards should be considered the "functional equivalent" of "judicial decisions" or as pronouncements of "the most highly qualified publicists" open.

203 The term "pronouncement" covers for present purposes e.g. "views", "recommendations" and "comments". On the use of term with regard to expert bodies, see Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 48 [14].

204 On the juridical status of treaty body outputs, see *Sir N. Rodley*, The International Court of Justice and Human Rights Treaty Bodies, in: M. Andenas/E. Bjorge (note 22), 88 et seq. See further Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 27 [63], which argues that the pronouncements of expert bodies share features of both means under Art. 38(1)(d). See also the statements by some members of the ILC, e.g. Šturma and *Sir Michael Wood*, when discussing the Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation, Sixty-eighth session (first part), provisional summary record of the 3370th meeting, UN Doc. A/CN4/SR3307. See, however, the general scepticism expressed by *Murphy* in the ILC on the judicial quality of the pronouncements of expert bodies. On the status of pronouncements by the Committee on the Rights of Persons with Disabilities under German national law, see the recent decision of the German BVerfG in *Zwangsbehandlung* (note 127), 30 [90].

205 For example, views and comments by the Human Rights Committee are to be considered as "judicial decisions" in the sense of lit. (d). See *A. Pellet* (note 6), 859 et seq. [318], who discusses "the constant practice" of the Human Rights Committee as part of "jurisprudence". On the judicial character of views issued by the Human Rights Council, see Human Rights Committee, CCPR General Comment No 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/33, 11. See further the Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 27 [63], which argues that "views regarding individual communications have certain elements in common with court decisions".

should nevertheless be considered judicial decisions, if they reflect the "constant approach" of the expert body in question. Art. 38(1)(d) does not require that the decision to which the court refers be rendered between parties or that the parties submit to the jurisdiction of the referred-to judicial body.[206] Pronouncements by expert bodies which do not exercise any judicial or quasi-judicial functions but which serve as scientific bodies providing technical advice are not covered by the term "judicial decisions".[207]

The practice of the ICJ also shows that it interprets the term "judicial decisions" broadly as covering different kinds of courts and tribunals (including arbitral tribunals), expert bodies which exercise judicial functions, and quasi-judicial bodies. The court has referred to the International Tribunal for the Law of the Sea (ITLOS),[208] the CACJ,[209] to the Court of Justice of the European Communities (now Court of Justice of the European Union),[210] and to human rights courts such as the Inter-American Court of Human and Peoples' Rights[211] and the European Court of Human Rights (ECtHR).[212] The court has further referred to international criminal tribunals, including the ICTY,[213] the International Criminal Tribunal for Rwanda

---

It suggests that "general comments have more in common with teachings due to their general nature" but nevertheless acknowledges that they "may also display features of a jurisprudence, or a settled case law" (Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 27 [63]).

206 See below on the problematic implications this has from a consensualist perspective on international law.

207 As an example of such an expert body, see the Commission on the Limits of the Continental Shelf, which consists of 21 members who are experts in the fields of geology, geophysics or hydrography, see on the function of this commission Fourth Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation (note 6), 28 et seq. [69]-[76].

208 See *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 666 [114], 668 [125], 690 et seq. [178], 715 et seq. [240]-[241], and *Diallo* (Compensation) (note 8), 331 [13], 343 et seq. [56].

209 In the *Frontier Dispute* (note 74), 599 [401], 601 [403]-[404] the court referred to the judgment by the CACJ in *El Salvador v. Nicaragua*, AJIL 11 (1917), 674. In the *Navigational and Related Rights* (note 182), 230 [22], 233 [36], 235 [41], 247 et seq. [82]-[83] the court referred to *Costa Rica v. Nicaragua*, AJIL 11 (1917), 181.

210 *Interim Accord* (note 8), 678 et seq. [109].

211 See *Diallo* (Judgment) (note 8), 664 [68]; *Diallo* (Compensation) (note 8), 331 [13], 333 [18], 334 et seq. [24], 337 [33], 339 et seq. [40], 342 [49], 343 et seq. [56].

212 *Bosnia Genocide* (Judgment) (note 3), 92 [119]; *Diallo* (Judgment) (note 8), 664 [68]; *Jurisdictional Immunities* (note 3), 131 et seq. [72], 134 [76] and 135 [78], 139 [90], 142 [96]; *Diallo* (Compensation) (note 8), 331 [13], 334 et seq. [24], 337 [33], 339 et seq. [40], 342 [49], 343 et seq. [56].

213 See *Arrest Warrant* (Judgment) (note 8), 24 [58]; *Bosnia Genocide* (Judgment) (note 3), 121 et seq. [188], 123 [190], 125 [193]-[195], 126 [198], 126 et seq. [199], 127 [200], 167 [300], 208 et seq. [399]-[407]; *Croatia Genocide* (Judgment) (note 8), 61 [129], 65 [142], 66 et seq.

(ICTR),[214] the Nuremberg International Military Tribunal,[215] and the Tokyo International Military Tribunal.[216] The court has also referred to international administrative tribunals, such as the Administrative Tribunal of the International Labour Organization[217] and the United Nations Administrative Tribunal.[218]

The court has referred to a great number of arbitral tribunals: some of them established under the institutional framework of the Permanent Court of Arbitration (PCA),[219] some of them operating before the establishment of the Permanent Court of International Justice (PCIJ),[220] and some after-

[145]-[148], 68 et seq. [154]-[164], 70 et seq. [161]; *Jan Mayen* (note 8), 58 [46], 60 et seq. [51], 62 et seq. [56], 67 [66].

214 See *Bosnia Genocide* (Judgment) (note 3), 126 [198], 167 [300].

215 See *Nuclear Weapons* (note 8), 257 et seq. [79]-[80]; *Arrest Warrant* (Judgment) (note 8), 24 [58]; *Wall Opinion* (note 3), 172 [89]; *Bosnia Genocide* (Judgment) (note 3), 115 et seq. [172], 125 [193]-[195], 208 et seq. [399]-[407].

216 *Arrest Warrant* (Judgment) (note 8), 24 [58].

217 *Administrative Tribunal of the ILO* (note 33), 78, 83, 98.

218 See operative part (conclusions) of the decisions in *Judgment No. 158* (note 33), 213 [101]; *Judgment No. 273* (note 33); *Judgment No. 333* (note 33).

219 For example, the court referred in the case *Boundary Between Cameroon and Nigeria* (Preliminary Objections) (note 8), 296 [38] to the *The North Atlantic Coast Fisheries Case* (*Great Britain v. United States of America*): rendered on 7 September 1910, RIAA XI (1961), 167, ICGJ 403 (PCA 1910), AJIL 4 (1910), 948, Hague Court Reports 1 (1910), 141 (PCA). In its decisions in the cases *Carribean Sea* (note 183), 723 [214], *Pedra Branca* (note 8), 50 [121], and *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 707 [227], the court referred to the famous award in the *Island of Palmas Case* (*or Miangas*): Award rendered on 4.4.1928, RIAA II (1928), 829, ICGJ 392 (PCA 1928), AJIL 22 (1928), 867 from 1928 which was decided by arbitrator *Max Huber*. Also in its decision in the case *Black Sea* (note 8), 109 et seq. [149], the court referred to an award, *Second Stage of the Proceedings Between Eritrea and Yemen* (*Maritime Delimitation*) (*Eritrea v. Yemen*): Award rendered on 17.12.1999, RIAA XXII (1999), 335, ICGJ 380 (PCA 1999), ILM 40 (2001), 983, ILR 119 (1999), 417, which was rendered by PCA. In *Black Sea* (note 8), 125 [198], and *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 705 [220], 707 [227], 715 et seq. [240]-[241], 716 et seq. [244], the court referred to the award delivered in the *Arbitration between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them* (*Barbados v. Trinidad and Tobago*): Award rendered on 11.4.2006, RIAA XXVII (2013), 147 (PCA).

220 See, for example, the referral in *Nottebohm* (Preliminary Objection) (note 8), 119, and the decision in *UN Headquarters Agreement* (note 8), 34 [57], to the award that was rendered in the *Alabama Claims of the United States of America Against Great Britain* (*Alabama Arbitration Case*) (*United States of America v. United Kingdom*): Award rendered on 14.9.1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8.5.1871, RIAA XXIX (2011), 125. In its decision *Diallo* (Preliminary Objections) (note 3), 615 [90], the court referred to the award rendered in the *Delagoa Bay Railway, Re* (*Delagoa Bay Railway Arbitration*) (*United Kingdom and United States v. Portugal*): Award rendered in 1888, BFSP 81 (1888-1889), 691, Moore Interntional Arbitrations 2 (1865). In its decision in *Navigational and Related Rights* (note 182), 229 et seq. [20], 233 [36], 235 [41], 247 et seq. [82]-[83], the court referred to the *Award in Regard to the Validity of the Treaty of Limits between*

wards.[221] The court has further relied on decisions by mixed claims commissions and tribunals.[222] The only Investor State Arbitration the court has

Costa Rica and Nicaragua of 15 July 1858 (*Costa Rica v. Nicaragua*): Award rendered on 22.3.1888 by US President *Cleveland*, RIAA XXVIII (1888), 189. In the *Diallo* (Preliminary Objections) (note 3), 615 [90], the court referred to the award *Claim of the Salvador Commercial Company* ("*El Triunfo Company*") (*Salvador Commercial Company* case) (*United States of America v. El Salvador*): Award rendered on 8.5.1902, RIAA XV (1966), 467. In the *Carribbean Sea* case (note 182), 729 [235], 755 et seq. [310], the court referred to *The Border Dispute between Honduras and Nicaragua* (*Honduras v. Nicaragua*): Award rendered on 23.12.1906 by *HM Alfonso XIII*, King of Spain, RIAA XI (1906), 101.

[221] See in the *Carribbean Sea* case (note 182), 701 [133], the court referred to the award rendered in *Affaire Des Frontières Colombo-Vénézuéliennes* (*Colombia v. Venezuela*): Award rendered on 24.3.1922 by the Swiss Federal Council, RIAA I (1922), 223. In *Carribbean Sea* case (note 182), 701 [133]-[134], 710 [165], 722 et seq. [213], the court referred to the award in *Honduras Borders* (*Guatemala v. Honduras*): Award rendered on 23.1.1933, RIAA II (1949), 1307. In its decisions in *Interim Accord* (note 8), 685 [132], the court referred to *Tacna-Arica Question* (*Chile v. Peru*): Award rendered on 4.3.1925, RIAA II (1949), 921, ADIL No. 269 (1925-1926), AJ 19 (1925), 398. The court further referred in *Interim Accord* (note 8), 685 [132], to the *Lake Lanoux Arbitration* (*Spain v. France*): Award rendered on 16.11.1957, RIAA XII (1963), 281, ILR 24 (1961), 101. In *Pulau Ligitan* (note 8), 682 [135], the court referred to the *Argentina-Chile Frontier Case* (*Palena Arbitration*) (*Argentina v. Chile*): Award rendered on 9.12.1966, RIAA XVI (1969), 109, ILR 38 (1969), 10. The Court referred in a number of decisions (6) to the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic* (*Anglo-French Continental Shelf*) (*United Kingdom v. France*): Award rendered on 30.6.1977, RIAA XVIII (1980), 3, ILM 18 (1979), 397, (see *Continental Shelf* (*Tunisia v. Libya*) (note 8), 57 [66]; *Gulf of Maine* (note 8), 274 [46]; *Continental Shelf* (*Libya v. Malta*) (Judgment) (note 8), 44 et seq. [57]; *Jan Mayen* (note 8), 58 [46], 60 et seq. [51], 67 [66]; *Boundary Between Cameroon and Nigeria* (note 8), 446 [299]; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 697 et seq. [198], 708 et seq. [231]. In the judgment in *Gabčíkovo-Nagymaro* (Judgment) (note 8), 55 [83], the court referred to the *Air Service Agreement of 27 March 1946 Between the United States of America and France* (*United States of America v. France*): Award rendered on 9.12.1978, RIAA XVIII (1980), 417, ILR 54 (1979), 303. In the cases *Maritime Delimitation* (*Qatar v. Bahrain*) (Merits) (note 8), 75 et seq. [110]-[114], 77 [117], 83 [139]-[140] and *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 690 et seq. [178], the court referred to the *Dubai-Sharjah Border Arbitration* (*Dubai v. Sharjah*): Award rendered on 19.10.1981, ILR 91 (1993), 543. The court referred in three cases to the award which was rendered in the case *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau* (*Guinea v. Guinea-Bissau*): Award rendered on 14.2.1985, RIAA XIX (1990), 149, ILM 25 (1986), 252, RGDIP 89 (1985), 504, ILR 77 (1988), 635 (see *Boundary Between Cameroon and Nigeria* (note 8), 445 [297]; *Carribbean Sea* case (note 182), 746 et seq. [288], 756 [311]; *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 691 [179]). In the *Boundary Between Cameroon and Nigeria* (note 8), 447 [304], the court referred to the *Delimitation of Maritime Areas between Canada and France* (*St Pierre and Miquelon Arbitration*) (*Canada v. France*): Award rendered on 10.6.1992, RIAA XXI (1992), 265, ILM 31 (1992), 1149, ILR 95 (1994), 645. In its judgment in the *Kasikili/Sedudu Island* (Judgment), 1060 [20] (note 8), the court referred to the *Boundary Dispute between Argentina and Chile concerning the Frontier Line Between Boundary Post 62 and Mount Fitzroy* (*Laguna del Desierto Arbitration*) (*Argentina v. Chile*): Award rendered on 21.10.1994,

referred to is the award in the case *Biloune and Marine Drive Complex Limited v. Ghana Investments Centre and Ghana*[223] which was rendered by an *ad hoc* tribunal under the United Nations Commission on International Trade Law (UNCITRAL) rules.[224] However, the court did not refer to the award as a judicial authority or use it for the determination of the applicable law, but addressed it briefly only because Ghana had relied on the award in its arguments.

The court has also referred to treaty monitoring bodies, such as the United Nations Human Rights Committee[225] and the Committee Against Tor-

RIAA XXII (1994), 3, ILR 113 (1999), 1, ILR 113 (1999), 17, RGDIP 2 (1996), 592. In the *Boundary Between Cameroon and Nigeria* (note 8), 415 [223], the court referred to the *Indo-Pakistan Western Boundary* (*Rann of Kutch between India and Pakistan Tribunal Constituted Pursuant to Agreement of 30 June 1965*) (*India v. Pakistan*)*:* Award rendered on 19.2.1968, RIAA XVII (1980), 1, ILR 50 (1976), 1, and the *Dispute between Argentina and Chile Concerning the Beagle Channel* (*Argentina v. Chile*)*:* Award rendered on 18.2.1977, RIAA XXI (1998), 53, ILR 52 (1979), 93, ILM 17 (1978), 632.

222 In *Diallo* (Compensation) (note 8), 331 [13], the Court referred to the Iran-United States Claims Tribunal which was set up as a collective settlement process on the basis of the *Algiers Declarations* (*Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran* (*Iran-United States Claims Tribunal*) (signed 19.1.1981), 1 Iran-US CTR 9, AJIL 75 (1981), 422, ILM 20 (1981), 230). In *Diallo* (Compensation) (note 8), 331 [13], the court further referred to the Eritrea-Ethiopia Claims Commission which was established on the basis of a treaty between Eritrea and Ethiopia (*Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the Resettlement of Displaced Persons, as well as Rehabilitation and Peacebuilding in both Countries* (signed and entered into force 12.12.2000), 2138 UNTS 93, UN Doc. A/55/686, Annex, UN Doc. S/2000/1183, Annex, UN Reg. No. I-37274). In its decision on compensation in *Diallo* (Compensation) (note 8), 333 [18], 334 et seq. [24], the ICJ referred to the opinion in the *Opinion in the Lusitania Cases* (*United States of America v. Germany*)*:* Award rendered on 1.11.1923, RIAA VII (1956), 32 by the United States-German Mixed Claims Commission. In the *Bosnia Genocide* (Judgment) (note 3), 92 [119], the ICJ referred to the award rendered by *von Tiedemann v. Poland:* Award rendered on 1.11.1926, TAM 6 (1926), 997, RDTAM VII (1927), 704 by the German-Polish Mixed Arbitral Tribunal.

223 *Biloune and Marine Drive Complex Limited v. Ghana Investments Centre and Ghana, Award on Jurisdiction and Liability:* Award rendered on 27.10.1989, ILR 95 (1994), 183, YB Comm Arb XIX 11(1994), (United Nations General Assembly [UNGA]; United Nations Commission on International Trade Law [UNCITRAL]).

224 *Diallo* (Preliminary Objections) (note 3), 615 [90].

225 See, for example, the *Wall Opinion* (note 3), 192 et seq. [136] in which the court referred to the decisions in *López Burgos v. Uruguay, No. 52/1979*, UN Doc. CCPR/C/13/D/52/1979, IHRL 2796 (UNHRC) 1981, *Lilian Celiberti de Casariego v. Uruguay, No. 56/1979* UN Doc. CCPR/C/13/D/56/1979, ILR 68 (1981), 41, IHRL 2801 (UNHRC) 1981 and *Mabel Pereira Montero v. Uruguay, No. 106/1981* UN Doc. CCPR/C/18/D/106/1981, IHRL 2549 (UNHRC) 1983. It further referred to *Human Rights Committee, CCPR General Comment No. 27: Article 12* (*Freedom of Movement*) UN Doc. CCPR/C/21/Rev1/Add9. See further the references in *Diallo* (Judgment) (note 8), 664 [66],

ture.[226] Among the institutions referred to by the court are other quasi-judicial bodies, such as the Governing Council of the United Nations Compensation Commission, created as a subsidiary organ of the United Nations Security Council to deal with claims which resulted from Iraq's invasion and occupation of Kuwait.[227] The ICJ has further referred to the African Commission on Human and Peoples' Rights, a quasi-judicial body with a mandate to promote and protect human rights and collective peoples' rights on the African continent, as well as interpreting the ACHPR and considering individual complaints linked to violations of the Charter.[228] Inter-governmental bodies have also been cited by the court, for example the United Nations Human Rights Council[229] and the Council of the International Civil Aviation Organization (ICAO),[230] though they do not fall under Art. 38(1)(d).

In the 2004 *Wall Opinion,* the court relied on legal and factual findings by UN Special Rapporteurs, including the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967 and the Special Rapporteur on the Right to Food.[231] These referrals are, however, in our view, not to be considered as judicial decisions.

In a number of cases the ICJ has referred in general terms to the decisions of other international courts and tribunals (including arbitral tribunals) without specification. In the *Corfu Channel* case, for example, the court referred to "international decisions",[232] in the *Fisheries case,* to "certain arbitral decisions"[233] and in the *Continental Shelf between Libyan Arab Jamahiriya and Malta,* to "[j]udicial decisions".[234]

---

668 [77], *Diallo* (Compensation) (note 8), 334 et seq. [24], and in *Judgment No. 2867* (note 8), 27 [39].

226 *Obligation to Prosecute and Extradite* (note 8), 457 [101].

227 *Diallo* (Compensation) (note 8), 331 [13], 339 et seq. [40]. The court referred to *Germot International S.A.*, Report and Recommendations Made by the Panel of Commissioners concerning the Fourteenth Instalment of "E3" Claims, UN Doc. S/AC 26/2000/19 (United Nation Compensation Commission).

228 *Diallo* (Judgment) (note 8), 664 [67] and *Diallo* (Compensation) (note 8), 334 et seq. [24].

229 See *Wall Opinion* (note 3), 179 [109].

230 *Appeal Relating to the Jurisdiction of the ICAO Council* (*India v. Pakistan*), ICJ Rep. 1972, 46.

231 See *Wall Opinion* (note 3), 179 [58]-[59].

232 *Corfu Channel* (Merits) (note 8), 18.

233 *Fisheries Case* (note 8), 131.

234 *Continental Shelf* (*Libya v. Malta*) (Judgment) (note 8), 38 [45]. See as further examples: *Nottebohm* (Second Phase) (note 8), 21 et seq.; *Nicaragua* (Jurisdiction and Admissibil-

There seems to be common agreement that Art. 38(1)(d) covers domestic decisions from all different levels of national courts.[235] The records of the court show that in practice it uses domestic judgments as relevant state practice under lit. (b), (i.e. "international custom, as evidence of a general practice accepted as law").[236] Two judgments serve as illustrative examples. In *Arrest Warrant* (2002),[237] the court referred to the UK House of Lords in *Pinochet (No. 3)*[238] and to the French Cour de Cassation in the *Gaddafi* case.[239] In *Jurisdictional Immunities* (2012),[240] the court undertook an extensive survey of relevant state practice and cited a large number of domestic authorities.

b) Methodological Questions and Challenges

What are the methodological implications of Art. 38(1)(d) covering "judicial decisions"? To start with, *Talmon's* observation that "[m]ethodology is probably not the strong point"[241] of the ICJ not only holds true for with regard to the determination of customary international law by the court, but also with respect to its application of Art. 38(1)(d). The court's jurisprudence is not very informative with regard to the concrete method to be applied.[242] Little can be found in scholarly writings about methodological approaches to Art. 38(1)(d).[243]

---

ity) (note 8), 431 [88]; *Gulf of Maine* (note 8), 314 [16]; *Jan Mayen* (note 8), 62 [55]; *Black Sea* (note 8), 125 [198].

235 See the references in note 201.

236 See *Jurisdictional Immunities of the State* (note 3), 122 [54], 127 [64], 129 [68], 131 et seq. [71]-[75], 134 [76], 135 [78], 136 [83], 137 [85], 139 [90], 142 [96], 148 [118]. See in this context, however, *A. L. Paulus* (note 6), 253 et seq. who argues that it merely "constitutes an academic exercise to consider whether, in addition [to their relevance as elements of customary international law], decisions of domestic courts may also constitute judicial decisions" under Art. 38(1)(d).

237 *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), ICJ Rep. 2002, 3, 23 et seq. [56]-[58].

238 *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (*On Appeal from a Divisional Court of the Queen's Bench Division*) (*Pinochet, No. 3*), All ER 2 (1999), 97, AC 1 (2000), 147, ILR 119 (2000), 136 (UK House of Lords).

239 *Gadaffi* Arrêt de Cour Cassation, 13.3.2001, No. 1414.

240 *Jurisdictional Immunities of the State* (note 3).

241 *S. Talmon* (note 87), 417.

242 In the *Frontier Dispute* (note 74), 601 [403], in one of the only explicit references of the ICJ to Art. 38(1)(d) ICJ Statute, the court merely stated that it should take "the 1917 Judgment into account as a relevant precedent decision of a competent court, and as, in the words

We will focus on three (interrelated) methodological questions that are relevant to all three contexts in which Art. 38(1)(d) may be applied – as a subsidiary means for the determination of customary international law, conventional law and general principles of international law.

The first question is whether Art. 38(1)(d) stipulates any quantitative requirements with regard to the use of other judicial decisions. The second question is whether Art. 38(1)(d) stipulates any qualitative requirements with regard to the different decisions to be taken into account. The third question concerns the term "use" and the style of judgments.

aa) Quantitative Requirements

The wording of Art. 38(1)(d) ICJ Statute is not conclusive on quantitative requirements. The term "judicial decisions" may be read as demanding a plurality of judicial decisions; but a more natural interpretation is that it points to judicial decisions in general, whether one or many.

If one analyses the court's case law from the viewpoint of whether it has relied on individual judicial decisions or on multiple decisions in the context of Art. 38(1)(d), its practice shows a variety of different approaches, which do not reflect a consistent pattern. In a number of cases, the court has simply referred to a single decision of another court or tribunal in order to determine a rule of customary international law or a general principle. For example, in the *Nuclear Weapons* opinion, the court held that a great many rules of humanitarian law contained in the Hague and Geneva Conventions constitute "intransgressible principles of international customary law" and merely referred to one decision of the Nuremberg International Military Tribunal.[244] In the *Gabčíkovo-Nagymaros Project* case, when determining the conditions under which counter-measures were justifiable, the ICJ referred to a single arbitral award.[245] Another example is the decision on pre-

of Art. 38 of the Court's Statute, 'a subsidiary means for the determination of rules of law'. In short, the Chamber must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit."

[243] See e.g. one of the few papers that explicitly deals with method and Art. 38(1)(d) ICJ Statute: *A. Z. Borda* (note 81).

[244] *Nuclear Weapons* (note 8), 257 et seq. [79]-[80] (notably, however, the decision concerned a number of trials against members of the Nazi leadership, see *Trial of the Major War Criminals*, Nuremberg 1947, Vol 1., 254).

[245] *Gabčíkovo-Nagymaro* (Judgment) (note 8), 55 [83]. The court referred to the award in the case *Air Service Agreement of 27 March 1946 Between the United States of America and France* (*United States of America v. France*): Award rendered on 9.12.1978. The court furthermore referred to its own decision in *Nicaragua* (Judgment) (note 194) and the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (*26 July 2001*), UN Doc. A/CN4L602/rev1.

liminary objections in the case concerning the *Land and Maritime Boundary Between Cameroon and Nigeria*, in which the court only referred to the arbitral award in the *North Atlantic Fisheries case*[246] in discussing the principle of good faith as a general principle of international law.[247]

In other cases, the court has reviewed and cited a number of judicial decisions in order to determine the rules of law. In its 2010 *Diallo* decision, the court relied on numerous decisions by a variety of different judicial bodies in order to determine the rules governing compensation. For example, when discussing the quantification of compensation for non-material injury, the court again referred to the award in the *Lusitania* case,[248] as well as to decisions of the Human Rights Committee,[249] the African Commission of Human and Peoples' Rights, the ECtHR[250] and the Inter-American Court of Human Rights.[251] The court further referred to the ECtHR, the Inter-American Court of Human Rights and the Governing Council of the United Nations Compensation Commission when dealing with Guinea's claim for the alleged income lost by Mr. *Diallo* as a result of his unlawful detention.[252] With regard to post-judgment interest on the sum awarded in the judgment, the court cited the ITLOS, the Iran-United States Claims Tribunal, the ECtHR and the Inter-American Court of Human and Peoples' Rights.[253] Other examples are the *Territorial and Maritime Dispute* case where the court, discussing the right of States to establish a territorial sea of 12 nautical miles around an island, referred to the award in the *Dubai-*

246 *North Atlantic Coast Fisheries Case* (1910) (note 219).

247 *Boundary Between Cameroon and Nigeria* (Preliminary Objections) (note 8), 296 [38].

248 *Lusitania Cases* (*Mixed Claims Commission*) (note 222).

249 *A v. Australia, No. 560/1993*, UN Doc. CCPR/C/59/D/560/1993 (UNHRC).

250 *Al-Jedda* (note 40), [114].

251 *Diallo* (Compensation) (note 8), 334 et seq. [24]. The court cited the *Lusitania Cases* (*Mixed Claims Commission*) (note 222); *A v. Australia* (HRC) (note 249); *Kenneth Good v. Botswana, No. 313/05* available at <http://caselawihrdaorg/doc/31305/>, last accessed 1.8.2017 (African Commission on Human and Peoples' Rights); *Al-Jedda* (note 40), and *Cantoral-Benavides v. Peru* (*Reparations and Costs*) IACHR Ser. C, No. 88.

252 *Diallo* (Compensation) (note 8), 339 et seq. [40]. The ICJ cited the *Teixeira de Castro v. Portugal* (*Judgment* (*Merits and Just Satisfaction*)) App. No. 25829/94 (ECtHR); *Suárez-Rosero v. Ecuador* (*Reparations and Costs*) IACHR Ser. C, No. 44 and *Germot International S.A.* (note 227). Further, the court cited *Elçi and others v. Turkey* (*Judgment* (*Merits and Just Satisfaction*)) App. Nos. 23145/93 and 25091/94 App. Nos. 23145/93 and 25091/94 (ECtHR) and the *Case of the "Street Children"* (*Villagrán-Morales et al. v. Guatemala* (*Reparations and Costs*)), IACHR Ser. C, No. 77.

253 *Diallo* (Compensation) (note 8), 343 et seq. [56]. The court referred to *M/V "Saiga" Case* (*No. 2*) (*Saint Vincent and the Grenadines v. Guinea*) (Judgment), ITLOS Case No. 2, ICGJ 336 (ITLOS 1999), ILM 38 (1999), 1323, ILR 120 (2002), 143 (ITLOS); *Bámaca-Velásquez v. Guatemala* (*Reparations and Costs*), IACHR Ser. C, No. 91; *Lordos and Others v. Turkey* (*Judgment Just Satisfaction*) App. No. 15973/90 (ECtHR).

Sharjah Border Arbitration[254] and to the ITLOS[255] ("other tribunals have adopted the same approach").[256] Similarly, in the *Bosnia Genocide* judgment, the ICJ referred to ECtHR jurisprudence – without citing specific cases – and an arbitral decision of the German-Polish Mixed Arbitral Tribunal[257] when discussing questions of *res judicata* and jurisdiction.[258] Sometimes, however, the court has simply referred to "judicial decisions" in general – implying that multiple judicial decisions have been taken into account – which are said to reflect a specific rule.[259]

From a voluntarist perspective, one may argue that lit. (d) requires courts to "take into account" all available decisions based on the contention that reliance on a single judicial decision would not reflect general acceptance of the existence of a rule by a sufficient number of states. In a similar way, one judicial decision would not (generally) constitute sufficient state practice to determine customary international law or establish a general principle under lit. (b) and (c). According to the ICJ, customary international law requires that a state practice of sufficient generality be established.[260] Even though the practice need not be "unanimous",[261] it must be "extensive"[262] and "sufficiently widespread"[263] among states, particularly those whose interests are "specially affected".[264] Similar arguments are raised with regard to the determination of general principles under Art. 38(1)(c) ICJ Statute which requires that such principles be "recognized by civilized nations". It is argued that general principles must be found in a large number and variety of domestic legal systems.[265] The inductive method, which is seen as following

254 *Dubai-Sharjah Arbitration* (note 221).

255 *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (No. 16)* (*Bangladesh v. Myanmar*) (Judgment), ITLOS Rep. 4 (2012).

256 *Territorial and Maritime Dispute* (*Nicaragua v. Colombia*) (Judgment) (note 8), 690 et seq. [178].

257 *von Tiedemann v. Poland* (note 222).

258 *Bosnia Genocide* (Judgment) (note 3), 92 [119].

259 See e.g. *Jan Mayen* (note 8), 62 [55].

260 Second Report on Identification of Customary International Law (note 6), 34 [52].

261 Second Report on Identification of Customary International Law (note 6), 34 [52].

262 *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v Netherlands*), ICJ Rep. 1969, 3, 43 [74].

263 Second Report on Identification of Customary International Law (note 6), 34 [52]. See further *Maritime Delimitation* (*Qatar v. Bahrain*) (Merits) (note 8), 102 [205] ("widespread State practice"); *Gulf of Maine* (note 8), 299 [111] ("sufficiently extensive and convincing practice").

264 *Continental Shelf* (note 262), 42 [73]; Second Report on Identification of Customary International Law (note 6), 34 et seq. [52] and 36 et seq. [54].

265 *J. Ellis*, General Principles and Comparative Law, EJIL 22 (2011), 949, 955 and the broader analysis in: M. Andenas/L. Chiussi, General Principles and the Coherence of Interna-

from voluntarist approaches and which ensures a solid empirical basis, is understood "as inference of a general rule from a pattern of empirically observable individual instances of State practice and *opinio juris*" and "a systemic process of going from the specific observation to the empirical generalization".[266] Inductive reasoning in this sense relies on and explicates a claim of "derivative authority".[267]

Yet the argument that a voluntarist perspective requires that the court relys on a multiplicity of judicial decisions is unconvincing in the context of Art. 38(1)(d). The idea that determination of the law must be sufficiently grounded in a wide-ranging state consensus should be fulfilled at the principal level of law formation. Reliance on judicial decisions merely adds complementary voluntarist legitimacy.

The "obligation" to take into account a multiplicity of available judicial decisions, however, follows from Art. 38(1)(d)'s systemic relevance. Courts and tribunals are elements of the wider international system and their existence depends on the functioning of the system. This in turn requires courts to contribute to the structural stabilization of the system.

The method to be applied must be compatible with practical limitations, while at the same time facilitating the process of systemic institutional integration.

---

tional Law – Principes Généraux Et Cohérence Du Droit International, University of Oslo Faculty of Law Research Paper No. 2017-14, available at SSRN: <https://ssrn.com/abstract=2939082>.

[266] *S. Talmon* (note 87), 420, has shown that in fact the main method applied by the ICJ to determine customary international law is assertion rather than inductive or deductive reasoning. See also the statement by the former President of the ICJ, *P. Tomka*, Custom and the International Court of Justice, Law and Practice of International Courts and Tribunals 2 (2013), 195, 197 et seq., on the court's rather flexible method. Inductive comparative reasoning also corresponds with formalistic accounts of the sources of international law, if one considers the secondary rules – here Art. 38(1)(a)-(c) ICJ Statute, respectively their customary equivalents – as requiring inductive assessments (of judicial decisions as state practice). Furthermore, induction may be understood as proof of the final rule of recognition in the *Hartian* sense (see *F. L. Bordin*, Induction, Assertion and the Limits of the Existing Methodologies to Identify Customary International Law, <www.ejiltalk.org>, 2015, last accessed 1.8.2017). From an – admittedly rather simplified – *Kelsenian* perspective, which bases the validity of all legal rules on a presupposed imaginary *Grundnorm*, the inductive method is only required insofar as it is determined by those law-validating rules which can be deduced within the metric of law established by the *Grundnorm*.

[267] See *H. G. Cohen*, Methodology and Misdirection: Custom and the ICJ, <www.ejiltalk.org>, 2015, last accessed 1.8.2017. However, *Cohen* argues that one must nevertheless distinguish between the "negotiated law" made by states and the transformed adjudicated law made by the courts.

Several substantial practical challenges that must be met are connected to the availability of sufficient resources,[268] the lack of financial and personal resources at courts,[269] the requirement of expertise and the potential lack of knowledge of foreign legal systems,[270] linguistic barriers,[271] a lack of time,[272] and the availability of legal materials. The limitation on financial and personal resources within international courts and tribunals makes comprehensive surveys of all judicial decisions from international and municipal legal systems on a particular issue practically unfeasible.[273] A comprehensive survey of judicial decisions requires enormous resources and expertise, often lacking in international courts. In particular, the use of national court's decisions often comes at high costs due to strong language barriers. The ICJ, for example, lacks sufficient financial and personnel capacity to make it possible to carry out comprehensive comparative legal research for detailed inductive reasoning.[274] The other challenge – which can only be partly mitigated by financial and personnel resources – is the limited availability of decisions and other legal material.[275] Though the availability of judicial decisions from

268 On the relevance of comparative discourses for international law, see note 142.

269 See *P. Mahoney/R. Kondak*, Common Ground: A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?, in: M. Andenas/D. Fairgrieve (note 3), 120. See also, with regard to the ECtHR, *L. Wildhaber/A. Hjartarson/S. Donnelly*, No Consensus on Consensus? The Practice of the European Court of Human Rights, HRLJ 33 (2013), 248.

270 See *V. C. Jackson*, Comparative Constitutional Law: Methodologies, in: M. Rosenfeld/A. Sajó, The Oxford Handbook (note 146), 70.

271 See *V. C. Jackson* (note 270), 70; *R. Sacco*, Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II), Am. J. Comp. L. 39 (1991), 1, 10 et seq.; *M. Rosenfeld/A. Sajó* (note 146), 12 et seq.

272 See *V. C. Jackson* (note 270), 70.

273 See with regard to the determination of general principles *J. Ellis* (note 265), 949.

274 The ECtHR's practice serves in this context as an interesting comparative model. For long its empirical comparative method was strongly criticized. Now it is generally considered as having become a successful model. This positive development is mainly explained by the expansion and professionalization of the Court's research division, which reviews the practice and law of the Member States of the Convention, as well as the professionalization of the comparative-law research process. (*P. Mahoney/R. Kondak* (note 269), 120 and 126). See also *L. Wildhaber/A. Hjartarson/S. Donnelly* (note 269). The Division's reports are drafted on request by the rapporteur of a given case. By 2015, 12 lawyers and three assistants worked for the court's research division (*L. Wildhaber/A. Hjartarson/S. Donnelly* (note 269), 125 et seq.). See also *K. Dzehtsiarou/V. Lukashevich*, Informed Decision-Making: The Comparative Endeavours of the Strasbourg Court, NQHR 30 (2012), 272 et seq. Further reasons put forward for the positive development are the increased desire of the judges to have recourse to comparative-law research reports and the fact that the court's own international empirical results are double-checked against independent information put forward by third parties.

275 See, however, *T. Kadner Graziano* (note 180), 30 et seq., who notes that "information on foreign law [is] increasingly accessible".

non-developed countries has increased over the last few years, there is still a large gap in accessibility between legal systems from different parts of the world.

In addition to these practical challenges, there are a variety of more fundamental, conceptual challenges often interlinked with broader theoretical assumptions about the nature of comparative law (and law in general). As mentioned, there is the risk of "cherry picking" and strategic, instrumental use of judicial decisions, selection bias by judges, and the arbitrariness in the selection process.[276] Further difficulties are due to the challenges of understanding the broader legal and social context and properly evaluating similarities and differences,[277] the risk of error and oversimplification,[278] and the presumed impossibility of legal transplants.[279]

bb) Qualitative Requirements and the Selection of Decisions

Given these practical and conceptual challenges, how might decisions be selected in a way that meets the systemic and conceptual concerns and limitations? What are the "relevant" decisions that should be taken into account?

The following criteria are suggested as a starting point. It must be acknowledged that any selection inevitably entails an element of choice. Therefore, first, and most importantly, courts should base their selection on rational grounds and make their selection procedure transparent to dispel concerns about arbitrariness.

Courts should attach particular weight to decisions by specialized and regional courts when determining rules of international law which are strongly related to regional or specialized legal "subsystems".[280] At the same time, specialized courts should attach great weight to rulings on general international law by courts with broad jurisdiction.[281] This approach is in line with the ICJ's findings in its *Diallo* judgment where it held that in cases in which it applies regional instruments "it must take due account of the interpretation" by any judicial body established to monitor the application of the instrument in question.[282] Also, in the *Bosnia Genocide* case the court held that it "attaches the utmost importance to the factual and legal

276 See above section III. 5. e).
277 See *V. C. Jackson* (note 270), 70. *M. Rosenfeld/A. Sajó* (note 146), 12 et seq.
278 See *V. C. Jackson* (note 270), 54.
279 See *P. Legrand*, The Impossibility of Legal Transplants, Maastricht J. Eur. & Comp. L. 4 (1997), 111; *P. Legrand*, On the Singularity of Law, Harv. Int'l L. J. 47 (2006), 517.
280 See the similar suggestion by *J. S. Martinez* (note 91), 487.
281 See a similar argument, *J. S. Martinez* (note 91), 487.
282 *Diallo* (Judgment) (note 8), 664 [67].

findings made by the ICTY in ruling on the criminal liability of the accused before it".[283] In the view of the court, less importance is attached to findings of the ICTY that deal with issues of general international law which are not part of the specific domain of its jurisdiction (which is first and foremost to deal with matters of international criminal law).[284] Arguably, this distinction between the legal relevance of decisions of specialized courts and general courts can be seen as the institutional side of the *lex specialis derogat legi generali* principle[285] – as a developing rule of *forum speciale derogat foro generali*.

The decisions of general courts should be granted particular weight when it comes to the determination of rules of general international law.

Decisions of the courts and tribunals whose constituencies' interests are "specially affected"[286] should be taken into account.

Furthermore, the selection of judicial decisions should be representative. Even though this criterion does not necessarily follow from voluntarist accounts, good arguments may be advanced in favor of such a method. This approach may provide additional legitimacy and further ground legal findings in state consent (at least indirectly). More importantly though, taking into account "sufficiently widespread" and "extensive" judicial practice strengthens the construction and stabilization of the international judicial system – one of the very aims of the principle of systemic institutional integration. When considering domestic decisions, the requirement of representativeness is particularly pertinent; the court must demonstrate its neutrality.[287]

The decisions to which the parties to the case have referred in their written and oral submissions should be taken into account in order to show that their arguments are given full consideration.

---

283 *Bosnia Genocide* (Judgment) (note 3), 209 [403].

284 *Bosnia Genocide* (Judgment) (note 3), 209 [403].

285 On the systemic relevance of this principle: ILC Fragmentation Report (note 9), 30 et seq. [46]-[222].

286 See on a similar criterion in the context of customary international law, see *Continental Shelf* (note 262), 42 [73]; Second Report on Identification of Customary International Law (note 6), 34 et seq. [52] and 36 et seq. [54].

287 See *G. Guillaume* (note 89), 19 et seq., who explains that this is the reason why the ICJ "always abstained itself from the smallest reference to the rationales employed by the regional jurisdictions". See also the separate opinion by *Judge Moore* who pointed to a particular problem in the *Lotus* case with regard to the use of decisions of national courts. He wrote that international tribunals "are not to treat the judgments of the courts of one state on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expression on the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law" (*S.S. "Lotus"* (note 160) [Dissenting Opinion by *Judge Moore*], 74).

Arguably, the ICJ may focus on the decisions of international courts as they represent a broader constituency and in general strictly apply international law – of course often through the prism of their respective functional subsystem. Moreover, municipal judicial decisions reflect *opinio juris* and are also relevant as evidence of state practice – they may therefore already play a role in the formation of the principal legal source. In principle, however, there is no reason why domestic judicial decisions may not also be taken into account under Art. 38(1)(d). One specific challenge that comes with the use of municipal decisions is that it requires greater mindfulness under Art. 38(1)(d), more so than under Art. 38(1)(b): one must clearly distinguish between those parts of a domestic judgment that determine rules of international law and those which rule on domestic legal issues.[288]

Again, it is important to emphasize that these criteria do not establish whether and to what extent courts should *follow* the decisions of another judicial body, as there is no obligation to follow other judicial decisions under the principle of systemic institutional integration. These criteria should simply serve as guidance in selecting the decisions to be taken into account, where practical limitations make selection necessary. Other judicial decisions merely shift the argumentative burden. Whether to follow them ultimately depends on their substance and on the strength of the legal argument.

When courts are faced with conflicting decisions, they may follow the decision which they consider to accurately reflect the law. While courts must take all relevant decisions into account, they are free to evaluate the reasoning adopted and to decide which decision to follow. Whether decisions of some courts, such as the ICJ, enjoy categorically higher authority than decisions of other courts cannot be discussed at length here. While functional considerations of different sub-systems in international law may justify stronger reliance on courts that deal with the same subject matter, defiance of the ICJ as the "principal judicial organ" of the United Nations (Art. 92 UN Charter), comes at a high cost – not only for the court in question, but for international law as a whole.

[288] See *Sir C. Greenwood*, *The Contribution of National Courts to the Development of International Law* (summary available at <http://www.biicl.org>, last accessed 1.8.2017), who argues that the decisions of national courts as a means for the determination of rules of customary international law must be approached with caution, since, in his view, "national courts consider international law differently from international courts". See also Third Report on Identification of Customary International Law (note 6), 42 [58].

cc) The Term "Use" and the Style of Judgments

The style of drafting judgments differs considerably between courts and tribunals.[289] While it is difficult to establish one-fit all parameters for different courts and tribunals, we suggest that the "use" of other judicial decisions and their selection should be made at least explicit in the decisions. The open reference to other judicial decisions explicates judicial dialogue and it allocates judicial authority more openly. It adds legitimacy to international adjudication. It is the precondition for a "judicial dialogue" that is not only informal and that does not evade public scrutiny. It gives courts and tribunals a responsive framework within international adjudication that resonance their legal reasoning.

IV. Conclusion and Outlook

For international law to be an effective legal system, the ever-increasing number of bodies with a role to play in international law must take account of each another. They must address possible conflicts, including those which cannot be resolved and, in so doing, contribute to the development of custom, general principles and substitutions for hierarchies of norms and institutions. How can this be achieved in what remains a basically non-hierarchical order? Here we concur with *Howse* and *Teitel* who suggest that a "[l]ack of hierarchy does not mean lack of normative rationality or anarchy".[290] A "commitment to openness in the project of legal hermeneutics" is necessary.[291] "Concerted adjudication" by courts of different regimes is a means of overcoming problems in cases of shared responsibility by different international actors which do not fall under a single jurisdictional domain. The difficulties represented by conflicting and inconsistent jurisprudence may be alleviated by "systemic interpretation of the relevant treaties and by mutual acceptance of the precedential values of judgments by other courts and tribunals, both international and national".[292] We agree with *Crawford* in his Hague Lectures that "the problems that result from proliferation tend to emerge not due to a failure of the system as a whole" and that many of

[289] See the analysis in *M. Andenas/D. Fairgrieve*, Simply a Matter of Style? Comparing Judicial Decisions, European Business Law Review 25 (2014), 361 et seq.

[290] *R. Howse/R. Teitel*, Cross-judging Revisited, N. Y. U. J. Int' l L. & Pol. 46 (2009), 867, 874.

[291] *R. Teitel/R. Howse* (note 16), 989.

[292] *G. Ulfstein*, International Courts and Judges: Independence, Interaction, and Legitimacy, N. Y. U. J. Int' l L. & Pol. 46 (2013-2014), 849, 858.

the "tools necessary to address problems of proliferation are already available".[293]

Art. 38(1)(d) offers a tool for the application of a principle of systemic institutional integration as a natural and logical corollary to the principle of substantive legal integration, if interpreted as "obliging" courts to take other judicial decisions into account.

There may be, however, a number of critical objections to the far-reaching interpretation presented in this article. These concerns will be briefly addressed here and will require further consideration and discussion.

Some may argue that this interpretation opens the door to the self-empowerment of courts vis-à-vis other actors who participate in the process of law creation – first and foremost, states. International judicial cooperation – so the argument runs – fosters judicial activism and leads to undemocratic empowerment of a "New Class", a "Juristocracy"[294], whose agenda has been co-opted by judges.[295] One concern relates to the so-called "counter-majoritarian difficulty",[296] one of the main problems of public authority exercised by courts from a democratic point of view. Judges that are not directly elected may exercise judicial review over directly elected representatives who express the will of the majority. Arguably, this problem is even more pertinent at the international level.[297] Some may contend that this fear is not totally unfounded if one takes into consideration the "Judicial Construction of Europe".[298] It has been shown that the preliminary reference procedure, in conjunction with the concept of precedent, has led to a "complicit relationship between the ECJ and the national courts" and has "generated the context for judicial empowerment, which proceeded in the form of a nuanced, intra-judicial dialogue between the ECJ and national judges on how best to accommodate one another".[299]

Without engaging in an extensive discussion of democratic legitimacy and international adjudication, three points should be stressed in this context. One of the main roles of courts is to secure the very foundation of any democratic system that is the protection of minorities against majoritarian

---

293 *J. Crawford* (note 22), 224.

294 See, on this term, *R. Hirschl*, Towards Juristocracy, 2004.

295 See *R. H. Bork*, Cocercing Virtue: The Worldwide Rule of Judges, 2003, 25 et seq.

296 *A. M. Bickel*, The Least Dangerouse Branch: The Supreme Court at the Bar of Politics, 2nd ed. 1986, 16 et seq.

297 *J. S. Martinez* (note 91), 461.

298 *A. Stone Sweet* (note 92).

299 *A. Stone Sweet* (note 92), 21. See also *J. H. H. Weiler*, The Transformation of Europe, Yale L.J. 100 (1991), 2403; *J. H. H. Weiler*, A Quiet Revolution: The European Court of Justice and Its Interlocutors, Comparative Political Studies 26 (1994), 510, on the strategic choices of European judges in this context.

decisions. Democracy is not an absolute value but has to be balanced against other considerations, such as the rule of law. This requires judicial review, even at an international level. Furthermore, without denying the inherent tension between concerted international adjudication and domestic democratic processes, international judicial cooperation is also one mechanism for mitigating the democratic deficit that results from the projection of one state's power onto people who are not citizens of that state.[300] In the words of *Benvenisti* and *Downs*:

> "[D]emocratic failures at both the national and the international level can be best addressed through greater interaction and coordination between national courts and international tribunals. Such cooperation promises to enhance democracy at both levels by helping to ensure that decision makers take account of the interests of a greater proportion of the relevant stakeholders and that the outcomes are therefore better informed and more balanced. […] '[D]emocracy' in this context must also be understood as providing a voice to foreigners, who are often excluded from domestic and global decision making processes."[301]

In this sense, systemic institutional integration is also in line with more general process-oriented approaches to legitimacy.[302] Decisions are considered legitimate if they are the result of adequate and fair procedures that have taken into account the interests of a variety of stakeholders.[303] It is important to stress that enhancing the legitimacy of international adjudication, as an exercise of public authority, not only favors stronger judicial cooperation but also requires the broader inclusion of actors other than courts in judicial processes.[304]

Further, some may contend that the use of other judicial decisions under Art. 38(1)(d) is problematic from a voluntarist perspective of international law. It privileges litigants that appear before a court first, thus bringing about a shift in the argumentative burden for later cases between other parties. Lit. (d) does not require that the decision to which the court refers be rendered between the parties of the case. It is not even required that the par-

---

[300] See on this argument with regard to "international action" in general: *A. von Bogdandy/I. Venzke* (note 150), 10.

[301] *E. Benvenisti/G. W. Downs*, Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance, N. Y. U. J. Int' l L. & Pol. 46 (2014), 741.

[302] See on the legitimizing effect of procedures: *N. Luhmann*, Legitimation durch Verfahren, 3rd ed. 1983.

[303] *R. Wolfrum*, Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations, in: R. Wolfrum/V. Röben (eds.), Legitimacy in International Law, 2008, 6 ("[l]egitimacy may also depend on who participates in the decision-making process").

[304] We thank *Matthias Lippold* for highlighting this point.

ties to the case in which Art. 38(1)(d) is applied have any connection to the other courts. States may therefore be indirectly affected by the decisions of institutions to whose authority they have not submitted. On closer examination, this point does not fully challenge the compatibility of cross-referrals between courts with voluntarist approaches. The consent of the state cannot be considered in isolation – in terms of one's submission to the jurisdiction of a specific tribunal – but must be seen against the backdrop of their broader agreements. Every recognized state in the world is party to the ICJ Statute which forms an integral part of the United Nations Charter. They have all accepted to comply with Art. 38(1)(d). Most importantly, the principle of systemic institutional integration does not grant other judicial decisions any binding effect but merely shifts the argumentative burden in legal reasoning.[305]

Another argument against reading into Art. 38(1)(d) ICJ Statute a principle of systemic institutional integration is that it may centralize judicial authority and thus prevent progressive normative outcomes within international legal subsystems (for example in human rights law). *Broude* has objected that the "possible success of norm integration" would threaten "the particular authority of decision-making (and norm-making) bodies in international law, and is further associable with justifiably unpopular ideas of centralized global 'government' rather than governance".[306] The principle of systemic institutional integration of courts is even more likely to trigger such concerns as it takes effect directly at the institutional level.

Yet interpreting Art. 38(1)(d) as providing an "obligation" to take into account other decisions, without giving them binding effect, does not necessarily foster centralization of authority. The first, and most important effect of systemic institutional integration is discursive coordination between judicial actors rather than hierarchical or centralized structures of authority. The specific position given to the various courts and tribunals and the weight of their decisions under lit. (d) depend on a number of variables: their persuasive authority, their argumentative capacities, their representative nature and their overall function. The final decision as to whether decisions of other courts are to be followed, and if so, which ones, remains with

305 This view is based on an understanding of consent as having a "dynamic meaning referring to the establishment of a regime or a system of governance which – having been set up by consent – develops a legal life of its own, such as by formulating obligations" rather than having a "specific and static meaning" referring to a particular clearly defined obligation (*R. Wolfrum* (note 303), 9. See also *D. Bodansky*, The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?, AJIL 93 (1999), 596, 604.

306 *T. Broude* (note 54), 174.

the individual judicial body.[307] Systemic institutional integration under Art. 38(1)(d) seems even more likely to protect the heterogeneous and horizontal nature of international adjudication rather than eliminating them. This principle may even foster the construction of a decentralized international judicial system – an international "*Gerichtsverbund*".[308] It gives expression to the "Multiple Unity"[309] as the underlying dialectic character of international law: it strengthens the dynamic heterogeneous character of the international judicial system, while at the same time stabilizing its construction.[310] Hence, it also mitigates some of the concerns articulated by pluralist accounts of international law, which refuse hierarchy, unity and universal harmonization schemes in order to protect the differing pursuits and preferences of actors in our pluralist world.[311] The discursive, rather than hierarchical, character of cross-references under Art. 38(1)(d) provides for flexibility and allows for the correction of errors, as well as progressive normative developments in different legal "subsystems".[312]

Premised on a similar rationale to that of its substantive counterpart Art. 31(3)(c) VCLT, Art. 38(1)(d) ICJ Statute sets out a basic framework for coordinating and harmonizing international adjudication, while at the same time recognizing its heterogeneous and horizontal character. It offers a formal framework for the "production of communitarian semantics" that goes beyond "the emergence of a sustainable *feeling* of convergence of the prac-

---

307 *R. Teitel/R. Howse* (note 16), 967 et seq., arguing that "[c]ross-interpretation does not lead necessarily to harmonization".

308 See on the concept of "*Verfassungsgerichtsverbund*", A. Voßkuhle, Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund, Eu Const. L. Rev. 6 (2010), 175.

309 *B. Simma/D. Pulkowski* (note 37), 529.

310 This can be understood as an institutional element in a process of "constitutional pluralism" (see on this notion: *N. Walker*, The Idea of Constitutional Pluralism, M.L.R. 65 (2002), 317). *H. Ruiz Fabri/L. Gradoni*, La Hiérarchisation des Précédents, in: Colloque annuel de la Société Française Pour le Droit International – Le Précédent en Droit International, 2016, 185, speak of the rise of "asymmetric network relations" which can be described as "horizontal hierarchies".

311 See on pluralist concerns and rationales in international law: *Berman*, Global Legal Pluralism, Southern California Review 80 (2007), 1155 and ILC Fragmentation Report (note 9), 14 et seq. [15]-[16]. See on the identification of hegemonic and counter-hegemonic narratives in international law: *M. Koskenniemi*, International Law and Hegemony: A Reconfiguration, Cambridge Revue of International Affairs 17 (2004), 197. As *G. Ulfstein* (note 292), 858, has aptly noted: "a certain amount of fragmentation of international law may be inevitable and even serves positive functions, such as protecting the specific aims of specialized regimes and national traditions and self-determination".

312 On error correction through pluralism, see *R. M. Cover*, Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, Wm. & Mary L. Rev. 22 (1980), 639.

tices of law-ascertainment"[313] of international judges and arbitrators. Lit. (d) "obliges" international courts and tribunals to take into account the jurisprudence of other judicial bodies but it does not require obedience. If a court does not take into account other decisions or wants to depart from another court's ruling, it must show that it does so on reasonable grounds.

313 See *J. D'Aspremont* (note 17), 205 et seq.