No. IT–96–22–A, Judgment on Appeal, paras. 42ff (Oct. 7, 1997). In the *Nuclear Weapons* advisory opinion, a Japanese court decision was noted in some of the separate and dissenting opinions as a relevant subsidiary source under Article 38(1)(d). See, e.g., 1996 I.C.J., 375, 397 (Dissenting Opinion of Judge Shahabuddeen, citing *Shimoda v. State* (Tokyo Dist. Ct. 1963)).

B. THE TEACHINGS OF THE MOST HIGHLY QUALIFIED PUBLICISTS OF THE VARIOUS NATIONS

The place of the writer in international law has always been more important than in municipal legal systems. The basic systematization of international law is largely the work of publicists, from Grotius and Gentili onwards. In many cases of first impression only the opinions of writers can be referred to in support of one or the other of the opposing contentions of the parties. The extent to which writers are referred to as "subsidiary" authorities differs often according to the tradition of the court and the individual judge. Here the practice of national as well as of international courts is relevant. As a corollary to the position of precedent in common law jurisdictions, there has traditionally been judicial reluctance, more marked in the British jurisdictions than in the United States, to refer to writers. In the civilian systems reference to textbook writers and commentators ("doctrine" in continental terminology, referring to scholarship) is a normal practice, as the perusal of any collection of decisions of the German, Swiss or other European Supreme Courts will show. In France the notes appended by jurists to important decisions published in the *Recueil Dalloz* and *Recueil Sirey* enjoy high authority and often influence later decisions. A prominent example of reliance on writers in a common law court is the decision of the U.S. Supreme Court in the *Paquete Habana* case (see p. 61).

The practice of the International Court of Justice and of its predecessor has typically been to refer to scholarly writings only in very general terms. Lauterpacht, The Development of International Law by the International Court 24 (1958). Lauterpacht suggests as a reason for the Court's reluctance to refer to writers: "There is no doubt that the availability of official records of the practice of States and of collections of treaties has substantially reduced the necessity for recourse to writings of publicists as evidence of custom. Moreover, the divergence of view among writers on many subjects as well as apparent national bias may often render citations from them unhelpful. On the other hand, in cases—admittedly rare—in which it is possible to establish the existence of a unanimous or practically unanimous interpretation, on the part of writers, of governmental or judicial practice, reliance on such evidence may add to the weight of the Judgments and Opinions of the Court." Id.

Although the Court itself has been reluctant to identify writers in its judgments and advisory opinions, it is evident from the pleadings and

from the references in the separate and dissenting opinions of the judges that the opinions of authorities on international law have been brought to the attention of the Court and have often been taken into account by some of the judges. For a broad historical survey of the role and influence of "teachings" in the development of international law, see lectures by Judge Manfred Lachs, Teachings and Teaching of International Law, 151 Rec. des Cours 163–252 (1976–III).

The major treatises of international law usually cited by states and tribunals were generally produced by jurists of Western Europe. The citations in those treatises referred to state practice and judicial decisions in only a few countries. Most writers also relied heavily on quotations and paraphrases of statements by earlier writers. These highly selective tendencies, presented in support of broad conclusions of law, were far from consistent with the prevailing doctrine of sources based on state practice accepted by law by states generally. Moreover, many of the well known treatises were written from the standpoint of national concerns and perceptions. Schachter has commented that:

> [M]any of the legal scholars had close links with their official communities and there were often pressures on them, sometimes obvious and sometimes subtle, to conform to the official point of view. Even apart from such pressures, we recognize that social perspectives and values are generally shared by those in the same political and cultural community. * * * That a degree of bias is inescapable is recognized by the common assumption that more credible judgments on controversial issues of international law were more likely if made by a broadly representative body than by persons (however expert) from a single country or a particular political outlook.

Schachter, International Law in Theory and Practice 38–39 (1991). Schachter also suggests that "the selective tendency of the writers to quote the generalities of other writers, meant that their statements were steps removed from the ideal of an inductive approach." Id. at 38.

International bodies of "publicists" include the International Law Commission, an organ of the United Nations composed of 34 individuals elected by the U.N. General Assembly on the basis of government nominations and criteria of wide geographical representation. See Statute of the I.L.C., G.A. Res. 174 (II), art. 2 (Nov. 21, 1947). The I.L.C. is concerned, as indicated in Chapters 2 and 3, with the preparation of codification conventions and other draft treaties. However, in the course of its work, and in its reports, positions are expressed by the Commission as a whole on existing rules of law. The I.C.J. has drawn on such reports for authority even before completion of the I.L.C. study in question. See, e.g., *Gabčíkovo–Nagymaros Project*, 1997 I.C.J. 7, para. 83 (citing Draft Articles on State Responsibility, adopted by I.L.C. on first reading in 1996 and not finally approved until 2001; see Chapter 8).

A non-official body, the Institut de Droit International, established in 1873, is composed of about 120 members and associate members elected

by the Institut on the basis of individual merit and published works. Its resolutions setting forth principles and rules of existing law and, on occasion, proposed rules, have often been cited by tribunals, states and writers. The biennial Annuaire de l'Institut contains its resolutions and the lengthy reports and records of discussion that preceded the resolution. For an account of its contribution from 1873 to 1973, see its centenary volume, Livre du Centenaire, Annuaire de l'Institut de Droit International (1973), particularly articles by Charles de Visscher and H. Battifol. See also Koskenniemi, The Gentle Civilizer of Nations (2003).

Another unofficial body, the International Law Association, (also founded in 1873), is organized in national branches in many countries. Resolutions adopted by majority votes at conferences of the Association are based on reports and studies of international committees. The multinational character of the Association adds weight to those of its resolutions that are adopted by consensus or large majorities representative of different regions and political systems. The biennial reports of the I.L.A. contain the resolutions and committee reports.

Another category of the writings of publicists is the Restatement of the Foreign Relations Law of the United States, prepared by recognized legal scholars and adopted after discussion by the American Law Institute, a non-official professional body. The first restatement appeared in 1965 designated curiously as the Restatement Second. A revised Restatement Third was published in 1987. The Restatement contains rules of international law as it applies to the United States in relations with other states and also rules of U.S. domestic law with substantial significance for U.S. foreign relations. Although prepared by a U.S. professional society, it does not purport to state rules that the U.S. government would put forward or support in all cases. As stated in its introduction, "the Restatement in stating rules of international law represents the opinion of the American Law Institute as to the rules that an international tribunal would apply if charged with deciding a controversy in accordance with international law." In considering what a hypothetical international court would decide is an applicable rule, the A.L.I. adopts a standard that aims at an objective determination of general international law. Each section consists of a statement of the "black letter law," followed by comments and reporters' notes. The latter are particularly useful because of their careful analysis of and citations to international law authorities. Unlike the comments, the reporters' notes state the views of the reporters only; their substance is not endorsed as such by the A.L.I.

In general, U.S. courts have viewed the Restatement as the most authoritative U.S. scholarly statement of contemporary international law. Some courts, however, have disagreed (occasionally in emphatic terms) with positions adopted in the Restatement and have criticized the disciplinary stance of international law embodied in Article 38(1)(d) of the I.C.J. Statute for according unwarranted deference to the opinions of scholars. See, e.g., *United States v. Yousef*, 327 F.3d 56, 98–104 (2d Cir. 2003).

Writings of authoritative international law scholars are published annually by the Hague Academy of International Law in its Collected Courses, often referred to by its French title, Recueil des Cours de l'Académie de Droit International (Rec. des Cours). The scholars are selected by the international curatorium of the Academy on a broad geographical basis, with increasing participation of scholars and practitioners from outside Europe and with diverse points of view. In addition to discussion of particular topics, the Recueil includes an annual General Course by a well-known publicist.

NOTES

1. *"Invisible College."* If "the most highly qualified publicists" are generally influenced by the interests and policies of their own states (and by their legal cultures), is their authority open to question on that ground? Would a tribunal look for majority opinions, "representative" views or "objective" data? Is there a shared disciplinary culture in the profession of international law? Schachter has described the "invisible college of international lawyers" as engaged in a continuous process of communication and collaboration across national lines. Schachter, The Invisible College of International Lawyers, 72 Nw. Univ. L. Rev. 217 (1977). For a revisiting of Schachter's idea 25 years later, see the proceedings of the annual meeting of the American Society of International Law on the theme of "The Visible College of International Law," 95 A.S.I.L. Proc. (2001).

2. *Dual Roles of Scholars as Advisers to Governments.* Since the "leading" publicists are often engaged or consulted by their own governments, they influence state conduct and are in turn influenced by their governments. What advantages and drawbacks are likely in this dual role? Can the legal advisers of foreign offices meet the sometimes conflicting demands of their "clients" and the obligation to ascertain the law objectively? Do they have the double function of applying the law in the national interest and supporting the international legal system? See Report of a Joint Committee on The Role of the Legal Adviser of the State Department, 85 A.J.I.L. 358 (1991). See also the different views expressed at the panel on Scholars in the Construction and Critique of International Law, 94 A.S.I.L. Proc. 317–20 (2000).

3. *Specialization.* The vast increase in international law has naturally led to specialization. It is no longer possible for international lawyers to claim expertise on the subject as a whole. It is even difficult to keep abreast of developments in any one of the main specialized areas. (In 2009, the American Society of International Law had more than twenty "interest groups.") Has this reduced the role of general international law? See Vagts, Are There No International Lawyers Anymore? 75 A.J.I.L. 134–37 (1981). Schachter argues for maintaining international law as a unified discipline. "The Invisible College," *supra*, at 221–23. See also Franck, Review Essay—The Case of the Vanishing Treatises, 81 A.J.I.L. 763 (1987).