Provisional

For participants only

10 July 2023

Original: English

International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3626th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 17 May 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Subsidiary means for the determination of rules of international law (agenda item 7) (*continued*) (A/CN.4/760)

Mr. Patel said that he supported the Special Rapporteur's suggestion that a multilingual bibliography should be included in the Commission's study of the topic "Subsidiary means for the determination of rules of international law". In addition to his own recent efforts to contribute to such a bibliography, he would share with the Special Rapporteur his ongoing work on the role of the Supreme Court of India in the emerging jurisprudence of international law in India, which relied significantly on subsidiary means.

According to Article 59 of the Statute of the International Court of Justice, the common law principle of *stare decisis* was not applicable to the Court's decisions. While the Court often cited its previous rulings or those of its predecessor to support its reasoning, thus maintaining a certain consistency in its decisions in the interests of legal certainty, there was never any suggestion that it was bound in all circumstances to follow them. The Court could therefore decide to depart from a solution or line of reasoning adopted in a previous case, but would do so only on serious grounds, for example in the light of subsequent developments in international law. The "uncodified rule" of maintaining consistency was expressed in its 1948 advisory opinion on *Admission of a State to the United Nations*.

Analysis of the decisions of the International Court of Justice suggested that the principle of horizontal *stare decisis* was followed in practice. While respect for precedents and the maintenance of continuity of jurisprudence were without the slightest doubt highly desirable from the viewpoint of legal certainty, international law was not created by an accumulation of opinions and systems; nor was its source a sum total of judgments, even if they were consistent with each other. Judicial decisions were ancillary instruments that the judge and jurist could use to identify the rules of international law. In sum, they were subsidiary, as opposed to principal, and they served solely to determine, rather than to create, international norms. Consequently, legal rules were not engendered by case law and doctrine. The International Court of Justice used its previous decisions as authentication, although it recognized no formal doctrine of precedent. The Court might simply cite the earlier decision as the incarnation of the rules of applicable law, so that no further identification, proof or analysis was necessary. By upholding *ratio decidendi* and ensuring consistent practice, the Court played a role in the application and identification of international law.

According to the Handbook of the International Court of Justice, judicial decisions and the teachings of publicists did not have the same status as other sources of law; they merely constituted a "subsidiary means for the determination of rules of law". The term "subsidiary means" indicated that judicial decisions were applied subsequently to, and were dependent on, a prior principal determination of legal rules. He proposed that the Commission, in its work on the topic, should consider gathering the opinions of international and regional judicial institutions, including the Court of Justice of the European Union, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights. As there was no similar regional judicial institution in Asia, the Special Rapporteur was requested to find innovative methods for gaining insights into regional approaches in Asia. Regional judicial institutions promoted judicial dialogue and the application of legal principles and international law as determined by the International Court of Justice. For instance, in the *Bernard Anbataayela Mornah* case, the African Court had relied on the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it was reiterated that where a peremptory norm was breached, States were also under an obligation not to recognize the illegal situation resulting from such breach and not to render aid or assistance in maintaining that situation.

In its judgment in the case concerning *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, the International Court of Justice, basing itself on the Vienna Convention on Diplomatic Relations, observed that the United Nations Convention against Transnational Organized Crime must be interpreted in good faith, in accordance with the ordinary meaning to be given to their terms in their context and in the light of the object and purpose of the Convention. Further, it was observed that to confirm the meaning resulting

from that process, to remove ambiguity or obscurity, or to avoid a manifestly absurd or unreasonable result, recourse might be had to subsidiary means of interpretation, which included the preparatory work of the Convention and the circumstances of its conclusion.

In its judgment in the case concerning the *North Sea Continental Shelf*, the Court observed that the Truman Proclamation, issued by the Government of the United States on 28 September 1945, had, in the opinion of the Court, a special status. It went on to state that, although various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had previously been advanced by jurists, publicists and technicians, the Truman Proclamation had come to be regarded as the starting point of the positive law on the subject, and the chief doctrine it enunciated, namely that of the coastal State as having an original, natural, and exclusive right to the continental shelf off its shores, had come to prevail over all others, as it was reflected in article 2 of the 1958 Convention on the Continental Shelf. Thus, a domestic proclamation, or a unilateral act of a State, had become a source of international law.

In its judgment in the *Certain Iranian Assets Case (Islamic Republic of Iran v. United States of America)*, the Court rejected the objection to admissibility based on the "clean hands doctrine". The Court took note that the International Law Commission had declined to include the "clean hands" doctrine among the circumstances precluding wrongfulness in its articles on responsibility of States for internationally wrongful acts, on the ground that the doctrine had been invoked principally in the context of the admissibility of claims before international courts and tribunals, though it had been rarely applied.

An analysis of the relevant decisions of the International Court of Justice demonstrated that Article 38 (1) (*d*) of the Court's Statute played a role in the verification of the existence and state of rules of law and in the verification of the proper interpretation of rules of law. Furthermore, within the subcategory of subsidiary means, the Court relied more heavily on judicial decisions than on scholarly works.

Article 38 (1) was not an exhaustive enumeration of the foundations on which the decisions of the International Court of Justice were based. It did not mention unilateral acts of States or the decisions and resolutions of international bodies, which very often contributed to the development of international law and might also be sources of rights and obligations. Thus it might not be feasible to provide an exhaustive list of all reliable sources of law. The Commission's focus should be on defining the standard or qualifications of a given source of international law.

In *El-Morsi v. President of Egypt*, the Supreme Constitutional Court of Egypt had observed that, although United Nations General Assembly resolutions were not binding on States, they nevertheless had moral and political weight; they also served as proof of current trends in the international community with regard to certain issues. The judicial review decision of the Supreme Court of Cyprus in *Constantinou v. Cyprus* was a rare example of the direct application by a domestic court of a General Assembly resolution, specifically, the Declaration on the Rights of Disabled Persons. Although General Assembly resolutions were not generally regarded or accepted as independent sources of international law, that case illustrated that domestic courts were not necessarily precluded from applying or relying on "soft law" instruments in determining "hard law" cases. In *Iraq v. Corporation Dumez GTM*, the French Court of Cassation had dealt with the question of whether and under which conditions United Nations Security Council resolutions were directly applicable in the French legal order. The Court had held that binding resolutions of the Security Council had no direct effect in France as long as their provisions had not been incorporated in the national legal order. In such cases, they could be taken into account as a "legal fact". The legal basis chosen by the Court of Cassation in that case was interesting, as article 55 of the French Constitution referred explicitly only to the effect of international treaties and agreements in the national legal order and did not cover international unilateral acts such as Security Council resolutions.

Resolutions of the International Maritime Organization set out international standards and recommendations that could be adopted by States. Many such resolutions had played a tremendous role in shaping the Organization's conventions. Even though they were tantamount to a rule of law, the principles of public international law as found in Article 138

of the Statute of the International Court of Justice did not explicitly recognize the category of resolutions of the United Nations or the International Maritime Organization as a source of law. Generally speaking, such resolutions, for lack of intention or mandate, did not create binding obligations in positive law. However, there was widespread consensus that resolutions under which States were admitted to membership, rules of procedure were promulgated or subsidiary bodies were established were legally binding on all members because of the degree of consent that they represented. Similarly, adoption of the budget under Article 17 of the Charter of the United Nations and the expenses to be borne by Member States as apportioned by the General Assembly created binding obligations on those States.

The principle of good faith governed the creation and performance of legal obligations, whatever their source. International law placed the principal emphasis on the intention of the parties. The law prescribed no particular form, and parties were free to choose what form they pleased, provided their intention clearly resulted from it. Thus, "additional subsidiary means" could constitute a source of obligation if States intended to treat it as an obligation. Furthermore, there was little controversy as to the question of whether treaties were formally a source of obligations or a source of law. Two recent decisions on the law of treaties were notable in that regard: the finding, by the International Court of Justice, of a tacit agreement on a maritime boundary in the *Maritime Dispute (Peru v. Chile)* case, in which the Court had relied on the 1954 Special Maritime Frontier Zone Agreement between the parties; and the elaboration, by the International Court of Justice, of the conditions for unilateral declarations to take effect in the judgment in *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*. In both cases, the criticism had been made that there was a need for a more systematic and rigorous analysis of the sources of the obligations of the parties and a deeper reflection on the specific terms of such unilateral declarations.

Regarding the issue of equity, while the application of equity found its source in law and in the immanence of equity in law, the application of equity could find its legal source outside the law. In some cases, equity did not temper the law, but rather replaced it. The International Court of Justice was empowered by the parties to a dispute to create law or to derogate from existing law. Equity thus became a formal source – for those States – because they had wished it to be so in a specific case. In that connection, Article 59 restricted the binding character of the judgment to just the parties to the dispute before the Court.

In paragraph 50 of the report, the Special Rapporteur evoked the view, which some members of the Commission held, that the scope of the topic should be broadened to encompass the issue of conflicting decisions with respect to the same international legal issue. The practice of a number of international courts and tribunals was to use, to a greater or lesser extent, the decisions issued by other courts and tribunals but conflicting views had emerged in some cases. In the field of international humanitarian law, for example, in its decision in *Prosecutor v. Duško Tadić*, the Appeals Chamber of the International Tribunal for the Former Yugoslavia had rejected the "effective control" test relied upon by the International Court of Justice in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. However, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, the International Court of Justice had adhered to the formula applied in the *Nicaragua* case, while nonetheless suggesting that the divergence applied only to the case concerned.

Courts and tribunals sometimes relied upon their own knowledge but also sometimes had recourse to the opinions and judgments of the International Court of Justice and other international courts for pertinent legal information. Sometimes, albeit rarely, they developed specialized law pursuant to their constitutive instruments. More rarely still, that law varied significantly from general international law. However, when specialized courts created specialized law, that law was clearly limited to the specific circumstances of the case or court: there was no intention to diverge from general international law pertaining to the subject. Furthermore, as was noted in Jonathan I. Charney's study on "Sources of international law", although courts adjudicating on similar legal issues sometimes issued conflicting decisions, emerging law was largely coherent. Thus since divergences tended to arise in specialist fields and specialist courts only, he was not generally in favour of extending the scope of the study

to include conflicting judicial decisions. Their inclusion was unlikely to yield any significant benefits in terms of clarifying emerging case law related to subsidiary means.

On the other hand, the Special Rapporteur might consider examining non-legally binding instruments in future reports, notably in connection with the distinction between sources of international law and sources of international obligations, a matter that was addressed in paragraph 186 of his first report. Non-legally binding instruments did not constitute treaties but were widely used by States and international organizations as a form of political commitment. It was generally accepted that such agreements did not create legal rights and obligations and that no legal responsibility was incurred in the event that any of the commitments assumed thereunder were breached. That did not mean that such agreements were devoid of legal implications, but rather that such implications must be based on existing sources and rules of international law. In the context of the current topic, the question was whether such instruments might constitute subsidiary means for the determination of rules of international law. As Mr. Forteau had observed in his proposed syllabus on non-legally binding international agreements (A/77/10, annex I), and as he himself had been able to verify in his academic work, such agreements could have a role in the formation of other sources of international law and had sometimes been the subject of disputes between international organizations and States, between one international organization and another, and between international organizations and third parties.

With regard to the identification of additional subsidiary means for the determination of rules of international law, it was necessary to take State practice, practice from different regions of the world and all major legal systems and the deliberations of States in the Sixth Committee into account. The central focus of the Commission's work on the topic should be to establish the criteria to be used for that purpose. In future reports, the Special Rapporteur would presumably focus on developing conclusions that shed light on the nature of the subsidiary means referred to in Article 38 (1) (*d*). A more rigorous and systematic approach to the identification of subsidiary means would help to make the decisions of the International Court of Justice, *inter alia*, more persuasive and more easily explicable, in addition to more fully respecting State sovereignty in law-making and the settlement of particular disputes.

In conclusion, he recommended that the draft conclusions proposed by the Special Rapporteur should be sent to the Drafting Committee. Additionally, in view of the complexity and scope of the topic, he suggested that the time frame proposed for its completion should be reviewed.

Mr. Fathalla said he was pleased that the Commission's approach to the topic, which was to provide greater clarity on Article 38 (1) (*d*) of the Statute of the International Court of Justice, had been welcomed by States in the debate in the Sixth Committee. He agreed with that approach and with the methodology proposed by the Special Rapporteur in section IV of the first report. With regard to the draft conclusions in general, he believed that the Special Rapporteur had maintained an adequate level of orthodoxy, given that the consideration of the topic was still at an early stage, and that he had set forth subtle and reasonably open-ended interpretations of Article 38 (1) (*d*).

He was satisfied with the content of draft conclusion 1 but had several comments on draft conclusion 2. In subparagraph (a), the Special Rapporteur was correct to refer simply to "decisions" and to omit the qualifier "judicial" found in Article 38 (1) (*d*). The exclusion of the qualifier made it easier to accept that the "decisions" referred to could include arbitral decisions. He welcomed the specification that decisions of both national and international courts and tribunals constituted subsidiary means: as former Commission member George Scelle had observed, national courts were also agents of international law. However, the decisions of national courts should not be placed on a par with those of international courts owing to their differing natures and the far broader scope of application and acceptance of the latter within the international community.

The text of subparagraph (c) was promising in that it was open-ended yet firmly tied to the practice of States and international organizations. It maintained the necessary orthodoxy on the one hand while providing a good starting point for the identification of other subsidiary means on the other. He agreed in particular that "other means" should include the decisions and resolutions of international organizations, especially the repetitive

ones. However, he doubted that unilateral declarations could be considered to constitute "other means". Furthermore, paragraphs 368 to 370 of the report provided well-argued reasons for their exclusion.

In addressing "judicial decisions", the Special Rapporteur had shown commendable caution. However, in so doing, he had excluded some important decision-making bodies such as the panels and Appellate Body of the World Trade Organization (WTO). Although it was advisable not to wade into the debate as to whether those bodies were judicial, quasi-judicial or administrative in character, the reports they produced were certainly referred to, including by other international courts and tribunals, as if they constituted subsidiary means for the determination of rules of international law. More importantly, the vast majority of States involved in meetings of the WTO Dispute Settlement Body generally ascribed that value to the reports adopted therein. Treaty bodies – particularly the Human Rights Committee – should also be mentioned in connection with judicial decisions. The Committee acted as a quasi-judicial body in certain aspects of its work, such as the consideration of individual complaints, and the general comments it produced made a valuable contribution to the development of international law, adapting the interpretation and understanding of the provisions of the International Covenant on Civil and Political Rights to new developments.

Taking a still broader perspective, would it not be correct to also include the decisions of commissions of inquiry and other mechanisms that did not quite fit the definition of a judicial body within the scope of draft conclusion 2? For example, the principles of customary international law identified by the International Tribunal for the Law of the Sea in *M/V "SAIGA" (No. 2)* were largely, if not entirely, based on the reports produced by the commissions of inquiry established to examine the *I'm Alone* case and the *Red Crusader* case, respectively. The Special Rapporteur and the Commission more generally should also give consideration to the legal weight of conciliation reports and the possibility that they might also constitute subsidiary means. Since all the aforementioned examples could in some manner be considered to fall within the scope of subparagraph (c), the text of the draft conclusion was satisfactory overall. However, he would like to see some of those other internationally recognized mechanisms expressly mentioned in the Special Rapporteur's future reports and in the commentary to draft conclusion 2.

Draft conclusion 3 was an accurate reflection of the outcome of the research conducted by the Special Rapporteur. Each criterion for the assessment of subsidiary means was very clear, especially when applied to simple examples. His only observation concerned the distinction that might be drawn between adhering to a source *lato sensu* because it was persuasive and adhering to a source because it carried some form of authority. That distinction might be largely academic but it merited at least some attention. Specifically, the Commission might consider whether practitioners had recourse to subsidiary means because they were persuasive in shedding light on rules of law or rather because subsidiary means had an authority that in some way compelled practitioners to apply the rules or principles they encapsulated.

Draft conclusion 4 was adequate but more detailed guidance on the meaning of the term "authoritative" should be added to the corresponding commentary, including references to other contexts in which the word was used. In the context of the WTO dispute settlement system, for example, "authoritative interpretations" might be adopted. With regard to subparagraph (a), he questioned whether judgments issued by international bodies, and especially those of the International Court of Justice, should be considered "holy writs" – as Sir Robert Jennings had noted was often the case – and whether *obiter dicta* should be considered as authoritative as *ratio decidendi*: the authority of decisions was contextual, and dependent, *inter alia*, on the arguments and facts presented to the court responsible for issuing them.

He agreed with the notion, set forth in paragraph 280, that judicial decisions included "not just a final judgment rendered by a Court but also advisory opinions". That notion was supported, as also noted in the report, by the commentary to conclusion 13 of the Commission's conclusions on identification of customary international law, which explained that "decisions" included judgments and advisory opinions. However, as confirmed in paragraph 281, the term did not include separate opinions given by individual judges, which did not form part of the Court's decision.

Regarding subparagraph (b), it was widely agreed that the International Court of Justice was a *primus inter pares*. The decisions of the Court, as the principal judicial organ of the United Nations, were afforded greater authority and carried great weight. Accordingly, it was logical for the Commission to consider those decisions as deserving "particular regard". Taking that notion one step further, the Commission might even contemplate a scenario in which, in view of their authority, the decisions of the International Court of Justice were considered to constitute primary sources of international law. The Special Rapporteur should give in-depth consideration to the possibility of pursuing that approach.

He was also satisfied with the text of subparagraph (c), concerning the decisions of national courts. The circumstances in which decisions of national courts might be relevant were elegantly addressed by George Scelle in his theory of role-splitting, or *dédoublement fonctionnel*. However, even though national courts sometimes served as organs of the international legal system, the decisions of international courts should carry more weight. International courts were part of the system of international jurisdiction; national courts were not. The phrases "may be used" and "in certain circumstances", as used in subparagraph (c), were very important for that reason, and should be read not only with the general criteria set forth in draft conclusion 3 but also with the additional criteria applicable specifically to decisions of national courts in mind. Examples of additional specific criteria included, as stated in paragraph 299, the quality of the decision and whether it had been followed by other courts or tribunals within or, more significantly, outside of the jurisdiction concerned, and also by States. Those criteria should be covered in the commentary, to which, as stated previously, the Commission might need to devote more time.

The text of draft conclusion 5 was likewise satisfactory. He agreed with the inclusion of teachings as one of the subsidiary means for the determination of rules of international law expressly mentioned in draft conclusion 2 and also with the definition of teachings contained in draft conclusion 5. The definition contained two important specifications: firstly, that the teachings should be those of "publicists of the various nations, especially those reflecting the coinciding views of scholars"; and, secondly, that their teachings "may serve as subsidiary means for the identification or determination of the existence and content of rules of law". Those specifications reflected the link between teachings and interpretation: as explained in paragraph 308, teachings could not be considered a source of law but they could help to modify existing law.

With regard to the term "most highly qualified publicists", he agreed that, as specified in paragraph 327, "expert groups" would be expected to be "more authoritative producers of teachings". He also agreed with the inclusion of the specification "of various nations": as stated in the report, teachings should take account of opinions originating from or prevailing in all the various regions of the world. Regarding the meaning of the term "subsidiary", and the Special Rapporteur's request, in paragraph 350, for members' views on the relationship between subsidiary means and principal sources of international law, he concurred with the view, referred to in paragraph 340, that the purpose of subsidiary means was to "elucidate the existing law, and not bring new law into being".

Mr. Forteau said that the Special Rapporteur was to be thanked for the quality of his report and for the clear and methodological manner in which he summarized the conclusions drawn from the issues analysed. He particularly appreciated the care with which the Special Rapporteur had set out the positions in question and had endeavoured to establish a balanced and nuanced middle ground between them. The memorandum produced by the secretariat (A/CN.4/759) was also very useful. The decision to present the information in the form of a list of observations made it easy to grasp the lessons to be learned from the Commission's past work.

In view of the perhaps excessive length of the report, he would focus on the issues he considered most important, and specifically on those in which his opinions differed in some ways from those of the Special Rapporteur.

To begin with, he wished to make four general observations. Firstly, in response to the Special Rapporteur's request, in paragraph 67, for suggestions of relevant materials in various languages that might be cited to enhance the representativeness of the work, he had included a number of additional bibliographical references in French in a footnote to the

written version of his statement. Secondly, he agreed with the Special Rapporteur that the Commission's output on the topic should take the form of draft conclusions with commentaries.

Thirdly, whereas the first report repeatedly addressed very abstract questions – the definition of sources of international law, the distinction between formal and material sources or between sources of international law and sources of obligations – he believed that the Commission should focus on the practical aspects of the topic and that theoretical discussions should be kept to a minimum. Moreover, he did not find section VI, which was devoted to such theoretical discussions, entirely satisfactory, as the arguments set forth therein were too heavily reliant on the writings of authors from the common law tradition. Some of the conclusions reached in that section were not always convincing, at least for jurists like him from the civil law tradition.

Fourthly, he disagreed with those States that had expressed doubts about the relevance and value of the topic for international practice. The topic raised many very specific questions and, based on the Commission's answers to those questions, would equip practitioners to use subsidiary means for the determination of international law differently in their practice. For that reason, the Commission should pay close attention to the scope of its work. Its final output on the topic would accord a form of legitimacy to certain subsidiary means that could increase their importance while at the same time limiting the importance of others: in short, the rules and principles codified in the draft conclusions would not be without effect in practice. In that connection, the Special Rapporteur's suggestion, in paragraph 55, that the draft conclusions should reflect primarily codification, but possibly also elements of progressive development of international law, should be treated with caution. In his view, the Commission should stick to codifying existing international law related to the topic.

With regard to the scope of the draft conclusions, the formulation "the way in which subsidiary means are used" contained in draft conclusion 1 suggested that the Commission's work on the topic should be descriptive in nature. What the Commission should be aiming to do, however, was to determine how subsidiary means were to be used. Its work should have a prescriptive function: in fact, the 2021 syllabus suggested that it should serve as a "methodological guide". Accordingly, the wording of draft conclusion 1 should be revised to state that the draft conclusions concerned "the way in which subsidiary means are to be used" – a formulation that was in line with the language used in conclusion 1 of the Commission's 2018 conclusions on identification of customary international law. The draft conclusions should thus set forth the legal conditions in which subsidiary means were to be used. Those conditions might relate to the intrinsic nature of subsidiary means – for example, whether the decision in question was a judicial decision or what writings constituted teachings – or else to the external factors that determined in what cases practitioners could or should have recourse to them.

The Special Rapporteur addressed some of those questions in the report, but, in some passages, he appeared to suggest that the Commission should also engage in a critical analysis of the law or examine the sociology of law. That was not the Commission's role. For example, while judges might well in practice create law, what was important for the Commission was to determine how their role was officially defined. Accordingly, if the statutes of the courts and the judges themselves stated that their role was not to create law, the Commission should accept that statement rather than spend time attempting to ascertain what their actual practice was. It was important not to confuse academic study with codification.

The two-step approach taken by the Special Rapporteur to identify the scope of the topic, consisting of a description of the drafting history of Article 38 of the Statute of the International Court of Justice followed by a textual analysis of that article, had many advantages but also two disadvantages. The first was that the Special Rapporteur had started by looking to the past, whereas, in his view, the starting point for the Commission's work should be the current state of affairs, as had been noted by Italy, for example, in its statement to the Sixth Committee. The situation today was radically different from that of 1920 in terms of the number of international courts and the volume of doctrinal material. The considerable increase in the number of international norms also made the risk of *non-liquet* unlikely today.

Such developments necessarily had an effect on the role of subsidiary means, and the Commission should therefore start by studying those contemporary trends.

The second drawback of the method followed by the Special Rapporteur was that it was not fully in line with the general rule of treaty interpretation. Article 38 of the Statute of the International Court of Justice must be interpreted in accordance with the method established in articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties, which reflected customary law. The focus should therefore not be on the *travaux préparatoires* of Article 38, which were merely supplementary means of interpretation, or on dictionary definitions, but instead should be on the ordinary meaning to be given to the terms of Article 38, its object and purpose, its context and subsequent practice.

In that regard, particular attention should be paid to the terms used in the different language versions of Article 38. Article 38 used the term "subsidiary" in English and "*auxiliaire*" in French. According to the Special Rapporteur, "subsidiary" and "secondary" were synonymous and the term "*moyens auxiliaires*" in French stressed the supplementary nature of those means. The Special Rapporteur thus seemed to consider that subsidiary means were a source of law, but a secondary source that was "subordinate" to the primary sources of law. If he understood the Special Rapporteur's reasoning correctly, subsidiary means would thus have the same function as sources of law, but would simply be "supplementary" to the main sources. However, in his view, that did not accurately reflect the precise meaning of the term "*auxiliaire*" in French. "*Auxiliaire*" referred to something that provided support or assistance; in other words, a "*moyen auxiliaire*" served a different function from that of sources of law. Sources of law created law, whereas subsidiary means helped to identify what had been created by the sources of law. That was a fundamental difference. Sources of law and subsidiary means were not on the same level and therefore the terms "secondary" or "supplementary" did not adequately describe the nature of subsidiary means. Something could only be "secondary" or "supplementary" to something else if it fulfilled the same function. The function of subsidiary means was important, and that constituted another reason for not saying that "*auxiliaire*" meant "secondary".

The use of the term "*auxiliaire"* [subsidiary] also allowed another important distinction to be made. Article 32 of the Vienna Convention on the Law of Treaties referred to "supplementary means" of interpretation. A distinction must be made between those supplementary means and subsidiary means for the determination of rules of international law. The two concepts seemed to have been mixed up several times in the report and in the memorandum by the secretariat. The confusion was compounded by the fact that the term "*auxiliaire*" was used instead of "*complémentaire*" [supplementary] in the French version of observation 44 and paragraph 185 of the memorandum.

It was imperative for the Commission's future work on the topic to make a clear distinction between the formation, interpretation and determination of law, which were three different legal operations. The formation of law was the product of the sources of law; interpretation involved the means of interpretation, which were in a way integral to the process of formation; and the determination of law was a function of subsidiary means. Of course, in practice it could sometimes be difficult to distinguish between the three, but that did not make it any less necessary to do so. In that connection, it would be appropriate to consider in more detail the concept of the "determination" of rules of law, which was covered in paragraphs 339 to 343 of the report; further analysis of that word seemed essential.

With regard to the substantive points made in the report, considerable attention was paid to the role of jurisprudence and precedent in international law, and he agreed with the Special Rapporteur that they were of particular importance. Indeed, the French Society for International Law had recently held a symposium on the subject and the Institute of International Law had been working on the topic of international jurisprudence and precedents since 2011. He wished to make four points in that regard.

Firstly, the significance of precedent depended on the importance attached to jurisprudence in each applicable law provision. There was thus not one single answer when assessing the legal effect of precedents. It could differ from one applicable law provision to another. In paragraphs 173 to 176 of the report, the Special Rapporteur rightly cited several examples of applicable law clauses that gave particular weight to precedent. Other examples

could include the decisions of certain international administrative tribunals which applied the principle of *stare decisis*, whereby they were obliged to adhere to precedent. Secondly, a special effort should be made to identify the different legal effects of judicial decisions, as a study published recently in the *Japanese Yearbook of International Law* sought to do. In that regard, he wished to draw attention to an interesting decision adopted on 15 April 2011 by the French Court of Cassation. Thirdly, the Special Rapporteur seemed to consider that courts had the power to develop international law, as that would be necessary to prevent international law from remaining static and to take account of contemporary developments. It was true that international courts played a fundamental role in the development of international law, but that did not mean that they developed international law themselves. As stated by the International Court of Justice in its 1996 advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court "states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend." In other words, even when the development of international law was at stake, the Court merely determined the law. The international courts had similarly insisted that their power of interpretation did not extend to revising the law. To claim the opposite – that the Court had the power to create or develop the law – would be to run the risk of upsetting the balance of power in the international legal order. And fourthly, in his view, the relationship between subsidiary means and the principle of *iura novit curia* – the court knows the law – should be studied in detail.

Perhaps the most difficult issue to address had to do with the potential existence of subsidiary means other than teachings and judicial decisions. In paragraph 352 of the report, the Special Rapporteur noted that, in order to identify other subsidiary means, it was necessary to distinguish between "formal sources" and "subsidiary means", and that anything that was not a formal source could be a subsidiary means. However, the situation was rather more complicated than that, as other legal categories had to be taken into account. As already mentioned, a distinction had to be made between the subsidiary means for the determination of law and the supplementary means for interpretation. As the Special Rapporteur had pointed out, a distinction must also be made between subsidiary means and the constituent elements of custom and evidence of those elements. A distinction must also be made between subsidiary means and legally non-binding sources of law, such as General Assembly resolutions and, more broadly, all "soft law". As the International Court of Justice had noted in the *Nuclear Weapons* advisory opinion, a non-binding resolution could have both "normative value" and "normative character". In other words, such resolutions were part of the law-making process; they did not "determine" the law. In his view, the distinction between the elements that were part of the law-creating process and those that served to elucidate existing law was crucial for the Commission's work.

On that basis, he believed that, at least at the present stage of his own research, there was only one other possible candidate that could be added to the subsidiary means provided for in Article 38 of the Statute of the International Court of Justice. He had in mind the work of "experts", a category that fell into something of a grey area between teachings and judicial decisions. It encompassed several different types of persons or entities and had already caused considerable difficulties for the Commission in the context of its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Expert bodies were mentioned in the report and the memorandum of the secretariat in relation to both teachings and jurisprudence, which showed that they really fitted into neither one category nor the other. The term "expert" was very ambiguous; it said nothing about the potentially very different functions of the persons in question. A case-by-case approach was thus required to establish whether the work of a given expert fell into the category of teachings, judicial decisions or something else.

With regard to the particular case of the Commission and the nature of its work, he had been among those who had argued, during the debate on the identification of customary international law at the sixty-seventh session, that a separate draft conclusion should be devoted specifically to the work of the Commission, given its special role, in order to distinguish its texts from teachings. That proposal had been supported by several States at the time, and he noted with interest that the Special Rapporteur took the same view in paragraph 357 of the report. At its seventieth session, the Commission had ultimately opted not to pursue that proposal so as not to give the impression that it was awarding itself a

particular status in the determination of customary law. Instead, it had simply included a reference to its particular role in the commentaries to its conclusions on identification of customary international law. The Commission could, of course, revisit that decision. To his mind, it was increasingly clear that the Commission's output did not fall into the category of teachings, for a number of reasons: the Commission had an official mandate; it was not composed solely of academics; and it operated by consensus and, to a much lesser extent, by vote. Moreover, in its recent jurisprudence, the International Court of Justice had explicitly classified the work of the Commission as *travaux préparatoires* and not subsidiary means.

The nature of other expert bodies was ambiguous. He did not agree with the classification by the Special Rapporteur in his report, and by the secretariat in its memorandum, of the expert work of bodies such as the International Committee of the Red Cross, the Office of the United Nations High Commissioner for Refugees, the United Nations Environment Programme and the International Organization for Migration as "teachings". The International Court of Justice considered such work as supplementary means of interpretation. It was true that those organizations sometimes published legal studies, but the word "teachings" did not simply describe any writings or publication by a jurist, as suggested in the report. The concept of teachings referred to a specific group of people, a certain profession, with its own requirements, methodology and ethics, and total independence. In France, for example, ethical rules had recently been adopted to prevent any conflict of interest in academic research and publication. All of those elements should be used to refine the notion of "teachings" within the meaning of Article 38 of the Statute. In that way, it would be possible to distinguish between teachings and, for example, what two authors had recently referred to as "State-academic law-making".

A more detailed analysis of other expert work would be required to determine the exact nature of teachings. For example, could *amicus curiae* briefs or paid legal opinions submitted by professors in arbitration proceedings be considered teachings?

Turning to the secretariat's very useful memorandum, which provided an excellent basis for the Commission's work, he said that it would have been useful for it to have assessed in detail the degree of representativeness and diversity of the jurisprudence and teachings referenced in the Commission's work. His impression was that, over the past 20 years or so, references had become less diverse and that, with few exceptions, the commentaries to the draft articles or conclusions adopted by the Commission on second reading were rarely based on non-English-language references.

Observation 22 in the memorandum – that the Commission had placed "particular significance on Permanent Court of International Justice and International Court of Justice decisions" – should be put into perspective. It actually depended on the topic and, in some areas, the practice of other courts predominated, as had been the case in the Commission's work on international criminal law, the law of immunities and compensation for loss and damage. That point was also made in observation 28, which in some respects contradicted observation 22.

Observation 23, which noted that the Commission often relied on the text of the decisions of the International Court of Justice to formulate its own draft provisions, was an interesting one. Since that was clearly the practice in the Drafting Committee, it should be noted that subsidiary means were not only used to identify the rules of international law, but also to draft them. That point was particularly important given the proliferation of norms and the need to ensure a degree of coherence and uniformity in the way rules of international law were drafted and formulated in various languages. It was all the more important since the similarity of the terms used in several international rules had effects on interpretation, as the International Court of Justice had recently noted.

The secretariat's memorandum might help the Commission to distinguish more clearly between what fell within the scope of the topic and what did not. For example, it seemed that observations 31 and 41 had to do with evidence of custom rather than subsidiary means for determining the law, although that distinction was not easy to make.

Concerning the draft conclusions proposed by the Special Rapporteur, in draft conclusion 1 the words "are used" should be replaced with "are to be used". In draft conclusion 2, the decisions of international courts and tribunals should be mentioned before

those of national courts and tribunals. In addition, the two categories should perhaps be put in separate subparagraphs, along the lines of draft conclusion 4. Draft conclusion 2 (c) was overly broad and did not correspond to practice: it should be either deleted entirely, amended to refer only to expert bodies, or left pending until the Commission had studied other potential subsidiary means.

The criteria set out in draft conclusion 3 seemed to introduce confusion between the criteria for the assessment of evidence of custom and criteria for the assessment of subsidiary means. Furthermore, he believed it would be difficult to establish a standard rule that would apply to all types of subsidiary means. He would therefore be in favour of setting aside draft conclusion 3 for the time being. It would first be necessary to establish the criteria applicable to each type of subsidiary means in order to be able to draft a specific conclusion for each one.

In draft conclusions 4 and 5, reference was made to both the "identification" and the "determination" of rules of law, whereas the other draft conclusions referred only to "determination", which was somewhat confusing. In draft conclusion 5, reference was made in the English version to the views of "scholars", which had been translated as "*spécialistes*" in French. Was the reference to "scholars" intended to mean only "academics" [*universitaires*]? If so, that would be compatible with the notion of "teachings" as established in Article 38 of the Statute of the International Court of Justice, although the term "academics" might be overly restrictive.

The meeting rose at 11.25 a.m.