Provisional

For participants only

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International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3628th meeting

Held at the Palais des Nations, Geneva, on Friday, 19 May 2023, at 10 a.m.

Contents

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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
	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 10.20 a.m.

General principles of law (agenda item 3) (*continued*) (A/CN.4/753)

Report of the Drafting Committee (A/CN.4/L.982)

Mr. Paparinskis (Chair of the Drafting Committee), introducing the first report of the Drafting Committee for the seventy-fourth session, concerning the topic "General principles of law", said that he wished to thank the Special Rapporteur for his constructive approach and guidance and the members of the secretariat for their valuable assistance. The report reproduced the text of draft conclusions 1 to 11 as provisionally adopted by the Drafting Committee on first reading.

The Commission had provisionally adopted draft conclusions 1, 2 and 4 and the corresponding commentaries and had taken note of draft conclusion 5 in 2021 at its seventy-second session. The Drafting Committee had concluded its substantive consideration of all the draft conclusions and had provisionally adopted draft conclusion 3 and draft conclusions 6 to 11 in 2022, at the Commission's seventy-third session. After concluding its substantive consideration, the Committee had undertaken a final review of the entire set of draft conclusions to ensure that the provisions were coherent. The Commission had provisionally adopted draft conclusions 3, 5 and 7 and the corresponding commentaries and had taken note of draft conclusions 6, 8, 9, 10 and 11, also during the seventy-third session.

At the current session, the Drafting Committee had conducted a final read-through of the set of draft conclusions provisionally adopted in previous years and had decided to introduce minor textual changes to the French version. No changes had been made to the text of the draft conclusions in the other official languages of the United Nations. In the course of its discussions, the Committee had recalled that it would be useful for the Commission to consider including an additional draft conclusion or conclusions addressing the question of evidence of recognition of a general principle of law by the community of nations. It had noted that the question of evidence of recognition could be further addressed in the commentaries to the draft conclusions. That issue had also been raised in the Drafting Committee in 2022 and had been reflected in the statement of the Chair of the Drafting Committee delivered at the seventy-third session, which could be consulted on the Commission's website.

The Drafting Committee recommended that the Commission should adopt the draft conclusions on the topic "General principles of law" on first reading.

The Chair said she took it that the Commission wished to adopt, on first reading, the draft conclusions on general principles of law, as a whole, as contained in document A/CN.4/L.982.

It was so decided.

Mr. Vázquez-Bermúdez (Special Rapporteur) said that he wished to thank the Chair of the Drafting Committee for his report and to express his gratitude to the members of the Commission for having adopted the draft conclusions on first reading. He had no doubt that, with the continuing cooperation and contributions of all, the Commission would be able to adopt the commentaries to the draft conclusions during the second part of the seventy-fourth session and to submit them, together with the draft conclusions, to the Sixth Committee later in 2023.

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

Mr. Fife said that the Special Rapporteur's first report on the topic "Subsidiary means for the determination of rules of international law" provided a solid basis for the Commission's further discussions. The report was comprehensive and readable, rich in content, clearly structured and persuasive on several accounts. The secretariat's memorandum summarizing the Commission's previous work of relevance to the topic was also very useful.

In some passages, the report appeared to be inviting readers to enter into an ambitious theoretical undertaking. Sections VI and IX in particular raised a number of theoretical questions including: What was a source of international law? What were subsidiary means for the determination of a rule of law and what should be included in that category? Should the seminal provisions of Article 38 of the Statute of the International Court of Justice be considered merely as the applicable law for the Court itself or should the Commission take a broader approach and also consider subsidiary means of more general application? More fundamentally, was the concept of subsidiary means more likely to confuse jurists than to enlighten them by revealing itself to in fact constitute a formal or primary source of international law in disguise?

The topic covered key parts of the "engine room" of public international law, namely, judicial decisions and teachings. Although entering into debates about the methodology, nature, legality, normativity, authority and legitimacy of international law carried certain unnecessary risks, those issues were undeniably of interest. They had prompted seminal writings by numerous legal theorists, as Mr. Mingashang had noted, and would undoubtedly continue to generate debate in the future, with practitioners most likely continuing to grapple with them on an almost daily basis. Such debates did not diminish but rather highlighted the importance of sources of international law and, for that reason, he was particularly appreciative of the Special Rapporteur's considerable efforts to ensure scientific rigour and transparency in the Commission's work on the topic.

The focus of the Commission's work should be on codification, with practical guidance to foster clarity, conceptual consistency and, ultimately, consensus. He agreed that the terms of Article 38 of the Statute of the International Court of Justice should be the starting point and unreservedly supported the Special Rapporteur's stated aims, as set forth in paragraph 42 and paragraphs 57 to 60 in particular, which referred to the Commission's pivotal role in "systematically studying and clarifying the foundational sources of international law identified in Article 38" and the need to provide terminological clarifications "in the hope of avoiding, or at least minimizing, ambiguity".

In view of the need for terminological clarity, it would be useful to consider the meaning of key terms as used in well-established rules of interpretation of treaties, particularly those reflected in articles 31 to 33 of the Vienna Convention on the Law of Treaties. As Mr. Forteau had mentioned at an earlier meeting, an examination of the ordinary meaning of the terms appearing in the various authentic language versions of that Convention would be very helpful in the early stages of consideration of the topic, before, for example, any examination of the *travaux préparatoires*, which simply provided a supplementary means of interpretation. He agreed with Mr. Galindo and others that it was important to study multilingual legal materials and different language versions.

The ordinary meaning of the key terms in the phrase "subsidiary means for the determination of rules of law" was analysed, albeit briefly, in paragraphs 334 and 335 of the report. Although article 33 (3) of the Vienna Convention on the Law of Treaties stated that the terms of a treaty were presumed to have the same meaning in each authentic text, the wording of that phrase in Article 38 (1) (*d*) of the French version of the Statute of the International Court of Justice – "*moyen auxiliaire de détermination des règles de droit"* – carried a slightly different nuance. The term "*moyen auxiliaire*" described something that provided helpful assistance in the determination of rules of law, which was somewhat different to something that constituted an alternative, supplementary or complementary source of law, which was the meaning inherent in the English term. The same nuance could be found in the authentic versions of the Statute in other languages. For example, in the Spanish language version, the phrase was rendered as "*medio auxiliar"* and the language found in the Arabic version could likewise be understood to carry the meaning of "auxiliary" or "in reserve". The wording used in the German version had the same literal meaning as the language used in the French. In German teachings, moreover, treaties, customs and general principles were commonly referred to as "real sources of law" as opposed to subsidiary means. An examination of such translations was helpful in that they provided additional indications of widely used and concurrent meanings of the terms.

Like Mr. Forteau, he thought it necessary to draw a distinction between the wording "supplementary means of interpretation" – "*moyens complémentaires d'interprétation*" in

French – contained in article 32 of the Vienna Convention on the Law of Treaties, and the terms being considered by the Commission in the context of the current topic. The Commission had unique comparative advantages when it came to providing practical guidance and promoting consensus, given its unique composition and the breadth of legal traditions represented among its members, provided that all members were united in the aim of formulating an ever more coherent language of international law.

Another possible source of misunderstanding in discussions of sources of law lay in the unconscious transposition of sources from national case law into the international realm. A variety of approaches were to be found in national legal systems, and different legal cultures could have an influence on the manner in which international law was taught. In the Nordic countries, the realist tradition represented by Danish legal philosopher Alf Ross had had a decisive and formative influence on many jurists. Ross had placed predictions about judicial rulings at the forefront of legal analysis. In his 1947 publication, *A Textbook of International Law*, Ross took the view that, since sources of international law were the general factors or motives that were decisive for the determination of the specific legal content of international judicial decisions, a theory of sources of law should be built on an analysis of existing case law – primarily the judgments and advisory opinions of the International Court of Justice. That view had been consistently applied for the first time by Max Sørensen in his 1946 publication *Les sources du droit international*.

Ross held that the predominant, if not exclusive, concern of jurists should be how courts conducted themselves in practice and that a theory of sources deduced from Article 38 of the Statute of the International Court of Justice would therefore be misleading insofar as its provisions did not accurately reflect what occurred in reality. In his view, authoritative rules about sources of law were successful in constraining and guiding the application of the law to only a limited extent and might thus be considered rather as unconvincing attempts to reflect reality after the fact. That conclusion might also to some extent be applied to Article 38.

On the subject of subsidiary means, Ross held that, while Article 38 of the Statute placed "the teachings of the most highly qualified publicists" on a par with "judicial decisions" as subsidiary means for determining applicable law, that equivalence was misleading. While case law was a true source of law that contributed to judicial decision-making and was consistently invoked in supporting arguments, teachings had no role as a source of law. The "teachings of the most highly qualified publicists" were never invoked in decisions, only occasionally in dissenting individual opinions. Furthermore, as Sir Gerald Fitzmaurice had noted in a paper entitled "Some problems regarding the formal sources of international law", some authorities denied that any final determination in doctrine of sources of law was possible. To support that notion, he cited Ross's conclusion that:

> … the doctrine of the sources can never rest on precepts contained in one among the legal sources the existence of which the doctrine itself was meant to prove. The basis of the doctrine of legal sources is in all cases actual practice and that alone. The attempt to set up authoritative precepts for the sources of law must be regarded as later doctrinal reflections of the facts, which often are incomplete or misleading in the face of reality.

In Norway, the theory of sources of law was taught as a distinct, compulsory subject in national law faculties. Influenced to some extent by American realism, it had often been characterized by a sociological tendency to look for empirical evidence of what judges actually did – which was what the Special Rapporteur was doing to some extent – in order to predict future rulings, and on that basis to predict the actual state of the law as applied. Under that approach, extremely broad criteria were used to identify potentially relevant sources of law, but that openness was offset by the actual legal weight that a particular source of law might merit in a given context. In other words, the need to strike a balance between relevance and weight countered the effect of any potentially over-generous interpretation of the relevance of specific materials. He mentioned that effect purely as a cautionary illustration of the drawbacks of importing or transposing elements from a national legal system without considering the larger context of principles and applicable rules. A similar observation might be made with regard to any instinctive transposition of views that might be held regarding the authority and role accorded to judicial decisions: the understanding of the role of

precedent, or *stare decisis*, in common law traditions was not necessarily transposable to other legal systems.

The diversity inherent in national legal cultures and traditions called for as much consistency and coherence as possible in the development and use of a common language and grammar of international law. That consistency and coherence could be promoted through conceptual clarifications that served to prevent misunderstandings, and the Commission was particularly well placed to make important contributions to those clarifications. An awareness of the conceptual distinction between things that had the force and authority to establish rules of law and things that did not was essential for all lawyers. Nonetheless, in the first edition of his treatise on international law, Lassa Oppenheim had noted that most writers tended to confound the term "source" with the term "cause" and, on that erroneous basis, to arrive at a standpoint from which certain factors that influenced the growth of international law were considered to be sources of rules of the law of nations.

Certain passages of the report might evoke that same fundamental concern. In paragraph 162, the term "source of law" was defined as "that which gives to the content of rules of international law their character as law". That definition was backed up by the assertion that "when international lawyers speak of sources, they usually mean in the technical sense of where the law derives its force" – an assertion that could reasonably be interpreted as relating to the norms that were binding on States, or, more specifically, those factors that had the necessary force and authority to establish rules of international law binding upon States. Paragraph 163 provided the clarification that, under the foregoing definition, sources of law should be understood to mean "the norms of international law that carry binding legal effect for States".

That approach was in line with an interpretation of sources of international law that essentially equated the term with categories of norms recognized by the legal system as capable of establishing law – in other words, with formal sources of international law only. Assuming that the Commission took that approach, subsidiary means could not be considered to be sources of international law, as the Special Rapporteur apparently recognized in his observation that "subsidiary means are not sources, at least not in the formal sense". The approach was also in line with the interpretation of the concept of subsidiary means adopted by the Commission in its earlier work on the identification of customary international law, in which judicial decisions and the teachings of publicists were not referred to as a source of international law.

A broader approach to the term "sources of international law" could include within its scope material sources consisting of other factors that, while not having the force and authority to establish rules binding on States, might nonetheless be invoked to support the existence of a rule or the propriety of a certain interpretation of a rule. If that approach was adopted, subsidiary means could be referred to as sources of law, in that they qualified as material sources that might assist in the determination of rules of international law. However, such an approach would create a very broad umbrella term that would encompass not only practices and processes recognized as capable of, and necessary for, creating binding norms, but also any other factors that might influence the formation, application and interpretation of international law and that provided evidence to support the superiority of one legal interpretation over another.

Whatever option was chosen, it was crucial that terms were used in a consistent manner and were appropriately explained. It seemed clear from the report that the broader, more inclusive approach to the term "source of international law" was not the intended approach for the topic under consideration and he fully supported the Special Rapporteur's decision on that point. It was the stricter approach that, in his view, fit most accurately with the ordinary meaning attributed to the terms used in Article 38 in the various authentic language versions of the Statute.

Nonetheless, the report seemed to oscillate between narrow and broad approaches to the term in the subsequent discussion of the concept of subsidiary means. At some critical junctures in the text, the narrow approach to the term set out in chapter VI was appropriately applied in accordance with the definition described as "sufficient for present purposes". Elsewhere, however, application of the term drifted towards the broader and more inclusive

approach. For example, in the section on the Special Rapporteur's observations on the elements of subsidiary means, it was suggested that "the two subsidiary sources, namely judicial decisions and teachings, are placed on the same footing in paragraph 1 (*d*) of Article 38 [of the Statute]". Moreover, in paragraph 194 it was stated that: "The subsidiary means, which is a reference to judicial decisions and the teachings of publicists, may be thought to be, but are not actually intended to be, subordinated to the other sources mentioned in the article." In such cases, the term "source" appeared to be applied with an entirely different meaning from that said to be the one appropriate for the Commission's purposes. Yet there was no qualification of the term "source" in those contexts to explain that the application departed from the definition set out in chapter VI. He would therefore invite the Special Rapporteur to ensure as much consistency as possible in future reports. It was not simply a question of style, but also of substance. When the term "source" was explained as "that which gives to the content of rules of international law their character as law", the risk associated with the variations he had mentioned was the unintentional inflation of the authority and relevance of subsidiary means to be perceived as stand-alone sources of norms.

He fully agreed with the Special Rapporteur's assertion that the subsidiary means referred to in Article 38 did not constitute sources of law if that term was to be understood as equivalent to formal sources; that point was clearly reflected in the structure and wording of Article 38. The reference in Article 38 to Article 59 of the Statute, which provided that the decisions of the International Court of Justice were only binding between the parties to a case, made it clear that the reference to judicial decisions was not intended to imply the existence in international law of any general rule of judicial precedent, but simply to confirm that the Court could resort to jurisprudence as a factor to assist it in determining rules of law. Moreover, the term "subsidiary" clearly indicated that the function and relevance of the factors referred to in Article 38 (1) (*d*) differed from the function and relevance of the categories listed in Article 38 (1) (*a*), (*b*) and (*c*). While a decision by an international court, or a broad consensus amongst publicists, might inspire legal opinions of States and be put forward in support of legal arguments, neither inspiration nor support were based on a perception that those elements constituted norms of international law in and of themselves.

That aspect was, to his mind, of fundamental importance to the concept of subsidiary means and deserved to be clearly reflected in a separate draft conclusion that would situate the set of draft conclusions within their appropriate framework and offer clear methodological guidance on the relevance of subsidiary means. The absence of such a conclusion could, in time, give rise to confusion.

Concerning the practical importance of categorization, he recalled the words of Joseph Raz in *The Concept of a Legal System*: "The law is characterized by a rigid and relatively clear definition of what constitutes authoritative legal materials, just as much as it is characterized by a certain vagueness about the meaning and import of the authoritative legal material." He believed that, although that statement contained elements of truth, the Commission's future work, building on the Special Rapporteur's first report, would help to minimize vagueness. When applying the existing legal framework, a very large number of legal materials could be brought to the fore. Some helpful categorizations had already been alluded to.

The first consisted of legal materials that could qualify as "means of interpretation" of a treaty, such as materials that were part of the "context" contemplated in article 31 of the Vienna Convention on the Law of Treaties, or "supplementary means of interpretation" as described in article 32. The second category consisted of legal materials that provided evidence for establishing the existence of components of customary law or general principles. As noted by the International Court of Justice in its 1996 advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, those materials could "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*". The third category of legal materials comprised unilateral declarations, which had specificities analysed by the International Court of Justice and could have the effect of creating legal obligations. The Commission had provided separate guidance on that category.

The functions of the legal materials in the aforementioned categories were clear and separate from those of subsidiary means. He therefore agreed with the other members who had cautioned against unduly expanding the scope of the definition of subsidiary means for

the determination of rules of international law. In his view, subsidiary means should not cover the same functions as the legal materials he had just mentioned.

Concerning the role of judicial decisions and teachings, the importance of judicial decisions was indisputable, as was made clear in the report. However, he agreed with other members that the particular role and authority of the International Court of Justice should be reflected, in line with the general description of the Court's role in the *Nuclear Weapons* advisory opinion: "It is clear that the Court cannot legislate … . Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons." The Court had thus clearly signalled that it was not a law-making institution and nor had it ever claimed to be one. The object and purpose of Article 38 of the Statute was to clarify exactly that judicial role.

He also wished to highlight the importance of a settled jurisprudence over time, developed in particular by the International Court of Justice, which might have contributed to the emergence and consolidation of a well-established methodology. Beyond the interpretation of Article 38 of the Statute, case law had a particular role to play in providing arguments of acceptability for negotiating States, particularly with regard to the law of the sea. Judicial decisions might thus not only play a role as subsidiary means, but might also contribute to the evidence of *opinio juris* that could result in treaty-making.

In conducting an empirical analysis of the relevance of judicial decisions for adjudicators, it was essential to carefully consider the provisions of applicable law that defined the functions of the court or tribunal concerned. That applied to the working methods of courts and tribunals within the international criminal justice system as well as hybrid special tribunals. The example referred to in paragraph 174 of the report concerned the 1992 Agreement on the European Economic Area, which had brought together the European Union member States and three of the four European Free Trade Association States – Iceland, Liechtenstein and Norway – in a single market, and thus provided for the inclusion of European Union legislation in a number of sectors and for precisely calibrated rules on the relevance of rulings of the European Court of Justice. He was not convinced that that very particular legal framework provided any guidance regarding subsidiary means.

When speaking in favour of the systemic integrity of international law, the Commission must give full credit to the proliferation of courts and tribunals established to resolve particular issues, and the possibility of dialogue and cross-fertilization between them, which would help counter the detrimental fragmentation of international law. In the light of the criticisms of the current legal framework made by Mr. Mingashang, it might be useful for the Special Rapporteur in due course to address the revolution that had in fact taken place in terms of making judicial decisions and case law from an enormous variety of institutions available through digitalization and the Internet. While access to such rulings through appropriately furnished legal libraries had been extremely limited just a few decades earlier, a process of democratization had taken place, allowing for broad access to an enormous amount of international and national jurisprudence. The challenge now was related to information overload and the difficulty of gaining the necessary overview of legal cases found in vast databases on the Internet. Doctrine took on a new role in that context, and had now been expanded to encompass researchers on several continents. He supported the view expressed by other members that the Commission should draw on doctrine from a variety of regional sources. In that context, he would also invite the Special Rapporteur to address the role played by legal informatics. A brilliant example was the International Criminal Court's Legal Tools Database, which had been developed to promote easy and accurate access to jurisprudence from a variety of institutions in the field of international criminal law.

As mentioned by others, careful thought should be given to the bodies whose output should be considered relevant when analysing judicial decisions. He did not believe that statements and assessments by various treaty bodies, such as the Human Rights Committee or the Committee on the Rights of the Child, could properly be characterized as "judicial decisions". That term was ordinarily understood to refer to a decision by an institution exercising judicial powers. Although some of those committees did refer to their decisions in individual complaints cases as "jurisprudence", many States parties consistently objected to that view and argued that, as the committees were not courts of law or tribunals, they could not produce "jurisprudence". That was not to say, however, that the resulting legal materials

could not, in certain circumstances, play an important role in providing evidence for the identification of primary norms.

More generally, the report tended towards overestimating the relevance of subsidiary means. While he appreciated the influence of subsidiary means, particularly judicial decisions, on international legal writings and the development of international law more broadly, he believed that discussions of that impact needed to be carefully distinguished from discussions of formal relevance and authority. Statements in the report concerning a *de facto* influence of judicial decisions seemed to suggest a more formal role. The fact that judges could influence the development of international law did not mean that they acted as law creators. There was a difference between inspiration and influence on the one hand, and norm-creating competence on the other. The assertion in paragraph 208 of the report that the formal "subsidiary" status of judicial decisions belied their fundamental role and importance in the development and consolidation of international law might also give rise to confusion and inflation of authority. The formulation of draft conclusion 4 (a) to the effect that decisions of international courts and tribunals were a "particularly authoritative means for the identification or determination of the existence and content of rules of international law" might also be confusing, particularly with regard to the use of the terms "identification" and "determination". To minimize any potential misunderstandings concerning the status of subsidiary means in relation to sources of international law, a separate draft conclusion explaining the formal status of subsidiary means would be helpful.

With regard to the weight to be given to teachings, he believed that the focus should be on the quality of the text rather than the presumed pedigree or credentials of the author. Another factor to take into account was whether the text was the result of an institutional process.

As to the question of hierarchy between subsidiary means and the sources listed in Article 38 (1) (*a*), (*b*) and (*c*), he did not share the Special Rapporteur's position that there was no hierarchy between treaties, custom and general principles on the one hand and subsidiary means on the other. While Article 38 (1) did not explicitly use the term "hierarchy", it was nevertheless clear that the categories referred to in subparagraphs (*a*), (*b*) and (*c*) differed in function and status from the "subsidiary means" referred to in subparagraph (*d*). The former were formal sources – recognized categories of norms capable of establishing obligations under international law – whereas subsidiary means lacked such capability. The term "subsidiary means" also underscored the fact that the factors mentioned in Article 38 (1) (*d*) were somehow secondary to the categories in Article 38 (1) (*a*), (*b*) and (*c*). He therefore disagreed with the Special Rapporteur's assertion that subsidiary means might be thought to be, but were not actually intended to be, subordinated to the other sources mentioned in the article. In accordance with the formal framework of sources in international law, a clearly discernible treaty rule or customary rule, or even a general principle of law, took precedence over conflicting interpretations drawn from either judicial decisions or teachings, or any other subsidiary means. States generally applied the framework established in Article 38 (1) sequentially, and if that was the case for the norms in subparagraphs (*a*) to (*c*), it was most certainly also the case for the subsidiary means in subparagraph (*d*). States might be alarmed by the assertion that there was no actual or formal hierarchical relationship between those layers of legal argument. Suggesting that the category of subsidiary means was never intended to be subordinated to the categories of norms in Article 38 (1) (*a*), (*b*) and (*c*) risked gradually inflating the authority and relevance of subsidiary means.

He agreed with those members who had argued that the drafting of the Statute of the Permanent Court of International Justice by the Advisory Committee of Jurists in 1920 should not play a decisive role in the Commission's interpretation of the Statute today. However, he also believed that key dilemmas of jurisprudential legitimacy expressed during the deliberations of 1920 were still relevant. The crux of the matter was how judges should justify their rulings, and what to do when neither treaty law nor international custom provided for a rule of international law. The Norwegian member of the Advisory Committee, Francis Hagerup, had famously fought the idea of a *non-liquet* situation for the future court. The risk of a *non-liquet* situation was not easily identifiable today. The challenges were related instead to the need for dialogue and cross-fertilization between a variety of courts and tribunals.

Mr. Grossman Guiloff said that he agreed with others that the Commission should proceed with caution so as not to unduly expand the scope of the definition of subsidiary means. Nonetheless, he wondered whether it might not be worth studying concepts such as "conventionality control" in the inter-American system, including its impact and any State practice in that regard. In paragraph 124 of its 2006 ruling in the case of *Almonacid-Arellano et al. v. Chile*, the Inter-American Court of Human Rights had stated:

> The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention [on Human Rights], its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of "conventionality control" between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights.

He wondered whether it might not be worth studying the impact of that ruling in the Americas since 2006 and identifying whether there were similar examples in other regions that might also be examined in the context of the topic of subsidiary means.

Mr. Forteau said that consideration might also be given to the judgments providing an interpretation in the context of preliminary rulings of the European Court of Justice, the effect of which was not limited to the parties to the dispute. At the same time, the Commission must keep in mind that the topic under consideration dealt with subsidiary means for the determination of rules of international law, not the effects of the decisions of international judges. Judges' decisions were only being examined as a subsidiary means and not in relation to the other, potentially much broader, effects such decisions might have. It might therefore be worth considering a "without prejudice" clause to exclude the effects of judicial decisions. Article 21 of the Statute of the International Criminal Court should also be taken into account in that regard.

Mr. Fife said that the question raised by Mr. Grossman Guiloff was an extremely interesting one. He agreed entirely with the point made by Mr. Forteau. He himself had made a few digressions concerning the different functions and roles of judicial decisions, but that had partly been to ensure that the Commission fully grasped the added value and particular nature of subsidiary means and could make the necessary distinctions wherever they might be useful.

Mr. Grossman Guiloff said that his preference would be to study such phenomena as "conventionality control" properly before concluding that they fell outside the scope of the topic.

The meeting rose at 11.35 a.m.