Provisional

For participants only

10 July 2023

Original: English

International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3630th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 24 May 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	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)

Ms. Galvão Teles said that the Commission should take a practical, rather than theoretical, approach to the topic "Subsidiary means for the determination of rules of international law". It should clarify the role and function of subsidiary means, provide guidance on the elements that could constitute subsidiary means and discuss the circumstances under which subsidiary means should be used and the weight that should be given to them.

As the use of the phrase "*moyen auxiliaire*" in the French version of the Statute of the International Court of Justice made clear, the subsidiary means referred to in Article 38 (1) of the Statute were intended to serve as auxiliary means for determining the content of the sources of international law, and their use was not meant to be limited to cases where no applicable rule could be found in treaties, custom or general principles of law. Subsidiary means could not, however, in a strictly legal sense, be the source of a rule of international law. That assertion did not run counter to the Special Rapporteur's statements regarding the influence, authority and persuasive power that judicial decisions had in international law – particularly when the decisions were those of the International Court of Justice, which the Court itself, other judicial bodies and the Commission relied on when making determinations as to the existence or content of a rule of international law. However, a distinction should be drawn between the use of judicial decisions as subsidiary means for determining the existence or content of a rule and their use as evidence of the formation of a rule of customary international law or the recognition of a general principle.

The distinction between the interpretation and the creation of norms was a difficult one to make. It could be challenging to draw a clear line between the interpretation of a rule by a court and the application of that rule by the court in a decision that could then be used as a subsidiary means for the determination of the content of that rule and the effective creation or development of that rule. The Commission could seek to provide guidance to States and the International Court of Justice regarding difficult cases such as those where the Court's interpretation of a rule became the standard interpretation of that rule.

She welcomed the Special Rapporteur's proposal to further discuss, in subsequent reports, the status and role of subsidiary means and the relationship between subsidiary means and treaties, international custom and general principles of law, but the distinctions between the concepts behind the sources of international law and the functions of international law should not be blurred. Generally speaking, she could support the Special Rapporteur's proposal regarding the scope of the topic. It would be in line with the Commission's recent practice, particularly in its work on topics related to the sources of international law, for the outcome of its work to take the form of conclusions.

One of the issues raised in the first report was whether the term "judicial decisions" covered the advisory function of international courts. As Alain Pellet and Daniel Müller had noted in their contribution to *The Statute of the International Court of Justice: A Commentary*, the reference to "judicial decisions", in the plural, in Article 38 (1) (*d*) indicated that it was jurisprudence, and not particular decisions, that constituted subsidiary means. While the Court's decisions could not automatically be applied to other cases, its established jurisprudence – and, more specifically, the reasoning that it had applied in similar cases – had considerable weight in the determination of the state of international law on a given question and, hence, could offer guidance in the resolution of new disputes. The Court itself had explained that the question was not whether the parties to a given dispute were bound by previous decisions but rather whether there was a reason not to follow the reasoning of earlier cases.

For the same reasons, advisory opinions should be considered subsidiary means. In drawing on its previous advisory opinions, the Court would not be imposing the conclusions reached in them on the parties to a dispute; rather it would be relying on its previous reasoning and legal conclusions to the extent that there was no reason to deviate from them. In practice, the Court referred to its judgments and advisory opinions without making any distinction

between them. Other international courts took the same approach. For example, a special chamber of the International Tribunal for the Law of the Sea had cited the Court's advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* as relevant precedent in its decision in *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*. The Inter-American Court of Human Rights had, through its early advisory opinions, recognized the customary nature of the American Declaration of the Rights and Duties of Man, settled its competence to interpret and apply other human rights treaties, clarified the effects of reservations and developed the content of various human rights norms. The Commission itself had also relied on advisory opinions of the International Court of Justice and other courts in its work, as noted in the Special Rapporteur's report and in the memorandum by the secretariat on the topic (A/CN.4/759). She strongly agreed with the Special Rapporteur that the meaning of "judicial decisions" encompassed advisory opinions. That understanding should be made clear in the draft conclusions.

As noted in the report, a reference to teachings had been included in the Statute of the Permanent Court of International Justice and that of the International Court of Justice to help judges identify, interpret and clarify international rules and principles and avoid situations of *non liquet*. Teachings therefore carried the most weight when they related to one of the sources of international law, for example, when discussing the interpretation of a treaty or the development of a rule of customary international law. Teachings could influence the conduct of States and thereby generate practices capable of giving rise to the formation of a rule of customary international law, lead to the inclusion of certain provisions in international treaties and play a role in the codification and progressive development of legal regimes. However, like judicial decisions, they could not themselves be the source of a rule of international law.

The reference to teachings in Article 38 (1) (*d*) was generally thought to refer to the collective teachings of international legal scholars taken as a group, rather than to the writings of individual authors. The Commission must therefore consider how to define the group of authors whose collective scholarship was relevant to the determination of rules of international law. The Commission had undertaken similar exercises in its work on other topics relating to the sources of international law, including in its conclusions on identification of customary international law; in those cases too, there had been a concern that scholarly works and judicial decisions from certain parts of the world would be given disproportionate weight. A study cited in the report had found that the 10 scholars cited most often in the decisions of the International Court of Justice were all men from Western States. The same concern had been expressed by States during the debates in the Sixth Committee.

A clearly worded requirement of representativeness should therefore be included in the draft conclusions, either as part of draft conclusion 5 or as a separate draft conclusion. The Commission had addressed the representativeness requirement under Article 38 (1) (*d*) in the commentaries to the conclusions on identification of customary international law and highlighted the importance of having regard to "writings representative of the principal legal systems and regions of the world and in various languages". For the topic now before it, the Commission could consider a formulation similar to the one used in those commentaries, but two important amendments would need to be made: firstly, the phrase "principal legal systems" should be replaced with "various legal systems", the formulation used in the draft conclusions on general principles of law adopted on first reading earlier at the present session; and, secondly, an additional requirement should be added calling for gender representation to be considered when selecting the collective teachings of "the most highly qualified publicists of the various nations". The principle of non-discrimination, and the rights to equality and equal opportunities enshrined in the United Nations Charter, the Universal Declaration of Human Rights and other human rights instruments required that special attention should be given to instances of systemic gender-based discrimination in all international arenas. The International Court of Justice had itself raised concerns regarding the lack of both regional and gender diversity among the lawyers appearing before it. She invited the Special Rapporteur to address the issue of gender diversity in either the draft conclusions or the commentaries thereto.

The report suggested that a doctrinal position must be perceived as having a certain level of objectivity and quality to be persuasive and reliable. However, there had been much criticism of the objectivity and impartiality of international legal scholarship. Legal scholars were influenced by the specific viewpoint and methodology of their discipline and by cognitive biases shaped by their beliefs, values and political preferences. A certain level of objectivity could be achieved by considering the writings of a diverse and representative group of scholars with different perspectives on the international legal system. The diversity of scholarship practices around the world, including the criteria that they used to judge quality, should be taken into account in evaluating the quality of the writings to be considered "teachings of the most highly qualified publicists". An explicit reference to the importance of considering diversity in the selection of scholarly works should be included in the commentary to draft conclusion 3.

She could support the suggestion that greater weight should be given to the work of private expert bodies, which was more authoritative than the work of individual authors, as long as those bodies met the requirements for geographical and gender representativeness. The work of those bodies could be referred to in draft conclusion 5 or the commentary thereto.

The outcomes of the Commission's work merited a special mention, for the following reasons: the Statute of the International Law Commission required that members should be "persons of recognized competence in international law" who represented various legal systems and regions of the world; the Commission's working methods provided for a thorough analysis of the legal questions brought before it, guaranteeing the quality of the outcomes of its work; the Commission was a public body created by the General Assembly, with a mandate to progressively develop and codify international law; and the outcomes of the Commission's work were often cited by the International Court of Justice and were generally perceived as authoritative by States, other international legal bodies and scholars. Hence, the outcomes ranked high with respect to all the criteria included in draft conclusion 3 and could thus be considered to have greater weight than teachings or could even be considered as an additional subsidiary means.

Scholarly discussions had already taken place on the status of the outcomes of the Commission's work under Article 38 and the question of whether those outcomes had greater weight than most teachings, particularly since they incorporated direct input from States. The Commission should use the opportunity before it to clarify the matter. The International Court of Justice and the Commission had come to reciprocally exercise influence over each other, and the authoritativeness of the sources that they relied on was cyclically reinforced. For instance, after the Court had invoked the draft articles on responsibility of States for internationally wrongful acts in its 1997 judgment in the case concerning the *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, the Commission had cited the judgment in its commentary to the final version of the relevant article, and the Court had then cited the final articles on State responsibility in its 2004 advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The criticisms raised by some regarding the interplay between the Court and the Commission, in which *opinio juris* could be crystallized through the mutual reaffirmation of the existence of a norm, with no external practice to draw on, should perhaps be taken into account when considering whether the outcomes of the Commission's work constituted additional subsidiary means.

The Commission should consider the possible existence of subsidiary means for the determination of rules of international law beyond judicial decisions and teachings. For example, the separate opinions written by judges occupied an intermediate position between judicial decisions and teachings and could help clarify the majority's decision or provide alternative reasoning in divisive cases. As noted in paragraphs 128 to 130 of the memorandum by the secretariat, the Commission had relied on separate opinions in previous codification projects. The Commission should also investigate the potential role of the International Committee of the Red Cross (ICRC) – which, as noted in the report, was a private association with a mandate from the international community of States – as either a source of teachings of the most highly qualified publicists or of additional subsidiary means distinct from those mentioned in Article 38.

The ICRC study on customary international humanitarian law – which had been mandated by States and had taken almost a decade and the involvement of 150 experts to

complete – was the single most cited work on international humanitarian law and arguably one of the contributions of ICRC to subsidiary means for the determination of rules of law. The study had been cited by most international and regional courts, which had referred to it in various ways: as an academic work on a par with the teachings of publicists, an authoritative source on the subject and even an accurate reflection of customary international law. The study was often the sole authority cited by United Nations bodies in order to affirm the customary status of a rule. The Commission itself had shown varying levels of deference in its references to the study. Similarly, the ICRC commentaries on the Geneva Conventions of 12 August 1949, which were based on analyses of military manuals, legislation and case law, academic commentary, field experience and consultations with practitioners and external experts, had been cited by judges of the International Court of Justice in the determination of applicable law; the commentaries apparently carried authority although they were not taken as an authoritative interpretation of the Geneva Conventions. She would invite the Special Rapporteur to consider more closely the work of ICRC.

The Commission should explore whether the work of human rights treaty bodies could constitute either subsidiary means or subsequent practice under article 31 (3) (b) of the Vienna Convention on the Law of Treaties, since that work was frequently cited by international courts and tribunals and United Nations bodies.

She generally supported the Special Rapporteur's plans for future work on the topic and was in favour of referring all the draft conclusions to the Drafting Committee.

Ms. Mangklatanakul said that the Commission should address the concerns expressed by some States by offering practical guidance to practitioners on the use of subsidiary means, thus promoting clarity and conceptual consistency in their application. The Commission should distinguish the purpose for which Article 38 (1) (*d*), had been drafted – to help judges of the International Court of Justice determine rules of law for the settlement of disputes – from the broader use of the provision by Governments, national judges, lawyers, academics, expert bodies and others for purposes that might go beyond the scope of the provision. The Commission should also ensure that its work would in no way interfere with the judges' exercise of their judicial discretion or constitute a *de facto* amendment to Article 38 (1) (*d*), either by adding new elements to the provision or restricting its application. The Commission's work should focus on clarifying the scope and usage of the provision on the basis of the current practice of the Court, States and other actors.

The Commission should consider the concerns, needs and expectations of States from the outset of its work. The Special Rapporteur had, in the syllabus on the topic (A/76/10, annex), identified several problematic issues, including whether subsidiary means were sources of international law, what weight should be given to the decisions of national courts, quasi-judicial tribunals, specialized *ad hoc* panels and arbitrators and to different types of academic writings, and how, methodologically, judicial decisions and teachings should be assessed.

It would be helpful if the Special Rapporteur could evaluate the concerns he had identified and indicate whether the problems had practical consequences or were purely theoretical. It would be expedient to focus on the practical problems, and to engage in theoretical debate only if it helped to shed light on those problems. Unless it could be established that the issue of conflicting judicial decisions and perceived fragmentation had direct implications on the Commission's understanding of the meaning and function of subsidiary means, that issue should fall outside the scope of the present study.

She agreed with the proposal that special attention should be given to the jurisprudence of international courts and tribunals, particularly the International Court of Justice, and also other judicial bodies such as the Permanent Court of Arbitration, whose rules concerning applicable law were based almost word-for-word on Article 38 (1) (*d*). She wished to commend the Special Rapporteur for acknowledging concerns about a perceived overreliance on judicial decisions and teachings from certain parts of the world and for highlighting the need to consider a wide range of practices and literature.

Other speakers had drawn attention to the fact that the nature and usage of subsidiary means had already been addressed in works previously produced by the Commission. It was important to ensure consistency with those works, but she had identified certain

discrepancies. Notably, the conclusions on identification of customary international law referred to "means for the determination" of rules, but the proposed draft conclusion referred to "means for the identification or determination". That risked creating confusion as to the distinction between identification and determination. It might be advisable to follow the language of Article 38 (1) (*d*) and then to explain what the functions of subsidiary means were or what "determination" meant, either in separate draft conclusions or in the commentary.

She agreed with previous speakers that subsidiary means were not sources of international law. Subsidiary means could not create law but did serve to determine the existence and content of an already existing rule of law. It was not helpful to call subsidiary means "secondary" or "supplementary" sources as it gave the false impression that they could be sources of rights and obligations. She appreciated the Special Rapporteur's summary of the theoretical discourse surrounding sources, including the distinction between "formal" and "material" sources, between "sources of law" and "sources of obligations" and between "law-creating processes" and "law-determining agencies". Nonetheless, it was important to adopt a conceptual framework aligned with that of States, who were the primary beneficiaries of the Commission's work. The Commission should, therefore, take a pragmatic approach to the issue of sources, drawing an easily comprehensible distinction between, on the one hand, things that gave rise to rights and obligations for States and, on the other, things that merely elucidated pre-existing rights and obligations. That conceptual distinction would be sufficient as a starting point for the Commission's work.

The meaning of the phrase "for the determination of rules of law" was crucial for the Commission's understanding of subsidiary means, because it related to the purpose for which such means were used. Following a preliminary survey, she had identified a non-exhaustive list of terms – some possibly overlapping – that seemed to be associated with the purposes of subsidiary means. The terms were: "identification", "confirmation", "ascertainment", "proof of existence", "piece of evidence", "clarification", "elucidation", "interpretation", "application" and "determination of the existence and content of the rules". All those terms were premised on the basis that rules already existed and that subsidiary means helped to shed light on them. She was unpersuaded by the argument that the term "determination" could be interpreted to include the creation or development of new rules. The Rapporteur might wish to examine in greater detail the different practical purposes for which subsidiary means could be used as that would help to clarify the practical utilization of such means.

The Special Rapporteur had noted that the term "judicial decisions" encompassed not only decisions of international and regional courts and tribunals, but also those of arbitral panels, the Dispute Settlement Body of the World Trade Organization (WTO) and United Nations human rights treaty bodies. For its part, the Commission had previously confirmed that the term "decision" included both judgments and advisory opinions. Moreover, the Commission had concluded that, in the present context, the term "judicial decisions" included decisions of national courts. That broad understanding was supported by the practice of international courts and required no further debate. According to the secretariat's 2016 memorandum on the role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691), decisions of national courts served as evidence of the constitutive elements of customary international law and as subsidiary means for the determination of rules of such law. She agreed with Mr. Fife that the two functions needed to be clearly distinguished from one other.

It was important to remain aware of the distinction between monist and dualist legal systems. Whereas States with monist systems applied international law directly, in dualist States, national courts could apply and interpret only the laws enacted through their own parliaments, and international law had to be transposed into national law before it could be enforced. Thus, decisions of national courts in dualist States might not relate directly to the application and interpretation of international law or lend themselves to easy usage as subsidiary means. In that regard, the Commission needed to be mindful of the perceived predominance of judicial practices from certain States in the development of international law, as other speakers had already noted. Moreover, because domestic courts in certain dualist countries did not generally engage in the interpretation of international law, it might

be difficult to obtain relevant judicial practice regarding usage of subsidiary means from them. During the Sixth Committee debate, Thailand had, in fact, pointed out that the limited use of subsidiary means by some States might pose challenges to gaining inputs from them. It was therefore important to note that the information on judicial practice received from States might not be representative of all States and legal systems.

The Commission should consider formulating clear criteria for assessing what kind of decisions of national courts were to be used as subsidiary means. Many criteria had been proposed, such as whether the decision involved an interpretation of international law, whether it was based on high-quality reasoning, whether there was internal consistency among decisions of lower and higher courts, whether the court had specific jurisdiction or expertise and whether the decision had been followed by other courts. The Commission would need to decide which of those factors were supported by the practice of States and international courts and which were not.

Although it was widely acknowledged there was no formal *stare decisis* in international law, States often cited previous cases as precedents or distinguished them from the facts of the case they were submitting to the International Court of Justice. Other forums, including the WTO Dispute Settlement Body, also referred to the Court's decisions when they had no precedent of their own. However, despite suggestions by some scholars that judicial decisions could be sources of law, the Commission should heed the prevailing opinion of States that judges did not create international law. That was the view embodied in the language of Article 38 (1) (*d*) and to do otherwise would risk unduly expanding the general understanding of that provision.

In his report, the Special Rapporteur stated that judicial decisions served not only as means to identify and confirm rules but also, sometimes, as a basis for the actual formulation of the rules and principles of international law, as well as sources of rights and obligations. The Rapporteur then went on to suggest that, while in principle judicial decisions were labelled as "subsidiary", the reality found in the Commission's practice suggested that they could be akin to primary sources of international law. He thus concluded that there was an "apparent mismatch between theory and reality". Yet, she was not convinced that the Commission had, in fact, treated judicial decisions as primary sources. The fact that the Commission – as stated in the secretariat's 2016 memorandum – regarded decisions of the International Court of Justice as "statements of existing international law" and "relied directly on the text of those decisions to formulate provisions, or based its formulations closely thereon" did not mean that the Commission treated the decisions as primary sources. It simply meant that the Commission borrowed wording in order to formulate provisions that reflected the law that already existed. If she was correct in her assessment, then the "mismatch between theory and reality" might be more apparent than real.

In its previous work on customary international law, the Commission had used the term "teachings" in a broad sense to include teachings in both written and non-written form. She therefore agreed with the Special Rapporteur's broad interpretation of the term. Yet, as the Commission itself had noted, teachings differed greatly in quality, and it was therefore important to be cautious when using them as subsidiary means. The Special Rapporteur had identified several factors that could be taken into consideration when assessing the quality of a particular teaching, such as the expertise of the individuals concerned or the level of agreement inside the relevant body. If the Commission chose to discuss how to assess quality, it would need to examine which of those factors were supported by the practice of States and international courts and which were not. It was of the utmost importance that the Commission should not inadvertently overvalue or undervalue certain types of teachings. Lastly, account needed to be taken of the inherent bias underlying Article 38 (1); as Ms. Galvão Teles had just pointed out, the 10 writers most frequently cited by the International Court of Justice were all men from Western States.

She agreed with the Special Rapporteur that the relationship between "judicial decisions" and "teachings" was not so much hierarchical as complementary. As for "sources of international law" and "subsidiary means", they were two different things; therefore, the debate as to whether there was a hierarchy between them seemed misplaced. Since the Commission's current focus was on Article 38 (1) (*d*), she doubted whether it needed to consider additional subsidiary means. She agreed with Mr. Galindo that neither "unilateral

acts" nor "resolutions of international organizations" should be addressed as subsidiary means. Unlike teachings or decisions of the International Court of Justice, unilateral acts and resolutions stemmed directly from decisions taken by States. They could serve as evidence for establishing components of customs or, sometimes, as sources of rights and obligations, but including them in the present study could blur the line between sources and subsidiary means.

She supported the Special Rapporteur's suggestion that the outcome should take the form of a set of draft conclusions accompanied by commentaries. Nonetheless, she remained open to discussing other outcomes, such as the draft guidelines suggested by Mr. Paparinskis. She was in favour of referring the proposed draft conclusions to the Drafting Committee, although it might be too ambitious to expect the Committee to provisionally adopt all the conclusions in the first half of the session. She looked forward to the second report on the topic, which she hoped would be shorter so as to allow States to engage with the work of the Commission more effectively.

Ms. Okowa said that she wished to congratulate the Special Rapporteur for an outstanding, authoritative and meticulously researched first report. She also wished to thank the secretariat for the excellent companion memorandum.

It was beyond question, as the Rapporteur had noted, that the International Court of Justice operated a *de facto* doctrine of precedent. In fact, as a court of law, the Court needed to aim for consistent and coherent jurisprudence, and it therefore departed from its previous judgments only if it had good reason to do so. In fact, it was difficult to think of any instances when it had done so. Thus, in general, a decision of the Court was an eminently promising place to start when trying to identify the rules of international law applicable in a particular situation. It was important to bear in mind, however, that the significance of a judgment of the Court for the development of the law would partly depend on the political controversy that gave rise to the dispute, and on whether the Court could genuinely be regarded as a neutral forum. Moreover, careful account had to be taken of the reception of the judgment by States and in the academic literature.

For example, in the *South West Africa* cases, Ethiopia and Liberia had argued that, by instituting the policy of apartheid in South West Africa, South Africa had been in breach of its obligations under the mandate of the League of Nations. The Court had refused to give a judgment on the merits, reasoning that the respondent's obligations were owed to the League and not to its individual Member States and that, consequently, the two States had no standing to bring the case. That judgment had been widely discredited by States, including in the General Assembly, and in its subsequent decisions the Court had made every effort to distinguish or distance itself from the position of the majority in the judgment. For its part, the Commission had not criticized the judgment directly but, as the Rapporteur noted, had taken a diametrically opposite position on the question of standing in article 48 of its articles on State responsibility. It was not surprising that the Court's pronouncements on its law-making role in the context of its own relationship with political organs and on questions of standing were regarded as a major stumbling block to the progressive development of the law.

Another problematic example was the 1973 *Nuclear Tests* cases, when the Court had reached the controversial conclusion that the dispute brought by Australia and New Zealand challenging the legality of French nuclear tests in the South Pacific had become moot as a result of a pronouncement by France that it would cease atmospheric nuclear testing. The operative passages of that decision were tellingly *ex cathedra*, and the Court cited no authority in support of its proposition. Although subsequent cases referred to the judgment, they had not elucidated its claim to authority and had since, according to Prosper Weil, reined in the judgment's over-expansive *obiter dicta*.

A third example was that of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, in which the decision of the Court was still very polarizing, even after more than 40 years. The political background to that controversy and the feeling in some quarters that the Court had been seeking to overcompensate for its shortcomings in the *South West Africa* and *Nuclear Tests* cases had somewhat diminished the authoritative quality of the Court's pronouncements on key issues,

such as the legal prerequisites of a valid claim to collective self-defence, the permissibility of forcible countermeasures and the relationship between treaty and custom. In the light of such examples, the commentary should clarify that the authority of judicial decisions inevitably operated on a continuum and that their quality as a subsidiary means for the determination of rules of international law depended, in part, on contextual elements.

Previous pronouncements of the Commission on customary international law might have a bearing on its deliberations concerning the authority of judicial decisions as an aid in identifying rules of international law more broadly. In fact, the Commission had listed five factors in its commentaries to the 2018 conclusions on identification of customary international law: the quality of the reasoning; the reception of the decision, in particular by States and in subsequent case law; the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and procedures applied by the court or tribunal. The Commission had also recognized that judicial pronouncements on customary international law did not "freeze the law", which might have evolved since the decisions were taken.

As former Commission member Maurice Kamto had pointed out, judicial decisions were the only item in Article 38 (1) that was specific rather than general in nature. By definition, judicial decisions were a product of identification and interpretation of the law with a view to deciding a particular dispute. That was both a strength and a weakness. In the present context, there was a need for what Sir Robert Jennings had described in 1981 as "discipline in the extraction of principle from decided cases". In other words, it was important to take account of the context in which an extract appeared in the judicial decision as a whole, its relation to the decision, and the particular facts and issues in the case. She had been encouraged to see a growing tendency in the decisions of international courts and tribunals to take that matter seriously. For example, in its award in the *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, the Permanent Court of Arbitration had stressed the peculiar geographical context in which the *North Sea Continental Shelf* cases had been decided and the value that had as a precedent. More recently, the arbitral tribunal in *Barbados v. Trinidad and Tobago* had taken account of "the singular circumstances" of the judgment of the International Court of Justice in *Maritime Delimitation in the Area between Greenland and Jan Mayen* before deciding that there was not sufficient basis for the extraction of principle from the Court's judgment.

It was important to distinguish between the various contexts in which it was necessary to rely on a judicial decision in order to identify the relevant rule of international law. International courts, when deciding a case by reference to the municipal law of a State, would treat a decision by the State's final appellate court as determinative of a particular legal issue. For example, in many cases, international law determined certain fundamental concepts, such as nationality of claims, by reference to the municipal law of a State. It followed that any decisions of domestic courts on that point might be treated as determinative.

In paragraph 273 of the report, the Special Rapporteur discussed whether the decisions of United Nations expert bodies qualified as "judicial decisions", and seemed to take the view that they did. She agreed with that approach. It seemed obvious, for example, that the Views adopted by the Human Rights Committee under its individual communications procedure, the awards of arbitral tribunals or conciliation commissions, and the decisions of the WTO Dispute Settlement Body all qualified as "judicial decisions" in the sense of Article 38 (1) (d). In any event, the International Court of Justice seemed to treat them as such, notably in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* and *Application of the Convention on the Elimination of Racial Discrimination (Qatar v. United Arab Emirates)*. Furthermore, in its 2020 judgment in *Yong Vui Kong v. Public Prosecutor*, the Singapore Court of Appeal had treated the reports of United Nations special rapporteurs as subsidiary means.

In *Private Law Sources and Analogies of International Law*, Hersch Lauterpacht had produced a commentary on the general principles of law mentioned in Article 38 (1) (*c*) of the Statute of the Permanent Court of International Justice. In cataloguing those general principles, Lauterpacht had drawn his conclusions almost exclusively by reference to the decisions of arbitral tribunals and the mixed claims commissions. By contrast, the

Commission's identification of general principles had been based largely on the congruence of practice as found in decisions of national and international tribunals. The Special Rapporteur might like to address that issue in his second report.

While the Special Rapporteur was clearly aware of the prevalence of white males among the authors cited by international courts and tribunals, he had nevertheless stopped short of explaining exactly how that problem could be "addressed head-on". There was clearly a remarkable lack of diversity in the sources who were generally relied upon to determine rules of international law. The challenges involved in remedying that, although not insurmountable, were not easy to address, especially for those who worked primarily in only one of the official languages of the United Nations. Members could help overcome the problem by providing the Special Rapporteur with materials from civil law jurisdictions, especially those produced by non-English-speaking jurists. Factors that should be considered when assessing the authority of a jurist included their nationality; the extent to which they had helped to formulate their country's national policy, especially on controversial matters; and their reputation, including whether the positions they espoused had been challenged or discredited.

The Special Rapporteur had asked for guidance on whether the category of subsidiary means should be expanded beyond judicial decisions and the teachings of publicists. In her view, the case for such an expansion was indisputable. When, in 1945, the Statute of the International Court of Justice had succeeded the Statute of the Permanent Court of International Justice, the only substantive change in article 38 had been the addition, after "The Court" in the first paragraph, of the words "whose function is to decide in accordance with international law such disputes as are submitted to it". The addition suggested that the items mentioned in the following subparagraphs were not meant to be exhaustive, but were instances of international law in accordance with which the Court must decide.

The Commission, then, should consider possible subsidiary means that were not explicitly mentioned in Article 38 (1) (*d*) of the Statute of the International Court of Justice. General Assembly resolutions of a norm-creating character, supported by large majorities, were credible candidates for inclusion in the category of subsidiary means for the determination of rules of international law. For instance, the resolutions adopted in the immediate aftermath of decolonization, such as the resolution adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples, were not only a source of *opinio juris* and State practice, but in and of themselves could assist in the identification of the relevant rules of law. They were described in the literature and in chapter VI of the report as "material sources".

There were strong democratic arguments in favour of including resolutions passed in genuinely representative forums by decisive majorities in the category of subsidiary means. As with judicial decisions, much would depend on the context of the resolution, including the political controversy that had given rise to it, the reasons given for or against it, and whether there were any compelling considerations of corrective justice that could be put forward in its support. In any event, as the Commission had observed in its 2018 conclusions on identification of customary international law, a resolution adopted by an international organization or at an intergovernmental conference might provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development. Such resolutions could also be a form of evidentiary subsidiary means for determination of a rule of international law.

It was also worth considering the rules and standards produced by regulatory organizations such as the International Organization for Standardization, the International Electrotechnical Commission, the International Commission on Non-Ionizing Radiation Protection, and Social Accountability International. Compliance with those rules and standards was often required either to secure market access or because relevant requirements had been incorporated into domestic law. Representation of governmental and non-governmental actors in regulatory organizations could shape *de jure* or *de facto* State practice. Global standardizing bodies such as those set up by WTO performed a similar role.

The Special Rapporteur had rightly drawn attention to the importance of representativeness and the fact that the teachings of publicists should be representative of

"the various nations". That phrase underscored the need to take account of opinions originating or prevailing in all the regions of the world. However, there were profound difficulties in attaching normative qualities to the resolutions of international and non-governmental organizations that were not broadly representative in their composition, such as the International Monetary Fund or the World Bank. Such resolutions might lack the necessary democratic mandate. In relation to both treaties and customary law, parliaments and domestic courts acted as gatekeepers in ensuring that domestic implementation aligned with the national interest. Courts also played an important filtering role in the identification and application of customary law at the national level. For the aforementioned reasons, the use of resolutions as a means of identifying or interpreting customary law was problematic when they emanated from non-governmental organizations or bodies that were neither representative nor subject to the necessary democratic safeguards.

The report identified several possible subsidiary means other than those set out in Article 38 (1) (*d*), but did not address them in any detail. Two stood out: equity and religious law. In her view, it was worth considering the place of religious law in the doctrine of sources and whether it might qualify as an additional means for the identification or interpretation of international law. It was well known that the constitutions of several Islamic countries proclaimed sharia as the supreme law which, in the event of a conflict, would override all man-made law, including international law. In the sphere of human rights, that had caused difficulties which had been dealt with through reservations. For instance, Afghanistan and Maldives had entered reservations to the Convention on the Rights of the Child, indicating that its provisions would be applied only to the extent that they were compatible with the basic tenets of sharia, which were regarded as peremptory. Similarly, Bahrain, Libya and Malaysia had entered reservations to the Convention on the Elimination of All Forms of Discrimination against Women that underscored the centrality of Islamic law in matrimonial matters, including the division of property.

Given the prevalence of such tensions, which had not been dealt with before, she wondered whether the discussion of subsidiary means might not be a good opportunity for the Commission to consider the place of sharia in the interpretation of international law. As there were many States that subscribed to sharia, the problem could not be dealt with by recourse to the rule that a State might not plead the provisions of its national law as a reason for non-compliance with international law. She therefore invited the Commission to consider whether, in some contexts, sharia might be a subsidiary source, if not for the identification, then at least for the interpretation of international law.

Noting that the five draft conclusions had, for the most part, built on the Commission's prior work on related topics, she said that she joined the other members in concurring that the Commission should forward the draft conclusions proposed by the Special Rapporteur to the Drafting Committee.

Mr. Sall said that the report was an excellent and scholarly attempt to comprehensively address the topic "Subsidiary means for the determination of rules of law". He wished to dwell on two aspects: firstly, the place that should be accorded to "unilateral acts", and, secondly, the nature and scope of "judicial decisions".

In two instances, the report referred to the question of whether unilateral acts should be taken into account within the meaning of "subsidiary means". Paragraph 355 stated that: "There are various candidates given in the literature of what could possibly be considered additional sources of international law … The main examples found in scholarship are said to be unilateral acts, resolutions or decisions of international organizations, agreements between States and international enterprises, religious law (including sharia and Islamic law), equity, and soft law." According to paragraph 369, unilateral acts could be thought of "either as a primary source of obligations for States or as auxiliary means for the determination of rules of law". In his view, unilateral acts were not subsidiary means and should be excluded from the Commission's understanding of the term.

Such an exclusion was justified by the inherent meaning of the concept. Paragraph 334 of the report gave a definition of "subsidiary" as "something that provides assistance, that is 'subordinate', 'supplementary' or 'secondary', [a] subsidiary or subordinate thing; something which provides additional support or assistance; an auxiliary, an aid". That

definition conveyed the idea that subsidiary means were neither self-standing nor binding: in other words, they were not a direct and immediate source of international law.

Article 38 (1) (*d*) of the Statute of the International Court of Justice indicated that subsidiary means were composed of "judicial decisions" and "teachings of the most highly qualified publicists", thereby confirming the secondary nature of case law and doctrine. The word "means" suggested an instrumental purpose, while the adjective "subsidiary" contrasted with the "principal" sources of law – treaties, custom and general principles of law. The subsidiary character attributed to case law and doctrine reflected, firstly, that they were not in themselves sufficient to produce positive law; and secondly, that they served to reinforce or confirm another source of law.

Unilateral acts did not have such a character, since under international law they created an immediate obligation. In *Nuclear Tests (New Zealand v. France)*, the International Court of Justice had confirmed the binding nature of unilateral acts, stating that:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations … When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking … An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

In his view, therefore, unilateral acts, whether of international organizations or of States, should not be considered subsidiary means for the determination of rules of law.

One related question was whether the resolutions of international organizations, such as the General Assembly resolutions adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, and the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, fell within the scope of subsidiary means. Paragraph 374 of the report suggested that such resolutions could be characterized as "a form of subsidiary means to the extent that a rule of international law is articulated in a judgment or decision of an international court or tribunal based on recognition of the views or provisions expressed in a resolution adopted by a universal membership body", and went on to say: "If the resolution is considered a material source, like a judicial decision, then it could well be argued that it is a subsidiary means for determining a rule of international law." Nonetheless, he took the view that resolutions of international organizations should be associated with international custom rather than subsidiary means. Indeed, the Commission, in its conclusions 4 and 6 on identification of international customary law, had considered that such resolutions possessed the required constituent elements, namely general practice and *opinio juris*, of international customary law. Conclusion 12 clearly stated that resolutions of international organizations "may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development". In short, neither unilateral acts nor resolutions of international organizations should be considered subsidiary means.

On the subject of judicial decisions, he took the view that the case law of quasi-judicial bodies, including the United Nations human rights treaty bodies, the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, should clearly be understood as judicial decisions within the meaning of Article 38 (1) (*d*). While such bodies did not hand down judicial decisions in the strict sense of judgments or orders, they did issue recommendations and Views. It was therefore logical to consider whether their case law should be taken into account. The report seemed to favour such an approach, but did not take a firm position. For example, paragraph 267 cited, as examples of judicial decisions, the decisions of the International Court of Justice, advisory opinions and arbitral awards, and national or municipal court decisions, but did not mention the case law of quasi-judicial bodies. On the other hand, paragraph 47 mentioned "expert bodies", doubtless referring to the human rights treaty bodies; while paragraph 64 mentioned the case

law of the African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights.

He thus saw a need for a more unequivocal recognition of such decisions as judicial decisions within the meaning of Article 38 (1) (*d*), for two reasons: firstly, the quality and the sheer quantity of quasi-judicial case law; and, secondly, the fact that quasi-judicial case law and writings were taken into account by both the Commission and the International Court of Justice in their work. For example, the Commission stated, in paragraph (6) of the commentary to article 18 of its articles on the expulsion of aliens, that: "The criterion of 'fair balance' also seems compatible with the approach taken by the Human Rights Committee for the purpose of assessing whether expulsion measures are in conformity with article 17 of the International Covenant on Civil and Political Rights." In addition, it referred to the decisions of the Human Rights Committee in paragraph (24) of the commentary to article 12 of its draft articles on prevention and punishment of crimes against humanity and, on the issue of enforced disappearances, to the pioneering quasi-judicial decisions of the Inter-American Commission on Human Rights.

The International Court of Justice, for its part, referred to the case law of the Human Rights Committee in its widely cited judgment of 30 November 2010 in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. In that ruling, it recognized that, since its creation, the Human Rights Committee had built up "a considerable body of interpretative case law, in particular through its findings in response to the individual communications that may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'." The Court also recognized the relevance of decisions adopted by quasi-judicial human rights bodies in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Numerous other examples could be cited.

The Commission should take the status thus accorded to decisions rendered by quasi-judicial bodies into account in its work on the current topic, as Mr. Vázquez-Bermúdez and Ms. Okowa had previously noted. That meant clearly specifying that such decisions constituted judicial decisions within the meaning of Article 38 (1) (*d*). However, "clearly specifying" did not mean enumerating sources that qualified as judicial decisions in the draft conclusions. Which specific sources were to be recognized as judicial decisions could be quite adequately explained in the commentaries. It was important, moreover, to keep in mind the need to respect terminological orthodoxy. There was no reason not to retain, as a matter of principle, the term "judicial decisions", from Article 38 (1) (*d*), in the proposed draft conclusion 4. The necessary clarifications should be included in the commentary.

Lastly, he wished to highlight the need to specify in what circumstances national judicial decisions might serve as subsidiary means. It was necessary to address that question insofar as draft conclusion 4 (c) provided that decisions of national courts might be used, in certain circumstances, as subsidiary means for the identification or determination of the existence and content of rules of international law. Some indication as to what precisely those "certain circumstances" might be was important, and the report did actually sketch out what they might be in paragraphs 298 to 301. In those paragraphs, three specific criteria were identified as being central to any assessment of the pertinence of a national judicial decision.

The first criterion concerned the potential value of the judicial decision, which was assessed on the basis of the importance of the legal question the decision addressed, the authority of the issuing court and whether the decision had subsequently been followed by other courts. The second criterion was the exportability of the judicial decision or, more specifically, whether it was relevant and applicable in other contexts. In order to meet that criterion, the decision should not be too closely bound to a particular point in time or a given geographical location or other context such as a specific country, legal system or form of reasoning. The third criterion was that the judicial decision should have a bearing on international law, national courts being known to sometimes apply rules of international law. Those criteria, which corresponded to the "circumstances" referred to in draft conclusion 4, were the fruit not of his own personal analysis but rather of an attempt to systematize the information and observations set forth in paragraphs 298 to 301. Since the criteria could be explained in the corresponding commentary, the wording of draft conclusion 4 could remain unchanged.

Mr. Tsend said that he wished to thank the Special Rapporteur for his exhaustive and illuminating first report on the topic "Subsidiary means for the determination of rules of international law". The overview of the drafting history of Article 38 of the Statute of the International Court of Justice and the wide-ranging survey of the academic landscape would be particularly useful aids to the Commission's understanding. The questions raised in the report not only captured the essence of academic debate on subsidiary means but also had practical implications for States and international legal practitioners. The proposed draft conclusions provided an excellent starting point for the Commission's ongoing discussions.

Emphasizing the importance of the Commission's work on the topic, he recalled that the examination of subsidiary means for the determination of rules of international law was a continuation of its past and ongoing efforts to elucidate a set of guiding tenets on the doctrine of sources. The current study, once completed, would complement its outputs on the topics "Identification of customary international law", "General principles of law" and "Peremptory norms of general international law (*jus cogens*)"; in that context, he welcomed the importance that the Special Rapporteur attached to ensuring that his methodology was consistent and the Commission's output would be useful for legal practitioners.

As noted in the account of the drafting history of Article 38, there had been considerable disagreement among the members of the 1920 Advisory Committee of Jurists regarding the relative importance of judicial decisions and teachings and the precise definition of each. Albert de Lapradelle had actually voted against the language that later became Article 38 (1) (*d*) on the grounds that laws, customs and general principles could not be applied without reference to jurisprudence and teachings. Despite those disagreements, the members of the Advisory Committee had generally concurred that judicial decisions and teachings were both "elements of interpretation" and, as such, should only be used "in a supplementary way to clarify the rules of international law". Rather than creating law, judicial decisions and teachings were simply tools that served to elucidate already existing rules of international law. That assessment had been consistently affirmed by the international legal community and he, along with other members of the Commission who had spoken previously, was in agreement with the Special Rapporteur on that point.

In the light of that common understanding, the Commission should aim to clarify how exactly international legal forums, including the International Court of Justice, should interpret and apply Article 38 (1) (*d*) and, more specifically, how the term "subsidiary" should be understood. The term had generated great debate and confusion as jurists and practitioners, including members of the Commission, had tried to ascertain the precise connection between rules of international law and judicial decisions and teachings. As the round-up of the interpretations of the word "subsidiary" and its equivalents in the different language versions of Article 38 provided by Mr. Fife had helpfully illustrated, the role of judicial decisions and teachings was to provide assistance and support. Building on that notion, it would be interesting to discuss the view that Article 38 (1) (*d*) imposed a soft-law duty on international courts and tribunals that required them, at the very least, to consider the decisions of other judicial bodies for reasons of institutional comity, judicial restraint and doctrinal coherence.

That soft-law duty was of course very different to the notion of judicial precedent that formed the backbone of the common law system. The International Court of Justice was not bound by the decisions of human rights treaty bodies, for instance – nor in fact were any other courts. Rather, the duty should be viewed as a need for courts to take the reasoned products of other international legal bodies' work into account in their deliberations. Moreover, if they chose to take a different approach, it would be prudent to provide an explanation for so doing.

In *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, the International Court of Justice stated that it ascribed "great weight" to the interpretations adopted by the Human Rights Committee because the Committee had been "established specifically to supervise the application" of the International Covenant on Civil and Political Rights. That statement clearly demonstrated that the Court was in no way compelled, as a matter of law, to be bound by the interpretations of the Human Rights Committee. The International Court of Justice had further demonstrated its capacity to diverge from the decisions of human rights treaty bodies in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, in which

it had rejected the interpretation of that convention proposed by the Committee on the Elimination of Racial Discrimination. After an examination of the Committee's practice, the Court had opted to form its own interpretation of the provisions of the Convention pursuant to articles 31 and 32 of the Vienna Convention on the Law of Treaties and had arrived at a conclusion that was the exact opposite of the Committee's. Despite their differing outcomes, the aforementioned cases both provided examples of how subsidiary means, in the form of the opinions of expert bodies, were used to help judges to determine the contours of rules of international law. The role explicitly ascribed to the general comments of the Human Rights Committee and the practice of the Committee on the Elimination of Racial Discrimination in the Court's decision-making processes in those cases were an illustration of the correct usage of Article 38 (1) (*d*).

The foregoing interpretation of the term "subsidiary means" might of course raise concerns about fragmentation of public international law. The pitfalls of fragmentation, as evidenced by the inconsistencies in the criteria for attribution of State responsibility applied by the International Court of Justice and the International Tribunal for the Former Yugoslavia, had been explained by Mr. Grossman Guiloff, who had at the same time noted a growing tendency among practitioners towards convergence rather than a splintering of international law. That lively debate was ripe for discussion within the Commission.

He supported the Special Rapporteur's conclusion that the subsidiary means mentioned in Article 38 (1) (*d*) did not constitute an exhaustive list. While the Advisory Committee of Jurists might not have contemplated additional sources of subsidiary means in 1920, as noted in paragraph 183 of the report, the international legal system had since undergone paradigmatic shifts that called for additional, complementary subsidiary means to be taken into account. In parallel with a dramatic increase in players, specialized fields such as human rights law and trade and investment and specialized mechanisms such as criminal tribunals, the fundamental nature of legal interactions between States had changed. Before 1945, international law had been the means through which States learned to coexist; since the adoption of the Charter of the United Nations, international law served the fundamental goal of fostering active inter-State cooperation. Accordingly, it would be inappropriate to make assumptions based on the fact that no additional sources of subsidiary means had been considered in the Statute's *travaux préparatoires*.

Regarding the main candidates for recognition as additional subsidiary means, he shared the Special Rapporteur's doubts regarding the inclusion of unilateral acts. Unilateral acts and declarations, as legally binding statements under customary international law, might readily be covered by Article 38 (1) (*b*). Indeed, in the *Nuclear Tests* case, the International Court of Justice had held that authoritative statements made on behalf of the French Government unilaterally created good-faith legal obligations, and, in *Legal Status of Eastern Greenland*, the Permanent Court of International Justice had concluded that a statement "given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs". Thus, acts that expressed a State's intent to be bound, were made publicly by a State official with the corresponding powers and were sufficiently clear and specific were accorded the status of binding legal obligations under customary international law. Allowing unilateral acts also to be covered by Article 38 (1) (*d*) would give undue status to the actions of individual States, besides introducing confusion as to whether the action of an individual State should be considered binding under customary international law or merely as a subsidiary means for the determination of rules of international law.

The legal force of resolutions and decisions adopted by international organizations merited more detailed examination. Although the multitude of possible actions that international organizations might take resulted in varying levels of international obligations for States, the resolutions and decisions of the United Nations General Assembly and Security Council were of the most wide-reaching significance. The General Assembly had the power only to make recommendations but some of its more influential resolutions were of undeniable value as evidence of either an emerging State practice or *opinio juris*, as Mr. Oyarzábal had explained in his detailed remarks on the topic.

General Assembly resolutions could also fulfil two additional functions. Firstly, they could serve as evidence of customary international law in and of themselves, not just as evidence of constitutive elements of customary international law. For example, resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations" – a unanimously adopted non-binding declaration enumerating State responsibilities under the Charter of the United Nations regarding the threat or use of force – had solidified into rules of customary international law and was embodied in article 50 of the Commission's articles on responsibility of States for internationally wrongful acts. Resolution 1653 (XVI), on the prohibition of the use of nuclear and thermonuclear weapons, was also pertinent: in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice found that resolution 1653 (XVI), despite having been routinely adopted by a majority of States, had faced consistent opposition from nuclear-equipped States and that that disagreement, as reflected in the history and patterns of voting on the resolution, had hampered "the emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such". If such authoritative General Assembly resolutions could be cited as evidence of custom, or a lack thereof, they could certainly aid understanding of the rules of international law.

Secondly, General Assembly resolutions could serve as authoritative interpretations of the Charter of the United Nations. General Assembly resolutions that had been unanimously adopted could, under article 31 of the Vienna Convention on the Law of Treaties, be considered to constitute subsequent agreements between the parties to a treaty or subsequent practices in application of the treaty and might thus be used for purposes of interpreting the text of the treaty. For instance, General Assembly resolution 3314 (XXIX), on the definition of aggression, which expounded on the meaning of the term "aggression" as used in the Charter, had subsequently been heavily relied upon by international bodies, including the International Court of Justice and the International Criminal Court. If interpretive resolutions of that kind drew their validity from the underlying binding treaty, they could at the very least shed light on how the rules of international law expected States to behave in their relations with each other.

Turning to resolutions of the United Nations Security Council, which was empowered under the Charter of the United Nations to create binding obligations for its members, he noted that its plenary power had led many to analogize the Security Council to a world legislature. That analogy was best supported by the series of binding resolutions passed in the wake of the attacks of 11 September 2001, which contained sweeping mandates requiring all States to adopt new counter-terrorism legislation and establish enforcement mechanisms. Under Security Council resolution 1422 (2002), for example, members of United Nations peacekeeping missions had been granted immunity from investigation or prosecution for a 12-month period if they were citizens of States that were not parties to the Statute of the International Criminal Court – and that immunity had been granted even though the resolution did not expressly state that prosecution would constitute a threat to international peace and security under Chapter VII of the Charter of the United Nations. The resolutions issued after the 11 September attacks also empowered a panoply of global administrative law agencies, including the Financial Action Task Force, to broaden their mandates to include combating the financing of terrorism. Thus, if the Security Council could expressly impose responsibilities on States, its actions could be considered strong indicators of the contours of international law.

However, as Mr. Asada had previously noted, a distinction should be made between non-binding and binding resolutions of the Security Council. Binding resolutions could not be considered subsidiary means because States Members of the United Nations were under an obligation, pursuant to Article 25 of the Charter of the United Nations, to carry out the decisions of the Security Council. Binding resolutions were thus in and of themselves sources of law. Non-binding resolutions, on the other hand, as Mr. Asada had pointed out, might fall under the umbrella of subsidiary means.

Overall, the draft conclusions proposed by the Special Rapporteur accurately reflected the Commission's objectives and were consistent with its past work on the identification of customary international law and on general principles of law. However, although the

Commission's task included the progressive development of international law, draft conclusion 2 (c), as currently worded, was too broad for the ambit of current discussions on the topic, which were squarely focused on the practice of the General Assembly and the Security Council. He suggested, therefore, that the provision regarding State practice and unilateral acts should be set aside. In addition, the Commission might explore the possibility of explaining in the commentaries the reasons for its focus on resolutions of the General Assembly and the Security Council.

He agreed with the language proposed for draft conclusion 4 (b), which rightly placed greater emphasis on decisions of the International Court of Justice. Although its jurisdiction was limited to the situations described in Article 36 of its Statute, the Court remained the only judicial forum with general subject matter jurisdiction to which nearly every State in the world had access. Its unique supremacy was grounded in its vast and equal membership, based on membership of the United Nations.

Given that the purpose of draft conclusion 5 was to contextualize the phrase "teachings of the most highly qualified publicists of the various nations" by providing a relevant example of such teachings, he found the language used – "coinciding views of scholars" – ambiguous. It was unclear whether such views originated from individual experts or from expert groups or bodies like the International Law Association. The former interpretation, whereby the opinions of individual scholars were required to be coinciding in order to be considered subsidiary means, would consolidate the status of Western-educated jurists and unfairly disadvantage those not steeped in English-speaking common law or Romance language-speaking civil law traditions. That would be especially inappropriate since a demographic analysis of the 20 writers most frequently cited in the advisory opinions of the International Court of Justice had revealed that only one of those writers, Eduardo Jiménez de Aréchaga of Uruguay, was a citizen of a non-Western country.

If draft conclusion 5 was to be interpreted as referring to the views of expert bodies, as appeared to have been the Special Rapporteur's intention, there was a need for greater nuance in the language to distinguish between the different types of expert bodies. It might be useful to specify in the commentary which factors might endow the teachings of a given expert body with greater value than those of others. Such factors might include, for example, whether the body in question practised *lex specialis* or *lex generalis*, whether it exercised particular care and authority when issuing its findings, and whether the findings it issued reflected its field of expertise.

In conclusion, he noted that, although the Commission itself did not consider its outputs to be teachings, they were by far the most commonly cited source in the advisory opinions of the International Court of Justice. Judges of the Court had cited both draft and finished products of the Commission, the deliberations published in its Yearbooks and the reports of the various Special Rapporteurs. Overall, the Commission was cited as many times as the next four most frequently cited sources – the Institute of International Law, the International Law Association, the International Committee of the Red Cross and the American Law Institute – combined.

Mr. Cissé said that the Special Rapporteur's extremely detailed first report addressed the key questions raised by the topic and provided pertinent examples of practice and teachings. Chapter V, which provided an overview of key aspects of the past work of the Commission that touched on the subject, was particularly appreciated. He was also grateful for the memorandum prepared by the secretariat. The Commission had in fact regularly referred to judicial decisions and the teachings of publicists of the various nations in almost all the topics it had considered. However, not all the sources it had cited would necessarily fall under the umbrella of Article 38 (1) (*d*).

Chapter VIII of the report, in which the Special Rapporteur sought to distil the ordinary meaning of the key terms in Article 38 (1) (*d*) was very helpful. In chapter IX, in which the Special Rapporteur considered whether, taking into account the developments in State practice and in the practice of international courts and tribunals, there might be additional subsidiary means implicit in Article 38 (1) (*d*), paragraph 346 was of particular interest. It was noted in that paragraph that courts, including the International Court of Justice, relied on their prior judicial decisions more than on teachings. However, although

the Court certainly referred to its own decisions, it did not necessarily feel constrained by them. Notably, in its judgments on the delimitation of maritime boundaries, it had indicated that each case was unique.

In general, he had no problems with the text of the proposed draft conclusions. Draft conclusion 4 (c), however, should mention, in addition to the decisions of national courts, the decisions of regional courts such as the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights.

The meeting rose at 12.35 p.m.