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International Law Commission

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Provisional summary record of the 3632nd meeting

Held at the Palais des Nations, Geneva, on Thursday, 25 May 2023, at 3 p.m.

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Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Fife
	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
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.05 p.m.

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

Mr. Lee said that the discussion surrounding sources of international law had a long history. Doctrine on the topic had emerged with the advent of positivism in international law. One of the earliest usages of the term "sources of international law" could be found in a 1750 textbook written by Johann Jakob Moser, one of best-known positivists. In the nineteenth century, leading legal texts had listed a great variety of sources of international law. The "codification" of sources of international law in 1920 had had a stabilizing influence on doctrine. Yet, since 1945, despite some positive evaluations, many commentators had questioned the continuing relevance of Article 38 (1) of the Statute of the International Court of Justice for modern international relations. In that sense, the Commission was confronted with a challenge similar to that posed by piracy, namely, how to address twenty-first century developments with a normative framework originating in the early twentieth century.

The report contained a detailed analysis of the *travaux préparatoires* for Article 38 (1) (*d*). In that regard, it would be useful to shed some light on how that provision – formerly Article 38 (4) of the Statute of the Permanent Court of International Justice – had been interpreted in the pre-1945 period. In 1925, in a lecture to the Hague Academy of International Law on the sources of international law, Charles de Visscher had observed that court judgments were both an element in the formation and a mode of expression of international custom. By contrast, he had considered doctrine to be only evidence of custom. It was striking that neither de Visscher nor his contemporaries Paul Fauchille and P.E. Corbett had mentioned Article 38 (4) in their discussion of sources of international law.

In another lecture at the Hague Academy, published in 1931, Maurice Bourquin had offered a lucid observation on the difference between "subsidiary" and "auxiliary" means. However, his line of interpretation could not eliminate the substantial ambiguities surrounding the sources of international law. In a 1925 article in the *British Yearbook of International Law*, Corbett, recognizing that difficulty, had made the following caustic comment: "In the treatises of the last hundred years there has been an enormous amount of writing on the sources of international law … To the severely practical reader much of this doubtless appears sheer, riotous logomachy, and he hastens on through introduction or chapter one to the pages where he may hope to find some statement of what the law actually is."

Sources of international law differed considerably from one legal tradition to the next. For example, sources listed in French textbooks on international law were quite different from those found in English or German textbooks. Substantial diversity on the exposition of sources of international law could even be found among the scholars belonging to the same legal tradition. Although the Special Rapporteur had made an appreciable effort to include a range of judicial decisions and teachings from various legal systems, a more balanced and inclusive approach would have been to take into account jurisprudence and doctrine originating outside the common law system. In that regard, the extended discussion of the distinction between formal and material sources, in paragraphs 163 to 167 of the report, appeared to be largely based on the concept of material sources as understood in the common law system. The Special Rapporteur could also have painted a clearer picture by eliminating certain misleading explanations. For instance, in paragraph 167 he observed that "the distinction between *formal* and *material* sources seems rather difficult to sustain" [emphasis in the original], but then went on to emphasize the role of material sources as defined in paragraph 165, and he explicitly applied the concept in paragraph 374.

The Commission should ensure that it addressed the topic of sources of international law in a manner compatible and consistent with its previous work. In that regard, some members had made suggestions regarding the consistent use of terminology. In his view, the Commission should not modify or deviate from its *acquis* without a compelling reason for doing so. Regarding the question of whether advisory opinions were included within the conceptual boundary of "judicial decisions" as provided for in Article 38 (1) (*d*), the commentary to the Commission's conclusion 13 on identification of customary international law explained that the term "decisions" included judgments and advisory opinions. The

report also devoted lengthy paragraphs to the question of whether Article 38 (1) (*d*) itself constituted a source of international law. Again, the commentary to conclusion 13 on identification of customary international law clearly stated that: "The term 'subsidiary means' denotes the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law." If the Special Rapporteur had adopted the Commission's *acquis* as his starting point, it might have been unnecessary for him to engage in such a lengthy discussion of the absence of a formal hierarchy in the sources. Indeed, revisiting questions that had been previously addressed not only raised concerns about duplication of effort, but could also give the impression that the Commission was calling into question the authority of its own previous work.

Another concern related to how the Commission could increase the accessibility and utility of its work. In his view, the Commission should respond to the needs of Member States by employing methodologies that focused on State practice. It should also produce outcomes that were easily accessible and practically beneficial for the typical consumer of its work. Future reports could benefit from the virtues of brevity and conciseness. Lengthy theoretical discussions, such as that contained in the chapter on the drafting history of Article 38 (1) (*d*), could have been simplified and shortened.

There was a need to restore a degree of balance in the utilization of subsidiary means. Unless a corrective or critical effort was made, Article 38 (1) (*d*) might end up like an echo chamber, reflecting or amplifying a specific perspective or value orientation. It went without saying that the Commission should accord substantial weight to *lex lata* in its work.

Certain questions relating to additional subsidiary means could be effectively addressed by referring to the Commission's *acquis*, as confirmed in the relevant parts of the memorandum prepared by the secretariat (A/CN.4/759). However, it might be necessary for the Commission to engage in a delimitation exercise in which it considered the advisability of placing sources of international law in the narrow category of subsidiary means under Article 38 (1) (*d*). Some sources, such as binding resolutions of the Security Council, would fall under the category of Article 38 (1) (*a*), while the Special Rapporteur admitted in paragraph 286 that judicial decisions of national courts "in addition to serving as subsidiary means … are also indications of State practice." A similar opinion had been expressed concerning "unilateral acts".

In addressing the question of the non-exhaustive nature of Article 38 (1) (*d*), the Special Rapporteur appeared inclined to maximize the elasticity of the provision. However, another possible approach would be to discuss sources of international law within the broader framework of Article 38 (1), on the grounds that some sources or subsidiary means performed a dual or multiple function. Indeed, it was not uncommon for a source of international law to encompass all four elements set forth in Article 38 (1); it thus seemed inadvisable to confine the discussion on candidates for sources of international law to Article 38 (1) (*d*). Doctrine appeared to support that view. Moreover, the Commission should exercise caution so that its consideration of additional subsidiary means did not draw it into a theoretical and abstract debate or lead it to revisit its previous work.

Lastly, he said that he supported the proposal for the final outcome to take the form of draft conclusions with commentaries, although he remained open to other forms of outcome. He was in favour of sending the draft conclusions to the Drafting Committee.

Mr. Ruda Santolaria said that the report was a rigorous and thorough text that shed light on the subject of subsidiary means and supplemented the Commission's previous work on sources of international law. However, he was concerned that the length of the report might hinder appreciation of its content, particularly by those States that had fewer resources and smaller legal teams at their disposal. As some members of the Commission had noted, the report covered a number of theoretical considerations, such as those on the distinction between formal and material sources, that might draw the reader's attention away from more important practical issues. In his view, the most appropriate form of outcome would be draft conclusions, in keeping with the Commission's approach to international custom and general principles of law under Article 38 (1) (*b*) and (*c*) of the Statute of the International Court of Justice.

He supported the argument advanced by Gerald Fitzmaurice, cited in paragraph 182 of the report, that Article 38 was non-exhaustive, since it was not intended to list all the sources of international law but to direct judges where to look when determining the applicable rules of international law. As noted in paragraph 185, the apparent deficiencies of Article 38, such as the unfortunate reference to "civilized nations", had not prevented the International Court of Justice or other international courts from deciding international disputes, giving advisory opinions or adopting innovative or creative solutions.

As for the term "subsidiary means", as the report noted, the Commission had previously observed, in its conclusion 13 on identification of customary international law, that the term denoted "the ancillary role of such decisions in elucidating the law, rather than being themselves a source of international law (as are treaties, customary international law and general principles of law)".

He agreed that the term "judicial decisions", within the meaning of Article 38 (1) (*d*), included the decisions of the International Court of Justice itself and those of its predecessor, the Permanent Court of International Justice, and advisory opinions and orders issued by those courts and by regional and subregional courts and tribunals such as the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of Justice of the European Union, the Court of Justice of the Andean Community and the Dispute Settlement Body of the World Trade Organization.

The Inter-American Court of Human Rights, for instance, besides ruling on claims of violations of rights recognized in the American Convention on Human Rights, issued advisory opinions to States members of the Organization of American States on the interpretation of the Convention or of other human rights treaties on the American Continent. Moreover, at the request of a member State, the Inter-American Court could give its opinion on the compatibility of any rule of domestic law of the State in question with the aforementioned international instruments. The Court thus had extremely broad advisory jurisdiction, which was not limited to the American Convention on Human Rights, but extended to other treaties, including universal treaties adopted within the framework of the United Nations and applicable in the American States, as highlighted by the Court in its Advisory Opinion No. OC 01/82 of 24 September 1982.

Consequently, he shared the opinion, expressed by other members of the Commission, that the term "judicial decisions" could also cover decisions taken by quasi-judicial bodies such as the Human Rights Committee in the framework of their individual complaints procedures. The term could also encompass the decisions of national courts and tribunals. Indeed, the Commission's draft conclusion 8 (2) on general principles of law, provisionally adopted on first reading, stated that: "Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of general principles of law, as a subsidiary means for the determination of such principles." In that regard, he agreed that it would be appropriate – as the Commission had concluded in relation to customary international law – to consider 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. It would also be necessary to apply a stricter level of scrutiny to national decisions than to international judgments, the latter being based on international law, whereas the former applied, or applied primarily, to national law.

Regarding the meaning of "teachings", he noted with satisfaction that paragraph 307 of the report cited the Commission's prior work in determining that the term should be understood in a broad sense and would include teachings in non-written form, such as audiovisual materials and materials in any other dissemination format that might be developed in the future. The report's emphasis on the interpretative function of teachings, especially where groups of experts interpreted, determined or clarified the existence of rules or principles of international law, was also welcome. In his view, the phrase "most highly qualified publicists of the various nations" referred to persons eminent in the field, in particular members of public and private expert bodies, with the greatest possible degree of representativeness; the phrase included experts, both male and female, who represented the principal legal systems and regions of the world, and who gave their opinions in diverse languages, as an expression of multilingualism. In that regard, he shared the concern, expressed by the Special Rapporteur and members of the Commission, that the International

Court of Justice mostly cited male Anglo-Saxon authors who were versed in the common law tradition and wrote in English.

The definition of "subsidiary" contained in paragraph 334 of the report was apposite, given that judicial decisions and teachings were subordinate in status to treaties, custom and general principles of law, because they were not sources of law in and of themselves. As paragraph 343 made clear, judicial decisions and teachings did not give rise to rules of international law, but assisted in the determination of the existence, and in the interpretation, of rules of law.

Like other members of the Commission, he took the view that the category of subsidiary means could not include unilateral acts of States; the *Nuclear Tests* cases and the *Legal Status of Eastern Greenland* case had shown that such acts created legal obligations. Nor could subsidiary means include Security Council resolutions, which were binding under Chapter VII of the Charter of the United Nations.

Regarding the proposed draft conclusions, he supported draft conclusion 2 (a) and (b), but considered that subparagraph (c) was very open and should be reviewed in subsequent reports. In draft conclusions 4 (a) and 5, he would prefer to avoid the use of the word "identification" and refer only to "determination". In draft conclusion 4 (b), he welcomed the emphasis placed on the decisions of the International Court of Justice, which was consistent with a similar emphasis in the Commission's conclusion 13 (1) on identification of customary international law and draft conclusion 8 (1) on general principles of law, as provisionally adopted on first reading. He supported the transmission of the five draft conclusions on subsidiary means to the Drafting Committee.

Mr. Akande said that the Special Rapporteur's first report on the topic of subsidiary means for the determination of rules of international law carefully set out the issues to be addressed and raised some important considerations that would serve to guide the Commission's work. The secretariat's memorandum was also very helpful. The topic was challenging because, although there was an abundance of material on subsidiary means, and legal practitioners and scholars regularly referred to them, there had been very little in-depth analysis of relevant materials that systematically set out what was meant by the term "subsidiary means" and how they should be categorized.

As a number of members had already stated, the aim of the Commission's work on the topic should be to provide those who needed to make determinations on the rules of international law with practical guidance as to the means that might assist them in doing so. That said, and as the discussions within the Commission had shown, in the area of subsidiary means, theoretical considerations were not easily avoided. While members agreed that subsidiary means for the determination of rules of international law were not sources of law and had a different function to the materials enumerated in Article 38 (1) (*a*) to (*c*) of the Statute of the International Court of Justice, even drawing that conclusion entailed making certain assumptions as to what it meant to describe something as a source of law and how the term "sources" should be used. Owing to their different views on those questions, not all members were in agreement on the types of materials that should be considered subsidiary means within the meaning of Article 38 (1) (*d*). The Special Rapporteur's endeavours to clarify those underlying conceptual issues were particularly appreciated, as they were central to the development of a common understanding on how to approach the topic.

He agreed with those members who had insisted that subsidiary means for the determination of rules of international law should not be regarded as sources of law as they did not lend force or validity to rules of law. Rather, their role was to provide assistance for decision makers seeking to ascertain what the law actually was. In other words, subsidiary means did not determine the law in the sense of deciding what the law was; they helped in the determination of the rules of law in that they helped legal practitioners and scholars to draw conclusions about the state of the law based on reasoning, inquiry and the examination of relevant materials. With regard to the meaning of the word "subsidiary" as used in the English-language version of the Statute, he was grateful to Mr. Fife for his extremely helpful analysis of other language versions of the Statute, which had demonstrated that the word "subsidiary" as used in the English version did not carry the meaning that might ordinarily

be ascribed to it. Unfortunately, that point was not one that had been recognized and addressed in legal writings in the English language.

For the foregoing reasons, a close examination of what members of the Commission and other practitioners and scholars actually meant when stating that subsidiary means were used for the determination of rules of law was worthwhile. As was clearly set forth in conclusion 13 of the Commission's conclusions on identification of customary international law and in the commentaries thereto, subsidiary means could be of use in identifying the existence and content of rules of law. It might thus be useful to expressly enumerate the functions of subsidiary means in a draft conclusion before proceeding to discuss the different types of subsidiary means.

With regard to the types of subsidiary means expressly mentioned in Article 38 (1) (*d*), beginning with judicial decisions, he noted that the Special Rapporteur's analysis of the term provided persuasive reasons to support the inclusion of the advisory opinions of the International Court of Justice within the category of subsidiary means. Insofar as the term referred to a decision of a judicial body – in other words, a body that had authority to judge cases – he agreed that advisory opinions constituted judicial decisions. Moreover, the Commission had already considered whether advisory opinions fell within the category of subsidiary means for the determination of rules of law – in its work on identification of customary international law – and, as other members had noted earlier in the session, had concluded, as set forth in the commentary to conclusion 13 of its conclusions on that topic, that the decisions of international courts and tribunals were subsidiary means for the determination of rules of customary international law and that advisory opinions were included in the category of such decisions.

It was also important to note that the International Court of Justice itself used its own decisions as a means for determining rules of international law and that it referred to its advisory opinions in precisely the same way as it relied on previous decisions in contentious cases. That was unsurprising given that they were decisions of the same body and similar processes were used to arrive at decisions in the two types of proceedings. Decisions set forth in advisory opinions were not of course binding, whereas a judgment issued in a contentious case was binding on the parties involved. However, neither decisions issued in contentious cases nor decisions set forth in advisory opinions were binding upon the Court, nor for that matter upon anyone else other than the parties to the dispute adjudicated. Thus, when the Court was called on to consider, in a subsequent case, whether to rely on its previous decisions in order to establish what the law was, the formal status of judgments in contentious cases and decisions set forth in advisory opinions was indistinguishable. Neither were binding on either the Court or the parties.

A second question that arose with respect to judicial decisions was whether the category included decisions of arbitral tribunals as well as decisions of permanent courts and tribunals. In order for the decisions of arbitral tribunals to assist with the determination of rules of law within the meaning of Article 38 (1) (*d*), the tribunals issuing them must apply rules of international law. The first point to note in that connection was that, in the case of inter-State arbitral tribunals, there was not always a clear-cut distinction between such bodies and courts and tribunals. The dispute settlement panels at the core of the dispute settlement system of the World Trade Organization, for example, were formed of individuals chosen to adjudicate the particular dispute in a manner very similar to those selected to sit on arbitral tribunals. It was thus not easy to specify exactly where within the divide between decisions of courts and arbitral decisions their decisions fell. The lack of a clear divide was grounds not to draw too rigid a distinction between the two types of decision.

Perhaps more importantly, the International Court of Justice had routinely referred to decisions of inter-State arbitral tribunals without making a distinction between the value of such decisions and the value of its own decisions and those of other courts. Moreover, the Court had explicitly included arbitral tribunals within the meaning of Article 38 (1) (*d*) in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*). It had also invoked the decisions of mixed arbitral tribunals in the context of investor–State dispute settlement, and also the decisions of the Iran–United States Claims Tribunal, the latter, for example, having been cited in the judgment rendered in March 2023 in *Certain Iranian Assets* (*Islamic Republic of Iran v. United States of America*). Given that

it was the practice of the International Court of Justice, of other courts and tribunals and also of States to refer to arbitral decisions, he agreed that such decisions, including those issued by mixed arbitral tribunals, should be included within the rubric of judicial decisions.

He likewise agreed that the decisions of national courts fell within that rubric. The fact that decisions of national courts might constitute State practice or might be evidence of acceptance as law (*opinio juris*) for the purpose of customary international law did not preclude their use also as a means for determining rules of law. The important point, as noted by the Commission in its work on customary international law, was that the same material might serve several purposes.

A further question that arose in connection with judicial decisions was whether the work of treaty bodies might fall within that category. That question also gave rise to a related broader question, specifically, whether the work of treaty bodies might constitute additional subsidiary means for the determination of rules of law. The decisions taken by treaty bodies in response to individual complaints submitted to them in connection with alleged violations of the treaty they were charged with monitoring were not binding. However, as had been noted in connection with advisory opinions, a decision need not be binding in nature in order to qualify as a judicial decision. The role of the United Nations treaty bodies was succinctly described by the Human Rights Committee in its general comment No. 33, on the obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, which stated, in paragraph 11, that: "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the Views issued by the Committee under the Optional Protocol exhibit some of the principal characteristics of a judicial decision."

To determine whether the decisions of treaty bodies were judicial decisions within the meaning of Article 38 (1) (*d*), it was again necessary to consider whether and how such decisions were used by the International Court of Justice. As a number of members of the Commission had noted, the Court's judgment in the case of *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) was useful in that it stated that "great weight" should be ascribed to the interpretation adopted by United Nations treaty bodies and, similarly, that, when interpreting regional instruments, "it must take due account" of the interpretation adopted by the bodies created to monitor the application of the instrument. The Court referred variously to the interpretations adopted by treaty bodies when dealing with individual complaints in that judgment. What was particularly important for the current topic, however, was not so much the fact that the Court referred to the decisions of treaty bodies but how it referred to them. It referenced, for example, "the jurisprudence of the Human Rights Committee" and the "considerable body of interpretative case law" built up by that Committee, and also "the case law of the African Commission on Human and Peoples' Rights". Without prejudice to whether the other work of such treaty bodies, to which the Court had also referred, might be regarded as other additional subsidiary means, those examples clearly indicated that the Court was using their decisions as judicial decisions within the meaning of Article 38 (1) (*d*).

With regard to the teachings of publicists, the second category of subsidiary means expressly mentioned in Article 38 (1) (*d*), he wished to repeat that, as noted by the Commission in the commentaries to its conclusions on identification of customary international law and as highlighted by Mr. Ruda Santolaria earlier in the meeting, the term "teachings" should be understood in a broad sense. "Teachings" could be disseminated through a variety of channels and the range of possible channels, which now included online forms of communication, was even broader in 2023 than it had been in 1920. Moreover, while the Statute of the International Court of Justice referred to the teachings of the "most highly qualified" publicists, it could be argued that the most important requirement of such teachings should be the cogency and quality of their reasoning rather than the eminence of the writer.

That observation tied in with a wider point that might be made with respect to teachings in particular but also to subsidiary means for the determination of rules of law more generally, specifically, the fact that the weight to be ascribed to the material was more important than the gate-keeping function used to determine what materials should be considered to fall within the category. On the basis that those who needed to know and apply the law would look to materials that helped them to ascertain, by reasoning and research, the

state of the law, logically, the question of whether and to what extent those materials were helpful would be dependent on the weight that could be ascribed to them. He would therefore be in favour of the Commission formulating a set of criteria that could be used to assess that weight.

The Special Rapporteur also referred to the degree to which views expressed in teachings reflected a broad understanding of the law. On that point, the emphasis had rightly been placed on the need for the teachings to reflect "the various nations". Diversity was important and agreement across that diversity even more important. One of the reasons why the collective works of private and State-empowered codification bodies had risen to prominence, both in scholarly circles and among States, was that they could more easily demonstrate a consensus of views across a diverse group. However, as Ms. Okowa had pointed out previously, the Commission needed to examine its work closely to ensure that such diversity actually existed.

With regard to the possible existence of additional subsidiary means for the determination of rules of international law not enumerated in Article 38 (1) (*d*), his view was that the category should not be regarded as closed. The Commission should keep in mind the general purpose of subsidiary means for the determination of the law – specifically, that they should serve as an aid for identifying the existence and content of the law – as well as the fact that the landscape of international law had changed and the material now available extended way beyond that envisaged in 1920.

Returning to the treaty bodies, he noted that, besides issuing judicial decisions when dealing with individual complaints, many of them, particularly those established under human rights treaties, also issued general comments and concluding observations on States parties' efforts to implement the corresponding treaties. In so doing, the treaty bodies adopted specific interpretations of the treaties that they had been created to oversee. Thus, bearing in mind that the subsidiary means under consideration in the present topic might be used, and should be useful, for the determination of all sources of international law – not just customary international law and general principles of law but also rules that emerged from treaties – and insofar as their work assisted with the interpretation of treaties, the treaty bodies' general comments and concluding observations should also be regarded as subsidiary means for the determination of rules of international law.

The Commission had recognized the possibility of the work of treaty bodies also constituting subsidiary means within the meaning of Article 38 (1) (*d*) in its conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. In that connection, it was interesting to consider the relationship between the rules of treaty interpretation and the materials used for that purpose, on the one hand, and the use of subsidiary means for the determination of the rules of treaty law, on the other. Was it possible for the work of a treaty body to be used as supplementary means for the interpretation of a treaty but to be rejected as a possible subsidiary means for determination of the rules of international law? Since such a situation was unlikely, the Commission's conclusion, as stated in its earlier work, that there was nothing to prevent material from being used for the determination of treaty interpretation under Article 38 (1) (*d*) must be correct: otherwise, that provision would not in fact refer to all the sources of international law.

With regard to the recognition of unilateral acts as subsidiary means, if the term "unilateral acts" was taken to mean unilateral assumptions by States of obligations under international law in the form considered by the International Court of Justice in the *Nuclear Tests* cases (*Australia v. France* and *New Zealand v. France*), he agreed with the Special Rapporteur that they should be regarded as falling outside the scope of the topic. However, other materials unilaterally produced by States, such as pronouncements setting out their national positions and understandings on particular areas of law – for example, military manuals setting out in detail how States understood the law of armed conflict and the increasing number of national statements issued on the application of international law in cyberspace – though not unilateral acts in the sense of unilateral assumptions of obligations, expounded the law in a manner not too dissimilar to publications issued by scholars and expert bodies. Such statements clearly qualified as State practice or *opinio juris*; they could also reflect State practice in the interpretation of treaties. What was less clear was whether they qualified as subsidiary means for the determination of law. However, if the decisions of

national courts were considered to fall within that rubric, why should the unilateral pronouncements of States not also qualify?

Lastly, with regard to the recognition of decisions of international organizations as subsidiary means, at the present stage of consideration of the topic, he was in favour of their inclusion. Binding resolutions, which appeared to be the Special Rapporteur's focus, certainly qualified since, when States voted for, adopted or spoke in favour of or against resolutions of international organizations, the position they took counted as State practice and possibly *opinio juris*. Binding resolutions might also constitute a subsequent agreement or subsequent practice in the interpretation of a treaty: as already noted, materials could fulfil a range of functions. The collective expression in the text of a resolution of what international law was considered to be also served a distinct function that extended beyond the individual acts of States in respect of the resolution in question. That collective expression might also serve as an exposition of the rules of international law. For example, a resolution might constitute subsequent practice in the application of a treaty, but might not in that case reflect the agreement of all the parties. Nonetheless, as the Commission had pointed out previously, the resolution would constitute a supplementary means of interpretation and in that sense might also constitute a subsidiary means for the determination of the rules of international law.

He was in favour of referring all the draft conclusions proposed by the Special Rapporteur to the Drafting Committee. He had several comments on specific draft conclusions but would raise them when the text was before the Drafting Committee.

Mr. Zagaynov said that he wished to thank the Special Rapporteur for his detailed, thought-provoking and informative first report on the topic "Subsidiary means for the determination of rules of international law". The report provided a solid basis for the Commission's ongoing discussions and the formulation of draft conclusions. The detailed overview of the drafting history of Article 38 of the Statute of the International Court of Justice was particularly appreciated. He was also grateful for the secretariat's memorandum, which was likewise of impressive quality and would aid the discussions.

With regard to the Special Rapporteur's approach to the topic, he noted that numerous sources had been reviewed and the Special Rapporteur had endeavoured to reflect different and sometimes opposing approaches and viewpoints. Nonetheless, some legal traditions, including the Russian legal system, were not covered, as other members of the Commission had pointed out, and Western nations accounted for the vast majority of the teachings and case law cited. For that reason, the Special Rapporteur's invitation to share relevant materials in order to ensure that the principal legal systems, languages and regions of the world were duly represented was very important. Efforts to ensure greater representativeness were essential in the initial stages of consideration of the topic, when key areas of divergence were expected to be discussed. Paragraph 332 of the report cited a study of teachings in which Sondre Torp Helmersen, a Norwegian law professor, had found that the 10 writers most cited by the International Court of Justice were all from Western nations and all were male. He agreed with the Special Rapporteur's observation that, while that issue might give rise to "uncomfortable conversations", it should not be ignored: the Commission could in fact set an example for the International Court of Justice in that respect.

He also supported the Special Rapporteur's view, set forth in paragraph 155, that the purpose of consideration of the topic was not "to resolve the sometimes heated theoretical debates on the sources of international law". Given the complexities of the topic, an excursion into theoretical matters could not be completely avoided, but the Commission should analyse such matters only to the extent necessary to understand the nature of subsidiary means, their functions and their role in the determination of international law. It should not attempt to find answers to all the many questions that arose in connection with sources of international law, however fascinating such questions might be from an academic perspective.

For him, as a representative of the civil law legal system, the starting point for that analysis was the clear distinction between subsidiary means and the three sources of international law cited in Article 38 (1) (*a*) to (*c*) of the Statue of the International Court of Justice. In making that distinction, the Special Rapporteur observed in paragraph 345 of the report that subsidiary means were not sources of law, at least not in the formal sense, as the

first three sources enumerated in Article 38 were. It was worth noting in passing that, during the consideration of the topic "General principles of law", some members had also questioned whether general principles were independent sources of law in their own right. In the report, however, the Special Rapporteur repeatedly referred to subsidiary means for the determination of the rules of international law as "secondary sources", sometimes contrasting them with primary sources.

That distinction raised important terminological issues that required clarification. The Commission should adhere as closely as possible to the language of Article 38 unless there were substantive reasons to depart from it. On that basis, the appropriateness of the use of the adjective "secondary" was questionable. With regard to the term "sources", in paragraph 162 the Special Rapporteur appeared to have adopted for the purpose of the topic the definitions given by Malcolm Shaw and Ian Sinclair. According to those jurists, sources were "those provisions operating within the legal system on a technical level" or "that which gives to the content of rules of international law their character as law". The Special Rapporteur concluded that jurists generally used the term "in the technical sense of where the law derives its force". In that paragraph, he seemed to be referring to sources in general, raising the question of whether the definitions set forth should also be considered to apply to what was understood by "secondary sources".

He was opposed to that understanding. The first question that needed to be clarified was whether it was appropriate to use the terms "secondary sources" and "subsidiary means" in parallel. Certainly, that approach existed, and had been supported by some very authoritative authors whose work was cited in the report. A similar viewpoint could be found in Russian and Soviet teachings. As Grigory Tunkin had noted, the majority of Soviet authors were of the opinion that, while not sources of international law in the sense that they did not create or modify rules, the decisions of the International Court of Justice and international arbitral tribunals could be considered as secondary sources.

However, a different point of view had later begun to gain currency. From that new standpoint, the term "secondary sources" was inapposite since subsidiary means could not under any circumstances be considered sources of international law: rather, to varying degrees, they provided evidence of the existence of customary rules of international law. It was noted, moreover, that judicial practice and teachings in international law provided no more than guidance of a general nature and that, accordingly, it was not entirely correct to refer to them as "secondary sources of international law". For him, that point of view was more logical, and the parallel use of the terms "secondary sources" and "subsidiary means" thus raised certain questions. Specifically, was there a difference between the two, or were "secondary sources" and "subsidiary means" identical in nature? If they were identical, what was the reason for using two distinct terms? And if they were not identical, how exactly did they differ? Those questions were worth further consideration.

As a final terminological point, he saw a need to clarify the relationship between the various concepts referred to by the Special Rapporteur, including the differences between the qualifiers "formal," "primary", "material", "subsidiary" and "secondary". For example, were "material" and "secondary" sources equivalent in their scope and content? The definitions of material sources cited by the Special Rapporteur interpreted the term differently. According to Alain Pellet, they could be defined as "the political, sociological, economic, moral or religious origins of the legal rules" whereas, according to James Crawford, they provided "evidence of the existence of rules which, when established, are binding and are of general application". It seemed to him that, while judicial decisions could theoretically be considered "material sources" under Crawford's definition, they did not meet Pellet's definition. Clarification on all those terminological points could be included in the commentaries.

Paragraph 48 of the report referred to "increasingly empirical legal scholarship mapping the *de facto* development of precedents in international courts and tribunals". Russian and Soviet teachings traditionally took the view that, in the light of Articles 38 and 59 of the Statute of the International Court of Justice, the decisions of the Court set no precedent. It was only subject to Article 59 that the Court could use its decisions as subsidiary means for the determination of rules of law. It followed that its decisions were not included in the process of forming or changing rules of international law.

In his view, neither the authors who supported the position that judicial and arbitration decisions did, *de facto*, set precedent nor those who did not saw any practical need for judges and arbitrators to repeat all the steps taken when earlier, similar cases had been decided. It was simply sensible to use the outcomes of earlier work. However, he would not characterize that practice as the setting of precedent, even *de facto*, under international law, as such a characterization would contradict the letter of the Statute, was not needed for judges and arbitrators to be able to resolve the matters before them, and would wrongly detract from rule-making based on the agreement and will of States. Furthermore, the role played by political and other non-legal factors in certain judicial and arbitration decisions could not be disregarded.

The value of a decision depended on the body that had adopted it and States' attitude to that body. It could not be ignored that certain bodies received regular, sharp criticism from a large number of States, with some States withdrawing their recognition of those bodies' jurisdiction. The question then arose as to the extent to which it was acceptable to use the decisions of such international courts or tribunals as subsidiary means for the determination of rules of international law, particularly in cases where a party to the dispute being settled was critical of or did not recognize the jurisdiction of the court or tribunal that had issued the decision concerned. With respect to the question raised in paragraphs 50 and 51 of the report regarding whether the Commission should address conflicting judicial decisions, he did not think it advisable to go beyond the scope of the syllabus for the topic.

The relationship between subsidiary means for the determination of rules of international law and materials used for the interpretation of international treaties, or for the determination of the existence of rules of customary law or general principles of law, was an important one. He shared the Special Rapporteur's assessment, in paragraph 378, that an instrument that had the potential to be used as a subsidiary means could instead be used as evidence of the existence of rules of international law. Subsidiary means could perhaps be considered an umbrella category encompassing other specified categories of materials. However, it was still unclear to him precisely what functions had not been covered by the Commission's previous work.

In general, he took no issue with the discussion in the report of the role of the decisions of national courts. However, a cautious approach should be taken when dealing with decisions of national courts as means of determination of rules of international law, as such issues were at the junction of international and domestic law, and when using such decisions to identify rules of international law, the diversity of the world's political and legal systems must be taken into account. It was a well-known problem that the decisions of the courts of a small group of countries, which had already been mentioned, played a predominant role. The Commission had frequently addressed issues relating to national judicial decisions in its previous work and could draw on its experience in that respect.

The Special Rapporteur noted in paragraph 351 of the report that Article 38 (1) (*d*) did not expressly limit subsidiary means for the determination of rules of law to judicial decisions and teachings. At the same time, however, the provision did not explicitly refer to other subsidiary means. Without first discussing whether the article allowed for additional subsidiary means, the Commission should not take a decision as to whether instruments such as the decisions of expert bodies or of international organizations could be considered subsidiary means.

Furthermore, it appeared that, in the Special Rapporteur's view, the list of potential additional subsidiary means should be open-ended. Paragraph 378 of the report stated that any source, instrument or text, whether binding or non-binding, that could inspire legal arguments could be used as a subsidiary means for the determination of rules of law in a particular case. Judges could indeed use a variety of materials. However, in his view, it was important to distinguish between what did and what did not fall under subparagraph (*d*). The subparagraph could be read to mean that the International Court of Justice must look to judicial decisions and teachings in cases where the use of subsidiary means was required for the determination of a rule of international law, whereas decisions regarding the use of other materials could be made at the Court's discretion and in the light of the wishes of the parties to the dispute.

He would like to understand what the theoretical and practical basis was for considering that resolutions of international organizations constituted subsidiary means in addition to contributing to the interpretation of international treaties and the demonstration of the existence of customary rules or general principles of law. The characteristics of decisions of international organizations varied widely and whether a particular decision was considered a subsidiary means for the determination of rules of international law would depend on factors such as which of the organization's bodies had taken the decision, whether the decision had been taken in accordance with the rules of procedure and whether it had been taken by consensus or following a vote. For instance, in *Whaling in the Antarctic* (*Australia v. Japan: New Zealand intervening*), the International Court of Justice had concluded that the non-consensual resolutions of governing bodies of international organizations could be considered neither subsequent agreements among parties regarding the interpretation of a treaty nor subsequent practice establishing an agreement among parties regarding the interpretation of a treaty.

Whatever decision the Commission took regarding additional subsidiary means, it should not go beyond the scope of the topic and tackle questions relating to supplementary sources. In the doctrine, one could find the view that both unilateral acts and resolutions of international organizations, for example, were analogous to or derivative of international agreements.

The Commission should be cautious in how it chose to reflect the existence and nature of additional subsidiary means. Given the chapeau to Article 38 (1), an assertion that subparagraph (*d*) provided for the existence of additional subsidiary means could logically suggest that subparagraphs (*a*) to (*c*) provided for the existence of additional sources.

The Special Rapporteur's reasoning was clear and unobjectionable when he wrote in paragraph 177: "As the foregoing sections have shown, Article 38, paragraph 1, and, with it, its treatment of the role of judicial decisions are, in principle, provisions of limited application, which may be displaced by the other statutory provisions constituting *lex specialis*." The Special Rapporteur was referring to the fact that international treaties could provide for an approach to the use of precedent that differed from that under the Statute. However, the Statute formed an integral part of the Charter of the United Nations, as clearly stated in Article 92 of the Charter. He wondered how appropriate it was to speak of displacement and of the application of the principle of *lex specialis derogat legi generalis* in relation to a provision that formed a part of the Charter, particularly in the light of Article 103 of the Charter. It could be suggested that it would be more appropriate to consider the displacement of a customary rule that originated from Article 38, whereas there was no need to depart from Article 38 itself when using the treaties mentioned by the Special Rapporteur, as the Article was directly addressed to the Court.

The Commission had previously spent a great deal of time on issues relating to sources of international law. For instance, it had spent 17 years on the topic of treaties, 18 years on reservations to treaties, 10 years on subsequent agreements and subsequent practice in relation to the interpretation of treaties, and 9 years on the provisional application of treaties. Recently, however, the Commission's practice seemed to be to have a cycle of three reports at the first-reading stage, a one-year break for the collection of States' responses and then one session for a second reading and the conclusion of the Commission's work. Such a pace was perhaps too fast for consideration of complex topics, including those relating to the sources of international law. The Commission should be guided above all by the need to ensure that the outcome of its work was of the highest quality.

The Chair, speaking as a member of the Commission, said that the Commission's work on the topic should be consistent with its previous work and should be approached pragmatically. If the Commission could, as suggested by the Special Rapporteur in paragraph 45 of the report, elucidate how judicial decisions, teachings and possibly other subsidiary means had been used in the practice of States, international courts and tribunals, as well as by other relevant actors such as expert bodies, in the process of identifying, determining and applying rules of international law, it would be in a position to provide guidance to States and practitioners of international law. That, in her view, was the ultimate objective of the Commission's work. She was open to both the Special Rapporteur's proposal that the

outcome of the Commission's work should take the form of draft conclusions and Mr. Paparinskis' suggestion that it could take the form of draft guidelines.

In order to determine how expansive or restrictive the scope of the term "judicial decisions" should be, the Commission could, as Ms. Okowa had noted, use as a guidepost the factors set out in the commentaries to the conclusions on identification of customary international law. During the Commission's debate, members had pointed out that judicial decisions were not sources of international law *per se* and that, under Article 59 of the Statute of the International Court of Justice, they lacked precedential value. However, such lines were harder to draw in practice, including with respect to the decisions of the International Court of Justice and other tribunals that had shaped the law of maritime delimitation. For example, in its 1969 decision in *North Sea Continental Shelf*, the Court had cast aside provisions of the 1958 Convention on the Continental Shelf that had codified the equidistance method for determining continental shelf boundaries and had instead applied a judicial standard based on equitable principles. The Court had helped shape customary international law and both it and other international tribunals had subsequently cited that decision. In contrast, in other cases the Court's citations simply reflected its agreement with the interpretation or application of the law in a previous case. The Commission's work would hopefully offer clarity on the nature and use of judicial decisions, while keeping in mind that judicial decisions were not sources.

In her view, it was evident that advisory opinions could not be excluded from the scope of "judicial decisions". The International Court of Justice and other international tribunals made regular reference to them. For example, in *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*), *Preliminary Objections*, a special chamber of the International Tribunal for the Law of the Sea had recognized that an advisory opinion – at least one from the International Court of Justice – entailed an authoritative statement of international law on the questions with which it dealt, and that, while they were not legally binding, judicial determinations made in advisory opinions carried no less weight and authority than those in judgments, because they were made with the same rigour and scrutiny by the principal judicial organ of the United Nations with competence in matters of international law.

She agreed with members who had said that the decisions of national courts should not be placed on the same level as those of international courts for the purposes of Article 38 (1) (*d*) of the Statute of the International Court of Justice. Draft conclusion 4 (a) implicitly reflected a distinction between the two in noting that the decisions of international courts and tribunals on questions of international law were particularly authoritative.

She had reservations as to whether, in draft conclusion 4 (b), the Commission should create a *de facto* hierarchical relationship between the International Court of Justice and other tribunals such as the International Tribunal for the Law of the Sea. That tribunal was a permanent entity that had been established under a multilateral convention, the United Nations Convention on the Law of the Sea, and the Commission should be wary of implying that the International Court of Justice was more authoritative than the Tribunal, particularly in matters concerning the law of the sea.

In his examination of the drafting history of Article 38 (1) (*d*), the Special Rapporteur noted that the majority of the members of the Advisory Committee of Jurists had considered judicial decisions and teachings to be of roughly equal importance. That had undoubtedly been the case a century earlier, when there had been far fewer international judicial decisions and many more scholarly writings. Because there had been few international courts to define rules of customary international law, that role had fallen to scholars writing about international law. She appreciated the Special Rapporteur's view that judicial decisions and teachings might stand in a complementary relationship rather than a hierarchical one. However, the role of the writings and teachings of publicists in the judgments of the International Court of Justice had probably waned over the years.

She agreed that, in addition to individuals and institutions, expert bodies could also be considered publicists. Sir Michael Wood had noted the particular standing of the International Law Commission, which arose from of its position as a subsidiary organ of the General Assembly and its special relationship with the Sixth Committee. A study published

by Michael Peil in 2012 had demonstrated the extent to which judges on the Court cited the work of the Commission.

She fully aligned herself with the remarks made by Ms. Galvão Teles regarding the importance of taking gender diversity into account in discussions regarding the most highly qualified publicists. She would welcome further study and discussion on the issue of additional subsidiary means. International law now involved a much more complex web of institutions and instruments than when Article 38 (1) (*d*) had been adopted. She generally agreed that soft-law instruments and resolutions of international organizations should be addressed. Binding and non-binding resolutions should be distinguished. Like the Special Rapporteur, she had reservations regarding the inclusion of unilateral acts by States as subsidiary means. Such acts were not comparable to reasoned judicial decisions and did not reflect the collective expertise and methodological rigour of expert bodies or the collective will of the members of international organizations as expressed in the resolutions of those organizations.

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

The meeting rose at 4.50 p.m.