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International Law Commission

Seventy-fourth session (second part)

Provisional summary record of the 3635th meeting

Held at the Palais des Nations, Geneva, on Monday, 3 July 2023, at 3 p.m.

Contents

***Present*:**

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

***Secretariat*:**

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3.10 p.m.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair drew attention to the revised programme of work for the second part of the session, which had been distributed to Commission members. She took it that the Commission wished to adopt the revised programme of work as proposed by the Bureau.

It was so decided.

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

Report of the Drafting Committee (A/CN.4/L.985)

Mr. Paparinskis (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of subsidiary means for the determination of rules of international law (A/CN.4/L.985), said that the report contained the texts and titles of three draft conclusions provisionally adopted by the Drafting Committee. The Committee had held nine meetings on the topic, from 26 May to 2 June 2023, and had proceeded on the basis of the text proposed by the Special Rapporteur in his first report (A/CN.4/760), which the plenary Commission had referred to the Drafting Committee at its 3632nd meeting. The Drafting Committee had not had sufficient time to address the last two of the five draft conclusions referred to it; those draft conclusions, which dealt with decisions of courts and tribunals and with teachings, would be examined in due course.

Draft conclusion 1 addressed the scope of the set of draft conclusions. The inclusion of a provision on scope was in line with the established practice of the Commission. The draft conclusion reflected the Commission's intention to focus on the question of the "use of" subsidiary means for the determination of rules of international law. The Drafting Committee had considered the possibility of also addressing in that provision the role and function of subsidiary means for the determination of rules of international law, but had decided to retain the focus on the "use" of subsidiary means. It had taken the view that the task before the Commission was to elaborate on Article 38 (1) (*d*) of the Statute of the International Court of Justice with a view to explaining the meaning, content and consequences of the use of subsidiary means. It had also noted that the French and Spanish versions of the phrase "subsidiary means" – "*moyens auxiliaires*" and "*medios auxiliares*", respectively – reflected more clearly the ancillary role and function that such materials played in relation to the sources of international law. A suggestion had been made to include some wording indicating expressly that subsidiary means differed from the sources, but the prevailing view had been that, at the current early stage of the consideration of the topic, the formulation should track the wording of the Statute as closely as possible.

The Drafting Committee had proceeded on the basis of a revised proposal which the Special Rapporteur had submitted to take into account the views expressed in the plenary debate. The Drafting Committee had seen no reason to change the opening phrase "[t]he present draft conclusions concern", as originally proposed by the Special Rapporteur, since it reflected previous such formulations adopted by the Commission, including in the equivalent provision of the 2018 conclusions on identification of customary international law.

The phrase "the use of" had been the subject of discussion in the Drafting Committee. The Special Rapporteur had initially proposed the wording "the way in which subsidiary means are used" to underline the methodological nature of the topic. The Drafting Committee had considered the formulation "the way in which subsidiary means are to be used" but had concluded that it could be understood as being imperative. Some members had noted that subsidiary means served as an aid to the determination of rules of international law, when needed, but that Article 38 of the Statute, which used the term "apply" in the *chapeau*, did not necessarily establish an obligation for the Court to use subsidiary means. The Drafting Committee had decided to streamline the formulation to simply "the use of", which was seen as being less repetitive and more neutral, so as to avoid limiting the scope of the topic in the future.

The word “determination” had been retained on the basis of the Special Rapporteur’s original proposal and was the term used in Article 38 (1) (*d*) of the Statute. That term was intended to reflect the role of subsidiary means within Article 38 as part of the process of carrying out an evaluation of rules of international law. The Drafting Committee was of the view that subsidiary means interacted with the sources but were not themselves sources of international law, since they merely assisted with the determination of rules of law.

The main focus of the discussion in the Drafting Committee, however, had been the Special Rapporteur’s proposal to refer to the determination of “the existence and content” of rules. The members had been divided as to whether such specificity was required. Some members had expressed the view that the reference to the “existence and content” of rules of international law was appropriate, since the determination of such rules included their identification and application to solve a concrete legal problem. Others had held that the use of such a formulation could be misunderstood as granting subsidiary means the status of sources of law comparable to treaties, customary international law and general principles of law, which were covered in Article 38 (1) (*a*), (*b*) and (*c*), respectively. There had also been a concern that the use of the words “to determine the existence and content” could inadvertently limit the scope of the functions of subsidiary means. It had been argued that retaining such a formulation might lead to the exclusion of the use of subsidiary means for purposes such as determining the effect and legal consequences of rules. In the context of subsidiary means, the materials being referred to were used as external criteria for elucidating rules that had already been established. The Special Rapporteur had accepted the deletion of the words “existence and content” from the draft conclusion, but on the understanding that the same formulation might still be used in later draft conclusions and that the Special Rapporteur would explain the meaning of the phrase in detail in the commentary, building on the Commission’s explanation in its work on other topics dealing with the sources of international law, such as the 2018 conclusions on customary international law, from which the phrase “existence and content” had been drawn.

The concluding phrase “rules of international law” was a conscious departure from the formulation in Article 38, which was simply “rules of law”. The Drafting Committee had decided to maintain the proposed focus of the Commission’s work on rules of international law, in line with the syllabus for the topic and the Special Rapporteur’s first report. At the same time, the reference to rules of international law should not be seen as an *a priori* exclusion of other rules of law that could provide assistance in the determination of rules of international law.

The reference to “rules” in English had been rendered as “*règles*” in French and “*normas*” in Spanish. It had been the practice of the Commission in its work on prior topics, including those dealing with the sources of international law, such as identification of customary international law and general principles of law, to refer to “rules” in a broad sense, encompassing both rules *stricto sensu* and general principles of law. Likewise, the reference to “subsidiary means” had been rendered in the Arabic version as “الوسائل التكميلية”, which was considered to be the clearest encapsulation of the concept. The Drafting Committee considered that the terms used in those languages in the draft conclusions and the Special Rapporteur’s report should not be interpreted as changing the meaning of Article 38.

The title of draft conclusion 1 was “Scope”.

Draft conclusion 2 concerned the categories of subsidiary means used to assist in the determination of rules of international law. The Drafting Committee had commenced its work on the basis of the text proposed by the Special Rapporteur in his first report, which sought to track the formulation of Article 38 (1) (*d*), with the exception of subparagraph (c), which was a new proposal by the Special Rapporteur to refer to other categories of subsidiary means arising out of the practice of States and international organizations.

The Drafting Committee had initially considered whether to follow the text of Article 38 or to adopt a new formulation more reflective of the contemporary international legal community. It had ultimately opted for the latter course of action and had adopted draft conclusion 2 with changes to the original proposal of the Special Rapporteur. The proposed draft provision departed from Article 38 both by using new formulations for existing concepts and by explicitly recognizing, in subparagraph (c), the possible existence of other subsidiary

means, which the Special Rapporteur argued to be implicit in Article 38. Indeed, the inclusion of a new subparagraph (c), along the lines of the one proposed by the Special Rapporteur, had been the subject of extensive debate in the Drafting Committee, not only on its merits but also because of its implications for the *chapeau* and possibly subparagraph (a).

Draft conclusion 2 followed the same structure as the original proposal of the Special Rapporteur, namely that of a *chapeau* followed by three subparagraphs listing three categories of subsidiary means for the determination of rules of international law. The Drafting Committee had agreed with the Special Rapporteur that the point of departure for the *chapeau* was the understanding that the list of subsidiary means in Article 38 (1) (*d*) was not exhaustive. In practice, other subsidiary means could also perform an auxiliary function in the determination of rules of international law. That understanding was reflected in the use of the word "include" at the end of the *chapeau* and in the inclusion of subparagraph (c). A proposal by some members to replace "include" with "can take the form of" had not found support in the Drafting Committee.

While the drafting of the *chapeau* itself had proved uncontroversial, the key question that had arisen was the relationship between the *chapeau* and subparagraph (c). Some doubts had been expressed as to the advisability of including subparagraph (c) at the current initial stage of the Commission's work on the topic. Thus, it had been proposed that subparagraph (c) should be omitted and that the possibility of including subsidiary means additional to those listed in subparagraphs (a) and (b) could be indicated through the introduction of the phrase "but are not limited to" at the end of the *chapeau*. That formulation would allow for the addition of other subsidiary means in later conclusions or even in the accompanying commentary. However, that amendment had not been made to the *chapeau*, as the Drafting Committee had decided to retain subparagraph (c). The Drafting Committee had thus settled on the formulation of the *chapeau* initially proposed by the Special Rapporteur.

Subparagraph (a) identified the decisions of courts and tribunals as being a subsidiary means for the determination of rules of international law. The provision was intended as the analogue to the phrase "judicial decisions" in Article 38 of the Statute, albeit formulated in broader terms to take into account the contemporary international legal community. The Drafting Committee had initially worked on the basis of the Special Rapporteur's original proposal, which referred to "decisions of national and international courts and tribunals". There had been unanimity in the plenary Commission that judicial decisions within the meaning of Article 38 (1) of the Statute were subsidiary means for the determination of rules of international law. However, the question that the Drafting Committee had considered in relation to subparagraph (a) was whether to adopt the formulation found in Article 38, namely "judicial decisions", or to accept the Special Rapporteur's view that a more all-encompassing formulation was needed in order to take into account developments over time in the practice of States and international organizations.

There had been a range of views within the Drafting Committee on that point. Several members had been in favour of reverting to the phrase "judicial decisions", since a reference to the "decisions of courts and tribunals" could be read broadly to include other institutions beyond courts and tribunals. Those members had argued that there was insufficient justification for departing from the formulation used in Article 38 and that, instead of diluting the notion of "judicial decisions", the Commission should elaborate on the contemporary understanding of the concept in the commentary, accommodating developments in international practice. Ultimately, the prevailing view in the Drafting Committee had been in favour of the broader approach espoused by the Special Rapporteur. Several members had noted, for example, that a strict reading of "judicial decisions" would not cover such bodies as claims commissions, conciliation commissions or the decisions issued by human rights treaty bodies in the context of individual complaints of rights violations. There was also a concern that the term "judicial decisions" was ambiguous. For example, other texts, such as Article 33 of the Charter of the United Nations, drew a distinction between judicial settlement and arbitration. Thus, a strict reading would seem to exclude arbitral awards as a form of subsidiary means. Such an outcome would not reflect the extensive practice of citing arbitral awards as subsidiary means for the determination of rules of international law.

A further and decisive consideration was the need to ensure consistency with other texts previously adopted by the Commission. Several members had highlighted the

Commission's conclusions on identification of customary international law, in particular the broad reference in conclusion 13 to "decisions of courts and tribunals". Earlier in the current session, the Commission had also adopted an identical formulation in draft conclusion 8 of the draft conclusions on general principles of law.

As in the case of the *chapeau*, subparagraph (a) had been considered in conjunction with subparagraph (c). Several members had highlighted the importance of ensuring that the decisions of human rights treaty bodies would be covered under one of the subparagraphs as subsidiary means. The commentary would discuss the meaning of the term "decisions" and the phrase "courts and tribunals", indicating which type of subsidiary means would cover, for example, the dispute settlement mechanisms of the World Trade Organization and the decisions of human rights treaty bodies. Some members, however, had expressed the view that the commentary should not include references to the decisions of human rights treaty bodies as a form of judicial decision.

A further point discussed had been whether the reference to national and international court decisions, as proposed by the Special Rapporteur, should be retained. One suggestion had been to reverse the order of "national" and "international" so as to place greater emphasis on the jurisprudence of international courts and tribunals. However, although several members had supported the Special Rapporteur's approach, the prevailing view in the Drafting Committee had been that the Commission should not include such a reference at all, but should leave detailed consideration, including of the qualifying elements and of the question of decisions of national and international courts, for further elaboration in draft conclusion 4.

Subparagraph (b) addressed "teachings", rendered as "*la doctrine*" in French and "*la doctrina*" in Spanish. The text initially proposed by the Special Rapporteur in his first report reproduced the text of Article 38, which referred to "teachings of the most highly qualified publicists of the various nations". The plenary Commission had unanimously supported the inclusion of that category of subsidiary means for the determination of rules of international law in the draft conclusions. Accordingly, the Drafting Committee's main focus had been on whether the wording of the Statute was still fit for purpose for the twenty-first century international legal community.

Once again, there had been a range of views within the Drafting Committee. For some members, the phrase "of the most highly qualified publicists of the various nations" remained apposite and was sufficiently elastic to encompass modern practice. It had also been recalled that the Commission had, earlier in the session, adopted that phrase in draft conclusion 9 of the draft conclusions on general principles of law. Other members had considered the reference to the "most highly qualified publicists" a historically and geographically charged notion that could be considered elitist and excessively focused on individuals as opposed to their body of work. The concern had also been raised that it might be difficult to determine who was a qualified publicist, as standards could be different in various legal systems. Some members had noted that in some languages the term "publicists" could be understood as referring primarily to male publicists, which would not be appropriate. The Drafting Committee had ultimately opted for a more neutral, inclusive and representative formulation.

Several proposals had been considered in that regard, including "persons of recognized competence", drawn from the Commission's own statute, or the "works of persons of recognized competence in international law, with due regard to gender diversity, of the various nations"; adding "representing the various legal systems of the world" to the end of the text proposed in the report of the Special Rapporteur; utilizing the concept of jurisconsults, as mentioned in the Statute of the International Court of Justice; and referring to the "doctrine of the most highly qualified publicists recognized by the community of nations". However, none of those proposals had found general support within the Drafting Committee, as introducing new terminology in draft conclusion 2 could give rise to further questions.

The Committee had therefore decided simply to adopt the term "teachings". As in the case of subparagraph (a), the concept would be further elaborated upon in a dedicated draft conclusion, namely draft conclusion 5, and in the accompanying commentaries. A proposal

to render the English version as “doctrine”, to align with the French and Spanish versions, had not been accepted, given the different meaning of the word in English.

Subparagraph (c) had been the subject of extensive discussion in the Drafting Committee, which had taken as its starting point the view expressed by several members during the Commission’s plenary debate that there existed subsidiary means for the determination of rules of international law other than the two traditional categories referred to in subparagraphs (a) and (b). The next question had been whether to reflect that understanding explicitly in the draft conclusion as subparagraph (c). Some members of the Drafting Committee had expressed a preference not to do so at the current stage, but rather to leave the matter open in the *chapeau* and address it further in the commentary. For those members, taking an affirmative position in the text could be premature, in view of the anticipated second report of the Special Rapporteur and the forthcoming memorandum by the Secretariat. A view had been expressed that it might also be difficult to determine whether certain subsidiary means were already covered by the existing categories referred to in subparagraphs (a) and (b).

Nonetheless, the prevailing view within the Drafting Committee had been that a specific provision should be included as subparagraph (c). The Committee had therefore focused its attention on the formulation of the provision. It had agreed early on that, as work on the topic was still in its initial phase, the Committee was not yet in a position to provide a definitive list of all the additional subsidiary means that were or could be covered by the topic. Thus, the provision was best understood in the light of future work to be undertaken on the question of additional subsidiary means, taking into account the comments of States.

It had been underlined in the Drafting Committee that there had already been support in the plenary debate for the inclusion of works of expert bodies, including the human rights treaty bodies. Indeed, suggestions had been made both during that debate and in the Drafting Committee to refer expressly to such works in subparagraph (c). However, the addition of explicit categories of subsidiary means had been set aside on the understanding that they would be elaborated upon subsequently in draft conclusions to be proposed by the Special Rapporteur. It had also been suggested during the Commission’s plenary debate that certain unilateral acts and religious law could form part of such additional subsidiary means, but those views had not obtained support in the Drafting Committee.

With regard to the formulation of subparagraph (c), the Drafting Committee had proceeded on the basis of the proposal made by the Special Rapporteur in his report, which referred to other means “derived from the practices of States or international organizations”. It was the view of some members of the Drafting Committee that such a formulation was too broad and might be confusing, *inter alia* because it might even encompass unilateral acts, which many members had maintained would not qualify as subsidiary means used to assist in the determination of rules of international law.

The discussion had therefore focused on finding a suitable way to reformulate subparagraph (c). Different options had been considered, ranging from the preparation of a complete illustrative list of additional subsidiary means to the insertion of a placeholder as an indication that text would be included in the future. Neither option had garnered sufficient support. The Drafting Committee had then focused on a proposal simply to refer, in general terms, to “any other means used to assist in determining rules of international law”. The general view had been that such a formulation would be sufficiently broad to allow for elaboration in future draft conclusions and commentaries. The Committee had subsequently added the qualifier “generally” to indicate that a degree of usage was needed and to convey the notion that a particular material used on a single occasion as a subsidiary means by one specific court or tribunal would not automatically become a subsidiary means more generally.

Finally, the text of subparagraph (c) as adopted by the Drafting Committee mentioned the role of subsidiary means, which was “to assist” in determining rules. Some members had expressed doubts about the introduction of a new term not found in Article 38. While the functions of subsidiary means were best addressed separately, the Drafting Committee had felt that introducing some such elements at the current stage could be helpful both in identifying possible candidates for other subsidiary means and in emphasizing their auxiliary function. The Committee had used the term “determining”, which was the verbal form of the

word “determination” used in Article 38. It had discussed whether to use the word “determination”, and, if so, whether to add the term “identification”, but had decided against it for linguistic reasons, as, in French, both terms would have been expressed as “*détermination*”.

The title of draft conclusion 2, “Categories of subsidiary means for the determination of rules of international law”, was aligned with the *chapeau* in referring to rules of “international” law. There had been some discussion of whether to retain the word “categories” in the title of draft conclusion 2, as initially proposed by the Special Rapporteur. Some members had expressed doubts regarding the reference to the means listed in subparagraphs (a) to (c) of draft conclusion 2 as “categories”. Several other options had been considered, including a reference merely to “subsidiary means” or to “forms”, “types” or “range”, but none had been found to be suitable. The Committee had ultimately followed the Special Rapporteur’s proposal, which it had deemed clearer and which had the merit of consistency with recent work of the Commission on the topic of general principles of law.

Draft conclusion 3 concerned the general criteria for assessing subsidiary means for the determination of rules of international law. The Drafting Committee had agreed with the proposal of the Special Rapporteur that it would be useful to provide some general criteria for the assessment of subsidiary means. Following a discussion in the Drafting Committee, it had been agreed that the criteria being proposed were meant to be used as factors for determining the relative weight to be given to material that was already considered a subsidiary means within one of the categories listed in draft conclusion 2, not for determining whether a particular material was to be considered a subsidiary means within the meaning of the draft conclusions. That point was made explicit in the *chapeau*, which referred to “assessing the weight of subsidiary means”. The factors listed in draft conclusion 3 concerned possible determinants of weight; their use would be dependent on the circumstances under which they were being used.

The Drafting Committee had proceeded on the basis of the Special Rapporteur’s initial proposal, which had been presented as a single paragraph; however, the Special Rapporteur had accepted the suggestion made in the Drafting Committee to list the criteria in a series of subparagraphs, making the provision easier to understand and helping to clarify that not all factors would be applicable to all categories of subsidiary means. Which factors would be relevant, and to what extent, would depend on the subsidiary means in question and the particular circumstances in which the determination took place, as confirmed by the concluding phrase of the *chapeau*: “regard should be had to, *inter alia*”. What followed was not meant to be a prescriptive statement or to establish an obligation to use a particular subsidiary means.

Subparagraph (a) referred to the degree of representativeness of the materials being used as subsidiary means. Such a criterion did not appear in the Special Rapporteur’s initial proposal, but the Drafting Committee had decided to include it in order to address some of the concerns expressed regarding the importance of taking into account the views and approaches of the various legal systems of the world. The criterion should be applied flexibly, as the topic related to the use of subsidiary means for the determination of all rules of international law. Accordingly, if the rules of international law under consideration were bilateral or regional in nature, then the degree to which the subsidiary means being assessed were representative of various regions or legal systems would be less relevant. The focus would instead be on the content and degree of specialization of the subsidiary means used to aid in the determination of the rules in question, exemplifying the flexible application of the criteria identified in draft conclusion 3.

Subparagraph (b) referred to the quality of the reasoning. The Drafting Committee had considered that such a criterion should prevail over the renown of the author in the case of teachings. At the same time, the criterion was subjective and not necessarily applicable equally to all subsidiary means. Thus, while the quality of the reasoning would be important in some contexts, for example when assessing decisions, it might be less relevant when scrutinizing certain materials such as resolutions adopted by the General Assembly.

Subparagraph (c) referred to the level of expertise of those involved. The Drafting Committee had taken the view that, as in subparagraph (b), the criterion referred to the

background and qualifications of those involved in relation to the topic, which should be representative of a number of qualities, rather than solely focusing on the renown or academic titles of the particular author or actors.

Subparagraph (d), which referred to the level of agreement among those involved, was intended to refer to the internal consensus among those involved in taking a decision or among the authors of a text. Once again, such a criterion would need to be applied flexibly. Accordingly, the level of agreement could be more appropriate in the consideration of the category of teachings, where the level of convergence among scholars in relation to a specific point of law was likely to be of significance. It had been noted in the Drafting Committee that, even when there was a degree of internal consensus among those who participated in taking a decision, that decision could be subject to external criticism. That point was addressed in subparagraph (e), which referred to the reception by States and other entities, in other words the reactions to a decision after it had been made.

Finally, subparagraph (f) referred to the significance of the mandate conferred on the body that had taken the decision being assessed. The qualifier "where applicable" had been included to make it clear that the situations concerned were those where the materials being assessed had been produced by a body operating under a mandate, such as in the context of the human rights treaty bodies or certain expert bodies, including the Commission. It was not necessarily meant to be applicable to judicial decisions of courts and tribunals, even though it would be possible to assess whether certain decisions were consistent with the constitutive statutes of such tribunals.

The title of draft conclusion 3 was "General criteria for the assessment of subsidiary means for the determination of rules of international law". The title originally proposed by the Special Rapporteur in his first report had referred to the criteria for the assessment of subsidiary means. In the light of the Commission's plenary debate, the Special Rapporteur had proposed the addition of the term "general" to clarify that there could be more specific criteria to be determined in respect of certain subsidiary means to be addressed in future draft conclusions.

The Drafting Committee recommended that the Commission should adopt the draft conclusions on subsidiary means for the determination of rules of international law, as contained in the Committee's report. The Special Rapporteur would submit commentaries to those draft conclusions, which would be considered by the Commission at the current session.

The Chair said she took it that the Commission wished to adopt draft conclusions 1 to 3 of the draft conclusions on subsidiary means for the determination of rules of international law, as contained in the report of the Drafting Committee (A/CN.4/L.985).

It was so decided.

The meeting rose at 4.10 p.m.