Provisional

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International Law Commission
Seventy-fourth session (second part)

Provisional summary record of the 3642nd meeting
Held at the Palais des Nations, Geneva, on Friday, 21 July 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Galvão Teles
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Oral
	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 10.10 a.m.

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/Add.1)

Mr. Paparinskis (Chair of the Drafting Committee), introducing the addendum to 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/Add.1), said that the addendum contained the text and titles of draft conclusions 4 and 5, which had been provisionally adopted by the Drafting Committee during the second part of the current session. Following his presentation of the Drafting Committee's previous report on subsidiary means for the determination of rules of international law (A/CN.4/L.985) at the Commission's 3635th meeting (A/CN.4/SR.3635), at which the Commission had adopted the text and titles of draft conclusions 1 to 3, the Drafting Committee had held a further five meetings on the topic in order to complete its consideration of draft conclusions 4 and 5 on the basis of the text proposed by the Special Rapporteur in his first report on the topic (A/CN.4/760).

Draft conclusion 4 addressed decisions of courts and tribunals and built on draft conclusion 2, which provided a list of the categories of subsidiary means. The purpose of draft conclusion 4 was to draw a distinction between the role of international court decisions and that of national court decisions. It should also be considered in the light of future draft conclusions on the functions of subsidiary means. The Drafting Committee had proceeded on the basis of a revised proposal presented by the Special Rapporteur, which took into account the views that had been expressed by Commission members in the plenary debate. The Committee had decided to adopt the structure proposed by the Special Rapporteur, in which the draft conclusion was composed of two paragraphs, the first dealing with the decisions of international courts and tribunals and the second dealing with the decisions of national courts.

Paragraph 1 of the draft conclusion confirmed the basic proposition that decisions of international courts and tribunals were a subsidiary means for the determination of rules of international law. The initial proposal of the Special Rapporteur, as presented in his first report, had referred to the decisions of international courts and tribunals "on questions of international law". The Special Rapporteur had subsequently proposed a broader reference to "issues" of international law, in order to take into account some of the concerns that had been expressed by members during the plenary debate. However, the Drafting Committee considered that such a qualification was redundant, since international courts and tribunals were typically already mandated to rule on the basis of international law.

One of the questions that the Drafting Committee had considered was whether to include an express reference to the International Court of Justice. While there had been general agreement on the centrality of the Court, some members of the Committee had observed that the draft conclusions concerned not only rules of general international law, but also rules contained in regional, specialized and bilateral agreements. In such contexts, a reference to the International Court of Justice would not necessarily be appropriate and would, in effect, be suggestive of a hierarchy among tribunals that might not reflect the practice in those settings. Nonetheless, the Drafting Committee considered that the decisions of the Court retained a special relevance, in the light of its role as the principal judicial organ of the United Nations with general jurisdiction over matters of international law and the obligation incumbent on all States Members of the United Nations, under Article 94 of the Charter, to comply with those decisions. Accordingly, the Committee had decided to include an express reference to the Court, as reflected in the phrase "in particular of the International Court of Justice". Initially, the Special Rapporteur had proposed that the special role of the Court should be reflected in a separate sentence. However, the Committee had opted for more streamlined language modelled on conclusion 13 (1) of the Commission's conclusions on identification of customary international law.

The Drafting Committee had considered several options for reflecting the role of the International Court of Justice, while at the same time recognizing that, in some circumstances, the decisions of other courts might be more relevant. For example, it had

considered inserting the phrase “as appropriate” into paragraph 1 of the draft conclusion but had decided against doing so in light of the possible confusion that might arise regarding the use of that phrase in the conclusions on identification of customary international law and the draft conclusions on general principles of law. Other options considered had included rewording the paragraph to state that the Court’s decisions “are particularly authoritative” or that “regard shall be had” or “regard may be had” to its decisions. Ultimately, the Committee had settled on the phrase “in particular”, which, in its view, best captured the contemporary role of the Court in relation to other courts and tribunals. The commentary to draft conclusion 4 would explain that the explicit reference to the Court was related to the significance of its role and competence and should not be understood as suggesting any particular hierarchy. Some members of the Committee had requested that the commentary should include a reference to the consideration of the work of hybrid tribunals, so as to clarify whether the decisions of such tribunals would be considered as falling within the scope of paragraph 1 of the draft conclusion, as international court decisions, or whether they would be considered and assessed by analogy with national court decisions under paragraph 2.

In his presentation of the Drafting Committee’s previous report on the topic, he had mentioned that the Committee had considered the question of whether the term “identification” should be included in the draft conclusions but had in the end decided to retain only the word “determination”, or derivatives thereof, in draft conclusions 1 to 3. That decision had been taken on the understanding that it would be without prejudice to the inclusion of the word “identification” in future provisions. Indeed, the Special Rapporteur’s revised proposal for draft conclusion 4 had referred to the significance of decisions of courts and tribunals for the “identification or determination” of rules of international law. The Drafting Committee had held an extensive debate on whether to choose only one of those terms or include both of them. The choice had essentially been between maintaining consistency with the approach taken with regard to the earlier provisions or departing from it. In the end, the Committee had decided to retain only the word “determination”, also in order to maintain consistency with Article 38 (1) (*d*) of the Statute of the International Court of Justice. That decision would be further explained in the commentary to draft conclusion 4 and was without prejudice to the use of the same formulation in later draft conclusions.

Several members of the Drafting Committee, including the Special Rapporteur, had expressed their preference for referring to both “identification” and “determination”, terms which in their view reflected two different concepts or operations: “identification”, according to those members, concerned the exercise of establishing the existence of a rule but not necessarily specifying its content and also implied the possibility of ascertaining the non-existence of applicable rules, while “determination” was perceived as emphasizing instead, among other things, a more dispositive character encompassing a higher level of decision-making with a view to indicating the precise content of the rule. Those members considered that their position was consistent with the Commission’s established practice. Other members of the Drafting Committee had taken the view that “identification” and “determination” were synonyms and that the term “determination” was sufficiently broad to encompass also the identification of the existence of a rule. It had been recalled that, in the commentaries to the conclusions on identification of customary international law, the Commission had used the terms “identification” and “determination” interchangeably. It had also been pointed out that the word “determination” was to be found in the title of the project.

Paragraph 2 of draft conclusion 4 concerned decisions of national courts and was also based on a revised proposal by the Special Rapporteur, which took into account the comments made by members in the plenary debate and in the meetings of the Drafting Committee. The text was modelled on conclusion 13 (2) of the conclusions on identification of customary international law, which indicated that “[r]egard may be had, as appropriate” to decisions of national courts. It had been recalled that, in the commentary to that conclusion, the Commission had confirmed that such decisions could be used in certain circumstances as subsidiary means for the determination of rules of international law.

The two key elements in paragraph 2 were the phrases “may be used” and “in certain circumstances”. The Drafting Committee had decided to introduce those qualifying phrases to point out the need for particular caution in respect of the decisions of national courts, since only some decisions of some national courts could serve as subsidiary means for the

determination of rules of international law, and then only in some situations. Accordingly, in paragraph 1 of the draft conclusion, it was stated that decisions of international courts and tribunals "are" a subsidiary means, whereas, in paragraph 2, it was stated that decisions of national courts "may be used" for the determination of the existence and content of rules of international law. The Committee had considered inserting the phrase "as appropriate", which had been used in the conclusions on identification of customary international law and the draft conclusions on general principles of law, but had decided against doing so, since that nuance was already captured by the phrase "in certain circumstances". The commentary to the draft conclusion would elaborate on the nature of such circumstances, including by providing examples.

The title of draft conclusion 4 was "Decisions of courts and tribunals", which was consistent with the formulation used in other projects, such as the conclusions on identification of customary international law and the draft conclusions on general principles of law. A proposal had been made to refer to "categories of decisions" in the title, but the Drafting Committee had decided that such a title would be better considered in the context of a future draft conclusion dealing with the pertinent elements of judicial decisions.

The Drafting Committee had undertaken its work on draft conclusion 5, which concerned teachings, on the basis of a series of revised proposals by the Special Rapporteur that took Article 38 (1) (*d*) of the Statute of the International Court of Justice as a starting point and added elements, including some that were based on suggestions made during the plenary debate and some that had arisen in the context of the Committee's work on draft conclusion 3, in particular the need to emphasize representativeness. The draft conclusion was composed of two sentences: the first sentence described the basic proposition of the draft conclusion, while the second dealt with the matter of representativeness. Concerning the first sentence, the Committee had addressed several issues in the revised text proposed by the Special Rapporteur. The term "teachings" had been rendered as "*la doctrine*" in French and "*la doctrina*" in Spanish. Those terms should be understood as referring to materials collectively, not to a particular text or instrument.

The term "especially" had been included in the first sentence in order to allow for the consideration of teachings on subjects with regard to which fewer materials were available. It was the view of the Drafting Committee that such a formulation could also signal that, in certain circumstances, non-international law teachings could also be relevant for the determination of rules of international law. For example, writings that dealt with related areas, such as comparative law, could be relevant in that regard.

Concerning the phrase "generally reflecting the coinciding views", some members of the Drafting Committee had argued that coinciding views were needed for a given material to be considered a subsidiary means. Other members had noted that the existence of diverging views among writers was also relevant to the determination of the content of a particular rule and that the standard set out in the draft conclusion did not require consensus or unanimity for materials to be considered subsidiary means.

Concerning the phrase "persons with competence in international law", the Drafting Committee had considered alternative formulations, such as "persons of recognized competence", which was used in article 2 (1) of the statute of the Commission. However, it had been decided that the standard should not be the same as that used for the election of members of expert bodies or international tribunals, that allowance should also be made for the consideration of teachings by junior scholars and that the concept of teachings should be understood in as widely representative a sense as possible. It was the view of the Committee, as indicated in draft conclusion 3, that the main criterion should remain the quality of the teachings and the expertise of those involved. The term "recognized", which had been included in earlier proposals of the Special Rapporteur to qualify "competence", had been dropped from the final text, since it was unclear who would be responsible for recognizing such publicists.

As alternatives to the word "are", the Drafting Committee had also considered the phrases "may be used as" or "may serve as". Some members of the Drafting Committee considered that those phrases were more appropriate and precise, since they implied that only certain teachings could be subsidiary means. Nonetheless, the Drafting Committee had

decided to use the word “are”, as it more closely reflected the language used in the Statute of the International Court of Justice.

One point made during the Committee’s discussions was that a distinction should be drawn between the function and the weight given to subsidiary means. While it was expected that the functions of subsidiary means would be elaborated upon in the Commission’s future work on the topic, the Committee took the view that teachings were subsidiary means and that the question of the weight to be given to a particular material was different from whether the material itself could qualify as a subsidiary means. According to one view, the difference between the function and the weight given to subsidiary means could also be reflected in the order of the draft conclusions, with the placement of the provision on the question of weight, currently draft conclusion 3, after the provisions on the question of qualification as a subsidiary means, currently draft conclusions 4 and 5.

Again, the Drafting Committee had discussed extensively whether to refer to “identification or determination” or to only one of those two concepts. Some members had argued that the terms referred to distinct legal operations, while others had indicated that the distinction between them was not easy to draw. As in the case of draft conclusion 4, the Drafting Committee had decided to retain the term “determination” and the phrase “of the existence and content of rules of international law” in order to cover both operations, namely “identification” and “determination”, in a broad sense.

The second sentence of draft conclusion 5 dealt with the question of representativeness. The Drafting Committee was of the view that the provision presented a historic opportunity to address the imbalance of representation in the consideration of teachings and that it was important for the Commission to identify the relevant elements for addressing that imbalance. It provided that in assessing the question of representativeness, “due regard should also be had to, *inter alia*, gender and linguistic diversity”. In that connection, he wished to draw the Commission’s attention to a technical error. The word “also” had inadvertently been omitted in some of the language versions of the report of the Drafting Committee, including the English version, and should appear between the words “should” and “be had”. The text would be corrected when it appeared in the Commission’s annual report to the General Assembly.

It was the view of the Drafting Committee that gender and linguistic diversity would not necessarily be covered by the phrase “from the various legal systems and regions of the world” and should thus be mentioned directly in the text of the draft conclusion itself. At the same time, the words “*inter alia*” had been included to indicate that there existed other criteria that should be taken into account when assessing the representativeness of teachings. That would be explained in the commentary, in which it would be made clear that the Commission was not limiting the criteria for representativeness but merely highlighting some of them.

Other forms of diversity mentioned as possibly relevant examples during the Drafting Committee’s deliberations included racial, ethnic, cultural and religious diversity, as well as sexual orientation. Some members considered that an explicit reference to racial diversity should be included in draft conclusion 5; others took the view that the first sentence should be read in a broad sense. In particular, the reference to various “regions of the world” already covered criteria such as racial diversity. While it was the view of the Drafting Committee that the criteria mentioned in the provision were only illustrative, some members had expressed concern about the practicability of verifying the representativeness of teachings, since some of the proposed criteria could not be easily ascertained by a simple review of the materials and would require a further enquiry into the background and identity of the author. At the same time, the notion of “due regard” was to be understood flexibly as requiring that best efforts should be undertaken to make the assessment called for under the draft conclusion, in order to ensure representativeness.

The title of draft conclusion 5 was “Teachings”, which was consistent with the titles chosen in the conclusions on identification of customary international law and the draft conclusions on general principles of law.

At the current stage, the Drafting Committee recommended that the Commission should take note of draft conclusion 4 and draft conclusion 5, as orally revised, since there had been insufficient time available for the preparation of commentaries.

The Chair said she took it that the Commission wished to take note of draft conclusions 4 and 5, as contained in the report of the Drafting Committee (A/CN.4/L.985/Add.1) and as orally revised, on the understanding that the draft conclusions would be adopted at the Commission's seventy-fifth session and that the Special Rapporteur would prepare the commentaries to the draft conclusions for the Commission's consideration in due course.

It was so decided.

The meeting rose at 10.40 a.m.