Check against delivery

INTERNATIONAL LAW COMMISSION

Seventy-fourth session

Geneva, 24 April to 2 June and from 3 July to 4 August 2023

SUBSIDIARY MEANS FOR THE DETERMINATION OF RULES OF INTERNATIONAL LAW

Statement of the Chairperson of the Drafting Committee

Mr. Mārtiņš Paparinskis

3 July 2023

Madam Chair,

It is my pleasure, today, to introduce the fourth report of the Drafting Committee for the seventy-fourth session of the International Law Commission, which concerns the topic "subsidiary means for the determination of rules of international law." The report, which is to be found in document A/CN.4/L.985 and was issued on 8 June 2023 contains the texts and titles of three draft conclusions, on subsidiary means for the determination of rules of international law provisionally adopted by the Drafting Committee, and which the Drafting Committee recommends for adoption by the Commission at the present session.

Before commencing, allow me to pay tribute to the Special Rapporteur, Mr. Charles Chernor Jalloh, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also would like to thank the other members of the Committee for their active participation and contributions. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Madam Chair,

The Drafting Committee held nine meetings on the topic, from 26 May to 2 June 2023. The Drafting Committee proceeded on the basis of the text proposed by the Special Rapporteur in his First Report,[1] which the Plenary at its 3632th meeting, held on 26 May 2023, referred to the Committee. At the present session, the Drafting Committee adopted a total of 3 provisions in the form of draft conclusions on the topic, as was proposed by the Special Rapporteur.

The Drafting Committee ran out of time to address the two last draft conclusions referred to it by the Plenary. Those draft conclusions, which deal with the decisions of courts and tribunals, and with teachings, will be examined in due course.

Draft conclusion 1

Madam Chairperson,

Draft conclusion 1 addresses the scope of the entire set of draft conclusions. The inclusion of a scope provision follows the established practice of the Commission. The draft conclusion reflects the Commission's intention to focus on the question of the use of subsidiary means for the determination of rules of international law. The Committee considered the possibility of also addressing here the role and function of subsidiary means for the determination of rules of international law. However, it decided to retain the focus on the "use" of subsidiary means in the scope provision. The Drafting Committee was of 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 was also noted in the Drafting Committee that the French and Spanish versions of the phrase "subsidiary means" ("*moyens auxiliaires*" and "*medios auxiliares*", respectively) drew out more clearly the ancillary role and function that such materials play in relation to the sources of international law. A suggestion was made to include some wording indicating expressly that subsidiary means differ from the sources. However, the prevailing view in the Committee was that

[1] A/CN.4/760.

at this early stage of the consideration of the topic the formulation should track the Statute of the Court as closely as possible.

Turning to the drafting of the provision, the Drafting Committee proceeded on the basis of a revised proposal presented by the Special Rapporteur, which took into account the views expressed in the Plenary debate.

The Special Rapporteur had proposed the opening phrase "[t]he present draft conclusions concern" in his original proposal, drawn from past such formulations adopted by the Commission, including in the context of the equivalent provision in the conclusions on identification of customary international law, adopted in 2018. The Drafting Committee saw no reason to change the formula.

The phrase "the use of" was the subject of discussion in the Committee. The Special Rapporteur initially proposed the phrasing "the way in which subsidiary means are used" to underline the methodological nature of the topic. The Committee considered using the formulation "are to be used" but concluded that it could be understood as being imperative. Some members noted that subsidiary means serve as an aid to the determination of the 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 decided to streamline the formulation to simply "the use of", which was seen as being less repetitive and more neutral, so as to avoid introducing a limitation on the scope of the topic in the future.

The verb "determination" was retained from the Special Rapporteur's original proposal, which had been the term used in Article 38(1)(d) of the Statute. The term is intended to reflect the role of subsidiary means within Article 38 which is part of the process of carrying out an evaluation of rules of international law. The Drafting Committee considered that subsidiary means interact with the sources, but are not themselves sources of international law, since they merely assist with the determination of rules of law.

The main focus of the discussion in the Drafting Committee, however, was the Special Rapporteur's proposal to refer to the determination "of the existence and content" of rules. The Committee was divided on the inclusion of such further specification. Some members expressed the view that the reference to the existence and content of rules of international law was appropriate

since the determination of rules of international law included their identification and application to solve a concrete legal problem. Other members held that the use of such formulation could be misunderstood as granting subsidiary means the status of source of law, comparable to customary international law, treaties and general principles of law included in Article 38, subparagraph 1, literals (a), (b) and (c), respectively. There was also a concern that the use of the terms "to determine the existence and content" could inadvertently limit the scope of the functions of subsidiary means. It was maintained that retaining such formulation might lead to the exclusion of the use of subsidiary means, e.g., for the determination of the effect and legal consequences of rules. In the context of subsidiary means, the materials being referred to are used as external criteria so as to elucidate rules that have already been established. The Special Rapporteur accepted the deletion of the "existence and content" reference from the draft conclusion, but on the understanding that this was without prejudice to the same formulation being used in later draft conclusions; and on the understanding that he would explain in detail the meaning of the phrase in the commentary, which would build on the Commission's explanation in other topics dealing with the sources of international law, such as customary international law where the "existence and content" formulation had been borrowed from in order to describe the role of subsidiary means and their interaction with that source of international law.

I wish to draw the Commission's attention to the fact that the concluding phrase "rules of international law" was a conscious departure from the formulation in Article 38, which is simply "rules of law". The Drafting Committee 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 first report of the Special Rapporteur. At the same time, the reference to rules of international law should be understood as not being an *a priori* exclusion of other rules of law that could provide assistance in the determination of rules of international law.

Finally, permit me to point a linguistic matter. The reference to "rules" in the English has been rendered as "*règles"* in French and "*normas*" in Spanish. I recall that it has been the practice of the Commission in prior topics, including those dealing with the sources of international law, such as the "identification of customary international law" and the "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" was rendered in the Arabic version as

"masdaran ittiatat",[2] which was considered to be the clearest encapsulation of the concept. It was the view of the Drafting Committee that the terms used in these 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 is "scope".

Draft conclusion 2

Madam Chairperson,

Draft conclusion 2 concerns the categories of subsidiary means to assist in the determination of rules of international law.

The Committee 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) of the Statute, with the exception of subparagraph (c), which was new, and reflected a proposal by the Special Rapporteur to refer to other categories of subsidiary means arising out of the practice of States and international organizations.

An initial consideration within the Drafting Committee was whether to follow the text of Article 38, or to adopt a new formulation more reflective of the contemporary international legal community. As I will describe, the Drafting Committee chose the latter course of action, and adopted draft conclusion 2 with changes to the original proposal of the Special Rapporteur. In doing so, the proposed draft provision departs from Article 38, both in a textual form, in the sense of adopting new formulations for existing concepts, and in terms of the explicit recognition by the Drafting Committee (of what the Special Rapporteur argued to be implicit in Article 38) of the possibility of the existence of other subsidiary means, through the retention of subparagraph (c), mentioned earlier.

Indeed, as I will describe shortly the inclusion of a new subparagraph (c), along the lines of that proposed by the Special Rapporteur, was the subject of extensive debate in the Drafting

[2] الوسائل الاحتياطية.

Committee, not only on its merits, but also because of its implications for the chapeau and possibly subparagraph (a).

Draft conclusion 2 follows the same structure of 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 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) of the Statute was not exhaustive. In practice, other subsidiary means may also perform an auxiliary function in the determination of rules of international law. This understanding is reflected in the use of the word "include" at the end of the chapeau, and in the inclusion of subparagraph (c), which, as I already said, recognizes the existence of other subsidiary means. A proposal by some members to replace "include" with "can take the form of" did not find traction in the Drafting Committee.

While the drafting of the chapeau itself proved uncontroversial, the key question that arose was the relationship of the chapeau with subparagraph (c). As discussed shortly, there were some doubts in the Drafting Committee as to the advisability of including subparagraph (c) at this initial stage of the Commission's work on the topic. Hence, it was proposed that the provision not include subparagraph (c), but rather 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. Such additional phrasing would create the space for addition of other subsidiary means in later conclusions or even in the accompanying commentary. However, such amendment to the chapeau was not introduced since the Drafting Committee did decide to retain subparagraph (c). Hence, the Drafting Committee settled on the formulation for the chapeau as initially proposed by the Special Rapporteur.

Let me now address **subparagraph (a)**, which identifies the decisions of courts and tribunals as being a subsidiary means for the determination of rules of international law. The provision is 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. I will return to this question of the choice of formulation shortly.

First, the Drafting Committee initially worked on the basis of the initial proposal of the Special Rapporteur, which referred to "decisions of national and international courts and tribunals". It is important to recall that there had been unanimity in the plenary that judicial decisions within the meaning of Article 38(1)(d) of the Statute of the International Court of Justice were subsidiary means for the determination of rules of international law. However, the question that the Drafting Committee considered in relation to subparagraph (a) was whether to adopt a text as found in Article 38, namely "judicial decisions", or to accept the proposal of the Special Rapporteur that a more all-encompassing formulation was needed, so as to take into account developments over time in the practice of States and international organizations.

There was a range of views within the Drafting Committee on this point. Several members preferred 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. According to this view, there was insufficient justification for departing from the formulation in Article 38 of the Statute. As such it was preferable not to saturate, or dilute, the notion of "judicial decisions", but rather to elaborate the contemporary understanding of the concept in the commentary which could accommodate developments in international practice.

In the end, the prevailing view within the Drafting Committee favoured the broader approach that had been espoused by the Special Rapporteur. Several members noted, for example, that a strict reading of "judicial decisions" would not cover such instances 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 "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. Hence, 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 the citation of 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 pointed out the work on the identification of customary international law, and in particular, the broad reference in draft conclusion 13 thereof to "decisions of courts and tribunals". The Commission had earlier at the

present session 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, which I discussed earlier, subparagraph (a) was also considered in conjunction with subparagraph (c). This was important for several members who underlined the need to ensure that the decisions of human rights treaty bodies would be covered under one of the subparagraphs as subsidiary means.

The commentary will discuss the meaning of the term "decisions" and the phrase "courts and tribunals", by 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. I note that some members also expressed another view that the commentary should not include references to the decisions of human rights treaty bodies as a form of judicial decisions.

A further point discussed was whether the reference to national and international court decisions, as proposed by the Special Rapporteur, should be retained. One suggestion was 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 supported the Special Rapporteur's approach, the prevailing view of the Drafting Committee was not to include such a reference at all, but rather leave the detailed consideration, including of the qualifying elements and of question of decisions of national and international courts, for further elaboration in a subsequent conclusion, namely draft conclusion 4.

Let me now consider **subparagraph (b)**, which addresses "teachings", "*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 refers to "teachings of the most highly qualified publicists of the various nations." I recall that there was unanimity in the Plenary debate as to the inclusion of this category of subsidiary means for the determination of rules of international law. Accordingly, the Drafting Committee's main consideration revolved around whether the formulation of the Statute was still fit for purpose for the twenty-first century international legal community.

Once again, there was a range of views within the Committee. For some members, the phrase "of the most highly qualified publicists of the various nations" remained apposite, and sufficiently elastic to encompass modern practice. It was also 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 considered the reference to the "most highly qualified publicists" as being a historically and geographically charged notion that could be considered elitist, and excessively focused on the individual as opposed to their body of work. There was also a concern that it could be difficult to determine who was a qualified publicist as the standards could be different in various legal systems. Some members 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 ultimately preferred to resort to a more neutral, inclusive and representative formulation.

Several proposals were considered in that regard, including referring to "persons of recognized competence", which was drawn from the Commission's own Statute; referring to 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 Special Rapporteur's text proposed in his report; utilizing the concept of *jurisconsults*, which is mentioned in the Statute of the International Court; and referring to the "doctrine of the most highly qualified publicists recognized by the community of nations". However, none of these proposals found general support within the Drafting Committee since introducing new terminology in this draft conclusion could give rise to further questions.

Therefore, the Committee decided to simply adopt the term "teachings". As in the case of subparagraph (a) the concept of teachings will be further elaborated 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, was not accepted given the different meaning of the word in English.

As I indicated at the beginning of my presentation, **subparagraph (c)** was the subject of extensive discussion in the Drafting Committee. It took as its starting point the view expressed by several members within the Plenary, namely that there exist 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 was whether or not to reflect such understanding explicitly in the draft conclusion, as subparagraph (c). As I indicated earlier, some members of the Drafting Committee

preferred not to do so, at the present stage, but rather to leave the matter open in the chapeau and then to further address it in the commentary. For those members, taking an affirmative position in the text this year could be premature in light of the anticipated second report of the Special Rapporteur and the memorandum being prepared by the Secretariat. The view was expressed that the difficulty may also lay in identifying whether certain subsidiary means could already be covered by the existing categories in subparagraphs (a) and (b).

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

Having said so, it was underlined in the Drafting Committee that there had already been support in the Plenary for the works of expert bodies, including the human rights treaty bodies. Indeed, there were suggestions made during the debate and in the Committee to already expressly refer to those in subparagraph (c). However, the addition of express categories of subsidiary means was set aside for now on the understanding that they will be later elaborated in draft conclusions proposed by the Special Rapporteur. The view was also expressed in the Plenary that certain unilateral acts and religious law could be part of the additional subsidiary means. These views did not, however, obtain support in the Drafting Committee.

Turning to the formulation of subparagraph (c), the Drafting Committee proceeded on the basis of the proposal of the Special Rapporteur in his first report, which referred to other means "derived from the practice of States and international organizations". It was the view of some members of the Drafting Committee that such formulation was too broad and could be potentially confusing, *inter alia,* because it could 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 thus focused on finding a suitable reformulation of subparagraph (c). Different options were considered, ranging from formulating a complete illustrative list of

additional subsidiary means, as I noted before, to simply leaving a placeholder as an indication that text would be included in the future. Neither option garnered sufficient support. The Drafting Committee then focused its work on a proposal to simply refer, in general terms, to "any other means used to assist in determining rules of international law." The sense was that a formulation along those lines would be sufficiently broad to allow for elaboration in future draft conclusions and their commentary. The Committee subsequently added the qualifier "generally" so as to indicate that a degree of usage was needed and to convey 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 2(c) as adopted mentions the role of subsidiary means, namely "to assist" in determining rules. Some members had 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 felt that introducing some such elements at the present stage could be helpful in both identifying possible candidates of other subsidiary means and emphasizing their auxiliary function. The Committee used the term "determining," which is the verb of "determination" from article 38 of the ICJ Statute. The Committee discussed whether to use the formulation "determination", and, if so, whether to also add the term "identification", but decided against that. This was for linguistic reasons since, in French, both terms would be expressed as "determination".

The title of draft conclusion 2 is "**categories of subsidiary means for the determination of rules of international law"**. The title was aligned with the chapeau, to refer to rules of "international" law.

There was also some discussion whether to retain the title of "categories" for this conclusion, as the Special Rapporteur had initially proposed. Some members expressed doubts regarding the reference to the means listed in subparagraphs (a) to (c) as "categories". Several other options were considered, including merely "subsidiary means" or referring to "forms", "types" and "range", but none were found to be suitable. The Committee ultimately followed the Special Rapporteur's proposal which was deemed clearer and had the merit of consistency with recent work of the Commission in the topic "general principles of law".

Draft conclusion 3

Madam Chair,

Let me now turn to **draft conclusion 3**, which concerns the general criteria for assessing subsidiary means for the determination of rules of international law. Permit me to make some general remarks. The Drafting Committee agreed with the proposal of the Special Rapporteur that it was useful to provide some general criteria for the assessment of subsidiary means. Following a discussion in the Committee, it was agreed that the criteria being proposed were meant to be used as factors for determining the relative weight to be given to material which was already considered a subsidiary means within one of the categories in draft conclusion 2, and not for determining whether a particular material was to be considered a subsidiary means, within the meaning of the draft conclusions. This point is made explicit in the chapeau, which states that, "when assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, *inter alia*." The factors listed in the draft conclusion thus concern possible ingredients of weight that would be dependent on the circumstances under which they are being used.

The Drafting Committee worked on the basis of the initial proposal of the Special Rapporteur, which, if you recall, was presented as a single paragraph. However, the Special Rapporteur accepted the suggestion made in the Drafting Committee to structure the provision in the form of criteria listed in a series of subparagraphs. Doing so makes the provision easier to understand. It also helps to clarify that not all factors would be applicable to all the categories of subsidiary means. Instead, 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 takes place.

This is confirmed by the concluding phrase "regard should be had to, *inter alia*" in the chapeau. What follows is not meant to be a prescriptive statement or to establish an obligation to use a particular subsidiary means.

Let us now consider each of the criteria in turn.

Subparagraph (a) refers to the degree of representativeness of the materials being used as subsidiary means. If you recall, such a criterion did not appear in the Special Rapporteur's initial proposal. However, the Drafting Committee decided to include it to address some of the concerns expressed in the plenary regarding the importance of taking into account the views and approaches of the various legal systems of the world.

This criterion should be applied flexibly, since the topic at hand relates to the use of subsidiary means for the determination of all rules of international law. As such, if the rules of international law under consideration are bilateral or regional in nature, then the degree of representativeness from various regions or legal systems of the subsidiary means being assessed 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. This provides an example of a flexible application of the criteria identified in draft conclusion 3, which I alluded to earlier.

Subparagraph (b) refers to the quality of the reasoning. The Drafting Committee considered that such criterion should prevail over the renown of the author in the case of teachings. At the same time, the criterion is subjective and not necessarily applicable equally to all subsidiary means. Hence, while the quality of the reasoning will be important in some contexts, such as when assessing decisions, it might be less relevant when scrutinizing certain materials like the resolutions adopted by the General Assembly of the United Nations.

Subparagraph (c) refers to the level of expertise of those involved. The Drafting Committee was of the view that, similar to subparagraph (b), the criterion referred to the background and the 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) refers to the level of agreement of those involved. This criterion was meant to refer to the internal consensus when the decision was made, or among the authors of the text. Once again, such 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 would be likely to be of significance.

It was noted in the Drafting Committee that even when there is a measure of internal consensus among those who participated in a decision, such decision can be subject to external criticism. This point is addressed in **subparagraph (e),** which refers to the reception by States and other entities, in other words the external component in the form of the reactions after the decision was made.

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

Let me now turn to the title of draft conclusion 3, which is **"[g]eneral 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 referred to the criteria for the assessment of subsidiary means. He proposed, in light of the plenary debate, the addition of the term "general" to clarify that there could be more specific criteria to be determined in respect of certain specific subsidiary means to be addressed in future draft conclusions.

Madam Chair,

This concludes my introduction of the fourth report of the Drafting Committee for this session, devoted to the topic "subsidiary means for the determination of rules of international law".

As I indicated at the beginning of my statement, the Drafting Committee recommends that the Commission adopt the Draft Conclusions on subsidiary means for the determination of rules of international law, as contained in the report of the Drafting Committee. The Special Rapporteur will submit the commentaries to these draft conclusions, which will be considered by the Commission at the current session. I would like to once more thank Mr. Jalloh for this and for his work on this topic.

I thank you for your kind attention.

_____