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International Law Commission
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Provisional summary record of the 3663rd meeting

Held at the Palais des Nations, Geneva, on Thursday, 9 May 2024, at 10 a.m.

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Subsidiary means for the determination of rules of international law (*continued*)

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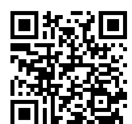

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Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Subsidiary means for the determination of rules of international law (agenda item 8) (*continued*) (A/CN.4/769)

Mr. Jalloh (Special Rapporteur), introducing his second report on the topic "Subsidiary means for the determination of rules of international law" (A/CN.4/769), said that he looked forward to engaging in a discussion with the Commission on that very interesting topic.

He had submitted his report to the secretariat on 30 January 2024, ahead of the deadline for submission. Unfortunately, as had been the case in 2023, some errors had been introduced into his report during the document's processing, and the report had therefore been reissued at his request on 22 April 2024. However, as some of the errors amounted to substantive changes to his argument, he had also requested the secretariat to issue a corrigendum and, in future, to give him the opportunity to review and approve the final edited versions of his reports prior to their publication.

At the outset, he wished to highlight the generally positive reactions of States, described in chapter II of the report, to the Commission's work on the topic of subsidiary means, as had been reflected in discussions in the Sixth Committee. There had been general and in some cases enthusiastic support for the scope, direction and outcome that the Commission had delineated for its work on the topic. Therefore, the Commission had no reason to depart from the scope that had been agreed on, as reflected in its report on the work of its seventy-fourth session (A/78/10), nor would it be fruitful for the Commission to reopen the debate on aspects already agreed on by its members and endorsed by States in the Sixth Committee in 2023. He would thus appreciate it if members would focus their comments in the current discussion only on chapters III and IV of the second report.

He appreciated the comprehensive memorandum by the secretariat (A/CN.4/765), which, unlike a report of a Special Rapporteur, was not intended to take a position on the substance of a topic one way or the other. That was why the observations on the functions of subsidiary means and the question of precedent in international law were prefaced in the memorandum with a number of caveats in the introduction, owing to the principle of neutrality of the secretariat. While he agreed with only some of the observations, on the whole the extensive compilation of the actual practice of international courts, tribunals and other bodies contained in the memorandum confirmed his own independent findings.

In chapter III of his second report, he examined the key functions of subsidiary means. Section A recalled some important points from the first report on that issue, including on the hierarchy between sources and subsidiary means in Article 38 (1) of the Statute of the International Court of Justice, and showed that subsidiary means were not only different in nature from sources, but were subordinate to the sources of international law found in Article 38 (1) (*a*) to (*c*).

Section B showed that there seemed to be a consensus in the Commission's earlier work and in the Sixth Committee on the assistive function of subsidiary means in relation to sources of international law. In paragraph 77, it was explained that the main function of subsidiary means was to support or assist the sources. Sections C to G demonstrated that, in practice, subsidiary means were used in a supportive role to help determine the existence and content of the rules of international law.

After a detailed analysis, the report set out three concrete findings. The first was that subsidiary means played a secondary or auxiliary role. That conclusion was based on a textual interpretation of Article 38 (1) of the Statute of the International Court of Justice. The term "subsidiary means", especially when considered in the various official languages, implied that there were means that were principal in nature. The principal means were the sources of international law. In resolving a dispute or providing an advisory opinion, the Court was required to apply a rule found in one of those sources to the facts of the case before it. Unlike the sources, to which judges could refer directly to find an applicable rule, subsidiary means were used indirectly as a vehicle or method for identifying and determining rules of international law.

Second, the assistive function of subsidiary means was supported by the drafting history of Article 38 (1) (*d*) of the Statute. The narrow view of some drafters that the judges of what was now the International Court of Justice could do nothing more than objectively select and apply the rules of international law given to them had not been accepted, nor had there been a consensus on the view that the judges of the Court were lawmakers who filled legal gaps so as to avoid a *non liquet*. A compromise had been found, as he had shown in his first report (A/CN.4/760), through the characterization of judicial decisions and teachings as subsidiary means.

Third, and most importantly, the assistive function was confirmed in the actual practice of the Court and other international courts and tribunals. Although the Court rarely made explicit reference to Article 38 1 (*d*) of the Statute, it routinely referred to its own previous decisions, including both judgments and advisory opinions. References to teachings were rather exceptional in majority judgments, but it was clear from the practice that the Court considered both judicial decisions and teachings as performing an auxiliary role, although more weight was accorded to judicial decisions. Paragraphs 91 to 95 of his second report set out six of the many examples of the Court's explicit or implicit references to Article 38 (1) and to subsidiary means.

In the case concerning *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, to take one example, a chamber of the Court had expressly cited Article 38 (1) to explain that, for the purpose of ascertaining the rules of international law that governed the subject of maritime delimitation, reference would be made to conventions and international custom, "to the definition of which the judicial decisions … either of the Court or of arbitration tribunals have already made a substantial contribution". In that case, the Court had emphasized the sources of law before referring, secondarily, to the possibility of using judicial decisions as a subsidiary means. The assistive role of subsidiary means had been self-evident.

Other international courts and tribunals, such as the International Tribunal for the Former Yugoslavia and the International Criminal Court, also regarded subsidiary means as auxiliary to the sources of international law. Some examples were presented in paragraphs 96 to 103 of the report. In the *Prosecutor v. Kupreškić et al.* judgment, the Tribunal had held that judicial decisions "should only be used as a 'subsidiary means for the determination of rules of law'" and that "judicial precedent is not a distinct source of law in international criminal adjudication", thus treating subsidiary means as auxiliary to the sources of international law.

The practice of national courts also confirmed the assistive function of subsidiary means. To take just one of the examples cited in chapter III (F) of the report, the Federal Court of Justice of Germany, in case No. 3 StR 564/19, had referred to Article 38 (1) (*b*) of the Statute to address whether customary international law prohibited the German prosecution of subordinate officials of foreign States. The Court had noted that the Federal Constitutional Court had held that judicial decisions and teachings of international law were to be used only as subsidiary means for the clarification of customary international law. Accordingly, the Court had carried out an extensive survey of relevant decisions of national and international courts and tribunals before ultimately ruling against the appellant.

Finally, confirmation of the auxiliary nature of subsidiary means was found in the works of scholars. The examples of scholarly work cited in chapter III (G) spanned over a century, indicating that that view on the function of subsidiary means was well established. For example, in the eighth edition of *Brownlie's Principles of Public International Law*, it was stated that judicial decisions "are not strictly a formal source of law, but in many instances they are regarded as evidence of the law".

In the light of the analysis contained in chapter III, a draft conclusion 6, on the nature and function of subsidiary means, was proposed in paragraph 126 of the report. Paragraph (a) of the proposed draft conclusion stated that subsidiary means were auxiliary in nature *vis-à-vis* the sources of international law found in treaties, customary international law and general principles of law, while paragraph (b) stated that subsidiary means were mainly resorted to when identifying, interpreting and applying the rules of international law derived from the sources of international law. The two paragraphs must be read together

because their logic was interconnected. The content and language of the proposed draft conclusion was consistent with the Commission's previous work on related topics.

Chapter IV addressed the general nature of precedent in domestic and international adjudication. Section A covered the meaning of precedent and the approach to it in common law and civil law systems. Since part of the confusion in that area concerned the very idea of precedent, he had drawn a distinction between a broader, non-technical definition of the term and a narrow, technical definition that was used in the legal context. The broad definition essentially referred to the idea of something that had come before. The technical definition of "precedent", which was sometimes referred to as *stare decisis*, was the doctrine that "a court is to follow accepted and established legal principles set out in previous cases decided by the same court as well as by other courts of equal or higher rank in respect of litigated and necessarily decided issues", according to the article cited in footnote 219 of his report. Civil law and common law systems differed in their approach to precedent, but the distinction between the two types of systems should not be overemphasized, as the reality was more nuanced.

In contrast to common law national systems, international law lacked a formal theory or doctrine of precedent. However, the International Court of Justice and other international courts and tribunals did follow prior decisions and judgments. Civil law jurisdictions also followed prior decisions under the doctrine of settled case law. That approach was also reflected in international law, including the work of the Court.

Chapter IV addressed different aspects of the relationship between Article 38 (1) (*d*) and Article 59 of the Statute of the Court. Article 38 (1) (*d*) stated that subsidiary means were to be applied "subject to the provisions of Article 59", which was of relevance for the scope of subsidiary means. Article 59 of the Statute, which stated that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case", had often been taken to imply the absence of precedent in the Court. Sections B to E of the chapter addressed several issues related to that question. Article 38 (1) stated that the Court "shall apply" subsidiary means, which could be taken to imply that subsidiary means were sources of law. The controversy over that issue was often accompanied by a certain sensitivity about the role of judges in a decentralized international legal system, the fear being that if judges in international courts and tribunals were to issue judicial decisions that were not based on sources of law to which States had consented, they might overstep their legitimate role. That could undermine States' interest in peacefully resolving their disputes through judicial settlement, an issue raised in his first report.

The apparent lack of clarity arising from the language of Article 38 (1) (*d*) led to concerns about the practical implications of its reference to Article 59. Both the drafting history and the literature indicated that the opening caveat in Article 38 (1) (*d*) had been added to assuage States' concerns about the effects of final judgments of the Court. In fact, some authors held that Article 59 had nothing to do with subsidiary means. Instead, Article 59 was aimed at protecting States that were third parties to a case from the binding effect of a particular decision of the Court. That, in his view, was an altogether different question from whether or not the Court was bound by its prior legal position when ruling in an analogous case. Already in 1945, the Inter-Allied Committee on the Future of the Permanent Court of International Justice had clarified the content of Article 59, stating that the provision in question "in no way prevents the Court from treating its own judgments as precedents".

In chapter IV (D), he had tried to show that the binding effect of the judgments of the International Court of Justice primarily concerned the operative part of the judgment and not the reasoning underlying it. However, the Court had established a practice of relying on the reasoning set out in previous decisions, as it had no cause to depart from previous legal reasoning that could still be regarded as sound. In addition, the distinction between the reasoning and the operative part of judgments implied a difference between what he called in his report the narrow legal effect and the broader legal effect of the Court's decisions.

With regard to the narrow legal effect, there was no doubt that the operative aspects of a judgment of the Court applied only to the specific parties in a case. The broader legal

effect, however, was felt by all States based on the need for them to abide by the correct legal principles stated by the Court in its case law. States themselves also cited previous cases in order to bolster their legal arguments, whether in contentious or advisory proceedings.

In chapter IV (E), he examined the link between Article 59 and Article 61 on the finality of judgments, often referred to as *res judicata*. At a broad level, the importance of Article 59 lay mainly in its indication of the value or effects of Court decisions on the merits of a case. Among those effects, the "binding force" element of the Court's decision could be distinguished from the idea of bringing finality to a matter, or the *res judicata*. Among the many examples cited in his report was the well-known *Trail Smelter* arbitration, where the tribunal had found that there was undoubtedly *res judicata* when "[t]he three traditional elements for identification: parties, object and cause … are the same". In relation to the Court, the *res judicata* was created by the combined effects of Article 59, which stated that a decision was binding on the parties; Article 60, which stated that the Court's decision was final; and Article 61, which placed limits on the possibility of revision of the Court's judgments. The effect of the three provisions in combination was explicitly confirmed by the Court in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

The formal legal position of the Court was, without any doubt, that its decisions were binding only on the parties and in respect of their case. However, that was not a statement of the rule concerning the absence of precedent before the Court. Although there was no *stare decisis* before the Court, the legal effects of its decisions were constraining not only on the parties; effects were also felt by third parties, especially in terms of the force of the Court's decisions as expressions of rules of international law. The report gave the example of the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, where the Court made clear that no *a contrario* argument could be made in respect of any of its findings in that judgment concerning the interpretation of article 36 of the Vienna Convention on Consular Relations.

In addition, there was no need for the Court to resort to doctrines of binding precedent more suitable for domestic tribunals, as the Court had developed its own system that had worked generally well. Furthermore, the Court examined previous rulings not so much as binding precedents as for their persuasive and practical value in resolving a subsequent dispute. Once a statement of the Court was found to be a correct statement of law, third States bound by the same rule would have to conform to it. A failure to comply could constitute a breach of obligations owed to other States. To hold otherwise would introduce legal uncertainty and cause chaos in international relations.

Near the end of chapter IV of his report, which predominantly focused on the Court as the principal judicial organ of the United Nations, to which Article 38 (1) (*d*) formally applied while also having broader relevance as a statement of customary international law, he explored the approach to precedent taken by the International Tribunal for the Law of the Sea. In section H he made observations on the practice of the Tribunal regarding precedent. In sum, the Tribunal, like the International Court of Justice, lacked a formal system of binding precedent. Yet it had developed a practice whereby it routinely relied on prior decisions, including its own but predominantly those of other courts, in particular the International Court of Justice. In many instances, there was no express reference to the precedential value of prior decisions. On the other hand, as in the case of the Court's practice, legal security and stability were better enhanced when consistency in the Tribunal's decisions was ensured.

At the end of chapter IV, he proposed two draft conclusions concerning, respectively, the absence of a rule of precedent in international law and the persuasive value of decisions of courts and tribunals. Draft conclusion 7 stated that international courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, did not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents. The final part of the proposed draft conclusion addressed two distinct situations: courts' and tribunals' own prior decisions, in the first instance, and the decisions of other courts, in the second instance. International tribunals did not normally follow decisions of either type as legally binding precedents. To the contrary, they might

follow prior decisions not so much as a legal requirement as a matter of practicality and convenience.

Draft conclusion 8 concerned the persuasive value of decisions of courts and tribunals. It stated that international courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, could follow their own prior decisions and those of other international courts or tribunals on points of law where those decisions addressed analogous factual and legal issues and were found persuasive for resolution of the issue at hand. Draft conclusion 8 reflected the other side of the issue addressed by draft conclusion 7: international courts and tribunals followed prior judicial decisions because of their persuasive value in addressing analogous factual and legal issues, not because there was a doctrine of legally binding precedent.

Lastly, with regard to the future programme of work, the third report would focus on teachings and other subsidiary means. As mentioned in paragraph 228 of the second report, there were additional issues concerning judicial decisions that could merit further examination in future reports, including the question of fragmentation and the link between subsidiary means and the supplementary means of interpretation mentioned in the Vienna Convention on the Law of Treaties. Any adjustments to the programme of work would be duly shared with the Commission and the Sixth Committee.

Mr. Reinisch said that the Special Rapporteur’s second report provided a very useful summary of the debate on the topic thus far, as well as three additional proposed draft conclusions.

With regard to the purpose and structure of the report, while he fully agreed with the Special Rapporteur that the practice of the International Court of Justice was of overriding importance, he was somewhat disappointed that the report focused almost exclusively on the jurisprudence of the Court and to a lesser extent on the practice of the International Tribunal for the Law of the Sea, without taking into account the many other international courts and tribunals. In his view, the wealth of information on those other international dispute settlement mechanisms contained in the memorandum by the secretariat (A/CN.4/765) would also be useful for the purposes of analysing the function of subsidiary means in general and the question of precedent and persuasive value in particular.

As the Special Rapporteur himself had rightly acknowledged, the length of his reports was sometimes problematic. That point had been made by many Commission members and delegations in regard to the first report and it also applied to the second report, which admittedly was somewhat shorter. For example, chapter II, summarizing the work on the topic to date, could have been condensed.

Chapter III of the report, entitled “Functions of subsidiary means for the determination of rules of international law”, provided the background for the proposed draft conclusion 6 on the nature and function of subsidiary means. Paragraph 65 mentioned three specific functions of teachings, which were characterized as the “interpretative, persuasive and the codification/progressive development functions”. He would be hesitant to consider the function of teachings as a subsidiary means in the sense of Article 38 (1) (*d*) of the Statute of the International Court of Justice to be progressive development. As stated in that provision, the function of subsidiary means was the determination of rules of international law. The Special Rapporteur also seemed to acknowledge that fact at the end of paragraph 65, stating that the three functions “assist in identifying and determining rules of international law”. While teachings and the opinions of courts might sometimes suggest new rules of international law, he doubted whether, in those situations, they would qualify as subsidiary means for the determination of existing law.

With regard to the nature of subsidiary means, he fully agreed with the opinion, expressed in paragraph 72 and elsewhere, that both judicial decisions and teachings were subordinate to the sources listed in subparagraphs (*a*) to (*c*) of Article 38 (1). In his view, the nature of subsidiary means was definitely a secondary or subordinate one, whereas their function was an assistive, auxiliary or identifying one.

In his view, the text of draft conclusion 6 was somewhat problematic. Paragraph (a) was supposed to refer to the nature of subsidiary means and paragraph (b) to their function,

but the two paragraphs in fact conflated nature and function. According to paragraph (a), subsidiary means were "auxiliary" in nature *vis-à-vis* the sources of international law. That auxiliary role or function was then taken up in paragraph (b), which referred to the identification, interpretation and application of rules of international law. In his view, however, the nature of subsidiary means had rightly been characterized as a secondary or subordinate one and should be described as such in draft conclusion 6. He therefore proposed that the beginning of paragraph (a) should be reformulated to read "Subsidiary means are secondary in nature" or "Subsidiary means are subordinate in nature". His view that it was not the nature but the function of subsidiary means that was auxiliary was confirmed by the Special Rapporteur's use of the word "auxiliary" in relation to the function of subsidiary means in chapter III (D) and (E).

The Special Rapporteur suggested that the handful of illustrations drawn from Germany, South Africa, Sierra Leone and the United States of America cited in chapter III (F) would suffice to make the point that courts at the national level also treated subsidiary means as auxiliary. Such an important discussion might have merited a broader analysis of national court decisions discussing the function of subsidiary means. Although the findings of such an analysis were unlikely to be substantively or unexpectedly different from what was already set out in the report, it would have been appropriate, given the emphasis that the Special Rapporteur had placed on the "degree of representativeness" in draft conclusion 3, to more broadly examine what courts in other jurisdictions had said in respect of that important question.

In that regard, consideration should also be given to the "reception" of international judicial decisions by national courts. In a significant number of national court decisions, examples of which were provided in his written statement, judges had relied on the interpretative authority of the jurisprudence of the International Court of Justice in order to elucidate their understanding of international law through international jurisprudence as an auxiliary, subsidiary means. They clearly did not consider themselves bound by those decisions, but did deem themselves obliged to take the judicial decisions of international courts into account. Such examples showed how important it was to rely not only on international jurisprudence when researching an issue within the realm of Article 38 (1) (*d*). Indeed, it was most often the reception of international norms at the national level that helped in identifying the specific function of the subsidiary means mentioned in that provision.

Referring back to draft conclusion 4, "Decisions of courts and tribunals", which had been provisionally adopted by the Drafting Committee at the Commission's previous session, he reiterated his view that the text unnecessarily downplayed the importance of decisions of national courts. The wording suggested that national decisions were given secondary rank *vis-à-vis* the decisions of international courts, a notion he rejected. To his mind, the Commission should carefully re-examine the words "may be" in draft conclusion 4 (2), especially as contrasted against the word "are" in draft conclusion 4 (1) to describe the role of decisions of international courts and tribunals. It might be more appropriate to use language that described what was actually happening in the practice of national courts and the impact of such decisions on the content of the sources of international law.

Turning to chapter IV, entitled "General nature of precedent in domestic and international adjudication", he said that the reference to "domestic" adjudication had presumably been included because the Special Rapporteur provided an overview, in section A, of the different approaches in common and civil law systems. However, given that draft conclusions 7 and 8, and the remainder of the chapter, dealt almost exclusively with precedent in international adjudication, that should perhaps have been reflected in the chapter's title. It would certainly be beyond the scope of the Commission's task to adopt a view, let alone any conclusions, on the role of previous decisions or precedent in the work of national courts or tribunals. While he appreciated the reminder that the debate about the value of precedent was rooted in the differences in approach between common and civil law systems, it would have been useful to base section A on a broader comparative approach. Having said that, he agreed with the Special Rapporteur that the differences in approach should not be overemphasized. It was certainly correct that the principle of

binding precedent or *stare decisis* was generally considered to be of common law origin. Even the *travaux préparatoires* of Article 59 of the Statute of the International Court of Justice mentioned that origin, while explicitly rejecting such binding effect for decisions of the Court. However, it also seemed to be accepted that the notion of the gradual development of the law through judicial decisions had already been present in Roman law.

The Special Rapporteur's explanation of the relationship between Article 38 and Article 59 of the Statute and how that relationship had been interpreted in the Court's practice was very useful and enlightening, as was the description of the approach of the International Tribunal for the Law of the Sea to the question of precedent. However, again, he wondered why other courts and tribunals had not also been discussed, particularly given that both of the proposed draft conclusions referred broadly to international courts or tribunals. For example, there was only a brief reference in the report to the Dispute Settlement Body of the World Trade Organization (WTO), in which the issue of precedent had often been addressed. In its 1996 report on the *Japan – Taxes on Alcoholic Beverages* case, the Appellate Body had stated that adopted panel reports were often considered by subsequent panels and created legitimate expectations among WTO members, and, therefore, "should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute."

The more decentralized system of dispute settlement found in the emerging jurisprudence of investment tribunals would also have provided fertile examples. In the 2006 International Centre for Settlement of Investment Disputes award in *ADC v. Hungary*, the tribunal had found that, while arbitral awards did not constitute binding precedent, the findings in one case could not be transposed to other cases in view of their fact-driven nature, and different cases were based on different bilateral investment treaties, "cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States".

Similarly, the jurisprudence of human rights courts would have merited closer attention. In its 1990 judgment in the case of *Cossey v. the United Kingdom*, the European Court of Human Rights had concluded that, while the Court was not bound by its previous judgments, it usually followed and applied its own precedents, "such a course being in the interests of legal certainty and the orderly development of" its case law, although that "would not prevent the Court from departing from an earlier decision if it was persuaded that there were cogent reasons for doing so". The broader jurisprudence of international courts and tribunals would enable the Commission to draw more confident conclusions on the absence of a rule of strict precedent in international law and on the persuasive value of the decisions of courts and tribunals, as suggested in draft conclusions 7 and 8.

The report included a discussion of many policy considerations and doctrinal approaches in relation to the value of "precedent" in international adjudication. However, to his mind, sufficient attention had not been paid, beyond brief references in paragraphs 155, 185 and 201, to the underlying rule of law requirement that like cases should be decided in a like fashion and that a minimum of consistency and predictability in the decisions of adjudicatory dispute settlement mechanisms needed to be achieved. That was an overarching rule of law demand on any adjudicatory system, regardless of whether it followed a common law, civil law or any other legal tradition, and warranted closer attention, in particular when assessing the role of previous decisions by international courts and tribunals.

At each of its sessions, the Commission commented on its role in relation to the annual General Assembly resolution on the rule of law at the national and international levels, which was just one of many manifestations of the importance of the rule of law in international law, including the requirement of legal certainty and predictability. As stated by the Secretary-General in his 2004 report to the Security Council on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), "the 'rule of law' is a concept at the very heart of the Organization's mission" and required measures to ensure adherence to "fairness in the application of the law, … legal certainty, avoidance of arbitrariness and procedural and legal transparency". Rather than insisting on the rigid and

narrow doctrine of *stare decisis*, it would be preferable to concentrate on alternative approaches for achieving legal certainty and predictability in international decision-making of an adjudicatory nature.

Concerns about inconsistent decisions by investment tribunals had led to action by States in Working Group III (Investor-State Dispute Settlement Reform) of the United Nations Commission on International Trade Law (UNCITRAL), which had raised the issue of whether forms of binding precedent should be introduced or might be achieved more informally, such as by creating an appellate mechanism or even a permanent multilateral investment court.

As to the proposed draft conclusions 7 and 8, he agreed with the gist of the message expressed in both of them. The report contained an extensive explanation concerning the absence of a rule of precedent in international law. However, he wondered whether the proposed wording of draft conclusion 7 adequately reflected the general absence of binding precedent in international law as identified, given that it stated that courts and tribunals "normally" did not follow prior decisions as legally binding precedents, which suggested that in some cases they did so.

With regard to draft conclusion 8, he was not convinced that it should be formulated in a permissive way with the use of the verb "may". If the provision was based on an assessment of what was actually happening in practice, it should perhaps reflect the descriptive language of draft conclusions 6 and 7 by stating that international courts and tribunals "usually follow their own prior decisions". Of course, to the extent that the Special Rapporteur wished to make a normative statement and bearing in mind the rule of law considerations he had outlined in favour of following precedent, the Commission might consider replacing the word "may" with "should".

In conclusion, he fully supported referring the draft conclusions to the Drafting Committee.

Mr. Oyarzábal said that the Special Rapporteur's second report contained very useful food for thought. He concurred with the Special Rapporteur's key conclusion that subsidiary means should not be considered sources of international law. As noted in draft conclusion 6, the sources of international law were treaties, customary international law and general principles of law. Subsidiary means only reflected those sources; they did not constitute independent sources in and of themselves. He also agreed with the Special Rapporteur's overall analysis that the rule of *stare decisis* did not apply in international law. The Special Rapporteur rightly pointed out that, in the absence of special regimes, there was no system of binding precedent in the international legal system.

The Commission should be wary of importing notions derived from domestic systems, particularly the common law tradition, into the international law context. Its frame of reference for analysing the notion of precedent in international law must remain within the international legal system, rather than including notions derived from specific domestic traditions. Some domestic legal categories and concepts, such as *stare decisis*, did not fit in that system and risked compromising its foundations. Indeed, the international legal system was different from domestic law, in that it was based on State consent. Unlike common law, international law did not include judicial decisions as one of its sources. To conceptualize international courts as being bound by their previous decisions in the absence of a specific treaty regime would be to bind States to a new source of international law to which they had never agreed.

Draft conclusion 6, as he understood it, addressed the nature of subsidiary means in paragraph (a) and their function in paragraph (b). In draft conclusion 6 (a), he would be in favour of rewording the formulation "sources of international law found in treaties, customary international law and general principles of law" to reflect the fact that treaties, customary international law and general principles of law did not contain the sources but were themselves the sources of international law.

He also found the use of the word "auxiliary" to describe the nature of subsidiary means rather confusing and not particularly helpful. In the report, the Special Rapporteur made a strong case that subsidiary means were not to be regarded as sources of

international law, but only as reflecting those sources. Subsidiary means were used for elucidating the content and meaning of the sources of international law. That subsidiary function, which was addressed in draft conclusion 6 (b), was implied by the word "auxiliary". However, the word remained ambiguous, particularly for readers who would not have the benefit of the Special Rapporteur's second report. He would therefore be in favour of a more direct and unambiguous formulation stating that the nature of subsidiary means was, first and foremost, that they were not sources of international law in the absence of a specific treaty regime.

Draft conclusion 6 (b) did not, to his mind, accurately reflect the functions of subsidiary means identified in the report. First, the current formulation did not clearly articulate what the functions of subsidiary means were, but rather the conditions in which they were "resorted to". He believed a more direct formulation should be adopted. Second, as the Special Rapporteur noted several times in the report and as discussed by the Commission at the previous session, the functions of subsidiary means were primarily to assist in the determination of the existence and content of rules of international law. That formulation, which was already used in some of the previously adopted draft conclusions, would be preferable to the current wording.

Third, the use of the word "mainly" implied that subsidiary means had additional functions. Indeed, the second report referred to other functions, such as ensuring predictability, consistency and legal security in the international legal system; however, draft conclusion 6 (b) did not address them. Since draft conclusion 6 was about the functions of subsidiary means, that question should have been addressed comprehensively in the second report and relevant language should have been proposed in the draft conclusion. Nevertheless, the plenary Commission and the Drafting Committee should tackle the issue at the current session, if it was agreed that subsidiary means had additional functions of a general character.

He agreed with the suggestion in draft conclusion 7 that international courts or tribunals did in fact follow their own prior decisions and those of other international courts and tribunals, not because they considered them to be binding, but for reasons relating to persuasiveness, convenience, policy, legitimacy, consistency and procedural economy. However, the use of the word "normally" in the phrase "do not normally follow their own prior decisions or those of other courts and tribunals as legally binding precedents" was problematic, since it admitted the possibility that there could be situations in which international courts and tribunals considered themselves bound to follow prior decisions. Such situations existed but were limited in practice and were generally laid out in specific treaty regimes, as for example in the case of the appellate and trial chambers of international tribunals. To avoid ambiguity, draft conclusions 7 and 8 could be combined into a single draft conclusion, couched in positive terms, that would read:

> International courts or tribunals may follow their own prior decisions and those of other international courts or tribunals on points of law where those decisions address analogous factual and legal issues and are found persuasive for resolution of the issue at hand. However, international courts and tribunals do not consider their precedents as legally binding in the absence of a specific rule of international law to that effect.

The phrase "when settling disputes between States or international organizations or issuing advisory opinions" in draft conclusions 7 and 8 effectively limited their scope to cases involving the principal subjects of international law, namely States and international organizations. That wording would include permanent international courts and tribunals such as the International Court of Justice or the International Tribunal for the Law of the Sea, *ad hoc* State-to-State arbitral tribunals and, presumably, other bodies performing a quasi-judicial or quasi-arbitral function such as WTO panels. It excluded the increasing number of international courts and tribunals dealing with human rights complaints, international crimes, international claims and investment disputes, even though the memorandum by the secretariat showed that such bodies also made use of subsidiary means. The Drafting Committee should reflect on whether the scope of draft conclusions 7 and 8 should encompass the decisions of all international courts and tribunals, in which case it

might suffice to delete the phrase “when settling disputes between States or international organizations or issuing advisory opinions” from both draft conclusions.

Regarding draft conclusion 8, analysing the persuasive value of the previous decisions of international courts and tribunals through the lens of analogous factual and legal issues could risk letting domestic conceptions of precedent in through the back door. Furthermore, in many cases, a court or tribunal might not be convinced of the persuasive value of existing judicial decisions on the same factual and legal issues owing to divergences in the applicable legal or procedural frameworks or judicial cultures. In those instances, recourse to existing jurisprudence could undermine the real character of international adjudication. Moreover, draft conclusion 8 did not provide an adequate explanation of the term “persuasive value”. The idea put forward in the report that “legal security”, “consistency” and “predictability” could serve as criteria for determining persuasive value could be true for institutions such as the International Court of Justice or the International Tribunal for the Law of the Sea, which handled a small number of cases and had stable and simple judicial structures. However, consistency became harder to achieve in the case of complex judicial structures such as regional human rights courts and *ad hoc* tribunals, such as investment tribunals. Draft conclusion 3 provided some guidance in that regard; an express reference to that draft conclusion in draft conclusion 8 might be warranted.

Lastly, the report would have benefited from references to sources from outside the anglophone Western States. Like the first report, the second report relied heavily on judicial decisions and doctrinal works from developed anglophone countries, in particular the United States of America and the United Kingdom. Draft conclusion 3 provided that when assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to their degree of representativeness. On that front, the Commission should lead by example. He would therefore submit to the secretariat a bibliography of works on subsidiary means, including works from the French- and Spanish-speaking international legal community, which he hoped would be of use to the Special Rapporteur in the preparation of the draft commentaries to draft conclusions 6 to 8.

Mr. Galindo said that the Special Rapporteur was to be congratulated on his thorough second report, which addressed complex conceptual issues in a straightforward and accessible manner.

Paragraphs 27 and 62 of the report addressed the question of whether a specific analysis of unity and coherence in international law should be carried out as part of the topic. He wondered whether and to what extent such an analysis would contribute to the advancement of the Commission’s work. While fragmentation was an issue with far-reaching implications for different areas of international law, the added value of focusing on that aspect of the topic was unclear. He fully supported the proposal made by one State in the Sixth Committee, referred to in paragraph 54, to include a reference to representativeness in draft conclusion 4. That addition would address the underlying concerns reflected in draft conclusion 5 and contribute to promoting the pluralism of international law.

Paragraph 68 of the report indicated that the Special Rapporteur had stressed in his first report that there “was in practice a hierarchy” among the sources of international law. However, that phrase did not appear in the first report (A/CN.4/760), which referred only, in paragraph 192, to the “empirical superiority” of treaties and customary international law. The word “hierarchy” was of questionable appropriateness, since the empirical prevalence of those sources could be due to their suitability in the context of adjudication, as opposed to any inherent superiority; it should therefore be avoided.

Paragraphs 81 and 82 focused too much on the perspective of adjudicators. While the concerns of adjudicators were important, the Commission’s study was relevant to all stakeholders in international law, including policymakers, legal advisers, agents and advocates.

The phrase “international law was in an immature stage of development” in paragraph 86 raised serious concerns. It was reminiscent of the idea of progress in

international legal history, which was both highly questionable and unhelpful for the topic at hand. Furthermore, it was based on a doubtful domestic analogy. It should be avoided.

He also had misgivings about the decision to refer to only four States from only two different United Nations regional groups in paragraph 104. While he fully appreciated the practical limitations imposed by the report's word limit, views of States from all regional groups, encompassing different legal systems and languages, should be reflected. The Constitutional Chamber of the Supreme Court of Costa Rica, for example, had asserted that decisions of the Inter-American Court of Human Rights interpreting the American Convention on Human Rights had the same value as the Convention itself. For the Constitutional Court of the Plurinational State of Bolivia, the jurisprudence of the Inter-American Court formed part of the country's constitutional law. The Supreme Court of Justice of the Dominican Republic had clearly stated that it attributed binding character not only to the American Convention on Human Rights, but also to the interpretation of its content by its courts. The Constitutional Court of Colombia considered international jurisprudence as a relevant hermeneutic criterion for determining the meaning of its own national constitutional norms. The Constitutional Court of Peru had gone even further and considered all decisions of the Inter-American Court, including all *ratio decidendi*, as binding even if Peru was not a party to the dispute.

Paragraphs 138 and 139 did not accurately capture the diversity and nuance of civil law systems. For instance, while *jurisprudence constante*, or settled case law, played an important role in the domestic law of Brazil, judges were required to rely on previous single decisions under certain conditions.

The analysis presented in paragraph 157 was overly centred on a few scholars. In general, the citations in the report skewed too heavily towards the work of English and Western men. He strongly encouraged the Special Rapporteur to cite works by women and men from as wide a range of legal systems and languages as possible.

Regarding methodology, the scope of the adjudicatory practice assessed should be broadened to include, as a minimum, regional human rights courts, investor-State dispute settlement, in particular investor-State arbitration, and international trade law, especially the practice of the WTO Dispute Settlement Body. Specific references to other adjudicatory bodies should also be made, where appropriate. He fully appreciated the practical reasons for not doing so raised in paragraph 205. It was well known that the aggregate output of the Dispute Settlement Body, investor-State dispute settlement mechanisms and regional human rights courts far exceeded that of the International Court of Justice and the International Tribunal for the Law of the Sea. Nonetheless, lively legal and political discussions on the value of precedent were under way in those other forums. In order to meaningfully engage with the question of the persuasive value of precedent in international law, the Commission must consider the practice of those other bodies.

As an example of how such practice could be relevant, the investor-State arbitral tribunal in the 2002 case of *SGS v. Philippines* had explicitly departed from a previous interpretation of the scope of a similarly worded umbrella clause by the tribunal in the case of *SGS v. Pakistan*. More recently, a wealth of cases had arisen in relation to the repercussions of the decision of the European Union Court of Justice in the case of *Slovak Republic v. Achmea BV* and objections to intra-European Union investor-State arbitration. It was also interesting to note that adjudicatory bodies operating in completely different fields of international law sometimes engaged with one another. The famous 2008 report of the Appellate Body in the case of *US – Stainless Steel (Mexico)*, which had established the "absent cogent reasons" test, had not only relied on article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, but also referred to the 2000 judgment of the International Tribunal for the Former Yugoslavia in the case of *Prosecutor v. Zlatko Aleksovski* and to an investor-State arbitral award rendered in 2007 by an arbitral tribunal of the International Centre for Settlement of Investment Disputes in the case of *Saipem v. Bangladesh*.

Even very specific forums had engaged with the topic. The United Nations Appeals Tribunal, for instance, in its 2014 judgment in the case of *Igbinedion v. Secretary-General of the United Nations*, had explicitly affirmed the application of the principle of *stare*

decisis within the United Nations system of internal justice, even though no rule on precedent was foreseen in the statute of either the United Nations Dispute Tribunal or the Appeals Tribunal itself. In Judge Nosworthy's separate and partially dissenting opinion on the 2015 *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings* of the Special Tribunal for Lebanon, in *Case against Akhbar Beirut S.A.L. and Ibrahim Mohamed Al Amin*, she argued that the application of *jurisprudence constante* would be contrary to fairness and the proper administration of justice, given that the Special Tribunal was not a permanent judicial institution and had not been envisaged to adjudicate large numbers of criminal cases and that the substantive law applicable to the cases submitted to it was diverse. Instead, she argued for the application of a strict *stare decisis* rule. Further consideration of two-tiered adjudicatory systems, specifically in the absence of statutory provisions establishing the value of precedents issued in appellate review, was necessary. While the outcome of such an analysis did not necessarily have to take the form of a new draft conclusion, the issue was relevant enough to warrant a more detailed investigation in a future report.

Paragraphs 141 to 148 of the report addressed the question of precedent in international courts, with a primary focus on the International Court of Justice. While the value of the Court's interpretation of Article 38 was undeniable, the assessment presented by the Special Rapporteur did not reflect the plurality of approaches taken by other tribunals and thus did not suffice as a basis for drawing conclusions on the question of precedent in international courts in general. While the decisions of the Court carried no binding force except between the parties to the dispute, and even then, only in respect of their particular case, the same was not true of the inter-American human rights system. Since the 2006 case of *Almonacid-Arellano et al v. Chile*, the Inter-American Court of Human Rights had consistently affirmed that domestic judges had a duty to exercise "conventionality control", or review of national laws' compliance with international conventions. That meant that, when adjudicating a case, domestic judges must apply not only the American Convention on Human Rights, but also the Inter-American Court's interpretation thereof. In the case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, the Inter-American Court had left no doubt that the review of compliance with international conventions was not a power but an obligation of domestic judges. In the case of the *Río Negro Massacres v. Guatemala*, it had clarified that the same obligation was incumbent on some non-judicial authorities. Those and subsequent cases had demonstrated that the effects of the Inter-American Court's decisions were not limited to the particular cases in which they had been handed down. He was not suggesting that the Inter-American Court's position on the matter of precedent was automatically applicable to other systems. Rather, it demonstrated that the value of "precedent" in international and regional law was far from uniform.

He had four comments regarding draft conclusion 7. First, for the sake of clarity, and in view of the controversy surrounding the value of precedent in international adjudication, the title of draft conclusion 7, which currently read "Absence of a rule of precedent in international law", should be amended to read "Absence of a general rule of legally binding precedent in international law". In paragraphs 129 to 131 of the report, the Special Rapporteur clarified that the term "precedent" had multiple meanings and could imply varying degrees of binding or persuasive force. The text of the draft conclusion accordingly contained the term "legally binding precedents", which should be reflected in the title. Furthermore, the word "normally" in the phrase "do not normally follow their own prior decisions or those of other courts and tribunals" implied that a treaty or other relevant instrument could explicitly provide for the applicability of *stare decisis* for a given international court or tribunal, although that was uncommon in practice. The title should thus refer to a "general" rule rather than simply "a rule".

Second, the phrase "when settling disputes between States or international organizations or issuing advisory opinions", which appeared in both draft conclusion 7 and draft conclusion 8, excluded adjudicatory and quasi-adjudicatory bodies that settled disputes involving individuals or groups of individuals, such as regional human rights courts, investor-State arbitration tribunals and human rights treaty bodies, which often relied on subsidiary means. There was no reason to exclude them from the scope of the

draft conclusions. The phrase "between States or international organizations" should thus be deleted.

Third, the word "or" in the phrase "or issuing advisory opinions" could be read as disjunctive, implying that advisory opinions could not settle disputes. In that regard, he recalled the so-called "binding" advisory opinions discussed in paragraphs 97 to 104 of the report, section 30 of the 1946 Convention on the Privileges and Immunities of the United Nations (General Convention) and the advisory opinion of the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. Despite the limited judicial practice in that regard and the General Convention's use of specific terms such as "difference" and "decisive", it should be clarified in the commentaries that draft conclusion 7 was not intended to negate the possibility that "binding" advisory opinions could be issued by international courts and tribunals. The same comments applied, *mutatis mutandis*, with respect to draft conclusion 8.

Fourth, in its use of the phrase "do not normally follow", draft conclusion 7 appeared to make an impartial statement on the current and past practice of international courts and tribunals, without any apparent legal meaning. Such neutral drafting was at odds with the title of the draft conclusion, which stated in positive terms that there was no general rule of binding precedent in international law. It was noteworthy that the draft conclusions on general principles of law and on identification and legal consequences of peremptory norms of general international law (*jus cogens*) and the conclusions on identification of customary international law did not contain the adverb "normally". He suggested replacing the words "do not normally follow" with the words "are not generally obliged to follow" or a similar normative phrase.

Regarding draft conclusion 8, he had three comments. First, the meaning of the verb phrase "may follow" was unclear. One possible interpretation was that the draft conclusion allowed adjudicators to dispense with making their own assessment of a matter and simply adopt a previous judicial decision as *ratio decidendi*; another interpretation was that adjudicators could only refer to previous decisions to support or enhance the persuasiveness of their own thorough examination of all relevant facts and arguments of the case before them. While the difference of interpretation might appear to be a mere nuance, that concern was at the core of sensitive legal and political discussions in the field of international economic law, especially at WTO. Judging by the final part of draft conclusion 8, namely the caveat that the decision must be "found persuasive for resolution of the issue at hand", the underlying intention of the draft conclusion seemed to correspond to that second interpretation, which was in keeping with the auxiliary nature and function of subsidiary means, as stated in draft conclusion 6. To avoid any misinterpretation, the word "follow" should be replaced with the words "refer to".

Second, draft conclusion 8 contained important caveats that prior decisions must "address analogous factual and legal issues" and must be "found persuasive for resolution of the issue at hand". Both caveats were reminiscent of the "likeness" test applied in WTO adjudication, yet neither the draft conclusion itself nor the second report presented a systematic review of the elements of that test. Although reference was often made to general factual and legal similarity, other criteria had been articulated by the International Court of Justice and other adjudicators, especially when they decided to depart from a decision invoked by one or both parties to the dispute. A more thorough analysis of noteworthy cases in which the Court had departed from its previous position, albeit implicitly, could be illuminating; one example was the Court's 2016 judgment in the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* and the declaration of President Abraham in that case. In any event, a few examples should suffice to show that certain criteria were already applied in practice by adjudicators in deciding whether or not to rely on a given precedent.

Third, the Commission should further investigate whether two-tiered adjudicatory systems warranted special consideration and should perhaps depart from or add nuance to the general rule contained in draft conclusion 8. That could be done by means of a new draft conclusion, a caveat in draft conclusion 8 or simply a note in the commentary to the draft conclusion.

The meeting rose at 11.55 a.m.