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International Law Commission

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Provisional summary record of the 3664th meeting

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

Contents

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
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	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. Forteau said that the Special Rapporteur and the secretariat were to be commended on the high quality of, respectively, the second report on the topic "Subsidiary means for the determination of rules of international law" and the second memorandum on the topic (A/CN.4/765).

In relation to translation, he said that, in the French translation of the report, the English word "auxiliary", for instance in the term "auxiliary role", had been inaccurately translated, in particular throughout chapter III of the report, as "*subsidiaire*", although "*subsidiaire*" did not have the same meaning as "*auxiliaire*", which was the term used in the official version of Article 38 of the Statute of the International Court of Justice. That created some conceptual confusion. He would be grateful if, in future, translators and interpreters would keep the term "*moyens auxiliaires*" for the English term "subsidiary means", as it was used in Article 38 of the Statute, and use the French word "*auxiliaire*" for the English word "auxiliary" when referring to the role, character, nature or "auxiliary" function of those means.

He commended the secretariat on the clarity of its second memorandum on the topic, which had proven very useful to support and assess the proposals of the Special Rapporteur. He particularly appreciated the care with which a careful distinction had been drawn between what came respectively under the formation, the interpretation and the determination of law. However, despite its high quality, one might regret that the memorandum attached disproportionate importance to the international criminal courts, in which the balance between national legal traditions was not always taken into account in the type of reasoning followed, as was clear from, for example, paragraph 531. Moreover, as explored in paragraphs 97 *et seq.* of the second report, the practice of international criminal courts showed that they had a somewhat ambiguous, or at least confused, position on the role of subsidiary means. Their practice was perhaps not especially relevant to the Commission's work, particularly since their applicable law provisions differed from what was generally found before other international courts.

The practice of the Dispute Settlement Body of the World Trade Organization and that of investment arbitration tribunals, on the other hand, had been ignored, even though, as Mr. Reinisch and Mr. Galindo had pointed out, such practice could shed light on the present discussion because those bodies had debated the possible precedential value of jurisprudence at length.

In addition, it was apparent from the material examined in paragraphs 104 *et seq.* of the report that the practice of national courts was somewhat equivocal. The Special Rapporteur considered that such practice confirmed the auxiliary nature of subsidiary means, but the examples given showed that national courts did not have a very clear understanding of the role of subsidiary means. For instance, several of the examples showed that such means were used only in the absence of a treaty, as if subsidiary means had a suppletive, rather than an auxiliary, role. Such approximations demonstrated the value of the Commission's work on the topic, which could serve as a useful guide for national courts.

The short section of the report in which the Special Rapporteur asserted that teachings confirmed the auxiliary nature of subsidiary means was problematic, as the excerpts quoted did not really concern subsidiary means, but the role of case law as a means of developing law, which was a different subject. Furthermore, only a few authors, all from the common law tradition, were cited in said section. Recent work on precedents and jurisprudence in French by the Institute of International Law and the French Society for International Law deserved more than a mere mention in footnote 216 of the report. The Special Rapporteur should have used those references to help shape his conclusions and should draw on them in drafting the commentaries.

As a matter of principle, he did not disagree with draft conclusion 6, which reproduced in substance the Commission's commentaries adopted during the previous session concerning the auxiliary role of subsidiary means. However, in paragraphs 119 and 123 and

several times in his oral introduction of the report, the Special Rapporteur had referred to the "secondary" role of subsidiary means; as had been pointed out at the previous session, the term "secondary" reflected a different idea and should therefore be avoided. Moreover, the sources of international law were not, as proposed in draft conclusion 6 (a), limited to treaties, customary international law and general principles of law; that wording should be revised to cover all other sources of international law.

In respect of draft conclusion 6 (b), he agreed with previous speakers that the term "mainly" was problematic. It implied that subsidiary means had other functions, but did not specify them; they should be spelled out. The Institute of International Law, in its resolution of 1 September 2023 on "Precedents and case law (*jurisprudence*) in interstate litigation and advisory proceedings", had stated that case law could also play a significant role in the evolution of international law; and the International Court of Justice, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, had stated more specifically and, in his view, more accurately, that its role was, "in stating and applying the law", "to specify its scope and sometimes note its general trend". The idea that judicial decisions also served to "note the general trend" of international law should be included in draft conclusion 6.

Draft conclusion 6 should also specify that the use of a means as a subsidiary means was without prejudice to its use for other purposes. He questioned the assertion, in paragraph 124 of the report, that "subsidiary means" could have functions other than their auxiliary function; to his mind, they had only an auxiliary function, and that was precisely what characterized them. However, and this was a different idea, a means such as a judicial decision could be both a subsidiary means and, for example, an element of customary practice.

It was not for the Commission to address the other possible functions of means that could serve as subsidiary means, as proposed by the Special Rapporteur. The fact that a means that could serve as subsidiary means could also fulfil other functions lay outside the scope of the topic under consideration. Similarly, he had doubts about the assertion in paragraph 125 of the report that subsidiary means could serve as an independent basis for rights and obligations. A judicial decision might indeed, in some cases, give rise to obligations but, when used as a subsidiary means, it could not, as such, create rights or obligations in and of itself.

He agreed, at least on a general level, with the statements in draft conclusions 7 and 8, which were in line with his own contribution to the 2016 colloquium organized by the French Society for International Law. Although they might be perceived as contradicting each other – as draft conclusion 7 excluded the possibility of precedents while draft conclusion 8 asserted their persuasive value, which amounted to creating a *de facto* rule of precedent – they did reflect actual practice. For example, as noted with maybe some irony in observation 31 of the secretariat's memorandum, the International Court of Justice had relied on its own previous decisions to confirm that there was no rule of precedent, without that necessarily being contradictory.

Some clarification was, however, needed to avoid any risk of incompatibility between the two draft conclusions. That risk could be avoided by adding the words "legally binding" before "precedent" in the title of conclusion 7, as proposed by Mr. Galindo. The decisive point, as was correctly indicated at the end of draft conclusion 7, was that judicial decisions did not constitute "legally binding" precedents. However, that did not preclude them from playing a certain role as precedents, as explained in paragraph 158 of the report in the excellent quotation from the Report of the Inter-Allied Committee on the Future of the Permanent Court of International Justice. They could play that role provided that they were not considered to be legally binding on the judges and the parties.

It was, however, one thing for the role of case law to be described in such terms in the teachings, but quite another for those ideas to be taken up by the Commission in a text that would be read as having a certain normative scope. As an academic, he agreed with the general description of practice in draft conclusions 7 and 8, but believed the Commission should exercise caution in the wording of them in order to avoid any misunderstandings.

A first point in that connection was the need to avoid excluding the possibility that an international judicial decision might have binding effect beyond the case directly concerned.

As he had noted in the previous year's debate and as was mentioned in paragraph 9 of the memorandum, the value of precedents depended first and foremost on the specific rules of each court. It was therefore difficult to word draft conclusion 7 in a general manner. For example, a rule of precedent could be observed in some international administrative courts. Certain decisions of the Court of Justice of the European Union also had a specific effect, as did the decisions of the regional human rights courts to which Mr. Galindo had referred; there were thus many exceptions. The word "normally" in draft conclusion 7 was very ambiguous in that respect; much clearer, more explicit and precise wording should be found to cover the exceptions.

Secondly, the inclusion of the term "persuasive value" in an official text of the Commission could be problematic. As it was a very common-law oriented term, its use could, as Mr. Oyarzábal had said, be inappropriate in a text supposed to reflect the different legal traditions. According to the secretariat's memorandum, the concept of "persuasive authority" was used only by the international criminal courts, which tended to work in the spirit of common law; it was also employed in the area of investment arbitration, where common law reasonings tended to predominate. On the other hand, it did not seem to have been used by the International Court of Justice, which generally preferred to use more neutral expressions such as "settled jurisprudence" or to state that the Court took previous judicial decisions "into account" or "into consideration". Nor did the Institute of International Law use the term in its 2023 resolution on "Precedents and case law (*jurisprudence*) in interstate litigation and advisory proceedings". The secretariat's memorandum of the previous year (A/CN.4/759) showed that the Commission had never used it previously.

Moreover, the topic under consideration was not concerned with the effect of precedents, but rather, as stated in draft conclusion 1, with "the use of subsidiary means for the determination of rules of international law", which was a distinct, if related, subject. The Commission's role was not to question the effect of precedents, but to identify their possible use as subsidiary means.

Use of the term "persuasive value" might also imply that precedents actually had a form of binding effect and that, consequently, international courts could have a certain normative power. The Commission should accept the statement made by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, that it "states the existing law and does not legislate". Despite the Special Rapporteur's mischievous assertion in paragraph 88 of his report that "that statement could be seen as a mere denial aimed at reassuring States", in his view, the Court's statement should be taken at face value: the Court did not intend to create law and did not have that function. The Commission must not give the impression that it could get round that statement by attributing an autonomous legal effect to precedents.

However, that was what some of the Special Rapporteur's observations seemed to do. Paragraph 180 of the report went too far in its assertion that existing case law was "presumed" and that it was up to the party seeking to displace existing precedents "to displace that presumption". Establishing the law was not a question of assembling evidence and it was therefore not appropriate to reason in terms of presumption; the judge was expected to know the law, and it was not for the parties to prove it. It was also up to the judge to decide in each case whether to follow previous solutions. While the existence of precedents might facilitate that task, it did not relieve the judge of the duty to assess the merits of any precedent invoked before him. Indeed, the Special Rapporteur noted in paragraph 184 that the Court could only make use of precedents to the extent that it continued to hold the view that they reflected an accurate statement of the law. A precedent therefore, in and of itself, had no autonomous value but had to be reassessed by the judge in each case.

The argument in paragraph 203 of the report that any decision made by an international court would oblige all States, not only the parties to the dispute, to comply with it and that any failure to do so would constitute an unlawful act, was also problematic, as it amounted to creating a rule of precedent with binding effect *erga omnes*.

In draft conclusion 8, a clear distinction should eventually be drawn between two things: he had no issue with the idea that prior decisions were useful tools for the courts and that continuity in case law was legitimate and necessary for reasons of legal certainty and

predictability; but he would hesitate to explicitly characterize the value of precedents by saying that they had persuasive value or autonomous legal effect, as that could be perceived to contradict draft conclusion 7.

Thirdly, the implication in draft conclusion 8 that there was only one type of scenario and that the value of the precedents would be the same regardless of the situation required clarification. The aim of the Commission's work, as indicated in paragraph (3) of the general commentary adopted the previous year, was to propose a coherent methodology for the use of subsidiary means, and that required the formulation of more precise practical guidelines.

The role of a precedent differed depending on whether the prior decision had been made by the same or a different court. In the judgment on the 2010 case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, for example, the International Court of Justice had been careful to make a distinction between precedents depending on the type of judicial or quasi-judicial body that adopted them, and graded them accordingly. The role played by precedents also differed according to whether the legal question at stake was exactly the same as or only similar to the one under consideration. For example, the Court's interpretation of article 36 of the Vienna Convention on Consular Relations in the 2001 case concerning *LaGrand (Germany v. United States of America)* had been followed to the letter in subsequent cases relating to the same provision, but that would not necessarily happen in a case involving the interpretation of treaties that were comparable but not the same. In its most recent decision in the case concerning *Duarte Agostinho and Others v. Portugal and Others*, the European Court of Human Rights for instance had recalled that it was "not bound by interpretations given to similar instruments by other bodies, having regard to possible differences in the content of the provisions of other international instruments or possible differences in the role of the Court and that of other bodies".

The Institute of International Law had attempted in its September 2023 resolution to clarify the regime governing how prior judicial decisions were used, specifying, in paragraphs 3 and 6, in particular, the conditions under which such decisions might legitimately be used. Useful guidance could also be found in observations 47 and 155 of the secretariat's memorandum. One criterion that seemed important in practice was the degree of specialization of the court; the more specialized the court, the more weight was given to its decisions by other courts. Conversely, differences between the mandates or legal contexts of two courts could justify one of them not taking prior decisions of the other into account, as indicated in observation 210 of the memorandum.

There were many nuances in practice, as witnessed by the 310 observations in the memorandum, and clearly they could not all be reflected in the draft conclusions, but the Commission should go beyond the general guidance given in draft conclusion 8 and make it more specific. If the intention was to ensure that the Commission's conclusions were used and disseminated widely, as much detail as possible should be included in the text, rather than consigned to the commentary.

One possibility could be to divide draft conclusion 8 into two paragraphs. The first paragraph could take up, in simpler form, the principle set out in the current draft. The second paragraph would then explain the meaning of the principle in more concrete terms, identifying the types of court decisions that were particularly useful as subsidiary means. For instance, the *Diallo* case might be paraphrased as: "Great weight should be ascribed in particular to decisions adopted by a court or tribunal that was established specifically to supervise the application of the rule at hand." It could also be clarified that some decisions, such as those of a court acting in a field other than that of the rule in question or decisions interpreting a similar but not entirely identical rule, had a less important auxiliary role. It could also, as Mr. Galindo had suggested, be noted that the auxiliary role of subsidiary means depended on the universal or regional nature of the court; on whether it was permanent or not; and on whether it was a judicial or arbitral body.

Such clarification, which could be presented in the form of an indicative list, would enable readers to better identify the types of precedent that could be most useful and persuasive in supporting their legal arguments.

Fourthly, the indication in draft conclusions 7 and 8 that courts might follow their "prior decisions" was problematic, as a prior judgment between two parties was not a

"decision" in respect of other parties, precisely because there was no rule of precedent in international law. Rather than following "prior decisions", the courts followed the reasoning, conclusions or legal positions that they had reached in those prior decisions. As was clear from the quotation in paragraph 70 of the memorandum from the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice was not bound by its prior decisions but could follow the "reasoning and conclusions of earlier cases". That was a very good formulation that the Drafting Committee could take as an example.

Fifthly, a draft conclusion must be included to address the important issue of the reversal of case law, to indicate to practitioners the conditions under which an international court might change its case law. The recent work on the subject by the Institute of International Law was very instructive in that respect; the guidance in its September 2023 resolution was very different from that initially proposed by the two rapporteurs, which highlighted the complex and divisive nature of the issue. The wording of paragraph 5 of the resolution, noting that "established case law may be set aside for a legal reason duly stated, notably in light of the evolution of international law", might form a good starting point for the Commission's consideration of the question, supplemented by the information in the memorandum.

The criteria for the reversal of case law had not been clearly identified in current practice, as shown in the memorandum, and seemed to vary between courts and even within a court, as explained in observations 35, 72 and 207 and paragraph 331 *et seq* of the memorandum. Moreover, a comparison between observations 35 and 44 showed that the International Court of Justice had applied different criteria in departing from case law depending on whether the decisions at issue were its own or those of other courts. It might also be discussed whether practice in the area differed depending on whether it concerned an isolated prior decision or "settled" case law and, indeed, whether the expression "settled case law" had a precise legal meaning.

To sum up, he was of the view that the Commission could best serve the users of its work not by using a general and abstract formula to try to determine what the "value" of judicial precedents would be, but by attempting to specify more concretely the circumstances, conditions and criteria under which judicial decisions might be used as subsidiary means. Draft conclusion 8 already contained some elements in that regard, but needed to be further developed.

It should, furthermore, be remembered that the draft conclusions were aimed not only at courts and tribunals, but also – and perhaps primarily – at States and practitioners, who were called on, in the context of their functions, to determine the content of international law. When negotiating a maritime boundary or settling a legal dispute through diplomatic means, for example, each State must identify the rules that it could invoke in support of its claims. As it stood, draft conclusion 8 was addressed only to international courts and tribunals as users of precedents. It should be reworded to include other users too.

Mr. Nguyen said that he wished to commend the Special Rapporteur on his second report on the topic "Subsidiary means for the determination of rules of international law". The support expressed by States in the Sixth Committee should encourage the Commission to persist in considering subsidiary means to be auxiliary in character and not sources of international law.

He agreed with Mr. Reinisch that the word "auxiliary" should be replaced with "secondary" in proposed draft conclusion 6 (a). The secondary nature of subsidiary means had led the drafters of Article 38 of the Statute of the International Court of Justice to separate them from sources of international law and in effect create two lists in the article: one of sources of international law, which were law-creating, and the other, in Article 38 (1) (*d*), of subsidiary means, which were used in the interpretation and determination of rules of law. Furthermore, the word "generally" should be inserted before "secondary" because, while the wording of proposed draft conclusion 6 (a) suggested that subsidiary means could have only an auxiliary function, the Special Rapporteur had referred to other, specific functions in paragraphs 124 and 125 of his report. In draft conclusion 6 (b), care should be taken to prevent

any misunderstandings about the place of subsidiary means, as compared with the other sources of international law, in determining rules.

Care should be taken not to blur the boundary between the two lists contained in Article 38 (1) of the Statute of the International Court of Justice. The risk of such a blurring could be seen in paragraph 70 of the second report, which referred to subsidiary means as the law-determining agencies, and paragraph 124, which illustrated the potential for subsidiary means to play a gap-filling role similar to that of general principles of law in specific cases. Reading Article 38 (1) (*d*) in the light of articles 31 and 32 of the Vienna Convention on the Law of Treaties provided further support for the position that subsidiary means were subordinate to other sources of international law in the determination of existing rules. Tribunals and courts could utilize sources of international law and subsidiary means to ascertain the applicable law.

Although, as the Special Rapporteur observed in paragraph 73, no distinction had initially been made between judicial decisions and teachings and there had been no hierarchical relationship between them, the persuasive strength of each played a significant role in decisions as to which to use in determining the rules of existing law. In practice, collective judicial decisions carried more weight than individual teachings, but the significance of judicial decisions varied, with decisions on the competence of judicial bodies being utilized less frequently than substantive decisions. Advances in science and technology could enhance the value of teachings through the assistance of artificial intelligence. Whether it would be possible to consider teachings developed by or with the assistance of artificial intelligence as subsidiary means in the future would be an intriguing question to explore.

The Special Rapporteur had conducted a thorough analysis of the issue of precedent in international courts and tribunals, particularly with respect to the relationship between Article 38 (1) (*d*) and Article 59 of the Statute of the International Court of Justice. Article 59 delineated the non-binding nature of the Court's decisions, except between the parties involved and in respect of the specific case at hand, but it did not address the non-binding force of other judicial decisions on third parties not engaged in a particular dispute and it imposed no binding obligation on any State to consider teachings as subsidiary means in the determination of legal rules. The distinction between judicial decisions and teachings lay in the extent of their non-binding content. Judicial decisions had non-binding force with respect to third parties, whereas teachings served an advisory role for all. The intricacies of the relationship between Article 38 (1) (*d*) and Article 59 could be elucidated through an understanding that the formal rule governing the combination of the two articles aimed to prevent States from being subjected to external pressure without their consent. That aspect of the issue warranted further exploration.

How different judicial bodies used subsidiary means varied depending on their statutes, regulations, policies and traditions. The International Tribunal for the Law of the Sea directly invoked Article 38 of the Statute of the International Court of Justice in cases involving maritime delimitation. The Tribunal had the authority to employ subsidiary means other than the judicial decisions and teachings mentioned in Article 38 (1) (*d*) in determining the applicable law, provided that they did not conflict with the United Nations Convention on the Law of the Sea. The Tribunal was not prohibited from considering decisions of the International Court of Justice or other bodies, teachings, unilateral acts or resolutions of international organizations if it found them to be persuasive. In practice, however, the Tribunal reviewed its own prior decisions and those of the International Court of Justice, primarily for the sake of legal certainty and particularly owing to the partial overlap in their jurisdictions. Greater clarity was required as to the uniformity or fragmentation in the use of subsidiary means by different jurisdictions. A comparison of the Tribunal's advisory opinions on States' obligations under the United Nations Convention on the Law of the Sea to prevent, reduce and control pollution of the marine environment in the context of climate change and those of the International Court of Justice on States' obligations in respect of climate change could yield interesting observations for inclusion in future reports.

He concurred with the Special Rapporteur that judicial bodies, particularly the International Court of Justice, the International Tribunal for the Law of the Sea and the International Criminal Court, did not operate under a system of binding precedent. There was no rule requiring them to make reference to their own decisions or those of other judicial

bodies when determining the rules of existing international law in a specific case. The crucial aspect of any such references was that they reflected the persuasive strength of the arguments presented by those judicial bodies. The judicial decisions of the International Court of Justice were those most frequently cited, contributing to the establishment of legal stability, unity and consistency in international law. The function of the Court was to resolve various types of disputes between States, whereas other courts and tribunals had specialized functions. The comprehensive nature of the Court's rulings, coupled with the backing of the Security Council, underscored its significance. It also had a longer history than other courts and tribunals, which lent its decisions considerable weight. However, issues relating to the differing opinions that could arise as a result of the expansion of the jurisdiction of other courts, such as the International Tribunal for the Law of the Sea, in disputes relating to, for example, the delimitation of the continental shelf beyond 200 nautical miles or States' obligations with respect to climate change, should be explored.

Proposed draft conclusions 7 and 8 complemented each other. However, the use of the phrases "do not normally follow" and "may follow" rendered those draft conclusions inconclusive as to whether the prior decisions of international courts and tribunals were legally binding precedents. The commentary to draft conclusions 7 and 8 should clarify whether the phrase "international courts or tribunals" included quasi-judicial bodies. The contributions made by judicial bodies other than the International Court of Justice, the International Tribunal for the Law of the Sea and the International Criminal Court, such as regional human rights courts, investor-State arbitration bodies and the Dispute Settlement Body of the World Trade Organization, should be considered in order to ensure the representativeness provided for in draft conclusion 3 (a). Representativeness must also be ensured through an analysis of teachings reflecting all regions and countries and different legal systems. He supported the referral of the draft conclusions to the Drafting Committee, taking into account his comments and those made by others during the debate.

Ms. Mangklatanakul said that she wished to commend the Special Rapporteur for his thought-provoking second report. Although the comments made by States in the Sixth Committee had generally concerned the draft conclusions adopted at the Commission's previous session, several of the issues raised should be highlighted in connection with the Commission's consideration of the Special Rapporteur's second report. First, as most States had reiterated that subsidiary means were not a source of law, it would be prudent for the Commission not to put too much weight on subsidiary means. Second, while several States had welcomed the use in the draft conclusions of the formulation "decisions of courts and tribunals", which was broader than the language found in the Statute of the International Court of Justice, others had asked for the relationship between the language of the draft conclusions and that of the Statute to be clarified. The Commission should provide that clarification in the relevant commentary.

Although the Special Rapporteur had, in his report, suggested addressing States' comments at the first reading stage, it would be preferable for the Commission to take them into account in its work going forward, particularly in terms of clarifying that subsidiary means were not a source of law. Such a course would be advisable since, as rightly noted in the report, the various aspects of the topic were interconnected. For example, draft conclusions 2 (a) and 4, which addressed decisions of courts and tribunals, were relevant to proposed draft conclusions 7 and 8, which also discussed decisions. Addressing States' comments as soon as possible would allow for a more streamlined first reading and for a more coherent set of draft conclusions.

Proposed draft conclusion 6 concerned the very nature and function of subsidiary means, which were central to an understanding of subsidiary means generally; it would therefore be better placed before draft conclusions 4 and 5, which addressed decisions and teachings, respectively. She was pleased that the distinction between sources of law and subsidiary means had been made clear throughout most of the second report. As had been stressed by many Commission members, including herself, at the seventy-fourth session, and by States in the Sixth Committee, subsidiary means could not be regarded as sources of law. It was important for the separation between subsidiary means and sources of law to be maintained, in line with the wording of the Statute of the International Court of Justice and

with State and judicial practice. The Commission should therefore avoid putting too much weight on subsidiary means in any of the draft conclusions.

The description in proposed draft conclusion 6 (a) of subsidiary means as "auxiliary in nature" vis-à-vis sources of law could potentially be misconstrued by some readers as suggesting that subsidiary means were a source of international law but of lesser normative status. Subsidiary means were not just auxiliary, but also completely different in nature. It would be helpful to have an express statement in the draft conclusion that subsidiary means were not in themselves sources of international law. The description of sources of international law as being "found" in treaties, customary international law and general principles of law was perhaps also misleading, as treaties, customary international law and general principles of law were sources of international law in and of themselves.

Proposed draft conclusion 6 (b) addressed the fundamental question of what subsidiary means were used for. Article 38 (1) (*d*) of the Statute indicated that they were to be used for "the determination of rules of law". In her view, the three functions referred to in proposed draft conclusion 6 (b) – the identification, interpretation and application of rules of international law – fell under the concept of "determination" and were not distinct from it, as it was clear that the term "determination" as used in Article 38 (1) (*d*) covered the determination of both the existence and content of a rule. The relationship between the various terms was not made clear in the second report, and the distinction that the Special Rapporteur sometimes seemed to draw between "determination" and the other three terms – such as in paragraph 65, which referred to "both the identification and determination of rules of international law", suggesting that "identification" and "determination" were two different concepts – was, in her view, misleading. The relationship between the different terms used to denote the functions of subsidiary means should be discussed and clarified in the Drafting Committee.

Furthermore, it was unclear from the wording of the proposed draft conclusion whether the list of functions that it set out was meant to be exhaustive. She would welcome the Special Rapporteur's views on the many words and phrases that had been used in an interchangeable and overlapping manner in the academic literature and by the Commission itself when discussing the functions of subsidiary means, including "identification", "confirmation", "ascertainment", "proof of existence", "piece of evidence", "clarification", "elucidation", "interpretation", "application", and "determination of the existence and content of the rules". In addition, the use of the word "mainly" in the proposed draft conclusion raised the question of whether subsidiary means were resorted to on other occasions. Either that question should be addressed or the word "mainly" should be deleted.

She welcomed the Special Rapporteur's attempt to address the issue of precedent and his analysis of the practice of courts and tribunals. As she had noted during the Commission's seventy-fourth session, it was important to recognize that Article 38 (1) (*d*) had been drafted specifically to help judges of the International Court of Justice determine rules of law for the settlement of disputes. That use should be distinguished from the broader use that other actors could make of the provision and that could go beyond its strict meaning. The Commission must ensure that its work in no way interfered with judges' exercise of their judicial discretion or constitute a *de facto* amendment to Article 38 (1) (*d*), either by adding new elements to the provision or restricting its application. The Commission's aim should be to clarify the scope and use of the provision on the basis of existing practice.

As drafted, proposed draft conclusion 7 indicated that decisions of international courts or tribunals were not "normally" binding, which could be understood to suggest that prior decisions could be legally binding under certain circumstances. Further consideration should be given to the proposed text so as to prevent such an understanding, which would expand the scope of Article 38 (1) (*d*) and was alien to the international system. Judicial decisions merely reflected existing rules of international law and had no norm-making effect; in other words, they were not sources of international law.

While there was no universally accepted meaning of the term "precedent", it implied, especially in common law systems, that courts were compelled to follow the decisions of higher courts. Such a notion could not be transplanted onto the international system because, first, as Mr. Oyarzábal had noted, the international system was based on State consent; second,

there was no higher court or hierarchy of courts in international law; and third, international jurisprudence, especially in the context of international arbitral tribunals where the parties appointed the arbitrators, was often chaotic and inconsistent. The Commission should use the term "precedent" with caution and its usage should be clarified in the Drafting Committee.

Proposed draft conclusion 8 restated a well-known fact concerning the practice of international courts and tribunals. It would be worth reflecting on the value added by proposed draft conclusions 7 and 8, as all international courts and tribunals had specific rules governing the types of primary sources that they could use. Furthermore, the common practice of citing prior decisions in analogous cases was largely a matter of courtesy.

While the "persuasive value" of decisions of national courts as subsidiary means for the determination of rules of international law had been alluded to by the Special Rapporteur in the context of the debate in the Sixth Committee, the proposed draft conclusions made no mention of such decisions. She agreed with Mr. Reinisch that decisions of national courts should not be regarded as less important than those issued by international courts and tribunals. However, they should be used with caution when determining rules of international law.

Dualist States, where international law had to be incorporated into national law before it could be applied, were more difficult to study and thus risked being underrepresented, especially when the national languages of such States did not include English or French. That concern had already been discussed by the Drafting Committee during its consideration of draft conclusion 4 (2), which stated that decisions of national courts could be used as a subsidiary means "in certain circumstances". However, in her view, it would be remiss of the Commission not to address the persuasive value of such decisions at least in the commentary to the draft conclusion in question, if not in the draft conclusion itself. It had been confirmed by the International Court of Justice in, *inter alia*, the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, and by the Commission in conclusion 13 of its conclusions on identification of customary international law and in draft conclusion 8 of its draft conclusions on general principles of law, that judicial decisions included decisions of national courts. Moreover, national jurisprudence could help to clarify concepts in international law, especially those originating in national law. For example, the concept of intergenerational equity, which was being considered in the context of the request by the General Assembly for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, had originated in clearly developed doctrines in English trust law.

As for the Commission's future work on the topic, she looked forward to the Special Rapporteur's analysis of the teachings of the most highly qualified publicists in his third report. She had taken due note of his discussion of other subsidiary means and the proposed list of subsidiary means to be studied further, which included unilateral declarations or acts of States and decisions and resolutions of international organizations. However, she still had reservations, which had been echoed by States in the Sixth Committee, about the proposal to explore subsidiary means other than judicial decisions and teachings at that juncture, since, under Article 38 (1) (*d*) of the Statute of the International Court of Justice, only judicial decisions and teachings could be used as subsidiary means for determining rules of international law. To consider additional subsidiary means could lead to a misinterpretation of Article 38 (1) (*d*) and create confusion. While she was of course open to discussing the existence and usefulness of other subsidiary means, if such a discussion would benefit States as the primary users of the Commission's outputs, the Special Rapporteur might first wish to conclude his work on the subsidiary means listed in Article 38 (1) (*d*) and clarify whether other subsidiary means could be included under those two categories before considering whether to explore a new category in a future report.

She had likewise taken note of the Special Rapporteur's suggestion that the interaction between the subsidiary means for the determination of rules of law and the supplementary means of interpretation set out in the Vienna Convention on the Law of Treaties should be discussed in a future report. However, the Commission should exercise caution in exploring that relationship. While it was true that the two provisions were related insofar as article 32 of the Vienna Convention, which referred to the preparatory work of treaties as a supplementary means of interpretation, could be used to help ascertain the meaning of

"subsidiary means" as envisaged in Article 38 (1) (*d*) of the Statute of the International Court of Justice, that relationship was only superficial, as article 32 applied to every treaty in the same way.

Article 38 (1) (*d*) of the Statute of the International Court of Justice and article 32 of the Vienna Convention on the Law of Treaties differed in many respects. First, article 32 referred only to "interpretation", whereas Article 38 (1) (*d*) referred to "determination", which was broader in scope. Second, article 32 mentioned only "supplementary" means, whereas Article 38 (1) (*d*) mentioned "subsidiary" means. A preliminary discussion of the differences between those two terms would need to take place before the issue could be explored in a future report. Third, the provisions each had a different purpose. Article 32 referred specifically to the interpretation of treaties, whereas Article 38 (1) (*d*) referred to the determination of rules of law in general. Fourth, the two provisions were intended for different audiences. Article 32 had been drafted for interpretation by States parties to the Vienna Convention on the Law of Treaties and could be used by courts, academics and the wider public to substantiate their reasoning. However, Article 38 (1) (*d*) had been drafted specifically for judges of the International Court of Justice to determine rules of law and had a smaller scope. Fifth, and most fundamentally, although the two provisions might both relate to interpretation, that interpretation was assisted by different means. While article 32 was non-exhaustive, it referred specifically to the preparatory work of treaties as a supplementary means of interpretation; Article 38 (1) (*d*), on the other hand, concerned the assistive value of judicial decisions and teachings.

She recommended sending all the draft conclusions to the Drafting Committee, where she hoped that her concerns would be addressed in full.

Mr. Asada, thanking the Special Rapporteur for his excellent second report, said that, in paragraph 123, the Special Rapporteur had concluded that the subsidiary means referred to in Article 38 (1) (*d*) of the Statute of the International Court of Justice were not sources of international law but secondary means or materials mainly or usually resorted to in the process of identifying, determining or applying rules of international law to address a legal question. He wished to recall that, at its seventy-fourth session, the Commission had discussed whether to refer to the "identification or determination" of rules of international law or simply to the "determination" of such rules and had ultimately decided to replicate the wording used in Article 38 (1) (*d*) of the Statute, namely "determination", in draft conclusions 1 to 5. He wondered why the Special Rapporteur had departed from the consensus reached by the Commission by referring to "identifying" and "applying" rules of international law in that paragraph.

Curiously, proposed draft conclusion 6 (b) used different wording again when it stated that subsidiary means were mainly resorted to when "identifying, interpreting and applying" the rules of international law. He wondered whether there might be an inconsistency between the language used in paragraph 123 and that used in proposed draft conclusion 6 (b). However, if the Special Rapporteur's intention in proposing draft conclusion 6 (b) was to clarify the meaning of the word "determination" in Article 38 (1) (*d*) of the Statute by referring to "identifying, interpreting and applying", that point should be made more explicit.

The wording of proposed draft conclusion 6 (a) was problematic, as sources of international law were not something "found" in treaties, customary international law or general principles of law; rather, treaties, customary international law and general principles of law were themselves sources of such law. Furthermore, it was arguably not the most appropriate place to discuss what constituted sources of international law. He proposed deleting the reference to treaties, customary international law and general principles of law and ending the sentence after "sources of international law". He wondered whether, for the sake of coherence, it might not be advisable to place proposed draft conclusion 6, which discussed the nature and function of subsidiary means as a whole, immediately after draft conclusion 2, which listed the categories of subsidiary means, and before draft conclusion 3, which set out the general criteria for their assessment.

He concurred with the Special Rapporteur's assessment in paragraph 124 of the report that, while the main role of subsidiary means was to perform an auxiliary function, the possibility of subsidiary means performing "other more specific functions" should not be

ruled out. However, he was uncertain as to whether addressing legal lacunae, or gap-filling, in international law was one of them. To refer to subsidiary means as a gap-filler could lead to a serious misunderstanding, as doing so implied that subsidiary means were at least partly equivalent to general principles of law, which were a source of international law characterized by their gap-filling function, whereas subsidiary means were not.

A similar but more problematic statement was found in paragraph 125 of the report, which stated that subsidiary means could "serve as an independent basis for the rights and obligations of the subjects of international law". Members would recall that draft conclusion 10 (2) (b) of the Commission's draft conclusions on general principles of law stated that such principles could serve, *inter alia*, as a basis for primary rights and obligations. In the Sixth Committee, some States had indicated, in relation to that draft conclusion, that the possibility of general principles of law being an autonomous source of rights and obligations could risk overriding the will of States in the creation of rules of international law. That criticism could *a fortiori* apply to subsidiary means if they were intended to serve as an independent basis for rights and obligations, as asserted in the report.

The functions outlined in paragraphs 124 and 125 arguably went beyond those that subsidiary means for determining rules of international law might reasonably be expected to perform. In fact, such functions were typically associated with sources of international law, which conflicted with the Special Rapporteur's repeated assertion that subsidiary means were not sources of international law.

As for part IV of the report, on the general nature of precedent in domestic and international adjudication, he broadly agreed with the Special Rapporteur's explanation of the relationship between case law, jurisprudence, judicial decisions and precedents in municipal legal systems and concurred with his understanding of the doctrine of *stare decisis* in common law systems, which required judges to follow accepted and established legal principles set out in previous cases. While no such doctrine existed in the international legal system, the International Court of Justice and other international courts and tribunals generally followed their previous decisions in order to ensure legal stability and predictability.

The implications of the inclusion of a reference at the beginning of Article 38 (1) (*d*) of the Statute of the International Court of Justice to Article 59 of the Statute, which provided that the decision of the Court had no binding force except between the parties and in respect of the case in question, were worth exploring. The two provisions differed in several respects. First, Article 59 was addressed to the parties to the dispute, whereas Article 38 (1) (*d*) provided for subsidiary means by which the Court might determine rules of law. Second, while the subject of Article 38 (1) (*d*) was the question of prior decisions, Article 59 did not address that subject. Third, Article 59 concerned only the decisions of the International Court of Justice, whereas Article 38 (1) (*d*) referred to judicial decisions in quite general terms. There was thus reason to conclude that the reference to Article 59 in Article 38 (1) (*d*) was not relevant to judicial decisions considered a subsidiary means for the determination of rules of law.

While he was inclined to agree with the Special Rapporteur that the purpose of Article 59 was to ensure that the decisions of the International Court of Justice, as such, bound only the parties to the case concerned, he failed to understand why the Special Rapporteur had chosen to examine the functions of Article 59 in such depth in the report. In his view, further discussion of the reasons for and the consequential effects of referring to Article 59 at the beginning of Article 38 (1) (*d*) of the Statute of the Court would have been more useful.

The Special Rapporteur's referring to the "narrow legal effect" and the "broader legal effect" of decisions by international courts and tribunals in paragraph 179 and elsewhere in the report did not sit well with him. The language "narrow legal effect" seemed to be used to refer to the binding force of the judgments of the International Court of Justice between the specific parties to the dispute in the specific case in question, as provided for in Article 59 of the Statute of the Court, while the term "broader legal effect" appeared to correspond to the function that subsidiary means could perform under Article 38 (1) (*d*). However, such terminology was misleading. He suggested replacing the language "narrow legal effect" with "[legally] binding force" and "broader legal effect" with "potential legal effect".

He fully agreed with the Special Rapporteur's assessment that the practice of the Permanent Court of International Justice and the International Court of Justice had shown that there was no need to resort to doctrines of binding force of precedent in international law. Once a statement of law had been found to be correct, States should – but were ultimately not obliged to – conform to it until the rule was no longer considered a correct interpretation of the law.

The scope of the phrase "international courts or tribunals" in proposed draft conclusions 7 and 8 was unclear. While the original focus of the topic was the subsidiary means referred to in Article 38 (1) (*d*) of the Statute of the International Court of Justice, the Special Rapporteur's second report appeared to have broadened the scope of consideration by including, for example, article 21 of the Rome Statute of the International Criminal Court. If the scope of the phrase "international courts or tribunals" was meant to encompass all international courts and tribunals, which would be preferable, then the language "when settling disputes between States or international organizations or issuing advisory opinions" in proposed draft conclusions 7 and 8 seemed overly restrictive, as it excluded human rights, investment and criminal courts and tribunals which adjudicated cases involving individuals. Wording along the lines of "when adjudicating international law cases or issuing advisory opinions" might better capture all relevant judicial institutions. The Special Rapporteur might also consider clarifying the scope of the topic at hand.

Proposed draft conclusion 7, as currently worded, was ambiguous and could be read in at least two different ways. It should be reworked to clarify that international courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions, normally followed their own prior decisions or those of other courts and tribunals, but not as legally binding precedents.

Regarding proposed draft conclusion 8, the Special Rapporteur might have usefully included in the report more thorough research on and examinations of cases where the International Court of Justice or other judicial institutions had not followed relevant precedents, and he might have proposed a draft conclusion reflecting such research and examinations.

He supported sending proposed draft conclusions 6, 7 and 8 to the Drafting Committee.

The meeting rose at 11.40 a.m.