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International Law Commission

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Provisional summary record of the 3666th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 14 May 2024, at 10 a.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	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. 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)

Ms. Oral said that she wished to commend the Special Rapporteur for the high quality of his second report on the topic "Subsidiary means for the determination of rules of international law". While chapter III of the report was intended to apply to all subsidiary means, there were, in her view, differences between the nature and function of judicial decisions and those of teachings. Those differences were reflected to some extent in the draft conclusions proposed by the Special Rapporteur but should have been delineated more clearly.

She agreed with Ms. Ridings that it would be helpful to have clarification regarding the distinction, if any, between the "assistive" and "auxiliary" functions of subsidiary means discussed in paragraph 77 of the report. While it was generally agreed that subsidiary means were by nature auxiliary to sources of law and were not themselves sources of law, the adjective "auxiliary", which was used in proposed draft conclusion 6 (a), did not fully reflect the role played by subsidiary means, especially judicial decisions, in practice. The additional subset of functions listed in proposed draft conclusion 6 (b) – the identification, interpretation and application of rules of international law derived from the sources of international law – also failed to fully encompass the range of functions and effects that subsidiary means had in practice.

In light of extensive judicial practice spanning more than a century, the Commission should perhaps not limit the functions of international judicial decisions to those set out in proposed draft conclusion 6. In addition, there should perhaps be a more nuanced analysis of the effects of judicial decisions, including those effects that Ms. Galvão Teles had noted. She agreed with Ms. Galvão Teles that the use of judicial decisions as subsidiary means for determining the existence or content of a rule must be distinguished from their use as evidence of the formation of a rule of customary international law. While it was true that the decisions of international courts and tribunals had no formal law-making function, such decisions exerted significant influence in practice on the codification of international law and the practice of States, and thereby on the development of rules of international law.

The contribution of judicial decisions to the shaping of international law had begun with the early cases of the Permanent Court of International Justice. Repeated citations of judicial decisions provided for continuity and served to legitimize and consolidate the status of rules of international law that might otherwise have been continually challenged, as even the clearest sources of international law could give rise to differing interpretations. Through such serial citations as well as teachings, the rule of international law assumed a certain authority and permanence. For example, the well-known decision of the Permanent Court of International Justice in the *Case concerning the Factory at Chorzów* had become an authoritative reference and had shaped the international law duty relating to reparations; the arbitral award in the *Trail Smelter Case* continued to be cited by international courts and tribunals and scholars; and the 1951 judgment in the *Fisheries Case (United Kingdom v. Norway)* had been foundational in launching the straight baseline formula that had eventually been codified in article 4 of the Convention on the Territorial Sea and the Contiguous Zone and article 7 of the United Nations Convention on the Law of the Sea.

A similar argument could be made with respect to advisory opinions. In the *Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, the Special Chamber of the International Tribunal for the Law of the Sea had stated that, in its view, determinations made by the International Court of Justice in an advisory opinion could not be disregarded simply because the advisory opinion was not binding.

She agreed that, as the Special Rapporteur noted in paragraph 200 of the report, there was a distinction between the force of a decision itself and the force of international law as authoritatively expressed in a decision. The issue of authoritativeness was closely related to that of precedent.

With respect to the relationship between Article 38 (1) (*d*) and Article 59 of the Statute of the International Court of Justice, it was important to distinguish the effect of judicial decisions on future cases from the common law concept of *stare decisis*. She agreed with Mr. Reinisch that the focus should not be on the narrow doctrine of *stare decisis*, but on the rule of law requirements that like cases must be decided in a like fashion and that there must be a minimum of consistency and predictability in the outcome of adjudicatory dispute settlement proceedings. The Government of the Republic of Korea had also touched on that important point in its comments on the topic, when it noted that the decisions of international courts and tribunals were crucial for the protection of the rule of law in international relations. In addition, as stated in the memorandum by the secretariat on subsidiary means for the determination of rules of international law (A/CN.4/765), the Permanent Court of International Justice had referred on a number of occasions to the importance of consistency with its prior decisions in the absence of sufficient reason to depart from them, and on a number of occasions, the International Court of Justice had referred to the value of consistency of judicial decisions and of international law. In her view, the draft conclusions had not captured those important aspects of judicial decisions in their role as subsidiary means.

The role of judicial decisions in relation to the unity and coherence of international law, an issue sometimes referred to as fragmentation, should be further analysed, with a view to identifying the areas of law in which the jurisprudence was coherent and consistent and those in which it was not. Furthermore, some important aspects of judicial decisions, such as the role that they played in creating continuity, predictability and coherence in international law and the authoritative character that they could have in the development of international law, had perhaps been overlooked in the proposed draft conclusions.

In proposed draft conclusion 6 (b), the adverb “mainly” should be deleted. If it was retained, its meaning must be explained. It would perhaps have been preferable to address the decisions of courts and tribunals, on the one hand, and teachings, on the other, in separate draft conclusions, rather than addressing all subsidiary means in proposed draft conclusion 6, as their roles and influence differed. The use of the adverb “normally” in proposed draft conclusion 7 suggested that there were exceptions to the statement set out therein and raised questions as to what those exceptions might be. That draft conclusion was perhaps an appropriate place to address the authoritative nature of some decisions of international courts and tribunals. In the title of proposed draft conclusion 8, the reference to “value” appeared subjective, and the adjective “persuasive” did not fully capture the different functions and effects of judicial decisions. Mr. Reinisch’s observation about the role of international courts and tribunals in creating legal certainty and predictability by following prior decisions could be addressed in that draft guideline. She supported the referral of the proposed draft conclusions to the Drafting Committee.

Mr. Zagaynov, after thanking the Special Rapporteur and the secretariat for the second report and the second memorandum, which focused on valuable topics, said that unfortunately, as other speakers had noted, the report once again relied mainly on the works of English-speaking authors; the Commission needed to give some thought to how best to draw on the views of scholars from different legal systems and regions of the world.

He agreed with those members who had already questioned the scope and representativeness of the case law considered and the relevance of the decisions of the international criminal justice institutions. The Commission should not forget the harsh criticism by a number of States of the activities of those bodies, primarily the International Criminal Court, and their rejection of its methods and approaches. In addition, the subsidiary sources used by the International Criminal Court should not be confused with subsidiary means for the determination of law, as was done in paragraphs 99 to 101 of the report.

Like some other members, he did not agree with the Special Rapporteur that subsidiary means might have other functions, such as those of “addressing lacunae in the law” and “complementing the rules of international law”, as they were not sources of law. The function of addressing lacunae was related, rather, to general principles of law, which the Commission was considering as a separate topic. He had previously suggested that the idea of an informal hierarchy among the sources of international law, as proposed in paragraph 68 of the report, should be considered under that topic, perhaps during the second reading of

the relevant draft conclusions, at which point the Special Rapporteur's analysis would be a useful contribution to the debate.

It was important to take account of the positions that States had expressed on the matter: they had noted the importance of distinguishing between the subsidiary function and the function of establishing norms of international law, which was done by the subjects of international law.

It was, of course, possible to reach completely different conclusions if judicial decisions and doctrines were considered not as subsidiary means for the determination of rules of law, but as materials that could influence the rule-creating process. Subjects of international law clearly did not exist in a vacuum, uninfluenced by the doctrines and decisions of authoritative courts, when participating in law-creating activities. But a delineation must be established between the rule-creating process and the process of determination of rules of law, as, while they were based on the same materials – judicial decisions and doctrines – they could have completely different functions.

Not all speakers had agreed on the usefulness of considering issues related to fragmentation and coherence in the work of courts under the present topic, as the Special Rapporteur proposed. However, if it was decided to do so, attention should be paid to the decisions of national courts as subsidiary means.

Note had been taken, in paragraph 46 of the report, of a number of States that had, in the Sixth Committee, expressed disagreement or concern with the idea of expanding the list of subsidiary means beyond that currently contained in the Statute of the International Court of Justice. The Russian Federation should be added to their number. He had expressed his own opinion on the matter the previous year and other members had done so during the current session. More clarity might emerge after the functions of judicial decisions and doctrines had been discussed but, in any case, careful attention must be paid to the positions of States on the matter.

In the first part of proposed draft conclusion 6, the attempt to define the "nature" of subsidiary means raised several questions: firstly, different language versions used different terms in the paragraph. The term used in English was "nature", while in Russian, it was "*kharakter*"; in Spanish "*carácter*"; and, in French, the words "*nature*" and "*caractère*" were used alternately. In his view, there was a certain semantic difference between them. In Russian, the term "*priroda*", meaning "nature" in English, seemed to emphasize the inherent substance of the notion.

As to whether "subsidiary means" had a special nature of their own, he was of the view that judicial decisions and doctrines did not have a common nature. What they did have in common was that, because of their features and characteristics – for example, the quality of legal argumentation or persuasiveness – they could be used by a court or other body to help in determining the rules of law. He was not convinced that the objective of the draft conclusions required the nature of judicial decisions and doctrine to be determined. Rather, what the Special Rapporteur considered to be their nature related more to the characteristics of their functions. The function of subsidiary means, unlike that of sources, was not to generate or contain a rule of international law, but, as others had already said, to assist practitioners of international law in determining the rules. In any case, if it was to be attempted to identify the nature of subsidiary means, then one should speak of that nature precisely for the purpose of determining the rules of law.

A further issue in the proposed draft conclusion, already noted by others, lay in the use of the related concepts "auxiliary" and "subsidiary". The two terms were generally translated into Russian by the same word: for example, in the United Nations Convention on the Law of the Sea and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention (I)), the term "auxiliary" was rendered in the authentic text in Russian by the same word used for the concept of "subsidiary means" in Russian. The attempt in the Russian version of proposed draft conclusion 6 to distinguish between the two concepts was not entirely successful from a linguistic point of view. The Special Rapporteur should thus consider alternative approaches, such as clarifying in the wording that subsidiary means were not a source, which was one of the key distinguishing features that had been highlighted in the discussion; that was worth

mentioning in the text of the draft conclusions, rather than just in the commentary to draft conclusion 2, as it would better explain the concept of subsidiary means and overcome the terminological issues.

Some clarification was also needed in the second part of the wording of draft conclusion 6 (a), if it was to be retained; the phrase "found in" would appear to be incorrect in the context.

Paragraph (b) of proposed draft conclusion 6 referred to cases in which subjects of the law might "mainly" resort to subsidiary means, but did not explain what the function of the subsidiary means might be. The function was probably to assist in determining the rules of law. It would also be worth combining the two paragraphs of the proposed draft conclusion.

The wording of paragraph (b) referred to the identification, interpretation and application of rules of international law, but it was unclear whether those were elements of the determination process or something such as stages in the work of a court or other entity or body that applied the law.

If, as was suggested in draft conclusion 4 (a), the determination of rules of law encompassed the existence and content of rules of law, that would seem to be in line with the purposes of identification and interpretation. However, in the case of application, it was unclear what use of subsidiary means was being referred to. If the content of rules of law needed to be determined at the stage of their application, the question of interpretation would arise again.

The text of proposed draft conclusion 6 (b) appeared to refer not to a function but to situations in which subsidiary means could be used, without explaining how those situations related to the determination of rules of law.

He generally agreed with the approach adopted in proposed draft conclusions 7 and 8, affirming the non-binding nature of precedents in international law. However, in respect of the terminology, it would have been helpful to have a clarification of the term "judicial decisions". It was noted in paragraph 163 of the report that, for the International Court of Justice, a reference to a judicial decision was an allusion only to the operative part of the judgment, the *dispositif*, and not to the reasons in support of it, the *motifs*. That reflected the view that a judicial decision was essentially an act that generated rights and obligations for the parties to a particular case. It was the operative part, and not other parts of the decision or other acts of the court, that was binding on the parties.

Proposed draft conclusion 8, however, apparently referred to what was sometimes in doctrine, including in Russian doctrine, called a "normative proposition". The concept, which meant a description of the law from the viewpoint of the court and what it prescribed, was used in the philosophy of law and could be found in the Commission's debates on other topics. Such terminology might help to provide a more precise differentiation between the part of a judicial decision that was binding only on the parties and a court opinion – a normative proposition – regarding, for example, the existence of an international custom.

It was true, as highlighted in paragraph 155 of the report, that the International Court of Justice did not have to start afresh each time; it could refer to its findings, positions or normative propositions, but the latter could not, in themselves, be binding. In particular, subjects of international law could support a normative proposition formulated by the Court by, for example, referring to it in a new dispute with other parties. The opposite could also occur, if the international community of States did not agree with a position adopted by the Court.

It had been suggested during the debate that detailed criteria should be developed to guide the use of the conclusions of various courts in determining the rules of international law. In particular, attention had rightly been drawn to the importance of whether a judicial body was specialized in a particular area of international law. However, it was still unclear what a detailed list might look like and how it would relate to the existing content of draft conclusion 3. Perhaps the Special Rapporteur had not yet carried out a sufficiently detailed analysis in that regard.

He shared the doubts expressed by other speakers in respect of the criterion of "persuasive value" proposed in draft conclusion 8. Furthermore, the wording did not indicate clearly whether the phrase "those decisions address analogous factual and legal issues and are found persuasive" referred to all judicial decisions or only those of other international courts or tribunals, not a court's own prior decisions.

He was in favour of referring the proposed draft conclusions to the Drafting Committee.

Mr. Patel, thanking the Special Rapporteur for his insightful and detailed second report, said that, based on the discussions at the seventy-fourth session, he understood that the Commission's mandate was to clarify and substantiate the nature and function of subsidiary means for the determination of rules of international law and their relationship with the other sources of international law, and the nature of precedent in international law.

In 2023, the Drafting Committee had deliberated on the assistive or auxiliary function of subsidiary means and had concluded that both of the subsidiary means listed in Article 38 (1) (*d*) of the Statute of the International Court of Justice, namely judicial decisions and teachings, assisted in the identification and determination of rules of law. The Special Rapporteur had taken the view that judicial decisions and teachings were subordinate to the sources of international law set out in Article 38 (1) (*a*) to (*c*), namely international conventions, international custom and general principles of law, and that Article 38 (1) in fact established two separate lists: one of sources from which rules of international law could be extracted or created and another of the means by which such rules could be identified and determined. The scope of judicial decisions and, by implication, subsidiary means, had been addressed by Sir Robert Jennings when he had remarked that even law-creating court decisions must be seen to emanate from existing and previously ascertainable law. Mr. Shabtai Rosenne, for his part, had emphasized the subsidiary character and assistive or auxiliary function of judicial decisions by describing the subsidiary means listed in Article 38 (1) (*d*) as a "storehouse" from which the rules of the sources of law mentioned in Article 38 (1) (*a*) to (*c*) could be extracted. Furthermore, as pointed out by Sir Humphrey Waldock, subsidiary means were a different kind of "source" of international law from conventions, custom and general principles of law. Unlike the latter, however, subsidiary means could not accord principles the status of a legal rule; rather, they provided plausible evidence which might assist the Court in confirming the existence of a conventional or customary rule or of a general principle of law.

He therefore agreed that the main function of subsidiary means, which were confirmed as auxiliary in character and "not sources of law that may apply in and of themselves", was "to assist or to aid in determining whether or not rules of international law exist, and if so, the content of such rules", and supported the conclusions presented by the Special Rapporteur in paragraphs 123 and 124 of the report. Subsidiary means thus served as a useful tool for improving understanding and increasing the efficiency of international law processes and for determining other rules of international law. While the role of subsidiary means among the sources of international law listed in Article 38 (1) (*a*) to (*c*) of the Statute of the International Court of Justice had been clarified, it should also be made clear that it was the function of subsidiary means that was auxiliary, not their nature, as pointed out by Mr. Reinisch.

Whereas, in paragraph 65 of the report, the Special Rapporteur referred to the "interpretative, persuasive and the codification/progressive development functions of teachings" as the second category of subsidiary means outlined in Article 38 (1) (*d*) of the Statute, in paragraph 89, he asserted that teachings were rarely cited by the Court in its majority decisions and were found mostly in separate opinions. That contradiction begged the question of how teachings could assist in codifying and progressively developing rules of international law. It was also unclear why States might decide to bring their conduct into line with a doctrine or legal test proposed by a highly qualified publicist when he or she had no first-hand experience of the jurisdiction in question. Even if teachings had a role to play in the codification and progressive development of international law, an assessment needed to be made as to whether the teachings cited by judicial institutions other than the International Court of Justice were widespread and representative of all the major legal systems of the world.

The Special Rapporteur's conclusion in paragraph 104 of the report that national courts treated subsidiary means as auxiliary was based on the practice of only four nations, belonging to just two different regional groups of the United Nations. The Indian courts had borne out the Special Rapporteur's assessment. For example, in *Gramophone Company of India Ltd v. Birendra Bahadur Pandey and Others*, the Supreme Court of India had relied on teachings of the most qualified publicists to identify the rules of international law applicable to the legal question that had arisen in that case. In *Ravinder Kumar Dhariwal and Anr. v. Union of India and Ors*., the Supreme Court of India, in considering the question related to the application of disability-related laws in India, had relied on teachings and the explanations of the United Nations Committee on the Rights of Persons with Disabilities. Furthermore, in *MK Ranjitsinh and Ors. v. Union of India and Ors*., the Supreme Court had relied extensively on judicial decisions and teachings to identify the content of the obligations and rules applicable to the country's climate change commitments and to the promotion of a healthy environment. While the Indian courts had not pronounced on the auxiliary or assistive function of subsidiary means, a review of its practice showed that the courts had been identifying the country's international obligations through a systematic application of Article 38 (1) (*d*) of the Statute of the International Court of Justice and using subsidiary means to identify, determine or apply rules of international law to address legal questions. In the aforementioned cases, the Supreme Court of India had relied extensively on the explanations, general comments and statements of expert bodies, particularly the United Nations human rights treaty bodies, to identify the authoritative interpretation of States' obligations under the relevant instruments. Future reports on the topic should include the practices and doctrines of diverse geographical regions, major civilizations and representative legal systems.

Despite the Special Rapporteur's having, on more than one occasion, referred to other more "specific functions" of subsidiary means in the report, proposed draft conclusion 6 merely outlined the main, auxiliary, function of subsidiary means without explaining the nature of those specific functions or their potential impact on the function of subsidiary means in general. It would be useful to know whether those specific functions constituted additional functions or whether they simply built on the main, auxiliary, function of subsidiary means. Regardless, it was clear that the scope of those specific functions, which, as he understood it, would be addressed in a future report, would have a bearing on the Commission's work.

Attention should also be paid to the role of the International Court of Justice in rule-making, particularly concerning its own procedures, as that exercise might subsequently influence international law. Article 30 of the Statute of the Court empowered it to frame rules to carry out its functions, including rules of procedure. A notable example of the Court's rule-making capacity was the recent amendments made to articles 81, 82 and 86 of the Rules of the International Court of Justice, which had the potential to affect practices such as interventions by States under Article 63 of the Statute. The Special Rapporteur might wish to examine, in a future report, the potential impact of changes to the procedures of the International Court of Justice and other international courts or tribunals on the development of international law.

The reference at the beginning of Article 38 (1) (*d*) to Article 59 of the Statute of the International Court of Justice, which provided that only the parties to a particular case were bound by the Court's decision, was critical and, as had been noted by several States during the debate in the Sixth Committee, consideration should be given to the practical implications of that caveat. Indeed, a certain circularity could be discerned in the Special Rapporteur's argument that, despite the decisions of the Court having no binding force except for the parties to the case, in practice, the Court relied extensively on such decisions. In *Temple of Preah Vihear (Cambodia v. Thailand)*, for example, the Court had addressed a preliminary objection raised by the Government of Thailand by distinguishing between "the binding effect of its decision and the wider utility of the decision as an accurate statement of the law". The Special Rapporteur had gone on to explain the broader legal effect of the Court's decisions, which 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", and the importance of the reasoning and conclusions of earlier cases for other cases, stating that "the presumption is that the Court will start from its prior correct statement of the law". It was thus for the party seeking to displace the previously articulated legal conclusion of the Court to challenge that

presumption. The report arguably alluded to the idea of respect for legal precedent, albeit obliquely. That hypothesis was, in his view, borne out by the Special Rapporteur's conclusion that, "once found to be a correct statement of the law, then the conduct of other States that are parties to the relevant treaty or acting under customary international law or invoking a general principle of law would have to conform to that statement of the law until the rule is no longer seen as a correct interpretation of the law".

In view of the foregoing, judicial decisions could be said to be something more than a subsidiary means for determining rules of international law, a reality recognized by Sir Hersch Lauterpacht, who had insisted that "the line between the function of judicial decisions as evidence of existing law and as a formal source of law for the future is a thin one". In his own view, the source of the binding character of judicial decisions was the agreement of the parties to submit the case for judicial settlement and was, therefore, essentially "conventional". Thus, the Court's judgment was the immediate source of law for the parties, but the judgment itself derived its force from the agreements, compromissory clauses, special agreement or declarations which had established the jurisdiction of the Court to hear the case. He thus agreed with the Special Rapporteur's assessment that the term "judicial decisions" in Article 38 (1) (*d*) of the Statute of the Court referred primarily to the *dispositif*, or operative part of a judgment of the International Court of Justice or other international court, which bound the parties to the case, as outlined in Article 59 of the Statute. However, when considering judicial decisions as a source of law, the focus shifted to the Court's reasoning, which formed the basis for establishing legal precedents. That distinction showed that, while the operative clause of a judgment might simply state the outcome of the case, it was the detailed reasoning that guided future legal interpretations and applications.

While the Special Rapporteur's analysis of the different connotations of the term "precedent" in the common law, civil law and the international law context was useful, to define the notion of precedent at the international level as "a decision rendered by an international court or tribunal" was, to his mind, restrictive. That definition should be broadened to include "international adjudicative bodies", which would cover quasi-judicial monitoring bodies such as the Human Rights Committee and judicial bodies such as the Appellate Body of the World Trade Organization, both of which tended to rely heavily on subsidiary means.

He agreed with Mr. Galindo that the title of proposed draft conclusion 7, "Absence of a rule of precedent in international law", did not capture the multiple meanings of the term "precedent" outlined in paragraphs 129 to 131 of the report. To avoid suggesting that the doctrine of *stare decisis* applied in the international legal system, and to ensure alignment with the language used in the body of the text, the title of the proposed draft conclusion should be amended to refer to "legally binding" precedent. The use of the adverb "normally" posed a similar challenge, as it seemed to suggest that there was a limited set of circumstances in which international courts or tribunals did in fact follow prior decisions as legally binding precedents. If the word "normally" was to be retained, the Special Rapporteur should spell out those circumstances. Moreover, the phrase "international courts or tribunals" was highly restrictive, as it excluded a wide array of adjudicatory and quasi-adjudicatory bodies, including regional human rights courts, investor-State arbitration bodies and United Nations human rights treaty bodies. The phrase should be modified to ensure that the practice of all adjudicatory bodies was reflected in the future work of the Commission.

The term "persuasive value" appearing in the title of proposed draft conclusion 8 struck him as ambiguous and open to subjective interpretation and should therefore be explained more fully. The language "may follow", in reference to international courts or tribunals, was unclear and suggested that judges or adjudicators might only refer to previous decisions to support the persuasiveness of their own assessment of the relevant facts and arguments in the case at hand. Therefore, to avoid any misunderstanding, the verb "follow" should be replaced with "refer to". He found the language "analogous factual and legal issues" to be misleading, since international courts or tribunals had departed from their previous line of reasoning in spite of the existence of similar legal and factual issues. That language should be replaced with more accurate normative terminology. The practice of the Human Rights Committee was extremely relevant in that regard.

He recommended the referral of the proposed draft conclusions to the Drafting Committee.

Mr. Fife, thanking the Special Rapporteur for his accessible and well-structured second report, said that the debate on the topic at the Commission's seventy-fourth session had served to settle key questions relating to subsidiary means for the determination of rules of international law, as reflected in draft conclusions 1 to 5. The conceptual clarity obtained at that juncture would help the Commission to better understand and analyse relevant practice and thus to provide helpful guidance to the users of its draft conclusions on the topic.

He had noted with interest the critical questions raised by Mr. Mingashang regarding the Commission's approach to the topic, which, in the view of Mr. Mingashang, was characterized by excessive legal formalism and a somewhat exaggerated respect for the language developed by the International Court of Justice to describe its own judicial activities. While he was sensitive to the injustices of the modern world and critical of any attempts to cover up or legitimize any lack of fairness, he was also convinced that developing a common, accurate description of methodology related to judicial or other legal activity promoted a better universal understanding and discussion of international law, its limits and its potential. Although grammar and language were arguably quite formalistic phenomena, they were nevertheless essential for effective communication. That logic could also be applied to the Commission's discussion of subsidiary means. At the same time, he largely agreed with Mr. Mingashang that the Commission should not place excessive trust in legal formalism. The philosophical volte-face performed by Ludwig Wittgenstein, who had abandoned his early attempts to establish a comprehensive system for the structural analysis of mutually exclusive concepts in language to undertake a closer examination of the meaning of words and their use in context, had ushered in a focus on "ordinary meaning" in analytical philosophy, which was perceptible in the general rule of interpretation laid down in article 31 of the Vienna Convention on the Law of Treaties. Major misunderstandings could be prevented by developing a common understanding about the use of language.

The discussions on the topic so far had confirmed the value of the Commission's deepening its understanding of the views expressed by members representing different legal systems and traditions and the benefits of adopting a multilingual approach to its work, which only served to underscore the importance of using language that accurately reflected the universal nature of international law.

As mentioned by other members, while progress had been made in obtaining greater conceptual clarity, several lines of reasoning were still characterized by a common law systemic thinking that he did not consider to be transposable to international law. Moreover, the evidence provided in the report drew too heavily on international criminal law at the expense of certain other, no less relevant, areas of law, including, for instance, the law of the World Trade Organization, which included an ongoing discussion on precedential value.

The Commission's approach to the topic was predicated on the fact that it did not consider subsidiary means to be sources of law, which, strictly speaking, were texts that served as the formal vehicles through which norms became legally binding for States. Subsidiary means could simply not have the same law-creating function as treaties, customary law or general principles of law; if they did, the carefully built structure of normativity and the associated legitimacy and acceptability that characterized international law, including, in particular, requirements of consent, would be undermined.

The use of the term "legally binding" could cause confusion if it was used indiscriminately without due regard for context. For example, the expression was not synonymous with the expression "binding force", or the *res judicata* legal effects of a judicial decision on the parties to a dispute, referred to in Article 59 of the Statute of the International Court of Justice. It was beyond the scope of the Commission's study to enter into a discussion of the effects of a judgment on the parties to a dispute. He concurred with Mr. Asada and others that, despite the inclusion in Article 38 (1) (*d*) of the Statute of the International Court of Justice of a reference to Article 59 of the Statute, that reference was not relevant to judicial decisions considered a subsidiary means for the determination of rules of law and that the two provisions should be kept separate. Indeed, Article 59 was addressed to the parties to a dispute, whereas Article 38 (1) (*d*) provided for subsidiary means by which the Court might

determine rules of law, a process in which parties to a dispute would not be involved. To refer to the binding force of the Court's judgments for the parties to a dispute and the function that subsidiary means could perform under Article 38 (1) (*d*) as the "narrow" and "broader" legal effects of decisions, respectively, was misleading.

The Commission had also established that subsidiary means had a function different to that of sources of law, namely to assist in determining rules of law. However, that auxiliary function was fundamentally different to "gap-filling", which could easily be understood as bypassing or circumventing sources of law to fill a legal void. Rules of international law were created not by subsidiary means but by one of the recognized sources of international law. The grafting of "gap-filling" on to references to the auxiliary function of subsidiary means in paragraph 88 and elsewhere in the report was therefore problematic. While a popular expression that could be used legitimately in several other contexts, "gap-filling" was not an acceptable or useful description of the function of subsidiary means and could cause confusion.

As aptly pointed out by Mr. Forteau, the role of an international court and judicial decisions had been precisely stated by the International Court of Justice in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear* Weapons. The suggestion in paragraph 88 of the report that the observations made by the Court in that regard "could be seen as a mere denial aimed at reassuring States in the context of a controversial matter" struck him as gratuitous. Those distinctions were, in his view, essential when considering the role of judicial decisions as a subsidiary means. More explicit mention might also have been made of *Fisheries Jurisdiction (United Kingdom v. Iceland)*, in which the Court had held that "as a court of law, [it] cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down".

The task before the Commission was not to write a treatise on all the potential roles of judicial decisions in international law, but to consider the precise role of judicial decisions as subsidiary means for the determination of rules of international law. He fully supported distinguishing between judicial decisions considered to be subsidiary means within the meaning of Article 38 (1) (*d*) of the Statute of the International Court of Justice and judicial decisions that performed other roles, such as national judicial decisions serving as evidence of State practice or of *opinio juris* relevant for the consideration of the formation of customary international law, or as evidence of the existence of a general principle of law within the various national legal systems in the world. In those contexts, judicial decisions were applied not as subsidiary means but as evidence subject to the rules relating to the formation of the sources of international law listed in Article 38 (1) (*b*) and (*c*).

The same could be said of decisions of international courts or tribunals that were given a special function pursuant to a specific agreement concluded by States or international organizations. Examples included regional human rights courts and the European Free Trade Association Court. Judicial institutions were established on the basis of certain needs and objectives and might have different applicable laws or rules on binding force, as was the case with the International Court of Justice and the International Criminal Court. As many members had noted, it was therefore essential to set out the specific applicable law governing the institutional machinery concerned. He likewise fully concurred with all those who had underlined the importance of diversity in that regard.

He agreed that a conceptual distinction should be made between the role of judicial decisions as "subsidiary means", on the one hand, and, on the other, various processes of "interpretation", which consisted in obtaining clarification of the exact meaning and scope of a text or rule of international law. As the 1950 judgment of the International Court of Justice concerning the *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)* made clear, the "object [of the request] must be solely to obtain clarification of the meaning and the scope". Moreover, it was not the Commission's purpose to analyse the supplementary means of interpretation of treaties reflected in article 32 of the Vienna Convention on the Law of Treaties, which concerned texts that had a particularly close relationship with the emergence of a treaty. He saw no benefit in broadening the scope of the present study to consider roles that might be played by judicial decisions other than as subsidiary means.

Speakers, including Mr. Forteau, had referred to the thorough consideration given by the Institute of International Law to the topic in its 2023 resolution on “Precedents and case law (*jurisprudence*) in interstate litigation and advisory proceedings”, which was referred to somewhat cursorily in paragraph 130 of the report. Although its value as recommended reading was mentioned in footnote 216, no further analysis was offered. The resolution contained some elements that would be extremely useful to the Commission in its deliberations and deserved a far more central position in the analysis. It made clear that a particular legal context might lead to different results in assessing the relevance or weight of a judicial decision, and that it was of no use to attempt to articulate a general theory of precedent.

Some particularly important lessons could be drawn from the role played by the International Court of Justice in the area of maritime delimitation in the law of the sea, in which there did not appear to be any precedent inspired by common law but, rather, the gradual establishment of case law and the emergence of a line of reasoning that entailed a methodology. As the Court had stated in its judgment in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*: “Since the adoption of the Convention, the Court has gradually developed a maritime delimitation methodology to assist it in carrying out its task.” The use of the verb “assist” should be noted.

Until the 1980s, case law had been perceived as unpredictable, which meant that the Court’s contributions were needed to achieve greater certainty; the manner in which that certainty had been achieved, as described to the General Assembly in 2001 by the President of the International Court of Justice, Gilbert Guillaume, had subsequently served as inspiration for the International Tribunal for the Law of the Sea and arbitral tribunals.

In an article published in 2023 in the *International Journal of Marine and Coastal Law*, he himself had described the various stages in the Court’s road towards greater certainty in that domain, and the resultant lessons used by negotiators of maritime delimitations. That certainty had been based on the strength of the Court’s legal reasoning developed over time, not on a doctrine of precedent.

The role of the International Court of Justice in the context of the interaction between different rules and legal regimes had been usefully highlighted by Ms. Ridings, who had referred to the Court’s advisory opinion on the case concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the interaction between human rights law and international humanitarian law. He hoped that that role would be adequately reflected in the Commission’s output.

He agreed with the inclusion of proposed draft conclusion 6, which clearly spelled out the nature and function of subsidiary means. It should be established that “subsidiary means” were not understood to be “sources of law”, as they had a different function. He agreed with Mr. Oyarzábal that clear wording to that effect should be included, and suggested: “The term ‘subsidiary means’ as applied in Article 38 (1) (*d*) of the Statute does not refer to sources of international law.” As Mr. Reinisch and others had noted, function should not be conflated with nature, and the helpful auxiliary function of such means should be highlighted separately.

While proposed draft conclusion 7 gave a useful assessment that there was no general rule of precedent in international law, it should be made clear that applicable law might establish otherwise for particular institutions.

In proposed draft conclusion 8, the Commission needed to avoid creating a perception that courts and tribunals had a particular way of determining rules of international law: the method used should be universal. The use of the verb “may” in the text was incorrect in the context of a normative statement: the proposed wording required revision, and possibly a more thorough study.

He was in favour of referring the proposed draft conclusions to the Drafting Committee, on the understanding that the widely held views expressed during the debate were taken into account. He agreed with Ms. Ridings that it would be helpful if the Special Rapporteur could provide a revised version of the draft conclusions that reflected the discussions in the plenary meetings.

Mr. Sall said that he wished to thank the Special Rapporteur for his meticulous second report. The report's key conclusion, reached after a review of relevant teachings and case law, was that the doctrine of *stare decisis* did not apply under international law. It was important to note the structural obstacles to the establishment of doctrine at the international level, where not only was the consent of States required before any case involving them could be heard by a court or tribunal, but the role and powers of the court or tribunal could also be determined by the States. The features of domestic legal systems that allowed for precedent to be binding, including a relatively unified institutional structure and a hierarchy of courts, were absent in the decentralized international one. Those structural issues had been touched on in the report but should perhaps have been analysed in greater depth.

If international courts and tribunals chose to draw on their prior decisions, they did so not because the earlier decisions had any binding effect but because of considerations based on such things as legal certainty, consistency or non-contradiction. The absence of *stare decisis* in no way prevented courts and tribunals from using earlier decisions as precedents if they wished to do so. The use of a prior decision could take the form of a simple citation or a borrowing of the reasoning of the earlier decision. Both types of use could be seen in the decisions of human rights and arbitral courts and tribunals.

For example, the Inter-American Court of Human Rights had, in its judgment of 24 February 2012 in the *Case of Atala Riffo and Daughters v. Chile*, referred to its judgment in the *Case of Velásquez Rodríguez v. Honduras* and its judgment in the *Case of Fontevecchia and D'Amico v. Argentina*; and in its judgment of 26 March 2021 in the *Case of Vicky Hernández et al. v. Honduras*, it had referred to its judgment in the *Case of Manuel Cepeda Vargas v. Colombia* and its judgment in the *Case of Fernández Prieto and Tumbeiro v. Argentina*. In other decisions, the Court had highlighted that it was applying the same reasoning as in the cases that it had cited.

The European Court of Human Rights had included in its judgment of 11 July 2002 in the *Case of Christine Goodwin v. the United Kingdom* the statement: "While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases." The same Court had included similar language in its judgments in other cases, such as that of 18 January 2001 in the *Case of Chapman v. the United Kingdom*. The Court's judgments were noteworthy in that they almost systematically began with an analysis of what could be considered the "general principles" relating to a right or freedom, which were then applied to the case at hand. As those "general principles" were drawn from the Court's previous judgments, the legal reasoning was being deliberately placed in a continuum, in the light of which the case at hand would be considered. The consideration of prior judgments was to a certain extent encouraged by rule 72 (2) of the Rules of Court, which sought to minimize conflicts with earlier case law: "Where the resolution of a question raised in a case before the Chamber might have a result inconsistent with the Court's case-law, the Chamber shall relinquish jurisdiction in favour of the Grand Chamber."

The African human rights system was unique in that it provided for the use of sources external to the system. It also clearly encouraged judges to draw inspiration from case law, as reflected in article 61 of the African Charter on Human and Peoples' Rights, which called on the African Commission on Human and Peoples' Rights to "take into consideration … legal precedents and doctrine". It was understood that those precedents could come from other continents and other human rights protection systems. In fact, the Commission and the African Court on Human and Peoples' Rights regularly consulted decisions issued by other bodies, such as the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights, drawing on the jurisprudence of the Inter-American Court of Human Rights in particular on issues such as compulsory membership of an association for journalists and the protection of Indigenous communities. However, while judges could be influenced by legal precedents and doctrine, article 61 of the Charter, in a manner similar to Article 38 of the Statute of the International Court of Justice, described them as "subsidiary measures to determine the principles of law". The status of the precedents as subsidiary was thereby codified under the Charter, as under the Statute. The example of the Charter would therefore have been a fitting one for inclusion in chapter III of the report.

Without getting into the thorny issue of whether one could speak of jurisprudence in arbitration, particularly given the *ad hoc* nature of arbitral awards, it could at least be noted that certain solutions were coming to be recognized as accepted outcomes and that there was therefore a movement towards the idea of "established case law". In that regard, at least two awards by the arbitral tribunal under the International Centre for Settlement of Investment Disputes had made use either of earlier awards by the same tribunal, such as in the 17 August 2012 award in *Iberdrola Energía, S.A. v. Republic of Guatemala*, or of the judgments of judicial bodies, as in the 2001 decision in *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, in which the tribunal referred to earlier cases heard by the International Court of Justice. In an older arbitral award, in *The Grisbådarna Case*, it had been stated that: "It is a well established principle of the law of nations that the state of things that actually exists and has existed for a long time should be changed as little as possible."

The examples mentioned all clearly supported one of the Special Rapporteur's arguments: that the absence of *stare decisis* at the international level did not prevent courts and tribunals from relying on judicial precedents. A second, more far-reaching, implication of the absence of *stare decisis* was, however, the freedom not to follow precedents. He would have welcomed a more detailed exploration of that freedom, which could be seen to be exercised by both human rights and arbitral courts and tribunals, in the second report. One key concept that justified breaking with precedent was that of evolutive interpretation, which the European Court of Human Rights often applied in its judgments in order to reorient its jurisprudence so as to reflect changing conditions in various areas. It had, for example, invoked that freedom in its judgment in the *Case of Chapman v. the United Kingdom*.

The draft conclusions proposed by the Special Rapporteur followed logically from the analysis contained in the second report. They were well-balanced and reflected the complexity of the issues involved. In the French version of proposed draft conclusion 6, however, there was a lack of alignment between the title, which used the word "*nature*", and the first sentence of paragraph (a), which used the word "*caractère*". Therefore, either the words "*ont un caractère*" in the first sentence of paragraph (a) should be replaced with the word "*sont*", or the word "*Nature*" in the title should be replaced with "*Caractère*". The first sentence in the French translation, "*Les moyens auxiliaires ont un caractère auxiliaire*", should also be reformulated to avoid the repetition. Lastly, the draft conclusion should state that the sources of international law were – and not that they were "found in" – treaties, customary international law and general principles of law.

The reference to precedent in the title of proposed draft conclusion 7 should be modified by an adjective such as "binding", as in the text of the proposed draft conclusion itself. As the report made clear, it was not that there was an absence of precedent, but an absence of precedent that was binding on courts and tribunals. In addition, the adverb "normally" should be deleted from the text of the proposed draft guideline, as its meaning was unclear.

It was also unclear why the text of proposed draft conclusion 8, after mentioning "points of law", went on to refer to "factual and legal issues" instead of simply "legal issues". Either an explanation should be provided or the words "factual and" should be deleted. Alternatively, the second half of the sentence could be rephrased to read: "… may follow their own prior decisions or those of other international courts or tribunals where those decisions address analogous issues." The use in the proposed draft conclusion of the word "persuasive" was also problematic. While the report indicated that it was used in certain legal traditions, it was not used in all of them, and the definitions of it found in academic dictionaries were not entirely consistent with the meaning reflected in the cases referred to in the report. It would perhaps be preferable to avoid any reference at all to the "persuasive value" of judicial precedents. The deletion of the final words of proposed draft conclusion 8 were unlikely to prove problematic. He supported the referral of the draft conclusions to the Drafting Committee, taking into consideration his comments.

Mr. Lee, thanking the Special Rapporteur for his comprehensive and thoroughly researched second report and the secretariat for the very useful memorandum, said that he appreciated the detailed analysis in chapter II of the report of the debates in the Commission and in the Sixth Committee, as it was crucial that the views expressed in those forums should be incorporated into the final output. He agreed with other speakers that much wider

reference should be made to the practice of international courts and tribunals other than the International Court of Justice and the International Tribunal for the Law of the Sea, and greater account taken of the content of the memorandum.

The Special Rapporteur used a number of different adjectives – auxiliary, subsidiary, assistive, ancillary, supplementary, secondary, subordinate and gap-filling – in describing the nature or function of subsidiary means for the determination of rules of law, in particular judicial decisions; it would be helpful to have their meanings clarified. The term "gap-filling", in particular, could have significant implications for the nature and function of judicial decisions.

The wording of proposed draft conclusion 6 (a) removed the ambiguity that had surrounded the term "subsidiary means" in the first report, in particular in respect of the meaning of "subsidiary". He agreed with the proposed characterization of the nature of subsidiary means for the determination of rules of law as not a subsidiary source but simply an auxiliary source, which was in line with the teachings of Maurice Bourquin in his 1931 lecture to the Hague Academy. However, if the term "gap-filling", which some speakers, including Mr. Fife, had queried, was used in relation to the nature and function of judicial decisions, the apparent clarity provided in proposed draft conclusion 6 (a) seemed to be eroded. It was one thing to acknowledge the sociological fact that the adherence of the International Court of Justice and other international courts or tribunals resulted in them playing a "gap-filling" role on a *de facto* basis or as a by-product of their judicial activities, but it would be quite another if that were to be codified in the Commission's work concerning Article 38 (1) (*d*) of the Court's Statute. The Special Rapporteur might therefore pay closer attention to the semantics of various terms used in his report.

There was still some ambiguity surrounding the function of subsidiary means: while proposed draft conclusion 6 (a) appeared to address the question quite clearly, allusion was made at the end of chapter III to "other more specific functions of subsidiary means" in addition to the auxiliary function that was their "main role". The suggested specific functions included their function as "a means of interpreting or contemplating the rules of international law, including addressing lacunae in the law or advancing the coherence or the systemic nature of international law as a legal system", with the possibility that subsidiary means could serve as "an independent basis for the rights and obligations of the subjects of international law".

That proposal would substantially expand the scope of the topic under consideration, leading to appreciable overlap with, in particular, the Commission's work on general principles of law. Furthermore, it also called into question the very nature and function of subsidiary means for the determination of rules of law. If the additional functions suggested were attributed to subsidiary means, it would be very difficult to claim that their nature was merely auxiliary vis-à-vis the sources of international law. The approach taken by the Special Rapporteur also diverged from that of the Institute of International Law. In particular, attention should be paid to the wording of the Institute's 2023 resolution on "Precedents and case law (*jurisprudence*) in interstate litigation and advisory proceedings", which stated that: "A precedent or established case law (*jurisprudence constante*) cannot, in and of itself, form the basis of a decision."

The report could be made more compact and cohesive if greater focus were put on the questions of particular relevance to the topic under consideration. In his view, the extended discussion in chapter III of the relationship between Article 38 (1) (*d*) and Article 59 of the Statute of the International Court of Justice would be necessary only if Article 59 of the Statute was linked to the common law rule of *stare decisis*. However, as R.Y. Jennings had made clear in his *General Course on Principles of International Law*: "[Article 59] was concerned solely with the limits of the obligation flowing from a *res judicata* in a particular decision; … thus, the reference to Article 59 has strictly no relevance to judicial decisions considered as 'a subsidiary means for the determination of rules of law.' It is presumably inserted out of abundant caution."

Judge Shahabuddeen shared the same view, as noted in footnote 230 in the Special Rapporteur's second report: "Article 59 has no bearing on the question of precedents. It is

directed to emphasising that the juridical force of a judgment *en tant que jugement* is limited to defining the legal relations of the parties only."

If Article 59 had no relevance to judicial decisions considered as "a subsidiary means for the determination of rules of law", it was understandable that some parties might wonder whether the extended treatment of the relationship between Article 38 (1) (*d*) and Article 59, together with a fairly detailed discussion on the link between Article 59 and Article 61, was really indispensable to the Commission's consideration of the topic at hand, namely, the nature and function of subsidiary means, and, in particular, judicial decisions *qua* jurisprudence, not *qua* particular decisions. In that connection, it must be remembered that the 2023 resolution of the Institute of International Law distinguished between a precedent, which was a much broader concept than that found in the common law rule of *stare decisis*, and case law – "*jurisprudence*" in French – describing the latter only as "a subsidiary means for the determination of rules of law".

The key question facing the Special Rapporteur, and one which would substantially impact the scope, structure and substance of the Commission's work on the topic, revolved around the choice between, on the one hand, the notion of precedent largely coloured by the common law rule of *stare decisis* and, on the other, the notion of precedent which was more flexible and arguably consonant with the practice of international courts and tribunals. For instance, in paragraph 1 of the 2023 resolution of the Institute of International Law, a precedent was defined, for the purposes of the 2023 guidelines, as "a decision rendered by an international court or tribunal which may serve as a reference in a case other than the one in which it was rendered". The need for the Commission to go beyond the narrow and rather technical ambit of the common law rule of *stare decisis* had already been pointed out by several members of the Commission.

In his view, a strategy of "liberating" or "extricating" the Commission from the limited and limiting conception of the common law rule of *stare decisis* had several benefits for its work. First, the common law rule of *stare decisis* was inextricably associated with the image of courts and tribunals engaging in "judicial lawmaking", triggering the warning buttons of traditional subjects of international law, particularly sovereign States, which tended to jealously guard their prerogative as the "lawmakers" in the international community.

Second, the alternative of using a more flexible and pragmatic notion of precedent removed the need for the arduous work on the relationship between Article 38 (1) (*d*) and Article 59, on the one hand, and the link between Article 38 (1) (*d*) and Article 60, on the other. That would help the Commission to produce a more compact and cohesive outcome in which it discussed other, more relevant, questions that had been left unaddressed in the second report.

Third, and most importantly, the more flexible and pragmatic approach to the notion of precedent in international law enabled the constructive role played by judicial decisions to be addressed, again, not as particular decisions but as case law (*jurisprudence*) in the international legal process. As had rightly been observed by Alain Pellet and Daniel Müller in their magisterial commentary on Article 38 (1) (*d*), the reference therein to Article 59 of the Statute could be interpreted as "clearly encourag[ing] the Court to take into account its own case law as a privileged means of determining the rules of law to be applied in a particular case", which was exactly what the International Court of Justice did in interpreting and applying Article 38 (1) (*d*). That practice arose not from the common law rule of *stare decisis* or similar principles but from the natural need for international judicial organs to achieve the necessary clarity and the essential consistency of international law, as well as legal security, as the International Court of Justice had observed in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. Again, it must be emphasized that, in doing so, and as it had repeatedly stressed, the Court did not purport to engage in judicial lawmaking, contrary to some doctrinal opinions tending in a different direction. As was clearly pointed out in the 2023 resolution of the Institute of International Law: "Case law (*jurisprudence*) is a subsidiary means for the determination of rules or law and not an autonomous source of international law. It plays a significant role in the identification, interpretation and evolution of international law."

In that connection, it must be remembered that the Commission had taken a similar approach to the role and function of treaties in the identification of customary international law. Conclusion 11 (1) of the conclusions on identification of customary international law provided that a treaty rule might reflect a rule of customary international law if it: "(a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; and (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law." The same paragraph, together with the relevant part of the commentary thereto, could be productively utilized in respect of judicial decisions as subsidiary means for the determination of rules of law. Judicial decisions, in particular those rendered by the International Court of Justice, could have a "codifying/ascertaining", "crystallizing/catalytic" or, likely more rarely, "generative/norm-creating" role or function, depending on the specific circumstances of particular cases.

Another benefit of that approach would be to expand the cognitive horizon of the topic to include some of the relevant questions such as the "setting aside" of established case law (*jurisprudence constante*) for a duly stated legal reason, notably in the light of the evolution of international law, as was addressed in paragraph 5 of the 2023 resolution of the Institute of International Law. The practical importance of the question was eloquently demonstrated by the saga of the jurisprudence of the International Court of Justice on the law of maritime delimitation.

Some of the judicial decisions quoted in the Special Rapporteur's second report might be employed in a manner that was more attentive to the context of the discussion. For instance, in chapter III, section F, the Special Rapporteur discussed the practice of national courts concerning the auxiliary role of subsidiary means, and in paragraph 114, he analysed in some detail the relevant part of the famous *Paquete Habana* case heard by the United States Supreme Court in 1900. However, the quoted part of the judgment mainly dealt with the relationship between international law and the law of the United States of America, rather than the auxiliary role played by subsidiary means.

The infelicity of the distinction between "narrow legal effects" and "broad legal effects", set out in paragraph 179 of the report, had already been pointed out by several members.

Rhetorical recalibration might be needed for several expressions used by the Special Rapporteur, such as "the almost sacrosanct nature" of the reasoning of the International Court of Justice, in paragraph 191 of the report. The observation in paragraph 196, to the effect that "in any event, States Members of the United Nations are obliged to respect the judicial pronouncements of the Court", together with the rather sweeping statement made in paragraph 203, might also need reconsideration.

Turning to the proposed draft conclusions themselves, he said that he shared the reservations that had been expressed by many other members about the formulation "the sources of international law found in treaties, customary international law and general principles of law" in proposed draft conclusion 6 (a) and about the use of open-ended terms such as "mainly", in proposed draft conclusion 6 (b), and "normally", in proposed draft conclusion 7.

Proposed draft conclusions 7 and 8 were asymmetrical, in that proposed draft conclusion 7 was drafted in a descriptive manner, while proposed draft conclusion 8 was formulated in a manner that carried a normative connotation. The personal scope of proposed draft conclusions 7 and 8 would be quite narrow given that they had in view the actions of "international courts or tribunals, when settling disputes between States or international organizations or issuing advisory opinions". As Mr. Galindo had eloquently noted, the practice of regional human rights courts deserved careful consideration by the Commission. The memorandum by the secretariat also included the practice of the human rights treaty bodies.

He subscribed to Mr. Paparinskis' recommendation that the draft conclusions as a whole should assume the character of a work geared towards the sources of international law, rather than to the law of dispute settlement. If the Special Rapporteur was receptive to that

recommendation, he might want to address some of the questions relating to the constructive role played by international courts and tribunals in the international legal process; in doing so, he might need to add several more draft conclusions.

He supported the referral to the Drafting Committee of all the proposed draft conclusions.

Mr. Huang said that he wished to extend his thanks to the Special Rapporteur for his thorough second report and to the secretariat for its memorandum, which meticulously catalogued the jurisprudence of international judicial bodies, including the International Court of Justice. Together, the two documents provided a solid foundation for the Commission's deliberations.

With regard to proposed draft conclusion 6 (a), the phrase "auxiliary in nature" was basically in line with the concept conveyed by the term "assistive materials" in the Chinese text of Article 38 (1) of the Statute of the International Court of Justice. In Chinese, "assistive materials", which was akin to "subsidiary means" in English, as used in the Statute, were not a supplementary source of international law; rather, they served merely as a subsidiary means of ascertaining rules of law. As he had noted at the Commission's seventy-fourth session, the wording and drafting history of Article 38 (1) affirmed that judicial decisions and the teachings of authoritative jurists from various nations might inform the Court's adjudication of disputes. However, in terms of being a source of law, subsidiary means were not the same as an international treaty, international custom or a general principle of law, as they were regarded only as a tool or instrument for ascertaining or identifying the existence of a rule of law or the specific content thereof, rather than as sources of international law in and of themselves.

It should be noted that while the term "auxiliary" was not an inappropriate interpretative term, the phrase "auxiliary in nature" lacked precision. Although proposed draft conclusion 6 was entitled "Nature and function of subsidiary means", the nature of subsidiary means was not clearly defined through the phrase "auxiliary in nature", in paragraph (a). It would thus seem advisable to explicitly state, either within the draft conclusions or in the accompanying commentary, that subsidiary means did not constitute sources of international law and that their existence must depend on an existing source of law.

In addition, in paragraph (a), the wording "sources of international law found in treaties, customary international law and general principles of law" appeared redundant, since treaties, customary international law and general principles of law were in fact sources of international law. He therefore agreed with Ms. Mangklatanakul that the wording on sources of international law should be amended accordingly.

He agreed with the Special Rapporteur's classification of the three functions of subsidiary means outlined in proposed draft conclusion 6 (b), namely, identification, interpretation and application of rules of international law. However, he wished to note that the three functions were distinct and were each subject to separate limitations. For example, in identifying sources of international law, subsidiary means should follow and defer to the methodology for identifying international custom and general principles of law. Prudence was advised in identifying newly-established rules of international law with the help of subsidiary means, as their validity ultimately hinged on verification using the identification methods employed for general international law.

Furthermore, the use of subsidiary means for interpreting international law should not contravene the connotation of the specific rules of international law themselves. That proviso was particularly relevant to the interpretation of treaties, which should continue to be governed by articles 31 and 32 of the Vienna Convention on the Law of Treaties. State practice, such as judicial decisions of the domestic courts of a contracting State, could serve as a means of interpretation under article 31 (3) (b) only when there was a consensus on such practice among the States parties to the treaty. Otherwise, it could be taken into account only as one of the supplementary means of interpretation as defined by article 32.

It was worth mentioning that the function of the expert treaty body created by an international treaty to interpret the provisions thereof should also be acknowledged and

respected in cases where a subsidiary means is resorted to when interpreting and applying the treaty.

He wished to reiterate that none of the three aforementioned functions of subsidiary means should in any way produce a spillover effect of "lawmaking", in that they could not go beyond the confines of existing international law.

In principle, he had no disagreements with proposed draft conclusion 7. He concurred with the Special Rapporteur's assertion, as contained in the second report, that unlike the differentiated approaches towards the issue of "precedent" used by countries following the common law and civil law traditions respectively, there was no doctrine of *stare decisis* at the level of international law. That position was fully reflected in Article 59 of the Statute of the International Court of Justice. Indeed, Article 59 explicitly provided that: "The decision of the Court has no binding force except between the parties and in respect of that particular case." By restricting the binding force of the Court's decision, the Statute had, to some extent, alleviated the concern of some countries about possible restraint of their sovereign will or erosion of their sovereign interests. Article 38 (1) (*d*) contained a clear reference to Article 59, with the precise aim of excluding the potential for the Court's decision to have binding force on States other than those that were parties, without, of course, denying the important role played by judicial decisions in maintaining the unity and integrity of the international law regime.

However, the word "normally", used in proposed draft conclusion 7, seemed to indicate that in some specific extraordinary circumstances, judicial decisions might become legally binding precedents, a position that contradicted the one taken by the Special Rapporteur in his second report. Additionally, it was probably inconsistent with the practice of the great majority of States. He therefore agreed that it might be safer and more appropriate to delete the word "normally".

Without downplaying the important reference value of previous rulings or decisions by international courts and tribunals, he wished to emphasize that caution and care must be exercised in examining the specific facts and legal criteria when referring to court decisions and tribunal judgments. As enumerated in draft conclusion 3, the criteria for the assessment of subsidiary means, and the persuasive value thereof, also depended on such conditions as the quality of the reasoning and the reception by States and other entities. Any international court should refrain, as far as possible, from invoking controversial cases and should exercise caution when referring to cases involving major controversies within the court itself over the application of international law or to cases that did not reflect contemporary customary international law.

For example, in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, the International Court of Justice had clarified the issue of the relationship between a country's outer continental shelf and another country's maritime boundary of 200 nautical miles. Nevertheless, the rule determined by the Court with regard to delimiting the scope of the outer continental shelf of a coastal state was not what had been clearly stipulated in the United Nations Convention on the Law of the Sea, and therefore might allegedly have changed the regime of the law of the sea that had been intended in that Convention. Several judges had submitted separate or dissenting opinions in the case. For instance, Judge Xue believed that the conclusion of the case had not been "reflective of general State practice and *opinio juris*", while Judge Tomka and Judge Skotnikov believed that the Court was not "interpreting and applying the existing law". It was thus obvious that serious controversies existed within the Court on whether the so-called rule of customary international law that had been applied in that case truly reflected State practices and *opinio juris* and whether the United Nations Convention on the Law of the Sea and the existing rules of international law had been misinterpreted. As a result, the utmost caution should be exercised if that case was invoked subsequently on issues of delimitation of a continental shelf. The Court should not go beyond the remit of its competence of identifying international law. He wished to recall the formulation used by the Court with regard to its own competence in its 1996 advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*, namely that the Court "states the existing law and does not legislate". In other words, when interpreting or applying the

current international law in a case, no international court or tribunal should amend or revise the existing law.

In the Sixth Committee, during the consideration of chapter VII, on subsidiary means for the determination of rules of international law, of the report on the Commission's seventy-fourth session (A/78/10), Member States had expressed similar positions and views and called for less reliance on controversial cases.

Overall, he endorsed proposed draft conclusion 8, with the caveat that international courts and tribunals should be cautious in making reference to cases where the application of the law was in dispute. Accordingly, after the word "persuasive", the words "and not contradictory to the existing international law" should be added. In addition, the word "follow" should be replaced with the words "refer to", to avoid suggesting that courts and tribunals were obliged to follow judicial decisions as precedents.

He generally agreed that relevant domestic judicial decisions and decisions of regional judicial bodies might also have the value of subsidiary means, but continued to believe that judicial decisions of domestic and regional courts remained a type of State practice by nature and that caution was needed if they were to be regarded as subsidiary means for identifying, interpreting and applying international law. That position on domestic judicial practice had also been adopted by Sir Michael Wood in his second and third reports on identification of customary international law (A/CN.4/672 and A/CN.4/682). In fact, a rule of customary international law was understood differently in different regions and countries. On some unsettled issues, a particular domestic judicial decision would be of limited relevance. For example, with regard to the rule of customary international law as applied to State immunity, Judge Yusuf, in his dissenting opinion submitted in respect of *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, had pointedly observed that:

> "State immunity is, as a matter of fact, as full of holes as Swiss cheese. Thus, to the extent that customary norms of international law are to be found in the practice and *opinio juris* of States, such practice clearly attests to the fact that the scope and extent of State immunity … which is currently characterized by conflicting decisions of national courts in its interpretation and application, remains an uncertain and unsettled area of international custom, whose contours are ill-defined. These uncertainties cannot adequately be resolved … through a formalistic exercise of surveying conflicting judicial decisions of domestic courts … and counting those in favour of applying immunity and those against it."

He likewise held the view that on certain controversial issues of international law, particularly the crucial question of whether a rule of customary international law had come into being, the judicial decisions of domestic and regional courts should be treated with greater caution.

He agreed to refer all three proposed draft conclusions to the Drafting Committee.

The meeting rose at 12.55 p.m.