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International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3625th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 16 May 2023, at 10 a.m.

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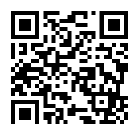

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Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	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
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

Prevention and repression of piracy and armed robbery at sea (agenda item 6) (*continued*) (A/CN.4/758)

The Chair, speaking as a member of the Commission, said that she welcomed the first report of the Special Rapporteur on prevention and repression of piracy and armed robbery at sea (A/CN.4/758). The report contained a very detailed and extensive review of national legislation and judicial decisions on the topic in five regions, supplemented comprehensively by the memorandum by the Secretariat (A/CN.4/757) and the statements made by the members in respect of regional practice and the far-reaching impacts of piracy.

At the seventy-fourth session of the General Assembly, as noted by Mr. Jalloh, some Member States had offered specific suggestions, indicating their recognition of the need to address the topic of piracy, as it had evolved over the years, and the more recently recognized crime of armed robbery at sea. The Kingdom of the Netherlands had suggested that it would be useful "to focus on armed robbery at sea and to provide guidance for the development of relevant domestic criminal law", and the Republic of Korea had expressed the hope that the Commission's work would "provide clarification on addressing piracy and armed robbery at sea under the United Nations Convention on the Law of the Sea, as well as practical information on its implementation by States".

Despite being as old as the law of the sea, the crime of piracy continued to plague both international commercial shipping and private watercraft. Globally, it was on the rise, although its severity seemed to be decreasing in some cases; for example, the number of piracy and armed robbery incidents in the Singapore Strait was rising and had reached a seven-year high in 2022, but the severity of the crimes was reportedly low.

Referring in particular to chapter II and paragraph 27 of the report, she said that the Commission should adhere to the clear road map for its work provided by the Special Rapporteur's 2019 syllabus for the topic, which was annexed to the Commission's report on the work of its seventy-first session.

Clearly, the 1982 United Nations Convention on the Law of the Sea was the starting point for the Commission's work, although there were shortcomings in the existing international legal framework, as highlighted in paragraphs 44 to 55 of the report. The shortcomings of the Convention in relation to piracy and armed robbery at sea had also been noted by experts at the hearings on the Convention held by the United Kingdom House of Lords in 2021. The partitioning of maritime spaces was certainly problematic for the prevention and repression of piracy in practical terms, especially in respect of piracy committed on the high seas that traversed multiple jurisdictions. As noted in paragraph 44 of the report, legal partitioning did not always "facilitate the repression of acts of piracy" in circumstances where a pursuing ship could not "enter the territorial sea or internal waters of a coastal State without having first obtained authorization from that State". It also had consequences in respect of the crime of armed robbery at sea, which had been defined in International Maritime Organization (IMO) resolution A.1025(26), although not in the Convention. The distinction between the two crimes was important because, as noted by Professor Robert Beckman, it limited the types of cooperative measure that could be taken to enhance the security of sea lanes and combat attacks against vessels.

A further shortcoming, mentioned in paragraph 49 of the report and already referred to in the Commission's current debate, was the two-ship requirement in the definition of piracy in article 101 of the Convention. Under that definition, piracy was an attack by one ship against another ship, though the Convention did not provide a precise and objective definition of "ship". That was a significant legal gap, particularly as the notion of a "ship" was changing as the world entered the era of maritime autonomous vessels; the issue therefore merited study by the Commission. Although the Commission could not alter the definition of piracy in the Convention, that definition was based on an understanding of the term "ship" that might soon become obsolete. Piracy in the twenty-first century was very different from the crime that it had been in previous eras. Modern ships relied heavily on digital connections for many systems, operations and controls, and activities from land, such

as cyberhacking, coupled with the use of maritime autonomous vessels, were likely to challenge the existing understanding of piracy.

Therefore, while it was clearly necessary for the Commission to address the definition of piracy, it should do so with caution and not appear to be amending the Convention. Accordingly, it should consider whether codification by means of draft articles was the best approach to adopt.

The fifth shortcoming identified in the report, and already addressed in the Commission's current debate, was the fact that States had no obligation to prosecute and punish pirates. States had the duty, under article 100 of the Convention, to "cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State". But while the Convention provided for universal jurisdiction, it did not impose on States any obligation to prosecute or exercise jurisdiction over acts of piracy committed on the high seas.

The tragic 1985 case of the *MS Achille Lauro* had highlighted the gaps in the existing international regime concerning acts of terrorism at sea, as distinct from acts of piracy, and had resulted in the adoption in 1988 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which imposed on each State the obligation to ensure that the necessary domestic laws were adopted to enable it to establish its jurisdiction and prosecute the offences referred to in that Convention, and to take certain procedural steps. Following the attacks of 11 September 2001, IMO had adopted the 2005 Protocol to the 1988 Convention and the 2005 Protocol to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. The 2005 Protocol to the Convention imposed an obligation on each State party to make a set of offences "punishable by appropriate penalties" which took into account "the grave nature of those offences" and provided for the arrest and prosecution of perpetrators of crimes that fell under the Convention, together with a detailed procedure for cooperation.

Other than the 1982 United Nations Convention on the Law of the Sea, there was no global instrument akin to the 1988 Convention and its protocols addressing piracy and armed robbery at sea. While acts of piracy and armed robbery had strong regional ties, their consequences were global. As mentioned in the report and the memorandum by the Secretariat, there were a number of IMO soft-law instruments and several regional cooperation arrangements, but the Commission could not alter the codified provisions relating to piracy in the 1982 Convention, though it could consider making use of available tools for further developing the Convention's general provisions. As other members had suggested, the Commission should examine the shortcomings identified with a view to elaborating upon the duty of cooperation.

Lastly, the issue of private security on board ships was an important matter that the Commission should consider in its future work.

On the understanding that the Commission could not amend the provisions of the Convention, she agreed that the Special Rapporteur's proposed draft articles should be referred to the Drafting Committee.

Mr. Cissé (Special Rapporteur), summing up the debate on the topic "Prevention and repression of piracy and armed robbery at sea", said that he wished to thank all the Commission members for their highly relevant comments, which he would, as far as possible, take into consideration in subsequent reports on the topic. He wished to address some specific points raised by certain members.

Mr. Ouazzani Chahdi had noted that the report's unusual length had been necessitated by the complex and technical nature of the topic. He had mentioned the importance of taking account of the technologies used by modern pirates and had considered the regional approach taken in the report to be appropriate. He had also noted that Switzerland, the only country in the world whose Constitution expressly prohibited any amendments that violated peremptory norms of international law, had raised the question of the prohibition of piracy as a *jus cogens* norm before the Sixth Committee in 2019. He had called for the scope of the definition of piracy to be expanded to include attacks by aircraft against ships, as the Commission had suggested in its 1956 draft articles concerning the law of the sea and the commentaries

thereto. He had also put forward the idea that, if the scope of the topic included "piracy and armed robbery at sea", the word "sea" should be defined. While the Special Rapporteur thought the observation pertinent, he was uncertain whether a definition of "sea" would be useful, though the issue could be considered in the commentaries.

Mr. Nguyen had expressed agreement with the regional approach adopted in the report, but had suggested that the regional and universal approaches should be integrated, combining the principles of national sovereignty and universal jurisdiction. He had noted that some countries viewed piracy and armed robbery at sea as acts equivalent to terrorism and that piracy was increasingly considered a form of armed robbery at sea that took place in the exclusive economic zone, with few countries distinguishing between the two offences. However, he had recognized the need to draw a distinction according to where the crime was committed. He had stated that the definition in article 101 of the Convention should be updated to take account of new technologies such as the use of drones by pirates to attack ships. Furthermore, he had expressed the view that pirates did not need to be crew members or passengers on a private ship, as they could direct attacks from land by using drones.

Mr. Nguyen had also emphasized the role of international organizations in combating the phenomenon, recalling the relevant Security Council resolutions under Chapter VII of the Charter of the United Nations. He had noted that countries such as Indonesia had expressed concern at the idea of extending the definition of piracy to cover the territorial sea, as the application of universal jurisdiction close to national coasts could entail risks. Mr. Nguyen had also pointed out that Viet Nam and China had authorized non-governmental maritime militias to protect fishing boats from pirate attacks and had suggested that the subject should be addressed in the framework of the Convention, taking account of State practice and clearly defining the two crimes and delimiting the boundaries of universal and national jurisdiction in preventing and repressing them.

In response to the concerns cited by Mr. Forteau, he wished to note first that the report was a preliminary report intended to present a broad, regional approach, reviewing the legislative and judicial practice of States; he had concluded that such practice did not have the features of generality, uniformity or consistency that he had sought to identify. Not every aspect of the practice noted in the report would be the subject of in-depth study or of a draft article. For instance, penalties were an example of an issue that could only be determined by the domestic law of States, not international law.

Mr. Forteau had noted that the report's description of French practice was not correct and had mentioned some French legal texts of which the Special Rapporteur had not been aware at the time of writing. They would be taken into account, as would the legal texts concerning the practice of Monaco. Much of the legislation cited in the report had been drawn from the website of the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs, a credible though perhaps incomplete source, as it was not continually updated with the legislation of all States Members of the United Nations. In the case of his own country, Côte d'Ivoire, the legislation on piracy from its 2018 Criminal Code was not on the Division's website. He would welcome the Commission members' cooperation in providing him with the relevant legislation from their countries. Both States and international organizations had begun to transmit their comments in response to the questionnaires sent to them.

He took note of Mr. Forteau's comment that it would have been more useful to structure the report on the basis of a thematic presentation of the subject, but considered that to be a question of preference. As to the report's indication that some States criminalized piracy but did not impose penalties, the information found on the website of the Division for Ocean Affairs did not include the legislation to which Mr. Forteau had referred, and it seemed that the body of French case law compiled for the report was incomplete. Further research would enable him to update that information.

Mr. Forteau had stated that the crime of piracy could be committed only on the surface of the sea and that it was therefore incorrect to refer to piracy on the continental shelf. The report had taken account of legislation that mentioned only the "sea" as the space in which piracy could be committed, without defining that concept more precisely. He had therefore interpreted it broadly to mean that under those laws piracy could be committed in any

maritime area, including the continental shelf, which was referred to in some legislation. Mr. Forteau himself had referred to amended French legislation that included the continental shelf as a space where armed robbery could be committed, under article 224-6 of the French Criminal Code, which referred *inter alia* to fixed platforms located on the continental shelf.

As to the distinction between piracy and armed robbery at sea in relation to international law, it was stated in paragraph 139 of the report, in respect of acts committed in waters under State sovereignty, that, under international law, even if such acts contained all the elements of maritime piracy, they could only be characterized as armed robbery. The "international law" referred to in that paragraph was IMO resolution A.1025(26), in which a clear distinction was made between armed robbery at sea and piracy, as defined in the 1982 Convention. As IMO was a specialized agency of the United Nations whose main mission was to ensure the safety of international shipping through the development of standards and principles, and thus through resolutions, it was reasonable to suppose that States parties could refer to its rules of international law when adopting domestic legislation, as some had done in respect of armed robbery at sea, reproducing the provisions of the IMO resolution. The wording in the report should thus not be interpreted as questioning the free choice of States to define the crimes of piracy and/or armed robbery at sea according to their own circumstances.

The mere fact of highlighting shortcomings in the legal framework did not always indicate an intention to change it. He agreed with Mr. Forteau that the *acquis* of the 1982 Convention should be preserved, albeit without closing the door to progressive development. He was thus at a loss to understand Mr. Forteau's statement that the Commission could hardly develop law in the area *contra legem*, as that was not at issue. In any case, the Convention was a framework convention that had resulted from both codification and progressive development. The statements made by the Commission members led him to believe that it would be possible to develop law on maritime piracy without affecting existing instruments. He did not agree that the chapter on shortcomings in applicable law, specifically article 101 of the Convention, was irrelevant; several members had welcomed it.

Regarding the assertion in the report that the absence of legislation should not serve as grounds not to pursue and arrest a pirate, he fully agreed with Mr. Forteau on the fundamental legal principle of *nullum crimen, nulla poena sine lege*, which had been illustrated in the *Le Ponant* case in France, in which the presumed perpetrators had been released by the court because of the absence of applicable domestic legislation at the time of the events. However, his interpretation had been based on article 100 of the Convention and Security Council resolutions 2018 (2011), which noted the obligation for States parties to the Convention to adopt applicable legislation, and 2020 (2011), which unequivocally stated that limitations in capacity and in domestic legislation had hindered more robust international action against pirates, with the result that in some cases they had been released without facing justice. The Commission's 1956 commentary to article 38 of its draft articles concerning the law of the sea supported that interpretation, noting that "[a]ny State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law".

He agreed with Mr. Forteau's proposal to include a paragraph in the Commission's annual report to the General Assembly to draw States' attention to the domestic practice that had been identified to date, as a means of eliciting their reactions.

Concerning the statement in the report that some States did not criminalize or penalize armed robbery at sea, it had certainly not been his intention to state that armed robbery committed on land was not criminalized or penalized, but simply to highlight some domestic legislation that contained no specific provisions on armed robbery at sea. As noted in paragraph 66 of the report, the idea was that armed robbery at sea could be prosecuted if there was legislation covering armed robbery in general, as was the case in most States.

In respect of Mr. Forteau's suggestion that the jurisprudence considered in the report was not complete, he pointed out that the report was preliminary and did not claim to be exhaustive. It was for that reason that he awaited the reactions of States at the seventy-eighth session of the General Assembly, as well as those of international organizations and of the Commission members.

Regarding Mr. Forteau's comment that the inclusion of motive as a defining element of piracy appeared to be called into question in the report, he said that he had not intended to question that element, which was described as being for "private ends" or *animus furandi*. He had merely described factual situations. It was not for him to cast doubt, either explicitly or implicitly, on an element of the definition of piracy set forth in article 101 of the 1982 Convention, especially given that the Convention was the foundation of the Commission's work on the topic. In paragraph 47 of the report, for example, he had merely observed, without passing judgment, that the motive could be unclear in cases of modern piracy, taking into account developments in the law of the sea and the technical and tactical capabilities of modern-day pirates. In paragraph 48, he had simply noted that it was not always easy to distinguish between a private motive and a political motive. He had given the example of maritime piracy perpetrated in the Sulu archipelago in the Philippines, which had become a source of revenue for groups affiliated with Islamic State but was also motivated by political, ideological and religious factors, in what was clearly an example of a case where private and political motives intertwined, or at least coexisted. Describing that situation was not tantamount to casting doubt on the definition of the motive of the crime. Moreover, the proposed draft articles 2 and 3 on the definition of piracy and armed robbery at sea in no way altered the definition established in the 1982 Convention, since they reproduced the provisions of article 101 in their entirety. Draft article 2 (d) was merely an addition made in the light of the diversity of States' legislative and judicial practice and was intended to take account of the different ways in which States defined piracy. Perhaps the addition of without prejudice clauses in draft articles 2 and 3 could address the concerns raised.

Mr. Savadogo had stressed the importance of considering complementary texts and had expressed the view that the violence associated with piracy could be psychological as well as physical. He had rightly pointed out that the embarkment of privately contracted armed guards on ships was a long-standing practice and had argued that two of the major issues that should be studied by the Commission related to the right of hot pursuit and the entitlement of ships to engage in pursuit. Mr. Savadogo had also referred to regional initiatives, which would be the subject of the second report on the topic.

Mr. Patel had raised a number of issues in relation to international organizations, in particular IMO, and had expressed the view that there was no need to distinguish between piracy and armed robbery at sea. Regarding Mr. Patel's comments on the distinction between private and political or other ends, he wished to reiterate that his intention had been only to point out that the distinction was not always clear or easy to draw, as they were often interrelated.

Mr. Fathalla had indicated that the definition of piracy must be sufficiently broad and that the Commission should draw a clear distinction between piracy and armed robbery at sea, describing the obligations of States in each case and recognizing that States had universal jurisdiction over the crime of piracy. Mr. Fathalla had also argued that the definition of armed robbery at sea gave the coastal State greater room for manoeuvre and had raised the question of whether acts committed for political ends should be excluded from the scope of piracy.

Mr. Asada had observed that while the number of incidents of piracy had decreased in almost every region of the world, there had been a significant increase in the proportion of incidents categorized as armed robbery at sea. He had also provided information on Japanese anti-piracy legislation and had described how, in two cases involving pirates, Japanese courts had applied universal jurisdiction. Mr. Asada's general analysis of the question of universal jurisdiction was pertinent; it should be noted in that regard that the report clearly stated that universal jurisdiction within the meaning of article 105 of the 1982 Convention was a right and not an obligation. Moreover, the fact that the distinct crimes of piracy and armed robbery at sea were being studied together under the topic did not mean that he intended to propose that the scope of universal jurisdiction should be extended to armed robbery, which, in general, was regulated by national law.

Mr. Oyarzábal had recognized the pertinence of the report's identification of shortcomings in the legal framework on piracy and the fact that national definitions of piracy did not always coincide with the definition set forth in the 1982 Convention. He had also welcomed the fact that the report highlighted the connection between piracy and terrorism and between piracy and other crimes perpetrated at sea. Like many members, Mr. Oyarzábal

was in favour of developing the law applicable to piracy but had stressed the importance of preserving the foundation laid by the Convention, and had indicated that he was open to the idea of the Commission's taking a regional approach, provided that it was anchored in the framework of international instruments.

Ms. Mangklatanakul had reiterated the importance of analysing other sources of information on maritime piracy, notably studies conducted by the United Nations Conference on Trade and Development (UNCTAD) and the World Bank, and had recognized the importance of understanding the shortcomings of the current global anti-piracy regime. She had stated that the Commission's work on the topic should facilitate the harmonization of existing national laws and clarify the distinction between piracy and armed robbery at sea, and had highlighted the importance of studying the humanitarian aspect of an anti-piracy regime, in particular cooperation in the rescue of victims of piracy. Like other members, she had raised questions about the legality of the actions of private security personnel on board ships. In her view, enhanced cooperation would contribute to eradicating piracy and armed robbery at sea.

Mr. Mingashang had acknowledged the need to make a distinction between piracy and armed robbery at sea, but had also argued that the definition of piracy set forth in article 101 of the 1982 Convention was controversial and had advocated a broadening of that definition on the basis of other multilateral legal instruments.

Mr. Sall had expressed the view that the Commission should take account of the evolution of the law of the sea in its work on the topic. He had also argued in favour of developing the framework for preventive action by States in respect of both piracy and armed robbery at sea, had expressed support for the proposal that the Commission should attempt to fill gaps in the applicable law and had stressed the need to respect the human rights of alleged pirates. Mr. Sall had also recognized the pertinence of analysing regional approaches to the issue, notably those taken in the Gulf of Guinea.

Mr. Fife had drawn attention to relevant Security Council resolutions and had argued that enhanced international cooperation, including police and judicial cooperation, should be encouraged. In his own view, increased military cooperation should also be encouraged, since military operations played a central role in the repression of piracy and armed robbery at sea. Mr. Fife had also said that he was open to the idea of clarifying the provisions of the 1982 Convention, albeit without altering them, and had stated his view that the connection between piracy and armed robbery at sea should be made clear.

The clarifications provided by Mr. Huang shed light on legislative and judicial practice in China and in the Asian regional context. According to Mr. Huang, the distinction between piracy and armed robbery at sea was a function of the place where the act occurred. He had also noted that there was insufficient practice concerning international cooperation in preventing and repressing armed robbery at sea, for which reason it would be necessary to request input from States. One of the major challenges associated with the issue was the proposed establishment of an international judicial mechanism to combat piracy; in that regard, Mr. Huang had said that a hybrid court with both national and international characteristics should be considered.

Mr. Nesi had stated that the decision to take a regional approach to the issue was appropriate and had indicated that it was important to take account of modern forms of piracy that made use of new technological tools. He had also expressed support for draft article 2 (d) as proposed in the first report, with the caveat that it should be drafted in more precise terms. Mr. Nesi had referred to the concept of strategic piracy, which encompassed all activity aimed at financing or otherwise supporting acts of piracy.

Mr. Paparinskis had pointed to a number of areas where he felt further clarification was needed, including the question of whether the principle of universal jurisdiction under article 105 of the 1982 Convention was applicable to conduct ancillary to piracy, such as the financing or intentional facilitation of piracy.

Mr. Galindo had expressed reservations regarding the right of self-defence that could be exercised by private ships. Concerning the question of whether acts of piracy could be committed on oil rigs, he had said he was in favour of seeking the views of States.

Mr. Grossman Guiloff had emphasized the importance of the protection of human rights in relation to acts of piracy and, like other members, had called for a unified approach. He had recognized that there were scenarios in which private and political ends could coincide and had indicated that the question of whether vehicles other than ships were capable of perpetrating acts of piracy required further study. With regard to universal jurisdiction, he had drawn the Commission's attention to the African Union Model National Law on Universal Jurisdiction over International Crimes and the principle of subsidiarity employed by the European Union.

Mr. Jalloh had said that he was in favour of making a distinction between piracy and armed robbery at sea. According to Mr. Jalloh, it would have been appropriate to make use of statistical data from IMO, rather than relying solely on data from the Maritime Information Cooperation and Awareness Center. He had proposed three options for the outcome of the Commission's work on the topic, which could be discussed in the Drafting Committee.

Ms. Ridings had expressed the view that the integrity of the provisions of the 1982 Convention must be maintained but that consideration could be given to aspects that were not governed by the Convention. She had given the example of article 100 of the Convention, which established a duty to cooperate in the repression of piracy that would benefit from clarification. Ms. Ridings had said she agreed that acts of piracy were subject to universal jurisdiction and armed robbery at sea was subject to national law. Like Mr. Savadogo, she had suggested that the Commission should consider other international legal instruments. She had expressed reservations with regard to subparagraph (d) of the proposed draft article 2, for reasons that would be discussed in the Drafting Committee.

According to Mr. Tsend, the cornerstone of the Commission's work on the topic should be to facilitate better cooperation between States in the prevention and repression of piracy and armed robbery at sea; in that regard, he had expressed the view that article 100 was the key anti-piracy provision of the Convention and that the other relevant provisions were geared towards helping States parties to fulfil their obligation under that article. He had also highlighted legal and political obstacles to the prosecution of pirates, notably the complexity of conducting criminal proceedings under universal jurisdiction and the human rights implications of doing so, as well as the possibility that arrested pirates could try to seek asylum in the prosecuting State. Regarding the definition of piracy, Mr. Tsend was of the view that the Commission should consider whether attacks on fixed platforms could qualify as acts of maritime piracy. In relation to the outcome of the Commission's work, he had expressed a preference for a non-binding text, as opposed to draft articles.

Ms. Okowa had said that she did not see the importance of identifying differences between national laws, since there was room for such differences under the applicable international law. In that regard, he wished to make clear that his intention had not been to conduct a comparative study but rather to describe the legislative practice of States in the different regions in relation to the provisions of the 1982 Convention. Like other members, Ms. Okowa believed that the integrity of the piracy-related provisions of the Convention should be preserved and that other legal instruments should be studied. In her view, the prosecution of pirates must be carried out under national legislation, taking due account of humanitarian and human rights considerations. She had raised the question of bilateral arrangements between States and had pointed out that there was considerable variation in how States approached matters of evidence in their national legal systems.

Mr. Lee had recalled the history of the concept of universal jurisdiction in the repression of piracy. He had suggested that the Commission should attempt to render the piracy-related provisions of the 1982 Convention more operational without altering them and that the distinction between piracy under the law of nations and piracy by analogy based on domestic law should be maintained. In Mr. Lee's opinion, post-1982 developments should be incorporated into the outcome of the Commission's work in order to respond to the needs of States. Like several members, he had raised the issues of the presence of private security personnel on board ships and the interpretation of the notion of the innocent passage of such

ships in the territorial waters of coastal States. With regard to the optional nature of universal jurisdiction in matters of prosecution, he had said that the duty of cooperation under article 100 of the Convention should be strengthened.

Mr. Akande had stated that piracy and armed robbery were already regulated by international legal instruments but that there were still gaps in the applicable international law. He had stated that the definitions proposed in the draft articles should not deviate from the relevant provisions of the 1982 Convention, but that advances could nonetheless be achieved. Above all, he had stressed that the Commission should focus on those issues to which the Convention did not provide a solution.

In his statement, Mr. Laraba had rightly affirmed that the first report was preliminary in nature. He had expressed a preference for the word “gaps” over “shortcomings” in relation to the international legal framework.

Ms. Galvão Teles had said that the Commission should maintain the definition set forth in article 101 of the 1982 Convention and that the proposed subparagraph (d) of draft article 2 constituted a broadening of the scope of the definition of piracy that could create more problems than it would solve and could have other legal implications, including in relation to the exercise of universal jurisdiction. She had suggested that primary responsibility for the prevention and repression of armed robbery at sea should be attributed to coastal States and that common rules should be devised with regard to the criminalization of both piracy and armed robbery at sea. She had also emphasized the importance of the protection of human rights in relation to piracy.

Ms. Oral had noted that piracy had evolved over time and that incidents of piracy were on the rise in some areas, notably in the Singapore Strait. She had suggested that the starting point for the Commission’s work should be the 1982 Convention and that the Commission should make a clear distinction between the crimes of piracy and armed robbery at sea. She had also raised the issue of cyberpiracy at sea, which merited further study. She had called for caution in addressing the definition of piracy and had mentioned the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation as a reference point.

Regarding the issues to be addressed in his subsequent reports, having examined the scope of the topic and the definitional issues in the first report, he intended to examine, among other issues, questions related to the need and the duty to cooperate in the prevention and repression of piracy; the pursuit and arrest of pirates; universal jurisdiction; mutual legal and police assistance; investigation procedures and the gathering of evidence; the application of the *aut dedere aut judicare* principle; the transfer of proceedings and of alleged pirates; the rights of alleged offenders and victims; fair trial guarantees; and court jurisdiction. With regard to the form of the final outcome of the Commission’s work, he would follow the proposals made in his 2019 syllabus and his first report. It was possible that, in the course of the work, the output initially proposed could change to take the form of draft conclusions or draft guidelines, depending on the wishes of Member States as expressed in the Sixth Committee.

The Chair said she took it that the Commission wished to refer draft articles 1 to 3 to the Drafting Committee, taking into account the comments and observations made during the plenary debate.

It was so decided.

Organization of the work of the session (agenda item 1) (*continued*)

Mr. Paparinskis (Chair of the Drafting Committee) said that, for the topic “Prevention and repression of piracy and armed robbery at sea”, the Drafting Committee was composed of Mr. Akande, Mr. Asada, Mr. Fathalla, Mr. Fife, Mr. Galindo, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Mr. Lee, Mr. Mavroyiannis, Mr. Mingashang, Mr. Nesi, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Oyarzábal, Mr. Patel, Mr. Reinisch, Ms. Ridings, Mr. Ruda Santolaria and Mr. Savadogo, together with Mr. Cissé (Special Rapporteur) and Mr. Nguyen (Rapporteur), *ex officio*.

Subsidiary means for the determination of rules of international law (agenda item 7) (A/CN.4/760)

Mr. Jalloh (Special Rapporteur), introducing his first report on the topic "Subsidiary means for the determination of rules of international law" (A/CN.4/760), said that he was deeply honoured to have been appointed as Special Rapporteur for the topic. He also appreciated the preparation of the comprehensive memorandum by the Secretariat (A/CN.4/759), which contained a review of previous work of the Commission that could be relevant to the topic. That information demonstrated that subsidiary means for the determination of rules of international law were central to the Commission's work and played a role that was far from subsidiary in the Commission's discharge of its mandate and, more broadly, in international law in general.

At the outset, he had no choice but to raise two process-related issues. First, he had submitted the English-language original of his report to the secretariat on 13 February 2023, and an advance unedited version had been circulated to members on 15 February 2023. However, the report had not been issued in all the official languages until 10 May 2023, about three months after its timely submission days ahead of the deadline. The first report of the Special Rapporteur for the topic "Prevention and repression of piracy and armed robbery at sea" (A/CN.4/758) had been similarly delayed, despite its timely submission. In addition, several typographical errors had been introduced into the English version of his own report during editing and processing, necessitating a technical reissuance. He was grateful to Mr. Forteau and Mr. Grossman Guiloff, who had checked the text of the proposed draft conclusions in the French and Spanish versions, respectively. While he recognized that the United Nations was facing budgetary constraints, the Commission, through its Working Group on methods of work, might wish to address the impact of such delays on the codification and progressive development of international law. His impression was that the situation had deteriorated in recent years. The Commission might also wish to bring the issue to the attention of Member States in its 2023 report to the General Assembly.

Second, any delays in the issuance of official documents had an impact on the order in which the Commission considered the topics on its agenda. The Commission's usual practice was to consider topics led by special rapporteurs before topics led by study groups or working groups. At the current session, however, the meetings of the Study Group on sea-level rise in relation to international law had been brought forward because the reports to be considered in connection with two of the special rapporteur-led topics had apparently not been translated in a timely manner. He had joined the consensus on the programme of work adopted at the beginning of the session on the understanding that a precedent was not being set for the order of consideration of topics in the future. Documents should be processed in the order in which they were submitted, and special rapporteur-led topics should continue to be given priority, in accordance with the usual practice of the Commission.

Turning to his first report, he noted that it was substantive, not preliminary, in nature and contained a total of 10 chapters. Chapter I covered the inclusion of the topic in the Commission's long-term and current programmes of work and the purpose and structure of the report as a whole. The report was intended to achieve two key objectives: to provide a strong conceptual foundation for the Commission's work on the topic and to serve as a basis for soliciting the views of both new and returning members of the Commission with regard to the approach to be taken. As the report was introductory in nature, in that it developed some of the key elements of the 2021 syllabus, which was annexed to the Commission's report on the work of its seventy-second session, and the issues arising in State practice, his proposals for the conceptual issues to be addressed and the general approach to be taken were tentative and subject to change based on the needs of the topic. In accordance with its practice, the Commission would need to demonstrate flexibility as its work on the topic progressed.

In the first few chapters of the report, he situated the topic within the wider context of the sources of international law and summarized the relevant portion of the debate in the Sixth Committee. In principle, Article 38 of the Statute of the International Court of Justice, which was the basis of the topic, was merely an applicable law provision in that it set out the law that the judges of the Court were to apply when resolving disputes between States or rendering advisory opinions. Nevertheless, the provision was widely recognized by States,

practitioners and scholars as the most authoritative statement of the sources of international law. Paragraph 1 mandated the Court, whose function was to decide in accordance with international law such disputes as were submitted to it, to apply treaties, whether general or particular, establishing rules expressly recognized by the contesting States; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by the community of nations; and, "as subsidiary means for the determination of rules of law", judicial decisions and the teachings of the most highly qualified publicists of the various nations. The Court's application of subsidiary means was qualified as being "subject to the provisions of Article 59", which, in turn, provided that the decisions of the Court had no binding effect except between the parties and in respect of the case in question.

Over several decades, the Commission had systematically considered the sources of international law as enumerated in Article 38 (1) (*a*)–(*c*) of the Statute of the Court, namely treaties, customary international law and general principles of law. The results of the Commission's work on treaties and customary international law, whether in the form of draft articles or draft conclusions, had generally been well received by the international legal community, and its work on general principles of law was at the penultimate stage, with the first reading of the draft conclusions on the topic expected to be completed at the current session. The topic "Subsidiary means for the determination of rules of international law" was the critical final component of the Commission's work on the sources enumerated in Article 38 (1).

Chapter II of the report included an analysis of the relevant portion of the debate in the Sixth Committee in 2021 and 2022. In 2021, over 20 delegations representing States in every region had offered comments on the Commission's decision to include the topic in its long-term programme of work. The overwhelming majority of comments had been positive. The view had been expressed that consideration of the topic would complete and complement the Commission's prior work on the sources of international law and would help to clarify the functioning of subsidiary means and their interplay with the other sources listed in Article 38 (1). However, a handful of States had expressed doubts. Some delegations had questioned the relevance of the topic compared to others included in the Commission's long-term programme of work, such as universal criminal jurisdiction. Some had argued that subsidiary means were of limited use in practice or that the Commission might have difficulty in securing interest and input from Member States. In 2022, most of the States that had commented on the topic had expressed strong support for the Commission's decision to include it in its current programme of work. In fact, some of the delegations that had previously expressed hesitation about the topic seemed to have embraced that decision. As in 2021, most of the comments made by States had underlined the importance, relevance and practical utility of the topic.

Chapter III of the report covered the scope and outcome of the topic. The longest of the chapter's three constituent parts set out his proposals for the substantive issues that the Commission should consider. Building on the 2021 syllabus, he was proposing that the topic should be divided into three main prongs.

The first prong consisted of clarifying the nature of subsidiary means for the determination of rules of international law. There were three elements to be addressed in that regard: the nature and origins of subsidiary means; issues of terminology, such as the need to clarify the meaning of the terms "judicial decisions" and "teachings of the most highly qualified publicists of the various nations"; and the related question of the scope of those two categories. For example, the Commission should consider whether the category of judicial decisions was limited to the decisions of international courts and tribunals or whether it also included the decisions of national, hybrid and regional courts and tribunals. Moreover, what was the legal value of advisory opinions? With regard to teachings, it should consider whether the category was limited to the work of individual scholars or whether it also included the work of collectives of scholars, such as groups of experts. A more fundamental question was whether subsidiary means should be limited to judicial decisions and teachings or whether, given the non-exhaustive nature of Article 38 (1) (*d*) and the practice of international courts and tribunals, additional subsidiary means should also be included. That was a critical issue that was addressed in chapter IX of the report.

The second prong was focused on the function of the subsidiary means listed in Article 38 (1) (*d*) and their relationship with the other sources of international law, namely treaties, customary international law and general principles of law. In that regard, the key questions to be considered by the Commission included the weight and value assigned in practice to subsidiary means, particularly the judicial decisions of international courts and tribunals, in clarifying and developing international law. The Commission should examine the notion that judicial decisions could be a source of obligations or at least serve as a basis for identifying the binding legal obligations of States, international organizations and other subjects of international law. The relationship between Articles 38 and 59 and the notion of precedent, or the alleged lack thereof in international law, needed to be clarified further, as did the link, if any, to the rights of third parties. While there was in theory no system of precedent in international law, the Commission could investigate whether one existed in practice.

The third prong was to clarify the question of subsidiary means other than judicial decisions and teachings of the most highly qualified publicists. Looking beyond those two categories mentioned in Article 38 (1) (*d*) and reflecting on practice since the establishment of the Court in 1945, the Commission could explore the evolution of subsidiary means in recent decades to determine whether there existed other sources of obligations. Examples might include unilateral acts or declarations of States and resolutions of international organizations or at least certain international organizations of a universal character.

Lastly, the question of the coherence and unity of international law, sometimes referred to in terms of its “fragmentation”, could also affect the scope and thus the utility and complexity of the topic. In the syllabus, it was explained that, in some instances, concerns had arisen that different international courts and tribunals might concurrently address the same dispute or might reach conflicting conclusions with respect to the same international legal rule. For example, the International Court of Justice and the Appeals Chamber of the International Tribunal for the Former Yugoslavia had reached different conclusions regarding the test for ascertaining State responsibility in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and *Prosecutor v. Duško Tadić*, respectively. Given the importance of that question, which seemed to arise naturally from a study of judicial decisions as subsidiary means for the determination of rules of international law, he invited members to reflect on whether it should remain outside the scope of the topic.

In accordance with the decision taken in 2021, he agreed that a set of draft conclusions accompanied by commentaries was the most appropriate form of output. The preference for draft conclusions was consistent with the approach that the Commission had taken in respect of the topics “Identification of customary international law” and “General principles of law”, both of which were also rooted in Article 38 (1) of the Statute of the Court. He saw no reason to reopen that decision, which seemed to enjoy the support of States. That said, the Commission had yet to clarify exactly what was meant by “draft conclusions”. There was no single meaning of that term. He considered that, for the purposes of the topic at hand, draft conclusions should be understood as a means of clarifying the law on the basis of what could be found in practice. In accordance with the Commission’s statute and established practice, the draft conclusions should thus reflect primarily codification and possibly also elements of progressive development.

The last section of chapter III concerned terminology. Throughout the report, the expression “subsidiary means for the determination of rules of international law” was to be understood as a reference to Article 38 (1) (*d*) of the Statute of the Court, although the wording used in the Statute itself was “subsidiary means for the determination of rules of law”. The inclusion of the word “international” in the title of the topic did not indicate a narrower scope. Moreover, the word “decisions” was sometimes used to refer to “judicial decisions”, and several words – including “doctrine”, “writings” and “scholarship” – were used to refer to the “teachings of the most highly qualified publicists of the various nations”.

With regard to methodology, which was covered in chapter IV, his suggestion was that the Commission should adhere to its established approach. It should rely primarily on the practice of States and, where appropriate, international organizations and others. That would require a comprehensive and integrated examination of a wide variety of primary and secondary materials and legal literature. As the Commission had noted in the context of its work on identification of customary international law, State practice consisted of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions. Examples included public statements, domestic legislation, decrees and other documents; treaties and other international instruments, including *travaux préparatoires*, where available; diplomatic exchanges; and pleadings before international courts and tribunals of a universal or regional character.

His suggestion was that the Commission should pay special attention to both judicial decisions and teachings. Regarding judicial decisions, it should consider the decisions of national and international courts on questions of international law. Special consideration should be given to the jurisprudence of international courts and tribunals with due regard to their respective areas of competence. The decisions of inter-State arbitral tribunals and the case law and decisions of regional courts and tribunals also warranted serious consideration. It would be important to bear in mind whether such courts and tribunals applied a methodology similar to that of the International Court of Justice and how the Court and States treated their decisions.

Similarly, relevant scholarly works on the topic of sources and the subsidiary means for the determination of rules of international law should be carefully examined. That would include the works of individual scholars and expert groups, whether established privately or by States.

In the last paragraph of the chapter, it was suggested that the Commission should prepare a multilingual bibliography, as it had recently done for other topics. In that regard, he would be grateful for suggestions from members of the Commission and States, which, alongside his own research, would help to ensure that the principal legal systems, languages and regions of the world were well represented.

In chapter V, which drew heavily on the memorandum by the Secretariat, he surveyed the Commission’s previous work on subsidiary means. The memorandum set out 48 observations relating to the Commission’s use of subsidiary means since 1949. He had focused on the assessment made of the Commission’s long-standing use of judicial decisions and the teachings of the most highly qualified publicists in its work. On the basis of the memorandum, he offered four preliminary observations on the Commission’s practice. First, the nature and extent of the Commission’s use of judicial decisions and teachings varied in accordance with the characteristics of the topic under consideration. Both sources tended to be used to shed light on substantive aspects and, to a much lesser extent, methodological ones. Second, judicial decisions, as subsidiary means, played a very important role in the Commission’s work in assisting States through the codification and progressive development of international law. Judicial decisions were used to identify or confirm the existence and content of rules of international law and, in some instances, served as a basis for the formulation of rules and principles of international law and the clarification of the sources of rights or obligations. That suggested that, while judicial decisions were in principle labelled as “subsidiary”, they could in fact be seen as akin to primary sources of international law. If that contention was correct, the Commission should at some point consider whether the apparent mismatch between theory and reality was also reflected in the practice of international courts and tribunals, in particular the International Court of Justice. Third, when formulating its conclusions, the Commission tended to make greater use of judicial decisions than teachings. That tendency was not surprising and did not indicate that judicial decisions were more important or relevant than teachings. Instead, it was in his view a function of the different yet complementary roles that they played. Lastly, in some cases, the Commission had relied on teachings to identify State practice. In that context, it seemed that greater weight was attached to the work of expert groups than to the work of individual scholars. He would welcome members’ views on those preliminary observations and any other aspects of the memorandum by the Secretariat that they found relevant.

Chapter VI, on the nature and function of sources in the international legal system, was the most theoretically ambitious. In it, he sought to situate subsidiary means within the wider context of sources discourse by explaining why sources held a distinctive place in international law as compared to municipal law. Unlike domestic legal systems, international law did not have centralized organs such as a legislature, executive or judiciary. There was no global legislature capable of adopting laws that would bind the subjects of the law, namely States and international organizations. However, it was well established that international law had "sources" from which the rules to govern the relations between subjects of the law could be derived. Identifying sources of law was of paramount importance for any legal system, as law-making was not a static endeavour. However, even the term "sources", in relation to international law, gave rise to some difficulties, as it had no single universally accepted definition.

Various academic theories had been advanced in an effort to clarify the sources listed in Article 38 (1) (*a*)–(*c*) of the Statute of the International Court of Justice. One way to understand the sources was to distinguish between "formal" sources, from which a legal rule derived its legal validity and obligatory character, and "material" sources, which provided the substantive content of the rule. While Article 38 was widely recognized as the most authoritative and complete statement of the sources of international law, it did not expressly mention the term "sources". Article 38 was significant not only because of its status as the applicable law provision of the Statute but also because it was generally accepted as being reflective or declaratory of customary international law.

However, as members would recall, Article 38 had been the object of a number of criticisms: that it was poorly drafted, that it presented logical difficulties because the Statute itself, being a treaty, would fall under paragraph (1) (a), and that it left unclear the question of whether the list of sources it contained was exhaustive, although the answer to that question had become relatively clear. Two related questions arose as to the hierarchy of sources: first, whether Article 38 (1), by listing the sources in a particular order, established a formal hierarchy of sources of international law, and second, what the role and status of "subsidiary means" entailed in the context of Article 38 (1) and the distinction between primary and secondary sources.

A final point was the distinction sometimes made in scholarly literature between sources of international law and sources of international obligations. In the late 1950s, Sir Gerald Fitzmaurice had made an argument to that effect, stating that Article 38 could not be a reference to the sources of international law because formal sources of law drew their inherent validity from natural law, while treaties should be understood as sources of obligations. The distinction between sources of law and sources of obligations could therefore serve as a useful analytical device, as it suggested that rules found in treaties, customary law and general principles of law, while important, were not the only possible basis on which States or other subjects of international law assumed binding legal obligations under international law.

The notion of sources of international law continued to give rise to some confusion. Scholarly efforts to distinguish between formal and material sources, between primary and secondary sources and between sources of law and sources of obligations, and debates about hierarchy or lack thereof among different sources, pointed to the need for closer examination of the interaction of subsidiary means with the sources of international law. Although it was not the Commission's role to settle the ongoing academic debates on the issue, it should take them into account. More pressing was the need for the Commission to assess the implications of the conceptual issues raised in chapter VI of the report for its future work on the topic. He intended to study those issues further in his next report.

In chapter VII, he examined the drafting history of the provision corresponding to Article 38 (1) (*d*) within the Advisory Committee of Jurists – which had drafted the Statute of the Permanent Court of International Justice – to confirm the meaning to be given to it and to offer insights into the origins of the debate on subsidiary means. The chapter contained four preliminary observations in that connection.

First, there had been diverging views within the Advisory Committee on the role of "judicial decisions" and "the teachings of the most highly qualified publicists" as subsidiary

means in the process of determining the rules of international law. In particular, views had been divided on whether judges merely applied the law or were permitted, in the course of application, to clarify, develop or even create new law. Second, the members of the Advisory Committee seemed to have believed that scholarly opinions would assist with the objective determination of which rules existed and had been agreed to by States in treaties or through customary international law or general principles of law by providing a base of evidence for finding legal rules. Third, while a minority of members of the Advisory Committee had considered judicial decisions to be more important than teachings, the majority had been of the view that, at least in principle, both were useful in determining the existence, or otherwise, of a rule of international law. In his own view, those two subsidiary means performed complementary functions under Article 38 (1) (*d*) and both served to help judges to resolve practical legal problems. Fourth, there had been some debate within the Advisory Committee about the amount of emphasis that should be placed on the establishment of a successive order of application of the sources of law. Some had taken the view that explicit wording establishing such an order was necessary, while others had believed that such an order was already implied by the listing.

In chapter VIII, he analysed the different elements of Article 38 (1) (*d*). In the last section of the chapter he offered two tentative observations based on the extensive analysis of the history and practice of the International Court of Justice. First, as the text of Article 38 itself confirmed, subsidiary means were unlike the first three sources listed in that provision in that they were not “sources” in the formal sense but “documentary sources” indicating where the Court could find evidence of the existence of the rules it was bound to apply. However, in practice, courts, including the International Court of Justice, relied more on their prior judicial decisions than on scholarly writings. Second, the two subsidiary means, namely judicial decisions and teachings, were placed on the same footing in Article 38 (1) (*d*) and performed complementary roles without any hierarchy between them.

In chapter IX, he considered whether there could be additional subsidiary means that merited further examination by the Commission. He argued that subsidiary means were not expressly limited to judicial decisions and teachings, since Article 38 (1) was a directive to the Court and was evidently not intended to be an exhaustive enumeration of the sources of international law. The Commission might therefore wish to give further consideration to the examination of subsidiary means not expressly mentioned in the Statute of the Court.

Of the main examples of additional subsidiary means generally found in international legal scholarship, unilateral acts of States and decisions of international organizations were most commonly considered to be primary or secondary sources that could also be deemed subsidiary means for the purposes of the topic at hand. Unilateral acts could be thought of either as a primary source of obligations for States or as auxiliary means for the determination of rules of law. Furthermore, the provisions of resolutions or decisions adopted by international organizations or at intergovernmental conferences, if binding, would be sources of binding obligations for the States in question. The works of expert bodies were also often mentioned, as were equity, religious law and agreements between States and multinational enterprises. He did not consider that the Commission should attempt to address all possible subsidiary means.

If the Commission decided to address one or more of those issues, such subsidiary means would need to be distinguished from sources that served as evidence of the existence of a rule or the elements of a rule. Ultimately, the definition of subsidiary means depended not only on a typology of instruments but also on their application in a particular case. In addition, different subsidiary means would have varying levels of weight or authority, which could also vary depending on the legal context. The weight of such other subsidiary means might depend on, *inter alia*, the “care and objectivity” with which they had been drafted and the expertise of the drafters, as noted in the commentary to conclusion 14 of the Commission’s conclusions on identification of customary international law. While he was in favour of including additional subsidiary means in the study, he believed that, at the current stage, such additional means should be limited solely to resolutions and decisions of international organizations.

In chapter X, he proposed five draft conclusions and set out a tentative plan for future work on the topic. In preparing draft conclusion 1, on scope, he had been guided by the

approach taken by the Commission in its work on identification of customary international law, borrowing generally from the language used in conclusion 1 on that topic. The scope had been left open to accommodate subsidiary means other than judicial decisions and teachings. The wording stated that the object of the task at hand was to determine both the "existence" and the "content" of "rules of international law".

Draft conclusion 2, on categories of subsidiary means for the determination of rules of law, was inspired by both Article 38 (1) (*d*) of the Statute of the International Court of Justice and the Commission's draft conclusions on general principles of law. The text was open-ended in that it used the word "include" in listing the categories of subsidiary means, namely judicial decisions, teachings and "any other means". Draft conclusion 2 (a) expanded upon Article 38 (1) (*d*) of the Statute, which referred only to "judicial decisions", by referring to "decisions of national and international courts and tribunals". The wording of draft conclusion 2 (b), "Teachings of the most highly qualified publicists of the various nations", was taken verbatim from Article 38 (1) (*d*) for the sake of consistency, despite his concerns regarding the archaic language. Draft conclusion 2 (c), "any other means derived from the practices of States or international organizations", could not be seen as a deviation from Article 38 of the Statute because Article 38 (1) was a directive to the Court and not a restriction on the sources of international law. In other words, Article 38 (1) left open the possibility that other sources of law might be considered under the formal sources listed in Article 38 (1) (*a*)–(*c*) and under the subsidiary means listed in subparagraph (*d*). Any additional subsidiary means that fell within the scope of Article 38 (1) (*d*) would require further consideration by the Commission.

Draft conclusion 3 set out the general criteria to be used for assessing whether subsidiary means were suitable for determining the existence and content of a binding rule of international law. Importantly, those criteria included how such subsidiary means had been received by States and other actors in international law, such as international organizations. The draft conclusion, which had been inspired in part by an analysis of the drafting history of Article 38, the text of that provision and how that provision and subsidiary means had been used in practice, drew on the language of the commentary to conclusion 14 of the conclusions on identification of customary international law.

Draft conclusion 4 stated that the decisions of international courts and tribunals on questions of international law were an especially authoritative means for the identification or determination of the existence and content of rules of international law, with particular regard to be given to decisions of the International Court of Justice, considering its role as the principal judicial organ of the United Nations. Decisions of national courts could be used, in certain circumstances, as subsidiary means to that same end.

In draft conclusion 5, as in draft conclusion 2 (b), "teachings of the most highly qualified publicists of the various nations" had been taken verbatim from Article 38 (1) (*d*) of the Statute, while the addition of the words "especially those reflecting the coinciding views of scholars" had been informed by the Commission's use of teachings in its work, the textual analysis of the word "teachings" in the report and the analysis of the drafting history of Article 38. It also reflected the reality that greater value was often attached to the collective works of scholars.

Regarding the tentative future programme of work for the topic, he wished to propose that his second report, to be submitted in 2024, should focus solely on judicial decisions and their relationship to the primary sources of international law. His third report, to be submitted in 2025, would focus on teachings and, as appropriate, other subsidiary means. If the proposed timetable was maintained, the first reading of the entire set of draft conclusions could be completed in 2025 and the second reading in 2027.

He would particularly welcome the Commission members' views and suggestions on the bibliography mentioned in paragraph 67 of the report; whether the issue of fragmentation of international law raised in paragraphs 50 and 51 should be dealt with as part of the topic; the implications of his tentative observations in chapter VIII (H); the appropriateness of examining additional subsidiary means and, in particular, whether unilateral acts of States should be excluded and resolutions or decisions of international organizations should be included in the study; and the proposed workplan and draft conclusions set out in chapter X.

He hoped that States and others would respond to the Commission’s request for information on their practice concerning the use of subsidiary means within the meaning of Article 38 (1) (*d*) of the Statute. As noted in General Assembly resolutions, Governments, particularly in countries in the global South, might wish to consult with national organizations, including national judiciaries, and individual experts, including university professors and international law centres, in responding to the Commission’s requests.

The meeting rose at 1 p.m.