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Held at the Palais des Nations, Geneva, on Thursday, 18 May 2023, at 10 a.m.

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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
	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.

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

Mr. Oyarzábal said that the Special Rapporteur was to be congratulated for his erudite and thought-provoking first report on subsidiary means for the determination of rules of international law (A/CN.4/760), which would greatly facilitate and expedite the work of the Commission. The topic was of incontrovertible relevance, particularly when viewed in connection with the Commission's ongoing work on general principles of law. The very nature of international law as a constantly evolving system with no central authority, together with the exponential growth of international court decisions and scholarly writings, made the question of the sources of international law a perennial one. Also incontrovertible was the need to take into account the diversity of sources. However, little reference was made in the report to judicial decisions or writings from outside the West and common law systems, or in languages other than English. He acknowledged the Special Rapporteur's request to the Commission members and to States for relevant materials in various languages, and strongly encouraged him to redress the imbalance in his future reports. That could help to correct the implicit bias both in the Special Rapporteur's work and in the subsidiary means relied upon by the Commission. A multilingual bibliography would be useful and important, but what mattered most was its actual use in the work of the Special Rapporteur and the Commission.

In general, international law continued to be State-centric. With some exceptions, State consent was the ultimate source of authority in international law-making, and Article 38 of the Statute of the International Court of Justice reflected that reality. Treaties, custom and general principles of law were sources of law, while judicial decisions and the teachings of publicists were used to verify the existence of a rule of law or a binding obligation for States under international law. Although decisions of the International Court of Justice had undeniable legal weight and moral authority, care should be taken not to subvert well-established rules and practices by overemphasizing the importance of judicial decisions and scholarship in the development of international law.

Concerning the question raised in the Special Rapporteur's report as to whether "judicial decisions" included advisory opinions, he noted that the issuance of advisory opinions was a key function of the International Court of Justice, and their authoritative character was hardly disputed in practice. While their material effect might be debated, as in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* and affected by their non-binding nature, that did not disqualify them as subsidiary means, just as judgments were subsidiary means regardless of compliance and even though, under Article 59 of the Statute, they were binding only on the parties to the dispute. Under Article 68, in the exercise of its advisory functions, the Court was also guided by the provisions of the Statute that applied in contentious cases. And in their own way, advisory opinions contributed to the clarification and development of international law. Their relevance was underscored by the United Kingdom authorities' agreement to negotiate the handover of the Chagos Islands with Mauritius following the Court's 2019 advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and the "legal effect" given to that opinion by the International Tribunal for the Law of the Sea in its 2021 judgment in *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean*. Likewise, the Inter-American Court of Human Rights had stressed, in its opinion of 14 November 1997, that its advisory opinions had "undeniable legal effect". The same approach had seemingly been endorsed by the European Court of Human Rights when it had stated, in a reflection paper on a proposal to extend its advisory jurisdiction, that even though its advisory opinions "would not be formally binding on the domestic courts, the Court itself should consider them as valid case-law which it would follow when ruling on potential subsequent individual applications". The requests for advisory opinions on climate change submitted to the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights and the International Court of Justice showed that States themselves had recourse to advisory opinions for the development of international law. In a functional sense, advisory opinions did qualify as subsidiary means, falling within the category of "judicial decisions" referred to in Article 38 (1) (*d*), and he saw no reason to exclude them from the scope of the Commission's work.

With respect to decisions of national courts, he agreed that Article 38 (1) (*d*) of the Statute was not confined to the decisions of international tribunals. Decisions of municipal courts had evidential value regarding the practice of the forum State. Moreover, the decisions of municipal courts had been an important source of material on diplomatic immunity, sovereign immunity and extradition. Although the application of international law was entrusted, in the first instance, to domestic courts, they often applied it wrongly. One salient example was the 2012 decision by a Ghanaian court to seize a foreign warship, which had eventually been reversed by the Supreme Court of Ghana only after the International Tribunal for the Law of the Sea had declared the seizure illegal and ordered the immediate release of the ship. However, the decentralization of the international legal system meant that, in most cases, no international court was available to remedy wrong decisions, although recourse to regional human rights courts was a notable exception in that regard. Moreover, while the decisions of Western domestic courts were relatively easy to find, decisions from developing countries were often difficult to uncover and put into context. The result was that contributions by developing-country courts were often overlooked. For example, international law on State immunity, as depicted by mainstream scholarship, largely stemmed from case law in the United States of America and the United Kingdom, even though a number of other jurisdictions continued to afford sovereign immunity for "commercial acts", raising the question of which rules were of general application. On the whole, national judicial decisions raised serious questions regarding the "quality" of the decisions and the legitimacy of their transmutation into international law owing to their limited and selective application. He therefore agreed with the Special Rapporteur's conclusion that, whatever merits there might be in invoking the decisions of national courts as subsidiary means, they should be examined with great caution.

He agreed with the Special Rapporteur that the decisions of specialized international and regional courts and tribunals warranted consideration, which in turn raised the question of the weight they should be given in the determination of international rules of general application, beyond the rules that might be applicable to the specific legal regime in question. The Commission's 2006 report on fragmentation of international law was relevant in that respect, and its current work could help to enhance coherence and legal certainty. It also gave the Commission an opportunity to establish the particular authority that should be accorded to the decisions of the International Court of Justice in the light of its role as the "principal judicial organ" of the United Nations and the high quality of its jurisprudence. The Commission could also address the so-called "case law" of investor-State arbitral tribunals, which the Special Rapporteur did not address in his report. The problems that arose in that regard concerning the impartiality of arbitrators, inconsistency of interpretation, poor quality of awards, flaws in proceedings and the lack of an appellate tribunal staffed by full-time judges cast serious doubt on the credibility of such decisions as material sources for the determination of international law. Unpredictability and inconsistency in decision-making were problems common to other international judicial bodies, including international criminal tribunals and regional human rights commissions and courts, and the Special Rapporteur's second report could explore possible means of resolving them.

It was clear that "the teachings of the most highly qualified publicists of the various nations", referred to in Article 38 (1) (*d*) of the Statute, had been influential in laying the foundation of international law. Although the writings of publicists were only rarely referred to in the judgments and advisory opinions of the International Court of Justice, they were referred to directly in dissenting and separate opinions, and indirectly in the application of "the general principles of law". As the principles were derived from domestic law, writers had been an important source for the elucidation of the law of various States and the decisions of national courts and authorities on legal questions. From a historical perspective, the weight of legal doctrine had decreased with the growth of judicial activity. However, the reciprocal influence of doctrine and jurisprudence was significant. Navigating the patchwork of arbitral awards and municipal court decisions would be arduous were it not for the opinions of writers and expert bodies, which often involved subjective assessments of judicial findings. In his view, the question was not so much whether a hierarchy existed between judicial activity and doctrine, since it clearly did exist in practice, as whether they performed somewhat different functions as subsidiary sources of law. While international judicial decisions could be instrumental in developing or moulding international law, the role of doctrine was limited to

"finding out" what the rule was. However difficult it might be, clarifying the functions of teachings and of judicial decisions as subsidiary means would be fundamental for the Commission's work. The question of whether teachings performed a different, "higher" role than treaties and custom in the determination of general principles could be studied further.

The Special Rapporteur's concept of "additional subsidiary means" raised two questions: whether other subsidiary means existed alongside judicial decisions and teachings for the determination of rules of international law and, if so, what those other means were. Possible additional means included resolutions of international organizations and the outcomes of the Commission's work on substantive topics. Other potential candidates either were not subsidiary means, as in the case of unilateral acts, or were more properly characterized as teachings, such as separate or dissenting opinions in judicial decisions and the reports of the Commission's special rapporteurs. The Commission had already established, in conclusion 12 of its 2018 conclusions on identification of customary international law, that "[a] resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development", a position that it had reaffirmed in draft conclusion 8 of its 2022 draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), which stated that resolutions adopted by an international organization or at an intergovernmental conference were one of the forms of evidence of acceptance and recognition that a norm of general international law was a peremptory norm. In particular, the evidentiary value of General Assembly resolutions had been acknowledged by the International Court of Justice in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the Court had stated that such resolutions, even if they were not binding, could sometimes have "normative value" and could "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*". In each case, it was necessary to look at the resolution's "content and the conditions of its adoption" and to see whether an *opinio juris* existed as to its normative character.

It thus appeared that, in the views of the Court and the Commission, General Assembly resolutions could be both part of the law creation process and a subsidiary means for determining the existence and content of a rule of international law. A similar argument could be made in respect of the outputs of the International Law Commission. As the report pointed out, the judgments and advisory opinions of the International Court of Justice increasingly referred to the Commission's work in order to interpret the codification conventions that the Commission had drafted or to furnish evidence of the existence of customary rules by citing the Commission's conclusions. The Commission's mandate to assist States by progressively developing and codifying international law, its status as a subsidiary organ of the General Assembly, its comprehensive working methods and its close interaction with the General Assembly weighed in favour of considering its outputs as a form of subsidiary means. He hoped that the Special Rapporteur would provide further analysis on whether the outputs of some other State-created bodies of a universal character, such as Human Rights Council resolutions and United Nations Commission on International Trade Law rules, could be regarded as subsidiary means.

Concerning the Special Rapporteur's intention to analyse, in the second report, the relationship between subsidiary means and primary sources, while such an analysis could provide added value, his own view was that attempting to determine the weight to be assigned to subsidiary means, especially judicial decisions, in the development of international law could entail risks. He fully subscribed to the comments made at the preceding meeting by Mr. Fathalla, Mr. Patel and Mr. Forteau. As was well known, in common law, judicial decisions were binding, while under civil law, only legislative enactments were considered binding for all and there was less scope for judge-made law. Authors had been debating that matter for decades, if not centuries, and he doubted that the Commission could resolve it. Furthermore, the difference was not without practical consequences when transposed to the international level, where State consent, through treaties and custom, was at the heart of the law development process. As the sources of international law were those established in Article 38 (1) (*a*)–(*c*) of the Statute of the International Court of Justice, as could be inferred from the text of that provision and the jurisprudence of the Court, it was safe to assume that

States took the same view. He would therefore be highly cautious about embarking on such an exercise without a clear mandate from the Sixth Committee.

In conclusion, he said that he supported the referral of the draft conclusions to the Drafting Committee.

Mr. Grossman Guiloff said that the Special Rapporteur's leadership, knowledge and expertise were well suited to the task ahead. As the Commission moved forward in its work on the topic, it should keep in mind its objective of promoting both the progressive development of international law and its codification. He commended the Special Rapporteur for having identified, in his introductory statement, the issues on which he was most in need of input from the Commission members. Because of the report's length, it could perhaps have been supplemented with a summary. With respect to the methodology outlined in the report, he agreed with Mr. Forteau that the Commission should examine the practical application of subsidiary means and address the issues that had arisen. He also wished to reiterate that, to date, the United States of America and Sierra Leone had been the only States to provide information concerning their practice in relation to subsidiary means. The absence of contributions from other States might be detrimental to the Commission's discussion.

He supported the Special Rapporteur's conclusion that judicial decisions and scholarly teachings should not be classified as secondary sources of international law. Their role was to assist in the identification of rules of international law, not to define the content of such rules. In that regard, the current topic gave the Commission an opportunity to develop a stable, comprehensive and consistent framework on the issue of subsidiary means in order to tackle the challenges arising from the fragmentation of international law. That specific aspect, which had been one of the grounds of support for the topic by some Member States, should be factored into the Commission's work, as the Special Rapporteur stated in the report.

In paragraph 273 of the report the Special Rapporteur referred briefly to quasi-judicial decisions, including those made by treaty bodies such as the Human Rights Committee. Mr. Fathalla, who had vast experience in that Committee, had referred to the importance of its decisions regarding individual complaints for the development of international law. His own experience as a former member of the Committee against Torture and of the Inter-American Commission on Human Rights led him to support that view. He also supported Mr. Fathalla's recommendation that the Commission should further study the impact and significance of the acts of United Nations treaty bodies and regional organs. Those bodies were the result of direct action by States, which had created them, granted them powers, elected their members and allocated their budgets.

In addition to their origins, the Commission should consider other relevant aspects of the United Nations treaty bodies and similar regional organs, including the nature of their reasoning, compliance with their decisions and the powers granted to them in their constitutive treaties. Regarding the quality of their reasoning, the Commission should assess the extent to which they had considered State practice. For instance, the Committee against Torture, when drafting its general comment No. 3 (2012), had compiled State practice, gathered State comments and analysed its own database of individual petitions in order to interpret the content of States' obligations under article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The significance attached to quasi-judicial decisions varied from one jurisdiction to another. The constitutions of some States in Latin America included explicit references not only to treaties but also to the decisions of international bodies, including quasi-judicial decisions. For example, "international instruments" were identified as a source of human rights in articles 10, 11 and 426 of the Constitution of Ecuador, among other articles. Nonetheless, there were jurisdictions, particularly those with a dualist system, in which international law occupied a different position under the constitution. For example, in its 2008 ruling in *Medellín v. Texas*, the United States Supreme Court had held that international law obligations were not enforceable unless the United States Congress enacted legislation to implement them or the treaty in question had self-executing obligations. A more granular analysis of such decisions was needed. The Commission's role was to find common ground without ignoring those differences and the complexities of the topic.

Although international arbitration, including on investment and commercial issues, played an important role in the determination of rules of international law, it had its own peculiarities. For example, many awards were not published for reasons of confidentiality. In addition, while limited by arbitration clauses, arbitrators often resolved issues that intersected with various international obligations. In the field of investment arbitration, there had been cases in which international obligations collided. The cases of *Bear Creek Mining v. Peru* and *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay* had touched on obligations under both bilateral investment treaties and human rights treaties. It was therefore possible that an arbitral decision could conflict with a decision of a treaty body or other organ established by the international community. As subsidiary means, however, the greatest value of such awards lay in the debates that they generated. As arbitral awards generally did not follow a system of precedents, arbitrators were obliged to engage in an intense intellectual exercise. He saw merit in continuing to study the influence and scope of arbitral awards, taking into account their complexities.

He agreed with the Special Rapporteur that advisory opinions were judicial in nature. As Mr. Oyarzábal had explained, the Inter-American Court of Human Rights also rendered advisory opinions, which addressed such matters as judicial guarantees in states of emergency, the right to information on consular assistance, the rights of the child, the rights of undocumented migrants, freedom of expression, presidential re-election without term limits and certain groups of persons deprived of their liberty. Those advisory opinions had proved influential among domestic courts and legislatures in the region, *inter alia* in the context of "conventionality control", a doctrine that required national courts and authorities to ensure that national laws and action taken at the national level were consistent with the American Convention on Human Rights. That mechanism needed to be studied further, since, to a certain extent, it showed how treaties adopted in a framework largely anchored in the civil law tradition served as a guide to conduct.

In many of its commentaries, the Commission had emphasized that national judicial decisions should be treated with caution. Various supreme and constitutional courts in the Americas had resorted to the rules of international law, whether universal or regional, for the purposes of adjudication. While the decisions in question were not primary sources, they provided important insights into the interplay between international and domestic law. Decisions concerning trade and investment were one example. He recommended that the question should be studied further. In addition, in future studies, the Commission should consider taking three courses of action. First, it should consider how national courts interacted with international courts. Second, it should pay attention to different legal traditions, in particular those of civil law countries, as Mr. Forteau and others had noted. Third, as Mr. Fathalla had argued, the Commission should focus more on the decisions of international courts than on those of national courts. It would be necessary to examine the extent to which international courts, regional courts and domestic courts each served as a guide to conduct.

Both the Special Rapporteur and Mr. Patel had raised the issue of precedent. In some traditions, the judgment in a dispute was binding only on the parties to that dispute. In practice, however, both national and international courts followed and cited previous decisions, meaning that their decisions affected the parties to future disputes as well. The doctrine of conventionality control, to which the Inter-American Court of Human Rights continued to adhere, was of special relevance in that regard. He agreed with the Special Rapporteur that there existed a *de facto* system of precedent in international law, which enhanced both the effectiveness and the consistency of the work of international courts. It would be inconsistent for an international court to decide on a legal point differently in two cases with similar factual circumstances.

He shared the Special Rapporteur's view that fragmentation posed a major challenge for the codification and progressive development of international law. There had been cases in which the rules of customary law or treaties had been interpreted differently by different courts, leading to further inconsistencies. State responsibility for acts of non-State actors was a classic example. The International Court of Justice and the Appeals Chamber of the International Tribunal for the Former Yugoslavia had adopted opposing views in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of*

America) and *Prosecutor v. Duško Tadić*, respectively. The Court had established that there must be "effective control" by the State over non-State actors, while the Appeals Chamber of the Tribunal had introduced the "overall control" test. Similarly, the European Court of Human Rights and the Human Rights Committee had reached different conclusions regarding the burka ban in *S.A.S. v. France* and *Yaker v. France*, respectively.

The possibility of fragmentation notwithstanding, there were also points of convergence, or "cross-fertilization", at the international level. With regard to the use of force by law enforcement officials, for example, the Inter-American Court of Human Rights had adopted the criteria of the European Court of Human Rights, as set out in *Kakoulli v. Turkey*, and of international human rights bodies. Such cross-fertilization could also be seen in the interpretation of the scope of emergency situations and of torture, for example. Indeed, the criteria used to interpret obligations relating to the use of force by law enforcement officials had been expanded and applied in various Latin American countries. For example, in judgment No. 33-20-IN/21, the Constitutional Court of Ecuador had relied on the criteria established by the Inter-American Court of Human Rights. The Commission's study should also take account of the consistency observed in the application of such criteria.

Like Mr. Patel, he looked forward to the Special Rapporteur's consideration of the practice of other regional and subregional courts and tribunals. One example was the Court of Justice of the Andean Community, whose primary function was to ensure that the laws of the Andean Community were interpreted and applied in a uniform manner by its member States. The interactions between the International Court of Justice and domestic courts offered a large body of practice that called for further analysis.

As noted by the Special Rapporteur, scholarly teachings could take the form of individual or collective contributions. However, he would be grateful for additional information on the categorization of the works of expert groups in that context. He agreed with the Special Rapporteur and others that, by themselves, teachings did not constitute a source of obligations. Nevertheless, they played an important role in identifying existing rules of international law and surveying State practice. The process by which they were validated should focus not only on the author but also on the teachings themselves.

Studies conducted by private institutions or groups played an important role in identifying State practice. It was worth noting that studies conducted by groups of experts from diverse countries, legal traditions and professional backgrounds, such as the Institute of International Law, were of greater value. A prime example of a forum for constructive dialogue was the Colloquium on Challenges in International Refugee Law, which had produced significant results, including the Michigan Guidelines on the Internal Protection Alternative. A more recent example was the Academic Forum on Investor-State Dispute Settlement, which consisted of a diverse group of academics, practitioners, arbitrators and representatives of offices of attorneys general from various countries. The primary objective of the Forum was to explore possible reforms to investment arbitration.

Expert bodies gathered examples of State practice, mostly operated on the basis of consensus and, in some areas, played a crucial role in determining the rules of international law and facilitating its codification and progressive development. For instance, the Expert Mechanism on the Rights of Indigenous Peoples advised the Human Rights Council and assisted Member States in achieving the goals of the United Nations Declaration on the Rights of Indigenous Peoples. It could not be said that the pronouncements of such bodies had no value in themselves, since they were prescriptive and brought about changes in conduct. A more granular analysis of their contribution was needed.

It was regrettable that, as the Special Rapporteur had noted, most scholarly works in the field of international law continued to be produced in a small number of languages by authors from a small number of Western countries. Under the Special Rapporteur's guidance, the consideration of the topic would offer an opportunity to achieve greater balance in that regard by giving due weight to authors in the global South.

As for other sources that were candidates for inclusion within the scope of the project, the Special Rapporteur had sought the Commission's views on two distinct sources, namely resolutions of international organizations and unilateral acts of States. The Special Rapporteur had signalled his intention to study resolutions, in particular those with a global

reach. He saw merit in the Special Rapporteur's proposal that unilateral acts of States should be excluded from the scope of the project. At its fifty-eighth session, the Commission had adopted the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. The main challenge presented by such acts was one of identification. Moreover, given their political dimension, if the Commission took an overly legalistic approach to such acts, it ran the risk of reducing the space for diplomatic and political exchanges and initiatives in the realm of international relations.

He agreed with the Special Rapporteur that resolutions of international organizations, in particular those with universal reach, could help to determine and clarify the rules of international law. As Mr. Oyarzábal had noted, the Commission had already identified their subsidiary nature on previous occasions. In his view, that category should not necessarily be limited to resolutions that were binding or mandatory under the Charter of the United Nations. It was worth noting that the Organization of American States, under its Charter, also issued resolutions of varying scope, which made an important contribution to the fulfilment of its mandate. It would be interesting to study other examples as well. Nevertheless, the question of resolutions of international organizations should be addressed separately, perhaps at a future stage, as they were different in scope from judicial decisions and teachings.

As the Commission was at the beginning of a multi-year project to formulate draft conclusions on the topic, he wished to note that he supported the general nature of that endeavour.

With regard to draft conclusion 2 (c), he considered that the Special Rapporteur's proposed third category of subsidiary means for the determination of rules of international law, namely "[a]ny other means derived from the practices of States or international organizations", represented an important example of progressive development of international law in accordance with the Commission's mandate. Nevertheless, that subparagraph remained ambiguous, as it did not specify in detail which practices of States or international organizations could serve as subsidiary means. An unconditional provision to that effect might open the door to further disagreement and uncertainty. The Commission should also strive to ensure that, in the case of international organizations, the practices considered were those that States had formally entrusted to such organizations. The Drafting Committee's primary task should be to identify which practices could directly aid in the identification and determination of rules of international law.

With regard to subsidiary means other than those explicitly mentioned in Article 38 (1) (*d*), it was noted in the report that resolutions of international organizations were a potential candidate for an additional material source. While he shared the Special Rapporteur's views in that regard, he wished to stress that the resolutions of international organizations could have various functions. The multiplicity of their types and forms required the Commission to undertake a thorough study in order to clarify their role and status in the determination of rules of international law.

Draft conclusion 3 on criteria for the assessment of subsidiary means for the determination of rules of law could be strengthened if further detail was provided on what each criterion entailed. For example, the proposed text referred to "the expertise of those involved" without explaining what was meant by "expertise" or what level of expertise was required. While such clarification could be provided in the commentary, the Commission should consider whether any guidance could be provided in the draft conclusion itself. The Drafting Committee might wish to consider mirroring the structure of draft conclusions 2 and 4, in which subparagraphs were used to provide further clarification. As for the elements of quality and expertise, his concerns centred around the criteria to be used to determine the quality of evidence. If that determination was based solely on the author's credentials, it might be somewhat arbitrary, since the merit of scholarly teachings did not always depend on the author's credentials; it also depended on assessments made by others. A piece of evidence that critically and accurately portrayed the practice of States could be considered valuable. A balance needed to be struck among different perspectives, and the commentary could play a very important role in that regard.

He supported draft conclusion 4 on decisions of courts and tribunals. The Commission might need to decide whether concerns regarding conflicting judicial decisions fell outside

the scope of the topic, as stated in the 2021 syllabus. As suggested in subparagraph (c) of the draft conclusion, the decisions of national courts could "in certain circumstances" be used as subsidiary means. Although both the Commission and the International Court of Justice had relied on national judicial decisions in their work, the specific circumstances in which such decisions could be used as subsidiary means should be defined more clearly in the commentary. At the current stage, the Special Rapporteur's work was based largely on the memorandum by the Secretariat (A/CN.4/759), and it might not be possible to discuss the issue in greater depth until additional memorandums or other relevant information had become available.

With regard to draft conclusion 5 on teachings, while he agreed with the proposition that special weight could be given to teachings that reflected the "coinciding views of scholars", that phrase should be explained further in the commentary. The Commission should, for example, consider whether the views in question needed to be representative of the various legal systems of the world, as required by the letter and spirit of Article 38 (1) (*d*). Moreover, it should be specified whether the phrase "coinciding views of scholars" included the works of private or State-empowered expert bodies, since the Special Rapporteur had endeavoured in the report to distinguish such works from individual or non-mandated scholarly teachings.

Lastly, he recognized that the criteria set out in draft conclusion 3 should be used to assess the credibility of subsidiary sources of law, which were defined in draft conclusions 4 and 5. However, it would be beneficial to include an explicit statement to that effect, either in draft conclusion 3 itself or as a subparagraph in draft conclusions 4 and 5, which could read: "Sources under these categories should be evaluated using the criteria listed in draft conclusion 3."

The Commission was in a unique position to emphasize the importance of subsidiary means for the determination of rules of international law within the scope of Article 38 (1) (*d*) of the Statute of the International Court of Justice. The Special Rapporteur's report highlighted the crucial need to formally recognize, analyse and properly address the issue. He supported the Special Rapporteur's suggestions and views regarding the Commission's future work on the topic. The comprehensiveness of the Special Rapporteur's first report and the quality of his analysis should inspire the Commission to strive to capture the full complexity of the topic. He supported the referral of all the proposed draft conclusions to the Drafting Committee.

Mr. Nguyen said that the Special Rapporteur was to be commended on his first report on the topic "Subsidiary means for the determination of rules of international law" and the oral introduction that he had provided. The Special Rapporteur had shed light not only on subsidiary means but also on the academic debate on the nature and function of sources of international law and the drafting history of Article 38 (1) of the Statute of the International Court of Justice. Nevertheless, he shared Mr. Forteau's concerns regarding the report's length, which would make it more difficult for States to study.

Article 38, which had the nature of a rule of customary international law, was significant as a specific directive to the Court on where to find the law on which it was to rely in resolving disputes between States. That provision was also invoked by other international and national bodies in resolving disputes that were not submitted to the Court. The Commission's consideration of the topic of subsidiary means for the determination of rules of international law was an initial step towards the completion of one of its oldest and most influential projects: the elucidation of the sources of international law. He had no doubt that the outcome of the Commission's work on the topic should take the form of draft conclusions, since its work on all previous topics related to the sources of international law, including "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", "Identification of customary international law", "General principles of law" and "Peremptory norms of general international law (*jus cogens*)", had culminated in the adoption of draft conclusions. The term "conclusions", as former Commission member Georg Nolte had noted, was designed to convey the notion that they rested on a firm basis in international law and practice and were therefore not merely recommendatory. The choice of the form of the outcome depended largely on the needs of States. In general, States needed the role of

subsidiary means to be elucidated by draft conclusions; they did not need draft articles to serve as the basis of a treaty.

The draft conclusions proposed in the report were principally drawn from observations on the role of subsidiary means in the previous work of the Commission, as well as in the work of the International Court of Justice. That was necessary but not sufficient. The study should be supplemented by an assessment of the use of subsidiary means in the work of other courts, both national and international, and in State practice, as Mr. Patel and Mr. Grossman Guiloff had already noted. General assessments of the role of subsidiary means had been made in the Commission's reports on the topics "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". Observations regarding references to subsidiary means in the previous work of the Commission could be extended *mutatis mutandis* to references to subsidiary means in the works of adjudicative bodies.

Paragraph 112 of the report related to the Commission's reference, in the draft articles on prevention and punishment of crimes against humanity, to the interpretation of the terms "widespread" and "systematic" in the definition of "crimes against humanity" in the judgments of the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Court of Justice. To that list could be added the use of those terms in the Commission's work on the topic "Protection of the environment in relation to armed conflicts" in connection with responsibility for widespread, long-term and severe damage to the environment. In its work on that topic, the Commission had also referred to the established jurisprudence of the International Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone on the war crime of pillage.

The Commission had also referred to its own previous work, the outcome of the work of expert bodies and submissions from States. For example, the work of the Study Group on sea-level rise in relation to international law had its origins in the Commission's debate on the topics "Protection of the atmosphere" and "Protection of persons in the event of disasters", and in written submissions from the Federated States of Micronesia and the Pacific Islands Forum. It had also consulted the work of the Committee on International Law and Sea Level Rise of the International Law Association. Furthermore, the Commission had referred to subsidiary means such as decisions of courts and tribunals, expert bodies and written submissions from States, depending on the nature of the topic under consideration, in the context of both the codification of international law and its progressive development. In rare cases, the Commission and other juridical bodies relied solely on subsidiary means in determining rules of international law. The Commission had not made separate use of the primary and secondary sources enumerated in subparagraphs (*a*)–(*d*) of Article 38 (1).

The secretariat, in its memorandum, and the Special Rapporteur, in his first report, observed that the Commission attached particular significance to decisions of the Permanent Court of International Justice and the International Court of Justice in its work. Conversely, the Commission's conclusions and commentaries featured prominently as references, among other subsidiary means, in judgments of the International Court of Justice and national courts. The Commission, as a subsidiary organ of the General Assembly, and the International Court of Justice, as the principal judicial organ of the United Nations, had a mutual relationship when it came to the codification and progressive development of international law. The Court used the Commission's work as *travaux préparatoires* for the identification, clarification or crystallization of rules of international law because that work was a primary means of determining the practice and *opinio juris* of States. In some cases, the Court modified the Commission's findings; in rare cases, the two bodies disagreed over the same legal issue. The Commission's work had also been found to have had an influence in other judicial settings. For example, British courts had already made use of the Commission's conclusions on identification of customary international law and the commentaries thereto.

He noted the Special Rapporteur's third tentative observation on the Commission's use of subsidiary means. The fact that the Commission's work relied more heavily on judicial decisions, in particular those of the Permanent Court of International Justice and the International Court of Justice, than on legal teachings was not an indication that one source was hierarchically superior to the other. Moreover, in paragraph 249 of the report, the Special

Rapporteur affirmed that the preference for relying on judicial decisions rather than on the writings of scholars did not suggest that teachings were less relevant or less important. That was especially true in the rare cases where there were no international judicial decisions on an emerging legal issue. Judicial decisions, which had the nature of authoritative collegial work, were easier to refer to than the opinions of individual scholars. However, history was full of cases where rules of international law had been developed on the basis of doctrines put forward by individuals. In the law of the sea, the doctrines of *mare liberum* and *mare clausum*, developed by Hugo Grotius and John Selden, respectively, had been used as the basis for international rulings.

The two subsidiary means expressly mentioned in Article 38 (1) (*d*) and other subsidiary means not mentioned in that provision had the same purpose, which was to determine the rules of international law for the settlement of practical legal problems, and the same functions, which were to be complementary to the primary sources described in Article 38 (1) (*a*)–(*c*), as well as to each other as subsidiary means. The choice to refer to one, some or all subsidiary means and the order in which they were referred to in proceedings depended on the nature and scope of the legal question at hand. The absence of a formal hierarchy among the primary sources mentioned in Article 38 (1) (*a*)–(*c*) had been firmly established. There was therefore no reason to continue arguing about the existence of an informal hierarchy among secondary sources within the context of Article 38 (1) (*d*), especially since the list of subsidiary means it provided was not exhaustive.

Unlike rulings, advisory opinions could offer, or point towards, solutions to global problems such as climate change and pandemics. States were increasingly inclined to seek the advisory opinions of the International Court of Justice on current global issues, such as the right to self-determination in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* or the obligations of States in respect of climate change, on which the General Assembly, by its resolution 77/276, had requested the Court to render an advisory opinion. The International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights had also been requested to issue advisory opinions on climate change. Given their role and nature, advisory opinions, including those of the International Court of Justice, the International Tribunal for the Law of the Sea and other bodies, were "judicial decisions" within the meaning of Article 38 (1) (*d*). In that regard, he agreed with Mr. Fathalla, Mr. Oyarzábal and Mr. Grossman Guiloff that advisory opinions could be subsidiary means and that the term "decisions" included both judgments and advisory opinions.

In paragraph 112 of its memorandum, the secretariat observed that the Commission had sometimes referred to the decisions of conciliation commissions. It would be beneficial for the Special Rapporteur to highlight the role of such decisions, which could be a hybrid between judicial decisions, especially in the case of compulsory conciliation mechanisms, and the works of expert bodies. The *Timor Sea Conciliation (Timor-Leste/Australia)* highlighted the advantages of compulsory conciliation proceedings under the United Nations Convention on the Law of the Sea, and the conciliation commission's decision could qualify as a subsidiary means.

Turning to the draft conclusions proposed in the report, he said that draft conclusion 1, which was modelled on conclusion 1 of the Commission's conclusions on identification of customary international law, was clear and concise. Draft conclusion 2 (c) expanded on Article 38 (1) (*d*) by adding "[a]ny other means derived from the practices of States or international organizations" to the list of subsidiary means. That addition reflected current practice in relation to the sources of international law. However, a future draft conclusion 6 should provide clarification of draft conclusion 2 (c). Otherwise, the title of draft conclusion 4, "Decisions of courts and tribunals", would not fully reflect the meaning of the term "judicial decisions" in Article 38 (1) (*d*). Concerning draft conclusion 5, the words "on questions of international law" should be inserted after the words "especially those reflecting the coinciding views of scholars" in order to clarify that teachings on legal questions, not simply all teachings, were valid as subsidiary means.

He supported the referral of all five proposed draft conclusions to the Drafting Committee, taking into account the comments and observations made during the plenary debate.

Mr. Mingashang said that he wished to thank the Special Rapporteur for his first report on subsidiary means for the determination of rules of international law, which was clear, well researched and, in its openness, intellectually courageous. He also wished to thank the secretariat for its memorandum on elements in the previous work of the Commission that could be particularly relevant to the topic.

He had no particular observations on the substance of the report, with which he was fully satisfied. Rather, his statement would be exploratory in character. First, he wished to draw the Commission's attention to a series of analytical considerations that could be addressed in the Special Rapporteur's second report. The first consideration was the risk that the work on the topic could tacitly perpetuate an international legal order that had given rise to a fundamental imbalance in the representation of the world's civilizations. In his first report, the Special Rapporteur echoed the wish expressed by Member States in the Sixth Committee that the Commission's work should "serve as a vehicle to help remedy certain consequences of the fragmentation of international law".

In chapter VIII (E) of the report, on the meaning of the term "the various nations", the Special Rapporteur exposed in a particularly lucid and striking manner the ideological bias of universalist discourse on international law, which masked the situations of historical ascendancy derived from the colonial violence that had characterized the context in which the theory of the sources of international law, and by extension that of the subsidiary means for their determination, had been developed. That was evident from the Special Rapporteur's analysis of the origin of the provision in question, in paragraphs 214 *et seq.* of the report. The rules of international law being debated at the time had been those "recognised by the legal conscience of civilised nations". It sufficed to read the works of authors active at the time of the progressive formation of classical international law, such as Franz von Liszt, John Westlake and James Lorimer, to gain insight into what constituted a "civilized nation" in that context. James Lorimer had taught that humanity was divided into three concentric zones or spheres: "that of civilised humanity, that of barbarous humanity, and that of savage humanity". It went without saying that Africa was presumed to belong to the last category, that of savage humanity. The idea that Africa was not "civilized" had been echoed in a number of well-known public statements of the time, such as that of Victor Hugo in May 1879 and that of King Leopold II of Belgium in September 1876. All other things being equal, the mere fact of replacing the term "civilized nations" with "various nations" was a semantic game that in no way disturbed the epistemological foundation on which international law had always been based. He had not identified anything in the report that amounted to an evaluation of the theoretical possibility of questioning what the Special Rapporteur termed the "basic conceptual foundation" of that original theoretical framework, which remained fundamentally Eurocentric and continued to convey surreptitiously, despite superficial adjustments, the underlying ideology of a law whose "international" character was increasingly debated, a fact to which the Special Rapporteur rightly alluded by way of the reference, in footnote 615 of the report, to the evocatively titled *Is International Law International?* by Anthea Roberts.

The second consideration to which he wished to draw the Commission's attention was the need to supplement the theoretical analysis with a presentation of the major doctrinal trends that currently structured international discourse. In chapter VI of the report, the Special Rapporteur stated that the nature and function of sources in the international legal system was a central issue and that the report would address a select set of theoretical matters that frequently arose in scholarly debates on the sources of international law. The chapter addressed many issues that were unquestionably worthy of study. However, one issue that would have enabled the Commission to define the conceptual foundation of its work more precisely concerned the fundamental oppositions between doctrinal trends in international law. His concern in that regard had grown stronger in the light of Mr. Forteau's statement at the Commission's preceding meeting, in particular his criticism of the sociological approach taken in the report's explanation of how sources of international law were used by international courts. Mr. Forteau had correctly noted that judges stated the existing law; they did not legislate. However, that position could be validly defended only within the framework of a formalistic conception of law.

Thus, it was worth asking whether the observable variations in the perception of the sources of international law might not have an effect on the perception of subsidiary means for their determination. Further, it might be asked whether, in view of those variations, the notion of "subsidiary means", understood according to what had evidently been a positivist conception of international law since the Permanent Court of International Justice had handed down its judgment in the *S.S. "Lotus"* case, was still generally valid. It was sufficient to recall the considerable polarization of the judges of the International Court of Justice, most notably when they had voted on one of its most emblematic advisory opinions, on the *Legality of the Threat or Use of Nuclear Weapons*, of which one of the operative paragraphs had been adopted by the casting vote of then President, Judge Bedjaoui. Where were the subsidiary means for the determination of the legal rule in that case, to help the judges to avoid a situation of *non liquet* regarding the use of nuclear weapons in armed conflict? That concern was also unavoidable when it came to justifying the classification of different types of sources, as in paragraph 164 of the report, where the Special Rapporteur distinguished between ultimate sources, functional sources, material sources and formal sources. Further distinctions could be added for the sake of completeness, such as transcendental sources versus conventional sources based on the theory of the social contract, or axiological sources versus technical sources, depending on whether the approach taken to international law was essentialist, formalist, materialist or simply objectivist. In the same vein, those considerations should be related to the question of gaps in international law and thus the role that subsidiary means might play in determining rules of law in such cases. The analysis in paragraph 247 of the report was pertinent in that regard.

The third consideration was the need to take a pragmatic approach to the way in which the international legal system worked with regard to the question of sources. In that connection as well, the conceptual frame of reference required some clarification; otherwise, the stated objective of providing a conceptual foundation for the Commission's work would be difficult to achieve. His *a priori* impression was that the Special Rapporteur's analysis of the topic was based on a fundamentally positivist view of international law. If that was indeed the case, two possible conclusions could be drawn. The first was that the only international law that existed was based on positivist reasoning, in which case it would be necessary to determine the value of other competing or parallel conceptions of international law in an increasingly fragmented context. The epistemological imperialism of legal positivism was supported by the systemic and argumentative constraints that framed legal discourse, in particular that of the International Court of Justice, whose judges would never admit to using sources other than those prescribed by Article 38 of the Statute.

The other possible conclusion was that, on the contrary, international law was not based exclusively on positivist reasoning, in which case many theoretical positions based on positivism would collapse. That possibility was hinted at by the Special Rapporteur in paragraph 263 of the report, where he stated that "the Court's practice of not necessarily citing teachings [did] not mean that it might not be consulting such works but without citing them", in which case "there would, from that perspective, appear to be a conflict in the drafting of Article 38". That metalegal contradiction affected judges' reasoning, as was highlighted in several places in the report, such as paragraph 305, which noted that there was "more consultation of academic works than formal citations of them", at least in the Court's majority opinions. For that reason, in its consideration of the topic, the Commission could not afford to ignore the increasingly pronounced trend towards the deformalization of law in general.

Contemporary law was increasingly setting more store by the objectives and values of different actors in the legal system than by the forms and logic of rationalism. Evidence of that shift included the development of distinctly axiological legal concepts such as good faith, equity and proportionality and the diversification of the mission of judges, as legal syllogism increasingly gave way to reasoning based on the weighing of interests, conciliation and even mediation.

Consequently, there was a "screening effect" in the report's discussion of the theory of sources in international law, with the result that it did not fully reflect the true functioning of the legal system owing to the strictures of the positivist framework. That filtering effect was highlighted in paragraphs 318 and 347 of the report, where the Special Rapporteur noted

that, in general, scholarship was used extensively by the International Court of Justice, despite "the apparent disregard of the Court for the legal doctrine". That implied that judges felt compelled to act as though subsidiary means for determining the sources of international law were of little use in drafting the Court's judgments, even though anecdotal evidence and background information on the Court's deliberations suggested that the opposite was true. Indeed, the Court's output often gave the impression that it produced only statements reflecting a typically positivist and formalist doctrine. However, it appeared that, beyond those statements of principle, the Court invariably followed a strategy whereby it presented seemingly technical and formalistic decisions that had, however, clearly been determined, at least in part, by political and/or ethical choices or constraints.

If the Commission's work was to serve a practical purpose, it must lift the veil on the equivocations obscuring the conceptual frame of reference within which judicial actors operated by identifying conceptual foundations that duly mirrored the principal legal systems of the world and the mechanisms through which the contemporary legal order actually functioned. As pointed out by Mr. Forteau, the international legal landscape was not the same in 2023 as it had been in 1920. Such an undertaking would be consistent with the Commission's mandate to promote the progressive development of international law.

The fourth consideration that warranted reflection by the Commission concerned the scope of the functions of teachings in international law. He wondered whether the list of three functions identified by the Special Rapporteur – the interpretation function, the persuasive function and the codification or progressive development function – was meant to be illustrative or exhaustive. It was his impression that teachings also performed a critical or reforming function; a legitimizing function, in the sense of preserving the achievements of a given legal system; a strategic or instrumental function in serving a particular cause or ideal; and a symbolic function. It could also be argued that doctrine, as a subsidiary means for determining rules of international law, also performed a recognition or identification function. The Special Rapporteur might, if he saw fit, wish to take up such purely theoretical questions in future reports.

Another issue that could be addressed in future reports was the impact that the reversal of precedent had on the use of judicial decisions as subsidiary means for determining rules of law. Such reversals, though rare in international law, crystallized the classic tension in law between novelty and predictability. On the one hand, reversal provided an opportunity to correct a recurring error in the legal reasoning that had traditionally been followed by judges and to adapt case law to an evolving society. However, it also raised questions about the scope of a judge's mandate in that situation. By going against the traditionally held position, the judge inevitably undermined the principle of the separation of powers and the consent-based character of international law. The Special Rapporteur might wish to reflect on how the status of judicial decisions as a subsidiary means for determining rules of law could be reconciled with the need to adapt the law to a changing environment, which could justify a reversal of precedent, if the law was not to be confined to abstract and fixed formulas or to lose its real-world effectiveness.

A further question that the Special Rapporteur might wish to explore was that of *stare decisis*, as referred to by Mr. Patel and by the Special Rapporteur in paragraph 346 of the report. The question of the status of judicial decisions in the theory of the sources of international law arose naturally in the context of the topic. He also wished to encourage the Special Rapporteur to clarify the status of soft-law instruments in the category of sources, as well as the legal status of resolutions of international organizations, with reference to the course on that subject given by former Commission member Jorge Castañeda at the Hague Academy of International Law.

He generally supported the draft conclusions proposed by the Special Rapporteur, on the understanding that certain clarifications, particularly of a semantic nature, would be made in the Drafting Committee. He also endorsed most of the suggestions made by Mr. Fathalla on that subject.

Mr. Galindo, thanking the Special Rapporteur for his thorough and thought-provoking first report on subsidiary means for the determination of rules of international law, said that, as correctly stated in paragraph 182 of the report, the list of sources in Article 38

(1) of the Statute of the International Court of Justice was not exhaustive. For example, as had been acknowledged by the Court and by the Commission, in its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, unilateral acts of States could, in some circumstances, give rise to obligations under international law. On that basis, he posited that Article 38 (1) (*d*) was similarly non-exhaustive, in keeping with the position taken by the Commission in the commentary to draft conclusion 9 of its draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). Therefore, at the very least, the works of expert bodies established by States or international organizations should also serve as subsidiary means, as expressly provided in draft conclusion 9 of the draft conclusions on *jus cogens*.

To his mind, the drafting history of Article 38 of the Statute of the International Court of Justice, while interesting, was of limited relevance to the Commission's discussions, since the composition of the Advisory Committee of Jurists had reflected only a small part of the world, and bias was evident in the exclusion of most peoples and nations from considerations about the role of international judicial precedent and doctrine.

The decision to focus the study of judicial decisions on the case law of the International Court of Justice, the Permanent Court of International Justice and inter-State arbitral tribunals accorded with the view expressed by the arbitral tribunal constituted under annex VII of the United Nations Convention on the Law of the Sea in its 2011 reasoned decision on challenge in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*. In determining the standard that was applicable for a challenge to an arbitrator on the grounds of partiality, the arbitral tribunal had favoured material pertaining to bodies belonging to the inter-State dispute settlement system, which, it had argued, was "based upon the consent of the Parties, and more specifically upon the rules of public international law, the sources of which [were] set out in Article 38 (1) of the Statute" of the International Court of Justice.

That precedent notwithstanding, he supported the broad interpretation given to the term "judicial decisions" in paragraph 273 of the report. In his view, that term should also include decisions of national and "mixed" or "hybrid" courts insofar as they applied international law, even though the weight accorded to them might differ from that given to decisions rendered by international courts and tribunals. He therefore agreed with the suggestion in paragraph 286 that decisions of national courts could be relevant as subsidiary means and for the identification of general principles of law and customary international law, and could provide evidence of State practice and/or *opinio juris*.

While he agreed that precedent was widely relied upon in the practice of international law and that a distinct weight had been ascribed to it by courts and tribunals, it was perhaps premature for the Commission to reclassify judicial decisions as a primary source of international law or to otherwise question their characterization as subsidiary means, as mooted in paragraph 150 of the report. The Commission could, however, shed light on the role of precedent and provide relevant stakeholders with the means to decide the weight to be accorded to it in individual cases. He wished only to caution against selectivity in surveying and appraising decisions of national courts, since many decisions seemed to be based on judicial decisions from certain regions or legal systems. If domestic case law was to serve as a subsidiary means for determining rules of international law, it should be resorted to in an unbiased manner, with due regard to wide geographical representation and encompassing as many legal systems and languages as possible. He did not dispute that, in practice, many international lawyers believed judicial decisions to be anything but "subsidiary" and that such decisions were cited more frequently by adjudicators than doctrine; nevertheless, the importance of precedent should not be overstated.

Neither unilateral acts of States nor resolutions of international organizations should be included in the scope of the study. As noted in paragraph 370 of the report, unilateral acts of States could be sources of binding legal obligations in their own right. Resolutions of international organizations, even when they were non-binding, could hardly be deemed subsidiary means for determining rules of international law; rather, they were evidence for identifying general principles of law or rules of customary international law, as had been confirmed by the International Court of Justice in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

The distinction between “formal” and “material” sources of international law mentioned in paragraph 167 seemed somewhat artificial, as politics, sociology and religion could play a role in the formation and even the application of international law, and “material” sources, such as religion and ethics, could impose binding obligations when they were applied by national or international institutions.

Regarding teachings, the term “publicists” reinforced the false dichotomy between public and private law and, especially, between public international law and private international law. As noted by the Commission in the commentary to conclusion 14 of its conclusions on identification of customary international law, while most “publicists” would, in the nature of things, be specialists in public international law, others were not excluded.

He wished to strongly commend the Special Rapporteur for having addressed head-on, in paragraphs 332 and 333 of the report, the unmistakable selectivity in respect of the scholars whose works were regarded as subsidiary means for determining rules of international law. Such profound inequity undermined the legitimacy of international law and the overall persuasiveness of legal reasoning. Multilingualism, too, was a paramount consideration in surveying scholarly works as subsidiary means.

Concerning the draft conclusions themselves, he wished to point out that the titles of draft conclusions 2 and 3 referred to the “determination of rules of law” and not to “determination of rules of international law”, the language used in the title of the topic. Although that choice of language was explained in paragraph 58 of the report, it raised the question of whether private international law, especially in its “international” dimension, was to be covered in any form by the draft conclusions. For the sake of clarity, he would prefer that “rules of international law” should be used throughout the draft conclusions, including in their titles.

He was unsure whether draft conclusion 2 (c) should be retained. If its main purpose was simply to state that Article 38 (1) (*d*) of the Statute contained a non-exhaustive list of subsidiary means, it was superfluous, since the word “include” in the *chapeau* already signalled as much. That point could also be further clarified in the commentary to draft conclusion 2. Furthermore, without accompanying guidance on the test by which such “other means” could be identified, the provision was unhelpful. The term “practices” would need to be defined, with a clarification as to whether it was used broadly or within the specific meaning attached to it for the purpose of identifying customary international law, particularly in the light of conclusion 6 of the conclusions on identification of customary international law. In any event, before a decision on that provision could be taken, the Commission would first need to decide on the existence of additional subsidiary means and on how to identify them. One possibility would be for draft conclusion 2 (c) to deal with private and “State-empowered” expert bodies, including the works of the International Law Commission and fact-finding commissions. Such works could hardly be classified as teachings or doctrine.

He also had serious doubts as to whether draft conclusion 3 should be retained. It was unclear whether that provision applied to all the subsidiary means mentioned in draft conclusion 2, especially since some of the criteria, such as “level of agreement among those involved” or “conformity with an official mandate”, would not apply to some types of subsidiary means, such as the teachings of individual scholars. Likewise, many judicial decisions did not elicit reactions from States or international organizations, especially when they were not parties, interveners or *amici curiae* in the dispute. Meaningful legal conclusions could not reasonably be drawn from the absence of reaction by non-parties to a decision concerning a bilateral dispute. Even if the provision was retained, it would have to be recast to account for the different criteria that should apply to each type of subsidiary means. Additionally, the word “evidence” should be revisited in the light of the discussion in paragraphs 375–378 of the report, and the term “others” in the last criterion should be further clarified. For instance, would the term include academic objections to a research paper or the rejection of a judicial decision by an international organization?

Draft conclusions 4 and 5 used the language “identification or determination of the existence and content of rules of international law”, whereas draft conclusions 1, 2 and 3 used simply “determine” or “determination”. For the sake of clarity, he would be in favour of using the same language throughout the text.

It was unclear whether, in draft conclusion 4 (a), "international courts and tribunals" also included quasi-judicial bodies, such as treaty bodies, claims commissions, hybrid or mixed courts, administrative tribunals, conciliation commissions such as those acting under annex V of the United Nations Convention on the Law of the Sea, or panels of experts such as those constituted under some free trade agreements concluded by the European Union. If that provision was intended to cover such bodies, it would need to be reworked. In the light of paragraph 280 of the report, an explicit reference to advisory opinions should also be included in the draft conclusions. Moreover, the word "authoritative" and, in particular, the words "particularly authoritative" were not used in the Commission's previous and ongoing work on identification of customary international law, *jus cogens* and general principles of law. Draft conclusion 4 (a) not only established an implicit hierarchy among subsidiary means – as evidenced by a comparison of its wording with that of draft conclusions 4 (c) and 5 – but could also be easily misconstrued as supporting something akin to *stare decisis* in international law. The language used in that provision should therefore be revisited.

Draft conclusion 4 (b) raised serious concerns, as it seemed to establish a general informal hierarchy among courts and tribunals, perhaps in keeping with the description of the International Court of Justice as the "apex court" in paragraph 319 of the report. While he agreed that the Court enjoyed a privileged position in international law and that the Commission relied more on its decisions than on those of other international courts and tribunals, he would be in favour of deleting that provision for three main reasons.

First, it was clear from the nature, origin and formation of international law that there was no formal *a priori* hierarchy among different international courts and tribunals, and even panels, claims commissions and quasi-judicial bodies or, for that matter, peaceful means of dispute settlement, such as those reflected in Article 33 of the Charter of the United Nations, as affirmed by the International Court of Justice in its 2018 judgment in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*. In the *MOX Plant Case (Ireland v. United Kingdom)*, which had been litigated simultaneously before an arbitral tribunal constituted under annex VII of the United Nations Convention on the Law of the Sea and the European Court of Justice, the tribunal had decided to suspend the proceedings until the European Court of Justice had ruled on the matter, not because of a perception of hierarchy, but out of "considerations of mutual respect and comity which should prevail between judicial institutions", both of which could "be called upon to determine rights and obligations as between two States". In contrast, draft conclusion 4 (b) proposed a hierarchy where none existed.

Second, the provision disregarded the particular weight that should be given to decisions or pronouncements of specialized courts, tribunals and expert bodies in their respective areas of expertise or in interpreting the specific international instruments whose application they had been tasked by States to oversee. The International Court of Justice, in its 2010 judgment in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, had stated that it should ascribe "great weight" to the interpretation adopted by the Human Rights Committee in respect of the International Covenant on Civil and Political Rights. Thus, for example, in the application of a specific regional instrument, the views of a regional court or body might be as relevant as – or, in some cases, even more relevant than – a pronouncement of the Court.

Furthermore, in its 2007 judgment in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the Court had reaffirmed the requirement to prove "effective control" set in its 1986 judgment in *Military and Paramilitary Activities in and against Nicaragua* and had rejected the "overall control" test for State responsibility for private conduct, as advanced by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the 1995 *Tadić* case. The Court had defended its test by distinguishing between matters of "general international law" and those "within the specific purview" of the Tribunal's jurisdiction, and qualifying State responsibility for private conduct, in general, as falling within the former category. Importantly, the Court had seemed to acknowledge the relevance of the Tribunal's precedents on matters related to its specialized jurisdiction and had cited its case law extensively throughout the judgment. Draft conclusion 4 (b) did not capture that nuance.

Third, if the purpose of giving the International Court of Justice a more prominent role was to tackle the so-called "fragmentation of international law" by promoting "coherence and unity" in the international legal system, it should be recalled that "coherence" and "unity" were both highly complex concepts and could not be approached solely from the perspective of formal rationality. The search for "coherence" and "unity" must take into account the "irrationality" of the inequalities in the world and could not be used as a pretext for confining international law to the role of legitimizing the *status quo*.

Draft conclusion 4 (c) should be amended to make clear that only decisions of national courts "applying international law" could be used as subsidiary means for determining rules of international law.

In draft conclusion 5, he wished to propose the addition of an explicit reference to wide geographical representation and linguistic diversity. For instance, the words "from different regions and legal systems, as well as writing in different languages" could be added after "the coinciding views of scholars". That addition would go some way towards addressing the stark inequity of international courts' and tribunals' practice of consistently citing the works of the same group of men from Western States, despite the enormous contribution that non-Western men and women with different legal backgrounds, hailing from developing and least developed States and speaking different languages, had made to the development of international law. In its most recent resolutions on multilingualism, the General Assembly had referred to multilingualism as a "core value" of the United Nations that contributed to the achievement of the goals of the Organization. Lastly, the Commission would need to decide whether the provision should include private and State-empowered expert bodies, and individual opinions by judges, arbitrators or other adjudicators, or whether they deserved a stand-alone draft conclusion. He was in favour of referring all the draft conclusions to the Drafting Committee.

The meeting rose at 12.55 p.m.