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Provisional summary record of the 3629th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 23 May 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	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 10.10 a.m.

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

Mr. Paparinskis, thanking the Special Rapporteur for his comprehensive first report on subsidiary means for the determination of rules of international law (A/CN.4/760), said that he was likewise grateful for the excellent memorandum by the Secretariat (A/CN.4/759). Going forward, the Commission might consider asking the secretariat to introduce its memorandums in a plenary meeting after the Special Rapporteur had presented his or her report, as doing so could helpfully frame the ensuing debate.

As recalled in the memorandum, the current study was not the first occasion on which the Commission had addressed subsidiary means from a conceptual perspective. He encouraged the Special Rapporteur to approach the topic in those terms, engaging with the Commission's work over the previous quinquennium, particularly conclusions 13 and 14 of the 2018 conclusions on identification of customary international law, which had been well received by States.

Some members might be concerned, on the basis of how the Commission's earlier work was presented in the report, that it played little role in the Special Rapporteur's thinking about the topic, except in relation to certain points of drafting. In summing up the debate, the Special Rapporteur could perhaps confirm that such suspicions were unfounded and indicate whether he intended to follow the approach described by the Chair of the Drafting Committee at the preceding session in relation to general principles of law (A/CN.4/SR.3605), which was not to depart from the Commission's earlier approaches in order to avoid giving the impression that the sources of international law were being dealt with in different ways. Doing so would reinforce codificatory elements in the Commission's earlier work and make it easier for States in the Sixth Committee to formulate a position on the topic at hand.

He agreed with Mr. Forteau and others that the Commission should focus on the practical aspects of the topic. That did not mean that the only possible approach was formalist positivism or that crucial contributions to international law had not been made by scholars of a theoretical or critical persuasion or scholars whose work had a sociological, empirical or other interdisciplinary bent, as noted by Mr. Mingashang and Mr. Fife. But the pedigree of the topic in an applicable law provision of a judicial body and the uncontroversial treatment it had received in the Commission's work since 2015 were arguments against venturing beyond mainstream international law in the current study. Naturally, account could and must still be taken of the diversity and pluralism of modern society and its history, as powerfully argued by Mr. Mingashang.

On a related note, he wished to encourage the Commission to reflect on the value of vagueness – a concept borrowed from Timothy Endicott – and on whether some parts of the topic might actually benefit from being left somewhat imprecise. For example, in determining whether the work of the Commission itself was a subsidiary means within the meaning of Article 38 (1) (*d*) of the Statute of the International Court of Justice, it was necessary to ascertain whether a particular document reflected the Commission's views, as discussed at page 69 of the tenth edition of *The Work of the International Law Commission*, and to know what weight to ascribe to the Commission's work by relying on considerations such as those set out in paragraph 111 of the judgment of the International Court of Justice in *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*.

It was less obvious, however, that much turned on where the Commission's output was placed within the internal taxonomy of Article 38 (1) (*d*) and whether it was viewed as "teachings", as significant materials not belonging to any particular category, or as works of "expert bodies established by States or international organizations", as referred to in draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*). Since subsidiary means could be introduced in a wide variety of institutional settings, international law tended to adopt a pragmatic approach by tolerating and perhaps even encouraging vagueness in respect of the internal taxonomy of that provision. In short, it would be of great practical value to clarify what materials fell within the category of subsidiary means and what weight should be ascribed to

them, but he would caution against refinement of taxonomy for its own sake, as it was not obvious that the international legal order would benefit from the introduction of new categories not spelled out in Article 38 or a sharp delineation between those enumerated in it.

Regarding the scope and outcome of the topic, he was inclined to agree that the matter of conflicting decisions by different tribunals with respect to the same international legal issue fell outside the scope of the topic, as stated in paragraph 27 of the 2021 syllabus annexed to the Commission's report on the work of its seventy-second session. First, the matter had already been addressed by the Commission's Study Group on fragmentation of international law; second, it might not have as much practical relevance as had once been thought; third, the matter was already partially addressed in relation to draft conclusion 3, which concerned criteria for the assessment of subsidiary means for the determination of rules of law; and fourth, the relationship between tribunals called for a framing different from that of the current topic, with its focus on general standards. Instead, such an enquiry would need to address the rich tapestry of adjudicative practice, where principles of procedural law played some role but issues turned mostly on specialized, highly varied rules of jurisdiction and applicable law. He would not object, however, to dealing with the issue in the related commentaries or in a without-prejudice clause.

The Special Rapporteur's main argument for proposing draft conclusions as the final form of outcome on the topic was the need to ensure consistency with the Commission's recent and ongoing work on sources. However, to his mind, since subsidiary means were not sources of international law, the Commission might wish to signal the distinctiveness of the current topic by producing another type of output, such as draft guidelines.

On questions of terminology, he would prefer to discuss the topic using terms of art in international law, avoiding terms that were strongly associated with a particular domestic legal tradition. For example, common-law expressions such as "case law", which had descriptive, normative and institutional implications that were ill-suited to discussions on general international law, should be avoided. While practice was not consistent on that point, in either the Commission or the International Court of Justice, the Commission might wish to seize the opportunity to settle on properly international and universal terminology and to standardize it in all the official languages of the United Nations.

Concerning methodology, while he agreed with the Special Rapporteur that the work on the topic should be guided by State practice in the sense of the Commission's 2018 conclusions on identification of customary international law, he would appreciate more granularity, both on the conceptual puzzle of relying on a constituent element of sources to identify the means for their determination and on practical examples of how the Special Rapporteur intended to carry out such an exercise. In the case of custom, he found it easier to imagine how a State might express its attitude towards subsidiary means in pleadings before international tribunals, submissions to the Sixth Committee or legal opinions, which, within the taxonomy of the 2018 conclusions, fell under evidence of *opinio juris*.

He noted the Special Rapporteur's request for suggestions on materials suitable for inclusion in a multilingual bibliography and fully supported the endorsement of multilingualism by members, including Mr. Galindo. The Commission should strive to go beyond the official languages of the United Nations to embrace genuine linguistic universality and intellectual pluralism.

Regarding the nature and function of sources in the international legal system, he first wished to encourage the Special Rapporteur to follow, rather than "problematiz[e]", the Commission's earlier work on the topic, particularly its 2018 conclusions on identification of customary international law. The relationship between sources and subsidiary means was already clearly described in paragraph (2) of the commentary to conclusion 13, which noted that subsidiary means played an ancillary role and that the term "subsidiary" did not suggest that they were not important for the identification of international law. He supported that position and wished to add that the importance of decisions or teachings likewise did not suggest that they were themselves a source of international law.

Second, the question of hierarchy did not even arise if the approach taken in the Commission's 2018 conclusions was followed. An inquiry into hierarchy required the objects

to be of the same character so that they would be capable of comparison in principle, which sources of international law and subsidiary means for the determination of rules of international law were not. That reading was supported by the language of Article 38 (1) (*d*) of the Statute. Following on from Mr. Fife's discussion of the term "subsidiary means" in the different authentic language versions of the Statute, he wished to point out that the equivalent terms in Chinese and Russian, respectively 补助资料 and в качестве вспомогательного средства, had the ordinary meaning of "auxiliary means". That was also true of the translations in Latvian, "*palīglīdzekļi*", and Lithuanian, "*pagalbinę priemonę*", although, in Estonian, "*kui abistavaid allikaid*" was closer to "auxiliary sources".

Third, regarding the treatment of judicial decisions within regional human rights and economic integration organizations, without taking a position on the accuracy of the characterization of that practice in the report, he agreed with the point made in paragraph 177 that the general rules on sources could be displaced by special rules. There was no reason of principle why judicial decisions could not function as sources or relevant materials for interpretation, provided, of course, that that was what the relevant special rules called for. While the overall focus of the work on the topic was on Article 38 (1) (*d*) of the Statute, such practice could be addressed in the commentaries or in a without-prejudice clause.

Fourth, the Commission should perhaps focus on materials that were consistent with the experience and assumptions of the modern international legal order. For example, Fitzmaurice's 1958 argument on the difference between sources of law and sources of obligations, referred to in paragraph 186 of the report, had been largely superseded by developments regarding multilateral aspects of sources and responsibility. In short, post-1969 and, in particular, post-2001 debates were likely to be more illuminating for answering modern challenges.

The drafting history of Article 38 (1) (*d*) of the Statute had less relevance as a supplementary means of interpretation than as a snapshot of how international lawyers had thought about the role of subsidiary means a century before. The key takeaway from those discussions was, in his view, the pragmatism and flexibility of the Advisory Committee of Jurists, whose original framing of the provision had prevented it from becoming obsolete despite the fundamental transformation of international law since its drafting in 1920.

Concerning the textual analysis of Article 38 (1) (*d*), he agreed with the Special Rapporteur's first tentative observation that subsidiary means were not sources of international law, regardless of the factual importance or irrelevance of particular means for the determination of particular rules. Like Mr. Nguyen, he also agreed with the Special Rapporteur's second tentative observation that Article 38 (1) (*d*) did not establish a hierarchy between judicial decisions and teachings. That was unsurprising, considering the variety of fields and institutions covered by the rules on subsidiary means. Perhaps rules of thumb on the comparative relevance that judicial decisions and teachings were likely to have in different contexts could be addressed in the commentaries. For example, judicial decisions were likely to be more important in specialized regimes that had courts with broad jurisdiction, while teachings were usually more important in fields that were still at an early stage of development, such as cyberlaw, or for universal treaties without dedicated international tribunals, such as those in the fields of diplomatic law and refugee law.

He would like to hear more about the pedigree of the subsidiary means category of "expert bodies established by States or international organizations", which was not mentioned in Article 38. One way to identify the scope of and distinctions within subsidiary means could be to examine the materials that were generally invoked as such and generally accepted by States and international tribunals. The aim of that exercise would be to characterize the relevant terms as generic and subject to evolutionary interpretation, or to rely on invocation by States as subsequent practice, or to treat "judicial decisions and teachings" as a composite phrase that covered more than the sum of its parts, which could be helpful for addressing materials that had features of both categories or for cases where the judicial character of the body in question was itself controversial.

By way of example of what such an examination might entail, the International Court of Justice, in paragraphs 53 and 185 of its March 2023 judgment in *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, referred to the invocation by both

parties of awards of investor-State treaty arbitration tribunals and application by the Court of such an award. Despite the concerns expressed by some colleagues, particularly Mr. Oyarzábal, about the use of investment arbitration decisions as a source, in light of *Certain Iranian Assets*, those concerns seemed to relate more to questions of weight and relevance, in line with paragraph 162 of the Court's judgment in *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* and its earlier treatment of the jurisprudence of the International Tribunal for the Former Yugoslavia in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

In addition to the bodies identified in paragraph (4) of the commentary to conclusion 13 of the 2018 conclusions on identification of customary international law and paragraphs 273 and 362 of the first report on the topic at hand, the Special Rapporteur might also consider conciliation committees, factual inquiries, compliance and implementation committees of multilateral environmental agreements and *sui generis* decisions within international adjudication, such as opinions of advocates general in the Court of Justice of the European Union. He would be particularly interested in hearing the Special Rapporteur's views on human rights treaty bodies. It seemed to be widely accepted that advisory opinions of the International Court of Justice and other international tribunals were a subsidiary means for determining rules of international law, as noted by Mr. Oyarzábal and Mr. Grossman Guiloff. Lastly, he strongly supported efforts to explore all possible ways of encouraging the use of the greatest possible diversity and plurality of teachings as subsidiary means.

He also supported the Special Rapporteur's intention to consider the "weight" of subsidiary means, which, to his mind, was where the practical relevance of the topic lay. In addition to the considerations identified in paragraph (3) of the commentary to conclusion 13 and paragraph (3) of the commentary to conclusion 14 of the 2018 conclusions, it might be relevant to consider what legal benchmarks the tribunal in question applied. Often those would consist of the correct determination of international law but might also require *prima facie* consideration of the claim or review of non-arbitrariness in the exercise of authority in accordance with international law, which would significantly affect the weight ascribed to the tribunal's decisions.

Regarding additional subsidiary means for the determination of rules of international law, he wished to encourage the Special Rapporteur to elaborate on his argument for addressing subsidiary means not enumerated in Article 38 (1) (*d*). There might be a logical gap between the proposition that the existence of further sources outside Article 38 could not be excluded and the conclusion that such means did exist and must be considered as part of a topic focused on Article 38. He agreed that unilateral acts did not constitute subsidiary means, though he would not hesitate to locate them within Article 38, as the International Court of Justice had done in its *Nuclear Tests* judgments by reference to the principle of good faith. Conversely, he was not convinced by the argument that resolutions of international organizations constituted additional subsidiary means. Resolutions played a very important role in the international legal process but there was no need to venture outside Article 38 (1) to explain their status, as reflected in conclusion 12 of the conclusions on identification of customary international law and conclusion 11 of the conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. He would, however, not object to the Special Rapporteur's exploring that issue in future reports if the Commission supported that course of action.

He supported draft conclusion 1, on scope, but wished to propose that the words "the existence and content of" should be deleted to ensure consistency with the language of Article 38 (1) (*d*) of the Statute. The provision's departure from the Commission's 2018 conclusions on identification of customary international law was justified by the need for terminology that was equally suited to all three sources, including treaties, where a distinction between existence and content of rules was less obviously relevant.

While he supported draft conclusion 2, on categories of subsidiary means for the determination of rules of law, its title should be aligned with that of the topic and the word "include" in the *chapeau* should be replaced with "are", until the Special Rapporteur had demonstrated the existence of non-enumerated subsidiary means that fell within the scope of the topic. Subparagraph (a) should perhaps be amended to refer to "judicial decisions" to

ensure consistency with Article 38 (1) (*d*), or to "decisions of courts and tribunals", in line with the Commission's 2018 conclusions. However, if the original wording was maintained, the order of the words "national" and "international" should be reversed to reflect the relative weight of decisions of such courts, as established in draft conclusion 4. He supported subparagraph (b) as proposed but did not support subparagraph (c) for the reasons given regarding the wording of the *chapeau*.

He supported the substance of draft conclusion 3, on criteria for the assessment of subsidiary means, although its title should be aligned with that of the topic. He would prefer a brief provision that noted the existence of criteria, which could then be elaborated on in the related commentary. Alternatively, the criteria could be set out separately for judicial decisions and teachings, as in the Commission's 2018 conclusions on identification of customary international law. He would also prefer to avoid using the passive voice and particularly the expression "are assessed", which seemed to allude to assessing entities in a manner that did not reflect the institutionally agnostic approach that international law took to sources and their determination. A revised sentence in the active voice could start with "Criteria for the assessment are/may be/include".

Although he supported draft conclusion 4, on decisions of courts and tribunals, he would prefer it to mirror conclusion 13 of the 2018 conclusions, albeit with the deletion of "the existence and content of" and "customary". In any event, he would prefer to delete "the identification or" to ensure consistency with Article 38 (1) (*d*); to delete the term "authoritative", which was likely to cause confusion, as it had a technical meaning in the law of treaties; and to make the same changes as those proposed in relation to draft conclusion 1. While it might be more appropriate to refer to the International Court of Justice in the commentary, he would be content to follow the approach taken in the Commission's 2018 conclusions on that point.

He supported draft conclusion 5, on teachings, and wished to propose the same drafting changes as those proposed for draft conclusions 1 and 4. Although the reference to "the coinciding views of scholars" seemed to relate more to application than to content and might fit better in the commentary, he was open to maintaining the current formulation.

Consideration could also be given to ways of addressing the relationship between sources and subsidiary means, taking into account the Commission's previous and ongoing work on sources. The first report and the reactions to it suggested that the relationship was less settled than might have been thought, and the Commission might wish to provide assurances at the outset that the topic would not lead to a reassessment of the established assumptions on sources. The Special Rapporteur could perhaps propose a new draft conclusion to that effect, drawing inspiration from the last two sentences of paragraph (2) of the commentary to conclusion 13 of the 2018 conclusions, which could form the basis of two paragraphs, with a third paragraph as a without-prejudice clause to address the concerns raised on the treatment of judicial decisions within regional human rights and economic integration organizations. Alternatively, the substance of the point could be addressed in the commentaries to draft conclusions 1 and 2.

He fully supported the Special Rapporteur's proposed future programme of work and the referral of the draft conclusions to the Drafting Committee.

Mr. Asada, thanking the Special Rapporteur for his excellent first report on the topic of subsidiary means for the determination of rules of international law, said that the report not only gave the Commission a basis on which to complete its work on Article 38 (1) of the Statute of the International Court of Justice, but also further clarified the relatively underdeveloped notions of "judicial decisions" and "teachings" in Article 38 (1) (*d*). He was in favour of expanding the scope of subsidiary means to include other possible means not listed in Article 38 (1) (*d*). The text of that subparagraph referred to judicial decisions and teachings as "subsidiary means for the determination of rules of law", which indicated not only that they did not represent "sources" of law themselves but also that they allowed for liberal interpretation.

The Special Rapporteur had proposed that unilateral declarations of States and resolutions of international organizations should be considered as possible additional means for the determination of rules of law. Given that those were the principal candidates found in

scholarship on the Statute of the International Court of Justice, he again supported the Special Rapporteur's proposal. However, other possible subsidiary means, such as the decisions of conciliation commissions established under annex V of the United Nations Convention on the Law of the Sea, as suggested by Mr. Nguyen, warranted further discussion and study by the Commission.

The Special Rapporteur seemed to have concluded that unilateral declarations that created legal obligations should not be considered subsidiary means, since they were legally binding, and that they were more likely to fall outside the ambit of Article 38 (1). However, in his view, such a categorical statement was incorrect or, at the very least, misleading. A specific unilateral declaration might or might not be considered a subsidiary means, depending on whether it was binding *vis-à-vis* the parties concerned.

There had been much debate as to whether or not Article 38 (1) should be considered exhaustive. Many people, including the Special Rapporteur, had argued that unilateral declarations might not fall under any of its four subparagraphs, while remaining a binding source of law. In contrast, he believed that Article 38 (1) should be understood as an exhaustive list upon which the Court could rely in rendering judgments, as indicated by the clear language of the provision. It was also preferable to read unilateral declarations into the existing provisions, if possible, instead of simply resorting to an extratextual solution.

Regardless of whether Article 38 (1) (*a*)–(*c*) was viewed as establishing a formal order among its subparagraphs, there were a number of reasons, including the *lex specialis* rule, for the Court to apply the applicable international conventions to the parties first, followed by customary international law. In the absence of either, general principles of law would apply, as was apparent from the drafting history of Article 38 and from draft conclusion 10 (1) of the draft conclusions on general principles of law adopted by the Commission on first reading at the current session.

In the *Nuclear Tests* cases, the International Court of Justice had relied on the French Government's unilateral declarations as a primary basis for its final conclusion. Thus, the Court must have considered unilateral declarations to fall within one of the first three subparagraphs of Article 38 (1) and not as a subsidiary means under subparagraph (*d*). Otherwise, in the light of the provisions of Article 38, the Court could be considered to have acted *ultra vires*. A purely unilateral act could not be characterized as an international convention or international custom. In his view, the French declarations could thus be characterized as an application or extension of "good faith" as a general principle of law. That interpretation based on "good faith" was consistent with the language in the judgments in the *Nuclear Tests* cases and also principle 1 of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. Accordingly, binding unilateral declarations could be considered to fall within the scope of Article 38 (1) (*c*).

A similar understanding could be applied to binding resolutions of the Security Council. Although they did not directly fall under any of the three sources of law enumerated in Article 38 (1), they could be viewed as an extension of the Charter of the United Nations as a treaty. The obligations contained in such resolutions had commonly been regarded, both in doctrine and in practice, as obligations under the Charter, often in relation to Article 103 thereof. In relation to the Statute of the International Court of Justice, those obligations could thus be described as falling within the scope of Article 38 (1) (*a*) on international conventions. The Special Rapporteur had a different understanding on that point, as he tended to dissociate Security Council resolutions from treaties.

The Special Rapporteur argued that binding unilateral declarations did not fall under Article 38 (1) (*d*) of the Statute because they were legally binding. In his own view, not all binding unilateral declarations necessarily fell outside the scope of subsidiary means. It should be recalled that judicial decisions in the narrow sense of judgments were also legally binding, but they were explicitly mentioned as "subsidiary means" in Article 38 (1) (*d*). That was because judicial decisions were not binding on States other than the parties to the dispute in question, as established in Article 59 of the Statute. Thus, a distinction should be made between the legally binding nature of judicial decisions in a general sense and their legally binding status *vis-à-vis* the parties in question.

Indeed, such a distinction was made in Article 38 (1) of the Statute. For example, Article 38 (1) (*a*) referred to "international conventions" with the qualifying phrase "establishing rules expressly recognized by the contesting states". Thus, in some contexts, even treaties might not fall under Article 38 (1) (*a*) but could instead be considered subsidiary means under Article 38 (1) (*d*) for non-parties to the treaty. Similarly, Article 38 (1) (*d*) referred to "judicial decisions", but was expressly subject to Article 59, which not only meant that the Court did not follow the *stare decisis* principle, but might also imply that judicial decisions binding on the contesting States were not "subsidiary means" *vis-à-vis* those contesting States because they were legally binding on them. They might be covered by Article 38 (1) (*a*), via the Court's Statute as a treaty.

Unilateral declarations that were binding only with respect to the declaring States would fall under Article 38 (1) (*c*) *vis-à-vis* the parties to a dispute but could fall under Article 38 (1) (*d*) *vis-à-vis* States that were not involved in the dispute in question. Thus, unilateral declarations should not always be excluded from the scope of the topic of subsidiary means simply because they were legally binding. They should be excluded only in situations where they were legally binding on the parties to a pending case, but otherwise they might fall under Article 38 (1) (*d*).

Legally binding Security Council resolutions could fall under Article 38 (1) (*a*) or Article 38 (1) (*d*) depending on which parties were bound by them. For the parties to a dispute bound by such resolutions, they would fall under Article 38 (1) (*a*) via the Charter of the United Nations as a treaty, while for others they could be among the subsidiary means under Article 38 (1) (*d*). However, practically speaking, most legally binding Security Council resolutions belonged to the former category, as they were generally binding on United Nations Member States as a whole. Moreover, most legally binding Security Council resolutions imposed sanctions on target States. Accordingly, they might not be directly relevant to subsidiary means for the determination of rules of international law. The few international legislative resolutions that existed on international terrorism prevention, such as Security Council resolutions 1373 (2001) and 1540 (2004), would fall under Article 38 (1) (*a*) for the reasons he had just explained. On the other hand, non-binding resolutions of the Security Council and other organs of the United Nations, as well as those of other international organizations, might well be subsidiary means under Article 38 (1) (*d*).

All in all, he believed that it would be inappropriate to exclude *a priori* unilateral declarations of States or resolutions of international organizations – whether binding or non-binding – from the scope of the topic. It seemed that the Special Rapporteur might, at least partially, concur with that view, given his assertion in paragraph 378 of the report: "Any source, instrument or text, whether binding or non-binding, that can inspire legal arguments can be used as a subsidiary means for the determination of rules of law in a particular case."

Concerning judicial decisions, the Special Rapporteur was correct in understanding that term in Article 38 (1) (*d*) to apply broadly, given that such decisions were merely subsidiary means for the determination of rules of law. With regard to the Court, judicial decisions should include not only its final judgments in contentious cases but also incidental or interlocutory orders and advisory opinions. That was in line not only with how the Court had dealt with the latter categories in its own findings, but also with how the Commission had dealt with them in its 2018 conclusions on identification of customary international law. When determining the weight to be given to a particular judicial decision, the primary consideration should be the quality of the legal reasoning and its persuasiveness in framing a legal opinion. Consequently, technical notions such as the legally binding status of the document or whether it was of a provisional or final nature should matter less. He also shared the Special Rapporteur's view that separate opinions should not fall within the scope of judicial decisions, although they could be instrumental for the purpose of interpreting the majority opinion.

While it was appropriate to understand the scope of judicial decisions broadly, it was also important to note that they were not all of equal quality. The Special Rapporteur rightly distinguished between the International Court of Justice and other international courts and tribunals in draft conclusion 4 (b). That approach was broadly in line with the Commission's previous work, including conclusion 13 (1) of the 2018 conclusions and draft conclusion 9 (1) of the 2022 draft conclusions on identification and legal consequences of peremptory

norms of general international law (*jus cogens*). The commentaries to those draft conclusions offered several valid reasons for expressly mentioning the International Court of Justice, including the fact that the Court was the principal judicial organ of the United Nations, that its members were elected by the main political organs of the United Nations and that it remained the only standing international court of general jurisdiction. However, singling out the International Court of Justice alone in the context of the current topic might give the misleading impression that all other international courts and tribunals were to be treated equally, irrespective of whether they were permanent or *ad hoc* in nature.

He agreed with other members that a distinction should generally be made between judicial decisions in the narrow sense and arbitral awards. It was true that, in terms of their legally binding character, there was no difference between the two types of decisions in that they were binding only on the parties to the dispute and only with respect to the particular case. However, there were some common differences between the two. For instance, given the *ad hoc* structure of an arbitral tribunal, it might tend to place more emphasis on the settlement of the particular dispute before it and on the specific facts and circumstances of the case at hand. It might therefore be difficult for arbitral tribunals to "give rise to generalization going beyond the special circumstances of each case", as the International Court of Justice had put it in the *Barcelona Traction, Light and Power Company, Limited* judgment of 5 February 1970. Additionally, arbitrators did not necessarily have legal training.

By contrast, permanently established courts with a standing mandate to resolve disputes and with more institutionalized experience and expertise tended to embody a desire for consistency and were interested in the law-finding exercise for future cases. As a result, the decisions of permanent courts might, in general, be more consistent and have more value as precedent than those of *ad hoc* tribunals. That might be one of the reasons why the International Court of Justice had long been parsimonious in citing arbitral awards in its jurisprudence, with some exceptions.

It was true that the value of all decisions should ultimately be assessed on the basis of the quality of evidence, the level of agreement among those involved and the reception by States, as noted in draft conclusion 3. However, the commentary to draft conclusion 4 on decisions of courts and tribunals might provide an opportunity to categorize international courts and tribunals according to their permanent or *ad hoc* nature or otherwise address the quality differences between judicial decisions in the narrow sense and arbitral awards. In addition, while the criteria for the assessment of subsidiary means listed in draft conclusion 3 drew on the commentary to conclusion 14 of the 2018 conclusions on identification of customary international law, some of the criteria, especially "conformity with an official mandate" and "the level of agreement among those involved", might apply largely or even exclusively to "judicial decisions" and potentially other outputs of institutions. Those criteria did not always fit well with "teachings", particularly with regard to individual scholarly works. In his view, a qualifying phrase, such as "as appropriate", was required in that draft conclusion.

He agreed with the Special Rapporteur that judicial decisions of national courts were relevant to Article 38 (1) (*d*) to the extent that they interpreted and applied international law, and that emphasis should be placed on the type of law used rather than the type of court or tribunal. However, caution must be exercised in relying on such decisions, not solely because they might be based on peculiarities of national legal systems, as the Special Rapporteur suggested, but perhaps more importantly because national court judges were, as a general rule, trained primarily to apply national laws and might sometimes lack international law expertise, as stated in the commentary to conclusion 13 of the 2018 conclusions. In that sense, the wording of draft conclusion 4 (c) was appropriate in his view.

There was some inconsistency of wording between draft conclusion 1 and draft conclusions 4 and 5. In the former, the word "determine" was used in relation to the "existence and content of rules of international law", which was in line with the title of the topic, whereas in draft conclusions 4 and 5, the expression "identification or determination" was used in relation to the same phrase. If that apparent discrepancy was intentional, he would be grateful if the Special Rapporteur could explain his rationale. Otherwise, the matter could be taken up in the Drafting Committee.

He fully endorsed the Special Rapporteur's suggestion that the final outcome of the work on the topic should take the form of draft conclusions, given that the Commission's related outputs had taken that form. His position thus differed somewhat from that of Mr. Paparinskis. The Special Rapporteur had noted his intention to present a second report in 2024, on judicial decisions, and a third report in 2025, on teachings. However, since additional subsidiary means were not dealt with extensively in the first report and were arguably more directly related to the fundamental questions with which the Commission was grappling, he would recommend further analysis of additional subsidiary means in future reports.

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

Ms. Ridings said that the Special Rapporteur's first report was methodologically sound, intellectually stimulating, rigorous, comprehensive and well written. The memorandum by the Secretariat would also be a valuable resource for future work on the topic.

Concerning the issue of whether subsidiary means were a "source of law", in examining the use by the Commission of judicial decisions as subsidiary means, the Special Rapporteur noted that they could be akin to primary sources of international law. Although he conceded that there was an apparent mismatch between theory and practice, the relationship between subsidiary means and sources of law warranted close attention. In her view, it was most appropriate to consider formal sources of law as "those methods for the creation of rules of general application which are legally binding on their addressees", as explained in *Brownlie's Principles of Public International Law*. There was also a distinction between law-creating processes in Article 38 (1) (*a*)–(*c*) and law-determining agencies in Article 38 (1) (*d*) of the Statute of the International Court of Justice, with the latter provision having a particular subsidiary function, that of assisting in the determination of rules of international law. That was apparent from a textual analysis of Article 38 (1) (*d*). The term "subsidiary" in that context seemed to mean something that was subordinate, or secondary, to the preceding subparagraphs, rather than something that was supplementary or additional to them. She also took note of the analyses of Mr. Fife and Mr. Paparinskis with respect to the authentic texts of that provision. In that sense, subparagraph (*d*) was clearly distinct from subparagraphs (*a*)–(*c*).

That understanding was in line with how the Commission had understood the term "subsidiary means" in the past. That meaning was confirmed by the *travaux préparatoires* on which Article 38 was based, although she noted the points made by some Commission members that the *travaux* dated back 100 years and the texts had been developed by a small group of advisers. However, it seemed from the analysis by the Advisory Committee of Jurists that the prevailing view at that time, which was grounded in the precepts of State sovereignty, was that such subsidiary means could not "create law". That suggested a distinction between the subsidiary means identified in subparagraph (*d*) and the "law-creating" sources recognized in subparagraphs (*a*)–(*c*). That was also consistent with the State-centric nature of international law, as noted by Mr. Oyarzábal. International law was ruled by the principle of the sovereign equality of States, as referred to in Article 2 (1) of the Charter of the United Nations. States had the freedom to consent or not to consent to treaties. Customary international law was created by State practice and the *opinio juris* of States. And States had the freedom to agree to judicial settlement of disputes, including where that consent was given in advance or on an *ad hoc* basis.

The term "determination" of rules of international law also needed further explanation. As noted in the *travaux préparatoires*, subsidiary means could serve to elucidate rules of international law. They could also verify the existence and state of rules of international law enunciated in Article 38 (1) (*a*)–(*c*) and could assist in verifying the proper interpretation of rules of international law. Those functions that judicial decisions and the teachings of publicists performed were auxiliary ones. They were not sources of law, as the Special Rapporteur agreed in the first of his concluding observations in chapter VIII of the report. However, the references to subsidiary means as "documentary sources" should be explained in light of the evidence they could provide of rules of international law. There were also other instances where the Special Rapporteur appeared to give greater weight to

subsidiary means than might be warranted. It would be useful to have consistent terminology clearly indicating that the subsidiary means set out in Article 38 (1) (*d*) were not sources of law.

That was particularly important in relation to judicial decisions. While the Special Rapporteur discussed academic writings on whether judicial decisions could develop international law, he appeared to give a special place to judicial decisions as quasi-formal sources of law and to their role and importance in the development and consolidation of international law. That raised the issue of precedence. The Special Rapporteur suggested that reasons of logic, consistency, predictability and legal stability would require international judicial bodies to follow their previous decisions. However, she agreed with other members that there was no binding system of precedence for international courts and tribunals. While courts and tribunals could, of course, follow the legal reasoning adopted in previous cases, that was not the same as following the decisions in previous cases. For example, it was the methodology of the International Court of Justice in maritime boundary delimitation that was followed, rather than prior decisions of the Court.

The issue of precedence also had practical relevance. For example, in its judgment in the case of *Prosecutor v. Zlatko Aleksovski,* the Appeals Chamber of the International Tribunal for the Former Yugoslavia had held that while it should normally follow its previous decisions, it was free to depart from them for cogent reasons in the interests of justice. The approach of not departing from previous decisions unless there were cogent reasons for doing so was also followed by the World Trade Organization Appellate Body on the grounds of security and predictability. That was one of the many reasons for the current impasse in the functioning of the Appellate Body. Thus, considerable caution was warranted when considering the precedential effect of judicial decisions.

A related issue on which the Special Rapporteur sought the views of Commission members was the question of fragmentation and whether conflicting decisions should fall within the scope of the topic. She agreed with Mr. Oyarzábal and Mr. Grossman Guiloff that the issue should be considered to some extent, since to ignore it would imply that the Commission did not recognize its existence. The Commission's work on the topic could bring coherence to the question of judicial decisions, where what mattered was the quality, legal coherence, logic and intellectual rigour of decisions, rather than the nature of the tribunal. However, the issue should be approached from a practical perspective, in line with the views of States. Concerning national court decisions, she agreed that such decisions could provide evidence of State practice and *opinio juris* that contributed to customary international law. In that regard, they performed the same evidentiary function as other subsidiary means. However, it went without saying that not all national court decisions could appropriately be used as subsidiary means; in particular, it was the nature of the legal question under consideration and of the law being applied that would be instructive. With regard to the specific question raised by the Special Rapporteur in paragraph 47 of his report, she agreed that the advisory opinions of judicial courts fell within the category of subsidiary means for the determination of rules of international law.

The inclusion of the teachings of the most highly qualified publicists as a subsidiary means for the determination of rules of international law in Article 38 (1) (*d*) was perhaps one of its most controversial aspects. Certainly, judicial decisions were resorted to much more frequently than teachings. Those writings that were referred to, particularly in judicial decisions, were largely those of Western men, which raised questions about the legitimacy of recourse to teachings as subsidiary means and highlighted the need for a truly international and multilingual approach, as noted by several other Commission members.

It was important to look at the different functions of the teachings of publicists. The Special Rapporteur had identified the interpretative function and the functions of elucidating or confirming existing rules of international law. To those he had added other functions, such as the persuasive function and the influential function. She agreed with the Special Rapporteur's assertion in paragraph 316 of the report that none of those functions suggested that teachings had any authority to "make law". As international law scholar Anne Peters had suggested, legal scholars were not and should not be considered lawmakers because they lacked the necessary democratic legitimacy and authority to make law. That authority lay with States. However, the Special Rapporteur's inclusion of the persuasive and influential

functions created the impression that scholars made law, which was contrary to the view that teachings functioned as a subsidiary means. At the same time, she agreed that teachings and writings could inspire law-making and contribute to the development of law, for example by identifying legal gaps, which could lead to the negotiation of treaties between States, or by influencing the development of State positions that might lead to expressions of customary international law. They could motivate and persuade States to take action in a particular direction, but it was States that took up the ideas expressed in scholarship and carried them forward. In other words, the influence of scholarship on international law was broader than the confines of Article 38 (1) (*d*), which was therefore of little assistance in explaining how international law scholars and practitioners contributed to the formation of international law. The persuasive and influential functions existed but were not found within Article 38 (1) (*d*). That provision therefore should not be taken beyond its specific confines and the specific function of the determination of rules of international law.

Regarding the Special Rapporteur's request for views on whether there were additional subsidiary means that ought to be covered by the topic, she noted his suggestion that the distinction between sources of law and sources of obligations might have some practical application when it came to considering the possible existence of additional subsidiary means. However, a distinction should be made between sources that created obligations for States and subsidiary means for the determination of rules of international law. From a pragmatic perspective, taking into account the general views on sources, those sources that created obligations should not be included within the scope of the topic, and in that regard she respectfully disagreed with Mr. Asada.

By that token, unilateral acts created obligations for States and were therefore not subsidiary means for the determination of rules of international law. Similarly, binding United Nations Security Council resolutions and other binding resolutions of international organizations should not be included within the scope of the topic. However, the situation was different with respect to non-binding resolutions. As the International Court of Justice had indicated in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, non-binding General Assembly resolutions could "provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*". The Court had reiterated that finding more recently in its advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. In its judgment in the case concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, the Court had ruled that non-binding resolutions of the contracting parties to the International Convention for the Regulation of Whaling, if adopted by consensus or unanimous vote, "may be relevant for the interpretation of the Convention or its Schedule". That suggested that there might be some merit in considering non-binding resolutions of international organizations as subsidiary means.

There seemed to be a difference of opinion among Commission members as to whether the work of expert bodies, including expert bodies established by States, should be considered to be "teachings of publicists" or a separate category of subsidiary means. Either way, it was clear that their work could be resorted to as subsidiary means, and it therefore did not seem necessary to consider them as a separate category of subsidiary means. However, that point could be clarified in the commentaries.

Regarding the outcome of the work on the topic, she concurred with the Special Rapporteur that draft conclusions were the most appropriate form, on the understanding that the term "draft conclusion" meant the outcome of a process of reasoned deliberation and a restatement of identified practices related to subsidiary means. It was also logical to use the same form that the Commission had previously used in its work on Article 38 (1) (*b*) and (*c*), as noted by the Special Rapporteur in paragraph 56 of the report. Concerning the future work on the topic, she noted that the Special Rapporteur's second report would cover the status and role of subsidiary means within Article 38 (1) and the interplay and relationship between subsidiary means and treaties, international custom and general principles of law. Consideration of those issues would be particularly important given the dialectic views presented in chapter VI of the first report. The programme of work was fairly ambitious, but that might be necessary if the objective was to complete the second reading in 2027. Her only concern was that lengthy second and third reports could hamper States' ability to make cogent

comments and could thus limit their necessary input. She had no particular comments on the proposed draft conclusions themselves at the current stage, although she noted the specific views expressed in that regard by some members of the Commission. She supported the referral of the draft conclusions to the Drafting Committee.

Mr. Vázquez-Bermúdez said that he wished to thank the Special Rapporteur for his excellent first report on subsidiary means for the determination of rules of international law, which would serve as a solid foundation for the Commission's work. He also wished to thank the secretariat for its memorandum on relevant elements in the previous work of the Commission, which contained a number of useful observations.

The Commission's consideration of the topic had practical utility, in that its aim was to clarify the manner in which subsidiary means should be used to determine rules of international law. Accordingly, he supported the Special Rapporteur's proposal that the outcome of the work on the topic should be a set of draft conclusions, accompanied by commentaries. Subsidiary means for the determination of rules of international law had already been addressed in the Commission's conclusions on identification of customary international law and its draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), as well as its draft conclusions on general principles of law, which had been adopted on first reading. There was no reason to move away from that format in considering subsidiary means as a topic in their own right. In its consideration of the topic at hand, the Commission should take due account of its own previous work on subsidiary means in the context of those topics, as Mr. Paparinskis had mentioned.

In line with the aim of the work on the topic, its scope should be limited to the role of judicial decisions, teachings and possibly other subsidiary means in determining the rules of international law and should not be expanded to cover other roles or aspects of judicial decisions and teachings. The Special Rapporteur had indicated that the question of conflicting judicial decisions on the same legal issue might fall outside the scope of the topic and had invited the Commission to decide whether to include it, given its significance and the fact that it seemed to arise naturally from the study of the role of judicial decisions as subsidiary means. For his part, he did not consider it appropriate to expand the scope of the topic by revisiting the question of the fragmentation of international law from the perspective of judicial decisions and teachings as subsidiary means. However, he would welcome clarification from the Special Rapporteur of what the objective of the consideration of that specific issue would be and what useful conclusions could be drawn from it.

In chapter V of the report, regarding the Commission's previous work on subsidiary means, the Special Rapporteur presented a useful summary of the secretariat's memorandum and concluded with four preliminary reflections, with which he broadly concurred. In the second observation, the Special Rapporteur rightly stated that judicial decisions as subsidiary means played a very important role in the Commission's work. Not only were they relied upon to identify or confirm the existence and content of rules of international law, but in some instances they also served as a basis for the actual formulation of rules and principles of international law and sources of rights and obligations. However, the Special Rapporteur's remark that the Commission's practice suggested that judicial decisions could be akin to the primary sources of international law did not seem to him to be entirely correct.

Regarding chapter VI of the report, on the nature and function of sources in the international legal system, Article 38 (1) of the Statute of the International Court of Justice was an authoritative statement of the sources of international law and was widely accepted as reflecting a rule of customary international law. The sources referred to in Article 38 (1) (*a*)–(*c*) were treaties, international custom and general principles of law recognized by the community of nations, as confirmed in State practice and the jurisprudence of international courts and tribunals. Article 38 (1) (*d*) of the Statute was also an authoritative statement that both judicial decisions and teachings were subsidiary means for the determination of rules of international law. As the Special Rapporteur correctly noted in the report, subsidiary means were not sources of international law; rather, judicial decisions and teachings were subsidiary means resorted to by courts, tribunals and other bodies to determine the existence and content of rules of international law, including rules contained in treaties, rules of customary international law and general principles of law. In the commentary to conclusion 13 of its

conclusions on identification of customary international law, the Commission stated, *inter alia*, that the term "subsidiary means" denoted the ancillary role of such decisions in elucidating the law, and that they were not themselves a source of international law, unlike treaties, international custom and general principles of law.

The Commission's consideration of the topic must of course be based on Article 38 (1) (*d*), taking due account of State practice, jurisprudence and teachings. A relevant aspect to be considered was whether, on the basis of an analysis of relevant practice and jurisprudence, additional subsidiary means could be identified. While the topic of subsidiary means related to the sources of international law, it would not be particularly useful or desirable for the Commission to enter into theoretical or academic discussions on formal and material sources of international law or on sources of law and sources of obligations, let alone the question of primary, secondary and documentary sources. Furthermore, subsidiary means did not need to be shoehorned into the category of sources in order to be considered important. Judicial decisions and teachings were of great importance in themselves as subsidiary means, as had been demonstrated in practice and noted in the commentaries to the conclusions on identification of customary international law. It was therefore advisable to maintain uniformity in the terminology used throughout the Commission's work on the topic, in the light of its previous work that touched upon subsidiary means. Thus, references to material sources, secondary sources, sources of obligations and documentary sources in relation to subsidiary means should be avoided and subsidiary means should simply be referred to as such, on the understanding that the term "source of international law" referred to the legal process and the form in which legal norms came into existence in the international legal system, namely through treaties, international custom and general principles of law.

Concerning chapter VI (E), on the absence of a formal hierarchy between the sources of international law, the Commission had already addressed that aspect previously and had established, on the basis of an analysis of practice and doctrine, that there was no hierarchy among the three sources of international law listed in Article 38 (1) (*a*)–(*c*). Thus, for example, in conclusion (31) of the conclusions contained in the report of the Study Group on fragmentation of international law, which was annexed to the Commission's report on the work of its fifty-eighth session, it was stated that: "The main sources of international law (treaties, custom and general principles of law as laid out in Article 38 of the Statute of the International Court of Justice) are not in a hierarchical relationship *inter se*." The absence of hierarchy among the three sources of international law did not need to be qualified as "formal", just as it had not been in the Commission's previous work, such as the report on fragmentation. Moreover, there was no need even to refer to the absence of hierarchy among the three sources of international law in the context of the current topic, since subsidiary means were not a source of international law.

With regard to chapter VII of the report, the Special Rapporteur's summary of the drafting history of the provision was useful and interesting. It was noteworthy that the provision ultimately adopted by the Advisory Committee of Jurists in 1920, after long deliberations, was essentially the one proposed by President Descamps as a compromise. In paragraph 230 of his first report, the Special Rapporteur, citing an author, stated that the text's reference to subsidiary means could actually indicate that "the position that subsidiary means could not be accorded the status of sources" had ultimately been incorporated into Article 38. He agreed with that conclusion. He also appreciated the Special Rapporteur's pertinent observation, at the end of paragraph 248, that the Advisory Committee of Jurists as a whole and ultimately the League of Nations had accepted that judicial decisions and doctrine could be used in a supplementary way to determine the existence and content of rules of international law and that such a position was reflected in practice and would be hard to contest.

In chapter VIII of the report, the Special Rapporteur analysed the *chapeau* of Article 38 (1) and concluded that the paragraph was a directive to the Court stating that it was required to apply the sources listed in subparagraphs (*a*)–(*c*) in resolving disputes and that it could have regard to subparagraph (*d*), addressing judicial decisions and scholarly works, as subsidiary means for the determination of the rules. Regarding the analysis of the term "judicial decisions" in chapter VIII (B), the Special Rapporteur rightly pointed out in paragraph 48 of the report that the relationship between Article 38 and Article 59 of the

Statute needed to be clarified, but the reason he gave was that the findings of judicial bodies when interpreting and applying treaties, customary law and general principles of law could "identify or serve as sources of binding legal obligations for States, international organizations and other bodies". However, while judicial decisions could certainly create binding obligations for the parties bound by those decisions, namely the parties to the dispute, they could not create law in general for all States and other subjects of international law. Courts and tribunals determined or identified the applicable law and applied it to the case in question, even if the parties had not invoked it, based on the general principle of law *jura novit curia*. The Inter-American Court of Human Rights had done so in the case of *Velásquez-Rodríguez v. Honduras*, stating in paragraph 163 of its judgment that:

> "The [Inter-American] Commission did not specifically allege the violation of Article 1 (1) of the Convention, but that does not preclude the Court from applying it. The precept contained therein constitutes the generic basis of the protection of the rights recognized by the Convention and would be applicable, in any case, by virtue of a general principle of law, *iura novit curia*, on which international jurisprudence has repeatedly relied and under which a court has the power and the duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them ..."

As the Special Rapporteur had pointed out, there was no *stare decisis* – no binding judicial precedent – in international law, but there often existed a mutual influence and cross-fertilization among the decisions of different international courts and tribunals.

He agreed with most of the Special Rapporteur's conclusions regarding the meaning and scope of the term "judicial decisions". Again, it was necessary to bear in mind relevant elements of the Commission's work in the context of other topics, such as identification of customary international law, peremptory norms of general international law (*jus cogens*) and general principles of law. In the context of those topics, it had rightly been determined that the term "decisions" included judgments and advisory opinions, as well as orders on procedural and interlocutory matters, as recalled by the Special Rapporteur in paragraph 280 of the report. Furthermore, as the Special Rapporteur correctly noted, the term "judicial decisions" included the decisions of the International Court of Justice and those of its predecessor, the Permanent Court of International Justice. The same applied to other courts and tribunals, which referred to their own previous decisions to elucidate the applicable rules of international law. Advisory opinions, while not legally binding *per se*, contained authoritative legal analysis on the state of international law and on the rules applicable in the context of the subject matter. Regional courts such as the Inter-American Court of Human Rights were competent to issue advisory opinions.

He agreed that separate opinions, whether concurring or dissenting, and declarations could help to clarify the basis of a decision or provide additional reasons or even address points raised by the parties or by the decision of the court or tribunal concerned. Such opinions and declarations were issued by judges on an individual basis and were not attributed to the court or tribunal itself. Therefore, as reflected in the Commission's commentary to conclusion 13 of its 2018 conclusions on identification of customary international law, they did not fall within the category of "judicial decisions", though they could serve as important references and were often mentioned in teachings.

It was clear that international courts and tribunals were among the bodies that issued judicial decisions. As stated in the commentaries to the 2018 conclusions, the term "international courts and tribunals" was intended to cover any international body exercising judicial powers and having jurisdiction to consider and apply rules of international law. The term included the International Court of Justice, the Permanent Court of International Justice, specialist and regional courts and tribunals such as the International Tribunal for the Law of the Sea, the International Criminal Court and other international criminal tribunals, regional human rights courts and the World Trade Organization Dispute Settlement Body. It also included inter-State arbitral tribunals and other arbitral tribunals applying international law. Claims commissions, such as the Eritrea-Ethiopia Claims Commission or the Iran-United States Claims Tribunal, should also be included. The International Law Commission had on occasion relied on the decisions of such bodies to elucidate aspects of international law. However, on the basis of Article 38 (1) (*d*) of the Statute and the practice of international

courts and tribunals, the Special Rapporteur had demonstrated that, as subsidiary means for the determination of rules of international law, "judicial decisions" also included decisions of national courts and tribunals, including so-called "hybrid" courts with mixed subject matter jurisdiction and composition.

In addition to serving as subsidiary means for the determination of rules of international law, whether customary international law or general principles of law, decisions of national courts and tribunals could serve as a form of State practice, which was an element of international custom. They could also be used to carry out a comparative analysis in order to identify common principles that could constitute general principles of law derived from national legal systems. It was suggested in paragraph 293 of the report – seemingly with good reason – that, in certain areas of law, for example criminal law, the roles that the decisions of national courts and tribunals played in that regard could be particularly significant. At the same time, as the Commission had noted in the context of other topics, and as the Special Rapporteur recognized, a degree of caution was needed when relying on decisions of national courts and tribunals as a subsidiary means, and for various reasons. For example, national courts and tribunals operated within a specific legal system, might reflect a given national perspective and might not necessarily have specialized knowledge of international law.

With regard to teachings, the Special Rapporteur had noted that, in a future report, he would analyse the use of teachings as a subsidiary means in practice and that, at the current time, it appeared useful to clarify what a teaching was. The Commission had previously taken the position that writings were not themselves a source of international law but might offer guidance for the determination of the existence and content of rules of international law. It had noted that "teachings", often referred to as "writings", were to be understood in a broad sense, to include teachings in non-written form, such as lectures and audiovisual materials. In the report, the Special Rapporteur had added a reference to "any other dissemination format that might be developed in the future", which would ensure that new formats could be included as technology advanced.

The reference to "publicists of the various nations" in the text of the Statute highlighted the importance of taking into account teachings that were representative of the various national legal systems and regions of the world and were produced in various languages. The works of private international bodies responsible for the codification and development of international law also fell within the category of "teachings" and might be of particular interest as subsidiary means. In addition, academic writings could be particularly useful for overcoming language barriers in the comparative study of national legal systems when identifying general principles of law derived from such systems. At the same time, caution was also needed in relation to teachings, the value of which could vary, as they might reflect national positions.

The work of expert bodies established by States or by international organizations fell neither within the category of "judicial decisions", as such bodies did not have judicial powers, nor within that of "teachings", as they had an intergovernmental mandate. However, their work could be understood as a subsidiary means for the determination of rules of international law. Examples included expert treaty bodies such as the Human Rights Committee and the Inter-American Commission on Human Rights. In draft conclusion 9 of the draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), which concerned subsidiary means for the determination of the peremptory character of norms of general international law, the work of such expert bodies was mentioned separately from judicial decisions and teachings. The Special Rapporteur might wish to carry out a more in-depth study of the work of expert bodies as a possible category of subsidiary means additional to judicial decisions and teachings.

The Commission's own work, which was distinct from teachings and probably also from the work of expert bodies, had a particular significance for reasons including its unique mandate to promote the progressive development and codification of international law and its close relationship with the General Assembly, of which it was a subsidiary organ, and with States.

Although the Special Rapporteur had raised the possibility that resolutions of international organizations and unilateral acts of States might be considered as subsidiary

means for the determination of rules of international law, his own view was that both lay beyond the scope of the topic. A resolution adopted by an international organization or at an intergovernmental conference could provide evidence for determining the existence of a rule of customary international law or contribute to its development. Such resolutions could also provide evidence for establishing recognition of a general principle of law, or could reflect a customary rule or a general principle of law.

In the report, the Special Rapporteur provided examples of law-making resolutions, including the resolution affirming the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal. However, the Principles had the character of principles of international law not because they were affirmed in a resolution but because the resolution reflected their recognition by the international community. In short, they provided evidence that could be taken into account by States, courts and tribunals and publicists when determining the existence and content of rules of international law. If resolutions adopted by international organizations or at intergovernmental conferences were included as subsidiary means, treaties would also have to be included as such, given that they could also provide evidence of customary norms or general principles of law.

With regard to proposed draft conclusion 1, he supported the amendment proposed by Mr. Forteau, which would avoid giving the impression that the draft conclusions merely described the way in which subsidiary means were used. Draft conclusion 2 (c), as currently worded, was too broad in scope and did not provide guidance. He agreed with Mr. Galindo that it could be deleted, as the list of subsidiary means in draft conclusion 2 was not exhaustive. Subject to the study to be carried out by the Special Rapporteur in a future report, the work of expert bodies established by States or by international organizations could be added. He also agreed with Mr. Galindo that the titles of draft conclusions 2 and 3 should refer to "rules of international law" and not simply "rules of law". The Drafting Committee would need to work on draft conclusion 3, since, as some members had pointed out, not all of the assessment criteria it contained were applicable to the categories included in draft conclusion 2. As Mr. Paparinskis had noted, one option might be to set out the assessment criteria separately for the two types of subsidiary means.

Following the example of the Commission's work on identification of customary international law, peremptory norms of general international law (*jus cogens*) and general principles of law, the words "in particular of the International Court of Justice" could be inserted in draft conclusion 4 (a), after "tribunals". As Mr. Galindo had pointed out, subparagraph (b) could then be deleted to avoid creating the impression that there was a hierarchy among international court and tribunals. He also agreed with the suggested deletion of the words "identification or" in draft conclusion 4 (c). In draft conclusion 5, although the phrase "especially those reflecting the coinciding views of scholars" was based on the deliberations of the Advisory Committee of Jurists in 1920, they should be deleted. The fact that a statement was repeated by different people did not mean that it was correct. A single scholar could produce a very sound and authoritative work even if the views it expressed were not replicated in other scholarly works. In addition, the words "identification or" should be deleted from the draft conclusion.

He agreed with the future programme of work proposed by the Special Rapporteur and supported the referral of all the draft conclusions to the Drafting Committee, taking into account the comments made during the plenary debate.

Mr. Huang said that, while he had a keen interest in the topic of subsidiary means for the determination of rules of international law, he found it regrettable that the Special Rapporteur had produced an overly academic first report that followed the unfortunate precedent set by the Commission's work on the topic "Reservations to treaties". From his perspective as an international law professional, the report suffered from two major flaws. First, although the Commission was, in accordance with its statute, composed of "persons of recognized competence in international law", the report addressed the topic at such a basic level and in such exhaustive detail that it gave the impression of being aimed at undergraduate students. If the report had been pitched at a higher level, it could have been much more succinct and readable. Second, the report was not organized around the fundamental issues raised by the topic, with the result that there was considerable duplication. For example,

chapters V to VIII contained repetitive arguments and elaboration on such basic concepts as the notion, nature and forms of sources and their place in international law and the meaning, elements, role and interpretation of subsidiary means. They also partially overlapped with the memorandum by the Secretariat. The reader was left with the false impression that the topic was highly complex and very academic. The report would have been more focused and logical if the Special Rapporteur had simply addressed, in turn, the three key issues that he himself proposed for consideration in chapter III (A) of the report, namely the origins, nature and scope of subsidiary means; the relationship of subsidiary means to the sources of international law; and additional subsidiary means for the determination of rules of international law.

The report outlined the debate on the topic that had taken place in the Sixth Committee in 2021. Although the overwhelming majority of the participating States' comments had been positive, with delegations noting that work on the topic would be consistent with the Commission's prior work on the sources of international law and could serve as a vehicle to help remedy certain consequences of the fragmentation of international law, some States had voiced misgivings about the topic. One State had expressed the view that the Commission should focus on issues that were "more pertinent for international practice". Another had argued that the topic was not as pressing or practically relevant as others included in the Commission's long-term programme of work. A third had suggested that the limited use of subsidiary means for the determination of rules of international law might pose challenges in terms of gaining interest and inputs from Member States. While the Commission should be encouraged by the positive comments of the majority, it should attach high importance to the critical views expressed by the minority. Such views underscored the need to avoid an overly academic approach to the topic.

In that connection, it was instructive to consider the reaction of Member States to the Commission's Guide to Practice on Reservations to Treaties, which had been adopted in 2011. At the sixty-sixth session of the General Assembly, some delegations in the Sixth Committee had questioned the value of the Guide. Some had argued that the Commission's work on the topic "Reservations to treaties" demonstrated the need for reform of its methods of work. The facts spoke for themselves: after 18 years of work on that topic, the Commission had produced a Guide that ran to hundreds of pages. Other delegations had argued that the Guide might raise more questions than it answered. When the Guide had been adopted on second reading by the Commission, he had said that it was too cumbersome, pedantic and grossly detached from diplomatic practice. It attempted to provide textbook answers to every question that had arisen or could possibly arise in the field of treaty reservations, even those that were based on scenarios that might never arise or could easily be resolved if they did. Going forward, and beginning with the topic under consideration, the Commission should endeavour to improve its methods of work.

In his view, the wording of Article 38 (1) of the Statute of the International Court of Justice and its drafting history indicated that, unlike treaties, customary law and general principles of law, subsidiary means were to be considered as tools for determining or identifying the existence of sources of law or their content rather than as sources in themselves. It was clear from the memorandum by the Secretariat that the Commission had taken the same view in the context of its work on such topics as "Identification of customary international law". As Mr. Paparinskis had noted, the equivalent of "subsidiary means" in the Chinese version of the Statute was 补助资料, which could be translated more literally as "supplementary" or "auxiliary" means. The wording used in the Chinese version of the Statute thus supported the view that subsidiary means were not a source or even a secondary source of international law. As Ms. Ridings had noted, it should be made clear that subsidiary means were not a source of international law.

Nevertheless, the role of subsidiary means could not be overlooked. Although the decisions of international courts had no binding force "except between the parties and in respect of that particular case", to use the wording of Article 59 of the Statute of the International Court of Justice, they had a significant bearing on the interpretation and application of the relevant legal principles and the determination of rules of international law, including their existence and meaning, and were often cited. As far as the writings of authoritative international law scholars were concerned, their role lay primarily in their

evidentiary value for the identification of sources of international law and their cumulative influence on the formation and development of rules of international law.

Article 38 of the Statute was silent on the question of whether resolutions of intergovernmental international organizations constituted a source of international law or were merely a subsidiary means for determining sources of international law. That silence could be explained, *inter alia*, by the fact that the role of such organizations had been less prominent at the time of the Statute's adoption. Consequently, the relationship between the resolutions of international organizations, in particular those with universal membership such as the United Nations, and the sources of international law deserved to be studied as part of the project.

The collective security resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, such as Security Council resolution 1816 (2008) on combating piracy and armed robbery in Somalia, were binding on all Member States under Article 25 of the Charter and could be regarded as sources of international law or at least as a subsidiary means for the determination of rules of international law. Generally, resolutions of the General Assembly or other organs of international organizations were merely recommendatory, had no binding force and did not constitute legal norms. Nevertheless, such resolutions, in particular those that declared rules of customary international law, could be considered as subsidiary means.

In his view, it was not possible to provide a consistent or coherent answer to the question of whether decisions of national courts could serve as subsidiary means for the determination of rules of international law.

Given the decisions taken in relation to the topic in 2021 and the Commission's practice, he agreed that draft conclusions accompanied by commentaries would be the most appropriate outcome of the Commission's work on the topic. He supported the submission of the five draft conclusions proposed by the Special Rapporteur to the Drafting Committee for consideration.

The meeting rose at 1 p.m.