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Held at the Palais des Nations, Geneva, on Thursday, 25 May 2023, at 10 a.m.

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Present:

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Members:	Mr. Akande
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	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	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
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

Settlement of international disputes to which international organizations are parties (agenda item 5) (*continued*) (A/CN.4/756)

Report of the Drafting Committee (A/CN.4/L.983)

Mr. Paparinskis (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic "Settlement of international disputes to which international organizations are parties" (A/CN.4/L.983), said that the report contained the texts and titles of the draft guidelines provisionally adopted by the Drafting Committee at the current session. The Committee had devoted seven meetings to its consideration of the draft guidelines as originally proposed by the Special Rapporteur in his first report (A/CN.4/756), together with a number of reformulations proposed by the Special Rapporteur in response to suggestions made or concerns raised during the plenary debate and in the Drafting Committee. The Committee had provisionally adopted two draft guidelines on the topic.

Draft guideline 1 had been adopted with two changes to the version originally proposed by the Special Rapporteur. The title of the draft guideline had been shortened to "Scope", in line with the most recent practice of the Commission in its work on peremptory norms of general international law (*jus cogens*), protection of the environment in relation to armed conflicts, protection of the atmosphere and provisional application of treaties. In addition, the words "of the draft guidelines" in the title had been considered superfluous, since the text of draft guideline 1 itself referred to the "present draft guidelines".

In the text of draft guideline 1, the Drafting Committee had replaced the words "apply to" with "concern". Although the Committee had discussed the possibility of using the words "relate to" instead, it had considered that "concern" was broader and in line with the usual wording of such provisions in the Commission's work, including guideline 2 (1) of the guidelines on the protection of the atmosphere and guideline 1 of the Guide to Provisional Application of Treaties. Draft guideline 1, as provisionally adopted by the Drafting Committee, thus read: "The present draft guidelines concern the settlement of disputes to which international organizations are parties."

There had been an extensive debate on possible formulations for draft guideline 1. The Drafting Committee had discussed whether it would be appropriate to qualify the word "disputes" to clarify the types and nature of the disputes that the draft guidelines were meant to cover. Terms such as "disputes with legal aspects", "legal disputes" and "international disputes" had been considered. Some members had expressed the view that a qualifier was important to delineate the precise scope of the topic and, in particular, to identify the types of disputes that were included and excluded from the Commission's work on the topic, such as disputes of a private law character, commercial disputes and staff member disputes. Members had stressed that the title of the topic might need to be changed to better reflect the scope of the topic.

The Drafting Committee had eventually agreed that adding qualifiers at the current stage would be premature and could have an adverse effect on the Commission's subsequent work on the topic. The text as adopted by the Drafting Committee would give the Commission enough flexibility to refine the nature and types of disputes that the draft guidelines were meant to cover, both in the commentaries and as work on the topic progressed. The importance of having comments from States on the text and the commentaries had also been mentioned. In that connection, it had been noted that clarity and transparency were important from the outset; thus, it was understood that the commentaries would explain the scope of the topic and elaborate on the question of the parties involved in disputes with international organizations. The commentaries would also clarify that national law issues pertaining, for example, to the competence of the judiciary, and questions that were governed exclusively by national law, were not included in the scope of the topic.

Draft guideline 2 had been adopted by the Drafting Committee with changes to the version originally proposed by the Special Rapporteur in his first report. The title proposed by the Special Rapporteur, "Use of terms", had been retained. The draft guideline comprised three subparagraphs and provided a functional definition of terms that were considered to have direct implications for the scope of the topic. The word "present" had been added before

"draft guidelines" in the *chapeau* of the text for the sake of clarity and to align the draft guideline with the Commission's standard practice in formulating such provisions.

Subparagraph (a) contained a definition of the term "international organization". The Drafting Committee had extensively debated the question of whether, for the purposes of its work on the topic, the Commission should reproduce the definition contained in article 2 of the articles on the responsibility of international organizations, adopted by the Commission in 2011 at its sixty-third session, or adopt a new definition, as proposed by the Special Rapporteur. Several members of the Drafting Committee had argued that reproducing the previous definition would be more appropriate, as that definition afforded enough flexibility for the purposes of the work on the current topic, was robust and generally accepted by States, was well established and known to readers and legal practitioners, fostered legal security and was consistent with the Commission's previous work. Adopting a new definition would create confusion and raise unnecessary questions. It had also been emphasized that the articles on the responsibility of international organizations were still before the Sixth Committee of the General Assembly. It had been pointed out that any nuances or refinements required for the purposes of the topic at hand could be addressed in the commentary.

Other members, however, had expressed the view that a new, more refined definition that was more in line with the general understanding of international organizations would be preferable. Some members had noted that the definition of "international organization" had evolved since the Commission had last dealt with the question. It had been stressed that a new definition would nevertheless build upon the 2011 definition and include its crucial elements. Ultimately, the Drafting Committee had agreed to adopt a new definition of the term "international organization", on the understanding that the commentaries would provide a detailed explanation of its consistency with the 2011 definition and the reasons for its new element. States would have the opportunity to comment on the definition in the Sixth Committee at the next session of the General Assembly.

The definition of "international organization" contained in subparagraph (a), as adopted by the Drafting Committee, read: "(a) 'International organization' means an entity possessing its own international legal personality, established by a treaty or other instrument governed by international law, that may include as members, in addition to States, other entities, and has at least one organ capable of expressing a will distinct from that of its members."

As to the actual changes made to subparagraph (a), the words "refers to", as originally proposed by the Special Rapporteur, had been replaced with the word "means", as the Drafting Committee had concluded that it better reflected the purpose of the subparagraph and aligned it with the usual wording of such provisions in the outputs of the Commission. The Drafting Committee had also considered using the word "organization" instead of "entity" at the beginning of the sentence but had concluded that "entity" was more appropriate to avoid a circular definition.

The Drafting Committee had added the phrase "possessing its own international legal personality" after the word "entity" in response to comments made by members of the Commission in the plenary debate, as well as in the Drafting Committee, that express reference to international legal personality was warranted in the definition itself. The purpose of that change was to reflect the formulation of the 2011 definition, of which international legal personality was a core element. The meaning of "international legal personality" and the crucial importance of having an express reference to that element in the definition would be explained in the commentary.

With regard to the phrase "established by a treaty or other instrument governed by international law", also contained in the 2011 definition, there had been an extensive debate in the Drafting Committee concerning by whom and by which means an international organization could be established. It had been agreed that the phrase "by a treaty or other instrument governed by international law" made it clear that international organizations could be established by States and international organizations as well as *sui generis* subjects of international law with treaty-making powers. The matter would be further developed in the commentary, including the fact that individual persons and non-governmental organizations could not establish international organizations. The commentary would also address the

question of whether the phrase “other instrument governed by international law” included international organizations created by non-legally binding instruments.

The Drafting Committee had added the phrase “that may include as members, in addition to States, other entities” to the definition, as the Special Rapporteur’s original formulation had not expressly mentioned who could be a member of an international organization. The issue of membership had been thoroughly discussed in the Drafting Committee, and it had been considered important to add that phrase, as it was also contained in the 2011 definition. The commentary would explain the meaning of the term “other entities”, including the fact that international organizations could have a mixed membership, and would address international organizations whose membership comprised only international organizations.

Finally, the phrase “possessing at least one organ capable of expressing a will distinct from that of its members” originally proposed by the Special Rapporteur had been retained, but with one change: the word “possessing” had been replaced with the word “has”. Differing views had been expressed as to whether such a phrase should be included in the provision and whether it would represent a departure from the 2011 definition. Some members had argued that express reference to an “organ capable of expressing a will distinct from that of its members” in the definition was unnecessary because the crucial constitutive element of an international organization was possession of international legal personality. It had also been mentioned that including that phrase could be construed as adding more criteria to the 2011 definition. It had been noted that the International Court of Justice, in its advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, had not referred to an “organ capable of expressing a will distinct from that of its members” as a constitutive element of an international organization. According to some members, the issue would be better addressed in the commentary, where the nuances and the difference between “international legal personality” and “at least one organ capable of expressing a will distinct from that of its members” could be explained in detail. Some members had argued that terms such as “distinct” and “will” were unclear and should be avoided. The Drafting Committee had considered replacing the phrase with “organ capable of acting on its own behalf”. Other members had been of the view that international organizations usually possessed at least one organ through which they acted to fulfil the tasks entrusted to them by the founding members. For that reason, the main purpose of having the phrase in the definition itself was to emphasize that an organ was a crucial defining element of an international organization. It had also been noted that express reference to “will” in the text was essential and that international legal personality should be considered a consequence of an international organization’s possession of a distinct will.

The final text adopted by the Drafting Committee was the result of a compromise between the various positions. The combination of text that was in line with the 2011 definition with the express reference to “at least one organ capable of expressing a will distinct from that of its members” should be interpreted not as a departure from that earlier definition, but rather as a way of enriching it. The importance of ensuring coherence and consistency between the definition of “international organization” in the work on the topic at hand and the definition used in the 2011 articles had also been highlighted. It had been agreed that the commentary would explain the reasons for having the phrase “at least one organ capable of expressing a will distinct from that of its members” in addition to the phrase “possessing its own international legal personality” in subparagraph (a).

It had also been agreed that the definition of “international organization” contained in subparagraph (a), as provisionally adopted by the Drafting Committee at the current session, could be revisited at a later stage in the light of further developments on the topic. Comments from States on that issue would be of particular benefit to the Commission.

Subparagraph (b) contained the definition of “dispute” and had been adopted by the Drafting Committee with changes to the version originally proposed by the Special Rapporteur in his first report. Subparagraph (b) now read: “‘Dispute’ means a disagreement concerning a point of law or fact in which a claim or assertion is met with refusal or denial.”

Following the same reasoning as for subparagraph (a), the Drafting Committee had replaced the words “refers to” with “means”. The Committee had decided to omit the word

"policy" from the text, as it had considered that the scope of the definition should be narrowed to include only disagreements on questions of law or fact and to exclude disputes of an exclusively political nature.

The Committee had debated whether subparagraph (b) should reproduce the definition contained in the judgment of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions* case. Some members of the Drafting Committee had argued that the question of disputes under the draft guidelines was already covered by the scope of the topic and that, since the commentary to draft guideline 1 would elaborate on the types and nature of disputes, a definition of disputes was superfluous and could create confusion. According to those members, if, however, it was considered necessary to include a definition of the term "dispute", the Commission should use the *Mavrommatis* definition. Other members had maintained that having a definition of the term "dispute" was useful, stressing that the reference to "policy" should nevertheless be omitted. Those members had suggested that the commentaries should go into detail about the nature of disputes, recalling the judgment in *Mavrommatis Palestine Concessions* and the International Court of Justice judgment in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom*). In addition, it had been noted that despite the omission of the word "policy" from the text, the commentary would need to explain that understanding the political context surrounding a dispute could at times be important for understanding the dispute itself. The Drafting Committee had reached a compromise with the adoption of a provision that built upon the *Mavrommatis* definition, on the understanding that the reasons for that choice and the concerns raised by members would be explained in the commentary.

The Drafting Committee had discussed whether it was necessary to make specific reference in the definition itself to the legal aspects of a disagreement concerning a "fact". It had been suggested that wording similar to that contained in Article 36 (2) (*c*) of the Statute of the International Court of Justice was needed in order to specify that the "fact" in question should be one that, if established, would constitute a breach of an international obligation. In that regard, it had been noted that the breach could be a breach of an obligation, not necessarily of an international obligation. The Drafting Committee had agreed that the commentary would explain that the reference to a "fact" for the purpose of the provision meant a fact related to a point of law. It would also address in detail the types of disputes covered under the provision and those that would fall outside its scope.

Lastly, the Drafting Committee had omitted the words "of one party" and "by another" originally proposed by the Special Rapporteur. There had been a debate as to whether it was necessary to refer to the parties that might be in opposition to each other and to define with whom international organizations might be in a dispute. It had been noted that if a reference to a "party" was retained, the word would need to be defined. It had also been suggested that if the reference was retained, the provision should envisage the possibility that third parties might also have an interest in a dispute with an international organization. The Drafting Committee had agreed that those matters would be better explained in the commentary.

With respect to the words "claim or assertion", it would be explained in the commentary that the appropriate term was "claim" when referring to legal issues, while "assertion" was appropriate when referring to factual issues. By the same token, it had been agreed that the commentary would explain that the term "refusal" applied to "claim", while the term "denial" applied to "assertion".

Subparagraph (c) had been adopted with changes to the original version proposed by the Special Rapporteur. It now read: "'Means of dispute settlement' refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of resolving disputes."

Subparagraph (c) was inspired by Article 33 of the Charter of the United Nations. The Drafting Committee had decided to insert the words "means of" before "dispute settlement" at the beginning of the sentence. Alternatives such as "methods", "forms" and "procedures" had been considered, but ultimately the word "means" had been deemed most appropriate so as to ensure consistency with the text of Article 33 of the Charter and take into account the wording used in the Manila Declaration on the Peaceful Settlement of International Disputes.

Unlike in subparagraphs (a) and (b), where the words “refers to” had been replaced with “means”, the words “refers to” had been retained in subparagraph (c). They signalled to the reader that the provision gave examples of the various means available to resolve a dispute, rather than providing a rigid sequence of those means. Furthermore, as the provision did not attempt to define “dispute settlement” but rather listed “means of dispute settlement”, it had been agreed that “refers to” was more appropriate.

As the provision was inspired by Article 33 of the Charter, the Drafting Committee had decided to include the phrase “resort to regional agencies or arrangements” in the text, as there was no reason to depart from the text of the Charter in that respect. However, it was unclear whether, in practice, such resort would not fall under one of the other means of dispute settlement enumerated in Article 33 of the Charter. The Drafting Committee had also replaced the word “and” before “other peaceful means” with the word “or” to bring the text closer to Article 33 of the Charter and to clarify that the means of dispute settlement listed in subparagraph (c) were not cumulative.

Regarding the phrase “other peaceful means of resolving disputes”, the word “solving”, originally proposed by the Special Rapporteur, had been replaced with the word “resolving”, which the Drafting Committee had considered more appropriate, since the subparagraph encompassed the notion of seeking a solution to the dispute rather than solving it.

Two other issues had been debated by the Drafting Committee. The first had to do with the placement of subparagraph (c). It had been suggested that “means of dispute settlement” should be the subject of a substantive draft guideline rather than being placed under a draft guideline concerning the use of terms. It had been agreed that the reason for the term’s placement in draft guideline 2 would be explained in the commentary. The second issue was the fact that subparagraph (c) did not contain the phrase “of their own choice”, which was used to qualify “other peaceful means” in Article 33 of the Charter. While some members had argued that such a phrase should be included in the provision, the Drafting Committee had agreed that, in that specific context, a departure from the text of Article 33 was justified because in some cases the parties to a dispute were not free to choose the means to resolve their dispute. In particular, States members of an international organization might be under an obligation to have recourse to specific means of resolving disputes according to the constituent instrument of the organization. Both of those issues would be explained in the commentary.

Draft guideline 1

The Chair said she took it that the Commission wished to adopt the text of draft guideline 1.

Draft guideline 1 was adopted.

Mr. Jalloh said he wished to state for the record that the Drafting Committee had discussed at length the use of the word “concern” in draft guideline 1 and its equivalent in the French and Spanish versions of that draft guideline. In the Spanish version, the phrase “*se refiere al*” could be translated as “applies to”, rather than “concern”, and in the French version, the phrase “*portent sur*” could be translated as “relate to”, as opposed to “concern”. However, the Drafting Committee understood all three formulations in the English, French and Spanish versions of the text to have the same meaning.

Draft guideline 2

The Chair said she took it that the Commission wished to adopt the text of draft guideline 2.

Draft guideline 2 was adopted.

The Chair said she understood that the Special Rapporteur would prepare the commentaries to draft guidelines 1 and 2 for the Commission’s 2023 annual report to the General Assembly. Accordingly, the commentaries to the draft guidelines would be adopted during the second part of the current session. Furthermore, given the content of the statement by the Chair of the Drafting Committee, and of draft guideline 1 just adopted by the

Commission, it was her understanding that the Commission wished to change the title of the topic by deleting the word “international” before the word “disputes”, so that the title would be “Settlement of disputes to which international organizations are parties”.

It was so decided.

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

Mr. Savadogo said that he wished to thank the Special Rapporteur for his excellent first report on the topic “Subsidiary means for the determination of rules of international law” (A/CN.4/760), which, together with the secretariat’s comprehensive memorandum on elements in the Commission’s previous work that could be relevant to the topic (A/CN.4/759), covered a vast field of research. He shared the views expressed by the Special Rapporteur. He wished to focus his remarks on the subject of applicable law, with reference to the means of dispute settlement established under the 1982 United Nations Convention on the Law of the Sea, in particular the International Tribunal for the Law of the Sea. He would then outline the way in which courts and tribunals had approached subsidiary means, with particular emphasis on the jurisprudence of the International Tribunal for the Law of the Sea.

Regarding the question of applicable law, article 293 of the 1982 Convention provided that: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.” The terms “court” and “tribunal” in article 293 referred to the “means for the settlement of disputes concerning the interpretation or application of this Convention” set out in part XV, section 2, of the 1982 Convention, namely the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with annex VII and a special arbitral tribunal constituted in accordance with annex VIII. Those bodies applied the provisions of the Convention and also “other rules of international law not incompatible with” the Convention.

The text of the 1982 Convention did not explicitly mention “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”, which were referred to in Article 38 (1) (*d*) of the Statute of the International Court of Justice. It could not be argued that the words “other rules of international law not incompatible with” the Convention referred to subsidiary means, since neither jurisprudence nor scholarly writings could be considered “rules of international law”. However, article 31 of the Vienna Convention on the Law of Treaties established the principle that, in matters of interpretation, “any relevant rules of international law applicable in the relations between the parties” should be taken into account. That formula included all relevant treaty rules between the parties, and the applicable law also included general international law. The Seabed Disputes Chamber had affirmed the customary nature of several provisions of the Vienna Convention on the Law of Treaties, notably the rules on the interpretation of treaties set forth in articles 31 to 33. The International Tribunal for the Law of the Sea had subsequently applied that finding in the case concerning *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*. Accordingly, article 31 of the Vienna Convention could afford the courts referred to in article 287 of the 1982 Convention a basis on which to avail themselves of the subsidiary means set out in Article 38 (1) (*d*) of the Statute of the International Court of Justice.

In its judgment in the case concerning *M/V “Norstar” (Panama v. Italy)*, the International Tribunal for the Law of the Sea specified the conditions in which article 293 of the 1982 Convention could be applied, stating that, apart from the Convention provisions on which it had relied to establish its jurisdiction in the case, in interpreting and applying those provisions to the facts of the case, it was “not precluded from applying other provisions of the Convention or other rules of international law not incompatible with the Convention, pursuant to article 293”. The Tribunal also noted, however, that “article 293 of the Convention on applicable law may not be used to extend the jurisdiction of the Tribunal”.

Article 293 (2) of the 1982 Convention provided that the courts and tribunals that had jurisdiction under part XV, section 2, had the power to “decide a case *ex aequo et bono*, if the parties so agree”. That provision, which was reminiscent of Article 38 (2) of the Statute

of the International Court of Justice, did not concern subsidiary means for the determination of rules of international law. Article 38 of the statute of the International Tribunal for the Law of the Sea provided that, in addition to the provisions of article 293, the Seabed Disputes Chamber was to apply "(a) the rules, regulations and procedures of the [International Seabed] Authority adopted in accordance with this Convention; and (b) the terms of contracts concerning activities in the Area in matters relating to those contracts". Accordingly, the Chamber applied not only the provisions of the 1982 United Nations Convention on the Law of the Sea, other rules of international law not incompatible with the 1982 Convention and rules, regulations and procedures of the International Seabed Authority, but also the terms of contracts concerning activities in the Area in matters relating to those contracts. Again, article 31 of the Vienna Convention on the Law of Treaties could provide a basis for enabling the Chamber to refer to subsidiary means for the determination of rules of law. In its advisory opinion in *Responsibilities and obligations of States with respect to activities in the Area*, the Seabed Disputes Chamber had found that the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area were subordinate to the 1982 Convention but could nevertheless be used to clarify and supplement certain aspects of the relevant provisions of that Convention.

For the purposes of settling disputes submitted to them, the dispute settlement mechanisms provided for in article 287 of the 1982 United Nations Convention on the Law of the Sea could refer to the subsidiary means set out in Article 38 (1) (*d*) of the Statute of the International Court of Justice, principally "judicial decisions" and "teachings". Article 38 (1) (*d*), which placed jurisprudence and teachings on the same level, was ambiguous, since the French text used the adjective "*auxiliaire*", while the English text used the adjective "subsidiary". The purpose of that provision was to prevent findings of *non liquet* owing to the absence of a relevant applicable rule, since that would be detrimental to the development of the role of international courts. For example, in its judgment in the case concerning *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, the International Tribunal for the Law of the Sea had found that since there was no provision in the 1982 Convention with regard to bunkering, it could not issue any findings in that regard. The issue of bunkering had again been brought before the Tribunal in the case concerning *M/V "Virginia G" (Panama/Guinea-Bissau).* In its judgment in that case, it had ruled that it was "apparent from the list in article 62, paragraph 4, of the Convention that for all activities that may be regulated by a coastal State there must be a direct connection to fishing" and that "such connection to fishing exists for the bunkering of foreign vessels fishing in the exclusive economic zone since this enables them to continue their activities without interruption at sea".

In any event, neither judicial decisions nor teachings could create rules of law; they served only to identify them. As far as jurisprudence was concerned, prior consent to jurisdiction required courts and tribunals to take account of practice and reflect inter-State law. In other words, they could not develop a body of judge-made law based on the principle of *stare decisis*. The competence to interpret nonetheless entailed considerable judicial power, since, under certain conditions, it enabled courts to decide what the law meant and to steer its interpretation in a certain direction. The influence of jurisprudence thus developed with the formulation and identification of customary law or general principles of law. Most such interpretations were found in the reasoning put forward in support of judgments or opinions, but the legal reasoning on which an argument was based must not be confused with the content of the decision. Decisions were merely advisory, in the case of opinions, or relative, in the case of judgments settling legal disputes between States. However, the persuasiveness of the reasoning of the court or tribunal, and the reactions to the decision, often led to the extension of judicial interpretations far beyond their theoretical scope.

Thus, jurisprudence was not, in principle, a source of international law, but rather, as stated in Article 38 (1) (*d*), a subsidiary or complementary means of identifying and interpreting international law. That was clear from the advisory opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, in which the Court found that its role was to state the existing law and not to legislate, even if, in stating and applying the law, the Court necessarily had to "specify its scope and sometimes note its general trend". In its advisory opinion in *Responsibilities and obligations of States with respect to activities in the Area*, the Seabed Disputes Chamber stated that judicial bodies

could not perform functions that were "not in keeping with their judicial character". However, in its judgment in the case concerning *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, the International Tribunal for the Law of the Sea stated that: "International courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of methods employed to that end."

The contribution of jurisprudence was particularly visible in the field of maritime delimitation, where, as one arbitral tribunal noted in its award in *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, international case law constituted an *acquis judiciaire*, which it described as a source of international law. Although they were not bound by the *stare decisis* rule, judges took care to rely on previous decisions and to ensure that all decisions formed a coherent whole. In the cases brought before it, the Tribunal and its chambers referred extensively to the decisions of the International Court of Justice and the Permanent Court of International Justice, as well as to the jurisprudence of arbitral tribunals. As had been previously mentioned, the term "decisions" included not only judgments but also advisory opinions. In a 2021 judgment in *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, a special chamber of the International Tribunal for the Law of the Sea stated, with regard to the distinction between the binding character and the authoritative nature of an advisory opinion of the International Court of Justice, that: "An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law."

The International Tribunal for the Law of the Sea had also ruled on the scope of domestic court decisions. In *M/V "Norstar" (Panama v. Italy)*, it had declared that the decisions of the Italian courts could help elucidate the facts of the case. The jurisprudence of arbitral tribunals had also had an influence on the deliberations of international courts and tribunals. Certain principles, such as the principle of neutrality in times of war, as set out in the 1872 arbitral award handed down in *Alabama claims of the United States of America against Great Britain*, the principle of the proportionality of reprisals for an offence, as set out in the 1928 arbitral award in the *Portuguese Colonies* (Naulilaa) arbitration, and the general characteristics of territorial sovereignty, as established in the arbitral award handed down in the *Island of Palmas* case, were precedents to which international courts and tribunals referred. Equally instructive was the arbitral award handed down in the 1941 *Trail Smelter* case, in which the arbitral tribunal, noting the non-existence in international law of a principle applicable to transboundary air pollution, had reasoned by analogy, referring to the jurisprudence of the Supreme Court of the United States of America and the Swiss Federal Court.

Teachings were contained in academic works, such as textbooks, articles, the *Collected Courses of the Hague Academy of International Law* and proceedings of symposiums of learned societies, and also in the work of expert research bodies such as the Institute of International Law. Article 38 (1) (*d*) of the Statute provided a legal basis for the consideration of teachings without conferring any particular legal authority on them. Their role was more important in the training of jurists than in the production of law, at least at first glance. Teachings could contribute to the formulation of rules in new or evolving areas of international law. In that respect, particular mention should be made of space law, which owed a great deal to teachings; the law of the sea, where teachings had played a leading role in the development of concepts such as the "continental shelf", the "contiguous zone" and the "exclusive economic zone"; and environmental law. However, the role of teachings was not readily comparable with that of jurisprudence. Unlike a judge or an arbitrator, who received a mandate to settle a dispute in application of the law, legal scholars merely presented their own point of view in a context dominated by States. Accordingly, teachings had no direct legal authority. They could, however, help to identify and define the scope of unwritten rules of international law, custom and general principles of law. They could also

be used as evidence. While they did not create rules, they contributed to the recognition of their existence.

The International Tribunal for the Law of the Sea had never openly referred to teachings. However, the International Court of Justice and the Permanent Court of International Justice had done so, though rarely. References to teachings were made by the Permanent Court in its judgments in the *S.S. "Lotus"* case and the case concerning *Certain German Interests in Polish Upper Silesia*, and in the arbitral award handed down in *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. Libya.* In the latter arbitration, the sole arbitrator, Professor Dupuy, had relied on several scholarly works to support his findings. Teachings were widely cited by parties before international courts, and judges often referred to them in their separate or dissenting opinions. In practice, legal teachings were used extensively, although not necessarily overtly, by judges and legal officers alike. In fact, many judges and arbitrators were also legal scholars, and their influence on jurisprudence should not be overlooked. In other words, in many courts and tribunals, scholarly views were already on the bench. There was a kind of silent dialogue between judges and legal scholars. The influence of certain eminent jurists had been particularly noticeable in the evolution of judicial decisions. That was notably the case with Judge Anzilotti in relation to the law of international responsibility.

Among national courts, the contribution of teachings could not be clearly determined, given the lack of available sources. In the case of *The Queen v. Keyn*, a British judge had made a brief allusion to teachings, noting the disagreement among the principal authors on the extent of the territorial sea. On the other hand, in the *Paquete Habana* case, the Supreme Court of the United States of America had accepted the use of teachings to prove the existence of a custom.

With regard to the draft conclusions proposed by the Special Rapporteur, he wished to propose that in draft conclusion 2 (a), the order of the words "national" and "international" should be reversed so that the phrase would read "international and national courts and tribunals". He also wished to propose that the wording of draft conclusion 2 (b) should be amended to read: "*La doctrine des publicistes les plus qualifiés représentant les principaux systèmes juridiques du monde et les langues en usage dans les institutions des Nations Unies*" [Teachings of the most highly qualified publicists representing the principal legal systems of the world and the languages used in the bodies of the United Nations]. With regard to draft conclusion 2 (c), he wished to point out that the practice of the United Nations was collected in the *United Nations Juridical Yearbook*. Access to information on State practice, however, depended on the situation of the States concerned, and in particular on their power and history, which gave rise to situations of inequality. Older States had diplomatic traditions and archives, while newer States could have administrative shortcomings or even language barriers that hindered the publication of documents relating to their practice. In any case, the documents in question could constitute a basis from which the elements of the formation of custom could be determined. Lastly, he proposed that the first clause of draft conclusion 5 should be amended in the same way as draft conclusion 2 (b), to read: "*La doctrine des publicistes les plus qualifiés représentant les principaux systèmes juridiques du monde et les langues en usage dans les institutions des Nations Unies*" [Teachings of the most highly qualified publicists representing the principal legal systems of the world and the languages used in the bodies of the United Nations].

Mr. Reinisch said that he wished to thank the Special Rapporteur for his excellent and comprehensive first report on subsidiary means for the determination of rules of international law, which contained a broad overview of the topic and focused on a number of important points.

Regarding the scope of the topic, in paragraph 49 of the report, the Special Rapporteur rather obliquely referred to potential "additional subsidiary means such as equity, religious law or agreements between States and international enterprises". That reference was rather surprising, since neither equity nor religious law appeared to fall within the scope of international law. It was also unclear what was meant by the unusual term "international enterprises", which could be regarded as referring not only to transnational corporations or multinational enterprises, but also to international organizations. From the Special Rapporteur's subsequent uses of the term, it was apparent that he had the former meaning in

mind. However, the more widely used term “transnational corporations”, or the term “multinational enterprises”, as used by the Organisation for Economic Co-operation and Development, might have been preferable. More importantly for the Commission’s purposes, however, the grounds on which agreements with such entities could be viewed as subsidiary means were not fully explained. Of course, international law might be reflected in such agreements, but that was also true of almost all other types of agreement, including treaties and the resolutions of international organizations, and did not appear to be a distinctive feature of “agreements between States and international enterprises”.

He appreciated the Special Rapporteur’s openness on the question of how to characterize the final outcome of the Commission’s work on the topic. In chapter III (B) of the report, the Special Rapporteur made a plausible case for “draft conclusions”, understood as reflecting primarily codification and possibly elements of progressive development of international law. Moreover, the fact that the outcome of other related work by the Commission on the sources of international law had taken the form of conclusions seemed to be a strong argument in favour of maintaining that term in relation to the outcome of its work on the current topic.

In chapter IV, the Special Rapporteur unobjectionably proposed that the Commission should follow its established methodology by comprehensively examining primary and secondary materials on the topic. What was not so clear in that context was the Special Rapporteur’s suggestion, in paragraph 62, that the “work on the topic should primarily be guided by State practice”. Although the examples that followed that suggestion clarified that “State practice” might not be restricted to the technical meaning employed in the context of the creation of customary international law, it was not quite clear why State practice should “primarily” guide the Commission’s work on the topic. Guidance should primarily be derived from the study of legal materials and legal literature on the topic, unless the Special Rapporteur had in mind that the Commission’s work should be guided by the wishes of States as expressed in the Sixth Committee, in which case that intention could have been stated more clearly. In response to the question raised in paragraph 68 of the report, he supported the Special Rapporteur’s suggestion to produce a broad multilingual bibliography on the topic and was willing to contribute to it.

In chapter V of the report, the Special Rapporteur made some preliminary observations on the Commission’s use of subsidiary means in its work. His second observation, in paragraph 150, was highly interesting, stating that judicial decisions were “not only relied upon to identify or confirm the existence and content of rules of international law”, but also served as “a basis in some instances for the actual formulation of the rules and principles of international law as well as the sources of rights or obligations”. The sentence that followed suggested even more explicitly that judicial decisions were not only subsidiary in the sense of helping to determine and confirm the existence of rules of international law, but “could be akin to the primary sources of international law”. That was a potentially very important and, as the Special Rapporteur rightly indicated, “tentative” observation, which could have far-reaching consequences and would certainly require particularly careful and thorough study by the Commission. He had serious doubts as to whether such a conclusion could actually be drawn and therefore noted with relief that the Special Rapporteur had not incorporated such far-reaching observations into the proposed draft conclusions.

The third tentative observation made in chapter V, namely that the Commission made greater use of judicial decisions than legal writings, appeared very plausible as a statement of fact. Nevertheless, the Special Rapporteur’s suggestion that the difference might indicate not that judicial decisions were more important than teachings but that they played a different role was not fully convincing, and further clarification would be welcome. The Special Rapporteur explained that judicial decisions tended to be more specific than writings. However, as some “doctrinal” legal assessments dealt with very specific problems of international law on which jurisprudence was entirely silent, it was unclear whether the criterion of greater specificity could be generalized. He had less difficulty agreeing with the Special Rapporteur’s fourth tentative observation, that the work of expert groups often carried more weight than that of individual scholars.

Chapter VI focused on the nature and function of sources in the international legal system. It was not clear that an extensive debate about the nature of sources of international

law was necessary. In any event, given the Special Rapporteur's explanation that judicial decisions and teachings should be regarded as subsidiary means, it was rather surprising that, in paragraphs 194 and 195 of the report, he repeatedly referred to both as "sources" of international law or seemed at least to favour such a categorization. The view that subsidiary means were not formal sources but could be used to identify, or determine, the rules of law was preferable. Such a view was more in line with Article 59 of the Statute, to which reference was made in Article 38 (1) (*d*). It also reflected the fact that the international legal system contained features of various legal systems, including those in the civil law tradition. In many legal systems outside the common-law tradition, judicial decisions were regarded not as direct sources of law but as evidence of the law and perhaps as the result of the application of the relevant legal norms. In accordance with the Statute of the Court, a decision was binding only between the parties to a dispute and in respect of that particular case. Beyond that, the content of judicial decisions was not necessarily and automatically a source of international law.

The considerations set out in chapter IX, which concerned the possibility of additional subsidiary means for the determination of rules of international law, required further elaboration and debate within the Commission. If the members accepted the Special Rapporteur's plausible argument that Article 38 (1) (*d*) was not intended to be exhaustive and thus left open the possibility of other subsidiary means, further inquiry was needed. In paragraph 355, the Special Rapporteur mentioned various "candidates" for consideration as additional sources of international law, including unilateral acts, resolutions of international organizations, agreements between States and non-State actors and religious law. In his view, many of those candidates could be subsumed within the sources of international law set out in the first three subparagraphs of Article 38 (1). In any event, a more detailed assessment was required.

The need for further reflection was also apparent when it came to the Commission's own output. In particular, the suggestion that the Commission might not consider its own work to constitute teachings required a more granular assessment. It might be useful to discuss in greater detail whether, on the strength of its special mandate and methods of work, the Commission's work could be qualified as something beyond teachings. Similarly, the work of State-created and treaty bodies warranted further analysis. The Special Rapporteur seemed to suggest that the work of such bodies offered authoritative interpretations or could give rise to subsequent agreements. However, the degree to which their interpretations were authoritative depended first and foremost on the functions entrusted to them under their constituent treaties.

The need for further debate was also apparent when it came to unilateral acts and resolutions of international organizations, which were also potential candidates for consideration as subsidiary means. It was not necessarily the case that because unilateral acts were considered to be legally binding, they simply fell outside the ambit of Article 38 (1). Of course, the Special Rapporteur was right that there was no need to qualify such binding legal obligations as subsidiary means. However, it did not necessarily follow that they fell outside the scope of Article 38 (1). They could be considered "inchoate treaties", as the Special Rapporteur himself acknowledged. According to other conceptual explanations, the binding effect of unilateral acts was rooted in the principle of *bona fides*.

In a similar way, the discussion of resolutions of international organizations in the report was somewhat cursory. It was limited mostly to the resolutions of United Nations organs. To state that resolutions were not treaties, even though they derived their binding authority from treaties, might not be sufficient to fully account for the legal authority attached to them as "secondary" to or "derived" from treaty law, which was a concept encountered in many international organizations. Nevertheless, he agreed with the Special Rapporteur that, in situations in which a resolution was not binding as a result of the constituent treaty of the organization in question, its content might not only reflect the *opinio juris* of the member States, as had been discussed in the context of the Commission's work on identification of customary international law, but could also be seen as an expression of views on international law that came close to a subsidiary means for the determination of international law.

Chapter IX contained a highly pertinent discussion of the weight or authority to be attributed to the different types of subsidiary means. In the case of teachings, it would largely

depend on the care and objectivity with which they were produced, which determined the degree of support they garnered for the position they reflected. The same criteria might also apply to judicial reasoning and might need to be broadened, as the value of judicial decisions for the determination of rules of international law depended on the care and objectivity with which they applied certain propositions of international law.

Most of the proposed draft conclusions were plausible and could provide a good starting point for the Commission's discussions. However, rather than explaining how he had arrived at the texts that he was proposing, the Special Rapporteur merely referred in general to the extensive analysis contained in the earlier chapters of the report. That uncertainty was particularly evident in proposed draft conclusion 2 (c), according to which the notion of subsidiary means included "[a]ny other means derived from the practices of States or international organizations". While arguments could be advanced in support of such a proposition, it clearly went beyond the text of Article 38 (1) (*d*). Additional evidence was needed to support the inclusion of such other means and, in particular, to clarify the content of such a category. In earlier chapters of the report, reference was made to unilateral acts of States and resolutions of international organizations, but the extent to which they fit the definition of subsidiary means was questionable.

Draft conclusion 3 addressed the important question of the weight and authority to be attached to subsidiary means. Some of the proposed criteria for assessing subsidiary means, such as "quality" and "expertise", seemed uncontroversial. It was not immediately evident, however, that "conformity with an official mandate" was relevant in that regard. That criterion might not be applicable at all, particularly in relation to so-called private bodies. An expert body could very well assess a matter beyond its official mandate in a highly persuasive and authoritative way, which might qualify that assessment as a subsidiary means to be relied upon in the determination of rules of law. The inclusion of "reception by States and others" as a criterion for the reliability and value of subsidiary means might create practical problems. While the other criteria related to characteristics inherent in the texts, the reactions of States and others were sometimes not known until much later, with the result that they were of little use for assessing subsidiary means for the determination of rules of law.

The proposed title of draft conclusion 3, "Criteria for the assessment of subsidiary means for the determination of rules of law", was insufficiently clear. The proposed criteria seemed to relate to the value, weight or authority of such means for that purpose.

Draft conclusion 4 seemed rather limited in view of the interesting discussion of judicial decisions contained in the report. While the reference to "tribunals" could be regarded as including arbitral tribunals, the draft conclusion was silent on the question of advisory opinions. He was not convinced that the proposed formulation of subparagraph (b), stating that "particular regard" should be had to the decisions of the International Court of Justice, aptly captured the ideas reflected in the report, which explained that the Court's decisions carried special weight. The Court's decisions might not always be pertinent, depending on the subject matter to be determined. With regard to subparagraph (c), he was not wholly convinced that the limitations built into the text in respect of national courts were necessary. Of course, decisions of national courts could be used only when they were relevant. However, the same was true of decisions of international courts and tribunals. To state that the latter were "particularly authoritative" but that the former "may be used, in certain circumstances" was an oversimplification and did not always reflect the correct approach. It seemed to him that the weight or authority attached to each category depended on the criteria set out in draft conclusion 3.

With regard to draft conclusion 5, he would welcome an explanation of why the overarching criterion used to assess the value of teachings for ascertaining international law should be the extent to which they reflected the coinciding views of scholars and how that criterion was related to those set out in draft conclusion 3.

In view of the disconnect between the rich analysis in the Special Rapporteur's report and the resulting draft conclusions, he was not sure that the latter were ready for referral to the Drafting Committee. Many of the issues addressed in the draft conclusions would merit closer analysis in subsequent reports. Nevertheless, he would not stand in the way of further progress and thus supported their referral.

Mr. Argüello Gómez said that he wished to thank the Special Rapporteur for a comprehensive and well-structured first report on subsidiary means for the determination of rules of international law, which provided an in-depth analysis and, far from being dogmatic, was aimed at generating comments on the most controversial aspects of the topic.

The study was presented as a continuation and conclusion of the Commission's work on the so-called sources of international law, which were usually understood to be those included in Article 38 of the Statute of the International Court of Justice. The Commission had completed studies on treaties and custom and was currently studying the topic of general principles of law. It had thus addressed the categories mentioned in the first three subparagraphs of Article 38 (1) of the Statute. That provision was recognized as the best and most complete statement of the sources of international law, or at least the traditional sources. The Commission had now embarked on the study of subsidiary means, which were referred to in Article 38 (1) (*d*). At the outset, an important distinction should be made between subparagraphs (*a*)–(*c*), which concerned the only three sources of international law that were generally accepted, and subparagraph (*d*), which concerned means for the determination of those sources or rules of international law.

In his view, discussions about the meaning of the word "subsidiary" and the equivalent terms in other languages were irrelevant. Whichever adjective was used to describe the means in question, they were simply a way of determining rules of law and did not themselves constitute such rules. Neither a judgment of the International Court of Justice nor a text by de Vattel was a rule. Treaties, custom and general principles of law, by contrast, were not means for determining rules but were themselves an expression of those rules. The distinction was an important one. The three traditional sources of law were basically the same as those known in 1920, when the original version of the provision in question – Article 38 of the Statute of the Permanent Court of International Justice – had been discussed and drafted. It had therefore been reasonable to study those three sources as enumerated in Article 38.

However, it might not be appropriate to base the current study of the means for the determination of such rules on a text that had been drawn up at a time when the vast majority of the rules of international law had not yet been determined. Moreover, the text in question had been intended not to serve as a model for the determination of rules of law by any authority or legal scholar but to establish the limits within which an international court was to operate. Article 38 of the Statute of the Permanent Court of International Justice had been drafted not to grant judges freedom of decision but to limit their discretionary power. That aim had been understandable at a time when States had been resisting the establishment of an international court for over 20 years – since at least 1899, when the first International Peace Conference had taken place in The Hague – for fear that it would undermine their sovereignty. To confine the study of the topic to Article 38 was therefore not the best way forward, particularly when it came to means for the determination of rules.

The *travaux préparatoires* showed that the central question had been not which sources to include but what means should be used to establish them: practice, in the case of custom, and recognition by "civilized" nations, in the case of general principles of law. That was why the discussion of subparagraph (*d*) had been so complex, since the drafters had sought to avoid leaving the selection of means for determining the existence of custom or general principles of law to the discretion of judges. It was not clear that confining the study of the topic to a provision drafted to limit the powers of an international court could provide any added value.

Moreover, the Commission was not the most appropriate body to analyse a provision of the Statute of the International Court of Justice, since it was for the Court itself to elucidate the meaning and application of that instrument. In its work on the topic, the Commission's task was to study subsidiary means for the determination of rules of international law and not to study the meaning and application of Article 38 by analysing its wording and revisiting the discussions that had taken place during the *travaux préparatoires*.

The restrictions within which a court had to determine the rules governing the conduct of the parties – their mutual rights and obligations – were not the same as those that might bind a legal adviser to a Government, an international organization or even an international enterprise. Moreover, wise publicists who sought to demonstrate the existence of legal rules

through their teachings, which in turn could be used as means to demonstrate the existence of those rules, would not limit themselves to the means indicated in subparagraph (*d*); nor had Grotius or de Vattel before them. If the Commission cut the umbilical cord between the study of means for determining rules and Article 38, it would avoid what would no doubt be a fruitless discussion of whether those means should be limited to judicial decisions and teachings. In any case, he did not believe that even the Court itself remained bound by that limitation.

Concerning the specific issues highlighted in chapter VIII of the report, he noted that, if the Commission decoupled its study of the topic from the text and context of Article 38, it would no longer need to address the problem created by the *chapeau* of paragraph 1, which implied that the judicial decisions and teachings referred to in subparagraph (*d*) were sources of international law alongside the sources included in subparagraphs (*a*)–(*c*). It was probably a mere inaccuracy of the kind that sometimes occurred when a title was given to a topic that encompassed various aspects. In any case, it was for the Court to resolve that inaccuracy. Never in 100 years had the Court confused means with sources.

In paragraph 267 of the report, the Special Rapporteur asked whether the expression "judicial decisions" covered the decisions of the Court itself, advisory opinions, arbitral awards and national court decisions. The Court had addressed the first of those points in its judgment of 18 November 2008 on preliminary objections in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*: "[T]he Court … will not depart from its settled jurisprudence unless it finds very particular reasons to do so." In practice, the Court frequently referred to its own decisions, as any of its recent judgments showed. In its judgment of 21 April 2022 in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, for example, the Court referred to several of its previous judgments, a decision of the International Tribunal for the Law of the Sea, an arbitral award and the work of the International Law Commission. The Court could thus rely on the decisions of other courts and tribunals, arbitral tribunals and the work of the Commission itself.

With regard to decisions of national courts and tribunals, in a footnote to paragraph 283 of the report, the Special Rapporteur cited the authoritative view of Hugh Thirlway. It was worth recalling that the decisions of national courts had been expressly included in conclusion 13 of the Commission's conclusions on identification of customary international law. There was therefore no reason to exclude them from the scope of the project on subsidiary means.

The report also included a discussion of whether the Court's advisory opinions could be regarded as subsidiary means. In paragraph 276, the Special Rapporteur noted that advisory opinions did not qualify as "decisions" of the Court within the meaning of Article 94 (1) of the Charter of the United Nations. In fact, the Court's judgments had no binding force except between the parties and in respect of that particular case. However, the fact that a judgment was binding only on the parties did not stop the international legal community from citing it in other cases.

An advisory opinion was not binding in the sense that there were no parties to be bound by it. That did not mean that it had no validity, but only that it was not binding on the organization that had requested it, which was typically, like the Court itself, a principal organ of the United Nations. However, the fact that an advisory opinion was non-binding did not detract from the fact that it was the opinion of the highest judicial authority of the United Nations and that, regardless of whether it was complied with, it had all the authority necessary to definitively establish rules of applicable law.

At the same time, much as the quality of teachings had to be taken into account for assessment purposes, as explained in the report, it was important to take into account the body that had issued an advisory opinion when assessing it. Advisory opinions rendered by the International Court of Justice were not comparable to those rendered by other courts, not only because of the Court's universal jurisdiction and because nearly every State was a party to the Statute but also because of the composition of the bodies that requested such opinions. The Court's main advisory opinions had been rendered in response to requests from the General Assembly. In the case of the International Tribunal for the Law of the Sea, by

contrast, an advisory opinion could be requested by an organization composed of a small number of States. For example, the Tribunal was currently preparing an advisory opinion in response to a request from the Commission of Small Island States on Climate Change and International Law, which had been created *ad hoc* by two States a few months prior to the submission of the request and had comprised six States at the time of submission. That request stood in contrast to the one that the General Assembly, a universal body, had made on a similar subject to the International Court of Justice by its resolution 77/276.

The parties to regional courts were of course limited to the States in the relevant region, and the procedure for requesting an advisory opinion was less representative. For example, any State member of the Organization of American States could request an advisory opinion from the seven judges who comprised the Inter-American Court of Human Rights.

Lastly, separate opinions of judges were at least important indications that needed to be assessed on an individual basis. For example, a dissenting opinion obviously represented a minority view and should be assessed accordingly. Other opinions should be assessed as possible means of shedding light on the text.

He agreed with the comments made by other members regarding the meaning of such expressions as "the most highly qualified publicists", "the various nations" and "subsidiary means".

With regard to chapter IX on additional subsidiary means for the determination of rules of international law, the question of whether Article 38 (1) (*d*) was limited to the two means explicitly mentioned in that subparagraph was answered by the Statute itself, which envisaged or implied the need to rely on other means to determine the constituent elements of customary rules and general principles. Custom was thus established by evidence of a general practice accepted as law and general principles were established by evidence of their recognition by nations. In short, those sources needed to be determined by means other than judicial decisions and teachings.

Article 34 (2) of the Statute provided that the Court could request information from public international organizations. Such information could be of any type, and nothing prevented the Court from using the information to determine the existence and correct meaning of any rule. Article 34 (3) required the Court to notify a public international organization whenever the construction of its constituent instrument or an international convention adopted thereunder was in question. Article 50 of the Statute authorized the Court to entrust any individual or body with the task of giving an expert opinion. The opinion could be on any subject, which did not exclude subsidiary means. In short, those were all means available to the Court for the determination of rules. It could be concluded that, in reality, even the Court itself was not subject to specific limitations on its ability to seek and use means for determining rules of law. Those considerations were meant to illustrate the point he had made at the outset, that the problem in question arose precisely because Article 38 was being used as the basis of the current study. In principle, a study of the applicable rules of law could not be limited to the means mentioned in paragraph 1 (*d*).

Considering that the problem of identifying means for the determination of applicable rules arose principally in relation to rules of customary law and rules based on general principles of law, since treaty rules were generally written down and were more or less fixed, the Commission needed only to refer back to its work on identification of customary international law and its ongoing work on general principles of law. Many of the conclusions drawn on those two topics concerned means for the determination or identification of those rules. With that in mind, it was impossible to imagine that, for example, the existence and content of a customary rule could be demonstrated solely on the basis of judicial decisions and teachings. A review of those conclusions would reveal a list of subsidiary means additional to those included in Article 38 (1) (*d*).

One aspect of the topic might warrant further exploration. Article 38 (1) (*d*) concerned means for the determination of rules of law. If the law needed to be determined, what remained of the principle of *jura novit curia* ("the court knows the law")? In its judgment of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice had held that, "[f]or the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia*

signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law". That revered principle notwithstanding, much of the work of litigators consisted of pleading not only facts but also the law. Thus, understanding the means for determining rules of law was very important for all those who worked in the field of law.

The search for rules of law, in particular customary rules and those emanating from general principles of law, was not the work of judges alone. In its judgment in *The Case of the S.S. "Lotus"*, the Permanent Court of International Justice had explained the process by which it had rejected the arguments put forward by France to demonstrate the existence of a general principle of law: "The Court … has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement." Even in 1927, therefore, it had been clear that the parties had to at least contribute to proving the existence of rules when they were not obvious.

A more recent example was *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, in which, for the first time in its history, the International Court of Justice had deemed it necessary to decide on certain questions of law before proceeding to a consideration of the merits of the case. That unusual procedure was an especially interesting example in the context of the topic under consideration, particularly with regard to efforts to demonstrate the existence of a rule and its content. At the oral proceedings, the parties had presented their arguments exclusively with regard to two questions. The first was whether there existed a rule under customary international law according to which a State's entitlement to a continental shelf beyond 200 nautical miles from the baselines from which the breadth of its territorial sea was measured could extend within 200 nautical miles from the baselines of another State. The second was what criteria existed under customary international law for the determination of the limit of the continental shelf beyond 200 nautical miles from the baselines; in other words, the parties had been requested to detail the content of that rule.

The Court's new procedure was perhaps a sign that the topic under consideration should include a more focused study of evidence under international law. Existing studies of evidence were typically limited to evidence of facts. As part of the project, the Commission would do well to devote specific attention to evidence in relation to rules of law.

He considered that the draft conclusions proposed by the Special Rapporteur constituted a good starting point for the Commission's work on the topic and should be referred to the Drafting Committee.

Mr. Nesi said that the Special Rapporteur's first report on subsidiary means for the determination of rules of international law was the outcome of impressive and thorough research and, together with the memorandum by the Secretariat, provided a basis for the Commission's work on the topic. The comprehensive and clearly structured report covered the main issues that the Commission would have to address as part of the project. Moreover, the proposed draft conclusions provided fertile ground for productive work.

As was clear from the analysis in chapter VI, consideration of the topic called for broader reflection on the sources of international law, albeit within clear limits. He was grateful to the Special Rapporteur for providing a summary of the role of sources and how they interacted with each other. However, as Mr. Fife had noted, the report seemed to oscillate between narrow and broad approaches to the concept of subsidiary means, and the theoretical ideas underpinning the summary were not applied uniformly throughout the report.

To fully understand the role of sources of international law, it was necessary to step outside legal constraints and think about the concept in everyday terms. A source was generally understood as being the origin of a process. If that idea was transposed to the legal field, treaties, customary international law and general principles of law could be regarded as the origin of the process of identifying and applying the rights and obligations that characterized the international legal system. But could the same idea be applied to judicial decisions and teachings as subsidiary means?

Beyond their contribution to the formation of other rules of international law, it could easily be affirmed that judicial decisions were not the origin but rather the result of the process of identifying and applying those rights and obligations. As in any complex process, the result could indeed differ from the origin, which underwent a process of modification. The changes that could affect sources that were subject to a process of interpretation in different legal systems could contribute to the development of the law. However, in a regime based on relations among States that were still jealously protective of their sovereign powers, such changes could have a negative impact on the original meaning of the sources and weaken the force of international law. Subsidiary means should therefore be handled with care, and the terms used to refer to them should be chosen carefully. To that end, a more practical analysis of the issue was needed, as Mr. Forteau and other members had noted.

Turning to the report itself, he said that chapter V provided a thorough and detailed account of the Commission's reliance on the judicial decisions of international and other courts and tribunals. While, as Mr. Galindo had noted, the Commission should avoid placing too much weight on such an analysis, the role of subsidiary means in the international legal framework could not be fully understood without some preliminary observations.

The Commission and courts and tribunals had frequently referred to domestic jurisprudence and had derived guidance from it for the application of international law. However, when reference was made to such decisions, it was important to understand why and what role they played in each case. It was one thing to speak of judicial decisions as subsidiary means but quite another to speak of them as relevant practice for the formation of other rules of law. It was important to avoid that confusion.

As recalled in paragraph 204 of the report, L.F.L. Oppenheim had held that, while judicial decisions could not create international law, they played an important part in developing it. That position was rather outdated and perhaps did not fully reflect the contemporary reality of the sources of international law. Nevertheless, it underlined one essential element, namely the "weight" of the contribution of judicial decisions to the development of international law. However, when judicial decisions made such a contribution, they functioned not as subsidiary means but as practice formed by a group of concordant decisions showing a trend towards a new interpretation of the law as it stood.

On the other hand, if the Commission wished to attach relevance to subsidiary means as an independent category, it needed to understand how judicial decisions could contribute to the determination of rules of law in a manner other than the formation of customary rules through relevant practice. In his view, the Commission's task was to try to understand the role played by jurisprudence – or a single judicial precedent – when it was cited by courts or other bodies as a particularly authoritative interpretation of a rule. That was reflected in the reasoning of several courts and, although judicial precedents were not binding, needed to be analysed with particular care.

In paragraph 343, the Special Rapporteur correctly concluded that judicial decisions did not create rules of international law; however, that statement was preceded by some observations that were not entirely consistent with it. While it was indisputable that domestic judicial decisions were an element of State practice at the international level, the Special Rapporteur seemed, in paragraph 150, to deduce from the Commission's previous work that they could be comparable to primary sources. That idea was risky, as Mr. Reinisch had noted, and the Commission should be careful in its use of terminology. In fact, referring to domestic judicial decisions as a "source" exacerbated the risk of fragmentation, which the Special Rapporteur was seeking to avoid. In its analysis, the Commission should bear in mind that it was national judges who had the last word on the application of the law and, as Mr. Grossman Guiloff had noted, a judge's position was strongly influenced by the legal culture of his or her State. Some domestic judicial decisions might not be fully supportive of international law; others might overlook the main features of the international legal system and its intricacies. Moreover, international law was not incorporated in the same way in different domestic legal systems and did not occupy the same level in the imaginary pyramid of internal sources. That was why it was important to discuss how domestic judicial decisions could be taken into account in the Commission's current work, even if only as subsidiary means.

The draft conclusions reflected a certain ambiguity with regard to the role of domestic judicial decisions as subsidiary means. In draft conclusion 4 (c), decisions of national courts were referred to as "subsidiary means for the identification or determination of the existence and content of rules of international law". That wording seemed to suggest a conclusion rejected by the Special Rapporteur in paragraph 343, since it could treat domestic judicial decisions as quasi-sources of international law that not only assisted courts in identifying pre-existing rules but could also autonomously determine the content of those rules. More cautious wording was needed. However, if the Commission agreed that subsidiary means could play such a role, the reference to "certain circumstances" should be clarified in order to prevent excessive reliance by courts on precedents that would set international law back instead of developing it.

In chapter VI, the Special Rapporteur provided examples of international instruments in which particular importance was attached to the decisions of international courts and tribunals. The Commission should try to clarify the role of international judicial decisions in order to avoid an excessive expansion of their influence. As emphasized in the 1996 advisory opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, international judges did not develop the law but must take into account its evolution and determine its scope. Accordingly, judicial decisions were not sources but reflected trends. It might be risky to adopt a different approach, especially in view of the fragmentation that international law was experiencing as a result of the proliferation of specialized and regional international tribunals. As Mr. Oyarzábal had pointed out, the role played by certain courts and tribunals in the process of establishing rules of international law required further examination on account of the unpredictability and inconsistency of their decisions.

Remarkably, in the report, the Special Rapporteur also addressed the question of whether the advisory opinions of international courts might be included within the scope of "judicial decisions" under Article 38 (1) (*d*). The Special Rapporteur made the preliminary observation that, although advisory opinions were not legally binding, their potential legal effects had long been a matter of debate. At the same time, the Special Rapporteur observed that both the practice of the Commission and that of some international courts and tribunals tended to ascribe to advisory opinions – or at least those of the International Court of Justice – a "legal effect". It was argued in paragraph 280 of the report that, since the judgments and decisions of the Court were generally similar in their legal character, the category of judicial decisions would include not only final judgments rendered by the Court but also its advisory opinions. Yet such a conclusion might be premature. The fact that the Court's advisory opinions were particularly persuasive and could have a strong impact on international law did not necessarily mean that they should be included within the definition of "judicial decisions" as subsidiary means. The same reasoning applied, *a fortiori*, to advisory opinions rendered by other international courts and tribunals.

Lastly, the Special Rapporteur had included "orders on procedural and interlocutory matters" within the definition of "judicial decisions". While such orders undeniably fell within the category of decisions that could have a strong impact on the legal rights and obligations of States, the focus should be on instruments that would be useful for the Commission's work. Procedural decisions would seem to be of little relevance to the determination of the content of rules of international law and should therefore be considered to fall outside the scope of the topic.

Although doctrine had proved to be particularly influential in the development of international law, international courts and tribunals had rarely referred to it explicitly. Chapter VIII (C) of the report showed that national courts tended to attach greater weight to doctrine. In paragraph 348, the Special Rapporteur deduced from practice that doctrine was "less important" than judicial decisions.

It was important to clarify what kind of practice was being taken into account and to examine what legal value was to be attached to it when interpreting the Statute of the International Court of Justice. Was the practice referred to by the Special Rapporteur established or did it merely reflect a growing trend? In addition, even if not explicitly cited, doctrine strongly influenced judicial decisions and vice versa. In 2013, Santiago Villalpando had revisited the famous concept of the "invisible college of international lawyers", which

had originally been developed by Oscar Schachter. That showed not only how the idea of *dédoublement fonctionnel* (role splitting) continued to apply but also how the work of scholars was more intertwined with the practice of law than in the past. The influence of doctrine on the acceptance of international law by national authorities and the power of the "invisible college" to unify legal cultures in the face of practical challenges thus pointed to the special relevance of doctrine for the determination of rules of law in the context of processes of fragmentation.

The teachings of the most highly qualified publicists should be examined in terms of their role as subsidiary means; in other words, as an aid – and only an aid – to the determination of rules of international law. They should also be considered as tools for unifying different legal cultures. Of course, that presupposed broad participation by all regions and legal systems of the world in shaping the category of teachings. Such participation could be facilitated through the fair use of contemporary technologies, such as high-quality, low-cost translations. While highly qualified publicists were active all over the world, limited access to their work sometimes hampered the dissemination of their ideas. Tangible progress in improving such access might address the understandable concerns about selectivity and open up discourse on international law to those scholars' ideas and contributions.

Chapter IX of the report concerned the possibility of expanding the category of subsidiary means under Article 38 (1) (*d*) of the Statute to include means that were not explicitly mentioned therein. While there was nothing in the ordinary meaning of the words of the provision to suggest that it was not exhaustive, the Commission should not approach that question without understanding what it was seeking to achieve. As Mr. Forteau had noted, the aim of the Commission's work on the topic was to provide a comprehensive analysis of how subsidiary means should be used by courts in the application of international law. The outcome should be a document aimed at clarifying the nature and role of existing rules. The analysis of the topic should therefore be limited to the content of the rules that needed clarification.

Consideration of other subsidiary means might lie beyond the scope of the topic. In that connection, he wished to make one more general remark. International law should deal with the reality of relations among sovereign States. While there was a strong need for legal certainty under domestic law, which led to the comprehensive labelling of all instruments that might have legal force, the main need under international law was for flexibility. To address fragmentation, it was important to adopt a flexible approach and avoid excessive labelling.

He agreed with other members of the Commission that the status of subsidiary means could also be extended to instruments that could potentially be assimilated to the two categories mentioned in Article 38 (1) (*d*). Two examples were the general comments of treaty bodies and the Commission's own reports, which were clearly akin to the second category of subsidiary means mentioned in the provision. An attempt to characterize all General Assembly resolutions as subsidiary means might be counterproductive in certain circumstances. Resolutions that had contributed to the creation, reaffirmation or development of international law should not be labelled as subsidiary means in view of the value that they had acquired in such fields as decolonization, self-determination of peoples and permanent sovereignty over natural resources. Their role was not limited to reaffirming the existing rules of international law; they could also play a normative role, which was a characteristic that was not and could not be attributed to subsidiary means. As not all General Assembly resolutions had normative value, by eschewing any form of labelling, the Commission would obviate the need to identify criteria for the selection of those that fell within the category of subsidiary means. Nevertheless, if the Commission agreed to expand the category of subsidiary means, it should specify the criteria for inclusion.

A similar problem could be identified in the wording of draft conclusion 2 (c), in which "[a]ny other means derived from the practices of States or international organizations" were included among the subsidiary means for the determination of rules of international law. The Commission should perhaps specify what was meant by "practice". Indeed, the practice of States and of international organizations and their organs was attracting increasing attention in scholarship. In that regard, it was sufficient to mention the role of subsequent

practice and the established practice of international organizations for the development of international law. In addition, the notions of “established practice”, “subsequent practice” and “practice of international organizations” had been widely used in decisions of the International Criminal Court, as noted by Niels Blokker, among others, just as they had in the Commission’s previous work and the Special Rapporteur’s report. However, a definition was needed, as was a deeper understanding of those notions, their legal meaning and the interactions between the related notions of “subsequent practice” and “established practice”.

He fully supported the future programme of work proposed by the Special Rapporteur and the referral of the proposed draft conclusions to the Drafting Committee for consideration in the light of the comments made during the debate.

The meeting rose at 12.55 p.m.