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International Law Commission

Seventy-fourth session (first part)

Provisional summary record of the 3633rd meeting

Held at the Palais des Nations, Geneva, on Friday, 26 May 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	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. Vázquez-Bermúdez
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

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

Mr. Jalloh (Special Rapporteur), summing up the debate on his first report on subsidiary means for the determination of rules of international law (A/CN.4/760), said that he wished to thank the Commission members for an engaging and intellectually stimulating debate and for their feedback on the content of the report. He had taken due note of members' suggestions and observations on the topic and their drafting proposals. The fact that almost all the members of the Commission had made statements under the current agenda item confirmed their great interest in the topic and its practical relevance for States and practitioners of international law.

While most members had endorsed the approach that he had taken to the topic and the suggestions made in the first report, some had also criticized it as being too theoretical. For example, Mr. Forteau had expressed the view that theory would be better left aside, while several others, including Ms. Ridings, Mr. Vázquez-Bermúdez, Ms. Mangklatanakul and Ms. Galvão Teles, had emphasized the need for the Commission to focus on providing practical and pragmatic guidance. Some members had said they appreciated the Special Rapporteur's having confined the discussion of complex theoretical issues to a single chapter of the report. Others, such as Mr. Tsend, Mr. Akande and Mr. Zagaynov, had expressed appreciation of both the theoretical aspect of the report and its overall focus on practical issues. He wished to recall that the purpose of chapter VI of the report was to further clarify the Commission's understanding of the subsidiary means listed in Article 38 (1) (*d*) of the Statute of the International Court of Justice in light of the formal sources of international law listed in Article 38 (1) (*a*)–(*c*) and thus to lay the groundwork for the Commission's work on the topic.

A few members had engaged directly with the theoretical or historical aspects of the topic, albeit from different perspectives. Mr. Fife and Mr. Mingashang had each identified some key conundrums concerning both judicial decisions and doctrine. He agreed that some of the underlying questions about sources of international law were deeply philosophical in nature. While the Commission could, of course, decide to approach the topic in clinical isolation from the relevant legal theories on sources of international law, doing so might undermine conceptual clarity and thus the practical utility of its work. He understood from the debate that many members were against that course of action.

The formal sources of international law all required State consent, while the subsidiary means mentioned in Article 38 (1) (*d*) were just that: subsidiary means or tools that could be used to identify or determine, or to refute, the existence and content of a rule of international law. As observed by Mr. Mingashang, the point of view defended by Mr. Forteau and other members was undoubtedly correct: judges stated the existing law and did not legislate. However, as Mr. Mingashang had also noted, that position could be validly defended only within the framework of a formalistic conception of law.

It was hardly surprising that most members, like the Special Rapporteur himself, had emphasized the distinction between the formal sources listed in Article 38 (1) (*a*)–(*c*) and the subsidiary means mentioned in Article 38 (1) (*d*). As stated in paragraph 188 of the report, he did not think that it was the Commission's role to adjudicate or resolve theoretical debates on the sources of international law. Rather, the Commission should take stock of them with a view to assessing their possible implications for the practical aspects of its work on the topic. He was grateful to Mr. Zagaynov for having highlighted that point, which seemed to have been missed by many if not most members.

Several members had found the report to be too long. He did not agree that its length was excessive, given the task at hand. If the subject matter necessitated more thorough treatment, as was often the case in a first report, which was typically expected to include a comprehensive mapping of the area of law in question, the Special Rapporteur had to do the needful. If the report had been shorter, some members would undoubtedly have criticized it for lacking depth and oversimplifying key issues. The challenge for each Special Rapporteur was thus to judge what was substantively required in each report in order to advance the Commission's work. The suggestion made by Mr. Grossman Guiloff that, when a report was

lengthy, the Special Rapporteur might consider preparing an executive summary was perhaps worth exploring in the Working Group on methods of work.

Only a few members had explicitly addressed the question of methodology. Most of those members had said they appreciated the Special Rapporteur's transparent recommendation that the Commission should follow its usual methodology in dealing with the topic. That methodology was to be firmly rooted in State practice and, as appropriate, the practices of international organizations and others. The examples of practice included in the first report were based on the Commission's 2018 conclusions on identification of customary international law.

While members had broadly supported that methodology, some members, including Mr. Paparinskis, had posed some surprising questions. He had found Mr. Reinisch's comment about State practice baffling in light of the detailed explanation contained in chapter IV of the report. Conclusion 6 of the 2018 conclusions and the accompanying commentary provided a broad explanation of what State practice was. He did not recall that any discussions had taken place in 2018 to the effect that State practice was to be tethered to a technical meaning only for the purposes of Article 38 (1) (*b*). The Commission had made clear that State practice included verbal and non-verbal acts and materials from a wide range of national, regional and international tribunals, whether *ad hoc* or permanent, and also the practice of international organizations, some of which were themselves international courts. He had also stressed, in paragraph 66 of the report, the need to consult a wide variety of scholarship from all regions of the world, given the letter and spirit of Article 38 (1) (*d*), a sentiment that had been echoed by many members during the debate.

Most members had emphasized the centrality of judicial practice, including a careful analysis of Article 38 (1) as the starting point, but not necessarily the ending point, of the Commission's work on the topic. Mr. Nguyen and several others had recalled that the provision was not just a specific directive to the International Court of Justice and a non-exhaustive list of sources that the judges could consult, but also a settled rule of customary international law. Although, as Mr. Nguyen had correctly observed, Article 38 was invoked by both States and national and international judicial bodies in resolving disputes, including those not submitted to the International Court of Justice, the Commission should remain mindful that broader use was made of Article 38 (1) (*d*) by a wide range of other actors, as highlighted by Mr. Argüello Gómez. Ms. Mangklatanakul had emphasized the distinction between the use of Article 38 (1) (*d*) by judges of the International Court of Justice, which was the intended usage, and the broader use of the provision by other actors.

Regarding the proper interpretation of Article 38, as several members had emphasized, it was necessary to at least start with the interpretation given to the Statute by the International Court of Justice itself. Other members had stressed, and he himself agreed, that the text of the Statute should be interpreted in accordance with the rules of interpretation of the 1969 Vienna Convention on the Law of Treaties. He had in fact followed that methodology in the report, although, for the sake of clarity, he had switched the order of consideration set out in articles 31 and 32 of the Vienna Convention by first reviewing the drafting history of Article 38 (1) (*d*) and then examining the ordinary meaning of the terms appearing in the provision, their use in practice and how that practice had been confirmed.

Some members, such as Mr. Fathalla, Mr. Fife and Mr. Oyarzábal, had stressed that the jurisprudence of the International Court of Justice should be given special weight in view of its particular relevance to the topic, while several others had also stressed the need to examine how the provision had been invoked in the decisions of other international courts and tribunals. Several members, especially Mr. Fathalla, Mr. Grossman Guiloff, Mr. Galindo, Mr. Nguyen and Ms. Okowa, had supported a broad understanding of the scope of the term "judicial decisions", while others, such as Mr. Fife, had advocated a narrower understanding. Nearly all members had agreed that the decisions of various international tribunals should also be taken into account. The quality of judicial decisions should be assessed in light of the statutory competencies of the international tribunal concerned. For example, while agreeing that full account should be taken of the decisions of specialized courts within their areas of competence, some members, such as Mr. Asada, were of the view that decisions rendered by the International Court of Justice carried greater weight in light of the Commission's previous

work and the Court's status as the principal judicial organ of the United Nations and the only court with general jurisdiction over inter-State disputes.

In his report, he had made it clear that account should also be taken of decisions of regional courts and tribunals. Mr. Patel's call for innovative solutions to ascertain the practice followed in Asia, which did not have a regional judicial institution, and the references that he had provided were much appreciated. He hoped that other members would join those efforts to enable the Commission to produce an output that was truly representative of all the world's regions, languages and legal systems.

While most members had stressed that national court decisions on questions of international law could be particularly relevant, they had also emphasized the need for caution. Ms. Ridings had indicated that not all national court decisions could appropriately be used as subsidiary means; in particular, it was the nature of the legal question under consideration and of the law being applied that would be instructive.

Nearly all members had agreed that draft conclusions were the most appropriate form of output for the topic, in line with the Commission's previous decision to that effect. Only Mr. Paparinskis had suggested the possibility of an alternative outcome, such as draft guidelines, an idea which Ms. Mangklatanakul, Mr. Lee and Ms. Oral could likewise support. Given the almost complete unanimity among the members on the issue, and the need to ensure consistency with the Commission's approach to the related topics, draft conclusions still seemed to be the most advisable choice of output.

Unsurprisingly, the more challenging issue for members had been the question of what normative value the draft conclusions would have. Some members believed that the content of the draft conclusions should reflect only codification, while others had called for the Commission to keep an open mind at such an early stage of its work on the topic. Those members had also rightly observed that article 1 of the Commission's statute did not preclude it from engaging in the progressive development of international law in addition to its codification. As he had expressly stated in paragraph 55 of the report, for the purposes of the current topic, the Commission should transparently explain to States that "draft conclusions" were the outcome of a process of reasoned deliberation and a restatement in relation to the practices found on subsidiary means in the determination of the rules of international law, and that their essential characteristic was to clarify the law based on the current practice. Thus, their content reflected primarily codification and possibly elements of progressive development of international law. He was glad that most members of the Commission had endorsed his understanding of the nature of the draft conclusions, which was also broadly consistent with the Commission's position on identification of customary international law, general principles of law and identification and legal consequences of *jus cogens*.

However, despite the explicit focus on codification under the topic at hand, the Commission had not generally endorsed an express or implied hierarchy in its two-pronged mandate. In fact, it was partly because of the difficulty of separating its two tasks that it had settled on the so-called "composite" view of codification and progressive development as far back as 1949. Furthermore, in 1996, after careful consideration, the Commission had concluded that the distinction between codification and progressive development was so impractical that it could be eliminated in any future review of its statute.

He wished to thank all the members who had drawn attention to the differences between the Spanish, French and English authentic texts of Article 38 of the Statute of the International Court of Justice. The other language versions of his report clearly contained translation errors; he had thus appreciated the call for a distinction to be drawn between "supplementary means", as referred to in article 32 of the Vienna Convention on the Law of Treaties, and "subsidiary means", which was the term duly reflected in the original English version of the report. Mr. Sall, Mr. Fife, Mr. Forteau and others had discussed the meaning of "*auxiliaire*" in French, which might well differ from its counterpart "subsidiary" in English, as well as its counterparts in Arabic and Spanish. Mr. Paparinskis had referred to the translation of the same concepts in Chinese and Russian and in other equally authentic language versions of Article 38. Those remarks had highlighted the need for the Commission's work, in particular its outputs, to be translated with special care to ensure that the same meaning was conveyed in all the official languages of the United Nations.

He had understood from the debate that members broadly endorsed his suggestions concerning the scope of the topic. Many had agreed that the focus should primarily be the two categories of subsidiary means listed in Article 38 (1) (*d*) of the Statute of the International Court of Justice: judicial decisions and the teachings of the most highly qualified publicists of the various nations. The challenge would be to determine what should be included in and excluded from each category. A separate but related question was whether there were additional means that might fall within the ambit of Article 38 (1) (*d*).

In the report, he had asked whether "judicial decisions" were to be understood only as a reference to international court decisions or whether that category also included judicial decisions of national, hybrid or regional courts and tribunals. Most members had agreed that the category of judicial decisions should be understood in its broadest sense and include decisions of international and regional courts and tribunals, national courts, arbitration panels and other entities such as the World Trade Organization Dispute Settlement Body and human rights treaty bodies.

He had also asked whether advisory opinions should be included in the category of judicial decisions and what, if any, legal value they should be considered to have. Virtually all members had taken the view that advisory opinions could be as authoritative as judicial decisions, even though they were not judicial decisions as such. Several members had observed that the International Court of Justice and other international courts, such as the International Tribunal for the Law of the Sea and the Inter-American Court of Human Rights, referred to their own prior judgments and advisory opinions without distinction. Members had also pointed out that, since some of those issues had already been addressed by the Commission in relation to other topics, the draft conclusions and commentaries on subsidiary means should build on its previous work.

However, while maintaining consistency was important, the needs of the topic at hand should always be kept in mind. For instance, the Commission's 2018 conclusions on identification of customary international law only incidentally dealt with the question of decisions and teachings in two specific conclusions. Similarly, subsidiary means had been a secondary consideration in the Commission's work on the topics "Peremptory norms of general international law (*jus cogens*)", "General principles of law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties". Now that the Commission was working on subsidiary means specifically, its prior work could be used as a starting point but should by no means be construed as the end point of its discussions on substance. Additional elements would need to be fleshed out if the Commission was to provide proper guidance to all those who might have reason to address subsidiary means in practice.

While the report emphasized the importance of the decisions of the International Court of Justice and referred to it as an apex court, that phrase might have been taken out of context during the debate. Contrary to the assertions of some members, he had not gone so far as to suggest that there was a hierarchy among international courts and tribunals. There could be no hierarchy in a decentralized system comprising a variety of courts, each with its own mandate and statutes. Still, as Mr. Fathalla had rightly observed, the Court stood out for several reasons. Its status as the principal judicial organ of the United Nations undoubtedly meant that its decisions carried great weight, a point that the Commission had already addressed in its recent work on customary international law.

However, that fact did not diminish the importance of the work of other international courts. As he acknowledged in the report, specialist tribunals in fields such as international criminal law and human rights law played important roles in their respective areas of competence and helped to fill critical gaps in the mosaic of international law. The report also referred to the special relevance of judicial decisions of international(ized) tribunals and courts, whether *ad hoc* or permanent. Indeed, several members had supported the idea of examining the jurisprudence of specialized courts. Several other members had raised questions about whether the decisions of specific *ad hoc* courts could be considered. As stated in paragraphs 64 and 273 of the report, he was of the view that they warranted consideration.

With regard to decisions of other entities, such as the Human Rights Committee, the members' views were more mixed and more nuanced. A few members did not consider such

bodies to be capable of issuing judicial decisions and instead considered their output to fall within the category of teachings. Several members had argued in favour of including the "quasi-judicial decisions" issued by human rights treaty bodies, especially the Human Rights Committee, within the scope of the study. Mr. Grossman Guiloff had said that the output of other treaty bodies, such as the Committee against Torture, should also be included and had recalled that States had created those bodies and defined their mandates. Mr. Sall had highlighted the ubiquity and importance of quasi-jurisprudence in current international law, stressing the fact that it had already been taken into account in the Commission's previous work and in decisions of the International Court of Justice, such as in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*. Mr. Fife, however, had indicated that he was against the inclusion of treaty bodies' decisions on individual complaints in the category of "judicial decisions", since they were not rendered in the exercise of judicial powers. Nonetheless, the general view seemed clear, and in any case, aspects of the work of treaty bodies had already been studied by the Commission. For that reason, he recommended that, in its future work on the topic, the Commission should examine the work of the Human Rights Committee, the Committee against Torture and various other treaty bodies. A related point raised during the debate was whether those bodies' adjudicative work could be classified as teachings or should be placed in its own separate *sui generis* category. Irrespective of its ultimate classification, however, as Ms. Ridings had pointed out, it was clear that such work could be resorted to as a subsidiary means. In the same vein, Mr. Nguyen had raised the question of whether conciliation commissions and other bodies fell within the category of quasi-judicial bodies or constituted their own hybrid category.

Regarding arbitral decisions, Mr. Oyarzábal had stressed that the current topic offered the Commission an opportunity to address the so-called "case law" of investor-State arbitral tribunals and problems concerning the impartiality and independence of arbitrators. As noted in paragraph 63 of the report, inter-State arbitral tribunals often applied international law. He therefore believed that the decisions of investor-State tribunals could fall within the scope of the study. That view was supported by many members, although some had rightly cautioned that due account should be taken of the differences between the decisions of such tribunals and judicial decisions in the strict sense. In any event, the decisions of arbitral tribunals should be considered, as they had been in the Commission's previous work on related topics. Moreover, as Mr. Akande had noted, the International Court of Justice routinely cited decisions of arbitral tribunals without referring to their normative character.

Most Commission members had stressed that national court decisions on questions of international law could be particularly relevant to the topic. One view echoed by various members was that national courts could play a role in addressing questions of international law, and it had been suggested that the Commission should focus on decisions in which national courts applied international law. As the Commission had indicated in its work on identification of customary international law, national court decisions could also provide evidence of State practice. The secretariat had clarified in several memorandums that national court decisions also served as a subsidiary means for the identification and determination of the existence and content of rules of international law. In its future work on the topic, especially in the commentaries, the Commission should also take account of the important point, raised during the debate, that national court decisions could be determinative for the jurisdiction concerned. On a related point, he agreed with the suggestion made by several colleagues that the Commission should pay greater attention to different legal traditions, beyond the distinction between common-law and civil law systems, although he did not consider that religious law should be included in the study. He wished to thank those Commission members who had already pointed him towards relevant judicial decisions from their own jurisdictions and would welcome further support in ensuring greater diversity in his research.

In the report, he had raised the question of whether teachings, as subsidiary means for the determination of international law, were limited to the works of individual scholars. Most members felt that the category of teachings included the work of both individual scholars and collectives of scholars, whether organized privately or publicly. Interestingly, in his review of the drafting history of Article 38 (1) (*d*), he had found evidence that studies by collective bodies, particularly international bodies such as the Institute of International Law, had been specifically mentioned as having more relevance and more weight than other scholarly

works. In any case, as he had indicated in the report, while scholars could not be sources of law, they played a significant role in interpreting or identifying existing rules of international law and in surveying State practice. They also performed many other functions, including those identified in the report and additional functions mentioned by several Commission members.

Mr. Forteau had suggested that the Commission should differentiate teachings, whether individual or collective, from works produced by expert bodies. A similar point was made in paragraphs 328 and 357 of the report, namely that the work of State-created expert bodies might be more appropriately placed in a category of its own, given that such bodies had official mandates and were not expert groups of scholars producing scholarship. He did not believe, for the reasons stated in the report, that the work of public, State-empowered or State-created bodies should be classified as teachings. Moreover, the work of private bodies of experts, no matter how prestigious, should not be placed in the same category as the work of State-empowered bodies. Therefore, texts produced by private bodies such as the Institute of International Law should be categorized as teachings. While he noted the suggestion that the reasons for that distinction could be clarified in the commentary, his view was that it would be preferable, in the light of the plenary debate, to address the issue fully in the draft conclusions themselves. That view seemed to align with the preference expressed by several Commission members.

He had also raised the question of who exactly "the most highly qualified publicists of the various nations" were. Many members favoured more transparency and diversity in that regard and had noted that there was an overreliance on white male scholars from the Anglo-American tradition, essentially to the exclusion of authors from the global South, and on works in only a few languages. He agreed with Ms. Okowa that the Commission should explore how that issue could be addressed head-on. A number of proposals in that regard had already been made, notably by Ms. Galvão Teles, who had advocated better gender representation and other forms of diversity. He looked forward to receiving more suggestions on how the Commission could better take gender diversity into consideration. Unequal representation was referred to in paragraphs 332 and 333 of the report in order to highlight the unsavoury reality of that area of international legal practice and to encourage the Commission, States and international lawyers to take steps to change that state of affairs and avoid inadvertently entrenching the *status quo*. Another issue raised in the report was the underrepresentation of counsel from the global South before the International Court of Justice, although that issue had not been commented upon during the plenary debate.

In the report, he had proposed, as the second prong of the topic, that the Commission should examine the function and relationship between the subsidiary means listed in Article 38 (1) (*d*) and the sources of international law listed in Article 38 (1) (*a*)–(*c*), suggesting that the Commission might need to consider the weight and value assigned in practice to subsidiary means and the notion that judicial decisions could also be a source of obligations or at least a basis for identifying the binding legal obligations of States in concrete disputes. Many members agreed that there was a need for further examination of that question, the relationship between Article 38 and Article 59 and the notion of precedent, or alleged lack thereof in international law, and the link to the rights of third parties.

Mr. Fife, Mr. Vázquez-Bermúdez and a number of other members seemed to have interpreted the conclusion that he had reached in that regard in chapter VI of the report to be that there was no hierarchy between treaties, custom and general principles of law on the one hand and subsidiary means on the other. In fact, his conclusion was that there was no formal hierarchy among treaties, custom and general principles of law, at least as intended by Article 38 (1). However, a reading of Article 38 (1) in its entirety indicated a clear dividing line between Article 38 (1) (*a*)–(*c*) and Article 38 (1) (*d*); it could not be claimed that subsidiary means were on an equal footing with the sources of international law listed in Article 38 (1) (*a*)–(*c*). He noted, in paragraph 194 of the report, that subsidiary means might be thought to be, but were not actually intended to be, subordinated to the other sources mentioned in Article 38 (1); however, a number of Commission members appeared to be of the view that his statement had given rise to some confusion, for which he apologized. Based on his research, and after listening carefully to the debate, he tended to agree with Mr. Oyarzábal's approach, namely that the question was not so much whether a hierarchy existed in practice

between judicial activity and doctrine, or even among the sources of international law themselves, as whether they performed the same functions as subsidiary means, and that while international judicial decisions could be instrumental in developing or moulding international law, the role of doctrine was limited to determination, in the sense of "finding out" what the rules were. His own view at the current stage was that judicial decisions could be a source of obligations or at least serve as a basis for identifying the obligations of States in concrete disputes before the Court. A number of members had raised nuanced points in that regard, which he took on board.

Regarding the notion of precedent, he agreed that there was no formal *stare decisis* in international law, especially in respect of the International Court of Justice. However, Mr. Patel had rightly noted that there was an "uncodified rule" of maintaining consistency and that a form of horizontal *stare decisis* was followed in practice. By upholding *ratio decidendi* and ensuring consistent practice, the Court played a role in the application and identification of international law. Ms. Ridings had clarified that the act of following the legal reasoning used in previous cases was not the same as following the decisions in the strict sense. That view, with which he agreed, was consistent with the work of Judge Shahabuddeen, whose seminal book *Precedent in the World Court* was extensively cited in the first report. In paragraph 346 of the report, he noted that, in practice, the International Court of Justice and other international courts and tribunals relied on their prior judicial decisions almost as a matter of necessity, but certainly for reasons of legal security and stability. It remained a practice, however; it was not a rule. That was why he referred to "*de facto*" precedent in the first report. In paragraph 275, he even described a counter-intuitive phenomenon in the area of international investment law, whereby, according to leading scholars in that field, *ad hoc* arbitrators relied so much on prior decisions that they apparently sometimes failed to properly interpret legal texts specifically adopted by States to overturn prior panel interpretations. He was grateful for Ms. Okowa's suggestion that the Commission should clarify that the authority of judicial decisions operated on a continuum and that their quality as subsidiary means depended in part on contextual elements.

He had proposed, as the third prong of the topic, that the Commission should clarify whether there were additional subsidiary means beyond those enshrined in Article 38 (1) (*d*), suggesting that the Commission could look at the evolution of subsidiary means over the past several decades. While there were many examples that could apparently fall under Article 38 (1) (*a*)–(*c*), the question was whether there were others that could fall within the scope of Article 38 (1) (*d*). A review of the literature revealed many examples of possible additional subsidiary means, including unilateral acts and declarations of States, resolutions and decisions of international organizations, equity, agreements between States and multinational enterprises and even religious law. Not all of those candidates deserved the Commission's consideration, however, because many of them could be categorized under Article 38 (1) (*a*), (*b*) or (*c*), depending on their specific nature. Many Commission members had expressed support for his proposed exclusion of unilateral acts from the scope of the study, although Mr. Patel and Mr. Asada, in theory, supported the inclusion of unilateral declarations as additional subsidiary means, at least those declarations that created binding legal obligations for States not involved in the dispute in question. Mr. Grossman Guiloff had said that he would not rule them out completely but had highlighted the complexity of their study, given the nuances of their role in ensuring the stability of international relations.

The majority of Commission members had agreed that resolutions of international organizations could be regarded as additional subsidiary means. However, some members had expressed doubts. Mr. Paparinskis had suggested that he would not object to a decision to address the issue in future reports. Mr. Grossman Guiloff was of the view that the categories should be narrowed and that, in the case of international organizations, the practices considered should be those that States had formally entrusted to such organizations, particularly those that could directly aid in determining rules of international law. Mr. Grossman Guiloff and Mr. Nesi had also suggested that the Commission should clearly specify what was meant by the terms "State practice" and "practice of international organizations". Others opposed the inclusion of resolutions in the scope of the study. According to Mr. Galindo, resolutions could serve as evidence of State practice but were not sources of international law or subsidiary means; his own view was that if resolutions served as evidence of State practice, that was presumably because they were a material source. Other

members had distinguished between different types of resolutions and had argued that non-binding resolutions, such as the General Assembly resolutions cited by the International Court of Justice in its advisory opinions in *Legality of the Threat or Use of Nuclear Weapons* and *Western Sahara*, could be subsidiary means. Some members, such as Mr. Asada, had argued that Security Council resolutions could fall under either Article 38 (1) (*d*) or Article 38 (1) (*a*), depending on their substantive content. In that regard, he wished to note that the Commission had already addressed the topic of unilateral acts in its 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. While some robust arguments had been advanced in favour of looking into the issue, especially by Mr. Asada, he believed that the Commission should not revisit it in the context of the current topic. Given their legal character, he wondered whether unilateral acts might fall within the ambit of the formal sources listed in Article 38 (1) (*a*)–(*c*); as Mr. Asada had suggested, they could be considered to reflect general principles of law and thus be categorized under subparagraph (*c*).

Further possible additional subsidiary means mentioned during the plenary debate included non-binding sources and resolutions, arbitral awards, the work of various types of regulatory organizations and the work of expert bodies. The inclusion of the latter had found the widest support among members. If the Commission decided that "teachings" excluded the work of State-empowered expert bodies, that would exclude the Commission's own work, which would thus be regarded as an additional subsidiary means. Mr. Patel had suggested that it might not be feasible to provide an exhaustive list of all the subsidiary means that could be available and that the Commission should instead develop criteria for the determination of subsidiary means. His overall impression, based on the plenary debate, was that there was strong support for addressing certain types of resolutions and decisions of international organizations. He was grateful to all the members who had pointed out that such an exploration would be consistent with previous related work of the Commission, at least in relation to customary international law. Although a minority of members wished to include unilateral acts in the scope of the study, the overwhelming majority agreed with his recommendation not to revisit the issue.

He had invited the Commission to reflect on whether the issue of fragmentation of international law should be kept outside the scope of the topic. Many members had indicated that addressing the issue could be useful. Mr. Oyarzábal had noted that the Commission's work on the current topic could help to enhance coherence and legal certainty. If the Commission decided to address fragmentation, however, he supported Ms. Ridings's suggestion that it should do so from a practical perspective, in line with the views of States. He welcomed the diversity of members' views on the question and could foresee a way forward around which consensus could be built. However, given that the question of fragmentation had significant implications for the scope and utility of the Commission's work on subsidiary means, the Commission should perhaps defer a decision on whether to include or exclude the question in order to deliberate further and invite Member States to express their views in the Sixth Committee.

He wished to thank the many members who had expressed their support for the inclusion of a multilingual bibliography. Several colleagues had pointed to useful practice and scholarly works. His intention in soliciting multilingual contributions was precisely to address the issue of unequal representation discussed during the plenary debate. The only way international law could fully live up to its universalist aspirations was by representing the diversity of the world in which it operated.

In the concluding chapter of the report, he proposed five draft conclusions. They had been generally well received and endorsed by the Commission, save for one member, Mr. Reinisch, who had made rather scathing remarks in that regard, expressing confusion as to their origins and pointing to a lack of clarity in terms of their substance. While it was true that he could have provided further explanation in the report, he had chosen not to do so because of the report's already considerable length. He had, however, spent a significant amount of time explaining the draft conclusions in his introductory statement (A/CN.4/SR.3625). He had explained both the wording and the substance of the draft conclusions and had said that they were largely inspired by the Commission's previous work on related topics. Some members had suggested amendments to the wording of the draft

conclusions. While issues of drafting were better left to the Drafting Committee, he wished to briefly comment on the general trend of the main suggestions made. Concerning points of substance, he was generally in agreement with those members who had pointed out that the key terms used in the draft conclusions should be properly explained in the commentaries. As indicated in the report, after the first part of the current session he planned to prepare commentaries to the text adopted by the Commission to ensure that States had the opportunity to provide feedback at an early stage.

As for drafting suggestions, Mr. Forteau's proposal to make draft conclusion 1 more normative by changing the phrase "the way in which subsidiary means are used" to "the way in which subsidiary means are to be used" was intriguing. Besides the fact that such wording departed from the wording used in the 2018 conclusions on identification of customary international law, which had served as the basis for draft conclusion 1, the words "are to be" could be read as signalling that the Commission was engaged in progressive development, whereas its stated aim was to clarify the law on the basis of practice. He would nonetheless keep an open mind in that regard.

Regarding draft conclusion 2 (a), he was open to Mr. Forteau's suggestion to draft separate subparagraphs on national and international decisions, given that they were addressed separately in draft conclusion 4. He would also consider Mr. Forteau's suggestion to switch the order of the words "national" and "international". Mr. Paparinskis had proposed that the word "judicial" should be added before "decisions" or, in the alternative, that the phrase "[d]ecisions of courts and tribunals" should be used, and Mr. Fathalla had opposed the addition of the word "judicial".

The most heavily debated part of draft conclusion 2 was subparagraph (c). While it had been fully supported by some members, it had been criticized by others on the grounds that the phrase "[a]ny other means derived from the practices of States or international organizations" was too broad. When he had drafted that language, he had had in mind the two prime candidates for additional subsidiary means discussed in the report: the works of certain expert bodies created by States and certain resolutions and decisions of international organizations. Mr. Galindo's proposal to align the title of draft conclusion 2 with the body of the draft conclusion by referring in both instances to "rules of international law" was an interesting one. Mr. Grossman Guiloff had recognized that the criteria set out in draft conclusion 3 could be used to assess the credibility of the subsidiary means defined in draft conclusions 4 and 5, but had suggested that it would be beneficial to include an explicit statement to that effect, either in draft conclusion 3 itself or as a subparagraph in draft conclusions 4 and 5. Mr. Galindo had called for greater consistency between draft conclusions 4 and 5, which referred to the identification or determination of the existence and content of rules of international law, and draft conclusions 1 to 3, which referred only to the determination of rules of international law. That issue would be taken up in the general commentary to the draft conclusions.

Regarding draft conclusion 5, he saw some merit in Mr. Nguyen's proposal that the phrase "on questions of international law" should be inserted after the words "especially those reflecting the coinciding views of scholars", which would clarify that the teachings considered should be focused on international legal questions, although the end of the draft conclusion also contained a reference to "international law" as the object of those views. He also did not want to foreclose the possibility that rules found in national court decisions could also be relevant. Some members had proposed that the phrase "especially those reflecting the coinciding views of scholars" should be deleted, suggesting that the matter could be covered in the commentaries. He was open to the suggestions by various members to insert explicit references to wide geographical representation, linguistic diversity and gender diversity in draft conclusion 5. Alternatively, the questions of coinciding views and representativeness could be addressed in the commentary.

Concerning the Commission's future work on the topic, he was pleased that nearly all Commission members had agreed with his proposed programme of work. Some members had expressed reservations in that regard, suggesting that the programme might be too ambitious. It should be borne in mind that the proposed programme and timelines were tentative and subject to change depending on the needs of the topic. He was deeply committed to scientific rigour and wished to assure sceptical members that he did not believe that speed

should come at the expense of substance. He was also pleased that most members had expressly supported the referral of the draft conclusions to the Drafting Committee. One member had expressed serious doubts in that regard but had also said that he would not stand in the way of their referral. He hoped that the Commission would decide to refer draft conclusions 1 to 5 to the Drafting Committee so that substantive drafting work could begin as soon as possible.

The Chair said she took it that the Commission wished to refer draft conclusions 1 to 5 to the Drafting Committee, as recommended by the Special Rapporteur, taking into account the comments and observations made during the plenary debate.

It was so decided.

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

Mr. Paparinskis (Chair of the Drafting Committee) said that, for the topic "Subsidiary means for the determination of rules of international law", the Drafting Committee was composed of Mr. Akande, Mr. Argüello Gómez, Mr. Asada, Mr. Fathalla, Mr. Fife, Mr. Forteau, Mr. Galindo, Ms. Galvão Teles, Mr. Huang, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Mingashang, Mr. Nesi, Ms. Okowa, Mr. Oyarzábal, Mr. Patel, Mr. Reinisch, Ms. Ridings, Mr. Ruda Santolaria, Mr. Sall, Mr. Savadogo, Mr. Vázquez-Bermúdez and Mr. Zagaynov, together with Mr. Jalloh (Special Rapporteur) and Mr. Nguyen (Rapporteur), *ex officio*.

The meeting rose at 11.20 a.m.